6. REPLY OF THE GOVERNMENTS OF ETHIOPIA AND LIBERIA

CHAPTER I

STATEMENT OF THE CASE

A. This Reply is respectfully submitted to the Court by the Governments of Ethiopia and Liberia (hereinafter sometimes referred to as "Applicants") pursuant to an Order of the Court dated 20 January 1964, following upon submission to the Court by the Government of the Republic of South Africa (hereinafter sometimes referred to as "Respondent") of its *Counter-Memorial.*

B. In their *Memorials*, submitted to the Court pursuant to an Order dated 13 January 1961, Applicants have summarized the subject of the dispute between Applicants and Respondent,[1] and the said dispute continues to exist.

C. In its *Judgment of 21 December 1962* in respect of the *Preliminary Objections*, the Court declared, *inter alia*, "If the object of Article 7 of the Mandate is the submission to the Court of disputes relating to the interpretation or the application of the Mandate, it naturally follows that no Application based on Article 7 could be accepted unless the said Mandate, of which Article 7 is a part, is in force. . . "[2] "The unanimous holding of the Court in 1950 on the survival and continuing effect of Article 7 of the Mandate, continues to reflect the Court's opinion to-day. . . ."[3] "The validity of Article 7, in the Court's view, was not affected by the dissolution of the League, *just as the Mandate as a whole is still in force* for the reasons stated above."[4]

Notwithstanding the Opinion of the Court, Respondent persists in its rejection of Applicants' contention that the Mandate is still in force and that Respondent continues to have duties thereunder.[5] It remains obvious that the dispute between Applicants and Respondent has not been, and cannot be, settled by negotiation and, indeed, that Respondent also disputes the Judgment of the Court.

D. In its aforesaid *Judgment of 21 December 1962* the Court held that Applicants

> ". . . have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members."[6]

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[1] I, p. 32.
[2] I.C.J., *Judgment of 21 December 1962*, p. 333 (hereinafter referred to as "*Judgment*").
[3] *Id.*, p. 334.
[4] *Id.*, p. 335. (Italics added.)
[5] II, pp. 1-2, and *passim.*
[6] *Judgment*, p. 343.

Applicants' right and interest in Respondent's observance of its Mandate obligations thus being of a legal character, it follows that such right and interest is judicially determinable. The issues remaining for adjudication upon the merits of the dispute accordingly involve juridical interpretation of the terms of Respondent's obligations and their application to facts which, in essence, are undisputed.

CHAPTER II

HISTORY OF THE DISPUTE SINCE 1960

In their *Memorials*, submitted to the Court in April 1961, Applicants have set out the history of the Mandate for South West Africa from its origins through the 1960 Session of the United Nations General Assembly.[1] During that Session, the General Assembly adopted Resolution 1565 (XV), in which the Assembly found that Respondent had "failed and refused to carry out its obligations under the Mandate," and concluded that the dispute which has arisen between Applicants and Respondent "has not been and cannot be settled by negotiation."[2]

The history of relevant events since the adoption of the foregoing Resolution, including Applicants' efforts, through the agency and forum of the United Nations, to settle their dispute with Respondent, makes clear that the General Assembly's foregoing finding and conclusion remain valid.

(1) 1961

During the resumed 15th Session of the General Assembly, in March 1961, the Assembly without dissent adopted Resolution 1593 (XV), appealing to United Nations members having "particularly close and continuous relations" with Respondent to exert their influence to ensure that Respondent would adjust its conduct to its obligations and give effect to previous resolutions of the Assembly.[3]

No results having been achieved, the Assembly, in April 1961, adopted Resolution 1596 (XV).[4] The Assembly, without dissent, noted "with grave concern the continuing deterioration in the situation in South West Africa resulting from the continued application, in violation of the letter and spirit of the Mandate, of tyrannical policies and practices, such as *apartheid*. . . ." It decided, accordingly, to call the attention of the Security Council to the situation in South West Africa, "which, if allowed to continue, will in the General Assembly's view endanger international peace and security. . . ."[5]

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[1] I, pp. 33-85.

[2] G.A. Res. 1565 (XV), 18 December 1960, G.A.O.R. 15th Sess., Supp. No. 16 at 31-32 (A/4684). (The full text of the Resolution is set out in I, pp. 84-85.)

[3] G.A. Res. 1593 (XV), 16 March 1961, G.A.O.R. 15th Sess., Supp. No. 16 A at 7 (A/4684/Add. 1).

[4] G.A. Res. 1596 (XV), 7 April 1961, G.A.O.R. 15th Sess., Supp. No. 16 A at 7 (A/4684/Add. 1).

[5] *Id.*, para. 7. This decision was carried out by communication from the Secretary-General to the President of the Security Council (S/4787) (12 April 1961).

The Assembly "rejected" Respondent's refusal to co-operate with the United Nations in the implementation of the General Assembly's resolutions concerning South West Africa and requested the Committee on South West Africa to discharge the tasks entrusted to it "with the co-operation of the Government of the Union of South Africa if such co-operation is available, and without it if necessary."[1]

Respondent's denial of permission to the Committee to visit the Territory in order to investigate the situation prevailing there (a task which the General Assembly had invited the Committee to undertake[2]) compelled the Committee to conduct its inquiries outside the Mandated Territory itself.

The Committee submitted a special report on its investigative mission,[3] in which the Committee found, *inter alia*:

> ". . . South Africa is the only State in the world today to practice racism as an official policy, not only within its boundaries but throughout the Mandated Territory of South West Africa. This form of racial segregation and discrimination, known as *apartheid*, has been repeatedly condemned by the United Nations, by world public opinion, and by all those who appeared before the Committee during its visit to Africa.
>
> "This policy is the most pervasive feature of the administration of the Mandated Territory and extends to all aspects of life of the Native population. . . ." [4]

The Committee's conclusions, particularly relevant to the issues in dispute between Applicants and Respondent, are:

> 1. "The South African Government has from the beginning made plain its determination to annex the Mandated Territory entrusted to its care for the benefit of the Native inhabitants, and has engaged unilaterally in a progressive integration and incorporation of the Mandated Territory into South Africa, without a proper consultation of the inhabitants of the Territory and without the consent of the United Nations. . . .
>
> 2. "The Committee has found no indication that the South African Government intends to change its policies and practices in the Mandated Territory and it is convinced that the continued administration of South West Africa by the South African Government will prevent the political, economic, social and educational development of the vast majority of the population for whom the Mandate was designed." [5]

The General Assembly, by Resolution 1702 (XVI) of 19 December 1961,[6] noted with approval the foregoing special report of the

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[1] *Id.*, para. 5.

[2] G.A. Res. 1568 (XV), 18 December 1960, G.A.O.R. 15th Sess., Supp. No. 16 at 33 (A/4684).

[3] G.A.O.R. 16th Sess., S.W.A. Comm., Supp. No. 12A (A/4926).

[4] *Id.*, p. 20.

[5] *Id.*, pp. 21-22.

[6] G.A.O.R. 16th Sess., Supp. No. 17 at 39 (A/5100). (The Resolution was adopted by a vote of 90 to 1 (Portugal) with four abstentions.)

Committee on South West Africa, and also noted, "with increased disquiet, the progressive deterioration of the situation in South West Africa as a result of the ruthless intensification of the policy of *apartheid*. . . ."

The Assembly established a United Nations Special Committee for South West Africa, charged, *inter alia*, with the task of achieving as an objective:

> "The repeal of all laws or regulations confining the indigenous inhabitants in reserves and denying them all freedom of movement, expression and association, *and of all other laws and regulations which establish and maintain the intolerable system of apartheid*. . . ." [1]

The Assembly requested the Special Committee to visit the Territory and urged Respondent "to co-operate fully with the Special Committee and with the United Nations" in executing the Resolution.

The Assembly decided to call the Resolution to the attention of the United Nations Security Council, "in the light of paragraph 7 of Resolution 1596 (XV)."[2]

Three additional resolutions concerning South West Africa were adopted by the General Assembly on 19 December 1961, all without dissent, attesting to the pervasive and deep concern with which the membership of the United Nations, including Applicants, viewed Respondent's failure to observe its obligations under the Mandate.

The first of these, Resolution 1703 (XVI),[3] noted "with deepest disappointment and regret" the policy and method pursued by Respondent in its administration of the Territory and called upon it immediately to desist from further acts of force designed to suppress political movements or enforce *apartheid* in South West Africa, to refrain from prosecution of Africans on political grounds, and to ensure the free exercise of political rights for all sections of the population.

The second, Resolution 1704 (XVI),[4] dissolved the Committee on South West Africa, inasmuch as its functions were assumed by the United Nations Special Committee on South West Africa.

The third, Resolution 1705 (XVI),[5] established a special educational and training program for indigenous inhabitants of South West Africa. It invited the United Nations Specialized Agencies to offer assistance, facilities and resources to South West Africa and invited member states to make scholarships available. The Assembly thus recognized the inadequate standards, facilities and objectives

[1] *Id.*, para. 2(d). (Italics added: the italicized clause was added to the draft of the Resolution by amendment introduced by the United States.)

[2] *Supra*, p. 222, footnote 4.

[3] G.A. Res. 1703 (XVI), 19 December 1961, G.A.O.R. 16th Sess., Supp. No. 17 at 40 (A/5100); (adopted without objection).

[4] G.A. Res. 1704 (XVI), 19 December 1961, G.A.O.R. 16th Sess., Supp. No. 17 at 41 (A/5100); (adopted unanimously).

[5] G.A. Res. 1705 (XVI), 19 December 1961, G.A.O.R. 16th Sess., Supp. No. 17 at 41 (A/5100); (adopted unanimously).

with respect to the education of the indigenous inhabitants of the Territory.

During the discussion of the question of South West Africa in the Fourth Committee of the General Assembly, Respondent's then Foreign Minister, Mr. Eric H. Louw, declared Respondent's intention to invite three past Presidents of the General Assembly, *in their personal capacities*, to visit the Mandated Territory "to see for themselves whether there exists any threat to international peace and security, or whether there is any truth in the allegations relating to military terrorization, the existence of an explosive situation and planned extermination."[1]

The General Assembly, however, did not favour such a procedure, nor even an alternative one advanced by certain members (though without comment or commitment on Respondent's part) whereby the three past Presidents would have been nominated by the President of the Assembly in consultation with Respondent, and with wider terms of reference than those suggested by Respondent, as quoted above.

(2) 1962

Reference has been made to the establishment, by the 16th Session, General Assembly, of the United Nations Special Committee for South West Africa and to the tasks entrusted to such Special Committee.[2]

Certain events taking place thereafter, notably the circumstances attending a nine-day visit to the Territory by the Chairman and Vice-Chairman of the Special Committee, generated confusion and controversy which are wholly immaterial to the issues in dispute between Applicants and Respondent in the present Proceedings.

Respondent, in commenting upon the aforesaid Resolution 1702 (XVI), relies upon a joint communiqué, allegedly issued at the conclusion of the visit, as demonstrating "that the factual assumptions on which the said resolution of the General Assembly was based, were entirely fallacious . . ." and that "no probative value can attach to purported statements or conclusions of fact in the reports and resolutions . . . ."[3]

The actual circumstances surrounding the brief visit (the itinerary of which was fixed by Respondent); the preparation of the "joint communiqué" at the conclusion thereof; the acrimonious, though temporary, misunderstanding between the Chairman and Vice-Chairman as to both occurrence and substance; and the ultimate

[1] It is to be noted that, except for the concern expressed by the General Assembly that the present situation "if allowed to continue, will, in the General Assembly's view endanger international peace and security," (Resolution 1596 (XV), (*supra*, p. 222)) the above-quoted characterization of the "allegations" regarding the Territory was that of the former Foreign Minister himself, rather than that of the General Assembly.

[2] G. A. Res. 1702 (XVI) (*supra*, p. 223, footnote 6).

[3] II, p. 4.

understanding between them, embodied in a jointly-signed Report to the Special Committee, are all fully set forth in a Report of the Special Committee itself,[1] and, as Respondent concedes, "to canvass them fully would be a lengthy process which could serve no purpose in these proceedings."[2]

What is of relevant, and indeed decisive, significance are their jointly-approved conclusions, based upon "what they saw and heard during their visit to the Mandated Territory,"[3] and in particular their joint conclusion:

> "That the administration of the Mandated Territory by the South African Government has been and continues to be pervaded by the rigorous application of *apartheid* in all aspects of life of the African population, resulting not only in their being racially segregated and discriminated against and in their being deprived of all basic human rights and fundamental freedoms, but also in the complete subordination of their paramount interests to those of a small minority of Europeans."[4]

The Special Committee, in its own Report,[5] submitted to the General Assembly on 14 September 1962, pointed the obvious moral to be learned from the confusion and controversy attending the visit of its Chairman and Vice-Chairman. The special Committee thought it "obvious" that

> ". . . it will be difficult, if not impossible, to secure the complete implementation of the General Assembly's resolution unless and until a United Nations presence can be established in the Mandated Territory by the granting to the Special Committee or other organs or sub-organs and the specialized agencies of the United Nations of ample freedom to enter and leave the Mandated Territory."[6]

On the basis of its own evaluation of available information and evidence, notably including Respondent's avowed legislative and administrative practices and policies, the Special Committee concluded:

> "The situation in the Mandated Territory has continued to be dominated by the policy of *apartheid* which has been intensified and made more systematic in recent years. Under this discriminatory policy, certain inadequate areas are reserved as the homelands of the indigenous groups. Outside those areas, the country is regarded as belonging to the White population and the presence of indigenous

[1] G.A.O.R. 17th Sess., Sp. S.W.A. Comm. Supp. No. 12 (A/5212).

[2] **II**, p. 4.

[3] A/5212, p. 7 (footnote 1 of this page, *supra*).

[4] *Ibid.* It should be noted that nothing in the record of their visit, including relevant correspondence and statements set forth *in extenso* in the cited Report, at pp. 17-23, or in the alleged "joint communiqué" issued at the end of their visit, is in any way inconsistent with, or in derogation of, the conclusion in their joint report, quoted above.

[5] *Id.*, p. 15.

[6] *Ibid.* The Special Committee's conclusion confirms the necessity, more fully discussed below (pp. 239-240, 525-539) for effective United Nations supervision over the Mandate as an essential feature of the Mandate institution.

> inhabitants is considered to be temporary and as not giving grounds for political or related rights. The entry of indigenous inhabitants into the area outside the reserves, in particular into urban areas, and their continued residence there, are regulated by a pass system. In town, they live in segregated townships and locations and, except for a few minor activities in those townships or locations, have no economic possibilities other than wage labour." [1]

The Report of the Special Committee was the subject of twenty-four meetings of the Fourth Committee of the General Assembly, during which petitioners were heard, communications relating to South West Africa were considered, full debate on the question took place, and a draft Resolution was considered and adopted without dissent.[2]

The General Assembly condemned "the continued refusal of the Government of South Africa to co-operate with the United Nations in the implementation of Resolution 1702 (XVI)[3] as well as other resolutions concerning South West Africa."[4] The Assembly assigned the tasks of the United Nations Committee for South West Africa to the Committee of Seventeen,[5] and requested the Secretary-General to appoint a United Nations Technical Assistance Representative for South West Africa, as well as "to take all necessary steps to establish an effective United Nations presence in South West Africa."[6]

The General Assembly urged Respondent to refrain from "action involving the forcible removal of indigenous inhabitants from their homes or their confinement in any particular location," and from "using the Territory of South West Africa as a base for the accumulation, for internal or external purposes, of arms or armed forces."[7]

The General Assembly during the 17th Session adopted two other resolutions relating to South West Africa: Resolution 1806 (XVII),[8] dissolving the United Nations Special Committee for South West Africa and Resolution 1804 (XVII),[9] drawing attention of petitioners to the report of the Special Committee for South West Africa,[10] as well as to Resolutions adopted by the Assembly at its 17th Session.

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[1] *Id.*, p. 13.

[2] G.A. Res. 1805 (XVII), 14 December 1962, G.A.O.R. 17th Sess., Supp. No. 17 at 38 (A/5217).

[3] *Supra*, p. 223, footnote 6.

[4] Footnote 2 of this page, *supra*.

[5] "Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples," established 27 November 1961 by the Assembly in Resolution 1654 (XVI), G.A. O.R. 16th Sess., Supp. No. 17 at 65 (A/5100). The Committee, of which Ethiopia is a member, was subsequently enlarged to twenty-four, and is hereinafter accordingly referred to as the "Committee of Twenty-Four."

[6] Res. 1805 (XVII), paras. 5-6 (footnote 2 of this page, *supra*).

[7] *Id.*, para. 7.

[8] G.A. Res. 1806 (XVII), 14 December 1962, G.A.O.R. 17th Sess., Supp. No. 17 at 39 (A/5217).

[9] G.A. Res. 1804 (XVII), 14 December 1962, G.A.O.R. 17th Sess., Supp. No. 17 at 38 (A/5217).

[10] A/5212 (*supra*, p. 226, footnote 1).

(3) 1963

Pursuant to the General Assembly's request, [1] the Secretary-General sought Respondent's views concerning the appointment of a United Nations Resident Representative for Technical Assistance in South West Africa. Respondent expressed its unwillingness to agree to the appointment of such a Representative.[2]

Respondent also declined an invitation of the Committee of Twenty-Four to attend Committee sessions at which the question of South West Africa was to be considered.[3] Following numerous meetings in April-May 1963, at which evidence was received and testimony taken, the Committee adopted a Resolution on 10 May 1963,[4] in which the Committee, *inter alia*, regretted that the Respondent had "taken no steps to implement the resolutions of the General Assembly on South West Africa," and that in particular, it "refused to allow a United Nations Technical Assistance Resident Representative to be stationed in the Territory"; deplored Respondent's refusal to co-operate with the Committee; noted *"with deep concern* the continued deterioration of the situation in South West Africa as a result of the intensification of the policy of *apartheid*, which has been the subject of general disapproval"; and considered "with regret" that Respondent "has consciously and deliberately failed to discharge its international obligations in the administration of South West Africa."[5]

In its Resolution, the Committee recommended that "the General Assembly consider any attempt to annex the Territory of South West Africa by South Africa as an act of aggression," and that the Assembly "take all necessary steps to establish an effective United Nations presence in South West Africa with a view to achieving the objectives of Resolution 1702 (XVI). . . ."[6]

The Committee decided also "to draw the attention of the Security Council to the critical situation in South West Africa, the continuation of which constitutes a serious threat to international peace and security."

The Report of the Committee, including the text of the foregoing Resolution, was submitted to the General Assembly at its 18th Session, and was also transmitted to the Security Council.[7]

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[1] G.A. Res. 1805 (XVII) (footnote 2 of page 227, *supra*).

[2] Summary of the pertinent correspondence is contained in a Report of the Committee of Twenty-Four (A/5446/Add. 2) (26 July 1963).

[3] *Id.*, p. 14.

[4] *Id.*, p. 71.

[5] The Resolution was adopted without dissent. The Committee is composed of the following States: Australia, Bulgaria, Cambodia, Chile, Denmark, Ethiopia, India, Iran, Iraq, Italy, Ivory Coast, Madagascar, Mali, Poland, Sierra Leone, Syria, Tanganyika, Tunisia, U.S.S.R., United Kingdom, United States of America, Uruguay, Venezuela and Yugoslavia.

[6] Footnote 4 of this page, *supra*.

[7] Letter of Transmittal (U.N. Doc. S/5375) (1963).

Thereafter, the General Assembly, at its 18th Session, approved the Report of the Committee of Twenty-Four, "particularly its conclusions and recommendations,"[1] affirmed the decision of the Committee to draw to the attention of the Security Council the "present critical situation in South West Africa," and requested the Committee to continue its efforts with a view to discharging the tasks previously assigned to it.

The General Assembly similarly requested the Secretary-General to continue his efforts with a view to achieving the objectives stated in operative provisions of Assembly Resolution 1805 (XVII),[2] and to report to the General Assembly immediately after receiving a reply to his invitation to Respondent to inform of its decision regarding these provisions of Resolution 1805.[3]

Pursuant to the Assembly's request, the Secretary-General advised the General Assembly that Respondent's attitude remained unchanged.[4]

The General Assembly thereupon adopted a Resolution,[5] condemning Respondent "for its refusal to co-operate with the United Nations . . . and for its non-compliance with the General Assembly resolutions with regard to South West Africa." In the same Resolution, the General Assembly requested the Security Council "to consider the critical situation prevailing in South West Africa."

The foregoing Resolution was transmitted by the Secretary-General to the President of the Security Council on 10 January 1964.[6]

During its 18th Session, the General Assembly adopted two additional Resolutions concerning South West Africa. One of these concerned petitions;[7] the other provided for continuation of the United Nations Special Training Program for South West Africans.[8] The Resolution also invited States to consider providing for secondary education and vocational training in their offers of scholarships and to give sympathetic consideration to requests by the Secretary-General for places in secondary, vocational and technical training schools. The Resolution further requested all Member States,

[1] G.A. Res. 1899 (XVIII), 13 November 1963, G.A.O.R. 18th Sess., Supp. No. 15 at 46 (A/5515).

[2] *Supra*, p. 227, footnote 2. These provisions (Resolution 1805 (XVII), paras. 5 and 6) related to the appointment of a United Nations Resident Representative for Technical Assistance in South West Africa, and to procedures to establish an effective United Nations presence in South West Africa.

[3] G.A. Res. 1899 (XVIII), para. 5(a), (b) and (c) (footnote 1 of this page, *supra*).

[4] G.A. 18th Sess., Report of S.G. (A/5634).

[5] G.A. Res. 1979 (XVIII), 17 December 1963, G.A.O.R. 18th Sess., Supp. No. 15 at 51 (A/5515).

[6] Letter from S. G. (S/5515) (1964).

[7] G.A. Res. 1900 (XVIII), 13 November 1963, G.A.O.R. 18th Sess., Supp. No. 15 at 47 (A/5515).

[8] G.A. Res. 1901 (XVIII), 13 November 1963, G.A.O.R. 18th Sess., Supp. No. 15 at 48 (A/5515). (The Program had been provided for originally in Resolution 1705 (XVI) (*supra*, p. 224, footnote 5).)

particularly Respondent, to facilitate the travel of South West African students.[1]

CONCLUSION

Applicants reaffirm the Summary of the History and Background of the Dispute, set out in their *Memorials*, pp. 95-97. They respectfully submit that the record of events recounted above leaves no room for doubt that persevering effort on the part of the United Nations, by its responsible organs and agencies, in and through which Applicants have sought to settle their dispute with Respondent relating to the interpretation and the application of the provisions of the Mandate, have been unavailing. Submission of the dispute to this Honourable Court in terms of Article 7 of the Mandate, accordingly, remains Applicants' sole and indispensable recourse and source of relief.

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[1] Reasons underlying the Assembly's repeated expressions of concern regarding Respondent's educational policies and programs in the Territory are considered in detail below, p. 362 *ff*.

CHAPTER III

THE NATURE OF THE MANDATE

A. General Considerations

Applicants' dispute with Respondent relating to the interpretation and application of the second paragraph of Article 2 of the Mandate has at its core sharply divergent concepts concerning the nature and essential principles of the Mandate System itself. Such divergence, indeed, has lain at the heart of the controversy between Respondent and the United Nations itself, in which and through the agency of which, Applicants have vainly sought to settle the dispute by negotiation.

As this Honourable Court stated in its *Judgment of 21 December 1962* in respect of the *Preliminary Objections*:

> "... it should be pointed out that behind the present dispute there is another and similar disagreement on points of law and fact—a similar conflict of legal views and interests—between the Respondent on the one hand, and the other Members of the United Nations, holding identical views with the Applicants, on the other hand. But though the dispute in the United Nations and the one now before the Court may be regarded as two different disputes, the questions at issue are identical." [1]

As will be seen upon more detailed examination of the views expressed by the Permanent Mandates Commission and its Members, such a divergence of view between Respondent and agencies of the organized international community, to which Respondent has been and is accountable, has characterized its administration of the Mandate since its inception.

The divergence between the approach, or understanding, of Applicants and Respondent concerning the nature and essential principles of the Mandate is illuminated by the respective positions taken by them on certain key issues. One of the most important of these concerns their contrasting attitudes toward the nature and consequence of the "compromise embodied in Article 22 of the Covenant [of the League of Nations]," to use Respondent's phrase.[2]

In their *Memorials*, Applicants allege,[3] and here reaffirm, that "upon the dissolution of the League of Nations the Union did not conceal its desire to annex the Territory." Respondent's policies and

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[1] *Judgment*, p. 345.
[2] II, p. 13.
[3] I, p. 85.

actions designed to effectuate annexation or incorporation of the Territory are analyzed more fully below.[1]

Respondent characterizes as an "over-simplification, tending towards a wrong impression,"[2] Applicants' contention that

> ". . . The Mandate System, as ultimately given expression in Article 22 of the Covenant of the League of Nations and in the several Mandate Agreements, represented a victory for the opponents of the principle of annexation." [3]

To the contrary, Respondent contends

> ". . . 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." [4]

In support of its interpretation of the nature of the Mandate, Respondent approvingly cites several commentators who, Respondent avers, "spoke of the relationship between the Union and South West Africa as being, in effect, close to annexation."[5]

Consistently with its view of the Mandate "as being in effect, close to annexation," Respondent repeats in terms largely identical with those in the *Preliminary Objections* [6] its contention that Article 22 of the Covenant

> "set forth the agreed idealistic objectives of the System, agreed methods whereby it would be put into operation and agreed features which would be incorporated therein." [7]

Furthermore:

> ". . . [T]he opening paragraphs of Article 22 concerning a 'sacred trust' and 'tutelage', must be regarded as being *descriptive of the idealistic or humanitarian objectives* involved in the Mandate System, and . . . the reference to 'Mandatories on behalf of the League' is to be understood as affording a broad indication of the method whereby those objectives would be sought to be attained. It is, therefore, to the more detailed provision in Article 22 for 'securities for the performance of this trust' that regard must be had in order to determine the juridical content of the Mandate System as envisaged by the signatories to the Covenant." [8]

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[1] *Infra*, p. 572.
[2] II, p. 15.
[3] I, p. 33.
[4] II, p. 95.
[5] *Id.*, p. 15. The significance of the statement of one such "commentator," Mr. Ormsby-Gore, while a Member of the Permanent Mandates Commission, quoted in the *Counter-Memorial*, II, p. 14, must be appraised against the Commission's unbroken record of opposition to efforts on Respondent's part, directly or indirectly, to annex, incorporate, or assert sovereignty over, the Territory. See *infra*, pp. 575-576.
[6] I, pp. 300-301.
[7] II, p. 105.
[8] *Id.*, p. 104.

Applicants submit, on the other hand, that the "sacred trust" and "tutelage" principle, in itself, must be regarded as a statement of legal obligation, embodying juridical content. The enforcement of the "sacred trust," moreover, became a responsibility "laid upon the League as an organized international community." [1] The Court's view is amply supported by the origins and history of the Mandates System.

Prior to the establishment of the Mandates System, the fate of indigenous peoples in certain areas of Africa and Asia was considered to be the sole and unaccountable responsibility of the Powers controlling them. As a matter of international law, their well-being and future were, for the most part, in the hands of such Powers. Virtually the only restraints upon the control by such Powers were moral considerations. With the creation of the Mandates System, the well-being and future of indigenous peoples were, however, declared to be, in the words of the Covenant, "a sacred trust of civilization."

These words were not lightly formulated. They were incorporated into the Covenant only after sharp disagreement between the parties over the settlement of the colonial issue. It was clearly understood by all concerned that what was involved was the adoption, with respect to the treatment of indigenous peoples in certain areas of Africa and Asia, of a principle entirely different from that in effect until then. The new principle was that, as a matter of international law, the well-being and social progress of such peoples would be the responsibility of the "organized international community," insured by legal, rather than by solely moral, considerations.

Although the term "sacred trust of civilization" obviously imports a high moral principle, it was intended to have legal significance as well. Had it been otherwise, indeed, the Powers resisting establishment of the Mandates System would not have had difficulty with the term. What they objected to was, of course, precisely its acceptance as a *legal principle*, inasmuch as most of the Powers concerned already were committed, of their own accord, to the observance of *moral principles* in dealing with peoples not yet able to govern themselves.

It is not necessary here to trace in detail efforts made toward the end of the nineteenth century by the more enlightened European Powers to bring the restraint of moral principle to colonial administration. The history of the period with respect thereto has been well summarized in a study of the Mandates System published by the Secretariat of the League of Nations in 1945.[2] The study makes plain that only moral commitments, and nothing more,

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[1] *Judgment*, p. 329.

[2] *The Mandates System: Origin—Principles—Application* 10 (League of Nations Pub. 1945. VI.A.1.).

were acceptable to the European Powers involved until the creation of the Mandates System.

The most significant actions taken during that period by European Powers with a view to improving the condition of indigenous peoples were the General Act of the Conference of Berlin of 26 February 1885 and the General Act of the Conference of Brussels of 2 July 1890. The Secretariat study referred to above examines the undertakings in these Acts concerning the well-being of the peoples involved, and concludes that they were not legal obligations but rather "in the nature of aspirations, of generous statements of intention, of a declaration or acknowledgment of moral obligations." [1]

After considering other matters of relevance, the study makes an assessment of the position of indigenous peoples from the standpoint of international law on the eve of the First World War. Using to this end a quotation from an "authoritative writer," the study makes clear that, at the time, the international community of nations considered itself "bound only by moral principles resulting from Christian and humanitarian sentiments." The study goes on to state that such "moral principles" were, in the case of territories brought within the System, "*transformed into principles of international law*" by the institution of the Mandates System. [2]

Certain Powers concerned in the settlement of colonial issues came to the Peace Conference prepared to do no more than make formal acknowledgement of the humanitarian ideal prevalent in the post-World War I period. As one authority has stated, it appeared

> ". . . that all those who based their demands on justice alone were to be given mere lip-service in the form of some kind of humanitarian resolution, as was the custom of the international conferences of the pre-war period." [3]

Thus, the *French Plan of Procedure for the Peace Conference* contemplated that the Great Powers should settle among themselves all the issues involved, including the colonial issues. When that was done, it would be time enough for the Conference, as the French Plan put it, to "place itself as has sometimes been done in the past under the invocation of some of the great principles leading to justice, morals and liberty . . . ." [4]

Consistently with this approach, the French Minister for Colonies, M. Simon, during a session of the Council of Ten, opposed the Mandates System in favour of outright annexation of former German colonies, asserting as a justification that higher principles already

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[1] *The Mandates System, op. cit.*
[2] *Id.*, pp. 12-13. (Italics added.)
[3] Margalith, *The International Mandates* 13 (1930).
[4] Baker, *Woodrow Wilson and World Settlement*, Vol. III, p. 63 (1923).

guided his nation, and that all the Great Powers worthy of the name "considered their colonies as wards entrusted to them by the world." [1]

The United States, on the other hand, strenuously supported the principle of international legal accountability. Thus, at a session of the Council of Ten immediately prior to the one addressed by the French Minister of Colonies, President Wilson, referring to the Mandates System, proclaimed that:

> "The fundamental idea would be that *the world was acting as trustee through a mandatory. . . .*" [2]

The principle of vesting a legal responsibility in the organized international community, nevertheless, was not solely of American origin. It owed much of its development to British thought. As early as 1916, P. H. Kerr (later Lord Lothian), then editor of the *Round Table*, and later secretary to Prime Minister Lloyd George, analyzed the problems which might be expected to arise after the War in defining the relations between "advanced" and "backwards" peoples, and concluded that "the ruling people ought to govern the dependency *as trustees for all mankind.*" [3]

During the same year, another British authority, examining proposals for the solution of the colonial issue, concluded that

> ". . . what it seems most desirable to aim at is the reposing of undistributed local authority in whatever government may be the trustee of sovereign power, with responsibility for observance of principles laid down *enforceable through appeal to the court of the League.*" [4]

In 1918, another British authority expressed the view that if a mandatory Power failed to comply with its obligations under a mandate, it should stand to be charged before a permanent commission at the instance of any other State, on the ground of "violating her trust." He suggested further that if an *ad hoc* "court of enquiry" were thereafter to find against the mandatory Power, and that Power refused to obey the verdict of the court, "her trust would be invalidated." [5]

The principle of legal responsibility was concurrently being developed in the United States. Thus the celebrated "Cobb-Lippman-House Memorandum" of 29 October 1918, which played

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[1] [1919] *Foreign Relations of the United States*, Vol. I (Paris Peace Conference), p. 761 (1942).
The Council of Ten included two representatives from each of the five principal allied and associated powers.

[2] *Id.*, p. 741. (Italics added.)

[3] Kerr, "Political Relations Between Advanced and Backwards Peoples", in Grant, *Introduction to the Study of International Relations*, p. 179 (1916). (Italics added.)

[4] Olivier, *The League of Nations and Primitive Peoples* 13 (League of Nations Pub. Series (1918)). (Italics added.)

[5] Curtis, "Windows of Freedom," in *Round Table* 27-28 (December 1918).

a significant role in the development of Article 22 of the Covenant, stated:

> "It would seem as if the principle involved . . . is that a colonial power acts not as owner of its colonies, but as trustee for the natives and for the interests of the society of nations . . . that the peace conference may, therefore, write a *code of colonial conduct binding upon* [all] *colonial powers.*" [1]

Expressions of many such views, both in Britain and the United States, were seriously weighed by the Governments of both Powers. Thus, on 28 November 1918, the Imperial War Cabinet met to discuss the possibility of a mandates scheme. It was generally agreed that "mandatory occupation did not involve anything of the nature of condominium or international administration but administration by a single power on certain general lines laid down by the League of Nations." There would also be the "right of appeal from the mandatory power to the League of Nations on the part of anyone who considered himself ill treated or claimed that the conditions set down by the League of Nations were not being fulfilled." [2]

In a conversation with Colonel House on 29 October 1918, a short time before a meeting of the Imperial War Cabinet, Lloyd George had indicated his hope that the United States could serve as "trustee" for the German East African colonies. [3]

On 10 December 1918 President Wilson spoke to members of the "Inquiry," a group set up under the direction of Colonel House to provide views and suggestions regarding the settlement of the colonial issue. The President expressed the view that the German colonies should be declared the common property of the League of Nations and be administered by small Powers "as trustees." [4]

In an earlier conversation with the British Ambassador to Washington, the President was reported to have said that:

> ". . . while he had little faith in international administration for the German colonies and was absolutely opposed to their restoration to Germany, he favored administration by single states *'in trust'*. 'In trust for whom,' Wiseman asked. 'Well for the League of Nations, for instance' Wilson replied." [5]

Confirmation of the fact that the word "trust" was not used, as Respondent contends, as merely "descriptive of the idealistic

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[1] [1918] *Foreign Relations of the United States*, Vol. I, Supp. 1, p. 407 (1933). (Italics added.)

[2] Lloyd George, *The Truth about the Peace Treaties*, Vol. I, p. 118 (1938).

[3] [1919] *Foreign Relations of the United States*, Vol. I (Paris Peace Conference), p. 407 (1942); Tillman, *Anglo-American Relations at the Paris Peace Conference of 1919* 87 (1961).

[4] Tillman, *op. cit. supra*, footnote 3 of this page, p. 61; Miller, *The Drafting of the Covenant*, Vol. I, pp. 41-44 (1928).

[5] Tillman, *op. cit. supra* footnote 3 of this page, p. 87 (conversation of 16 October 1918, in *Papers of Sir William Wiseman*). (Italics added.)

or humanitarian objectives involved in the Mandate System" [1] may be found, *inter alia*, in the comment by a noted American scholar on colonial questions, cited by Respondent as an authority in another context,[2] to the effect that, if

> ". . . such backward regions are entrusted by international mandate to one State, there should be embodied in the *deed of trust* most rigid safeguards both to protect the native population from exploitation and also to ensure that the interests of other foreign States are not injured either positively or negatively." [3]

By the time of the Peace Conference, accordingly, there was wide support for the principle that the organized international community should be a legal party in interest to the disposition of the colonial issue. A summary of factors relevant to a settlement of the issue is set forth in the study of the Mandates System by the Secretariat of the League of Nations in 1945, referred to above. The study concludes that the proposal for a Mandates System was satisfactory, inasmuch as it was "calculated to safeguard the interests both of the natives and of those countries which had asserted special claims, and *in addition, the interests of the international community in general.*" [4] And, as the same study makes explicitly clear, the Mandates System "transformed into principles of international law" what had hitherto been accepted in the international community solely as "moral principles" in respect of the administration of colonial possessions. [5]

As has been pointed out, acceptance of the principle of legal responsibility and legal interest on the part of the organized international community did not come easily to the Powers concerned with the colonial issue, including Respondent. That certain of them, again including Respondent, would have preferred outright annexation stands unrefuted in the record herein. Indeed, Respondent describes its relationship with the Territory "as being, in effect, close to annexation." [6]

Respondent seeks to support such a contention on the basis, *inter alia*, of its assertion that only by such a "concession" was it "induced" to accept the Mandate at all.[6] The apparent implications are either (a) that the Mandate was thrust upon it and accepted reluctantly; or (b) that, but for the so-called "compromise," Respondent would have annexed the Territory outright. Neither implication derives any support from the record herein, and both are untenable.

The record shows, on the other hand, that the "sacred trust"

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[1] II, p. 104.

[2] *Id.*, p. 10.

[3] Beer, *African Questions at the Paris Peace Conference* 424-25 (1923). (Italics added.)

[4] *The Mandates System: Origin—Principles—Application* 17-18 (League of Nations Pub. 1945. VI.A.1.). (Italics added.)

[5] *Id.*, p. 13.

[6] II, p. 15.

and "tutelage principle," provided for in Article 22 of the Covenant and detailed in the Mandate, comprised obligations of a legal nature, in accordance with the expressed objective of the organized international community to afford legal protection to the well-being and social progress of the inhabitants of mandated territories, as a "sacred trust of civilization."

Respondent's contention that the Mandate was "not far removed from annexation" and was "in effect close to annexation" is, indeed, refuted by Respondent itself, in another context in the *Counter-Memorial*. There, Respondent contends that international accountability was so essential a feature of the Mandates System that if, as Respondent alleges, provisions governing such accountability have lapsed, the whole Mandate must be deemed to have lapsed. In order to demonstrate the essentiality of international supervision, Respondent argues:

> "As regards history, it seems clear that the various proposals which preceded the Mandate System as actually agreed upon, all proceeded from the basic principle of '*no annexations*', to which effect was to be given by some form or another of *internationalization* of the government or administration of the colonies and territories in question. . . .
>
> "The notion of 'Mandatories on behalf of the League' was therefore integrally combined with the notion of 'tutelage', as part and parcel of the 'best method' of giving practical effect to the basic principle of the sacred trust." [1]

The "no annexations" principle underlying the Mandates System, conceded by Respondent, is a negative form of expressing the affirmative objective of developing the Mandates, as rapidly as possible, toward sovereignty of their own.

The history of the Mandates System confirms the fundamental importance attached to the concept of self-determination and self-government.

Thus, at the meeting of the Imperial War Cabinet of 20 November 1919, it was generally agreed that Mandates should continue only "until such time as the inhabitants of the country themselves were fit for self-government." [2] In *The League of Nations—A Practical Suggestion*, General Smuts endorsed the principle of "No annexations, and the self-determination of nations." [3]

The second Paris draft of President Wilson explicitly provided:

> "The object of all such tutelary oversight and administration on the part of the League of Nations shall be to build up in as short a time as possible out of the people or territory under its guardianship a political unit which can take charge of its own affairs, determine its own connections, and choose its own policies." [4]

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[1] II, pp. 169-170. (Italics in original.)
[2] Lloyd George, *The Truth about the Peace Treaties*, Vol. I, p. 118 (1938).
[3] Miller, *op. cit. supra*, p. 236, footnote 4, Vol. II, p. 27.
[4] *Id.*, p. 104.

The provision contemplated by Wilson also provided that the League could at any time release the peoples or territories from tutelage and consent to their being set up as independent units. [1]

In the Council of Ten on 27 January 1919, President Wilson affirmed that:

> "... where people and territories were undeveloped, [the mandatory power should] assure their development so that, when the time came, their own interests, as they saw them might qualify them to express a wish as to their ultimate relations ...." [2]

In the same session of the Council of Ten, Wilson continued:

> "The fundamental idea would be that the world was acting as trustee through a mandatory, and would be in charge of the whole administration until the day when the true wishes of the inhabitants could be ascertained." [3]

Paragraph (1) of Article 22 refers explicitly to "peoples not *yet* able to stand by themselves." [4]

The word "yet" was included in the Hankey-Latham draft of 28 January 1919. When the draft was presented to the Commission for the drafting of the Covenant on 8 February 1919, "yet" had been deleted. The drafting committee of the Commission, appointed on 3 February 1919, did not re-incorporate the word, although its report recommended other changes in the draft of Article 22 (then Article 17). In its report of 13 February 1919, however, the drafting committee recommended the re-insertion of the word "yet." The Commission accepted this recommendation without debate, [5] and it remained in the final text.

On 17 May 1919 Wilson summarized for the Council of Four his concept of the Mandates System. He stated, *inter alia*:

> "The whole theory of mandates is not the theory of permanent subordination. It is the theory of development, of putting upon the mandatory the duty of assisting in the development of the country under mandate, in order that it may be brought to a capacity for self government and self-dependence which for the time being it has not reached, and that therefore the countries under mandate are candidates, so to say, for full membership in the family of nations. I think that this is a very important fundamental idea of the whole mandatory conception." [6]

Such insistence upon the objectives of self-determination and self-government is crucially relevant to the necessity for inter-

[1] Miller, *op. cit.*, p. 104.

[2] [1919] *Foreign Relations of the United States*, Vol. III (Paris Peace Conference), p. 741 (1943).

[3] *Ibid.*

[4] (Italics added.)

[5] For the evolution of the draft with respect to the incorporation of the word "yet", see: Miller, *op. cit. supra* p. 236, footnote 4: Vol. I, p. 109; Vol. II, pp. 274, 283, 306, 328.

[6] [1919] *Foreign Relations of the United States*, Vol. V (Paris Peace Conference), p. 700 (1946).

national accountability, as long as Respondent asserts rights and powers over the Territory. Respondent had demanded outright annexation; the framers of the Mandates System rejected its claim. Far from making a "concession," the result of which was to vest in Respondent rights "not far removed from annexation," as Respondent contends, [1] or "the day-to-day exercise of the attributes of sovereignty," [2] the authors of the Mandates System wished to assure the speediest practicable progress of the inhabitants of the Territory toward their own self-government and sovereignty.

The function exercised by "*the League as an organized international community*" [3] in assuring accomplishment of this objective was not a *quid pro quo* for the undertaking by Respondent to exercise duties under the Mandate, as is implicit in Respondent's argument that it consented merely "to report and account to a *specific supervisory body*, constituted under the provisions of a particular international convention." [4] Such a construction of the Mandate distorts the significance of its character as a treaty or convention, while at the same time ignoring its significance as a "new international institution, the primary, overriding purpose of which is to promote the 'well-being and development' of the people of the territory under Mandate." [5]

The *inhabitants* were the beneficiaries of the Mandate, not Respondent or the League of Nations. Respondent was to serve as trustee, or tutor, under a mandate.[6] The League was to serve as the then existent political organ of the international community, guarding the public interest of that community.

The consensual character of the Mandate does not diminish its essence as an institution. Respondent agreed to undertake the obligations inherent in the institution, and was under no constraint or compulsion to accept the Mandate if it rejected its essential attributes.

Applicants perceive in Respondent's central contentions fatal inconsistencies:

First, Respondent argues that its rights under the Mandate have survived even if its obligation of accountability has lapsed.

Secondly, Respondent argues that its obligation of accountability is so much of the essence of the Mandate that, if such obligation has lapsed, the whole Mandate has collapsed with it.

Thirdly, Respondent argues that the rights of the inhabitants, including that of self-determination, are subject to its unreviewable discretion, while, at the same time, it claims to be vested with

[1] **II**, p. 95.
[2] **IV**, p. 69.
[3] *Judgment*, p. 329.
[4] **II**, p. 119. (Italics in original.)
[5] *Judgment*, p. 329.
[6] See discussion at pp. 529-539, *infra*.

powers equivalent to annexation of or sovereignty over the Territory.

Such a series of mutually incompatible principles strikes at the heart of the Mandate's objective of self-determination and self-government.

This objective appears clearly from official and scholarly discussion of the subject from the year 1919 onward. Examples follow:

1. ". . . The whole theory of mandate is not the theory of permanent subordination. It is the theory of development, of putting upon the mandatory the duty of assisting in the development of the country under mandate, in order that it may be brought to a capacity for self-government and self dependence which for the time being it has not reached, and that therefore the countries under mandate are candidates, so to say, for full membership in the family of nations. I think that is a very important fundamental idea of the whole mandatory conception." [1]

2. ". . . The vital principles are: the principle of nationality involving the ideas of political freedom and equality; the principle of autonomy, which is the principle of nationality extended to peoples *not yet capable* of complete independent statehood; the principle of political decentralisation, which will prevent the powerful nationality from swallowing the weak autonomy as has so often happened in the now defunct European empires . . . . The only compromise I make, and make partly to conciliate the great Powers and partly in view of the administrative inexperience of the league at the beginning, is the concession that, subject to the authority and control of the league, *which I mean to be real and effective*, suitable Powers may be appointed to act as mandatories of the league in the more backward peoples and areas. *That compromise will, I hope*, prove to be only a temporary expedient." [2]

3. "Dans l'esprit des rédacteurs du Pacte [de Versailles] il s'agit pour la puissance mandataire plus d'une mission civilisatrice accélérant l'évolution sociale des peuples que d'une simple gestion administrative." [3]

4. "Si l'on envisage cette tâche dans l'esprit où elle est définie dans l'art. 22, la voie du mandataire est tout aplanie et le sort du territoire qui est actuellement une colonie est assuré: ce territoire deviendra peut-être en son temps un Etat indépendant et, dès lors, il jouera le rôle, considérable ou non, qui lui est dévolu dans l'ensemble des Etats." [4]

5. ". . . [The Mandates System] has also introduced into colonial administration a defined objective, namely, the gradual preparation

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[1] Speech by President Wilson, quoted in [1919] *Foreign Relations of the United States*, Vol. V (Paris Peace Conference), p. 700 (1946).

[2] Smuts, *The League of Nations. A Practical Suggestion*, 27-28 (1918).

[3] Maurice Besson, in *L'Afrique Française* 14 (1921).

[4] H. C. G. J. van der Mandere in 54 *Bulletin de la Société Belge d'Etudes et d'Expansion* 369 (1926).

of dependent peoples for the independent management of their own affairs and for their ultimate growth into statehood. It is unthinkable that a large part of the population of the world should remain in permanent subjection to a section of the other part, merely because their colour is different or their political experience is at present inferior. The Mandate system points the road to their ultimate emancipation, and so rapid is the development of some races that have habitually been regarded as 'backward' that this goal may in many cases be reached sooner than some of us think." [1]

6. "[The Mandated Territory of New Guinea] is to be controlled as if it were, contrary to the fact, an integral portion of the Commonwealth [of Australia]; but its development is to be not towards, but away from, absorption by the Commonwealth." [2]

7. ". . . [The Mandates System] was essentially temporary in character. The assumption was that it would come to an end when the various territories were able to 'stand by themselves.'" [3]

8. ". . . Underlying Article 22 was the assumption of independent national sovereignty for mandates." [4]

9. "The Mandates Commission consistently upheld the theory of ultimate independent sovereignty. It made no attempt to minimize the effect of the vague words of the Covenant in reference to the ultimate destiny of 'B' and 'C' mandates. It assumed that sovereign independence, and not merely 'self-government' and 'autonomy,' was intended by the Covenant. . . ." [5]

10. "Again, the phrase 'peoples not *yet* able to stand by themselves' is used. It follows from this and from the very conception of tutelage that this mission is not, in principle, intended to be prolonged indefinitely, but only until the peoples under tutelage are capable of managing their own affairs." [6]

B. Nature of the Mandate as Viewed by this Honourable Court

Respondent's premise that the Mandate was "close to annexation" underlies Respondent's contention that its rights and claims to the Territory would remain intact even if, as Respondent contends, the Mandate has "lapsed as a whole."[7] Such a contention, it is true, is not advanced with explicit candour, but it is an inescapable consequence of Respondent's assertion of freedom from accountability without relinquishment of right or title.

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[1] A. D. McNair in his Preface to Bentwich, *The Mandates System* vi (1930).

[2] Evatt, J. in *Jolley* v. *Mainka* (High Court of Australia, 1933), *Annual Digest and Reports of Public International Law Cases* (1933-34), Case 17, p. 48.

[3] H. D. Hall, *Mandates, Dependencies and Trusteeship* 31 (1948).

[4] *Id.*, p. 80.

[5] *Id.*, p. 81.

[6] *The Mandates System: Origin—Principles—Application* 23 (League of Nations Pub. 1945. VI. A. 1.).

[7] II, Chap. V.

Respondent's position in this matter not only contrasts with Applicants' understanding of the nature of Respondent's voluntary assumption of the Mandate obligations.[1] It also is in conflict with repeated holdings of this Honourable Court.

Clear expression has been given by the Court to the nature and central principles of the Mandates System. In its *Judgment of 21 December 1962* in respect of the Preliminary Objections, the Court said:

> "The essential principles of the Mandates System consist chiefly in the recognition of certain rights of the peoples of the underdeveloped territories; the establishment of a regime of tutelage for each of such peoples to be exercised by an advanced nation as a 'Mandatory' 'on behalf of the League of Nations'; and the recognition of a 'sacred trust of civilization' laid upon the League as an organized international community and upon its Member States. This system is dedicated to the avowed object of promoting the well-being and development of the peoples concerned and is fortified by setting up safeguards for the protection of their rights.
>
> "These features are inherent in the Mandates System as conceived by its authors and as entrusted to the respective organs of the League and the Member States for application. *The rights of the Mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations.* The fact is that each Mandate under the Mandates System constitutes a new international institution, the primary, overriding purpose of which is to promote 'the well-being and development' of the people of the territory under Mandate." [2]

The italicized language reflects an earlier holding of the Court, in its *Advisory Opinion of 11 July 1950*, quoted with approval in the *Judgment of 21 December 1962:*

> " The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified." [3]

Respondent has not sought to explain, either in its *Preliminary Objections* or in the Oral Proceedings thereon, any basis for its disclaimer of international accountability while at the same time

[1] Respondent seeks to support its construction of the "compromise" in Article 22 of the Covenant as "being in effect close to annexation" by averring that by this means "Respondent was induced to agree to the Mandate System" (II, p. 15). It is true that Respondent, Australia and New Zealand "strongly pressed their cases for incorporation" of the former German colonies in question, including South West Africa. It does not at all follow that the alternative to the Mandates System would have been annexation or incorporation; such a conjectural reconstruction of history cannot be debated with profit.

[2] *Judgment*, p. 329. (Italics added.)

[3] *I.C.J. Reports 1950*, p. 133; quoted in *Judgment*, p. 333.

maintaining rights of administration and possession over the Territory. In its *Counter-Memorial*, Respondent adverts to the matter, but refrains from an attempt to show either how such a result could be "justified," or on what grounds, or pursuant to what construction of the Mandate, Respondent hopes to "exclude the obligations connected with the Mandate," without at the same time excluding "its very essence."

Respondent concedes that its contention concerning the lapse of the Mandate, "has, on occasions in the past, resulted in the raising of the further questions whether, in such event, Respondent would have to rely on a basis other than the Mandate as such for a right or title to administer the Territory of South West Africa and if so, what that basis would be."[1]

The only "occasion in the past" referred to by Respondent is the above-quoted ruling of the Court in its *Advisory Opinion of 11 July 1950*. Another "occasion," unnoted by Respondent, is the explicit holding of the Court in its *Judgment of 21 December 1962*, also quoted above.[2]

Respondent's unilateral conception of its right and title to the Territory, as well as its disregard of the Court's views concerning the nature of the Mandate itself, is revealed by the manner of Respondent's disposition of such questions, which it concedes have arisen "on occasions in the past." Respondent confines itself to the comment that

> "Such questions do not, however, fall to be considered for the purposes of the present case. . . ." [1]

To this curt dismissal of questions to which the Court has attached solemn and decisive weight, Respondent adds a similarly terse comment:

> ". . . Respondent does not claim, but on the contrary, expressly disclaims, that its right of administration is based on continued existence of the Mandate." [3]

Applicants respectfully submit that, to the contrary, there is no basis whatever, other than the Mandate itself, for the continued exercise by Respondent of rights of administration, or of any other right, title or interest in or to the Territory.

Respondent's conception of the nature of the Mandate similarly gives rise to, and shapes, Respondent's interpretation of the second paragraph of Article 2 in a sense sharply in conflict with that of Applicants.

Respondent construes the aforesaid provision as not embodying obligations of a legal nature, but as indicating merely "the objective

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[1] II, p. 173.
[2] *Supra*, p. 220.
[3] II, p. 174.

to be pursued by the Mandatory, or *the spirit with which he should be imbued*, in exercising his power of administration and legislation."[1]

From this point of departure, Respondent concludes:

> "It follows consequentially that the particular methods whereby this purpose was sought to be attained, were left to the discretion of the Mandatory." [2]

Applicants demonstrate more fully below[3] the legally normative nature of Respondent's obligations toward the inhabitants of the Territory in terms of the second paragraph of Article 2. The present reference to Respondent's characterization of that provision is relevant as showing the wide divergence between Respondent's conception of principles basic to the Mandates System, and that of the Applicants.

As the History of the Dispute in the United Nations[4] makes clear, *Applicants' understanding and evaluation of the nature of the Mandate and of its essential principles corresponds to that of the United Nations*, in and through the agency of which Applicants have sought to make known their views concerning the issues in dispute and to settle their dispute with Respondent by means of negotiation in and through the diplomatic agency of the United Nations.

As the *Memorials* make clear,[5] and as is more fully set forth below, *passim*, the League of Nations, primarily through the Permanent Mandates Commission, actively developed and expounded its understanding and evaluation of the nature of the Mandate and of its essential principles.

In view of the importance attaching in the Mandates System to international supervision and accountability (which Respondent both concedes and contends),[6] as well as the undoubted competence and integrity of the members of the Permanent Mandates Commission, their views concerning the nature and purposes of the Mandates System traditionally have been accorded great weight and are, indeed, frequently cited by Respondent in its *Counter-Memorial*. The views of the Commission assume even greater significance in the light of their consistent development throughout the nineteen years of the Commission's existence, a development which, though interrupted by the war years, was revived with noteworthy continuity and carried on with equal consistency by the United Nations, its organs and agencies, dealing with the Mandates and with cognate issues.

It is, accordingly, pertinent to consider the nature of the Mandates System as viewed by the Permanent Mandates Commission.

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[1] II, p. 387. (Italics added.)
[2] *Id.*, p. 387.
[3] *Infra*, pp. 476-519.
[4] I, pp. 43-85. Reply, *supra*, pp. 222-230.
[5] I, pp. 37-40.
[6] *Supra*, p. 238; II, pp. 169 *ff.*

C. Nature of the Mandate as Viewed by the Permanent Mandates Commission

The views of the Permanent Mandates Commission and its members concerning the nature and essential principles of the Mandates System are entitled to great weight, for reasons already set forth.[1]

Although the development of the concept of legal responsibility of governing powers to promote the well-being of subject peoples had led to acceptance of treaties or other international instruments in particular cases[2] prior to the Covenant of the League of Nations, the Mandates System initiated a new phase in the development of the concept: the establishment of international supervisory authority both administrative and judicial, to assure the observance of the legal obligations of States administering peoples "not yet able to stand by themselves."[3]

The essence of the international supervisory jurisdiction thus established was submission by the Mandatory to the supervision of the League of Nations and the ultimate control of the Permanent Court of International Justice to assure observance of the Mandatories' procedural obligations vis-à-vis the League and the substantive responsibilities which they had undertaken toward the peoples of the mandated territories.

The Permanent Mandates Commission was diligent in defining and upholding the basic nature and principles of the Mandate for South West Africa.

The Commission, which was operative during the years 1920-1939, was established pursuant to the provisions of paragraph 9 of Article 22 of the Covenant: "A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates."

1. *Composition and Character of the Commission*

a. *The Composition of the Commission*

The Commission's organization and procedures were governed by a Constitution and Rules approved by the Council of the League of Nations. The Commission, composed of nine (later ten, then eleven) members, normally held two sessions a year, when the annual reports of the Mandatories to the Council of the League were discussed and examined. The Commission was assisted in its work by the presence of an accredited representative of the Mandatory, who was available to answer questions put by members of the Commission and to

[1] *Supra*, p. 245.

[2] Examples are the Berlin Act of 1885 and the Brussels Act of 1890.

[3] Covenant of the League of Nations, Article 22, para. 1, the text of which is set forth in I, p. 200.

amplify or correct statements in the reports. The Commission formulated detailed questionnaires covering all phases of administration, to be used as guides by the Mandatory Powers in the preparation of their annual reports. In addition to such reports, the Commission had at its disposal a variety of documentation, official and otherwise, collected by the Mandates Section of the League Secretariat. Finally, petitions setting forth grievances of the inhabitants of the Mandated Territories were received and evaluated by the Commission.

The members of the Commission were chosen primarily for their expertise in matters of colonial affairs. Many of them had already distinguished themselves as colonial administrators. They were, above all, endowed with practicality and experience. Some, as for example Sir Frederick Lugard and M. Van Rees, enjoyed high repute as writers and scholars on colonial administration and the Mandates System.

With the exception of the Japanese member, all of the Commissioners were Europeans. As originally established, the Commission consisted of nationals of Belgium, the British Empire, France, Italy, Japan, Netherlands, Portugal, Spain, and Sweden. Except that a national of Norway replaced the Swedish member in 1928, members were in every case replaced by nationals of the same country. In addition, a Swiss national and a German national were appointed as Commissioners in 1924 and 1927, respectively. Thus, at one time or another, nationals of Belgium, the British Empire, France, Italy, Japan, Netherlands. Portugal, Spain, Sweden, Norway, Switzerland, and Germany served as members of the Commission.

b. *The Character of the Commission*

The Commission may be described as in essence a quasi-judicial, quasi-administrative organ, analogous to similar bodies familiar to many municipal systems, the function of which is the interpretation and application of provisions of a legislative nature, within a constitutional framework.

That the Permanent Mandates Commission was regarded, by itself, as well as by the Council of the League, in this light appears clear from the Records of its Proceedings.

In the Commission's First Session, M. Rappard, then Director of the Secretariat, stated that the League Council "had wished, moreover, that each member of the Commission should be freed from any obligation to its own government, so that he could sit, not as a representative of any particular Government, but as an *entirely impartial judge.*"[1]

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[1] P.M.C. Min., 1st Sess., p. 6. (Italics added.)

During the Fifth Session of the Commission, the Chairman declared:

> ". . . The raison d'être of the Commission was to recall to governments the necessity for observing the principles of the mandate, principles which it must safeguard so as to prevent any suspicion arising as to the manner in which the mandatory Power executed its task." [1]

In its official report to the Council of the League during the Eighth Session, the Commission observed that

> *"the task of the Commission is one of supervision and of co-operation. It is its duty, when carefully examining the reports of the mandatory Powers, to determine how far the principles of the Covenant and of the Mandates have been truly applied in the administration of the different territories."* [2]

During the final session of the Commission, the Chairman summarized the character of the Commission, in discussing the duty of the Commission to consider a British White Paper on Palestine:

> "It might be asked—at the present meeting, no doubt, to do [so] was merely to knock at an open door, but the question had been raised elsewhere—whether the Commission was obliged today to give its opinion on the question whether the White Paper was in keeping with the mandate. The Chairman personally thought that was a duty the Commission could not escape. It was indisputably what was expected of it. It might have to give its opinion on other points as well, but certainly on that one. *To use an expression frequently heard at its meetings, the Commission, as the 'guardian of the mandate,' was fulfilling one of its essential functions by doing so.* He would go further and say it was its duty to do so. If it failed to carry out that duty, it would be abdicating and ruining any authority it might possess.
>
> *"Would it be said that it was not qualified to interpret the mandates? But it had done nothing else since the very beginning of its existence.* It had done that for the Palestine mandate itself, for the Tanganyika, Ruanda-Urundi and South-West African mandates; and were not the observations which it had submitted to the Council as the result of its examination of the various annual reports based on its conception of the provisions of the mandates? Neither the Council nor the mandatory Powers had ever suggested that in doing so it had exceeded its duties or its competence." [3]

The Commission often applied the principles of the mandates to situations and proposals, rendering a judgment accordingly. Such a quasi-judicial function was exercised, for example, in respect of the question whether the British White Paper was in conformity with the Mandate for Palestine; whether the South African Colour-Bar Act was in conformity with the Mandate for South West

[1] P.M.C. Min., 5th Sess., p. 18.
[2] P.M.C. Min., 8th Sess., p. 200. (Italics added.)
[3] P.M.C. Min., 36th Sess., p. 207. (Italics added.)

Africa; whether a plan for "closer association" between Tanganyika and the neighbouring East African colonies was permissible under the Mandate for Tanganyika. Many other specific instances directly relating to South West Africa are referred to in appropriate contexts in this Reply.

The Commission was mindful that its duty was not the rendering of *political* decisions. It exercised its authority as a body of independent experts, and it is common cause herein that the independence and competence of its members gave great weight and authority to its judgments.

When a question arose as to revision of the Commission's questionnaire, Respondent, along with other Mandatories, demurred. Lord Lugard responded for the Commission.

> "Several of the Mandatories . . . have very definitely declared that in their opinion such detailed questions ought not to be asked. They are described as inquisitorial and as dealing with matters quite outside our proper functions. They are, however, merely a reproduction of those which have been asked orally. The objection of the Mandatories is not therefore to the 'list' as such but to the whole method and procedure of the Permanent Mandates Commission, and this was made more clear in their speeches. . . .
>
> "It would seem to be the view of the mandatory powers that the Permanent Mandates Commission should confine itself to seeing that no gross and general maladministration is taking place, and that questions should be asked only regarding matters on which the Permanent Mandates Commission has cause for doubts. But it is by asking general questions that causes for doubt emerge. If the Permanent Mandates Commission is to discharge only functions of the perfunctory nature indicated, it would hardly seem worth while for men who have many other demands on their time to devote themselves to the work. *The South African delegate complained that the action of the Permanent Mandates Commission 'constituted an investigation of the policy of the Mandatory in its own country'. Is not that precisely its function?*" [1]

In the same statement, Lord Lugard made clear the Commission's policy of avoiding political judgments, in pointing to the fact that the Commission criticized laws and practices of Mandatories, even if similar laws and practices were applied by the Mandatories within their own domestic jurisdiction.

The quasi-judicial, non-political character of the Commission is, accordingly, beyond dispute.

2. *Legal Basis of Respondent's Obligations*

The Commission, as has been pointed out, considered itself a quasi-judicial, non-political body, the function of which was to apply standards of a legal nature to specific policies and acts. The

[1] P.M.C. Min., 11th Sess., pp. 166-67. (Italics added.)

Mandate institution embodied a system of a legal nature, with legal obligations, and susceptible of legal interpretation and application.

A clear and concise illustration of its view in this respect may be found in the Commission's discussion of Togoland, under French Mandate: "*The Chairman recalled that the mandate was the constitutional law of the territories under mandate, operating under the peculiar circumstance that it had arisen out of an international Convention.*"[1]

In the course of the Commission's review of Palestine, "the Chairman declined to find any opposition between the 'spirit' of the Covenant and the terms of the mandate. He saw no contradiction between those two texts, which for seventeen years had *constituted the law* that the Commission had applied to the case of Palestine."[2]

Similarly, during consideration by the Commission of the question whether "closer association" between Tanganyika and neighbouring British colonies could be justified under Article 10 of the Mandate for Tanganyika:

> "M. Rappard pointed out that, though the mandates might be compared to international agreements, they were, at the same time, the enforcement of the principles laid down in Article 22 of the Covenant. *If there was a very definite contradiction between these principles, which were constitutional, and their application which was legislative in nature,* it might well be asked what was the validity of such agreements. M. Rappard did not think that the Commission had reached this point. A solution should be sought in the following direction: the text of the mandates should be interpreted in the light of the principles which they should carry out. If, according to one interpretation, there appeared to be a contradiction with Article 22, it was the interpretation which was at fault. The only interpretation which was permissible was one not contrary to the principles of that article." [3]

Mr. Kastl reaffirmed M. Rappard's statement.[4]

As noted above, the Commission considered its task to be one of "supervision and of co-operation." In discharging its latter function, the Commission was at pains not to express its judgment harshly, in deference to the recognized difficulty confronted by Mandatories in the effective discharge of their obligations. The Commission often expressed the hope that it could discharge its own functions in a spirit of collaboration, rather than dictation. In the face of this approach to its task, all the more significance emerges from the frequent occasions upon which the Commission felt constrained to express criticism of Respondent, sometimes in blunt and reproachful terms. Instances are set out in appropriate context in other sections of this Reply.

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[1] P.M.C. Min., 34th Sess., p. 130. (Italics added.)
[2] P.M.C. Min., 36th Sess., p. 206. (Italics added.)
[3] P.M.C. Min., 15th Sess., p. 170.
[4] P.M.C. Min., 15th Sess., p. 204.

As "guardian of the Mandate," the Commission examined reports of the Mandatories, annually for nineteen years. In the course of such examination the Commission addressed questions to accredited representatives of the Mandatories. From time to time, the Commission was also called upon by the League Council for expert advice.

As a consequence of the Commission's functions of supervision, there evolved perennially what may be described as a "concrete content" of Mandates, the substance and form of which are embodied in the Commission's minutes. This "concrete content" is reflected in pronouncements of general principles, such as the compilation of "General Conditions which must be fulfilled before the Mandate Regime can be brought to an End in Respect of a Country placed under that Regime."[1]

More frequently, the substantive context of a broadly stated obligation of a Mandatory was developed through continuous application of general criteria to concrete factual situations.

As clearly appears from the record of its Proceedings, the Commission performed a quasi-judicial function of elaboration, distillation and specification of the broadly phrased "constitutional" principles of the Covenant and the Mandate. Explanation of the fact that the Commission found little difficulty in accomplishing this task, no doubt is to be found in the admitted competence of the Commission itself and in the widely accepted understanding of the nature of the obligations vested in the Mandatory by the legal instruments of the System. The major sources from which the Commission derived its explicit formulations are described more fully below.

3. *Purposes and Objectives of the Mandate*

In arriving at its judgments concerning the Mandatory's duties, the Commission proceeded from identifiable purposes and objectives of the Mandates System as a whole.

Thus, both the Commission and the League Council endorsed the view that Mandates, including that for South West Africa, were for an indefinite duration, their goal in each case being self-government, even though the "B" and "C" Mandate Instruments contained no explicit provision to this effect. Excerpts from the Commission's minutes are illustrative.

> **a.** "The victorious Powers having agreed at the close of the war on the two Wilsonian principles on which the Peace Treaties were to be based—the principle of the non-annexation of conquered territories and the principle of self-determination—the question arose whether those principles could satisfactorily be applied in their entirety to all the territories which were no longer under the sovereignty of the States that had formerly governed them. It was felt that the second principle clearly could not operate in certain

[1] P.M.C. Min., 20th Sess., p. 228.

territories, because they were inhabited by peoples who at that time were incapable of self-determination, or, in other words, of self-government. This was the origin of the mandate system, which, *having regard to the temporary incapacity of these peoples to assume the responsibility of independence, required that the application of the principle should be suspended but should by no means be cancelled.*" [1] (M. Van Rees.)

b. "The territories placed under mandate not being independent, for before the Treaties of Peace they belonged either to Turkey or to Germany, *the aim of the mandate was to bring those territories to the condition necessary for complete independence.* This they did not possess and were not yet capable of possessing, *i.e. they were incapable of self-government.* . . .

". . . Unfortunately, neither Article 22 of the Covenant nor the texts of the mandates have defined either the other general or special conditions of the termination of the mandate or the procedure required for this purpose. We shall therefore have to deduce them by interpreting the different provisions governing the mandate system.

"It has sometimes been urged that the B and C mandates were definitive, thus confusing a particular situation with a legal principle.

"*All the mandates are equally of limited duration, for all are based on Article 22 of the Covenant,* whose spirit was determined by the fifth and twelfth of President Wilson's points. The system was created to remedy the incapacity of the territories to govern themselves. *Ablata causa cessit effectus.*" [2] (Count de Penha Garcia.)

Addressing himself to a resolution of the Legislative Assembly of South West Africa (composed solely of "Whites") advocating the incorporation of South West Africa as a fifth province of South Africa "subject to the provisions of the said Mandate," a Member of the Commission concluded:

c. ". . . According to what the Commission learned . . . with regard to the Legislative Assembly's resolution, the territory would be administered as a fifth province of the Union 'subject to the provisions of the said mandate'. That was precisely where confusion might arise. A place could doubtless be found in the administration of any territory, even a sovereign territory, for the provisions of the mandate—namely, those on the protection of labour, freedom of conscience, the welfare of the natives, protection against slavery, alcoholism and dangerous drugs, etc. It would be possible to maintain them in the fifth province, but, notwithstanding, *the mandate would be violated solely by the establishment of the province.* The mandate was not made up solely of a whole group of protective provisions, but, by making these provisions the basis of a *sui generis* status for the territory and its inhabitants, it constituted a new institution set up under Article 22 of the Covenant as an historic compromise between extremely complicated interests."[3] (M. Palacios.)

[1] P.M.C. Min., 20th Sess., pp. 196-97. (Italics added.)
[2] P.M.C. Min., 20th Sess., p. 200. (Italics added, and in original.)
[3] P.M.C. Min., 26th Sess., p. 164. (Italics added.)

The Commission never expressed a doubt that the obligations embodied in the Mandate must be interpreted so as to give effect to the purposes and objectives underlying not only the terms of the instrument itself, but of Article 22 of the Covenant, as well. Despite the absence from the Mandate instrument of explicit prohibition of incorporation, such incorporation was nevertheless held to be *ultra vires*, in the light of Article 22 of the Covenant.

Considering the expenditure of the territory's funds for native education, taking into account the total funds available, the Commission examined the Mandatory's duties in the light of the underlying objectives of the Mandates System:

> **d.** "An analysis of the expenditure on education would show that about ten times more money was spent on white than on native education; as, moreover, there were about ten times less whites than natives in the territory, the average amount spent on the education of a white child was 100 times more than that spent on a native child. M. Rappard felt bound, however, to point out that the mandate had been established for the benefit of 'peoples not yet able to stand by themselves under the strenuous conditions of the modern world' (Article 22 of the Covenant, para. 1). *That being so, the policy of the Administration seemed to M. Rappard to be a little difficult to reconcile with the terms of the Covenant and of the mandate. History seemed to show that, on every occasion in the past when whites and blacks had come into contact in territories equally inhabitable by both races, the blacks had gone to the wall. The mandate system represented a kind of protest against the continuation of this state of affairs.* In view of the fact that the territory of South West Africa was the only one of the B and C mandated territories in which there was an appreciable population of white farmers, it seemed especially necessary to safeguard the interests of the natives, particularly from the point of view of education." [1] (M. Rappard.)

4. *Conclusions*

It is beyond dispute that, throughout its life, the Commission developed and interpreted legal principles, based upon the Mandate instrument and the Covenant, and applied such legal principles to specific situations.

The Commission's unanimity on this matter is noteworthy. The Commission, as a quasi-judicial body, gave expression to objectively determined conclusions of a legal nature, thus developing a body of practice and doctrine which furnish the basis, *inter alia*, for judicial determination concerning the scope and nature of Respondent's legal obligations under the terms of the Mandate for South West Africa.

The illustrative examples cited above reveal the Commission's insistence upon maintaining intact the central purpose of the

[1] P.M.C. Min., 18th Sess., p. 136. (Italics added.)

Mandate, which was the establishment of Respondent's fiduciary responsibility. Any suggestion that such a purpose could be subverted by annexation or incorporation of the Mandated Territory is clearly inconsistent with the views expressed by the Commission. Equally unacceptable is a suggestion that Respondent's obligations toward the inhabitants of the Territory are not subject to legal norms or standards, but are governed only by Respondent's discretion, free of international supervision and accountability. It is indeed difficult to perceive a distinction between such a state of affairs and outright annexation or incorporation.

CHAPTER IV

RESPONDENT'S VIOLATIONS OF ITS OBLIGATIONS TOWARD THE INHABITANTS OF THE TERRITORY

A. The Relevant Submissions

Applicants' Submissions 3 and 4, to which this Chapter IV of the Reply is addressed, are reproduced for the convenience of the Court.[1] Respondent has misconstrued these Submissions in several important respects, one consequence of which, discussed more fully *infra*, pp. 260-262, is Respondent's presentation to the Court of voluminous details of doubtful relevance to the central issues herein.

1. Respondent erroneously asserts, and construes the Submissions accordingly, that Applicants' contentions with respect to Respondent's violations,

> ". . . amount, on analysis, to a charge that Respondent has exercised its 'full power of administration and legislation' under Article 2 of the Mandate in bad faith. . . ." [2]

Respondent's misinterpretation of the import of the Submissions reflects its fallacious assumptions regarding the nature of the Mandate and of the character of Respondent's duties thereunder.[3]

That this is a valid explanation of Respondent's misconstruction of Submissions 3 and 4 will be readily apparent from the syllogism, false in its parts and *in toto*, on the basis of which Respondent

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[1] Text in I, p. 197: "3. The Union, in the respects set forth in Chapter V of this Memorial and summarized in Paragraphs 189 and 190 thereof, has practiced *apartheid, i.e.*, has distinguished as to race, color, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory; that such practice is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations; and that the Union has the duty forthwith to cease the practice of *apartheid* in the Territory;

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

[2] II, p. 2. To the same effect, Respondent states elsewhere that Applicants' "case alleged against Respondent . . . is one of bad faith in the exercise of its powers. . . ." (II, p. 395.)

[3] Respondent's contentions regarding the nature of the Mandate are appraised at pp. 476-519, *infra*.

presents its case and adduces its evidence with respect to Applicants' Submissions:

> (1) "... The particular methods whereby this purpose (*i.e.*, effectuation of Article 2 of the Mandate) was sought to be attained, were left to the discretion of the Mandatory." [1]
>
> (2) "... [T]o establish a breach of this Article, it would be necessary to prove that a particular exercise of Respondent's legislative or administrative powers was not directed in good faith towards such purpose." [2]
>
> *Therefore*: (3) "Whatever the Court may think of the merits of a particular legislative or administrative act, practice or policy, if it was devised and performed or practised in the exercise of the Mandatory's discretion with the *bona fide* intention of benefiting the inhabitants of the Territory, it would not constitute a violation of Article 2 of the Mandate." [3]

As has been pointed out earlier,[4] there is at best a tenuous distinction between a contention that the administration of the Mandate is "left to the discretion of the Mandatory," free of international supervision and accountability[5] and a contention that the Mandate created a relationship between Respondent and the Territory "close to annexation."[6]

Applicants' Submissions 3 and 4 are, on the contrary, based upon the conclusion, amply supported in the *Memorials*,[7] that:

> "... By law and by practice, the Union has followed a systematic course of positive action which inhibits the well-being, prevents the social progress and thwarts the development of the overwhelming majority of the people of South West Africa. In pursuit of this systematic course of action, and as a pervasive feature of it, the Union has installed and maintained the policy and practice of *apartheid*.
>
> "Under *apartheid*, the status, rights, duties, opportunities and burdens of the population are determined and allotted arbitrarily on the basis of race, colour and tribe, in a pattern which ignores the needs and capacities of the groups and individuals affected, and subordinates the interests and rights of the great majority of the people to the preferences of a minority. Since this section of the Memorial *is concerned with the record of fact*, it deals with *apartheid* as a fact and not as a word. *It deals with apartheid in practice, as it*

[1] II, p. 387.
[2] *Id.*, p. 390.
[3] *Id.*, p. 392.
[4] *Supra*, pp. 231-233, 237-241.
[5] As Respondent explicitly insists in its *Counter-Memorial*, II, p. 164: "Respondent's obligations to report and account to, and submit to the supervision of, the Council of the League of Nations, lapsed upon dissolution of the League and *have not been replaced by obligations to submit to the supervision of any organ of the United Nations or any other organization or body*." (Italics added.) This contention is discussed and disproved at pp. 520-552, *infra*.
[6] II, p. 389.
[7] Chapter V, *passim*.

actually is and as it actually has been in the life of the people of the Territory, and not as a theoretical abstraction. . . ." [1]

Applicants' characterizations of Respondent's policies and objectives by terms such as "deliberately," "knowingly," and the like, clearly are intended as inferences and conclusions reasonably flowing from Respondent's course of conduct, which is set forth explicitly and fully in the *Memorials*.[2] Such characterizations reflect a universally accepted axiom that, in the absence of evidence to the contrary, the predictable consequences of conduct are presumed to be intended. Respondent demonstrates its awareness of the true significance of Applicants' characterizations of its conduct, by itself equating "systematic" with "deliberate,"[3] both of which terms are used by Applicants interchangeably.

Respondent's contention that its dispute with Applicants regarding the performance of its obligations under Article 2 of the Mandate hinges on the issue of Respondent's "good or bad faith," rather than upon an objective evaluation of its conduct, is advanced by Respondent in the teeth of the Applications and the *Memorials*, as well as of Applicants' formulations of their arguments, evidence and Submissions. Such a contention, likewise, is incompatible with the Findings and Resolutions of the United Nations and its organs and agencies, in and through which Applicants have continuously made clear the nature of their dispute with the Respondent.

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

2. Respondent furthermore miscontrues Submissions 3 and 4 as excluding certain groups or individuals in the Territory designated, in the parlance of *apartheid*, as "Coloureds" or "Basters."[4] Such unwarranted misinterpretation of the Submissions is purported to be based upon Applicants' references to "Natives" (always in quotation marks) in the Legal Conclusions, and elsewhere, in Chapter V of the *Memorials*.[5]

In their formulation of the policy of *apartheid*, Applicants explicitly state that the *Memorials*

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[1] I, p. 108. (Italics added.)

[2] *Id.*, Chapter V. It will be noted that such inferences typically appear in the *Memorials* in Summaries and Conclusions, following in each case a specification of Respondent's policies and practices of which complaint is made. See, *e.g.*: I, pp. 108, 109, 117, 130, 143, 152, 160, 161 and 166.

[3] II, p. 393.

[4] *Id.*, pp. 382-383.

[5] In particular, paras. 189-90, I, pp. 161-166.

> ". . . deal with *apartheid* in practice, as it actually is and as it actually has been in the life of *the people of the Territory*, and not as a theoretical abstraction." [1]

The phrase "people of the Territory" was deliberately and literally intended to mean what is says.

Submissions 3 and 4 themselves similarly describe and comprehend "the inhabitants of the Territory," without qualification or restriction.[2]

The strained construction sought to be attached by Respondent to the Submission, relying upon Applicants' numerous explicit references to "Natives," also ignores a fundamental basis of Applicants' complaint of Respondent's violation of Article 2 of the Mandate, *viz.*, that the policy and practice of *apartheid*, as defined in the *Memorials*,[3] is in its very nature and objective repugnant to the Mandate.

Any interpretation of the Submissions which excluded *any* inhabitant of the Territory from the scope of the Submissions would, in itself, reflect an unacceptable assumption concerning the inevitable consequences of the policy with regard to *all* the inhabitants. As is demonstrated in the *Memorials*, and reaffirmed in this Reply, the policy of *apartheid* is injurious to the genuine interests and welfare of the *entire* population, including those whose benefit and privilege are purported to be served thereby.

That Respondent was not in fact misled by Applicants' emphasis on "Natives" (a group of individuals which, as categorized by Respondent, comprises the overwhelming majority of the Territory[4]) appears clearly from the *Counter-Memorial* itself.

Thus Respondent describes one of the "duties referred to by Applicants," as to which "regard is to be had in administering the Mandate,"[5] as seeking to promote the "political advancement of [*the inhabitants of the Territory*] through rights of suffrage."[6]

Similarly, Respondent describes "Applicants' duty No. 5," as involving "equal rights and opportunities for [*members of the population of the Territory*] in respect of home and residence, and their just and non-discriminatory treatment."[7]

Applicants hereby reaffirm that Submissions 3 and 4 do not

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[1] I, p. 108. (Italics added.)

[2] *Id.*, p. 197.

[3] *Supra*, pp. 256-257.

[4] Respondent's population estimates, 1960 census, II, p. 401:

"Whites"	73,467
"Coloureds"	23,963
"Asiatics"	2
"Natives"	428,575

[5] *Id.*, p. 397.

[6] *Id.*, p. 398. (Italics added.) (The italicized phrase is Respondent's own formulation of Applicants' contention.)

[7] *Ibid.* (Italics added.) (The italicized phrase is Respondent's own formulation of Applicants' contention.)

exclude, and may not reasonably be interpreted as excluding from their ambit any inhabitants whatever of the Territory.[1]

3. A third misconstruction by Respondent of Submissions 3 and 4 consists in its unwarranted assumption that these Submissions merely request the Court to adjudge and declare concerning allegations of fact.

Thus, Respondent avers that "it does not understand the quotations from reports of organs of the United Nations in Chapter II of the *Memorials* to constitute in effect further complaints made by Applicants." From this, Respondent concludes, erroneously, that the purpose sought to be served by Applicants in referring to United Nations reports was "to seek to establish the existence of a dispute between the parties, and no more." Respondent contends, moreover, that findings and recommendations embodied in United Nations reports and resolutions "are of no relevance whatsoever to this Court's judicial function. . . ."[2]

Respondent's contention overlooks the fact that the Submissions request the Court to adjudge and declare that the policies and practices of which Applicants complain, are, as a matter of law, in violation of Respondent's obligations as stated in Article 2 of the Mandate.

Respondent's argument that the findings, conclusions and recommendations embodied in reports and resolutions of the United Nations has no relevance to the Court's judicial function carries to the extreme Respondent's rejection of international supervision and accountability. It likewise ignores the point of the Court's comment, in its *Judgment of 21 December 1962*, that "though the dispute in the United Nations and the one now before the Court may be regarded as two different disputes, the questions at issue are identical."[3]

Applicants respectfully submit that the reports and resolutions of the United Nations and its agencies and organs, in and through which Applicants have sought to settle their dispute with Respondent, are highly relevant to the Court's judicial function in adjudging the legality of Respondent's administration of the Territory, and are entitled to great weight and respect as authority thereon.

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[1] In the light of Applicants' explicit interpretation and reaffirmation of the meaning of their own Submissions, it is respectfully submitted that amendment thereof is unnecessary and unwarranted.

[2] II, p. 3. Despite this contention, Respondent does not forbear from a sweeping indictment of the accuracy and reliability of United Nations reports. Such impeachment might have appeared less ungenerous had Respondent over the years relented from its obdurate denial of access of United Nations committees and agencies to the Territory. The sole exception, that of the ill-starred 1962 visit to the Territory of the Chairman and Vice-Chairman of the Special Committee for South West Africa (discussed at pp. 225-226, *supra*), as is shown by the circumstances attending the visit and its aftermath, stands as the exception which proves the rule.

[3] *Judgment*, p. 345.

B. Respondent's Policy with respect to the Inhabitants of the Territory

1. *Introductory Comment*

Notwithstanding the voluminous detail with which the *Counter-Memorial* is encumbered,[1] the decisively relevant facts concerning Applicants' Submissions 3 and 4[2] are undisputed.

It is possible, nevertheless, that the central issue, *viz.*, the character and consequences of the policy of *apartheid*, or "separate development" (in Respondent's presently preferred usage) may be lost to sight in a haze of irrelevant particulars. Accordingly, attention is respectfully drawn to the doubtful relevance of much material which is included, as well as the undoubted relevance of much that is omitted, from the *Counter-Memorial*.

Respondent's policy, described as *apartheid*, with respect to the inhabitants of the Territory, is explicitly defined in the *Memorials*.[3] Applicants contend, in terms of their Submissions, that such a policy which Respondent implements through practices fully described in the *Memorials*, Chapter V,[4] and in this Reply, violates Respondent's obligations under Article 2, paragraph 2, of the Mandate.

The measures by which the policy of *apartheid* is applied in practice are consistent with the objectives of the policy and they confirm its character. If the policy, as Applicants strenuously urge, is objectionable, unsound and illegal in terms of the Mandate, measures admittedly adopted for its implementation likewise must, *ex hypothesi*, be objectionable, unsound and illegal.

The inescapable logic and simplicity of this proposition confronts Applicants with a dilemma in respect of the most judicious and responsible manner of dealing in this Reply with the excessively voluminous mass of data and details in the *Counter-Memorial*. The dilemma referred to above arises in the following respects:

a. As is pointed out herein,[5] so much of the evidence as is adduced by Respondent for the purpose of demonstrating its "good faith," or that it is "actuated by an intention . . . other than one to promote the interests of the inhabitants,"[6] would be immaterial even if it did—as it does not—tend to show such "good faith," or the absence of such "intention."

If the policy of *apartheid* is unacceptable, a "good" intention to

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[1] Respondent, aptly characterizing the *Counter-Memorial* as "an extremely lengthy document", II, p. 2, attributes its "bulk," in part, to "pressure of time" (*id.*, p. 3). It is respectfully submitted that the time-limits fixed by the Court for submission of Respondent's pleadings herein have been generously adequate.

[2] I, p. 197.

[3] *Id.*, p. 108 and see pp. 256-257 *supra*.

[4] I, pp. 104 *ff.*

[5] *Supra*, pp. 255-257.

[6] II, p. 390.

apply a "bad" policy would be a contradiction in terms and, in any event, irrelevant.

b. Similarly, much of the evidence adduced by Respondent appears to be directed at the aim of persuading the Court that the considerations by which Respondent conceives and shapes the policy of *apartheid*, are so multifarious, complex, "political," and "technical" in nature, that the Court cannot—or in the exercise of a sound discretion, should not—undertake a judicial determination on the merits of the dispute regarding the application and interpretation of Article 2, paragraph 2, of the Mandate. Thus, Respondent asserts:

> "No legal criteria can be used in such adjudication. The decision can *only* be based on social, ethnological, economic and political considerations." [1]

Applicants, in consideration of the importance of the issues involved in these Proceedings, earnestly have sought in their Reply to meet fully and adequately Respondent's contentions and evidence in support thereof, without, at the same time, encumbering the already voluminous pleadings with a point-by-point refutation of evidence adduced by Respondent on the basis of false assumptions concerning the nature of its obligations or their legally justiciable character.

Applicants analyse below[2] the normative and objective legal standards governing the interpretation and application of Article 2, paragraph 2, of the Mandate, as to which the Court has held Applicants have an interest of a legal nature.[3]

Although argument on the merits of the issues in dispute is deferred for subsequent consideration,[4] it is relevant here to cite several illustrations showing that, on any reasonable assumption concerning the nature of Respondent's obligations under the Mandate, much of the evidence adduced in the *Counter-Memorial* is irrelevant to the issues in dispute and, conversely, that evidence of importance is omitted. Three illuminating examples follow:

1. The lengthy history and ethnology of the Territory [5] may be taken as substantially accurate for the present purpose.[6] It is indisputable that in the Territory there do exist groups differing in language, custom and economy. This is true of many other of the world's societies as well, which are typically composed of groups of individuals differing in one or more of these respects.

Respondent, however, stops short of an attempt to justify its official policy of *fostering* such differences, through practices fully

[1] **II**, p. 391. (Italics added.)
[2] *Infra*, pp. 476 *ff*.
[3] *Judgment* p. 343.
[4] *Infra*, pp. 362-475.
[5] **II**, pp. 311-380.
[6] Some errors in detail are briefly analysed pp. 458-464, *infra*.

described in the *Memorials* and in this Reply.[1] Yet it is precisely this aspect, *inter alia*, of Respondent's conduct toward the inhabitants of the Territory upon which Applicants ground Submissions 3 and 4.

2. Another illustration is the irrelevance of much of Respondent's "background" evidence showing that in an early period the majority of the Territory's inhabitants lived on subsistence economies, were pastoral nomads, or were preliterate.[2] In Applicants' submission, however, a highly relevant question is Respondent's maintenance, *up to the present*, of a subsistence economy in the Reserves. No evidence is adduced by Respondent to justify its policy in this respect.

3. The third illustration concerns that aspect of the policy of separate development which involves creation of so-called "Bantustans," "Homelands," or "Reserves."[3] This policy presupposes, *inter alia*, a system of migratory labour, in which men whose homes are in such areas spend long periods of labour in distant urban centres or on farms in so-called "White areas."

It is self-evident from the history of human society that no group or community has survived which was not based upon the family and that no stable, civilized community can be built upon a system which deliberately separates men from their families during substantial periods of their working lives. That such a result is an inevitable consequence of the territorial separation of groups and the exclusion of "non-Whites" from any secure tenure in the "White areas" is not denied by Respondent. Respondent, nevertheless, regards this implicit result of its admitted policies as so irrelevant to the central issue as to warrant no discussion whatever, among the voluminous details with which the *Counter-Memorial* is concerned.[4]

2. *Respondent's Policy: Decisive and Undisputed Facts*

The decisively relevant facts concerning Respondent's policies and objectives, relied upon by Applicants in support of their Submissions[5] with regard to Article 2, paragraph 2, of the Mandate, are undisputed. The doctrine of *apartheid* or, in the phrase of Respondent's currently preferred usage, "separate development,"[6] emerges

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[1] *Memorials*, Chapter V, *passim*, and *infra*, pp. 362-475.

[2] See, *e.g.*, II, pp. 316, 319, 324-325, 329-330, 335-336, 338-339 and 346.

[3] More fully analysed at pp. 312-326, *infra*.

[4] Respondent's silence is all the more surprising in the light of the widespread criticism of precisely this aspect of its separate development policy, as more fully shown at pp. 284-285, 288-289 and 467-468 *infra*.

[5] Submissions 3 and 4, I, p. 197; see p. 255, *supra*.

[6] As is pointed out in I, p. 108, Applicants deal with *apartheid* "as a fact and not as a word . . . as it actually is and as it actually has been in the life of the people of the Territory, and not as a theoretical abstraction." The Court's attention is respectfully drawn again to the phrase "*the people of the Territory*," which excludes none whose status, rights, duties, opportunities or burdens are fixed and allocated on the basis of race, colour or tribe. (See I, p. 161, para. 189, and this Reply, *supra*, pp. 257-259.)

from Respondent's own formulations of that policy, as set out in excerpts drawn below from the *Counter-Memorial, passim*, as well as from public statements of Respondent's highest officials. Respondent's measures for implementation of its policy are analysed in detail in the *Memorials*, Chapter V and in this Reply, *infra*. The existence and nature of such measures, like Respondent's policy itself, are undisputed as facts, although Applicants take sharp issue with the inferences which Respondent seeks to draw from its admitted policy and measures of implementation thereof, as well as with the legal consequences Respondent seeks to impute to them.

Before turning to Respondent's formulations of its policy, it is relevant to note that phrases such as "*apartheid*," "separate development," or the like, are not used by Respondent as words of art. To the contrary, such phrases, in Respondent's usage, have highly flexible connotations.

Thus, Respondent explains its current preference against use of the term "*apartheid*", as follows:

> "By its protagonists in South African politics, the word was used as a name for what may be termed an *earlier stage of evolution of the policy of separate development*. . . ." [1]

In contrast to the above-quoted explanation, Respondent cites a declaration of "General Guiding Principles" issued by one of the outstanding such "protagonists," Dr. D. F. Malan, former Prime Minister, in which Dr. Malan urges, *inter alia*, that:

> "*The policy of our country should envisage total apartheid as the ultimate goal of a national process of separate development.*" [2]

It is submitted that if "*apartheid*" is definable as an *earlier stage* in the evolution of the policy of "separate development," while, at the same time, it is regarded as the ultimate goal of that policy, the terms fairly may be said to be interchangeable.[3]

It is relevant also to note that in the *Counter-Memorial* Respondent draws attention to the connection between its policy in South Africa and its policy in South West Africa in general, and with particular emphasis upon events in the Transkei.

Chapter VII of Volume IV of the *Counter-Memorial* consists largely of an exposition and defence of Respondent's policy in South Africa. Thus, Respondent asserts that, in formulating its "policies and practices" for South West Africa

> ". . . Respondent was frequently influenced by experience gained in South Africa itself in regard to comparable problems and policies. . . ." [4]

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[1] **II**, p. 461. (Italics added.)

[2] *Id.*, pp. 463-464. (Italics in original.)

[3] Reference already has been made, p. 256, *supra*, to Applicants' usage of the term "*apartheid*" in the *Memorials* "as a fact and not as a word". (**I**, p. 108; also *id.*, p. 161.)

[4] **II**, p. 457; and *passim*, pp. 461 *ff.*

Further, Respondent states that:

> "Having regard to the specific problem of the future of South West Africa and its peoples, as outlined earlier in this Chapter, Respondent can by way of solution see no alternative to an approach involving similar objectives and principles to those of the South African policy of separate development, in the respects set out in the preceding paragraphs." [1]

Again, Respondent comments:

> "In the preceding brief summary, Respondent has given some indication of measures which have been taken in the Republic of South Africa. The success achieved with them has suggested that future developments in South West Africa should take a similar course, although the unique nature of local conditions would naturally require differences in the methods and tempo of application. . . ." [2]

In selecting the following examples of Respondent's self-formulated policy of *apartheid*, Applicants have endeavoured to avoid quotation out of context or other distortion of Respondent's intended signification.

a. Prime Minister Verwoerd, 1963:

> "Reduced to its simplest form the problem is nothing else than this: We want to keep South Africa White . . . 'Keeping it White' can only mean one thing, namely White domination, not 'leadership,' not 'guidance,' but 'control,' 'supremacy.' If we are agreed that it is the desire of the people that the White man should be able to continue to protect himself by retaining White domination . . . we say that it can be achieved by separate development." [3]

b. Prime Minister Verwoerd (1950), then Respondent's Minister of Native Affairs:

> " 'The supporters of the present Government say very clearly . . . that they will not be prepared to sacrifice white supremacy in South Africa. But when we do say that, we also say something else which is always left out when people talk about this policy. This is what we say:
>
> " 'Just as we want supremacy in our areas, so we are prepared to grant the same supremacy to the Bantu in his area. We don't want for ourselves what we are not prepared to cede to others. . . .' " [4]

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[1] *Id.*, p. 472. And see footnotes 2 and 3, p. 314, *infra*.

[2] *Ibid.*

[3] *R. of S.A., House of Assembly, Parl. Deb.*, 2nd Parl., 2nd Sess. (weekly ed., 1963), Col. 242.

[4] Grobler, *Africa's Destiny* 89 (1958). (Quoted in II, p. 464.) The foregoing, as well as similar statements by Respondent's officials concerning its objectives in South Africa, are relevant in all significant respects to South West Africa as well. See Respondent's reference to "a certain measure of inter-action between policies in South Africa and in South West Africa" as making necessary "some brief reference to certain specific aspects of policies in South Africa." (II, p. 461.)

c. Prime Minister Verwoerd, 1961:

" 'We prefer each of our population groups to be controlled and governed by themselves, as nations are. Then they can co-operate as in a Commonwealth or in an economic association of nations where necessary. . . .

" 'South Africa will proceed in all honesty and fairness to seek—albeit by necessity through a process of gradualness—peace, prosperity and justice for *all* by following the model of nations which in this modern world means *political independence coupled with economic interdependence.*' " [1]

d. Prime Minister Verwoerd, 1951:

" 'Now a Senator wants to know whether the series of self-governing areas would be sovereign. The answer is obvious. It stands to reason that White South Africa must remain their guardian. We are spending all the money on these developments. How could small scattered states arise? The areas will be economically dependent on the Union. It stands to reason that when we talk about the Natives' right of self-government in those areas we cannot mean that we intend by that to cut large slices out of South Africa and turn them into independent States.' " [2]

e. Extracts from an address by Respondent's Prime Minister in 1962 are quoted in the *Counter-Memorial*, **II**, pp. 467-468. These have been the subject of comments by the highly respected Director of the Institute of Race Relations, Mr. Philip Mason. These excerpts, together with Mr. Mason's published comments thereon, are set out in Annex 1 to this Reply, pp. 328, 334-335, *infra*, and are incorporated herein by reference.

f. Prime Minister Verwoerd, when Respondent's Minister of Native Affairs:

"[I]t is of no avail for [the African] . . . to receive a training which has as its aim absorption in the European community while he cannot and will not be absorbed there. Until 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.*" [3]

"It is the policy of my Department that education should have its roots entirely in the native areas and in the native environment and native community. There Bantu education must be able to give itself complete expression and there it will have to perform its real service. 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 however all doors are open." [4]

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[1] Address to South Africa Club, London, in *Fact Paper 91*, April 1961, p. 14. (Quoted in **II**, p. 466.) (Italics in original.)

[2] *U. of S. A., Parl. Deb., Senate,* 10th Parl., 4th Sitting (weekly ed., 1951), Cols. 2893-2894.

[3] *U. of S.A., Parl. Deb., Senate,* 11th Parl., 2nd Sitting, (weekly ed., 1954), Col. 2619. (Italics added.)

[4] *Id.*, Cols. 2618-2619. (Italics added.)

g. *Counter-Memorial*, **II**, p. 475:

Respondent, in its brief reference to the problem of the "Police Zone," or "White area" (comprising over 70 per cent of the Territory and disposing of its major developed economic resources) concedes that the "Native reserves" therein are "not nearly adequate" to serve as homelands in which each group can develop to proper self-realization. Respondent's explanation is as follows:

> "The reserves were, indeed, not planned for such a purpose, *in view of the contemplation that employment would be offered to a large number of the members of these groups in the economy of the European population.* This factor, together with historical reasons pertaining to treaties and agreements with specific communities, largely account for the fact that the reserves are not consolidated homelands for each group, but scattered units for localized sections of the groups concerned. Early attention to the making of revised and adequate provision in this regard is therefore an important step in the implementation of the policy of separate development." [1]

h. *Counter-Memorial*, **III**, pp. 528-530:

> "(b) It is Respondent's belief that the interests of the European and Native groups can best be served, and that peaceful co-existence between them can best be secured, by a policy which provides for their separate development, the goal aimed at being a situation where the Bantu groups will have self-government and, eventually, full independence in their own homelands, and *where economic relations between these homelands and the White areas will be such as to amount to a position of economic interdependence.*
>
> "In 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 Bantu Education, employs and trains Bantu who can contribute to the development of *their areas* and to the advancement of *their own people.*
>
> "(c) A fact of which Respondent must, and does, take cognizance, is that there has, throughout South Africa's [2] 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.
>
> "(d) The aforementioned factors, accentuated in all probability in the case of the European group by the fact that they have for a long time occupied a position of guardianship and leadership over the Bantu groups, also in the economic field, have limited relationships between Europeans and Bantu largely to those of tutors and

[1] (Italics added.)

[2] The omission of reference here to South West Africa underscores the extent to which Respondent's policies in the Mandated Territory are essentially projections of its policies in the Republic.

employers, on the one hand, and pupils and employees, on the other, and have, furthermore, as at the present stages of development of the respective groups, resulted in the factual situation that *many Europeans, in all probability the vast majority, are not prepared to serve in positions where Bantu are placed in a position of authority over them.* [1]

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

"(f) The matters referred to in sub-paragraphs (c), (d) and (e) above *are social phenomena which exist as facts, independently of any governmental policy, legislation or administrative practices*—as indeed they manifest themselves, to a greater or lesser extent, in mixed or plural communities throughout the world. Depending upon the exact circumstances of a particular situation, the phenomena may partake of the nature of group preferences, group self-protection, group assertiveness, group conceptions of differences in social and cultural level, or sometimes simply group prejudices. Whatever their exact nature or causes, and *whatever the moral rights or wrongs pertaining to them in particular situations, there can be no denial that such group reactions exist as facts of which due cognizance must needs be taken by any realistic government.*

"(g) In more recent times policies have been devised in various parts of the world with the specific ideal, to which Respondent wholeheartedly subscribes, of eradicating, avoiding or reducing to a minimum all undesirable aspects and manifestations of such group reactions, such as unfair discrimination, domination of one group by another, and the like. The problem does not lie with the ideal, but with practical means of achieving it in the diverse conditions existing in various plural communities; and frequently an important aspect of the problem is to find a just and proper balance between legitimate but competing or conflicting aspirations of various groups. Whereas policies aiming at a solution of the problem are in some countries proceeding in the direction of attempts at forced integration, with or without qualifications, Respondent is, for reasons explained earlier, fully convinced that such policies cannot possibly achieve a just and fair solution either in South Africa or in South West Africa, and that a solution is to be sought on the basis of separate development as set out *inter alia* in sub-paragraph (b) above.

"(h) An important motivating factor in regard to this policy has always been the advantage which it involves for educated and more advanced members of the Bantu groups, in that they can step into higher grades of employment *specially intended for them in planned and positive programmes for advancement of their own peoples—vis-à-vis* the large measure of friction, negation and frustration that must

[1] It will be recalled that the population of the Territory comprises 73,400 "Whites" and 428,000 "Natives."

inevitably arise for them, independently of any Government policy or legislation, from *attempts at free competition with members of the White population group in the higher strata of the economic, social and professional life of that group.*

"As a counter-part to the factor just mentioned, the policy of separate development takes due cognizance of the fact that its application is at present passing through a stage of transition, and aims at doing so with a minimum of group friction and the negative consequences that could result therefrom. The transition is from the earlier genre, mentioned in sub-paragraph (d) above, 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.* With a view especially to securing the maximum support from all the groups for this transition, 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.

"(i) A realistic approach to the problems of the transitional stage is, in Respondent's view, to train Bantu for occupations and professions which, at the present stage of developments, offer them avenues of employment and future advancement, and *to avoid creating a situation where Bantu qualify for professions in which they will find themselves dependent on White patronage, which might not be forthcoming, or in which either Respondent or other potential employers will not be able to make use of their services in a field where they will, of necessity, have to be placed in positions of authority over European employees or assistants.*"[1]

3. *Analysis of Respondent's Policy*

a. *General Considerations*

Analysis of Respondent's policy with respect to the inhabitants of the Territory appropriately may take as its point of departure Respondent's assertion that

> "*The policy of separate development is not based on a concept of superiority or inferiority, but merely on the fact of people being different.*"[2]

The above-quoted statement paraphrases a comment of Respondent's Prime Minister, Dr. Verwoerd, in 1961:

> "'. . . The Government's policy is not based upon people being inferior but being different. . . .'"[3]

[1] Italics added.
[2] II, p. 471. (Italics in original.)
[3] *Id.*, p. 471.

To the same effect, the *Counter-Memorial* quotes Respondent's Minister of Bantu Administration and Development, Mr. de Wet Nel, as follows:

> " 'The traditional approach has always been a policy of recognizing the equal status . . . of the Bantu, a policy of differentiation . . . *but differentiation without inferiority. . .*' " [1]

The "fact of people being different" is a commonplace statement, admitting of an infinite variety of interpretations. As an explanation of Respondent's policy toward the inhabitants of the Territory under Mandate—the statement is, in itself, ambiguous and meaningless.

If it is intended to suggest a political, sociological, economic or legal justification for Respondent's policy of *apartheid*, or separate development, the statement begs the central question in dispute with respect to Respondent's obligations under Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations.

Applicants' Submissions 3 and 4[2] are grounded upon the premise that allotment to the inhabitants of the Territory of status, rights, duties, opportunities and burdens on the basis of race, colour or tribe, does not promote their *well-being and social progress*.[3] This is but another way of saying that Respondent is obliged, in terms of the Mandate, to accord to the inhabitants of the Territory legal "equality of status," *as individual persons*.

As is clear from the record herein and, indeed, as is axiomatic to Respondent's cause, the contrary premise underlies Respondent's policy: *the status, rights, duties, opportunities and burdens of the inhabitants of the Territory are allotted solely on the basis of their quality and character as members of "groups," rather than as individuals*.[4]

Thus, Respondent characterizes as "basic aspects of the policy of separate development":

> ". . . acknowledgment of the just claims and moral rights of each *group* to advancement. . ."; [5] and
>
> ". . . an end result obviating all domination of *groups* by one another." [6]

In a Memorandum entitled "Decisions by the Government on the Recommendations of the Commission of Enquiry into South West Africa Affairs," [7] Respondent expressed acceptance of "the main

[1] *Ibid.* (Italics added.)

[2] II, p. 197.

[3] *Id.*, p. 108.

[4] See, in particular, the address of Respondent's Prime Minister, excerpted in II, pp. 467-468.

[5] *Id.*, p. 466. (Italics added.)

[6] *Id.*, p. 467. (Italics added.)

[7] Presented by Respondent's Prime Minister to the South African Parliament on 29 April 1964; approved by a resolution of the House of Assembly on 8 May 1964, and submitted as "Annex A" of the *Supplement to the Counter-Memorial* under letter of Respondent's Agent to the Registrar of the Court dated 28 May 1964, hereinafter referred to as "*Memorandum*").

features" of the Odendaal Commission Report,[1] "as [being] 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." [2]

More specifically, Respondent announced its desire

> "... to state clearly ... that its general attitude ... 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*. ... *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." [3]

One of the "main features" of the *Odendaal Commission Report* concerns the rationale of a policy pursuant to which the status, rights, duties, opportunities and burdens of inhabitants of the Territory are officially allotted upon the basis of the "population group" to which each inhabitant belongs, or in which he is classified. The arguments and findings of the Odendaal Commission in this regard, accordingly, are instructive as showing the premises which underlie Respondent's policy of *apartheid*, or separate development, and which account for the stringent and pervasive application of that policy in all aspects of the lives of the inhabitants.

The Commission formulated its approach as follows, *inter alia:*

> "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." [4]

The Commission stated further:

> "... Where, owing to fundamental differences in socio-cultural orientation, stages of general development and *ethnic classification*, the differences between the groups concerned *are of so profound a nature that they cannot be wiped out*, a policy of integration is unrealistic, unsound and undesirable, and cannot but result in continual social discrimination, discontent and frustration, friction and

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[1] *Report of the Commission of Enquiry into South West Africa Affairs*, R.P. No. 12/1964 (hereinafter referred to as "*Odendaal Commission Report*").

[2] *Memorandum*, Sec. B., para. 5 (IV, p. 202.)

[3] *Memorandum*, Sec. E., para. 21 (*id.*, p. 213). As pointed out below, p. 314, Respondent announced its intention to defer certain recommendations of the Commission for the creation of "homelands," on the ground, *inter alia*, that such recommendations are "affected by considerations pertaining to the pending case." (*Memorandum*, Sec. E., para. 21 (*id.*, p. 213).)

[4] *Odendaal Commission Report*, para. 1431, p. 427.

> violence—a climate in which no socio-economic progress can be expected to take place. Under such conditions the social cost in non-economic terms must outweigh any possible economic advantages. In the circumstances *it is therefore desirable to accept the position as it is and not to put idealism before realism.*" [1]

The Commission added, further:

> "In a territory like South West Africa, where there are *groups that differ fundamentally from one another*, a policy of *socio-cultural separateness* and economic interdependence is therefore the only one which can ensure the maximum freedom of action and self-realization to the greatest number of inhabitants at the same time. . . . In the light of the above, therefore, it is essential to regard the various population groups in South West Africa as independent in certain respects and as dependent developing units in other respects." [2]

As is more fully shown below,[3] governmental policies based upon assumptions such as these, *viz.*, that "differences between the groups concerned are of so profound a nature that they cannot be wiped out," and that it is "desirable to accept the position as it is," as a basis for the allotment to individuals of status, rights and duties, are incompatible with the overwhelming weight of authority in the political and social sciences. Such a premise of governmental action, and the policy of *apartheid* by which it is effectuated, are furthermore repugnant to the generally accepted political and moral standards of the international community, [4] as well as violative of norms, as accepted by international custom and as reflected in the general principles of law universally recognized by civilized nations. [5]

Such assumptions and their implementation, moreover, are neither factually valid nor logically tenable. Such "differences" as may be inherent in "ethnic classification" are in no way relevant to, nor can they properly be advanced to justify, denial of equality of opportunity based upon individual merit or capacity, or denial of equality before the law, or of fundamental rights and freedoms.

As pointed about above, [6] Respondent neither explains nor justifies its policy of *fostering* such "differences" by legislative *fiat* and administrative practice, by which it aggravates the "social discrimination, discontent and frustration, friction and violence," which the Odendaal Commission asserts results from what it terms a "policy of integration." [7] A policy of fostering such "dif-

[1] *Id.*, para. 1434, p. 427. (Italics added.)
[2] *Id.*, para. 1436, pp. 427-29. (Italics added.)
[3] *Infra*, pp. 302-312.
[4] See *infra*, pp. 293-302.
[5] See *infra*, pp. 476-519.
[6] *Supra*, pp. 261-262.
[7] Respondent's agreement with the Commission's analysis is manifest most clearly from Respondent's own formulations to the same effect, in strikingly similar terms. See, *e.g.*, **III**, p. 529; quoted *supra*, pp. 266-268.

ferences" is, indeed, calculated to assure not only that they "cannot be wiped out," but that they may explode into uncontrollable violence or disaster. [1]

The Odendaal Commission's view that it is "desirable to accept the position as it is and not to put idealism before realism," [2] strikes a note sharply dissonant with that implicit in the "sacred trust of civilization" pursuant to which Respondent undertook to promote "to the utmost" the well-being and social progress of the inhabitants of the Territory.

The thoroughgoing manner in which Respondent has given effect to such "realism" will be examined in more detail in connection with the application of *apartheid* to the various aspects of life in the Territory: the rigid policy of educational *apartheid,* [3] of economic *apartheid,* [4] of political *apartheid,* [5] and of the discriminatory policies and measures by which Respondent regulates and restricts security of the person, rights of residence and freedom of movement. [6]

As will be shown, Respondent's policy and practice with respect to each of these aspects of life, is directed toward the primary end of assuring an adequate "Native" labour supply in the Territory, particularly in its "White" Police Zone (comprising more than seventy per cent of the Territory), subject always to the condition that, in the words of Respondent's Prime Minister,

> "There is no place for him [*i.e.*, "the Bantu"] in the European community above the level of certain forms of labour." [7]

The policy of educational *apartheid* deprives the "non-White" inhabitant of the Territory of incentives or opportunities for progress, consigning him either to stringently limited possibilities of advancement in the "European community," or in unviable reserves with a mere subsistence economy.

Economic *apartheid* denies "non-White" inhabitants basic rights of organization and freedom of association. It condemns them to limited opportunities of employment or advancement, on the ground that:

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[1] The increasingly repressive legal and other measures by which Respondent endeavors "to accept the position as it is" are noted in Annex I, *infra*, p. 328, at 333-334.

[2] The Commission, characterized by Respondent as "experts of exceptional standing" (**II**, p. 476) here manifests an approach identical with that of Respondent's contention that "whatever the moral rights or wrongs" may be, "group reactions exist as facts of which due cognizance must needs be taken by any realistic government." (**III**, p. 529.)

[3] *Infra*, p. 362.

[4] *Infra*, p. 404.

[5] *Infra*, p. 439.

[6] *Infra*, p. 458.

[7] *U. of S.A., Parl. Deb., Senate*, 11th Parl., 2nd Sitting (weekly ed., 1954), Col. 2619 (when Minister of Native Affairs).

> ". . . many Europeans, in all probability the vast majority, are not prepared to serve in positions where Bantu are placed in a position of authority over them." [1]

Political *apartheid* fosters and aggravates just such "differences" as Respondent asserts justify its policy of separate development. Denial of suffrage and restriction of "non-Whites" to the most limited forms of participation in government, at any level, inhibit their social progress and thwart their development toward genuine self-determination.

The "sacred trust" and Respondent's undertaking to promote *to the utmost* the well-being and social progress of the vast majority of the inhabitants of the Territory are thus made subject to the prejudices and attitudes of a small minority among them. This, in Applicants' submission, is impermissible in terms of Article 2, paragraph 2 of the Mandate.

Such a predicate of policy, moreover, is wholly incompatible with Respondent's professed objective of promoting

> ". . . the advancement of peoples to a stage where they could indeed 'stand by themselves'—economically, educationally and socially as well as politically—as a pre-requisite to a mature political act of self-determination." [2]

To that end, Respondent projects the development of viable "homelands,"

> ". . . to be controlled and governed by themselves, as nations are,"

and which

> ". . . can co-operate as in a Commonwealth or in an economic association of nations where necessary . . ." [3]

Accomplishment of such an objective clearly demands a course of action based upon a premise precisely contrary to that adopted by Respondent. Educational and other opportunities would be afforded to individuals at all levels and skills, rather than within limits responsive to, or dictated by, the prejudices and attitudes of a small minority of the total population of the Territory. [4]

In no other way could such "homelands," even apart from their inherent inconsistency with the requirements of modern society,

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[1] **III**, p. 528.

[2] *Id.*, p. 459.

[3] Prime Minister Verwoerd, in an address in London in 1961, quoted *id.*, p. 466.

[4] Instead, Respondent proceeds on the premise that it is more "realistic . . . to avoid creating a situation where Bantu qualify for professions in which they will find themselves dependent on White patronage, which might not be forthcoming, or in which *either Respondent* or other potential employers will not be able to make use of their services in a field where they will, of necessity, have to be placed in positions of authority over European employees or assistants." (**III**, p. 530.) (Italics added.) Inherent capacity to "qualify" is thus conceded; the limitation is based solely upon membership in a "group."

be endowed with the prerequisites of true social progress, "to the utmost," and on a constantly ascending scale.

Respondent has misconceived its mission; it has construed its duty to "promote to the utmost" as being limited by, and subject to, the attitudes of a favoured and dominant minority.

Furthermore, the repressive and discriminatory policies by which "non-White" inhabitants of the Territory are denied legal equality with the "White" minority, in respect of rights of security, residence and movement are applied by Respondent so as to effectuate its policy of assuring that, when needed for labour in the "European" community, the presence of "non-Whites" is permitted and encouraged; when no longer required, "influx control" and "pass" laws could facilitate their eviction as "redundant." [1] Such restrictions and conditions, which may be applied impersonally to any "Native," whether university graduate or unskilled labourer, deny to the affected individual such human freedoms and fundamental rights as those of maintaining a normal family life, [2] thus striking at the rudimentary pre-condition of any stable, civilized community.

In sum, under *apartheid*, the accident of birth imposes a mandatory life sentence to discrimination, repression and humiliation. It is, accordingly, in violation of Respondent's obligation, as stated in Article 2, paragraph 2, of the Mandate, to promote to the utmost the well-being and social progress of the inhabitants. The policy of *apartheid*, moreover, is repugnant to the objectives and requirements of Article 22 of the Covenant of the League of Nations.

Respondent's premise that the status, rights, duties, opportunities and burdens of each inhabitant of the Territory are to be determined and allotted on the basis of his membership in a "group," rather than as an individual human being, proceeds from and perpetuates a major distortion of the intention of Article 22 of the Covenant of the League of Nations and Article 2 of the Mandate.

Article 22, paragraph 1, of the Covenant embodies the principle of a "sacred trust" for the well-being and development of certain areas "*inhabited by peoples not yet able to stand by themselves. . . .*" Article 22, paragraph 6, pertaining to "C" Mandates—including the Territory of South West Africa—refers to "the safeguards above mentioned in the interests of the indigenous *population.*" [3]

Respondent's policy of *apartheid*, allotting to individuals rights and burdens upon the basis of their membership in a "group," implicitly interprets and applies Article 22, paragraph 1, to mean that each and every individual member of a designated "group" is, *by that fact alone*, "not yet able to stand by himself."

Ascription of such a significance to the quoted phrase is a mani-

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[1] *Infra*, p. 465

[2] *Infra*, pp. 284-285, 288-289, 467-470.

[3] Quoted in I, p. 200. (Italics added.)

fest absurdity, yet the inherent nature and effect of Respondent's policies are consistent with no other possible interpretation.

As the history of the Mandates System established in the Covenant of the League clearly reveals, [1] the "sacred trust" has as its objective the promotion of the well-being and social progress of the "peoples," that is to say, of the individual inhabitants comprising the *population*.

This objective also is manifest from the very nature of the rights protected; thus "freedom of conscience" and "the free exercise of all forms of worship" [2] necessarily appertain to the individual as such, although of course such rights are commonly exercised through collective activity.

Respondent's policy, and its underlying premises, thus distort and corrupt the meaning of the term "peoples," as used in Article 22 of the Covenant of the League, and "inhabitants," as used in Article 2 of the Mandate, by interpreting these words to mean "groups" of peoples, or inhabitants, as classified by Respondent. The supreme fallacy implicit in such a misinterpretation is that, although rights, duties, opportunities and burdens can nominally be allotted on the basis of individual membership in a "group," the actual, direct, daily and life-long consequences of such a policy are, of course, visited upon and endured by the human beings comprising a "group," *as individuals*.

It is precisely this inescapable consequence of its policy that marks the fallacious and self-contradictory nature of Respondent's profession that the policy of *apartheid*, or separate development, is "not based on people being inferior but being different. . . ." [3] The necessary and direct consequence of allotting rights and burdens by treating "groups" *differently* is the treatment of at least some individuals in some "groups" as inferior.

The fallacy is reflected in Respondent's own inconsistent formulations of its policy. Thus, in what is described in the *Counter-Memorial* as an "historic address" by Respondent's Prime Minister, the following explanations are juxtaposed:

> "We prefer each of our population groups to be controlled and governed by themselves, as nations are. . . ."

On the other hand:

> "Where is the evil in . . . the fact that in the transition stage the guardian must needs keep the ward in hand and teach *him* and guide *him* and check *him* where necessary? This is separate development." [4]

Respondent's interpretation of its obligations under the Mandate,

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[1] I, pp. 34-37; *supra*, pp. 231-232 and *infra*, pp. 536-546.
[2] Mandate, Article 5.
[3] Prime Minister Verwoerd, quoted in II, p. 471.
[4] Quoted *id.*, p. 466. (Italics added.)

both in policy and practice, therefore, is in conflict with the fundamental objective of the "sacred trust": promotion to the utmost of the well-being and social progress of the individual inhabitants of the Territory. Applicants, in this Reply, [1] cite the overwhelming weight of evidence and the universally accepted legal criteria which bar a policy of which it has been said:

> ". . . [T]o say that by law people of one group must mix with no others can really only proceed from a conviction not only that the other groups are inferior *but that every member of each of the other groups is permanently and irremediably inferior.*" [2]

The practical consequences of such a policy appear from all of its aspects,[3] but perhaps the most striking is that conceded by Respondent in its explanation of the Education policy in the Territory, discussed more fully elsewhere in this Reply.[4] From this it is evident that, irrespective of the potential or existing quality, capability, or character of any individual inhabitant of the Territory, his membership in a "non-White group" does, in fact as well as in theory, result in the allotment to him of "permanently and irremediably inferior" status, rights and opportunities, although reserving for him at least an equal share of duties and burdens.

Insofar as Respondent considers relevant any reference whatever to individuals as such,[5] it is clearly on the basis that the individual is to be regarded as a member of a "group," in juxtaposition to members of other "groups."

Consonant with this premise, and in effectuation of its policy based thereon, Respondent allots the status, rights, duties, opportunities and burdens of the inhabitants of the Territory pursuant to a division of the population into four enumerated "groups," *viz.*, "Whites," "Natives," "Asiatics" and "Coloureds"[6].

The harsh rigour with which the "policy of differentiation" [7] is applied, is illuminated by Respondent's inclusion in the "Coloured group" of those, *inter alia*,

> ". . . who although in appearance are obviously white, are generally accepted as Coloured persons." [6]

Similarly, "Coloureds" are defined as "all persons not included in any of the three *groups* mentioned above," *viz.*, "Whites,"

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[1] *Infra*, pp. 302-312, 476-519.
[2] Philip Mason, in Annex 1, p. 339, *infra*. (Italics added.)
[3] *Memorials*, Chapter V, *passim*.
[4] *Infra*, p. 362.
[5] *E.g.*, Respondent's explanation of its policies relating to Education in the Territory; **III**, pp. 528-530, quoted pp. 266-268 *supra*.
[6] See **I**, p. 109.
[7] *Supra*, pp. 268-269.

"Natives," or "Asiatics," [1] thus assuring that each inhabitant of the Territory, whatever his individual character, quality or potential, is assigned to a "group," membership in which determines his status, rights, duties, opportunities and burdens.

b. *Relevant Evidence*

That Respondent's policy and practice of *apartheid* fail to promote the well-being and social progress of the inhabitants of the Territory is shown, in particular, by:

1. Judgments of qualified persons with first-hand knowledge of South Africa and South West Africa (*infra*, pp. 277-293);

2. Official views of Governments in all parts of the world, expressed, *inter alia*, through the United Nations (*infra*, pp. 74-83); as well as through findings and resolutions of the United Nations itself (*supra*, pp. 222-230; *infra*, pp. 502-503):

3. Overwhelming weight of contemporary authority in the political and social sciences (*infra*, pp. 302-312); and

4. History and character of the system of "Homelands," or "territorial *apartheid*" (*infra*, pp. 312-326).

1. *JUDGMENTS OF QUALIFIED PERSONS WITH FIRST-HAND KNOWLEDGE OF SOUTH AFRICA AND SOUTH WEST AFRICA*

In support of its contention that much "abuse directed at its policy of separate development . . . has arisen from wrong or inadequate factual information or assumptions," [2] Respondent cites, *inter alia*, the views of a former member of the South African Parliament, who is quoted as saying:

> "*Most people overseas* were still under the impression that the policy of separate development was aimed at keeping the Bantu down. They did not realize that the policy was aimed at uplifting them." [3]

Respondent's use of the foregoing quotation is an example of its often-asserted contention that only persons with "first-hand knowledge" [4] of the situation in South or South West Africa are capable of understanding it fully and appraising it fairly.

Applicants, accordingly, present a fairly selected cross-section of evaluations of *apartheid* by persons (A) whose authority is considered by Respondent of sufficient weight to merit quotation in the *Counter-Memorial*, assertedly in support of Respondent's views (*infra*, pp. 278-280), and (B) who, by reason of South African origin or

[1] I, p. 109. (Italics added.)

[2] II, p. 483.

[3] *Ibid.* (Italics added.)

[4] This ground, *inter alia*, was advanced by Respondent in rejecting the request of the United Nations Secretary-General that a Group of Experts, established pursuant to a Security Council resolution, visit South Africa. (S.C.O.R., Report of S.G. at 3 (S/5658) (1964).)

long residence there, indubitably possess "first-hand knowledge of the situation" there, as well as in South West Africa (*infra*, pp. 280-293).

(A) VIEWS OF AUTHORITIES CITED BY RESPONDENT

(1) Lord Hailey,[1] former member, Permanent Mandates Commission:

> ". . . Dr. Malan, who became Prime Minister in 1948 as leader of the reconstituted Nationalist Party, emphasized that *apartheid* was not a new policy; it was only the policy of separatism expressed in terms which experience had shown to be better adapted to the actual facts of the situation as it now stood. 'Total territorial separation', he said in 1950, 'is impracticable under present circumstances . . . where our whole economic structure is to a large extent based on Native labour.' (*House of Assembly Debates*, Vol. 71, Col. 4142.) There was, he repeated in 1953, no difference in meaning between 'segregation' and *apartheid*. They differed only in the fact that the objective of separation would now be pursued by a Nationalist Party which was, unlike the United Party in previous Parliaments, wholly united and determined to implement the policy as rapidly as possible, at any rate in the political and social sphere.
>
> "The policy of *apartheid* was thus to be comprehensive, and it involved racial separation in the electoral as well as in every other sphere. . . .
>
> "The doctrine of separatism has still to face the crucial question whether the economy of a modern industrialized State will permit the maintenance of a crude form of differentiation against a major part of the manpower on which it is dependent. . . .
>
> "'The greater industrial areas are in fact engaged in an active process of economic integration between the races. This process is dictated by the inescapable needs of industry for a constant supply of labour. It is becoming yearly more imperative that such labour be more dependable, more experienced, more adjusted to the habits of a modern industrial society. In consequence there is a fundamental quarrel between the natural integration of urban life and the unhistorical effort to impose "disintegration" upon the vital centres of South African economic prosperity.'
>
> "In no country south of the Sahara is there any such stark insistence on the principle of differentiation as in the Union of South Africa. Almost everywhere, as will subsequently be seen, there are signs of the closing of the gap which once seemed to separate African institutions and usages from those prevailing in the Western world; almost everywhere there are in consequence signs of changes in the conceptions held about the principles which should determine the future relations of the European and non-European communities.
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> "Nowhere has the concept of separatism as held in the Union been illustrated more clearly than in the lengthy debate on the

[1] Cited as an authority by Respondent in II, at, *inter alia*, pp. 388, 435, 440 (quoted by Respondent with approval); *id.*, p. 487 (quoted with disapproval).

Report of the important Commission on the Socio-Economic Development of the Bantu (the Tomlinson Commission) in 1956. [From time to time Europeans who have settled in other territories have shown an inclination to look to South Africa for countenance in their effort to maintain policies based on separatist ideas, while to those who look forward to a greater measure of integration, the régime of the Union has become a natural target for attack. But there is here something more than a contrast of philosophies. Both sides realize that the essence of the matter lies in the fact that the doctrine of *apartheid* implies that the European community must continue to hold a position of control over the non-European communities. It is actually on this basic issue, and not because of any argument about the maintenance of a European pattern of civilization, that the two schools of thought tend to range themselves so decisively in opposite camps.] [1]

"But the matter must be viewed with a due sense of proportion. The circumstances in which a régime of White civilization was established in South Africa and the great disparity in the social and economic development of the European and Bantu made it inevitable that some measure of differentiation should become a recognized feature of public policy. The difficulty does not lie there. *It lies in the assumption that discrimination is not merely an act of expediency but a law of nature.* Its most refractory aspect is the inability of the European to admit that there can ever exist within the social and political structure of the Union any place for the African who has passed outside the traditional life of his own group.

"The effects of insistence on the segregationist doctrine are not entirely one-sided. It has been accompanied by a more realistic appreciation by Europeans of the needs of Africans in the sphere which policy assigns to them. That is to be seen in the greatly increased provision made for African education, for the development of medical facilities, and for the improvement of agriculture in the Native Reserves. Very large sums of money are now being provided for the improvement of African housing in the urban areas. But the recent decision to improve the status of Chiefs or to base the institutions of Local Government on Tribal Councils rather than on electoral bodies belongs to a different category. *It is an attempt to divert the attention of the African from institutions of a pattern which is favoured by Europeans, and in which he might desire to have a share.* The change of policy embodied in this decision has been made at a time when in most of the British and French dependencies the African is being given increasing access to institutions of a European pattern. The forces of traditionalism are still strong in Africa, and it is possible that the change may have attractions for some part of the African population in the Union; it is not likely to appeal to the growing body of more progressive Africans or to the great mass of those who now live in urban conditions. For them it can have

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[1] *An African Survey* 163-64, 169 (3d ed., 1957). (Brackets added: the bracketed portion is quoted in II, p. 487, "by way of contrast" with earlier cited views of "impartial observers," *id.*, p. 485.

little or no meaning, and it is to this class that African society now looks for its leaders." [1]

(2) Prof. Gwendolen Carter,[2] Professor of Political Science, Smith College (U.S.A.):

"... Where is South Africa going? Of all the four answers being offered to its racial situation, it is the Nationalist one which is being implemented most vigorously. Under the spur of Mr. Strijdom and Dr. Verwoerd, efforts are being made to force as rigorous a separation as possible between Europeans and non-Europeans in every segment of life. So drastic and harsh are the provisions under which separation may be forced—*e.g.*, in the universities and in the churches (see p. 111 and p. 117)—that even certain Nationalists have become worried at the doctrinaire rigidity of the conceptions under which regulations are drafted. To the fully dedicated Nationalist, however, the program must be complete in every aspect. ...

"In this perspective, Nationalist apartheid becomes largely restrictive. In other words, the emphasis is mainly on its negative aspect, *i.e., on maintaining the European areas of the Union under the exclusive control of white South Africans*, rather than the positive one of promoting a distinctive life for the Bantu. This is the more so because the Nationalists owe their foremost allegiance to their own Afrikaner folk, who feel most acutely amongst the Europeans the competition of the Africans. It is not surprising, therefore, that apart from the limited amount which they are doing to develop the Reserves, *the Nationalists are concerned primarily with protecting the privileged position of white farmers and white laborers.* Thus the inevitable tendency in the future, as in the past, will be to underline and intensify traditional discrimination against non-Europeans, despite the fact that an increasing number of them are living in the so-called European areas.

"If European South Africans were living in the kind of community in which they picture themselves, *i.e.*, a self-contained white community wrestling with the problems of a huge non-European population, *rather than in a multi-racial society in a multi-racial world*, they might still be able to establish a stable balance which reflected within the boundaries of the Union the historic relationship between a dominant white minority and subject peoples of color. ..." [3]

(B) Views of South Africans with "First-Hand Knowledge" of Respondent's Policies

(1) "White" South Africans[4]

(a) *Scholarly Authorities*

(i) Dr. C. W. de Kiewiet, educated in South Africa, Professor of

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[1] Hailey, *op. cit., supra* p. 279, footnote 1, at p. 434. (Italics added.)
[2] Cited by Respondent as an authority, **II**, pp. 451, 455.
[3] *The Politics of Inequality* 416-17 (1958). (Italics added.)
[4] Solely for illustrative purposes, persons quoted below are arranged according to Respondent's classification of so-called "population groups" (see **I**, p. 109).

History in the State University of Iowa and in Cornell University (U.S.A.); President, Rochester University (U.S.A.):

> "In its various forms *apartheid* is a transfer of the responsibilities of the living world to a dream world of solved problems. It is the substitution of a wishful simplicity for a real complexity. The basic premise of *apartheid* is that the natives can seek no remedies and gain no citizenship within white society, but only within their own segregated society .... There is no awareness in the architects of *apartheid* that out of fact and fancy they have ingeniously contrived a mental toy, operating outside history and economics. They do indeed invoke economic and political principles, but they are the principles of a non-existent world, so that their scholarship becomes spurious and their logic a deception. ...
> "... 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. The segregation laws are an embargo upon the development of the non-European population. ..." [1]

(ii) Professor Edgar H. Brookes, formerly Senator, representing "Africans" of Natal and Zululand, and Principal, Adams College, Natal; Professor of Political Science, University of Natal; currently Professor of History, University of California (U.S.A.):

> "... This is the evil in pipe-dreams of *apartheid* which cannot stand the tests of a map, a balance-sheet, or an honest election with all the facts laid before the people. We enable ourselves to remain hopeful because we think that the Africans will accept 'heartlands' which have no adequate boundaries in any map, will be satisfied with a 'self-government' in those 'heartlands' which is ill-defined and incomplete, will be content to remain under the control of a Union in whose ultimate and sovereign decisions they will have no share. We remain hopeful, difficult though it may be, when we have no real plan at all to deal with the Coloured people, the Indians, or those many Africans who can never be accommodated in the 'heartlands'. ..." [2]

(iii) Professor D. V. Cowen, formerly Professor of Comparative Law in the University of Cape Town; since 1961 Professor, University of Chicago (U.S.A.):

> "The story is a long and shaming one, but it can be shortly told: it is the story of obsession with the fetish of race, and with the heresy that in South Africa differences in skin-colour mean differences in culture which cannot be reconciled in one common society. It is the story of denial by whites to non-whites of the liberty which whites deem essential to the fulness of their own lives; it is the repudiation of an equal claim for all human beings to life, liberty and the pursuit

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[1] *The Anatomy of South African Misery* 47-49 (1956).
[2] "South Africa and the Wider Africa, 1910-1960," 27 *Race Relations Journal*, No. 1, p. 8 (January-March 1960).

of happiness; and ultimately, the utter betrayal of the Christian concept of the brotherhood of man." [1]

(iv) Dr. Monica Wilson, Professor of Social Anthropology, University of Cape Town (South Africa):

"The God-given opportunity in South Africa, and our real achievement, lies in the close co-operation of Black and White, not in isolation and partition. That co-operation has in fact been closer here than anywhere else in Africa; we have a long tradition of common schools and open universities; of participation in municipal and provincial councils, and of voting on a common roll. This sort of equal co-operation and not the timid withdrawal into a *laager*, is the growing point in the South African tradition.

"The idea that colour should be the basis for compulsory separation or legal differentiation between people must be totally rejected, and therefore also the principle of Reserves." [2]

(v) G. V. Doxey, formerly senior lecturer in Commerce and Applied Economics, University of Witwatersrand:

"Even if we could disregard the presence, in the so-called white areas, of the Coloured people, the Indians and the urban Africans, and thus visualize the ultimate ideal of a racially partitioned South Africa—as do some imaginative upholders of *apartheid*—in reality it is now apparent that *apartheid* has achieved little else than the creation of a vicious circle of restriction, frustration and fear, with an ever-widening cleavage between white and non-white South Africans, and has made more, not less remote the attainment of a peaceful solution of the South African dilemma.

"It would seem that this state of affairs will continue so long as the vast majority of white South Africans of both language groups are unable to visualize life in a multi-racial society, inspired by the community approach, without at the same time thinking in terms of the disintegration of that society and the inevitable destruction of western civilization." [3]

(vi) Professor S. Herbert Frankel, a South African; now Professor of Colonial Economic Affairs, Oxford:

". . . A revision [is needed] of the present trend of economic legislation *which makes political issues of what are, in reality, functional economic relationships; because of unwarranted, and, indeed, highly dangerous, fears of their normal functioning*. These fears have caused the European population of South Africa to take upon itself a vast range of impossible and useless tasks. The rapidly expanding population of South Africa is to-day dependent for its livelihood on the increasingly complex tasks of a highly industrialized economy. But no industrial society can long afford to permit the minutiae

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[1] *Liberty, Equality, Fraternity—Today*: The Alfred and Winifred Hoernlé Memorial Lecture 1961, p. 4 (1961).

[2] "The Principle of Maintaining the Reserves for the African," *Race Relations Journal*, No. 1, pp. 8-9 (January-March 1962).

[3] *The Industrial Colour Bar in South Africa* 200 (1961).

of its economic arrangements to be strangled by irrelevant political regulation or debate.

"It should be the fundamental aim of such a revision of obstructive laws to ensure to everyone, irrespective of race, colour or creed, the freedom to pursue the affairs he desires to conduct in so far as they are not the affairs of others. This freedom implies the right of everyone to make decisions in regard to the acquisition and use of property, the acquisition and exercise of skill, the place of residence and nature of occupation, the allocation of resources, the right to invest, and the right to develop his assets and personality without let or hindrance as to time or place." [1]

(vii) Dr. L. M. Thompson, formerly Professor of History, University of Cape Town; since 1961, Professor of History, University of California (U.S.A.) (commenting on "heresies" which pervade South African political life):

". . . The first is the wilful failure to cherish the bridges that used to exist and to construct new bridges between the people of South Africa. This failure has caused a decline of confidence among the non-Whites in the motives of the White people in general and the Afrikaner Nationalists in particular. The policy of an insulated nation dominating a hierarchy of other nations within a single State would be dangerous at any time, and is simply not viable in the world as it is today. If one believes that the cohesion and power of one's own tribe is the greatest good, it does not follow that the members of the other tribes can be persuaded, or even coerced into the same belief. *Indeed most South Africans have now passed beyond the stage of mere tribal loyalty; and ironically enough this seems to be particularly true of most non-White South Africans.*

"The second of our heresies is that of mistaking words for realities. . . This illness has reached an advanced stage in South Africa, where politics are determined by a whole series of verbal images. *Stereotypes about our fellow-countrymen prompt us to forget that an Afrikaner or an African, an Indian or a Coloured man, is first and foremost a human being like ourselves.* And apartheid has become perhaps the most potent image in the modern world—the obsession of an entire party and government.

"Linked with the semantic heresy . . . is the Utopian heresy. To evade moral responsibility for the unpleasant realities of the position in which one finds oneself, one constructs an ideal order of things in one's mind and assures oneself that it will some how, some day, be conjured into existence. Then having obtained control of the machinery of the State, one tries to implant this ideal in the minds of all the other inhabitants, and cries 'Treason!' if they will not agree. . . ." [2]

(b) *Religious Leaders*

(i) Archbishop de Blank (Anglican):

[1] "The Tyranny of Economic Paternalism in Africa: A Study of Frontier Mentality," supplement to *Optima*, p. 49 (December 1960). (Italics added.)

[2] "Fifty Years of Union," 27 *Race Relations Journal* No. 2, 66-67 (April-June 1960). (Italics added.)

"... [H]ow far and how fast are you supposed to go when you are running away from sin and seeking to do God's will? We cannot ourselves prevent some of the racial legislation which bedevils South Africa today, but we can see to it that we do not camouflage it by such high-sounding names as separate development or territorial homelands." [1]

(ii) Dr. B. B. Keet, former professor of Theology, Seminary of the Nederduitse Gereformeerde Kerk, University of Stellenbosch:

"... *Apartheid* with its slogan ('separate but equal') fails precisely at this point because it does not deal with the Non-Europeans on a just and equitable basis. Territorially there can be no just partition and politically there are no equal rights. ...

"*Apartheid* claims that its policy is the only one calculated to preserve white civilization in South Africa. The contrary is true: there can be no hope for White South Africa if black nationalism is to be combated by forceful measures. And it cannot be denied that, in the case of those Non-Europeans who are capable of forming a responsible judgment, the implementation of *apartheid* can only be effected by the employment of force." [2]

(iii) Dr. Hugo du Plessis, Gereformeerde Kerk, Theologian at Potchefstroom University for Christian Higher Education:

"*Apartheid* leads to the mortification of humanity and to oppression. This is the accusation of the outside world and for this reason it will not tolerate *apartheid.*

"The outside world will not approve of the fact that more than half of the non-white population in South Africa has virtually no political and civil rights, that their economic progress is held back by the colour bar and that their freedom of movement is restricted." [3]

(iv) In 1960 the World Council of Churches arranged consultations with leaders of the eight South African churches which were then members of the Council: Anglican, Methodist, Presbyterian, Bantu Presbyterian, Congregational, the N.G.K. of the Cape Province, the N.G.K. of the Transvaal and the Hervormde Kerk of South Africa. The resulting Report (of which each paragraph had been approved by at least 80 per cent of the delegates) stated, *inter alia:*

"11. We call attention once again to the disintegrating effects of migrant labour on African life. No stable society is possible unless the cardinal importance of family life is recognized, and, from the Christian standpoint, it is imperative that the integrity of the family be safeguarded. ...

"13. The present system of job reservation must give way to a more equitable system of labour which safeguards the interest of all concerned. ...

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[1] XIII *Africa Digest,* No. 3, p. 81 (December 1963).

[2] *The Ethics of Apartheid* 14, 18-19 (1957).

[3] "The New Era and Christian Calling Regarding the Bantu in South Africa," *Delayed Action! An Ecumenical Witness from the Afrikaans speaking Church,* published by the authors, n.d. [1960].

"15. It is our conviction that the right to own land wherever he is domiciled, and to participate in the government of his country, is part of the dignity of the adult man, and for this reason a policy which permanently denies to non-White people the right of collaboration in the government of the country of which they are citizens cannot be justified. . . ." [1]

(c) *Jurists*

(i) Dr. H. A. Fagan, Retired Chief Justice, Supreme Court of South Africa:

". . . The latest move has been to pass a law eliminating Bantu representation in Parliament and, as a compensatory gesture, to grant the Bantu extended powers of self-rule in the Reserves, with promises of further extension in the future. Opinions differ as to whether this really means an improvement in the administration of the Reserves. For the point with which I am now dealing, however, that is of little relevance. In regions where Bantu live in tribal isolation it is a matter of natural development that powers of self-administration should be increased as rapidly and as far as the people concerned show the ability to exercise them without detriment to themselves or to the safety and well-being of the State to which they belong. But that does not touch the real problem: the adjustment of inter-racial contacts and of interests common to different racial groups. This problem does not lie in the Reserves where the population is homogeneous, but outside them where it is not. . . ." [2]

(ii) O.D. Schreiner, formerly Judge, Appellate Division, Appeal Court:

". . . The members of the non-White groups are most unlikely ever to be satisfied with having separate group loyalties built up on their behalf by White politicians and officials, while as individuals they are left at a disadvantage in respect of opportunities to learn, to gain a livelihood, to own property and generally to play a full part in the life of their country. . . .

". . . The apartheid policy must be judged to be unrealistic, and it ought accordingly to be abandoned." [3]

And also (commenting on the Transkei election):

"'From the point of view of real, legal power, which rests solely on the control and exercise of the parliamentary franchise, the ballot papers in a Bantustan election might as effectively be dropped into a well as into a ballot box.

"'No system whereby all real power is to be retained, as a matter of law, in the hands of the Whites, can succeed or endure. Nor can

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[1] Hewson (ed.), *Cottesloe Consultation: The Report of the Consultation among South African Member Churches of the World Council of Churches* 7-14, December 1960, at Cottesloe, Johannesburg, n.d. [1961], p. 75.

[2] *Our Responsibility: A Discussion of South Africa's Racial Problems* 47 (1960.)

[3] *Realism in Race Relations* 17, 20 (1962).

any system that aims at disguising such retention. Everyone concerned is too wide-awake today to be put off with a sham.'" [1]

(iii) Albert van de Sandt Centlivres, Retired Chief Justice, Supreme Court of South Africa:

"The policy recently endorsed by Parliament [*apartheid* in university education] is out of tune with modern times and it is an anachronism which cannot last. The sooner we wake up to the fact that we are living in the latter half of the 20th century and not in a bygone age the better it will be for all of us in this country and for the reputation of this country abroad." [2]

(d) *Political Leaders*

(i) Donald Molteno, Q.C., representative of Africans in the House of Assembly from 1937 to 1948 (commenting on the "Promotion of Bantu Self-Government Act"):

"The present government is seeking to justify its policy on the basis that it is aiming at eventual African autonomy in the African areas.

"The evidence is overwhelming that not only are there no separate African areas capable of accommodating the whole, or even a substantial majority, of the African population, but that at no conceivable future time can there ever be such areas. Despite this hard fact, the government is pursuing a policy which denies to the majority of our people any representation in the Parliament which makes the laws whereby they are governed . . . .

"No people worthy of the name will voluntarily submit to perpetual domination by others. Least of all will our African people do so at this time when African nationalism is advancing from strength to strength throughout the African continent. In the light of this consideration the government's policy is not only unjust, oppressive and foolish, but it is also extremely dangerous to the future peace and welfare of all the peoples of South Africa." [3]

(ii) Dr. Bernard Friedman, former member of Parliament; in 1955, resigned from the United Party to join the Progressive Party:

". . . The fact remains that South Africa is the only country that enshrines racial discrimination in its statute book and gives it the force of law. In seeking to enforce a policy of racial discrimination by the coercive power of the state, we are marching against the whole trend of human progress and condemning ourselves to a dangerous isolation. In a state of isolation we can scarcely survive, and we certainly cannot prosper. Sooner or later, we shall have to put ourselves on the side of progress by accepting a fundamental change in our racial policies. Only by renouncing racial discrimi-

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[1] As quoted in *The Star*, Johannesburg weekly edition, 18 January 1964, p. 7.

[2] *Thomas Benjamin Davie*: The First T. B. Davie Memorial Lecture Delivered in the University of Cape Town, on 7 May 1959, p. 7 (1961).

[3] *The Betrayal of Natives' Representation* 15 (1959).

nation can we restore South Africa to the society of civilized nations." [1]

(iii) J. D. du P. Basson, former Nationalist Party Member for Namib, South West Africa (commenting on the "Promotion of Bantu Self-Government Bill," in Parliament, 1959):

> ". . . As far as we can see, therefore, this Parliament will continue to exercise full and final and absolute control over everything and everyone in the Bantu areas. I do not think it is fair, as long as the Union Parliament remains the effective political legislative body controlling the Bantu areas, and as long as the separation of political power which is envisaged by the Government is as yet far from a reality, that the Natives should be deprived of the small share which they have in this Parliament. . . ." [2]

(c) *Authors*

(i) Alan Paton, author of *Cry the Beloved Country* and other works (commenting on the "Group Areas Act"):

> "The Act has purported to aim at racial harmony, but in fact it has done immeasurable harm to race relations. One might forgive fear, but it is hard to forgive those evil companions that exploit it, avarice, cruelty, and hypocrisy.
>
> "Lastly, the Act is based on the evil doctrine that the end justifies the means. It supposes that a common good can be bought at the cost of individual harm. It supposes that one can preserve civilization even when flouting its values. It supposes that one can carry out the Divine Will even when disobeying the Divine Commandments.
>
> "I could wish that my pen were able enough to convince the white people of South Africa that it is they who are being destroyed by the Group Areas Act, that I could write such words as would make the very paper catch fire, to burn them awake to the cruelty that is being done in their name." [3]

(ii) Stanley Uys, journalist and essayist, Afrikaner by birth (commenting on "Bantustan" or "Homeland" objective, of Respondent's policy of "separate development," for South West Africa and in South Africa):

> ". . . The flaw in the Bantustan programme is that it puts a brake on the process of detribalisation, urbanisation and westernisation of the indigenous Africans—a process which has been the condition of man's advance in civilisation. By congregating Africans in the reserves, instead of absorbing them into the modern economy, with its advantages of education, welfare services and skilled jobs, it seeks to ossify the whole system of tribalism.

[1] "South Africa and the Commonwealth," *Looking Outwards : Three South African Viewpoints* 7 (1961).

[2] *U. of S.A., Parl. Deb., House of Assembly*, 12th Parl., 2nd Sitting (weekly ed., 1959), Col. 6174.

[3] *The People Wept* 44 (1958). (Italics in original.)

"A cardinal feature of the Bantustans is that Dr. Verwoerd rigidly prohibits the entry into them of private white capital. They are necessarily dependent, therefore, on Government aid and self-help. Their development is thus retarded, not accelerated, and it is difficult to see the whole Bantustan scheme as anything more than a systematisation of the migratory labour system. In the Bantustans the Africans will have their homelands and their political title-deeds. But they will have to look outside these underdeveloped reserves for their livelihood." [1]

(iii) Patrick van Rensburgh, former member, South African Foreign Service:

"Finally, let us look to the future of Afrikaner policy. The 'Bantustan' policy of 'giving the Natives areas in which they can develop along their own lines' has been hailed with much fanfare by the Afrikaners. What is the truth?

"It is my own view that these reserve areas have been planned as nothing more than reservoirs of cheap Black labour for farms in White areas. The siting of industries on the borders of the reserves is designed to attract Africans away from the cities. An upper ceiling has been placed on the political and economic development of the African in the 'Bantustans,' and both are rigidly controlled by the Government. Africans will in this way be set apart, but their labour will be retained *for the benefit* of the White economy, and *not in competition with it* in dual (or multiple) economies with different wage and price structures." [2]

(iv) Colin Legum, South African journalist and author:

"One out of three of the Republic's 11 million Africans no longer has the legal right to live anywhere in the country. Where these people may live is a decision for bureaucrats.

"Well over 100,000 people have already been forcibly removed from one area to another, or from the towns to the stagnant, workless native reserves. Another 500,000 are under notice of removal. And by the time the process of creating Bantustans is complete, well over five million people will have been uprooted under the plans already announced. . . ." [3]

And also:

"Here [Cape Town], as in all urban areas, no African is allowed to live with his wife and family unless they previously 'normally resided' together. Newly-marrieds, for example, cannot live together unless both qualify for residence. Married men, deprived of their wives and families, are housed in 'bachelors' quarters,—great red slabs of barracks. . . .

"Wives are allowed to visit their husbands without a permit for only 72 hours at a time. After that they need a special permit to stay. Most of them travel hundreds of miles from the reserves to

[1] "The Golden Limb," *The Spectator*, London, 3 January 1964.
[2] *Guilty Land* 138-39 (1962). (Italics in original.)
[3] "Tearing a Country Apart," *The Observer*, London, 28 April 1963.

enjoy this privilege. Of course the men can always go to them—if they have the money and the time to travel. One of the reasons accepted for granting a permit for a wife to visit her husband for more than 72 hours is if she wishes to conceive. The request for 'a conception period' must be argued before a white bureaucrat. I have seen it happen." [1]

(2) South African "Natives"

(a) Albert John Luthuli: teacher, Adams College, Natal; Chief, African Community, Umvoti, Natal; President-General, African National Congress; awarded Nobel Peace Prize, 1960

(Acceptance Address, Oslo, Norway):

"There is a paradox in the fact that Africa qualifies for such an Award in its age of turmoil and revolution. How great is the paradox and how much greater the honour that an Award in support of peace and the brotherhood of man should come to one who is a citizen of a country where the brotherhood of man is an illegal doctrine.

"Outlawed, banned, censured, proscribed and prohibited; where to work, talk or campaign for the realization in fact and deed of the brotherhood of man is hazardous, punished with banishment or confinement without trial or imprisonment; where effective democratic channels to peaceful settlement of the race problem have never existed these 300 years, and where white minority power rests on the most heavily armed and equipped military machine in Africa.

"This is South Africa." [2]

Also:

"If there is a law in any country in the whole world which makes it a crime in many instances for husband and wife to live together, which separates eighteen-year-olds from their parents, I have yet to learn of it. But the pass does so in the Union of South Africa.

"Each year half a million of my people are arrested under the pass laws. Government Annual Reports tell of this tragic story. But statistics can tell only half the tale. The physical act of arrest and detention with the consequence of a broken home, a lost job, a loss of earnings, is only part of this grim picture. The deep humiliation felt by a black man, whether he be a labourer, an advocate, a nurse, a teacher or a professor or even a minister of religion when, over and over again, he hears the shout, 'Kaffir, where is your pass—*Kafir waar's jo pass*'? fills in the rest of this grim picture. . . .

". . . The authorities are busy trying to send city workers back to the Reserves to swell the ranks of the unemployed. At the same time the provisions of the Land Husbandry Act are squeezing people off the land in the Reserves and impelling them towards the cities. The vast circular tour of people with empty bellies is already under way. I am not predicting. I am commenting on a situation which is

[1] "The Roots of Violence," *The Observer*, London, 5 May 1963.

[2] Callan, *Albert John Luthuli and the South African Race Conflict* 57-58 (1962).

worsening daily, now, to-day. This is the Bantustan solution to poverty in the Reserves. One can see how useful, in time, will be the Minister's right to prevent any visitors from coming in to see how we are thriving.

"The whole scheme is one vast exploitation stunt. It creates a new class of workless workers, and in the same breath we are told that the Government will henceforth absolve itself from financing African services from the central treasury. 'Do it yourself!' we are told. Do what? And for whom?" [1]

(b) Professor Z. K. Matthews, LL.B.: Principal, Adams College, Natal, 1925-1933; Professor, Native Law and Administration, University College of Fort Hare, 1947-1960; M.A., Yale University (U.S.A.); Visiting Professor, Union Theological Seminary (U.S.A.), 1952-1953:

". . . To the extent that *apartheid* means a rigid separation between the various groups in South Africa in all walks of life and in all institutions—political, economic and social—it is not only impracticable, having regard to the facts of South African life, but it is morally indefensible, as it is imposed particularly upon the non-White sections of the population without any consultation with them about the solution of their problems. . . .

". . . Increasing mutual estrangement is the terrible price we are called upon to pay for the luxury of the policy of *apartheid*. . . ." [2]

Also:

". . . It is a peculiarly South African form of academic selfishness that the same man who is prepared to go and study in one of the great open universities of the world and to rub shoulders and minds there with teachers and students drawn from all racial groups should, when he returns to his country, forswear the broadening experiences he has had and work for the shutting up of university kraals—kraals for the English-speaking, kraals for the Afrikaans-speaking, kraals for the Bantu-speaking, kraals for coloureds and kraals for Asians. Nothing is more contrary to university tradition and practice than this kraal mentality which has been forced upon us all by our all-wise legislators." [3]

(c) Ezekiel Mphahlele, author and Director, African Programme of the Congress for Cultural Freedom (in exile):

"Three things emerge from the segregationist policies of the white Government which prevent the non-white from becoming either a stable peasant or a stable urban worker, and creates in him a haunting sense of insecurity. First, the South African white has come to accept a double stream of cultural life, which the African hates because he knows that he can never be independent even in the

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[1] Luthuli, *Let My People Go: An Autobiography* 245, 202, respectively (1962).

[2] *Social Relations in a Common South African Society* 17, 21 (1961).

[3] *African Awakening and the Universities*: The Third T. B. Davie Memorial Lecture Delivered in the University of Cape Town, on 15 August 1961, p. 2 (1961).

dream-state the white man says he can make for the black man. Second, cultural development is seriously hampered in an unsettled black community and can only reach pygmy stature among the privileged and sheltered white community. Third, traditional culture, much of which the missionary destroyed, has come to be associated by the Negro with an inferior political status and ethnic grouping which will destroy all the work that has been done by the educated Negro to unify all the tribes. Just as the primary and secondary school curricula are designed for Africans, Coloureds and Indians and whites separately, so is the syllabus for African crafts meant for Africans only and therefore highly suspect. . . .

"In spite of these setbacks, a proletarian culture is in the making. To this the average white man is completely blind. . . ."[1]

(d) Nelson Mandela: son of a Transkei chief; attorney; imprisoned, 1962, for five years upon conviction of incitement to strike and leaving the Republic without permission:

(Statement to Court during trial):

"Your Worship, I would say that the whole life of any thinking African in this country drives him continuously to a conflict peculiar to this country. The law as it is applied, the law as it has been developed over a long period of history, and especially the law as it is written and designed by the Nationalist Government, is a law which, in our view, is *immoral. unjust and intolerable.* Our consciences dictate that we must protest against it, that we must oppose it and that we must attempt to alter it. . . .

"*Government violence can do only one thing and that is to breed counter violence. We have warned repeatedly that the Government, by resorting continually to violence, will breed, in this country, counter-violence amongst the people, till ultimately, if there is no dawning of sanity on the part of the Government, ultimately the dispute between the Government and my people will finish up by being settled in violence and by force. Already there are indications in this country that people, my people, Africans, are turning to deliberate acts of violence and of force against the Government, in order to persuade the Government, in the only language which this Government shows, by its own behaviour, that it understands.* . . .

"I hate the practice of race discrimination, and in doing so, in my hatred, I am sustained by the fact that the overwhelming majority of mankind hates it equally. I hate the systematic inculcation of children with colour prejudice and I am sustained in that hatred by the fact that the overwhelming majority of mankind, here and abroad, are with me in that. I hate the racial arrogance which decrees that the good things of life shall be retained as the exclusive right of a minority of the population, and which reduces the majority of the population to a subservience and inferiority, and maintains them as voteless chattels to work where they are told and behave as they are told by the ruling minority.

"Nothing that this Court can do to me will change in any way that hatred in me, which can only be removed by the removal of

[1] *The African Image* 33-34 (1962).

the injustice and the inhumanity which I have sought to remove from the political, social and economic life of this country. . . ." [1]

(3) South African "Coloureds"

(a) George J. Golding: Principal of a "Coloured" School, Cape Town; President, Coloured Peoples' National Union:

". . . In short, the Coloured group has reached the stage where it expects, and demands, to be given every opportunity to enjoy to the full the richest blessings of a democratic Christian Western civilization. And what does it receive? Instead of receiving the bread for which it asks, there are flung in its face the stones of oppressive legislation, unfair discrimination and political segregation. Now that the Coloured people are in sight of the century-mark in the exercise of their political rights, they are being treated like the vanquished in a long-drawn-out battle. . . ." [2]

(b) R. E. van der Ross: Principal, Bottswood Training College for Coloured Teachers; Ph.D., University of Cape Town (commenting on the proclamation of "Group Areas" in the Cape peninsula):

"The first thing which strikes one about the proclamation is its extreme arrogance. Here, at a stroke of the pen, a huge portion of the land, the entire mountain area, the fertile valleys . . . all this and more is declared 'White'. . . . We raise our hands in horror at the incipient blasphemy in an act where men take unto themselves power to apportion the gifts of God so as to suit their own political ends. . . . I should place a conservative estimate at about 30,000 Coloured people who have to move. . . ." [3]

(c) M. D. Arendse, member, Council for Coloured Affairs (Government-appointed):

". . . Job Reservation may be politically expedient, but it is morally wrong and is unjustified and unchristian in a society that claims to follow the tenets of Christian civilization.

"Job Reservation is intended to preserve the White man's monopoly of political and economic power. . . ." [4]

(4) South African "Asiatics"

(a) P. S. Joshi, writer, who has left South Africa:

"South Africa loudly claims to have a long, rich experience of African administration, but, summed up, it is expressed in two words: Colour Bar. Its political talent is enshrined in the introduction of racial discrimination in the whole social fabric of the country. . . ." [5]

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[1] *The Observer*, London, 18 November 1962. (Italics in original.)
[2] *The Coloured Man Speaks* 3 (1952).
[3] "Coloured Viewpoint," *Cape Times*, Cape Town, 23 February 1961, p. 10.
[4] *Contact*, 19 April 1963, p. 1.
[5] *Unrest in South Africa* vii (1958).

(b) Yusuf Cachalia, formerly Secretary, South African Indian Congress:

> "Under the Nationalists the policy of segregation has been taken to its logical conclusion. No longer is it to be applied in half-measures, for such application would fail to achieve the aims of apartheid. . . . The Indian people . . . must be isolated in ghettoes, their wealth destroyed, properties confiscated and means of livelihood taken away . . . The Group Areas Act is capable of bringing about these changes and as such is the pivot of apartheid. . . ." [1]

(c) Dr. S. Cooppan, economist:

> "'Going for a holiday, putting a son into school or university, renting or buying a home, getting a licence for a shop or a job, inheriting property or travelling by bus or train—all these ordinary things which are taken in their stride by Whites are never so simple for the Indian or non-White. Some of these things are, to-day, even impossible of execution." [2]

The Court's attention is respectfully drawn to additional authorities, cited in Annex II, page 593, *infra*.

2. *VIEWS OF GOVERNMENTS*

Applicants have referred [3] to Respondent's submission that Reports and Resolutions of the United Nations and its organs "contain political findings and recommendations" and accordingly, "are of no relevance whatsoever to this Court's judicial function . . . ." [4]

In the same context, Respondent asserts that

> "In so far as such reports and resolutions contain purported statements or conclusions of fact, they might conceivably have been of some assistance to the Court and the parties if it had been possible to place reliance on them for reasonable accuracy." [4]

Respondent thus denies the relevance of findings and recommendations of the "organized body," [5] in and through which Applicants have sought to settle their dispute with Respondent through processes of "diplomacy by conference or parliamentary diplomacy." [6] Such a contention would appear to be unworthy of elaborate refutation.

In the light of the consistent findings and recommendations, reflecting views of the preponderant majority governments,

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[1] "The Ghetto Act," *Africa South*, Vol. II, No. 1 (October-December 1957), p. 39.
[2] *Contact*, 6 February 1960, p. 5.
[3] *Supra*, p. 259.
[4] II, p. 3.
[5] *Judgment*, p. 346.
[6] *Ibid.*

recorded over a period of seventeen years,[1] Respondent's dismissal of the relevance thereof may be regarded as a *reductio ad absurdum* of its total rejection of international supervision and accountability.

Respondent's contentions with respect to United Nations findings and recommendations, however, do not stop with a mere denial of their relevance. Respondent seeks also to impugn their validity and authority in the context, *inter alia*, of its discussion entitled: "Respondent's Policies: Comparison with Other African Territories." [2]

In this context, Respondent endeavours to explain why

> "... the development of participation by *African Natives* in the central government of African territories continued to be a gradual process up to approximately the middle of the 1950's after which it moved at an ever-accelerating pace." [3]

Such an acceleration of pace, Respondent asserts, reflected

> "... not only the results of *a strengthened demand for independence*, [4] on the part of the indigenous populations of the territories concerned, *but also the effects of increasing pressure in international affairs, particularly by the newly independent States of Asia and Africa.*" [5]

As an illustration of the asserted impact of the "demand for accelerated political progress" [6] upon the views and policies of Governments, Respondent contends that

> "The effects of the intensification of the pressure on the Powers administering colonial and trusteeship territories to speed up the grant of self-government or independence to the territories concerned, may also be seen in changed attitudes adopted by these Powers." [7]

Respondent quotes from statements of Representatives to the United Nations[8] which, Respondent correctly says, "found increasing support in world politics." [9]

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[1] See "History of the Mandate Subsequent to the Establishment of the United Nations," I, p. 43, footnotes; and "History of the Dispute Since 1960," *supra*, p. 3.

[2] II, p. 430, footnote; and in particular, pp. 440-449, inclusive.

[3] II, p. 441. (Italics added.) The phrase "African Natives", in Respondent's census terminology, would include all persons "who in fact are, or who are generally accepted as, members of any aboriginal race or tribe of Africa," I, p. 109.

[4] Which Respondent appears in this context erroneously to equate with "participation ... in the central government."

[5] II, p. 441. (Italics added.)

[6] *Id.*, p. 443.

[7] *Id.*, p. 442.

[8] Iraq, Liberia, Ceylon and Guinea, II, p. 444. Respondent quotes, apparently with disapproval, a statement by the Representative of Liberia: "*No amount of development could compensate for lack of freedom.*" *(Ibid.)* (Italics added.) Applicants consider this to be an impeccably valid principle, which they hereby reaffirm.

[9] *Id.*, p. 445.

On the basis of the foregoing considerations, *inter alia*, Respondent continues:

> "... The present proceedings against Respondent are to be seen as part of this political campaign [1] designed to bring South West Africa (and eventually the Republic of South Africa itself) into line with the new governmental systems established in other parts of Africa, and to achieve for the Territory majority rule by the Native population—as an overriding objective to which all other aspects and implications are to be subordinated." [2]

Respondent concludes, with a sweepingly declaratory judgment:

> "It will be apparent from the facts set out in the previous paragraphs, that the Applicants in the present case are in substance only nominal parties to the proceedings, the real parties being the independent African States, and that the main purpose of this action is to secure political independence for the Territory." [3]

Applicants do not consider compatible with the dignity of this Honourable Court, or with the gravity of the issues in dispute in these Proceedings, to reply to irresponsible and unwarranted comments of such a nature. The Court itself has declared, what the record herein makes inescapably clear, that

> "... behind the present dispute there is another and similar disagreement on points of law and fact—a similar conflict of legal views and interests—between the Respondent on the one hand, and *the other Members of the United Nations holding identical views with the Applicants*, on the other hand." [4]

The attribution by Respondent to such other Members of the United Nations—comprising the vast majority of the whole—of views and convictions so weak, indecisive or vacillating as to be deemed the product of "pressures" or "political action" [5] on the part of other Governments is unworthy of serious reply.

In view of Respondent's misinterpretations and misconceptions of the actual views and attitudes of other Governments, however, the following examples—selected from innumerable similar statements by Member States throughout the years—are relevant:

a. *United States*

The late President John F. Kennedy (Address to United Nations General Assembly, 1963):

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[1] *I.e.*, the "demand for accelerated political progress," *supra*, p. 234, footnote 6.

[2] II, p. 446. Respondent thereupon quotes resolutions adopted by the Second Conference of Independent African States, Addis Ababa, June 1960, and by the "Summit Conference," Addis Ababa, May 1963, as well as statements by the President and the Secretary of State of Liberia, stressing, *inter alia*, the attainment of independence or trusteeship for South West Africa, *id.*, pp. 447-449.

[3] *Id.*, p. 448.

[4] *Judgment*, p. 345. (Italics added.)

[5] Whatever these undefined and tendentious terms may be taken to signify.

". . . We are opposed to *apartheid* and all forms of human oppression. We do not advocate the rights of black Africans in order to drive out white Africans. Our concern is the right of all men to equal protection under the law—and since human rights are indivisible, this body cannot stand aside when those rights are abused or neglected by any Member State." [1]

b. *United States*

Ambassador Adlai Stevenson, United States Representative to the United Nations:

"We all suffer from the disease of discrimination in various forms, but at least most of us recognize the disease for what it is: a disfiguring blight. The whole part is that, in many countries, government policies are dedicated to rooting out this dread syndrome of prejudice and discrimination, while in South Africa we see the anachronistic spectacle of the Government of a great people *which persists in seeing the disease as the remedy, prescribing for the malady of racism the bitter toxic of apartheid.*" [2]

c. *United States*

Ambassador Sidney R. Yates, United States Representative to the Fourth Committee of the General Assembly:

"By extending the apartheid laws to South West Africa the mandatory power is, in the view of my Government, *clearly delinquent in its obligations to the international community and to the population of South West Africa.* These obligations are set forth explicitly in Article 2 of the mandate which states that South Africa 'shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory.'

"Mr. Chairman, *my Delegation believes not only that there is neither legal nor political basis for the apartheid laws in South Africa;* there is also no moral basis for such laws anywhere in the world, let alone in a territory such as South West Africa which has a clear international character, which was given to the government of South Africa as 'a sacred trust of civilization.'

"My Delegation believes, further, in the right of the people of South West Africa to self-determination as promptly as the expression may be freely and responsibly exercised. We would be strongly opposed to any division of the territory of South West Africa without the freely expressed consent of its people. We would be strongly opposed to the annexation by any state of all or any part of the territory without such consent.

"Mr. Chairman, my Delegation is encouraged that there are voices of white people still in South Africa calling for a restoration of reasons [*sic*]. In this connection, it was refreshing and reassuring to my Delegation to read a recent article which appeared in the publication, "Forum," a South African periodical, which urged the application of

[1] G.A.O.R. 18th Sess., 1209th meeting 31 (A/PV.1209).
[2] S.C.O.R. 18th year, 1052nd meeting 31 (S/PV.1052). (Italics added.)

reason and realism by the people of South Africa to the racial situation.

"The author of this article reminded the white South Africans that they, in fact, are the only actors in this looming tragedy who may have some ability to avert the onset of violence. In this South African article, the author suggests the following steps by white South Africans:

'Primarily they can hold fast to the principles of western civilization. *They can denounce at every opportunity the philosophy, the policy and the administrative practices of apartheid.* They can oppose it and frustrate it by all legal means. They can begin their crusade on behalf of human rights in our country. Theirs is the most worthwhile crusade of all—a crusade against unnecessary dying.' " [1]

d. *United Kingdom*

Prime Minister Macmillan:

". . . All kinds of discrimination, not only racial but political, religious and cultural, in one form or another have been and are still practised, often as a survival of long tradition; but the fundamental difference between ours and the South African philosophy is that we are trying to escape from these inherited practices. We are trying, with varying degrees of success but always with a single purpose, to move away from this concept in any form. What shocked the Conference was that the policy of the present South African Government appeared to set up what we would regard as an unhappy practice, inherited from the past, perhaps, as a philosophy of action for the future.

"This philosophy seemed altogether remote from and, indeed abhorrent to the ideals towards which mankind is struggling in this century, in the free world at any rate, and perhaps, who knows, sooner or later behind the Iron Curtain. It was not therefore because all of us are without sin that we felt so strongly. It was because this *apartheid* theory transposes what we regard as a wrong into a right. I do not question the sincerity with which these views are held by many people in South Africa, or their very deep conviction that theirs is the right course in the interests of all races; *but we in Britain have never been in doubt that this is a wrong course.*" [2]

e. *United Kingdom*

Mr. Patrick Wall, Member of the United Kingdom Parliament; Summary Minutes of Address to the Fourth Committee:

". . . [F]or over forty years, whatever the material progress that might have been made, the South African Government had deprived the indigenous inhabitants of the Territory of their basic human rights. His Government's position was quite clear: it could

[1] Statement in the Fourth Committee, 30 October 1963 (A/C.4/S.R. 1461). (Italics added.)

[2] Address to the House of Commons, 22 March 1961. (British Information Services Release No. T. 11 of 23 March 1961.) (Italics added.)

not accept a system which set men on different levels because or colour, or which enabled the men of one race to have complete power over the men of another by denying them the rights that should be theirs. *Apartheid was morally abominable, intellectually grotesque and spiritually indefensible.* Thus, the Government of South Africa was sufficiently to be blamed for the existence in South West Africa of a situation in which the rights of the individual were set at nought unless his skin was of the right colour." [1]

f. *United Kingdom*

Hon. Peter Smithers, M.P.; Address to the Fourth Committee:

"The people and Government of the United Kingdom were opposed to *apartheid* or to racial discrimination wherever they were practised; they considered them to be reprehensible morally and calamitous politically. *The equality of men before the law was a fundamental principle upon which the democracy of Britain rested.* The United Kingdom did not believe that societies could thrive, or nations command the universal loyalty which gives them life, unless they gave full recognition to that principle. There should be no doubt in the minds of the Committee on that point. *The Government of the United Kingdom was opposed to the policy of apartheid wherever it might be found.* The actions of the United Kingdom delegation in the matter of [*sic*] the Fourth Committee were all taken with that conviction firmly in mind, and with the intention of taking those steps which were most likely to benefit the inhabitants of the Territory [of South West Africa].

"The United Kingdom was frequently called upon to use its influence with the South African Government to persuade it to abandon its racial policies, and was sometimes reproached for not having done so. He submitted that by its policies in Africa and elsewhere the United Kingdom had done far more than any other Power to throw the practice of *apartheid* into isolation. He could not see by what right any delegation reproached a country *whose Prime Minister had delivered in the South African Parliament itself a categorical rejection of the doctrine of* apartheid." [2]

g. *France*

Ambassador Bérard:

"Racial discrimination and segregation have always been utterly foreign to the French way of thinking and to the policy which my country has followed in the past and continues to follow today. For centuries the idea of equality between men, to whatever group or nationality they belong, in whatever clime they were born, whatever their religion or race, has inspired French philosophy, which is based on reason and universality. Our thinkers and writers have developed and disseminated this doctrine. It was France

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[1] G.A.O.R. 17th Sess., 4th Comm. 332 (A/C.4/SR.1380).
[2] G.A.O.R. 15th Sess., 4th Comm. 83 (A/C.4/SR. 1113). (Italics added)

which first solemnly proclaimed the principle of equality, made it the basis of its institutions and established it as a rule of government. . . .

"All France's action in the African continent is inspired by these principles. They have guided the evolution of the States of the Community. We are convinced that they should guide all African life. . . . It takes its stand equally firmly against any kind of racialism on the African continent, whether white or black, against the exclusion of anyone from the life of a political community for racial reasons, against any limitation or hindrance to any person's activities. It proclaims that the hope of peace and of a better future depends on the ever closer co-operation and integration of the various human races in a world which is shrinking every year." [1]

h. *Norway*

"It is the Norwegian view that this legislative trend is deplorable and indeed indefensible. This repressive legislation is in itself a clear and unmistakable proof that the policy of *apartheid* is inhuman by its very nature since it requires such inhuman measures to ensure its implementation. We Norwegians still have fresh in our memory similar efforts to repress human rights and elementary freedoms which were to be the dawn of a dark millenium of Nazi rule and supremacy, which happily did not come about thanks to the persistence of the United Nations in the Second World War. . . .

". . . The Government deems it revolting that the South African authorities continuously sharpen the *apartheid* laws and their execution in spite of the urgent appeals from the United Nations that they abandon this policy. The new addition of the so-called anti-sabotage laws gives reason to fear that the authorities in South Africa are so determined to continue their policy of racial discrimination and segregation that they will not hesitate to employ pure police-state methods." [2]

i. *Ireland*

". . . [The Irish] delegation viewed 'apartheid' and all racial discrimination as a violation of natural law and therefore an intrinsically evil thing. All human beings possessed certain fundamental rights from their first creation and the authors of 'apartheid' in attempting to interfere with, or suppress, those rights were guilty of a perversion of natural law. *As practised in South Africa, that evil was total.* The non-white population of South Africa suffered not from a partial repression of freedom but an absolute one, attempting to control every movement of their daily lives and ensuring their political captivity and economic servitude. Moreover, the system was not temporary but was designed to be per-

[1] S.C.O.R., 15th year, 854th meeting at 2-3 (S/PV.854).
[2] S.C.O.R., 18th year, 1055th meeting at 6-7 (S/PV.1055)

manent and enduring Thus, the United Nations, dedicated to the establishment of perfect racial equality between all peoples, was confronted by a powerful sovereign nation obstinately dedicated to complete racial inequality.

"*The unanimous repugnance of the civilized world to 'apartheid', as reflected in the Committee from year to year, was in itself a condemnation of the inherent unwholesomeness of 'apartheid'*. The situation it created was a cause for sorrow and apprehension, sorrow at the deprivations suffered by the non-whites in South Africa and apprehension for the rulers of South Africa themselves, who must inevitably be contaminated and corrupted by the operation of that cruel system. It was a tragic irony of the times that the morning of independence for the peoples of Africa should be overcast by the shadow of 'apartheid.' " [1]

j. *Poland*

"Racialism was a venomous and contagious disease. Its gains in one country affected all humanity. Conversely, any achievement in the struggle against prejudice and discrimination set an example for all mankind. Therein lay the international significance of the South African situation. Poland was particularly sensitive to the dangers of racial prejudice, for it had learned the lesson of the ultimate consequences of the doctrine of racial superiority in a hard school. There could be no doubt as to the ultimate fate of *apartheid*, like any other reactionary tendency which went against the major trends of history, it was bound to lose." [2]

k. *Japan*

". . .[A]*partheid* persisted as a cancer on the body politic of the African continent and indeed of the world." [3]

l. *Malaya*

"The policy of apartheid was not only an affront to human dignity and a gross violation of the Charter but also, based as it was on an ill-conceived notion of the superiority of one race over another, a direct negation of the self-evident truth that all men were equal before God. Under the high sounding slogan of 'separate development' lay the iniquitous policy of the imposition of white supremacy over the vast majority of the South African population—a policy which was intended solely to preserve, consolidate and perpetuate the dominant position of the white minority vis-à-vis the African people." [4]

m. *Greece*

"In discussing matters of such fundamental human importance, there was no need to invoke the provisions of the Charter, for the

[1] G.A.O.R., 16th Sess., Special Pol. Comm. at 83 (A/SPC/SR.275). (Italics added.)
[2] G.A.O.R. 14th Sess., Special Pol. Comm. at 49 (A/SPC/SR.336).
[3] G.A.O.R. 18th Sess., Special Pol. Comm. at 13 (A/SPC/SR.390).
[4] G.A.O.R. 17th Sess., Special Pol. Comm. at 49 (A/SPC/SR.336).

Charter was transcended by the unwritten law recognizing the fundamental rights and freedoms of all men, the origin of which was lost in the mists of time. For three thousand years Greece had fought in defence of freedom, and it was continuing that fight today side by side with a people of the same national origin and the same civilization, which was struggling to free itself from foreign domination. *Faithful to the traditions, principles and ideals it had always upheld, Greece wished to make an appeal to the Government of the Union of South Africa and to warn it of the dire consequences to which its racial policy might lead.*" [1]

n. *China*

"The case against *apartheid* is precisely that it does not promote harmony and peace. On the contrary, it constitutes a constant source of conflict and violence. The Sharpeville incident in 1960 should have made this perfectly clear. So long as South Africa persists in enforcing the *apartheid* programme, greater tragedies may yet take place." [2]

o. *Mexico*

"... [South Africa is] hampering the material and moral well-being of the inhabitants of the Territory and impeding their normal development towards independence by the practice of racial segregation in all aspects of social life and by denying them their fundamental rights and freedoms.

"In particular, South Africa has been guilty of the following practices, which are in direct conflict with the obligations imposed by the Mandate: it allows only persons of European origin the right to vote and to be elected to the main legislative bodies of the Territory; it maintains an odious system of racial segregation in education; it establishes segregated residential areas based on race, colour and national or tribal origin; it denies the right to join trade unions to any person who is a 'member of any Native race or tribe of Africa'; it denies non-Europeans the entry to a large number of professions ... its legislation qualifies some of the workers in the Territory as 'servants' and their employers as 'masters.' The 'servants' are subjected to corporal punishment for any breach of their labour contract; the Native inhabitants are forced to live in specific urban areas; the Native inhabitants are subjected to a complicated system of passes governing their movements in the Territory, which is contrary to human dignity. ..." [3]

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[1] G.A.O.R. 13th Sess., Special Pol. Comm. at 20 (A/SPC/SR.89). (Italics added.)
[2] S.C.O.R. 13th year, 1053rd meeting at 41 (S/PV.1053).
[3] G.A.O.R. 16th Sess., 4th Comm. at 98 (A/C.4/507).

p. *The Netherlands*

". . . [The Netherlands Representative stated] that his Delegation had consistently condemned both the policy and practice of racial discrimination. Without denying the complexity of the problems facing the white minority in South Africa, the Netherlands considered that apartheid not only failed to afford any solution to those problems, but must inevitably lead to disastrous consequences.

"As the situation in South Africa had deteriorated, the Netherlands had become ever louder in its condemnation of the racial policies carried out by the South African Government. Now it could hardly find words strong enough to express its abhorrence of apartheid. . . ."[1]

q. *Pakistan*

"Pakistan's condemnation of apartheid had a wider and a stronger basis than the South African Government's maltreatment of people of Indo-Pakistan origin. Pakistan was an Islamic State and the Islamic ideology stood for equality, freedom and social justice. It completely rejected the concept of racial superiority. Racial discrimination was, therefore, alien and repugnant to Islam and its followers." [2]

Also:

"The Union of South Africa has embarked upon a course of national policy which has resulted in bloodshed in the past and which unfolds for the future a prospect of unending strife and violence. Its structure of 'apartheid' is based on a colonial concept of racial supremacy." [3]

3. *THE WEIGHT OF CONTEMPORARY SCIENTIFIC AUTHORITY*

Respondent's formulations of its policy of *apartheid*, or separate development, are based, *inter alia*, upon explicit and implicit assumptions concerning patterns of human behaviour, and asserted limits upon the ability of public authorities to influence or affect such behaviour. These assumptions, stated for the most part in the form of generalizations, appear clearly, for example, in Respondent's rationale of its policy on Education in the Territory.[4]

Respondent's underlying premises are, in effect, that historical circumstances have created a situation in which members of different "groups" *prefer* to "associate with members of their own group"; that "many Europeans, in all probability the vast majority, *are not prepared* to serve in positions where Bantu are placed in a position of authority over them"; that these are "social phenomena which exist as facts, *independently of any governmental*

[1] G.A.O.R. 17th Sess., Special Pol. Comm. at 38 (A/SPC/SR.334).
[2] G.A.O.R. 17th Sess., Special Pol. Comm. at 22 (A/SPC/SR.331).
[3] S.C.O.R. 15th year, 852nd meeting at 30 (S/PV.852).
[4] III, pp. 528-530; quoted pp. 266-268, *supra*.

policy, legislation or administrative practices"; and that "whatever the moral rights or wrongs pertaining to them in particular situations, there can be no denial that such group reactions exist as *facts of which due cognizance must needs be taken by any realistic government.*"[1]

On the basis of such assumptions and generalizations, Respondent accordingly concludes that efforts on its part to seek guarantees of equality of access of all individuals to employment, equal educational opportunities, equal residence rights and the like, would bring about refusal of white persons to continue to operate the economy, with the result that Respondent would be compelled to reinstate differential opportunities at a later stage and this, in turn, would have the consequence of creating a sense of "frustration" and unhappiness among "non-white groups" greater than they feel under the present system, under which they are "sheltered" from the unattainable.[2] Such contentions are repeated throughout the *Counter-Memorial.*

Discussing the limitation of certain posts to "Europeans" in the mining industry, Respondent argues:

> "The reasons underlying the above provisions flow from the traditional relationship between the Europeans and Native population groups of the Territory. 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. These factors are accentuated by the fact that the members of the European group have traditionally occupied a position of guardianship in respect of the indigenous groups, and that in the economic field the relationship between Europeans and Natives has generally been limited to that of employers and employees.
>
> "In this factual situation, most Europeans would refuse to serve in positions where Natives might be placed in authority over them. Although very few, if any, Natives in the Territory would at present be able to hold any of the posts mentioned in the aforegoing paragraph, Respondent was nevertheless *obliged to take cognizance of the factual situation*, and for the considerations aforestated, *to adopt measures which would prevent Natives employed in European-owned mining enterprises from being appointed to technical and responsible posts in which they would exercise authority over European co-employees.*" [3]

Respondent argues further, in discussing restrictions on employment opportunities in railways and harbours:

> ". . . On the one hand there was the danger of estrangement of members of the White group from fields of employment which required their services. On the other hand there was the prospect

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[1] *Ibid., passim.* (Italics added.)
[2] *Id.*, p. 528, para. (e); p. 530, para. (i); p. 531, para. (n).
[3] **III**, p. 55. (Italics added.)

> that in many avenues non-Europeans would find progress almost completely barred—through superior qualifications, ability or experience on the part of White competitors, *or through prejudicial reaction on the part of employers*, or through a combination of these *—whereby they would increasingly experience disillusionment and frustration. Goodwill and good relations across group and racial borders would suffer immeasurably.*" [1]

Respondent, accordingly, concludes:

> ". . . Displacement of European employees in graded posts by Native employees, on Native trains, would, as the Minister saw it, *and as matters then stood*, have caused grave dissatisfaction amongst European employees and the public." [2]

Respondent persists in the theme that it is helpless to act other than as it presently does, if it wishes to act responsibly. Thus, in discussing rights of residence, Respondent asserts:

> ". . . When Respondent assumed the Mandate, it was consequently *only logical* to reserve, as far as practicable, to the various groups areas in which their members could live, to the exclusion of members of other groups." [3]

In justifying its maintenance of a system of segregated educational facilities, Respondent declares:

> "Respondent was *virtually compelled* to adopt the course aforestated by the facts of the situation as it found them on taking over control of South West Africa; and such course in turn regulated the application of funds in providing educational facilities for the different population groups. Any other approach based, for example, on the supposition that all groups should at all points of time be treated equally in the allocation of funds—also in the educational field—would have been *completely artificial* in the circumstances of the Territory." [4]

Respondent further justifies the absence of a system of compulsory education for non-whites in South West Africa by arguing:

> ". . . In the light of its experience, the Administration has no doubt that any system of compulsory education, unless it can be introduced with the consent of the Native group concerned and with full appreciation on its part of what it will entail, will *inevitably* lead to dissatisfaction and probably also destroy much of the good work that has been done in the past." [5]

Summarizing its assertion that members of different racial groups prefer separate employment, that "Europeans" are not prepared to serve in positions subordinate to "Bantu," and hence

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[1] III, p. 65. (Italics added.)
[2] *Id.*, p. 67. (Italics added.)
[3] *Id.*, p. 232. (Italics added.)
[4] *Id.*, p. 383. (Italics added.)
[5] *Id.*, p. 393. (Italics added.)

that education of the "Bantu" for positions he cannot attain would "frustrate" him, Respondent states:

> "The matters referred to in sub-paragraphs (c), (d), and (e) above are *social phenomena which exist as facts, independently of any governmental policy, legislation or administrative practices*—as indeed they manifest themselves, to a greater or lesser extent, in mixed or plural communities throughout the world. . . . Whatever their exact nature or causes, and whatever the moral rights or wrongs pertaining to them in particular situations, *there can be no denial that such group reactions exist as facts of which due cognizance must needs be taken by any realistic government.*" [1]

The same premises underly the Report of the Odendaal Commission[2] whose findings Respondent fully supports.[3]

The Odendaal Commission, in explaining its recommendations, argues:

> ". . . [A] policy of integration is unrealistic, unsound, and undesirable, and *cannot but result* in continual social discrimination, discontent and frustration, friction and violence—a climate in which no socio-economic progress can be expected to take place. Under such conditions the social cost in non-economic terms must outweigh any possible economic advantages. In the circumstances it is therefore *desirable to accept the position as it is and not to put idealism before realism.*" [4]

Respondent seeks also to justify its policy on the basis of comparisons with human behaviour at all times and in all places. It suggests that its assumptions hold for at least a certain category of situations, *e.g.*, all African countries.[5]

Elsewhere, however, Respondent contends that the most analogous situation for comparative purposes is that of all mixed, plural, or multi-racial communities in the world.[6]

In reply, Applicants show that, to the contrary, the foregoing assumptions and generalizations, asserted by Respondent to underly and shape its policy of *apartheid*, or separate development, are contrary to, and are rejected by, the overwhelming weight of authority in the political and social sciences.

(A) Respondent's contention regarding "difference" without "inferiority"

Although as has been stated above,[7] Respondent avers that its "policy is not based on people being inferior but being different" — a policy of differentiation pursuant to which status, rights, duties

[1] **III**, pp. 528-529. (Italics added.)
[2] *Supra*, p. 270.
[3] *Memorandum*, para. 21 (**IV**, p. 213).
[4] *Odendaal Commission Report*, p. 427, para. 1434. (Italics added.)
[5] **II**, p. 383; Book IV *passim*; **III**, p. 57; *id.*, p. 381.
[6] **III**, p. 528.
[7] *Supra*, p. 268.

opportunities and burdens are allotted on the basis of group, race or colour, necessarily implies not only that some "groups" are inferior, but that individual members thereof are "permanently and irremediably inferior." [1]

Whatever may be the intended significance of Respondent's above-quoted statement, the overwhelming weight of authority in the sciences of biology, psychology, sociology and anthropology argue that no scientific evidence supports an assumption that groups or races differ innately.

Professor Philip V. Tobias, President of the Institute for the Study of Man and Head of the Department of Anatomy, University of the Witwatersrand, declares:

> "Racially discriminatory practices make certain assumptions about race, sometimes overtly, sometimes tacitly and sometimes couched under new names, such as cultural differences. These include:
>
> "(i) the assumption that races are pure and distinct entities;
>
> "(ii) the assumption that all members of a race look alike and think and act alike; basic to this one is the idea that how one behaves depends on one's genes;
>
> "(iii) the assumption that some races are better than others, some indeed falling right outside the magic circle of love and brotherhood, not being worthy of one's finest feelings because they are inferior beings."

Dr. Tobias concludes:

> *"Science provides no evidence that any single one of the assumptions underlying South Africa's racial legislation is justified."* [2]

The Court's attention is respectfully drawn to additional authorities, cited in Annex 12, page 590, *infra*.

(B) Respondent's contention of inevitable "frustation" if all inhabitants of the Territory are accorded equal opportunity [3]

The basic fallacy of Respondent's contention, captioned above, consists, in the scientifically demonstrable fact that the greatest "frustration" is caused by denial of equal opportunity inherent in the policy of *apartheid* itself.

> "The pattern of community practices is the fountainhead of prejudice: of prejudiced behavior and of prejudiced attitudes.
>
> "The growing child learns his social behavior primarily by following the modes and models of behavior around him. Indeed, he has little choice. ...

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[1] Philip Mason, in Annex 1, p. 339, *infra*.
[2] *The Meaning of Race* 22 (1961). (Italics added.)
[3] *Supra*, pp. 267-268, 270-273.

"These are the social situations, *i.e.*, the overt sets of relationships with which the child is surrounded. He does not have to be *told* that Negroes are 'inferior,' or what his relationships to them are supposed to be. These are apparent." [1]

The classic study of I. D. MacCrone, Professor of Psychology at Witwatersrand University, applies the foregoing principle to South Africa:

"... [W]e find that [the] present economic, political and social structure [of South Africa] invariably tends to lay upon the black the stigma of inferiority. From early childhood the white man is accustomed to look down upon the black as a member of the servant class, as one who definitely occupies an inferior status in the social system. ... *The result of such a system is, of course, unavoidable.* The white child growing up in such a community inevitably tends to regard the black as a menial by nature, as an inferior to be looked down upon with feelings of superiority and contempt." [2]

Dr. Robert MacIver, Columbia University (U.S.A.), has observed that:

"Under all conditions the discrimination of group against group is detrimental to the well-being of the community. Those who are discriminated against are balked in their social impulses, are prevented from developing their capacities, become warped or frustrated, secretly or openly nurse a spirit of animosity against the dominant group." [3]

Similarly, Dr. Kenneth Clark argues:

"... [T]he evidence from social-science research, from general observations, from clinical material, and from theoretical analyses consistently indicates that the personality pattern of minority-group individuals is influenced by the fact of their minority status." [4]

The United States Supreme Court has unanimously expressed the same view:

"To separate [children in grade and high schools] 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]

(C) Respondent's contention that as a "realistic government" it must support existing "group reactions" [6]

Respondent's contention, captioned above, is refuted by the overwhelming weight of scientific authority. Its basic fallacy

[1] Raab and Lipset, "The Prejudiced Society," in Raab (ed.) *American Race Relations Today* 48-49 (1962).
[2] *Race Attitudes in South Africa* 261 (1937).
[3] *The Web of Government* 428 (1947).
[4] *Prejudice and Your Child* 47 (2nd ed. 1963).
[5] *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954).
[6] *Supra*, pp. 269-273.

consists in its disregard of the fact that, inasmuch as attitudes of prejudice, discrimination and fear are generated by individuals through their social structure and processes, such attitudes likewise can be modified through the social structure and processes and, in particular, through governmental action.

Respondent's obligation under the Mandate to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory" is, and has been, within its capacity of accomplishment, because its failure to discharge its obligation in this regard has been systematic and deliberate.

The following scientific reasons and authorities establish the fallacy of Respondent's contention, as summarized above.

In the first place, many prejudiced persons will not discriminate in a non-discriminatory situation. As J. Dean and A. Rosen observe:

> "Within wide limits, prejudiced persons will accept and participate in a thoroughly mixed and integrated setting if integrated patterns are established and accepted as appropriate by other participants in that situation." [1]

G. Saenger, discussing the likelihood of a prejudiced or a democratic reaction to proposals for desegregation, concludes that much

> ". . . depends not only upon the relative strength of the conflicting desires, but also upon the social pressures exerted upon the prejudiced and the situation in which the conflict occurs. The desire to conform with prevailing public opinion is foremost in his mind." [2]

Racial or group attitudes are not decisive indicators as to how people will act in a racial or group situation. The social demands of such a situation, particularly when enforced by authority, are effective determinants of individual action.[3]

A clear definition of law and policy by governmental authorities can facilitate a change in behaviour.[4] Most individuals in a society prefer to obey the law, even if they disapprove of behaviour required of them.

> ". . . Most people will obey legislation that is properly enforced and will tend to bring their ideas into consistent relationship to their obedient action." [5]

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[1] *A Manual of Intergroup Relations* 59-60 (1963). They offer evidence drawn from the study of two cities in the Southwestern United States for this proposition. The custom in both cities was normally to have segregated facilities in theatres. When, for various reasons of convenience, the seating was integrated, there was no demonstrable reluctance of anyone to attend these theatres.

[2] *The Social Psychology of Prejudice* 240 (1953).

[3] Blumer, "Research on Race Relations: United States of America." 40 *International Social Science Bulletin* No. 3, p. 432 (1958).

[4] Williams and Ryan, *Schools in Transition* 247 (1954).

[5] Suchman, *et al.*, *Desegregation: Some Propositions and Research Suggestions* 37 (1958).

Authorities agree that enforcement of legislation can be a decisive means of overcoming discriminatory behaviour and reducing conflicts between groups.

Dr. G. Saenger states:

> "While enforced legislation does not suffice to erase discrimination completely, it appears to be one of the most successful techniques for the acceleration of progress, even though there is reason to believe that none of the existing laws are used to the fullest extent possible." [1]

Similarly, M. Tumin[2] and R. M. Williams, Jr.[3] comment on the positive role legislation and law enforcement can play in changing behaviour and reducing racial conflict.

A Memorandum submitted by the Secretary-General of the United Nations in 1949 summarizes the reasons why legal action serves to reduce the incidence of discrimination or other manifestations of prejudice or fear:

> "(a) It fosters the conviction that discrimination is wrong by fixing standards which are respected by the great majority of people.
>
> "(b) People who have little respect for the law are nevertheless afraid of the consequences of unlawful conduct; they therefore obey the law in order to avoid its penalties.
>
> "(c) In both cases and whatever the motive, the resulting daily behaviour tends to create social customs which are in harmony with the law; these customs constitute a powerful collective force.
>
> "(d) The law can also help repair the harm produced by unlawful conduct, in so far as it can provide indemnities and reparation for the person wronged." [4]

Respondent's assertion that it is in the grip of social "facts," [5] implies that legislation can only follow a change in public opinion, and that attempts to anticipate or modify public opinion are "unrealistic," or even dangerous. Such an assumption is similarly rejected by modern social science.

Dr. Gordon Allport, Professor of Psychology at Harvard University, speaking of race relations in the United States, notes:

> ". . . While it is true that unless a fairly large percentage of the people are in favor of a law it will not work, yet it is false to say that folkways must always take precedence over stateways. It was the Jim Crow laws in the south that in large part *created* folk-

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[1] *The Social Psychology of Prejudice* 271 (1953).
[2] Tumin, *Desegregation: Resistance and Readiness* 168-69 (1958).
[3] Williams, *Reduction of Intergroup Tensions*, 73-75 (1947).
[4] United Nations, *Main Types and Causes of Discrimination* 43 (E/CN.4/Sub.2/40/Rev.1) (1949).
[5] *Supra*, pp. 267-271.

ways. Similarly, we have seen that FEPC legislation quickly creates new folkways in a factory or department store. Within a few weeks, Negroes, Mexicans, or Jews are accepted as a matter of course in occupations where for decades they had been excluded." [1]

M. Tumin similarly argues:

"It is true that many persons in the South do not seem to feel very different about Negroes and Negro rights than did their ancestors two or three generations ago. It is equally true that many of them behave very differently in these matters than did their ancestors. In short, social action has been modified and cultural patterns have been revised without any *commensurate* and corresponding modification and revision of the basic feelings involved." [2]

K. Clark also argues that one need not change men's hearts (attitudes) before one can change their social behaviour.[3]

M. Deutsch concludes, to the same effect:

"There is strong evidence . . . that the social catalyst of change is a felt need to adhere to the law of the land. Particularly is this true in the middle classes and in the community power centers." [4]

In a study devoted to the effectiveness of a New York State law prohibiting discrimination, M. Berger demonstrated that the law has reduced discrimination in employment and concludes:

"Thus we have seen the efficacy of law in controlling the behavior of persons who acquire prejudice as they acquire other social values from the group to which they belong, and the behavior of those whose prejudice is more deeply rooted in personality disorders." [5]

H. Potter, reviewing similar legislation in Ontario, Canada, dating from 1944, concludes that the atmosphere created by the legislation has had a positive influence:

"The wind of change has blown through business offices, banks and stores, as well as through parliamentary chambers. In Montreal, for instance, all five of the English department stores employ coloured men and women in a variety of occupations." [6]

R. A. Kelly, discussing government action as an instrument of fostering integration of the Maoris in New Zealand, states:

"The great advances made by the Maori in the post-war period have sprung from the legislation of the few years from 1935, and from the Maori Social and Economic Advancement Act of 1945. Government, from being a passive instrument that had removed

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[1] *The Nature of Prejudice* 470-71 (1954).
[2] *Desegregation: Resistance and Readiness* 22 (1958).
[3] "Desegregation: An Appraisal of the Evidence," 9 *Journal of Social Issues*
[4] (1953).
71-72"Some Perspectives on Desegregation Research," *The Role of the Social Sciences in Desegregation: A Symposium* 5 (1958).
[5] *Equality by Statute* 186 (1952).
[6] "Negroes in Canada," 3 *Race* 54 (November 1961).

disabilities, changes in the next decade to an active promoter of racial integration in New Zealand and of the economic and social progress of the Maori people." [1]

Even where explicit legislation is not specially enacted, the willingness of authorities to deal swiftly and strongly with instances of disorder provoked by sentiments of racial prejudice can be effective, as the reactions of the Government of the United Kingdom to the Nottingham disturbances in 1958 clearly show. The Earl of Lucan commented in the House of Lords on why the disturbances were so quickly forgotten:

"I believe the reason why they were forgotten so soon was that after the first two outbreaks nothing further happened; and the fact that they did not recur is due to a number of factors, one of which was the fact that the law was very quickly and firmly asserted.

"Another factor was that declarations were made immediately by a number of public figures, some Ministers and members of the Opposition; and the Press almost unanimously condemned the outbreaks." [2]

But the Earl of Lucan called nonetheless for legislation on the following grounds:

"Not the least of the advantages of legislation is that it gives support to those of good will who otherwise might find it difficult to stand up against local opinion." [3]

It must be concluded that Respondent, by refusing to act against racial discrimination, has encouraged and abetted it. By official action Respondent could not merely have reduced discriminatory behaviour; it could have reduced the attitudes of prejudice that lay behind the behaviour. All competent authorities agree with W. Maslow that "legislation is educative." [4] Or, as A. Rose has stated:

"A significant amount of evidence has become available to indicate that the attitude of prejudice, or at least the practice of discrimination, can be substantially reduced by authoritative order." [5]

Or, as C. R. Nixon states, concerning the United States:

". . . Where law is not enforced, the law is ineffective; but where law enforcement procedures are firm, then the law can have an important effect on existing attitudes." [6]

[1] "The Politics of Racial Equality," 24 *New Zealand Journal of Public Administration* No. 2, p. 32 (1962).

[2] 212 H.L. Deb. (5th ser.) 684 (1958).

[3] *Id.*, p. 683.

[4] "Prejudice, Discrimination, and the Law," 275 *Annals of the American Academy of Political and Social Science* 16-17 (1951).

[5] "The Influence of Legislation on Prejudice," in Rose (ed.), *Race, Prejudice and Discrimination* 546 (1951).

[6] "Law, Race Relations, and Social Change in the United States," 22 *Race Relations Journal*, No. 1, p. 11 (1955).

Inaction, or, indeed, negative action in this regard on the part of Respondent has in consequence hindered the well-being and thwarted the social progress of the inhabitants of the Territory.

> "When discrimination is eliminated, prejudice . . . tends to lessen." [1]

It follows that acts of discrimination are, as the United States Supreme Court noted as early as 1879, in respect of exclusion of Negroes from jury-duty, "a stimulant to that race prejudice." [2]

4. *HISTORY AND CHARACTER OF THE SYSTEM OF "HOMELANDS" OR "TERRITORIAL APARTHEID"*

Respondent's formulation of the premises underlying the policy of "separate development" have been set out in this Reply,[3] and, for the Court's convenience, may be summed up here, again in Respondent's own words:

> "The only remaining alternative is therefore that of 'live and let live', [4] a policy which seeks to remove the competition and conflicts of interest which lead to a struggle for supremacy in an attempted process of integration, and which seeks to bring about *free, self-governing communities* which can co-operate with one another *as the nations of the world do in matters of mutual economic and other interest.*" [5]

Respondent avers further:

> ". . . Respondent proposes in this regard *to apply experience gained in the same direction in South Africa,* and to guide *the groups* towards an application of measures whereby an evolution will be possible from traditional systems to others *more suited to the conditions of the modern world*". [6]

The "experience gained in the same direction in South Africa," to which Respondent refers in this context, is a system comprising "three types of Bantu authorities, *viz.*, Tribal, Regional and Territorial Authorities." [7] Respondent asserts that

> "The acceptance of Bantu Authorities by the indigenous population groups and the development potential of this system has been strikingly illustrated by events in the Transkei." [8]

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[1] Allport, *The Nature of Prejudice* 472 (1954).

[2] *Vide*: *Strauder* v. *West Virginia*, 100 U.S. 303, at 308 (1879); cited in Maslow, "Prejudice, Discrimination, and the Law," 275 *Annals of the American Academy of Political and Social Science* 12 (1951).

[3] *Supra*, pp. 264-268.

[4] **II**, p. 460, defines this phrase as synonymous with "separate development."

[5] *Id.*, p. 473. (Italics added.)

[6] *Id.*, p. 474. (Italics added.)

[7] *Id.*, p. 478.

[8] *Id.*, p. 479.

Respondent sets forth in the *Counter-Memorial* its version of the origins and characteristics of the "self-governing" Transkei, the first of Respondent's projected series of "Bantustans" or "Homelands."[1]

By way of underscoring the relevance to these proceedings of its policy in South Africa, Respondent states:

> "Although these systems have not been introduced in South West Africa, a similar development, adapted to the peculiar circumstances of the Territory, is to be expected." [2]

With this expectation in view, Respondent appointed a Commission of Enquiry into South West Africa Affairs (the Odendaal Commission), the objectives, composition and terms of reference of which are set out in the *Counter-Memorial*.[3] The Report of the Commission, released 27 January 1964, has been publicly circulated and has been added by Respondent to the documentation of the instant Proceedings.[4]

In its Report, the Commission recommended, *inter alia*, the partition of the Territory into ten separate "homelands," a "Coloured" rural irrigation area, and a "White area."[5]

Respondent's Prime Minister presented to the Parliament, on 29 April 1964, the *Memorandum* [6] announcing, *inter alia*, "The Government's Attitude Concerning the Future Course of Development" of the Territory. [7]

By this *Memorandum* the Government endorsed "the view that it should be the aim, as far as practicable, to develop for each population group its own Homeland. . ." [8] In addition, the Government

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[1] **II**, pp. 478-481. It is noteworthy that Respondent has announced that it is not planning, at this stage, to grant powers of self-government in any additional South African area. (*R. of S. A., Parl. Deb., House of Assembly*, 2nd Parl., 2nd Sess. (weekly ed., 1963), Col. 8518).

[2] **II**, p. 481. Respondent there quotes a comment by its Prime Minister that if "UN asks us to do the same for the various communities in South West that we are doing for the communities in the Republic, I shall be only too glad." (*R. of S. A., Parl. Deb., House of Assembly*, 2nd Parl., 1st Sess. (weekly ed., 1962), Col. 92.)

[3] **II**, pp. 476-477.

[4] Communications from Respondent's Agent to the Registrar of the Court, dated 12 February 1964, 25 March 1964 and 28 May 1964 (the last such communication transmitting for filing the *Supplement to the Counter-Memorial*, which formally introduced the *Odendaal Commission Report* and the *Memorandum* thereon to the record of these Proceedings as relevant documents; see p. 269, footnote 7, *supra*).

[5] *Odendaal Commission Report*, pp. 81-109. A summary of the Commission's recommendations in this regard is contained in a Working Paper prepared by the United Nations Secretariat, 8 April 1964 (A/AC.109/L.108). Relevant extracts thereof are reproduced for the convenience of the Court in Annex 2, p. 341, *infra*.

[6] See p. 269, footnote 7, *supra*.

[7] *Memorandum*, sec. B (**IV**, p. 202).

[8] *Memorandum*, para. 21 (*id.*, p. 213).

announced its decisions with respect to measures of implementation which "should be executed immediately and on a large scale." [1] The basic assumptions underlying certain of such decisions, together with Respondent's express agreement with the Odendaal Commission's findings on "Homelands," [2] reaffirm Respondent's policy of applying in the Territory "experience gained in the same direction in South Africa." [3] This is consistent with its averment in the *Counter-Memorial* that

> "Respondent has for some time now been convinced that circumstances in South West Africa have also developed to a stage where accelerated and co-ordinated application of the constructive aspects of a suitably adapted policy of separate development has become possible and highly desirable." [4]

Respondent, while correctly asserting that the "policies and practices in South Africa are not in themselves matters for adjudication," nonetheless submits that it may

> ". . . by way of illustration, be instructive to have brief regard to certain aspects of what has been done and accomplished in South Africa, in pursuance of a policy of separate development, independently of any international engagement." [5]

Respondent thereupon sets forth [6] its version of "what has been done and accomplished" in the Republic. [7]

Applicants concur, although for contrary reasons, in Respondent's avowal of the "instructive" character of its "homeland" policy in South Africa with respect to the issues here in dispute involving administration of the Mandate in the Territory. Applicants deny the validity of Respondent's submission that

> ". . . the *development potential* of this system has been strikingly illustrated by events in the Transkei." [8]

Applicants respectfully submit that, to the contrary, the "events in the Transkei," cited by Respondent as the model for the future

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[1] *Memorandum*, sec. C. (*id.*, **IV**, pp. 203-211; language quoted, at p. 203). For a discussion of such measures of implementation, see Annex 10, p. 589, *infra*; such discussion is incorporated herein by reference.

[2] *Memorandum*, para. 21 (**IV**, p. 213).

[3] **II**, p. 474.

[4] *Id.*, p. 476.

[5] *Id.*, p. 477.

[6] *Id.*, pp. 477-480.

[7] The recommendations of the Odendaal Commission, accepted by Respondent "as an indication of the general course to be adopted" in the Territory (*supra*, p. 270, footnote 2), make clear that the "development to be expected" in the Territory (*supra*, p. 313, footnote 2) is, indeed, "similar" to that in South Africa itself.

[8] **II**, p. 479. (Italics added.)

development of South West Africa, as well as of South Africa, demonstrate conclusively that the premise of the "Homeland" policy is illusory and that its promise is deceptive. Measured against Respondent's obligation to promote the well-being and social progress of the inhabitants of the Territory, the policy falls cruelly and deceptively short of achieving its proclaimed objective in human terms, and violates the objectively determinable legal norms governing Respondent's obligations under Article 2 of the Mandate, as demonstrated below.[1]

Applicants deal below with the origins and character of the system of "Homelands," or "territorial *apartheid*," on the basis of considerations applicable equally to the Territory and to South Africa.

As has been pointed out,[2] explanations of the objectives of the "Homeland" policy have been formulated by Respondent in inherently ambiguous and mutually inconsistent terms.

Thus, Respondent, speaking through its Prime Minister, has proclaimed the aim of fostering "Homelands,"

> " '. . . following the model of the nations, which in this modern world means *political independence coupled with economic interdependence.*' "[3]

On other occasions, however, Respondent has candidly avowed an objective inconsistent with the foregoing. Thus, Respondent, again speaking through its Prime Minister, has conceded:

> "Now a Senator wants to know whether the series of self-governing areas would be sovereign. The answer is obvious. It stands to reason that White South Africa must remain their guardians. We are spending all the money on these developments. How could small scattered states arise?. . . It stands to reason that when we talk about the Natives' rights of self-government in those areas we cannot mean by that to cut large slices out of South Africa and turn them into independent States."[4]

Again, during an indeterminate, and probably permanent, "transition stage," Respondent describes its objective, with respect to the inhabitants of the Territory, as well as of South Africa, as that of serving as "guardian," in order to

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[1] Annexes 1-4, pp. 328-361, *infra*.
[2] *Supra*, p. 275.
[3] II, p. 466. (Italics in original.)
[4] Statement by Respondent's Prime Minister in the Senate of the Republic of South Africa (quoted p. 265 *supra*.)

> "... keep the ward in hand and teach *him* and guide *him* and check *him* where necessary." [1]

That the "transition stage" is indeterminate is conceded by Respondent. The possibility of its long duration, or even permanence, is made clear, *inter alia*, by statements such as that of Respondent's Prime Minister in 1958:

> "Territorial *apartheid* is the ideal ... to aim at ... the ideal must be total separation in every sphere, but everyone realizes that to-day it is impracticable. ... Such a thing cannot be attained within a space of a few years, *or even for a long time to come.*" [2]

In explicit reference to the Mandated Territory, Respondent describes its "general policy" there as one

> "in which it seeks to *encourage* the various population groups to develop culturally and otherwise in separate areas—*in accordance with the preferences shown by the groups themselves in this regard.*" [3]

The foregoing quotation from the *Counter-Memorial* embodies, so far as Applicants have noted, the most explicitly candid admission by Respondent of its objective to "encourage" separateness among the "groups."

The fostering of such differences, "culturally and otherwise," under the "protective shelter" [4] of the Tribal Chief is thus, in Respondent's conception of its obligations under the Mandate, the suitable method of promoting to the utmost the well-being and social progress of the inhabitants of the Territory who, in this way, are to be segregated into "homelands," "to be controlled and governed by themselves, as nations are." [5]

Respondent's Prime Minister, in 1956 Minister of Native Affairs,

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[1] Respondent's Prime Minister (1961), **II**, p. 466. (Italics added.)

[2] *U. of S.A., Parl. Deb., House of Assembly*, 2nd Parl., 1st Sitting (weekly ed., 1958), Col. 3805. (Italics added.) Addressing the House of Assembly the following year, Respondent's Prime Minister further stated: "And if it should happen that in the future they [the 'Homelands'] progress to a *very advanced level*, the people of *those future times* will have to consider in what further way their relationships must be reorganized." (*U. of S.A., Parl. Deb., House of Assembly*, 12th Parl., 2nd Sitting (weekly ed., 1959), Col. 62.) (Italics added.)

[3] **III**, p. 174. (Italics added.) The significance of Respondent's reference to the "preferences shown by the groups themselves" is to be appraised in the light of its failure and refusal to consult with the inhabitants or permit them a voice or vote in the making of decisions affecting them (discussed *infra*, pp. 320-326).

[4] *Infra*, p. 321.

[5] Respondent's Prime Minister (1959), quoted approvingly in **II**, p. 466.

is quoted in the *Counter-Memorial* as describing Respondent's "basic policy and its qualifications" as follows:

> "The quintessence of the matter is that while the European enjoys all his rights and privileges in one part of the country, namely in what we call White South Africa, the Native has similar rights and privileges, but can in turn only exercise them within the Native Areas, i.e. in the Reserves—whether Tribal territory or areas subsequently purchased. . . . *In these territories the European has no claim to property and certain civil rights. There he is the temporary inhabitant who helps with the development of those areas, but they belong to the Natives. The rights of the Natives are bound up with this fact. . . . Just the opposite is the case in the European areas. There is the home of the European's rights and there the Native is the temporary resident and the guest, for whatever purpose he may be there.*" [1]

So far as South Africa itself is concerned, such a formulation imports into Respondent's policy a false equivalence in all its relevant aspects: the "Native" *urban* population alone in "White South Africa" has *increased* from 2,329,000 in 1951 to 3,444,000 in 1960; "the reserves comprise merely 37 per cent of Respondent's 'native' population", the remainder living in "White South Africa" [2]; the Whites are *not* subject to racially discriminatory practices in the Transkei; the one and one-half million "Coloureds" and half million "Asiatics" in "White South Africa" are denied the franchise and other civil rights, without any pretension on Respondent's part that they have, or will be assigned, "reserves" or "homelands."

Identical considerations apply to the Territory although, of course, on a differing statistical base.

Applicants respectfully submit that if Respondent's good faith were, by itself, an issue in these proceedings, as Respondent erroneously asserts,[3] the inherently ambiguous and inconsistent formulations of its policy of *apartheid*, together with the manifestly false equivalence of its asserted balancing of rights and interests as between "Natives" and "Whites" in South Africa as well as in the Territory, would in itself raise a serious question of Respondent's *mala fides*.

The false equivalence, going to the heart of Respondent's pretensions concerning its "homeland," or "Bantustan," policy, is exposed by a distinguished South African jurist in the following terms:

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[1] **II**, p. 174. (Italics in original.)

[2] *Survey of Race Relations* (1963), p. 75, and see Annex 1, pp. 328 *ff. infra*.

[3] **II**, p. 2. See discussion *supra*, pp. 255-259, correcting Respondent's misconstruction of the Submissions.

"It is now hardly open to question that the principal object aimed at in introducing the Bantustan policy was to neutralise the call for an extension of the franchise to non-whites and, in particular, to Africans. What was primarily sought was not the physical development of the Reserves, which could have been accelerated more rapidly without political change and with white capital. Nor was it the reduction of the growing preponderance of non-whites in the so-called white areas, for obviously no material reduction was possible

"*The world was to be invited to look at a picture of retribalised African 'homelands', where multiracialism would not be tolerated, however much the Africans might want it, and where the whites, and also the Coloured people and the Asians, should be as alien and as rightless as the Africans would be elsewhere in the country.*

"There would thus be a division between African areas and white or non-African areas on an equal or 50-50 basis. This reminds one of the old story of the sausage-maker who claimed that his sausages were 50 per cent rabbit since he used a formula of one rabbit to one horse. *In this way it was thought possible to present the right to vote for some sort of subordinate local body as a right substantially equivalent to the parliamentary vote.*" [1]

Applicants respectfully submit that

(A) The system of "territorial *apartheid*" [2] is merely an extreme application of Respondent's basic *apartheid* policy, according to which rights and burdens of the inhabitants are allotted on the basis of "group" membership; and

(B) The system of "Homelands" is incompatible with the well-being and social progress of the inhabitants of the Territory, in that such "homelands" would be neither

(1) politically viable as "independent" entities, or otherwise, nor

(2) economically viable as entities "interdependent" with Respondent, or otherwise.

(A) That the "Homeland" system, or "territorial *apartheid*," is the extreme application of Respondent's policy of allotting rights and burdens on the basis of "group" is self-evident. Although proclaimed by Respondent as the "ideal," at which its policy of separate development is aimed,[3] it is the ultimate implementation and logical extension of the policy itself.

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[1] Hon. O. D. Schreiner, former Judge, Appellate Division of South Africa; Presidential Address to the South African Institute of Race Relations: *South Africa—United or Divided* 7 (1964). (Italics added.)

[2] The quoted phrase is that of Respondent's Prime Minister, *supra*, p. 316.

[3] *Ibid.*

The Group of Experts, established in pursuance of the Security Council resolution of 4 December 1963 [1], in a Report to the Security Council,[2] recorded its view that

> ". . . the arguments against *apartheid* apply with equal or even greater force to partition. No line of partition could be established by agreement, and an imposed partition would create a long frontier of continuing conflict. Nor could partition be politically or economically viable, for there is no substantial area of South Africa in which there is a majority of Whites, and the economy of South Africa, both in industry and agriculture, is entirely dependent on non-White labour. Partition would not solve, but would intensify and aggravate racial conflict." [3]

If, as Applicants contend, the policy of *apartheid*, or separate development, is in violation of Respondent's obligation to promote to the utmost the "well-being and social progress of the inhabitants of the Territory," the system of "territorial *apartheid*," as an extreme application of that policy, incontrovertibly and by hypothesis is, *a fortiori*, likewise in violation of Respondent's obligation under Article 2 of the Mandate.

(B) In support of their submission that the system of "territorial *apartheid*," projected for the Territory on the model of the Transkei development, would be incompatible with the well-being and social progress of the inhabitants of the Territory, Applicants respectfully draw to the attention of the Court the Report of 16 September 1963 of the United Nations Special Committee on the Policies of *Apartheid* of the Government of South Africa.[4] Considerations adduced by the Committee with respect to South Africa are, in all essential aspects, applicable to the Territory.

For the convenience of the Court, Applicants reproduce [5] from the Report an extract entitled "The Transkei Constitution Act and the Moves Towards the Creation of 'Bantustans.' " [6] Applicants hereby incorporate by reference the foregoing extract as part of their argument in reply to the *Counter-Memorial*, adopting as their own the statements of fact and conclusions set forth therein.[7]

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[1] S. C. Res., 1078th meeting, 4 December 1963 (S/5471).

[2] S.C.O.R., Report of S.G. (S/5658) (1964).

[3] *Id.*, pp. 14-15. Although directed at South Africa itself, the relevance of the quoted views to the issues in dispute concerning Respondent's interpretation and application of the Mandate with respect to the Territory is evident from the facts that the conditions described by the Group of Experts also exist in the Territory and that Respondent concedes that a "similar development . . . is to be expected" in the Territory. (*Supra*, p. 313.)

[4] S.C.O.R., Spec. Comm. on *Apartheid* at 41-55 (S/5426).

[5] Annex 3; *infra*, p. 349.

[6] The term "Bantustan," in Respondent's usage, is interchangeable with "Homeland."

[7] See, concerning economic viability, paras. 150-52 of Annex 3, at pp. 357-358, *infra*.

In supplementation and elaboration of the said facts and conclusions, Applicants further respectfully show as follows:

The system of "homelands," as projected for the Territory, on the model of the Transkei, are not politically viable as "independent" entities, or otherwise.

It is a principle accepted or professed by all civilized societies that an essential prerequisite of a valid and viable political system is consent of the governed.[1]

Contrary to this principle, however, Respondent's self-styled policy of "territorial *apartheid*" [2] is predetermined and the method of its application is pre-fabricated.

Thus, as pointed out in the Report of the United Nations Special Committee on the Policies of *Apartheid*,[3] the Chairman of the Territorial Authority of the Transkei, Chief Kaiser Matanzima, now installed as "Chief Minister," [4] defended his support of Respondent's proclaimed intention to establish the Transkei "Bantustan" on the ground that

> "White South Africa is 100 per cent agreed on the maintenance of white control of the white parliament. Only their defeat on the battlefield will divest them of this resolution. Will those people who oppose the peaceful road taken by the Transkei come out and advocate a revolution?" [5]

Respondent's predetermination to implement its policy of *apartheid* without consultation, other than of an illusory and perfunctory nature, with those more directly concerned, is manifest from the record.

The Group of Experts established in pursuance of the Security Council resolution of 4 December 1963,[6] in its Report of 20 April

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[1] That Respondent accepts the validity of the principle in theory, if not in practice, is demonstrated by its frequent avowals that the "Homeland" application of its *apartheid* policy is desired by the "Bantu" themselves; *e.g.*, Respondent's untenable contention that "the majority of Bantu have welcomed the creation of the Bantu authorities and have afforded Respondent an increasing measure of cooperation in developing and extending them." (II, p. 480.)

[2] *Supra*, p. 316.

[3] Annex 3, *infra*, p. 349.

[4] The circumstances of his election to this post by the legislative assembly of the Transkei are summarized in S.C.O.R., Spec. Comm. on *Apartheid* (S/5621) (1964). For the convenience of the Court, a relevant extract of the Report is reproduced as Annex 4, *infra*, p. 359.

[5] Statement of 26 November 1962; quoted *supra* in U.N. Committee Report (see Annex 3, p. 355, *infra*).

[6] *Supra*, p. 319.

1964,[1] stated, as one of the major considerations underlying its conclusions

> ". . . The Government [*i.e.*, Respondent], in disregard of all attempts to achieve consultation, persisted in its policies; the non-White majority was left thereby with no constitutional means of seeking freedom and justice. The conclusion might have been that when consultation and representation had been so flatly rejected there was no hope for the future. But we believe that the dangers are so great that there may yet be a desire, and consequently there may still be time, to avoid a vast and bloody collision. We are convinced that the way to do so, indeed we believe the only way, *is to turn to the means of consultation for which the movement of emancipation has struggled so patiently and persistently for so long.*" [2]

The history of Respondent's rejection of consultation is a crucially relevant aspect "of what has been done and accomplished in South Africa, in pursuance of a policy of separate development" which, Respondent submits, is "instructive" with respect to Respondent's present and projected policy towards the inhabitants of the Mandated Territory.[3]

Respondent has asserted that a main object of the origins of the "Homelands" system was " 'to put the traditional Bantu form of government into practice by degrees.' ".[4] Respondent has further asserted that the system

> " '... is the traditional Bantu democracy, and the Tribal Chief, together with his Tribal Council, provides the protective shelter under which the highest and the lowest can feel at home and *find self-expression and fulfilment.*' " [5]

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[1] *Supra*, p. 319.

[2] S.C.O.R., Report of S.G. at 18-19 (S/5658) (1964).

[3] **II**, p. 477.

[4] Report of the Department of Native Affairs (1954-7), p. 49; quoted in Cowen *The Foundations of Freedom* 35 (1961).

[5] *Ibid.* (Italics added.) Respondent's concept of "self-expression and fulfilment" under Tribal shelter underlies its policy of territorial *apartheid*, pursuant to which individual rights and burdens are determined and alloted on the basis of group, race or tribe. In sharp contrast is the concept given expression in the South African Legislature in Cape Town in 1960 by the former Prime Minister of the United Kingdom, the Rt. Hon. Harold Macmillan: "It has been our aim to create a society which respects the rights of individuals—a society in which men are given an opportunity to grow to their full stature, and that must in our view include the opportunity of an increasing share in political power and responsibility; a society finally *in which individual merit, and individual merit alone, is the criterion for a man's advancement, whether political or economic.*" (*Souvenir of a Visit*, Printed on the authority of Mr. Speaker, Cape Town, pp. 8-11; quoted *id.*, pp. 7-8.) (Italics added.)

The foregoing expressions of policy have been appraised by Professor D. V. Cowen,[1] in terms which are, in all essential aspects, applicable to the situation in the Territory:

> "It may be conceded immediately that the old Bantu tribal system was indeed imbued with the democratic spirit; but there are at least two conclusive reasons why the Bantustan system will not be at all like 'the traditional Bantu democracy', save in the most superficial appearance. On the contrary, the Bantustan system will be distinctly undemocratic.
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> "In the first place, even with the best will in the world, it would be very difficult—if not impossible—to restore the conditions which enabled the traditional tribal system to function democratically. In the old days the main sanction against a tyrannical chief was for his men to leave him, and offer their loyalty to another chief in return for the allocation of some of his land. In those days, moreover, men and followers were more important to a chief than land, which was plentiful. And the sanction that his followers might leave a tyrannical chief, and join a rival, operated as a powerful incentive to moderate and responsible government. But today land in the Bantu areas is far from plentiful, and freedom of movement is restricted. In short, the essential conditions which enabled the earlier sanctions to operate no longer exist. [Footnote (47): Ashton, *The Basuto*, p. 217.]
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> "But, secondly, even if it were possible for the Government to put the clock back and restore the conditions of a century ago (conditions which obtained before the conversion of Africans to Christianity), the actual pattern of government which is being imposed is both undemocratic and radically different from the traditional system. Thus, for one thing, under the old tribal system if the people were dissatisfied with a chief, and the way in which he performed his functions, he could be impeached. [Footnote (48): See generally I. Schapera, *Government and Politics in Tribal Societies*, 1956, pp. 135 et sqq.] But under the Bantu Authorities Act, the chief and his council are carefully insulated against the popular will; and, what is more, they are expressly made subject to the control of the responsible Minister and the Government.
>
> "The insulation of the chief and his council from the popular will is most clearly exemplified in the decision of the Government to sweep away the idea of the popular vote, which had been in force for many years in the Bantu areas prior to the passing of the Bantu Authorities Act. And the reasons given for this decision are so remarkable that they are worth recording. Explaining the Bantu Authorities Act, the authors of the Tomlinson Report say:

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[1] Denis Victor Cowen, for eighteen years Advocate of the Supreme Court of South Africa; former Head of Department of Comparative Law, University of Cape Town, currently Professor of Comparative Law, University of Chicago School of Law (U.S.A.). (See p. 281, *supra*.)

> 'Councillors will be appointed by the chief or headman himself and not, as under the old Local Council System, by popular vote. The idea is to foster strong progressive action by tribal authorities *whose councillors should be able to act independently of a less progressive and probably dissatisfied electorate.*' [Footnote (49): Full Report, chapter 17, para. 223.]
>
> "An even more ironic justification is given by the Department of Bantu Administration itself. In the 1956 handbook explaining the Bantu Authorities Act, it is said: '*The Councillors will perform their task without fear or prejudice because they are not elected by the majority votes.*' [Footnote (50): At p. 18. My italics. Quoted, what is more, with approval by Dr. Eiselen in *Optima*, March 1959, p. 6!] One has to read a passage like this several times to realize that it was actually written and seriously meant in the mid-twentieth century." [1]

The underscored reference, above, to the asserted desirability of independence of the authorities from a "probably dissatisfied electorate" is, in Applicants' submission, a *reductio ad absurdum* of Respondent's policy of rejecting consultation with the "Native" electorate, even in the form of the franchise.[2]

Consistently with its expressed intention to apply in South West Africa the fruits of the "considerable progress" Respondent assertedly has "made in South Africa in respect of political development"[3] Respondent has, as noted above,[4] expressed approval of the "main features" of the argument and findings of the Odendaal Commission. One of such main features is denial to "Natives" of participation in election of "one mixed central authority for the whole Territory."[5]

Respondent's failure and refusal to consult, in any meaningful sense, with the inhabitants of the Mandated Territory directly or with leaders freely selected by them, reflect its pre-determination to pursue the policy of separate development. As Judge Schreiner has pointed out, so long as Respondent adheres to such a policy, "consultation" would, in any event, be futile:

> "You cannot by consultation reach a settlement between those who refuse to accept a position in their own country of permanent

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[1] *Op. cit. supra*, p. 282, footnote 1, pp. 35-36. (Italics added and author's footnotes inserted in brackets.)

[2] The scope and significance of the elections held with respect to the Transkei are described in S.C.O.R., Spec. Comm. on *Apartheid* at 75-78 (S/5621); see Annex 4, *infra*, p. 359.

[3] **II**, p. 477. Respondent refers specifically to its efforts "to promote growth from the roots of the indigenous Native institutions." (*Ibid.*)

[4] *Supra*, pp. 269-270, 313-314.

[5] *Odendaal Commission Report*, p. 55, para. 184.

> disadvantage and discrimination based solely on race, and those who regard such acceptance as essential." [1]

It is this background against which must be evaluated such assertions by Respondent as "the co-operation of the Bantu," or the "request" in 1961 of the Transkei Territorial Authority to Respondent "to grant self-government to the Transkei," or the personal meeting of Respondent's Prime Minister with the Executive Council of the Transkei, and the Report of the Territorial Authority, which "contained a draft constitution."[2]

Respondent's pre-determination to create "homelands," in pursuance of its policy of "territorial *apartheid*" was made manifest, in explicit terms, long prior to the events recounted above.[3]

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,[4] and confirmed by its endorsement of the arguments and findings of the Odendaal Commission.[5]

Consistently with its practice of no-consultation in South Africa, Respondent attaches so little significance to consultation with the "Natives" in the Territory, that the *Memorandum nowhere refers to such consultation as having taken place prior to the release of the Commission's Report or of its endorsement, in principle, by Respondent.*

Similarly, no mention is made of consultation, either in the terms of reference of the Commission,[6] or in the *Report* of the Commission itself. The Commission prefaces its far-reaching Recommendations for the territorial partition of the Mandate with the comment:

> "In the course of the enquiry, the Commission *has gained the impression*, supported by evidence, that various population groups harbour strong feelings against other groups and would prefer to

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[1] *South Africa—United or Divided?* 6 (1964).

[2] II, p. 479.

[3] *E.g.*, the programme announced in 1950 by Dr. Eiselen (II, p. 465), which Respondent describes as "foreshadowing" the "homelands" system (*id.*, footnotes 4 and 5); and the statement in 1950 of Respondent's Prime Minister (then Minister of Native Affairs) quoted, *id.*, p. 464.

[4] II, p. 410.

[5] *Memorandum*, para. 21 (IV, p. 213): in announcing its intention to defer final decisions concerning the Commission's recommendations for constituting "Homelands" in the Territory, Respondent also stated that it "is favourably disposed towards the trend of policy embraced in the recommendations concerned." See pp. 269-270, 313-314, *supra*.

[6] II, p. 476.

> have their own homelands and communities in which they will have and retain residential rights, political say and their own language, to the exclusion of all other groups." [1]

Apart from attributing recommendations for establishment of "territorial *apartheid*" in the Mandate to a mere "impression," based upon undisclosed "evidence," the Commission does not refer to the fact—which consultation with the inhabitants would have made inescapably clear—that the inhabitants would "prefer" to "have and retain residential rights" and "political say" in the White area, which comprises more than 127,400 "non-Whites," as against 73,400 "Europeans."

Applicants have sought to show above that the "homelands" system, or "territorial *apartheid*," projected for the Territory,[2] is not, in any meaningful sense, based upon consultation with, or consent of, the governed, whose well-being and social progress form Respondent's sacred trust.

Such failure of consultation or consent achieves an even more pointed significance in the light of Respondent's failure and refusal to consult with the United Nations, or in any other manner to report to the international organ vested with supervisory authority by the Mandate instrument. Even more, Respondent has rejected the overwhelming consensus of the United Nations membership that its policy of *apartheid* in general, including "territorial *apartheid*," its most extreme form of application, is unsound, inhumane and incompatible with the obligations of the Mandate. Furthermore, by refusing to transmit petitions by the inhabitants, as required by the Rules established pursuant to Article 22 of the Covenant and the Mandate,[3] or permitting petitioners to leave the Territory to present petitions, Respondent has sought to assure that the inhabitants of the Territory could not consult with the United Nations, or *vice versa*.

In addition to the fundamental defect of the system of "territorial *apartheid*," arising from the fact that it is not founded upon consent of, or consultation with, the governed, Applicants submit that the system, as projected for the Territory, is neither politically nor economically viable.

The Court's attention is respectfully drawn to the analysis of the *Odendaal Commission Report*, contained in a Working Paper prepared by the United Nations Secretariat.[4] Applicants do not

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[1] *Odendaal Commission Report*, p. 55, para. 187. (Italics added.)

[2] IV, p. 198, and Annex A thereto, p. 213, para. 21.

[3] See *Advisory Opinion of 1 June 1956*, I.C.J. Rep. 1956, p. 23.

[4] Referred to *supra*, p. 313, footnote 5; reproduced (in part) in Annex 2, p. 341, *infra*. See, with respect to economic viability, paras. 42-50, at pp. 346-348, *infra*.

deem it necessary to encumber the pleadings with repetition of the evidence and conclusions set forth therein, which Applicants incorporate by reference herein and adopt as their own evidence and conclusions.

The Court's attention is also drawn to an equally balanced analysis of the "homeland" system, as projected for the Territory, by Philip Mason, Director, Race Relations Institute, London.[1]

In view of the essentially similar analysis and conclusions of both these studies, emanating from two independent, expert and objective sources, particularly when read in the light of the evidence and conclusions set forth in the *Memorials* and in this Reply, Applicants believe that elaboration of further evidence or argument would trespass upon the Court's time and patience.

It is respectfully submitted that, for all the foregoing reasons, the conclusion is inescapable that the "Homelands" system, projected for the Territory, is inconsistent with Respondent's obligations under Article 2, paragraph 2, of the Mandate and that such system, as the ultimate and extreme form of the policy of *apartheid* is *a fortiori* invalid inasmuch as the policy of *apartheid* is, in itself, a violation of Article 2 of the Mandate.

[1] Text of article by Mr. Mason is reproduced, for the convenience of the Court as Annex 1, p. 328, *infra*.

Annexes reproduced herein in support of Applicants' Arguments in this Chapter IV, Part B, Section 3:

ANNEX 1

"SEPARATE DEVELOPMENT AND SOUTH WEST AFRICA: SOME ASPECTS OF THE ODENDAAL REPORT"

by

PHILIP MASON

DIRECTOR, THE INSTITUTE OF RACE RELATIONS, LONDON;

reprinted from

RACE, Vol. V, No. 4 (April 1964), pp. 83-97

. . . This article does not attempt to discuss the Odendaal Report as a piece of planning nor does it venture to express an opinion on any point of international law. It is a consideration, mainly from the point of view of relationships between races, of the assumptions underlying the report and of where they are likely to lead. The method used is political and historical comparison; the assumption underlying this method is that, while the situation in any nation or territory at any given moment is unique, there are sometimes factors apparent which in the past in other contexts have produced certain results and may in this context produce similar, though never identical, results.

The Report proceeds on the basis that while the South African Government does not concede that its administration of South West Africa is now legally governed by the terms of the Mandate by which the Territory was acquired (which in its view has lapsed) the administration has been conducted in the spirit of the Mandate. The relevant principles, which are contained in Article 2 of the Mandate, are:

> That the Territory may be administered as though it were an integral part of South Africa.
> That the administration 'shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory. . . .'

The Territory has, it is true, been administered in some respects slightly differently from South Africa, but the basic principles have been the same; experiments have been made in South Africa and applied later to South West Africa if judged successful. The Report recommends that there should be in most respects a closer linking of the two countries and that the policy of separate development should now be applied more thoroughly and vigorously than before.

... In the Republic of South Africa, it is argued with some cogency that the White inhabitants have lived there for some centuries and have nowhere else to go; they and their culture are threatened with extinction unless special measures are taken. They claim the right of national survival. The National Party in South Africa also speak on occasion of their trusteeship for the Bantu-speaking peoples. The policy of separate development is intended to ensure the national survival of the White group, more particularly the Afrikaans-speaking section of it; it is also argued that the policy will discharge this duty of trusteeship. But the two aims are quite distinct, and the argument that separate development is necessary for national survival has much less force in South West Africa. In the terms of the Mandate, 'inhabitants' must mean 'inhabitants in 1921'. The Whites who were there in 1921 numbered 19,714; by 1960 there were 73,464 Whites, a more than threefold increase, well in excess of the general rate of increase. The proportion of Whites to the rest of the population in 1921 was 1 to 11 (19,714 : 223,665); in 1960 it was 1 to 7¼ (73,464 : 526,004). This higher rate of increase is due to White immigration into the Territory; this has no doubt increased the Territory's wealth, but the recency of much of the immigration does considerably weaken (if it does not destroy) in relation to the Territory what in the Republic is one of the strongest arguments for separate development. In the Territory, in terms of the Mandate, the emphasis must be on Trusteeship.

The Odendaal Report

Perhaps in recognition of this point, the Commissioners in their Report argue on different lines from those commonly used in the Republic. They say nothing of national survival and imply that Trusteeship is the only aim. The half-million population of the Territory is divided between twelve main ethnic groups, of which the largest, the Ovambo, numbering 240,000, are more than 45 per cent of the whole. A unitary state with adult suffrage would, say the Commission, mean domination by the Ovambo, who are likely to rule with little consideration for the minorities; there would be constant clashes which would hamper the proper development of each ethnic group. The smaller non-White groups fear this. Further the non-White groups have 'very limited experience of the alien and to them highly complicated economic and political systems operating in the white area'. Domination by the Ovambo would result in 'a lowering of the standards of administration and government and would also hamper the Whites, to whom the Territory mainly owes its economic progress, to such an extent that the development and progress of the Territory would be seriously retarded'. The Commission is therefore of the opinion that 'one central authority, with all groups represented thereon, must be ruled out and that as far as practicable a homeland must be created for each population group, in which it alone would have residential, political and language rights, to the exclusion of other population groups, so that each group would be able to develop towards self-determination without any group dominating or being dominated by another'.

Before further consideration of their political recommendations, it is worth turning to the section on economic and social development, where the Commission explain their thinking at greater length. They

state that the welfare of a community is determined by its productive capacity and describe, in terms which would win wide acceptance, the process of advance from a subsistence to a money economy. This involves a complete socio-cultural transformation which is attended by serious dangers. Where one population group still in the throes of this process is in contact with a group which passed through it some time ago, the former will need not merely protection but special advancement. Both cannot be given in an integrated community—even in the most favourable circumstances, as in the United States. It is 'a universal characteristic of man to identify himself with the population group which has the same social cultural and ethnic background as he has . . . a group consequently gives preference to its own group members . . . where differences are fundamental and so profound that they cannot be wiped out, a policy of integration is unrealistic. . . .' If there is to be social as well as economic progress, a policy of differentiation must be followed. This makes possible both advancement and protection.

This is good National Party doctrine and it has been said in the Republic (and no doubt it is felt that this applies also to the Territory) that differentiation without inferiority is as consistent with human dignity as integration and far more likely to work.

These are the general considerations which lead the Commission to recommend an increase of about 50 per cent in the area of the homelands for non-White groups, together with proposals for much closer integration of the whole territory with the Republic and for a more rapid political and economic development of the 'homelands' on lines similar to those of the Transkei. What is contemplated for Ovamboland, which would form a model for other areas, is a Legislative Council, in which three chiefs and thirty-two headmen would have seats *ex officio*, together with elected members not exceeding 40 per cent of the total. There would also be an Executive Council. These bodies would gradually take over from the Department of Bantu Administration and Development all functions except those of Defence, Foreign Affairs, Internal Security and Border Control, Posts, Water and Power. Dr. Verwoerd has spoken of the Bantu areas within the Republic as 'independent bodies in the first stage of development', and on a number of occasions he has stressed his intention that the Bantu States should eventually have complete political independence which, he once added, would be coupled with economic *inter*dependence, in a kind of Commonwealth. It is to be presumed that this is envisaged for the homelands in South West Africa too.

The development plans recommended by the Commission are outside the scope of this article, but to give a true picture it is necessary to add that the financial aid so far given by South Africa to South West Africa is R.165 m. (R.300 or £150 per head of the population), that the first five-year plan calls for a contribution of R.156 m. and the second seems likely to demand R.91 m. This is generous if regarded as 'aid' given by one State to another; it is of course a different matter if South West Africa is regarded as a province of the Republic. Again, if South West Africa is regarded as a number of separate States, or homelands, it would be necessary before assessing the generosity of the aid to give attention to the distribution between them and particularly between the White area and the rest.

It remains to consider whether the general policy chosen is in the

best interests of the inhabitants and whether it is likely to produce harmonious relations. It cannot be discussed as though South West Africa existed *in vacuo*; what is proposed is that the policy of South Africa should be extended to South West Africa. The circumstances of the Republic and of the Territory are different and the arguments for introducing the policy in one are not the same as those for introducing it in the other, but the policy is the same and it must be considered in both contexts.

Separate Development in the Republic

It is sometimes argued that the policy of the South African Government is neither more nor less than partition and that partition, though not perhaps an attractive solution to minority problems, may in the last resort be the only escape from an intolerable situation and has respectable precedents such as Eire and Ulster, India and Pakistan. This argument is used by Sir Penderel Moon (whose experience and attainments always entitle his views to respect) in his *World Opinion and South Africa*. 'It is difficult', he writes, 'to see how anyone could object in principle to such a policy if it is honestly and fairly carried out', and he mentions Ireland, India and Palestine.

But the policy of separate development is really quite different from partition as it took place in these countries. In the case of India and Pakistan, after much argument, it was agreed by each of the two main parties—though very reluctantly by the Congress on behalf of India—that whatever they would have liked, partition was inevitable. The broad principles of the partition were agreed, the more reluctant party this time being the Muslim League for Pakistan, who had claimed the whole of any province in which they had a bare majority. The agreements were reached in the presence of the former imperial power, at this stage about to relinquish responsibility; boundaries were settled by a British judge on the basis of agreed criteria. The actual boundary was disliked by Pakistan—but there was at every stage agreement to accept an unpalatable solution. Broadly, this principle applies also to Ireland and Palestine; discussion and agreement to submit to arbitration are the first essentials of partition. But in South Africa there has been no discussion. The solution is being imposed by one party.

If partition is to have any chance of success, it must not only be accepted by both parties as the solution but also be based on some principle of division which both regard as fair. (They are almost bound to regard the *application* of the principle as unfair, but it is possible to agree on principles.) In South Africa, the division at present proposed is not only imposed by one party but on any discernible ground appears unfair. In the first place, it is quantitatively unfair. The Bantu homelands at present provide 13 per cent of the land surface of the Republic for three-quarters of the population.[1] Secondly, the division proposed is

[1] This figure, though the best obtainable, is not a true indication of the position; the White 87 per cent contains a higher proportion of uncultivable desert and mountain, while the Bantu areas are heavily eroded. The balance would be somewhat redressed if Bechuanaland, Basutoland and Swaziland were included with the Bantu homelands. But even if this were done and all permanently uncultivable land were excluded from both sides it cannot be claimed that the result would be anything like an equitable division of area between White and non-White.

qualitatively unfair. The Bantu homelands are off the main lines of communication and badly placed for industrial development. The main wealth of the country is the mining area of the Rand, which is White; the policy denies to the non-White the opportunity of advancement in just that area where opportunity is likely to occur.

There are two other possible criteria for division, the actual distribution of population at a given moment or, more dubiously, a division based on some historical principle. The first is certainly not followed; there are more non-Whites than there are Whites in the White areas today.[1] On the historical principle, if the Bushman and Hottentot are ignored, it can be argued that the ancestors of the Afrikaners were established in some western parts of the Cape Province before there were any substantial numbers of Bantu-speakers. But this cannot be said of the rest of the Cape, nor of Natal, the Orange Free State or the Transvaal. Nor does the principle seem a very sensible one; over the greater part of the country, White and Black have been present for several generations and surely this is enough to confer rights on both. The division of the population is much more one of class than of territory; it is a group of landowners and managers against a group of labourers.

The principle of partition has really been that certain areas where for historical reasons the Bantu had remained relatively undisturbed were set aside as areas in which they would be protected; the remainder of the country is judged to be White because it has been developed under White management, though mainly with African labour. The implication that political control should belong exclusively to the group which has supplied capital, skill and management for development clearly does not command general acceptance in the world today.

There is thus no agreement that there shall be partition and the partition proposed cannot be regarded as fair. But there is another and more important reason than either of these for regarding separate development as quite different from partition in the cases quoted. India and Pakistan, Ulster and Eire, face each other as equals; a citizen of one when in the other is in a position similar to that of an Englishman in France. The Bantu homelands have not of course yet reached the projected stage of independence, but it does not appear to be contemplated that a similar equality should ever arise. The large numbers of Bantu-speakers in the White areas, even though born there, even though they have no dwelling place in the homelands, are to be regarded as citizens of the tribal homeland. It is not merely that they have no vote in the White area but that they may not stay there unless they have employment or a pass to seek work and that they are subject to continual humiliation of a kind that would be regarded as quite intolerable between the citizens of sovereign states.

The citizens of Eire do not find when they visit Ulster that the public lavatories and park benches are forbidden them. They are not compelled by law to live in segregated areas and when in certain kinds of employment forced to live away from their families. They are not forbidden to return to their place of employment if they absent themselves for a few days. But in the White parts of South Africa, this,

[1] The latest census figures show the Black urban population has actually increased from 2,329,000 in 1951 to 3,444,000 in 1960. Separate development and modern industrial society are uneasy bedfellows.

and much more, is the case for persons who are of African race even though they have no other home. They can never be naturalised. They have no right to combine and to refuse their labour. They are subject to a host of vexatious regulations and to imprisonment if any of these are infringed.[1] Further, the Bantu Affairs Amendment Bill, if passed, as seems likely, will intensify these conditions, with the object of inducing more Bantu-speakers to go to the homelands. This is not the way that subjects of independent States are treated. It is the treatment of a subject people.

It should be added here (though space does not permit developing this aspect of the question in detail) that the treatment of Asians and Coloured does not fit into the pattern proposed for the Bantu-speakers, because there are no homelands suggested for them. It does not appear that they are to have any prospect of self-development as separate nations. They are to have some rights of self-government on the municipal level, with an advisory council on the national level.

Account must also be taken of certain laws and penalties of a more serious nature. The General Law Amendment Acts (No. 76 of 1962 and No. 37 of 1963) amend a number of existing Acts and are designed to provide stringent penalties for subversive acts and also to overcome the difficulties encountered by the executive in obtaining convictions in the Courts. To deal with them at length would be out of place here but anyone who wishes to form a true opinion of the relationship between the Government and the majority of the people in South Africa should pay attention to these Acts and also the Bantu Laws Amendment Bill. The 1963 Act provides (to give three examples) that the Minister of Justice may, if he is satisfied that the person concerned is likely to advocate any of the objects of Communism, indefinitely prohibit a person who has completed a prison sentence from leaving prison. A person who obtains from outside the Republic any information which 'could be of use in furthering the achievement of any of the objects of Communism' and who fails to prove beyond a reasonable doubt that he did not obtain such information for such a purpose, may be sentenced to death. A commissioned police officer may without warrant arrest a person who in his opinion is in possession of information relating to certain offences (such as furthering the aims of Communism) and detain him in custody for interrogation for ninety days. No one may have access to such a person without permission of the Police or Minister; no Court may order the release of such a person; on release, such a person may immediately be re-arrested and detained for a further ninety days.

It should be remembered that in South Africa 'Communism' has been defined by law and the definition is drafted extremely widely. It specifically includes any doctrine or scheme '. . . (b) which aims at bringing about any political, industrial, social or economic change within the Union by unlawful acts or omissions or by means which include the promotion of such acts or omissions . . .' or '. . . (d) which aims at the encouragement of feelings of hostility between the European and non-European races of the Union the consequences of which are calculated

[1] There were 384,497 convictions in 1962 under the Pass Laws and influx control regulations.

to further the achievement of any object referred to in (a) or (b).' On this Mr. Gerald Gardiner has commented:

> If the Government passes a law which discriminates against non-Europeans, and therefore causes a feeling of hostility between Europeans and non-Europeans, that is not 'communism', but if anybody protests against that law in a manner which causes disorder, that is 'communism'.

It seems beyond doubt that it would be 'Communism' to advocate a general strike in favour of adult suffrage; it is hard to say what might be judged to be information which 'could be of use in furthering the achievement of the objects of Communism' and thus attract the death penalty if obtained from outside the Republic.

Every Government has a duty to govern and to maintain order and it may be necessary to use force to this end, or even temporarily to impose regulations and restrictions which are the negation of law as it is ordinarily understood, and in certain respects abolish personal freedom. But to fall back on such legislation indicates that something is seriously wrong, and a Government in any way responsible, or even responsive, to public opinion will try to put it right. If such legislation is steadily intensified over a number of years, it surely indicates that something is radically wrong in the relationship between the Government and a large section of the people and in the policy which the Government wishes to follow.

To sum up what has been said, the policy of separate development as advocated in South Africa cannot reasonably be compared with the partitions carried out in India and Ireland. To hold out any hope of success, partition must be accepted by both parties as the best solution remaining to them and they must agree on certain broad principles governing the division of territory and resources.[1] Further, after partition, the two States will expect equal and reciprocal rights in each other's territories. The division of resources proposed unilaterally by the South African Government could hardly be regarded as fair by any third party, the rights proposed are not reciprocal, and the necessity for repressive laws makes it clear that the policy is not acceptable to the majority.

In the light even of this brief examination the arguments used by Dr. Verwoerd in defence of his policy seem singularly unrealistic. Of various utterances, perhaps the most complete explanation of the doctrine is contained in his speech to the House of Assembly (reported in Reports of South African Parliamentary Debates, House of Assembly, 19 June to 26 June 1962, columns 69 to 72). He said that separate development

> could offer an opportunity of developing equalities amongst the groups. It could satisfy the desire for the recognition of human dignity. Because just as it is possible for us to live with the Black States on a basis of equality as separate states, to negotiate with each other and to help each other when necessary, so it would also be possible here if separation could be put into effect.

Does it seem possible that such happy relations could ever exist

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[1] What "fair" principles might be is really outside the scope of this article. They must be worked out in South Africa. But to avoid the charge of being purely negative, it may be suggested that they might fairly include a White homeland and that certain industrial areas would be non-racial.

when the immigrants from the homelands are forced to live in such conditions as those at which we have glanced? Contrast this with a remark made by Paramount Chief Sabata Dalindyebo in the Transkei Territorial Assembly: 'While we delay, our young men in the urban areas are being shot for demanding freedom now.'

Dr. Verwoerd continues:

> The creation of states has brought with it contentment, not only in the present age but right throughout history. In what way has satisfaction been given in Africa, notably in our time? Africa has been given satisfaction through the creation of states, and where there is conflict that is as a result of the fact that these new states are not states which embrace entities,

and he went on:

> It is as unlikely that it will be possible to hold together the Whites and the Bantu in peace and free of strife in one multi-racial unit as it is to do so in the case of Black nations in other parts of Africa or as it is to throw together Xhosa, Basuto and Zulu without conflict into one communal entity. They too are just as proud of their own national identity as we as Whites are of our national identity. . . .

Not only, he argues, is it impossible for Black and White to live together but Africans of different tribal origins cannot live together either. There are of course difficulties about tribal groups which may not disappear for generations. But can it really be thought that it would solve the problems of Africa if Kenya had been divided into twenty-three States, one for each of the major languages? Hardly one of them would have been without ethnic minorities. Nigeria on this principle might be divided into more than a hundred linguistic groups and there would still be minorities within them. Can it really be thought that pandering to tribal parochialism would make for peace or happiness, let alone the development of any civilisation or artistic achievement? Surely one has only to consider these statements in the light of a wider framework of facts to see that the argument for White separation, which is based on the need for White national survival, is being applied to the other people of Africa, partly to satisfy a logical principle and partly to perpetuate White hegemony when White supremacy has to go.

The White inhabitants of South Africa are a vigorous, courageous and intelligent group who have established a culture and a way of life which so far have depended on the labour of a less developed group. This they perceive cannot continue indefinitely in its present form. Since they have rejected the slow, painful road of integration—and it is probably too late to reverse that rejection—the only hope that remains to them is partition, but partition has no chance of providing a solution unless they are prepared to negotiate a far more equable division of resources.

Separate Development in the Territory

The case of South West Africa is somewhat different. Here, when the Mandate began, less than 20,000 Whites were present and, of these, few over twenty-one can have been born in the territory. As yet, they hardly amounted to a vested interest. It would show a lack of historical understanding however to blame the Government of South Africa at that time for failing to perceive how rapidly world opinion and African

aspirations would develop. This was the period when Southern Rhodesia became a self-governing colony; no substantial body of opinion protested because the electorate was almost entirely White. It was believed that the prosperity of South West Africa, and indeed of all African territories, would depend on development by Europeans, and European farmers were encouraged to come into the Territory. In 1962, there were some 5,500 White farms, in area 39,800,000 hectares—a considerable vested interest—and, as in Kenya, they contribute substantially to the economy of the Territory. The area of the homelands at present is 21,607,745 hectares, and it is proposed that they should be increased to 32,609,364 hectares. This would involve the transfer to them of some White farms, in area 3,406,181 hectares, making the total area of White farms 36,394,000 hectares. The homelands would thus still be smaller than the White farms. The total area of the territory is 318,261 square miles. The proposed homelands are approximately 126,000 square miles, leaving in the White (or police) area about 192,000 square miles, which includes game reserves and towns as well as the White farms. The division of the land proposed then is five-eighths for less than one-seventh of the population. The result, after an acceptance of these recommendations, would be division of the land in a proportion about as advantageous to non-Whites as that under the Land Apportionment Act in Southern Rhodesia, which is now under criticism from various quarters.

But this is not the whole story. The homelands, as in South Africa, are excised from the whole; the balance is the White area. The division is to be not merely a matter of ownership, nor merely a matter of the right to vote. The citizens of the homelands, if they find it necessary to earn their living in the White area, are governed by laws similar to those in South Africa. The African who comes to the White area must carry a permit to work or a contract of service, or a special permit to be in the area, and failure to produce any of these is a criminal offence. An African cannot leave his homeland without a pass nor buy a railway ticket in the White zone without a special permit; if he has been recruited in one of the homelands for work in the police zone, he is virtually tied to his place of employment. Africans from the homelands temporarily employed in the White zone are variously estimated at from 27,000 to 40,000, and altogether some 160,000 live there—about one-third of the non-White population.

It would be quite wrong to suggest that the problem of dealing with a more developed and a less developed population within the same nation-state is anywhere easy. India is finding the Nagas a problem and the United States have not found a wholly satisfactory answer for their Amerindians, let alone the Negroes. Both these countries have the great advantage that the less advanced groups are minorities and thus that if any assimilation takes place it is likely to be the more advanced culture that prevails. South Africa's problems are far more intractable.

The Odendaal Commission has rightly pointed out that in such circumstances the less developed culture needs both protection and development. It is not easy to strike a right balance between them. Protection involves sealing off tribal areas in order to prevent outsiders from acquiring land or lending money there. Development means bringing the backward people into the money economy and sooner or later involves some degree of assimilation. If the protecting power or

more advanced culture tries to develop and assimilate too quickly, much misery will certainly be caused—but protection without development can look very like neglect. In United States policy towards their Amerindians, most observers would say that (once the period of frontier wars was over) emphasis was at first much too heavily on assimilation and that it later swung back to excessive and rather negative protection. India at the moment is probably trying (or has been trying) to develop and assimilate the Nagas rather too fast. But whatever mistakes of emphasis are being made or have been made, in both countries the philosophy is one of trusteeship. Both countries protect tribal land against purchase by outsiders but permit and indeed encourage tribesmen to leave tribal areas and compete in the money economy with other citizens on equal terms. Protected at home, the tribesman is at no disadvantage when he leaves home.

South Africa's problem is not the same. As has already been suggested, South Africa has two aims which are usually confused, that of trusteeship and also that of national survival for the White, and more specifically the Afrikaner, group. There is much less excuse for confusing these two aims in South West Africa, where national survival is not involved. Here the argument for giving the Whites special treatment is that they make a special contribution to the economy. As a transitional measure this is a sound argument, but it can hardly justify giving the Whites a privileged position permanently. True trusteeship would involve training the non-White peoples to make a bigger contribution to the money economy and the removal 'with all deliberate speed' of racial distinctions in the police or White area. Politically it would surely mean a steady preparation of the non-White groups for a share, perhaps, in a federal system, certainly in one in which all the groups could play a part. It is either disingenuous or naïve to claim that 'one man, one vote' would mean domination of other groups by the Ovambo and instead to recommend a system whereby domination is in fact preserved by the much smaller White group. About three-eighths of the country is to be excised to make homelands for the non-Whites, while the rest is left for a White group, not one-seventh of the whole, who in this area have linguistic, political and social rights, just as a Bantu group will have in one of the Bantu homelands, in spite of the fact that even in this area they are outnumbered by more than two to one. To this area members of other population groups come as contract labourers whose movements are strictly limited, the whole Territory, police area and homelands alike, being in fact ruled by the White Government of South Africa—until the day when it is split into eleven self-governing fragments.[1] This is surely White domination and it is not easy to see how the Ovambo could really improve on the General Laws Amendment Act as an instrument for perpetuating their rule.

South Africans often ask in genuine bewilderment why it is they who arouse such hostility in the world. Other people, they say, are struggling to preserve their national identity as we are; we are not the only Nationalists, we are not the only people doubtful of the wisdom of adult suffrage. But it is we who are the targets for obloquy. Why are we so much worse?

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[1] There is no separate homeland for the Coloured group.

The answer to these questions is really to be found in the fact that they are asked, that the questioner is unconscious of the offensiveness to much of the world of the policy of separate development. As has been pointed out, this is not simply a policy of partition; it is not simply a question of national survival. What is proposed is that in the White area, which is much the greater part of the country and the area of chief opportunity, the two principal races should continue to exist but that in that area the White race, although even there a minority, should be by law permanently superior and the other permanently inferior—and that every individual belonging to the latter should be reminded of the inferiority by constant humiliation.

It is worth considering a legal opinion given in circumstances very different from South Africa's but in principle relevant. As everyone who has given any thought to relations between races is aware, on 17 May 1954 Chief Justice Warren on behalf of a unanimous United States Supreme Court held that

> To separate [Negro 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 . . . We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.

This decision was not based on precedent; indeed, it sought to establish a change of what was customary. It is an interpretation of the spirit of the American Constitution (in which the concept of natural law plays an important part) and in particular of the Fourteenth Amendment which extends the equal protection of the law to all. It explicitly takes into account a developing social situation. 'We cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted,' wrote the Court, 'or even to 1896, when the Plessy *v.* Ferguson [the "separate but equal"] ruling was written. We must consider public education in the light of its full development and its present place in American life.' Essential to the reasoning are two propositions: first, that education is something not only eminently desirable but essential to the full development of personality and therefore a right which 'must be made available to all on equal terms' and, secondly, that its full benefit depends on a feeling of self-confidence which will not be achieved if segregation is enforced. It is argued that the policy of segregation is usually interpreted as denoting that the segregated group is inferior.

These considerations surely apply with considerable force to separate development, if it is considered in a wider framework, outside the national laws of South Africa. Whatever may have been the case sixty years ago, today the peoples of Africa want desperately something not easy to define, nor very clearly visualised, but essential to self-respect. It is not simply economic progress, though of course they do want that provided it is compatible with self-respect. It is not simply town-life nor education, though one of these is part of it and the other a means towards it. They want to catch up with the rest of the world, to belong to a group which has some say in the affairs of the world, a group of which they feel they are really a part. Seventy years ago they wanted nothing better than to be left alone to grow pumpkins and weave baskets.

Today that is not enough.

This is of course a form of nationalism, and it is part of the doctrine of separate development that the Bantu-speaking peoples are as much entitled to nationalism as the Afrikaners. But nationalism surely means more than being allowed to speak one's own language. It means belonging to a group big enough to exercise sovereignty and to be represented abroad. The Okavango are a group of less than 30,000; the Herero are less than 40,000; the Damara less than 50,000; even the Ovambo are only a quarter of a million. To split up half a million people into twelve groups and encourage them in separatism is in the long run the surest way to bar them from the self-realisation that they seek.

This would be so even if they were to be genuine States on an equal footing with the White section. It is even more clearly a denial of what they seek if they are kept at arm's length in remote parts of the country and only admitted to the area of progress under a cloud of humiliating restrictions.

There is a final point to be made about these restrictions. White South African arguments are based on the different stages of development reached by various groups of people. It is undisputed fact that groups have developed at different paces in respect of the control of environment (although understanding of other aspects of life has not always grown at the same pace). But the aspect of South African thought which is widely questioned elsewhere is the assumption that an individual is permanently limited by the limitations of his group. His ties with it may be strong; indeed, when considering politics and national survival, the assumption that they will be strong is altogether reasonable. Again, as a matter of choice, people may prefer to mix socially with those of their own group, but to say that by law people of one group must mix with no others can really only proceed from a conviction not only that the other groups are inferior but that every member of each of the other groups is permanently and irremediably inferior. It is this that rankles. 'Separate but equal' is possible so long as it is a matter of choice by both parties; legally imposed by one, it must be regarded by the other as a humilation, and far more so if it applies not only to the group as a whole but to individuals. In fact, of course, what separate development has meant has been anything but equal.

These are some reasons why it will be hard to find natives of Africa who believe that to extend the policy of separate development to South West Africa even more completely than at present is in the interest of any but the White inhabitants.

References

The literature of separate development is considerable. The most up-to-date and authoritative expositions of the doctrine are to be found in:

Dr. Verwoerd's speech to the House of Assembly on 23 January 1962

Dr. Verwoerd's address to the South Africa Club, London, April 1962

Mr. de Wet Nel's speech to the House of Assembly 12 June 1961

Earlier statements of the doctrine in slightly different forms are:

S.A.B.R.A. (South African Bureau of Racial Affairs): *Integration or Separate Development?* Stellenbosch 1952

Gorbler, J. H.: *South Africa's Destiny*, 1958

Manifesto of National Party, 1947.

Other references are to: Brown *v.* Board of Education of Topeka: 347 US 483, 98 L ed 873, 74 S Ct 686

S.A. General Law Amendment Act, No. 37 of 1963
S.A. General Law Amendment Act, No. 76 of 1962
S.A. Bantu Laws Amendment Bill
South Africa and the Rule of Law: International Commission of Jurists, Geneva, 1960
D. V. Cowen: *The Foundations of Freedom*, London, O.U.P., 1961
Edgar Brookes: *Civil Liberty in South Africa*, London, O.U.P., 1961
S.A.I.R.R. (South African Institute of Race Relations): *Annual Surveys*, Johannesburg, 1962, 1963.
Report of the Commission of Enquiry into South West African Affairs 1962-3, (the Odendaal Report), Pretoria, Government Printer, R.P. No. 12 of 1964.

ANNEX 2

EXTRACT FROM WORKING PAPER PREPARED BY THE UNITED NATIONS SECRETARIAT

(U.N. Document A/AC. 109/L. 108; 8 April 1964.)[1]

Recommendations for the partitioning of South West Africa

18. The Odendaal Commission has recommended the partitioning of South West Africa into ten separate "homelands" for Non-Europeans covering an aggregate area of 32,629,394 of the Territory's 82,388,000 hectares, a Coloured rural irrigation settlement of 92,421 hectares, and a "White area". The proposed "White area" is not clearly defined to comprise the balance of the Territory. The Commission proposed that it consist of surveyed farms, the urban areas and those portions of two game reserves not included in the "homelands". Such a definition of the "White area" would include Walvis Bay[2] and exclude the two large diamond areas on the southwestern coast of the Territory, other than the urban areas therein, and also exclude areas of unsurveyed government lands. It also proposed that administrative and legislative authority over all mines and lands, delegated to the territorial Legislative Assembly in 1949, revert exclusively to South Africa.

19. The ten proposed Non-European "homelands" and one "White area" are as follows:

(a) Ovamboland, for the Ovambo peoples, numbering 239,363.[3] A total of 230,559 (96.32 per cent), including 27,771 Ovambo temporarily employed in the "White area", live in the existing Ovamboland Native Reserve; the remaining 8,804 Ovambos are settled in urban areas within the "White area".

(b) Okavangoland, for the 27,871 Okavango peoples. A total of 27,702 (99.40 per cent), including about 850 employed temporarily in the Police Zone, live in the existing Okavango Native Reserve.

(c) The Kaokoveld, for the 9,234 Kaokovelders, who live in the existing Kaokoveld Native Reserve.

(d) Eastern Caprivi, for the 15,840 East Caprivians, who live in the existing Eastern Caprivi Zipfel Native Reserve.

(e) Damaraland, for the 44,353 Damaras, 2,400 of whom live in Native reserves to be included in Damaraland, 1,224 live in other Native reserves, and 38,329 live in "White" urban and rural areas.

(f) Hereroland, for 35,354 Hereros, of whom 9,017 live in Native reserves to be included in Hereroland, 6,436 live in other reserves, and 19,901 live in "White" urban and rural areas.

(g) Namaland, for 34,806 Namas, of whom 2,292 live in Native reserves

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[1] [Footnotes renumbered.]

[2] Walvis Bay, territorially a part of the Cape Province of South Africa, is administered as an integral part of South West Africa. The Odendaal Commission Report included a footnote stating that the Walvis Bay area which was initially estimated at 374 square miles, was "re-estimated" in 1962 at 434 square miles.

[3] Population figures are for 1960.

to be included in Namaland, 2,009 live in other reserves and 30,505 live in "White" areas, 8,998 of them in "White" urban areas.
(h) Rehoboth Gebiet, for the 11,257 Basters, a Coloured group, of whom 8,893 live in the Gebiet, 2,026 live in "White" urban areas and the balance live in Native reserves and "White" rural areas.
(i) Bushmanland, for the 11,762 Bushmen, of whom 9,484 live in the "White" urban and rural areas or in Native reserves in the southern section and 2,278, described as nomadic, live mainly in the north-eastern part of South West Africa.
(j) Tswanaland, for the Tswana population of 2,632, of whom 437 live in a Native reserve to be abolished and the balance live mainly in "White" urban and rural areas; the area to be set aside as a Tswana "homeland" was promised by the Government to the Herero people as a future addition to the Aminuis Native Reserve which is now recommended for abolition.
(k) "White area", whose proposed administration was referred to as the "South West Africa Administration", for the 73,464 Europeans, of whom 53,680 (73 per cent) live in urban areas and 19,426 (27 per cent) live in rural areas of the Police Zone, and 358, mainly missionaries and officials are stationed in the northern Native reserves.

20. Of the total 1960 population of 526,004, a majority (286,485) lived in the northern Native reserves of the Kaokoveld, Ovamboland, Okavango and Eastern Caprivi Zipfel Native Reserves on the northern boundary of the Territory. Of the total northern population, 10 per cent were recruited as migrant labourers under one to two and a half year contracts for work on the mines, European farms, industries and for domestic service in the southern section of the Territory. The population of Ovamboland accounts for 45 per cent of the total population of South West Africa. It was proposed that the areas of three of the existing northern reserves be altered, the size of Ovamboland and Okavango increased, and the area of the Kaokoveld reduced.

21. In the southern section of the Territory, most of the population, both European and Non-European, now live in the proposed "White area". A total of 13,709 Damaras, Hereros and Namas and 8,893 Basters are settled in Native reserves and the Rehoboth Gebiet which will be included in their respective "homelands"; this total represents less than 10 per cent of the Non-European population permanently settled in the southern section of the Territory. The Odendaal Commission recommended that twelve of eighteen existing Native reserves in the southern areas of the Territory, and the Rehoboth Gebiet, be included in "homelands" which are to be extended and consolidated by the addition of European farmland, Government land and game reserve land. Six of the existing "permanent" Native reserves are recommended for dissolution: Aminuis, Bondelswarts, Neuhof, Otjimbingwe, Ovitoto and Warmbad. The report of the Odendaal Commission envisages the transfer of residents of all Native reserves to their respective "homelands"; the transfer of non-Baster groups from Rehoboth to their "homelands"; and the transfer of Namas and Basters in "White" urban areas to their "homelands". A total of 32,906 Non-Europeans would accordingly be moved to their respective "homelands", 20,882 of them from existing Native reserves or the Rehoboth Gebiet, and 11,024 from "White" urban areas. Some 1,000 Europeans would also be expected to move from the Rehoboth

Gebiet, as had already been decided before the appointment of the Odendaal Commission. Approximately 1,000 to 1,500 Europeans would have to vacate European farm areas which would be included in the proposed Non-European "homelands". From 4,000 to 6,000 Non-European employees on these farms would also have to be moved to their "homelands".

22. The Commission did not propose that Non-Europeans, other than 11,024 Namas and Basters, be resettled from the "White" areas to their "homelands". Some relocation of Non-Europeans within the "White" area were, however, proposed, involving the transfer of 2,500 or more Coloureds to three urban centres in the "White area", and the transfer of some 6,000 Natives in the Windhoek area from the old Native location to a new Native location (Katutura).

23. On the basis of 1960 population statistics and the recommendations of the Odendaal Commission, the proposed "White area" would initially have a *de facto* population of 73,106 Europeans and 116,383 Non-Europeans, as well as an additional 28,621 Non-European migrant labourers recruited from the "homelands" on the northern border of the Territory. A majority of the Non-Europeans in the southern portion of the Territory would thus live in the "White" area rather than in their "homelands". Unless continued European immigration alters the position, Non-Europeans would also continue to form the majority of the population in the "White" area. In this respect, it may be noted, only Europeans are permitted to enter the Territory from South Africa without permit, and the Commission recommended that further Coloured immigration from South Africa be curtailed due to unemployment among Coloureds in South West Africa.

24. The existence or future disposition of Hoachanas, referred to in official sources both as a "temporary" Native reserve and as "government land", is not mentioned in the report of the Odendaal Commission. The planned removal of the Rooinasie Nama inhabitants of Hoachanas to Itsawisis, one of the European farm areas to be included in the proposed Namaland, has not previously been carried out, due, *inter alia*, to the lack of potable water at Itsawisis. It may be noted that the General Assembly, by resolution 1357 (XIV) of 17 November 1959, urged the Government of South Africa to desist from the planned removal.

Government

25. The Commission recommended that only the proposed White area be administered by an Administrator, Executive Committee and Legislative Assembly, the latter to consist, as at present, of eighteen Europeans elected by the European voters of the Territory. Under the proposals, these government bodies would have greatly reduced powers.

26. At present the Administrator, Executive Committee and Legislative Assembly of South West Africa exercise authority over all matters except defence, police, foreign affairs, Native affairs (excluding, *inter alia*, health, education and agriculture for Natives), transport, interior, information, immigration, customs and excise, audit and the custody of enemy property, all of which are administered as integrated services by the Government of South Africa. The Commission proposed that South Africa also take over the following additional branches of the South West

Africa Administration with respect to all population groups: justice, prisons, mines, commerce, industries and labour, land, the Land and Agricultural Bank of South West Africa, agriculture, Meat Trade Control Board, water affairs, deeds, Surveyor-General, posts and telegraphs, social welfare, archives and the State Museum. The South African Government would also take over from the local Administration and the territorial Legislative Assembly the following: Coloured Affairs, all education for Non-Europeans, health for Non-Europeans outside of the "White area", and roads and works outside of the "White area" as well as supplies and transport, excluding transport of the South West Africa Administration. In addition, the South African Government would take over revenue other than that to be controlled by the South West Africa Administration.

27. The European Legislative Assembly would retain powers within the "White area" over education for Europeans, health services for Europeans and non-Europeans in the "White area", roads, local authorities and townships, public works, personal and income tax, the licensing of businesses, motor vehicles and entertainment, and all other matters not specifically taken over by the Republic of South Africa. Its legislation would be subject to the approval and signature of the State President of South Africa.

28. It may be noted that under the South West Africa Constitution, [1] exclusive authority to impose taxes, other than customs and excise duties, on Europeans and Coloureds is delegated to the territorial Legislative Assembly. The relevant financial provisions in the Constitution may not be altered except with the approval of the Legislative Assembly, notwithstanding a general reservation of powers to South Africa under the Constitution.

29. With respect to Natives, the Commission recommended, in effect, that all aspects of their administration and development other than health and environmental services for those in the "White area", and their education, be transferred to the South African Minister of Bantu Administration and Development. The education of Natives, it recommended, should be integrated with the organization of the South African Department of Bantu Education.

30. With respect to Coloureds (other than Basters) and Namas, the Commission recommended that the development and promotion of their administration be transferred to the Department of Coloured Affairs of South Africa and that their education as well as the education of the Rehoboth Basters be integrated with the organization of that Department. It also recommended that education and all matters in respect of the Rehoboth Basters be left to the Government of South Africa to deal with at its discretion, due regard being had to the Commission's recommendation concerning the integration of their education.

31. For each of the "homelands" other than Bushmanland and the Rehoboth Gebiet, the Commission proposed a Legislative Council, to be statutorily instituted, consisting of the chiefs and headmen *ex officio* and of members elected by all citizens or members of the "homeland" group over 18 years of age, living both within and outside the "homeland" area, provided they registered as voters in the "homeland". Elected members

[1] Act No. 42 of 1925, as amended.

were initially to constitute not more than 40 per cent of the legislature.

32. It was proposed that executive power should be vested in an Executive Committee consisting of chiefs and other members elected by the Legislative Council.

33. The "homeland" Legislative Councils were gradually to take over from the Department of Bantu Administration and Development the legislative authority and administrative functions entrusted to it. This was eventually to include all functions except: defence, foreign affairs, internal security and border control posts, water affairs and power generation, and transport. All "homeland" legislation would be subject to the approval and signature of the State President of South Africa.

34. The Commission recommended that each Legislative Council institute a "homeland" citizenship for all members of its group born within South West Africa or born outside of the Territory but permanently resident in the "homeland" and not declared "a prohibited immigrant in South West Africa". It also recommended that the Legislative Council institute inferior and superior courts, with appeals from the inferior courts lying to the superior courts, the latter's decisions subject to appeal to the South West Africa Division of the Supreme Court of South Africa and thereafter to the Appeal Court of South Africa.

35. The transfer of land within each "homeland" to the respective Legislative Council in trust for the population was recommended, subject to the proviso that the Council be allowed, with the approval of the State President of South Africa, to release certain parts of the land for alienation to individual citizens, and subject to the further proviso that neither the Executive Committee nor a citizen has the right to alienate land to a non-citizen except with the approval of both the Legislative Council and the State President.

36. With respect to Bushmanland, the Commission stated: "The position is, as is generally known, that the Bushmen are a nomadic people who have nowhere permanently established themselves as a community or indeed even as a fairly large group. They are scattered throughout South West Africa . . . There is no feeling of solidarity among them, and any form of government is wholly unknown to them. In their case, therefore, there is no conceivable form of self-government in which they can participate at this stage." The Commission also observed that "the greater part of the Bushman population is no longer nomadic" and that "9.484 (or 80.63 per cent) . . . have to a large extent been drawn into the economy of the southern section of the country".

37. For the Rehoboth Gebiet, the Commission recommended that a form of self-government be granted and that the provisions of the required constitution be determined by consultation between the Baster Community and South Africa. The report outlined previous unsuccessfull efforts in recent years to reach a mutually acceptable constitution and noted that the Community itself was engaged in drafting a new constitution.

38. The Commission recommended that four chief officers, to be stationed in "The White area" at Windhoek, be appointed by the South African Department of Coloured Affairs for the Rehoboth Gebiet, Namaland and the Coloureds, and by the Department of Bantu Administration and Development for the Native "homelands".

39. The Commission further proposed that a diplomatic post of Commissioner-General be established for Ovamboland, the Kaokoveld and Okavango combined, to serve as a link between these "homelands" and the South African Government and suggested that this recommendation be carried out even before any of its other recommendations. Mr. J. P. van S. Bruwer, who had served on the Commission, was appointed the first Commissioner-General early in 1964. The Commission also proposed that a Chief Commissioner and a Commissioner be stationed in Ovamboland, and that a Commissioner be stationed in each of the other "homelands" other than Namaland and the Rehoboth Gebiet, to serve in an advisory capacity to the local "homeland" governing bodies.

40. The Commission made a number of recommendations regarding the local government of Non-Europeans who would remain settled in the "White area". For the Coloureds, it suggested that the existing Coloured Council, which is composed of members appointed by the Administrator of the Territory, should in future include as many elected members as may be agreed between that Council and the South African Government. Apart from a small number of Coloured farmers, for whom a rural irrigation settlement was proposed on the Orange River, the Commission recommended that all Coloureds, who, it observed, were distributed over the whole "White area", be persuaded to move to the areas of their greatest concentration—Windhoek, Walvis Bay and Luderitz—and that the management of their separate Coloured townships be entrusted to Coloured Local Township authorities.

41. With respect to Natives settled in separate non-White townships in "White" urban areas, the Commission recommended the establishment of Non-White councils, at least 60 per cent of their members to be elected by the local non-White residents and the balance appointed by the "homeland" Legislative Councils. The White urban authority, or local government, was to delegate such functions, powers and authorities to the proposed Non-White councils as might be approved by the South African Minister of Bantu Administration and Development.

Five-Year Plans for the Development of South West Africa

42. The Odendaal Commission recommended a five-year development plan at an estimated cost of R114,512,485,[1] to be followed by a second five-year plan involving an estimated expenditure of R30,000,000, and a third plan for which no estimates were given. The main recommendations for development may best be assessed in relation to the existing economic position of South West Africa, and of the various "homeland" areas.

43. Mining, agriculture and fisheries are the most important contributors to the economy. In 1962, exports of minerals amounted to R53,133,000, the Consolidated Diamond Mines and Tsumeb Corporation accounting for 95 per cent of the Territory's mineral production; fish production was valued at almost R23 million; agricultural exports and local sales exceeded R27 million, cattle and karakul pelts accounting for over R24 million of the total. The highest published official figure for the sale of produce from Native areas is that for 1957, when the value

[1] One Rand equals 10 shillings sterling or U.S.$ 1.40.

of the sale of livestock, cream, pelts and hides totalled R834,000, followed by a drop to R638,000 the following year. [1]

44. The Commission noted that the most important economic activities were concentrated at a few places, e.g., diamond mining at Oranjemund, metal production at Tsumeb and Grootfontein, fisheries at Walvis Bay and Luderitz, and commerce and industry mainly in Windhoek and Walvis Bay. None of these areas are to be included in Non-European "homelands".

45. According to the Odendaal Commission, the "modern market sector links up with the traditional sector by attracting unskilled non-White employees, virtually to the maximum of their availability, as wage earners on farms and mines, and in domestic service and industries". In 1962 migrant labourers were being recruited at a beginning rate of R60 to R66 for the first year's work. According to a territorial commission of inquiry, average wages amounted in 1956 to about R120 per year for farm and domestic workers and to almost R200 for Native workers in urban areas, mines, industries, administration and railway employment. According to the Odendaal Commission, average wages of Non-White workers in mining rose from R123.8 in 1961 to R202.9 in 1962 and wages of White workers from R2,321 in 1961 to R2,452 in 1962.

46. The sales of agricultural produce from Native areas referred to above relate exclusively to Native areas within the Police Zone, in the southern sector of the Territory. According to the Odendaal Commission and numerous official sources, the northern Native areas, which contain the majority of the Territory's population also have the highest agricultural potential in South West Africa. Official publications indicate, however, that these areas have had no export market throughout the history of the Mandate. Due to cattle diseases, the sale or movement of animals or animal produce outside the individual reserves except under special permit is prohibited by law. As regards crop farming in the northern "homeland" areas, the Odendaal Commission reported that production is sufficient to meet the needs of the population in the Eastern Caprivi. It is negligible in the Kaokoveld and reasonably constant only during favourable years in Ovamboland and the Okavango. These three areas require supplementary food during the prolonged droughts which occur in the Territory.

47. According to the Odendaal Commission, the agricultural economy of the four northern homeland areas is based largely on their livestock population. It considered that the lack of exports from those areas for a considerable period had been a severe blow to the economy of South West Africa. The Commission estimated that these areas had from 10,000 to 15,000 cattle available for marketing annually, and that the number would in all probability increase to 30,000 per year in the future. These estimates of future potential may be compared to the Territory's annual cattle exports of 167,800 head of cattle and 50,000 frozen beef

[1] The Odendaal Commission gave one figure of the income derived from the sale of produce in Native reserves, relating to Damaraland only. It reported that the income from live-stock, skins, hides, bones, and the sale of cream amounted to R162,228 in 1956. According to another commission of inquiry, total sales of stock and produce in all Native reserves amounted to R782,718 during 1956.

carcasses in 1962, an additional 92,000 being slaughtered for local consumption in the southern section. The southern section also exported in 1962 a total of 67,437 sheep, 2,345,563 karakul pelts and dairy produce as well as fish products and minerals.

48. The Commission considered it imperative that a market be found for livestock from the northern areas and suggested the possibility of establishing quarantine camps from which animals could be taken to canneries in sealed vehicles. It observed that the possibility of establishing canneries within the northern areas had been explored and considered uneconomic and impractical. The Commission nevertheless suggested that in course of time such facilities should be provided for canning beef from the Kaokoveld, Ovamboland and the Okavango. For a long time to come, it stated, the meat canning factory at Otavi, in the "White area", would be the market outlet for Ovambo cattle; another canning factory, at Okahandja, in the "White area", might also play a role in the future in canning meat from the Kaokoveld and western Ovamboland, the Commission observed. Other possibilities suggested for the northern area included the establishment of a furniture factory in Ovamboland, which would be the first factory in the northern area, and the establishment of a jute industry in the Okavango.

49. The Commission was of the opinion that there were further possibilities for the development of mining in the Territory and suggested that the South African Department of Mines organize the exploration of the whole Territory, giving attention first to areas where minerals had already been exploited profitably. According to the recommendations of the Commission, mineral and mining rights in the various "homelands" would eventually be transferred to the "homeland" authorities. The Commission also considered it important that the inhabitants of the "homelands" be encouraged and assisted to become entrepreneurs in their own areas, as well as managers and responsible officers in their own mining.

50. While prospecting is being carried out in several of the Native reserve areas, the only operating mine within a Native reserve is the Uis tin mine in the Okombahe Native reserve in the Police Zone, a reserve which is proposed to be included in Damaraland. The mine, which has ore reserves estimated at 21 million tons, is owned by the statutory South African Iron and Steel Industrial Corporation Limited (Iscor). Production is being expanded from 15,000 to 66,000 tons of ore per month at a cost of R2 million. With respect to this particular mine, the Odendaal Commission recommended the establishment by the mining concern of a Native township within the Native reserve, and a Native labour force drawn in future from within the reserve. This would represent the first Native mine labour community settled on a family basis in South West Africa. As of early 1964, a small White community, which includes 41 houses and a school for European children, had already been established within the Native reserve for European employees of the Uis mine. Under existing laws, the income derived from taxation of the mine profits is payable into the central revenue of the Territory rather than into the Native reserve trust fund.

ANNEX 3

EXTRACT FROM REPORT OF THE UNITED NATIONS SPECIAL COMMITTEE ON THE POLICIES OF *APARTHEID* OF THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

(U.N. Security Council Document S/5426; 16 September 1963) [1]

THE TRANSKEI CONSTITUTION ACT AND THE MOVES TOWARDS THE CREATION OF "BANTUSTANS"

97. The promulgation of the Transkei Constitution Act [2] is perhaps the most significant development during the year in the direction of the implementation of *apartheid*. The Act, the provisions of which are described later in this Chapter, provides a degree of self-government for the African reserve of Transkei.

98. The Transkei, situated on the coast in the northeastern part of the Cape Province, has an area of 16,350 square miles. Its population consists of over two million Xhosa people, as well as 17,369 Whites and 13,716 Coloureds. [3]

99. The significance of the establishment of self-governing institutions for the Transkei lies, however, not so much in the legislation itself but in the proclaimed intention of the Government that it is a step toward the creation of a series of "Bantustans" in the African reserves, that the African people can only aspire for political rights in these states and that they would be regarded as transients and aliens in the White areas which comprise six-sevenths of the territory of the Republic of South Africa. [4] The Government has widely advertised this move as proof of its sincerity with respect to separate development, and has made extravagant claims such as the following:

> "The White man has undertaken a task such as history has not known. He is helping the Black man to bridge the gap, in one span, between the Stone Age and the atomic era." [5]

100. To appreciate the real significance of this development, it is essential to review briefly the evolution of the policy of the South African Governments [*sic*] towards African land ownership and the African reserves.

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[1] [Footnotes renumbered.]

[2] No. 48 of 1963. Text in *Government Gazette Extraordinary*, 30 May 1963.

[3] The Coloured population consists chiefly of Cape Coloured but also includes Cape Malays, Bushmen, Hottentots and all persons of mixed race.

[4] *South African official statements often tend to give an erroneous impression* of the ratio of the White and the African areas by including most of South West Africa, as well as three British Protectorates of Bechuanaland, Swaziland and Basutoland, in the calculations. The figures given here cover only the territory of the Republic of South Africa.

[5] Republic of South Africa, Department of Information, *The Progress of the Bantu Peoples towards Nationhood* (consolidated ed.), p. 1.

(a) *Evolution of the African Reserves*

101. South African Government spokesmen claim that the Europeans arrived in the country before or at about the same time as the Bantu and that there was a traditional geographical separation between the White and Black areas. [1] The theory that the Europeans were the first settlers, which applies only to a small part of the country around the Cape Peninsula, has been disputed by many historians and is of little relevance at the present time as the right of the people of European origin to live in South Africa has not been disputed. The claim of a traditional separation of the territory between the Whites and the Africans, however, deserves some consideration.

102. The first European settlement in South Africa was established in 1652 at Table Bay. It expanded slowly at first and faced little resistance from the native Africans, particularly the Hottentots. In 1702, however, a party of Afrikaner (Dutch) traders crossed the Fish River, and for the first time encountered the powerful Xhosa branch of the Bantu. From 1779, a series of "Kaffir Wars" [2] began, as the Bantu and Europeans fought each other for land. This struggle was to become one of the chief factors in South Africa's history for a century.

103. Great Britain, which established its rule over the country in 1814, also pursued a systematic policy of annexation and increased political authority over the Bantu. The restriction of land ownership by the Bantu, the pass laws, and the employment of tribal chiefs for administrative control became the central features of Native policy under British rule. [3] The Africans were thus progressively confined to limited areas of land.

104. The development of diamond and gold mining in the last quarter of the nineteenth century, and more recently the rapid development of industry in the urban areas, led to an ever-increasing demand for African labour outside the areas to which they had been confined.

105. The European mineowners of the Rand exerted pressure on the Government to restrict African landownership as they were faced with a chronic shortage of unskilled labourers and the Africans were reluctant to leave their farms to work for low wages in the mines. Similar pressure was exerted by the White farmers. Echoing their sentiments, General Botha, who was to become the first Prime Minister of the Union, declared in 1903 that "he would, if necessary, break up the areas of land reserved for the Natives (including the Protectorates) in order to provide labour for the mines and farms". [4]

106. One of the first acts of the Union of South Africa, formed in 1909 by agreement between the two major White elements in the country, was the promulgation of the Native Land Act of 1913, which laid down

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[1] Mr. W. J. le Roux, director of the Information Service of South Africa, in a letter published in the *Christian Science Monitor* on 5 June 1963, claimed further that the Whites settled South Africa by right of first occupation and that the Bantu were "migratory elements in the White man's land."

[2] The Afrikaners called the Bantu people "Kaffirs" (unbelievers).

[3] See, for instance, the report of the Inter-Colonial Commission, published in 1905.

[4] Quoted by Julius Lewin: "South African Native Policy Never Changes", *The Political Quarterly*, London, January-March 1957, p. 67.

the principle of territorial segregation and separation of land rights between "Natives" and non-Natives. Under this Act, 10 1/2 million *morgen* (about 21 million acres) were set aside as Native Reserve areas. The African opposition to this Act led to the formation of the Native National Congress, predecessor of the African National Congress, which tried in vain to prevent the application of this measure by representations in South Africa and in London.

107. Though the Government attempted to justify the legislation as a measure to protect African interests, African leaders protested it as an unjust law directed against the vital interests of their people. Most of the reserves were, in fact, Crown lands communally farmed and did not provide a property market. Purchase of land by individual Africans outside the Reserves was effectively restricted. In the few urban areas where the Africans had the right to own land, rights of occupation and tenancy were strictly limited by the Native (Urban Areas) Act of 1923.

108. The Native reserves could not support the African farmers even at the subsistence level and the pressure on the land continually increased.

109. In 1936, the Native Trust and Land Act provided for the acquisition by the Government of additional land of 15 million acres for African occupation, and for the progessive liquidation of the "Black Spots" in "White areas." This was declared to be a "final settlement".

110. The acquisition of the additional land has not yet been completed. When completed, the native reserves would cover about 41.6 million acres of land or about a seventh of the territory of the Republic of South Africa. [1]

111. The reserves contain less than two-fifths of the African population of the Republic and are already over-populated. The most optimistic estimates place the agricultural potential of the reserves at nearly 20 per cent of that of the Republic. But little progress has been made in the agricultural development of these areas and serious soil erosion has developed. According to the report of the Tomlinson Commission (1955), appointed by the National Party Government, the Reserves can decently support only half of their population.

112. In other words, the traditional geographical separation is mainly a restriction on land ownership imposed by the Government in which the Africans had no voice and which the African leaders had protested strongly. The reserves have for a long time ceased to support even a majority of the African population, and the African population has for a long time formed a majority outside the reserves. [2]

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[1] About five million acres of land have yet to be bought to carry out the provisions of the Native Trust and Land Act of 1936. (Republic of South Africa, Department of Information, *The Progress of Bantu Peoples Towards Nationhood* [consolidated ed.] p. 84). The delay in the acquisition of the land is due to the resistance of European farmers and the inadequacy of funds appropriated for the purpose. The "Black Spots"—African-owned land in European areas—are, however, being rapidly eliminated.

[2] In the urban areas, the African slightly outnumber the Whites. *In the "White" rural area, the number of Africans is about four times the number of Whites.* [Italics added.]

(b) *The policy of Separate Development*

113. The National Party came to power in 1948 after a campaign in which it stressed the alleged dangers of increasing African population in the White areas, and the trend towards economic integration. Its leader, Dr. D. F. Malan, asked in a speech at Paarl on 20 April 1948:

> "Will the European race in the future be able to maintain its rule, its purity and its civilization, or will it float along until it vanishes for ever, without honour, in the Black Sea of South Africa's Non-European population?" [1]

114. The National Party Government pointed to the numerical superiority of the Africans and the alleged danger of Black domination in embarking on a series of laws to outlaw all social intercourse between the racial groups, and to restrict the rights of Africans outside the reserves. The policy of "separate development" was linked with these measures.

115. This policy was pushed particularly by Dr. Verwoerd, Minister of Native Affairs from 1950 and Prime Minister since 1958. As early as 1950 Dr. Verwoerd outlined the Government's policy of "Autogenous Development" for the Bantu:

> "(The Government) wishes to create for the Bantu every possible opportunity to realize their ambitions and to serve their own people. This is, therefore, not a policy of oppression, but of creating a position which has never yet existed for the Bantu, namely that they will be able to develop on their own lines in accordance with their own languages, traditions, history and various ethnic groups." [2]

116. In pursuance of this policy, the Bantu Authorities Act of 1951 abolished the Native Representative Council and authorized the Governor-General to establish Bantu "tribal authorities". [3] The Bantu Education Act of 1953 provided Government control of Bantu schools and their reorganization along tribal lines. A host of other legislative and administrative steps were designed towards the separation of the Africans from the other ethnic groups and the creation of institutions on the basis of tribal units.

117. Each of these measures increased tension in the country and could only be imposed by force. The establishment of Bantu Authorities, for instance, was "accompanied by Government threats, by murder, violence, arson, tribal revolt and severe police action". [4] In 1957, when the Department of Native Affairs attempted to implement the Bantu Authorities system in Tembuland, the people objected strongly to the splitting of Tembuland into three—Bomvanaland, Tembuland, and Emigrant Tembuland—and sent a deputation to Pretoria to convey their opposition to the scheme. Subsequently, four of the delegates

[1] Quoted by Neame, L. E., *The History of Apartheid*, London, 1962, p. 73.

[2] Union of South Africa, Department of Native Affairs, *Report for 1954-1957*, p. 1.

[3] In 1959 there were 371 "tribal authorities", though Government officials had aimed at a "possible 500". (Republic of South Africa, Department of Information, *The Progress of the Bantu Peoples towards Nationhood* (consolidated ed.), p. 8).

[4] Tatz, C. M.: *Shadow and Substance in South Africa*, Pietermaritzburg, University of Natal Press, 1962, p. 191.

were deported by the Government on the grounds that they were causing dissension in the tribe and opposing Government measures. The "Tembuland technique" has since been adopted by the Government to overcome opposition in other areas. The Government has resorted to threats to cut off financial assistance and discontinue necessary social services, has deported leaders, and imposed chiefs and headmen who are willing to go along with the Government in return for promotions.

118. Serious rioting as a result of the Government's attempts to establish Bantu Authorities occurred in many areas. In May 1958, over 300 Africans were arrested after riots in the Sekhukhuneland reserve. Riots and unrest continued in East Pondoland during 1959 and 1960, and the Government imposed serious repressive measures.

Promotion of Bantu Self-Government Act, 1959

119. A significant step in the direction of the Government's plans was taken by the promulgation of the Promotion of Bantu Self-Government Act on 19 June 1959. The declared aim of the Act is "to provide for the gradual development of self-governing Bantu national units and for direct consultation between the Government of the Union and the said national units in regard to matters affecting the interests of such national units".

120. The Act abolished the limited representation of the Africans in Parliament and provided for the gradual consolidation of the 264 scattered Native reserves into eight self-governing "national units" and the establishment of territorial authorities in these units.

121. During the debates in Parliament, Dr. Verwoerd said that the Government's scheme would lead to a permanent White South Africa, and that unless it was accepted, the only other choice was a common multi-racial country where the Whites would be outnumbered by the Blacks three or four to one.

122. African leaders opposed this measure as a further denial of their rights. Chief Albert Luthuli, President of the African National Congress, stated in an article in the *Rand Daily Mail* in May 1959 that the African people had not been consulted on the Promotion of Bantu Self-Government Bill and that they "had certainly not decided in favour of the system—they did not want partition or separation in South Africa".

> "This 'solution', which is merely a disguise for the *apartheid* we already know, is completely unacceptable to the African people."

123. The Government, however, proceeded with the consolidation of the African "national units" and the establishment of territorial authorities. In the Transkei, which is a relatively large and compact reserve area, a territorial authority had been established as early as 1956. Five other territorial authorities were established by the end of 1962. [1] Two more—Zulu and South Sotho—are being planned.

The Transkei Constitution Act

124. Meanwhile, in January 1962, Prime Minister Dr. Verwoerd announced a plan to grant "self-government" to the Transkei. He said

[1] Ciskei, Tswana, Lebowa, Matshangana and Venda.

that the area would be given a wholly Black Parliament and Cabinet. The White inhabitants of Transkei would have no political rights in the territory, but would continue to vote for the central Parliament. Dr. Verwoerd also announced that a separate Transkei citizenship would be instituted for Africans and that Transkei Africans living outside the territory would be entitled to vote for the Transkei Parliament.

Powers in such fields as agriculture, education, health, welfare services, land, roads and minor local authorities would be entrusted to the new Transkei Parliament; external affairs, defence and certain aspects of the administration of justice would, for the time being, remain the responsibility of the Republic. The constitution would be decided by the *Bunga* (local council).

125. During the discussions which followed between the Government and the representative of the *Bunga*, it was reported that the Government had indicated that it could not entertain any requests for greater powers than had been offered or for a multiracial legislature; that all legislation of the Transkei Parliament would be subject to the consent of the State President of the Republic; and that the Transkei Parliament should consist of chiefs as well as elected representatives.

126. While supporters of the Government claimed that the move was the beginning of a new era in race relations and a step towards independence of Africans in their areas, members of the opposition and several African leaders argued that it was merely a disingenuous scheme, and that the terms "Parliament" and "Cabinet" were misleading as the area would enjoy little independence. Serious differences among the chiefs and people of the area were soon reported in the press. A number of cases of violence in the territory during 1962-1963 were attributed to opponents of the Government's scheme.

127. Defending his support of the Government's proposal, the Chairman of the Territorial Authority, Chief Kaiser Matanzima, said in a statement of 26 November 1962 that

> "White South Africa is 100 per cent. agreed on the maintenance of white control of the white parliament. Only their defeat on the battlefield will divest them of this resolution. Will those people who oppose the peaceful road taken by the Transkei come out and advocate a revolution?"

128. The Transkei territorial authority approved the draft constitution in December 1962 by a large majority.

129. The Transkei Constitution Bill was introduced in the Parliament on 28 January 1963 and promulgated on 24 May 1963. The Act confers self-government on the Territory of Transkei and vests executive functions in a Cabinet consisting of a Chief Minister and five ministers. The Cabinet is made responsible for the administration of six departments, namely: finance, justice, education, interior, agriculture and forestry and public works. [1]

130. The Legislative Assembly will consist of 190 members: the four paramount chiefs of the Transkei appointed by the Central Government; sixty appointed chiefs holding office in the nine regional authority areas of the territory; and forty-five members elected by Transkei citizens

[1] Section 10.

resident in the territory or in the rest of the Republic or in South West Africa. (All Bantu born in the Transkei and all Xhosa-speaking persons in South Africa and all Sotho-speaking persons linked with the Sotho elements in Transkei would be regarded as Transkei citizens). [1] The Assembly may conduct its business and adopt legislation in the Xhosa language.

131. The Act provides for a Transkeian flag, designed and approved by the Legislative Assembly, which will be flown side by side with the flag of the Republic at the building where the Assembly holds its sessions. "Nkosi Sikelel'i Afrika" is to be the national anthem of the Transkei.

132. All Bills approved by the Legislative Assembly are subject to the assent of the State President of the Republic. [2] The Assembly is not empowered to repeal or amend the Constitutional [*sic*] Act. Among other matters in regard to which it cannot legislate are: (a) the establishment of military forces; (b) the manufacture of arms and ammunition; (c) the appointment and recognition of diplomatic and consular representatives and the conclusion of international treaties and agreements; and (d) the control over the entry and presence of any Police force of the Republic sent to the Transkei for the maintenance of law and order and for the preservation of internal security. [3] The territory will, however, have control of any police force stationed in the Transkei and transferred to it by the Minister of Justice of the Republic.

133. The Government of the Republic will also retain control of the post office, railway and harbours, national roads, civil aviation, the entry of aliens into the territory, currency and public loans, and customs and excise. [4]

134. The Legislative Assembly, is competent to make laws in regard to taxation, Bantu education, agricultural improvements, inferior courts, wills, registration of deeds, public works, Bantu authorities, traffic, certain labour matters, welfare services, vital statistics, elections, liquor, markets, game preservation and licensing of trading and business. [5] Its powers in these matters extend to all citizens of the Transkei throughout the Republic.

135. The powers and functions of paramount chiefs, chiefs and headmen are not superseded by the establishment of the Legislative Assembly, however. The latter is not entirely competent in the restricted area of its jurisdiction because tribal authorities retain their original powers in certain areas. [6]

136. During the debate in the Parliament, the Minister of Bantu Administration and Development, Mr. M. D. C. de Wat [*sic*] Nel, said that the bill provided for the membership of the chiefs of the territories in the Legislative Assembly because experience elsewhere had shown that where the chiefs were pushed aside their traditional authority was eliminated. He also stated that as the Transkei did not at present have a sufficient number of trained Bantu to fill all the posts in the various

[1] Sections 23, 7 and 45.
[2] Section 40.
[3] Section 39.
[4] Section 39.
[5] Section 37, First Schedule, Part B.
[6] Section 43.

departments transferred to the jurisdiction of its Government, White officials would be placed at its disposal. These White officials would, however, remain in the service of the Government of the Republic and would be paid by the Republic. They would be gradually replaced by Bantu "but always beginning at the lowest grade and progressively advancing to the top so that White officials would never work under Bantu". [1]

137. The bill was vigorously opposed by the United Party which argued that the Bantustan policies would not change the outside world's attitude towards South Africa but would lead to the dismemberment of the country and endanger the security of South Africa. It contended that economic progress and separate development were incompatible.

138. Sir de Villiers Graaff, leader of the United Party, stated:

> "In Africa we had the position that metropolitan Powers who had controlled their colonies over many years and had had long experience in doing so, were abdicating those responsibilities. Here we are creating colonies, virtually speaking, in order to abandon them and abandon with them millions of people who will also be permanently present in the mixed areas but will be artificially regarded as citizens of those states." [2]

He added that the experience in Africa showed that once the metropolitan Powers promised a people independence, they lost control of the timetable and of the direction and development of the independent State. The promise of independence to the reserves by South Africa would create even greater problems in South Africa because of the influence of the mass of Bantus living outside the Bantu territories.

Implementation of the Transkei Constitution Act

139. The Transkei Territorial Authority met on 14 May to discuss arrangements for the establishment of the new institutions.

140. Regulations for the elections were published in the *Government Gazette* in June and registration of voters took place until 17 August in the Transkei and in other areas where large numbers of Transkei "citizens" are concentrated. The Government announced that nearly 800,000 persons had registered. Elections for the forty-five elected seats in the 109-member Legislature are due to be held on 20 November 1963.

141. The Government is reported to be planning to establish the new Transkei Government before Christmas 1963.

142. The Minister of Bantu Administration and Development announced on 16 August that the civil administration would be transferred to the territory in October: 1,900 of the 2,476 Civil Service posts would be filled by Africans. White officials would head the departments and hold other senior posts at this stage. [3]

143. Umtata, the largest town in the Transkei, will be the seat of government. The State will have no capital as Umtata is a White area.

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[1] *House of Assembly Debates*, 6 March 1963, cols. 2238-46.
[2] *House of Assembly Debates*, 22 January, 1963, cols. 27-29.
[3] *The Star*, weekly, Johannesburg, 17 August 1963.

Conclusions

144. In conclusion, a number of comments may be made on the Transkei Constitution Act and the moves towards the creation of Bantustans.

145. These moves are engineered by a Government in which the African people concerned have no voice and are aimed at the separation of the races and the denial of rights to the African population in six-sevenths of the territory of the Republic of South Africa in return for promises of self-government for the Africans in scattered reserves which account for one-seventh of the territory.

146. The reserves contain less than two-fifths of the African population of the Republic, while many of the Africans in the rest of the country are largely detribalized and have little attachment to the reserves.

147. Second, the "Bantustans" were not demanded by African leaders, but were imposed against their wishes. The leaders of the African people are silenced, entry into reserves by Whites is controlled by permit, and, under Proclamation 400, the Transkeins [*sic*] are denied freedom of assembly and speech.

148. Third, the self-government granted to Transkei at present is limited in many ways. Paramount Chief Sabata Dalindyebo of the Tembu, one of the biggest tribes in the Transkei, told the Tembus recently, "The freedom you are getting in the Transkei is a fowl-run. A cattle-kraal would be better." [1]

149. Fourth, the scheme aims at reinforcing tribalism and utilizing the tribal system against African aspirations for equality. [2]

150. Fifth, the "national units", made up of scattered reserves, are not economically viable. They do not provide a minimum standard of living even for the existing population of less than four million. Serious famines have recently been reported in Vendaland and Sekhukhuneland reserves in Transvaal. They have few known mineral resources, and they are almost devoid of industries. Their economies depend largely on the export of their labour to the "White" areas, at the rate of over half a million migrant labourers a year. [3] The Transkei is dependent on Government grants even for its administrative costs: the Government has offered 20 million Rand a year for this purpose.

151. A report on the Bantu areas prepared for the Government in 1955 —the Tomlinson report—stated that the farm population in the reserves should be reduced by half to promote economic agricultural units. It recommended rapid industrialization by White capital to provide employment to 300,000 farmers and add 50,000 new jobs a year. The Government, however, decided to limit industries within the areas to

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[1] *The Star*, weekly, Johannesburg, 10 August 1963.

[2] As in the rest of the continent, the African nationalist organizations in South Africa have opposed tribalism. One of the objects of the *African National Congress* is: "To encourage mutual understanding and to bring together into common action as *one political people* all tribes and clans or races and by means of combined effort and united political organization to defend their freedom, rights and privileges."

[3] According to the Tomlinson report, "with exception of cripples and disabled persons, nearly all males are employed outside Bantu areas at one or another stage between the fifteenth and fiftieth birthdays."

Bantu capital, with Government encouragement. It favoured encouragement of European-owned industries on the borders of—rather than in—the Bantu areas. [1]

152. A Bantu Investment Corporation has been set up with a small capital to promote industrial and commercial enterprises, but it has had little impact. [2] The Government has attached greater significance to the "border industries" and given various concessions for that purpose. Over half of the expenditure for the first five-year development plan of Bantustans (of which Transkei is one) is allocated for the establishment of villages intended to house Bantu labour forces for "*border industries*" in White areas. [3] But these have not created much employment either. According to a report delivered at a conference of the South African Bureau of Racial Affairs in June 1963, only 56,000 of the seven million Africans in and near the reserves were employed in industry. [4]

153. The creation of Bantustans may, therefore, be regarded as designed to reinforce White supremacy in the Republic by strengthening the position of tribal chiefs, dividing the African people through the offer of opportunities for a limited number of Africans, and deceiving public opinion.

[1] *Memorandum: Government decisions on the recommendations of the Commission for the Socio-Economic Development of the Bantu Areas within the Union of South Africa.* This decision had the advantage of ensuring adequate cheap manpower without disturbing the separation of races. But the rate of investment so far appears to be considerably below that recommended by the Tomlinson report.

[2] By July 1963, the Corporation granted loans totaling 862,811 Rand, and Africans had deposited 453,000 Rand in its savings accounts. (*The Star*, weekly, Johannesburg, 20 July 1963). The total number of Africans employed in industry in the Transkei is only 1,159. (Statement by the Minister of Bantu Administration and Development, *House of Assembly Debates*, 28 May 1963, col. 8772.)

[3] Republic of South Africa, Department of Information: *Scope*, March/April 1962.

[4] *The Star*, daily, Johannesburg, 10 June 1963.

ANNEX 4

EXTRACT FROM REPORT OF THE UNITED NATIONS SPECIAL COMMITTEE ON THE POLICIES OF *APARTHEID* OF THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

(U.N. Security Council Document S/5621; 25 March 1964) [1]

. . . 6. *Implementation of the Transkei Constitution Act*

The Adoption of the Transkei Constitution Act, as a step towards the creation of Bantustans, was reviewed in the last report of the Special Committee. The Act provided for limited self-government in the over-crowded African reserve of Transkei, to be exercised through a legislative assembly composed of sixty-four appointed chiefs and forty-five elected members.

Elections for the legislative assembly were held on 20 November 1963. The Government announced that 880,425 persons—414,238 men and 466,187 women had registered as voters.[2] One hundred and eighty candidates were nominated for the forty-five seats.

Political parties were not allowed, and the two main contenders for the post of Chief Minister—Chief Kaizer Matanzima, head of Emigrand Tembuland and Paramount Chief Victor Poto of Western Pondoland—issued election manifestoes. Chief Matanzima supported the Government's policy of "separate development", while Paramount Chief Poto called for multi-racialism and a more democratic legislature. [3]

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[1] [Footnotes renumbered.]

[2] All Africans born in the Transkei, all Whosa-speaking [*sic*] persons in South Africa and all Sotho-speaking persons linked with Sotho elements in the Transkei were regarded as Transkei citizens. Of the total registered voters, about 610,000 had registered in the Transkei and about 270,000 outside the territory.

[3] *South African Digest* (7 November 1963) summarized the main points of the manifestoes as follows:

"Chief Matanzima says in his 13-point manifesto that he would advocate:

"Separate development; industries for the Transkei, but not European private enterprise; the gradual takeover for the Bantu of all land in the Transkei including municipal property in the 26 villages; the establishment of a Bantu battalion in the Republic's defence force to train the young Transkeians for military service in the event of war involving South Africa.

"He would also press for an all-Black civil service in the Transkei with salaries comparing favourably with those of their White counterparts in the Republic.

"The Transkei's Education Department should be solely responsible for the nature and standard of education to be given to the Bantu children. The people of the Transkei should decide on the medium of instruction and syllabi.

"The Transkei would require financial stability. For this reason good relations would have to be maintained with the Republican Government (to facilitate the flow of money) from South Africa to the Transkei by way of grants and the employment of Transkeians in the border industries and elsewhere.

"He wanted agriculture to be placed on a high standard whereby every able bodied man owning land should use modern methods of farming. The whole country should be completely rehabilitated—irrigation schemes to be undertaken, soil erosion checked, dams built and good-quality stock bought.

(Foot-note continued on following page)

The issues in the elections were rather unreal as the Government had made it clear that multi-racialism could not be accepted. Paramount Chief Victor Poto stated that though he was in favour of a multi-racial Transkei, he realized that he would not be able to do much to promote it before the Transkei was totally independent. [1]

Moreover, the elections were conducted under a State of Emergency and with the full use of repressive force against the militant opponents of the policies of *apartheid*. As the Liberal Party noted shortly before the elections:

> "One candidate at least, Mr. L. Mdingi of Bizana, was given 90-days when he emerged as organiser of the IQumru LamaMpondo Ase-Mpumalanga (Pondoland People's Party) putting up eight candidates. Another, Mr. Hammington Majija, a well-known Liberal, was banned under the Suppression of Communism Act on 1st October, the eve of Nomination Day. An outstanding local leader, Mr. N. I. Honono, was house-arrested in Umtata in 1962 and another, Mr. R. S. Canca, banned and confined to Idutywa and Willowvale this year. And all the old factors remained—the cream utterly sceptical, banned, or elsewhere involved—Transkeians like Messrs. Nelson Mandela, Walter Sisulu and Govan Mbeki all in gaol and Mr. Oliver Tambo in exile. So came the Election, with many leading figures knocked out in advance, no political parties, no freedom to hold meetings at will, freedom of speech muzzled by the Emergency Regulations which make even 'interference with the authority of the State, one of its officials, a chief or headman' by making 'a verbal or written statement' an offence punishable by up to three years' gaol and £300 fine." [2]

The Paramount chiefs and the chiefs seemed to have exercised much influence on the elections.

(Foot-note 3 continued)

"He would strive to induce the Republican Government to employ Bantu men and women in all the departments that had not been transferred to the Transkei Government so as to train them for independence.

"The traditional authority of chieftainship should be preserved, and in order to do so, chiefs should participate in the body that made the laws—the Transkeian Legislative Assembly. The chiefs should be in the Assembly by virtue of their status.

"This is one of the main points on which Chief Matanzima and Paramount Chief Poto disagree. The latter has said that members of the Assembly should all be elected members and that the chiefs should sit in an Upper House of Review.

"Other points which Paramount Chief Poto advocates in his election are:

"The formation of political parties which have the interests of the Transkeian people at heart; an educational system that will fit the individual into human society and which is not bound by geographical boundaries; a policy of equal pay for equal work; freedom to compete for any position or employment in an unrestricted labour market and removal of disabilities of the work-seeker; a policy that will remove fear and uncertainty and instil confidence in the future and a sense of belonging and usefulness to a growing and expanding community; the establishment of factories and industries resulting in increased opportunities for employment; a legal system that will measure up to the international standards of justice; a policy of scientific, pastoral and agricultural development; increased and State-subsidized health services; and freedom of speech and religion."

[1] *South African Digest*, Pretoria, 21 November 1963.

[2] *Contact*, Cape Town, 30 November 1963.

Paramount Chief Botha Sigcau of Eastern Pondoland (Quakeni), against whom there had been revolts in the area, appealed to the electorate in his region to abide by the principle of separate development on which the Transkei Constitution was based and added: "order, law and justice, and not subversion and sabotage, have always adorned the careers of wise statesmen. Voters of Pondoland, vote for such men." [1] His statement was considered significant particularly as his region has the biggest block in the Assembly—eight elected members and fifteen chiefs.

Paramount Chief Sabata Dalindyebo, on the other hand, supported Paramount Chief Victor Poto.

Despite the clear evidence of the Government's support for Chief Matanzima, nearly thirty-five of the forty-five elected seats were won by supporters of Paramount Chief Poto. This was widely interpreted as a repudiation of *apartheid* by the Xhosa people.

Chief Matanzima, however, was elected Chief Minister on 6 December 1963 by 54 votes to 49, having obtained the support of a large majority of the chiefs.

Paramount Chief Poto and his supporters formed the Democratic Party as a parliamentary opposition.

[1] *South African Digest*, Pretoria, 21 November 1963

c. *Analysis of Respondent's Measures of Implementation of Its Policy*

1. *EDUCATION*

(A) General Policy

(1) Introduction

Respondent's educational policy with respect to the "Native," "Coloured," and "European" children in the Territory is similar insofar as each "group" is separated from each of the other "groups." This is "educational *apartheid.*" The education of "Coloured" children "has been promoted *in principle* to equality with European education." [1] As stated by the South West Africa Committee:

> ". . . [T]he same courses are offered for both groups; syllabuses are the same; the duration of the courses and examinations (with one exception) are the same; the inspection of Coloured schools is undertaken by the same inspectors as for European schools to ensure that the standard for all schools, European and Coloured, will be the same." [2]

Under the Education Ordinance of 1962, [3] education for "White" children is compulsory between the ages of seven and sixteen, and a "White" child may be allowed to attend school from the age of six years (secs. 61(1) and 60(1), respectively); education may be made compulsory within a given area by proclamation, for "Coloured" children between the ages of seven and fourteen, but no "Coloured" child under seven may attend school (secs. 97(2) and 97(1), respectively).

As stated in 1961 by the Committee on South West Africa, "all indications point to the conclusion 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." [4]

The education of the "Native" children of the Territory involves extreme application of "educational *apartheid.*" It is based on Respondent's system of "Bantu education" in the Republic, which applies to all "Bantu" children in the Republic of South Africa; this system has now been applied in the Territory, assertedly

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[1] G.A.O.R. 16th Sess., S.W.A. Comm., Supp. No. 12 at 5 (A/4957). (Italics added.)
[2] *Id.*, p. 26.
[3] Ordinance No. 27 of 1962, *The Laws of South West Africa 1962*, pp. 122 *ff.*
[4] G.A.O.R. 16th Sess., S.W.A. Comm., Supp. No. 12 at 25 (A/4957).

"with due regard to local conditions." [1] The application of principles of "Bantu education" to the Territory is brought out in Respondent's *Counter-Memorial* [2] and has been crystallized, in certain respects, by the enactment of recent legislation.[3] Apart from institutional *apartheid*, the essential distinctions between "Native" and "Coloured" education are the use of a special syllabus for "Natives" and the use of what Respondent refers to as "mother-tongue instruction," or teaching in the tribal tongue through the fourth year of school (with the ultimate expressed aim of using it as the instructional medium in all years). Institutional segregation in higher education is common to both "Native" and "Coloured" children, and thus they share the same disabilities in available opportunities. Respondent's policy of "Native" education as applied to all "Natives" in the Territory is therefore an extreme form of "educational *apartheid*." Inasmuch as "Coloured" persons have no tribal tongue for "mother-tongue instruction" and form a small percentage of the population, no syllabus is required for their instruction as manual labourers, as in the case of the "Natives."

In view of the fact that Applicants' submissions have not distinguished between the "European," "Coloured," and "Native"

[1] "The system of education for Native children is based on that which obtains for Bantu Children in the Union, with due regard to local conditions." (S.W.A. Administration: *Memorandum of Education Policy Adopted with Reference to Reports of Commissions of Enquiry Regarding European and Non-European Education Appointed in 1956 and 1958*, p. 29 (1960)); see also G.A.O.R. 16th Sess., S.W.A. Comm., Supp. No. 12 at 26 (A/4957).

[2] See *e.g.*, **III**, p. 358 (mother-tongue instruction), p. 455 (syllabuses), and p. 370 (community schools); see also, for a parallel identification of the ultimate objectives of *apartheid* in South Africa with those of *apartheid* in the Territory, *id.*, pp. 528-529, paras. (b) and (g) (the creation of "homelands" entailing "self-government" and "full independence" for the "Native" groups therein). See also, for information, the *Odendaal Commission Report* at para. 992 (curricula and examinations).

[3] The Education Proclamation, No. 16 of 1926, *The Laws of South West Africa 1926*, pp. 132-226 (see I, p. 152) was amended in 1960 by the Education Further Amendment Ordinance, No. 19 of 1960, *The Laws of South West Africa 1960* pp. 671-687, "to pave the way for the introduction of the Bantu system of education in South West Africa." (G.A.O.R. 16th Sess., S.W.A. Comm., Supp. No. 12 at 25 (A/4957)). The amending legislation dealt, *inter alia*, with the conversion of mission schools for "Natives" to government schools. Subsequently, the Administrator adopted a new educational system for "Natives" based, "with due regard to local conditions," upon the system of "Bantu education" which had been in effect in the Republic since the passage of the Bantu Education Act, No. 47 of 1953, *Statutes of the Union of South Africa 1953*, p. 258 (as from time to time amended). Finally, Administrator's Proclamation No. 84 of 1963, *Official Gazette Extraordinary of South West Africa* No. 2518 (17 December 1963), brought into force on 15 December 1963 new South West African legislation on education, the Education Ordinance of 1962 (Ordinance No. 27 of 1962, *The Laws of South West Africa 1962*, pp. 122-241); in Respondent's *Counter-Memorial*, **III**, p. 351, the Ordinance is mentioned but not described as having entered into force. The 1962 Education Ordinance covers almost every aspect of "White," "Coloured," and "Native" education in the Territory, giving, *inter alia*, wide grants of power to the Administrator (or to a Director of Education responsible to the Administrator) with respect to practically all matters touching on education.

groups in the Territory,[1] 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."

In Applicants' submission, Respondent's policy of educational *apartheid* with respect to the children of "Native" persons within the Territory inevitably distorts the social perspective and political 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.

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

(2) General Policy

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. . . ."[3] Education in South Africa and in South West Africa is geared to the objectives of Respondent's general policy of *apartheid*. Respondent's "Native" education policy has come to form an integral part of state policy, since the instruction of the young determines, to a large extent, their future attitudes. The South African 1961 Education Panel found in its First Report:

> "All education is necessarily geared to the future for, although modern education is greatly concerned with the happiness and welfare of the children while they are being educated, all its main objectives, whether moral, social or economic, relate to a significant extent to the adult lives of the children. . . ."[4]

In this connection, the International Commission of Jurists has stated:

> "It is not difficult to perceive that the Bantu Education Act of 1953, its amendments and subsequent Acts pertaining to education

[1] See Sec. A of this Chapter IV, at p. 255, *supra*.
[2] See III, p. 342.
[3] *Id.*, p. 528.
[4] *Education for South Africa*: The 1961 Education Panel First Report, p. 1 (1963).

> 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." [1]

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] Lord Hailey has written 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 it if were not politically inadvisable, to attempt to bridge it." [3]

There can be no clearer statement of the intention of Respondent's "Native" education policy than the following, by Dr. Verwoerd on 7 June 1954:

> "It is the policy of my Department that education should have its roots entirely in the native areas and in the native environment and native community. There Bantu education must be able to give itself complete expression and there it will have to perform its real service. 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 however all doors are open." [4]

Any concept of "equality" of the "Native" and the "European" is, therefore, antithetical to this basic premise. Dr. Verwoerd, introducing the Bantu Education Bill in 1953, referred to the previous situation in education, and said that this was unsuitable for the "Bantu" because it "made him feel different, made him feel he was not a member of a Bantu community, but a member of a wider community." [5]

Any attempt to cross into the "wider community," Respondent holds, must only result in the "frustration" of the "Native"

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[1] International Commission of Jurists, *South Africa and the Rule of Law* 77 (1960).

[2] **III**, p. 528, paras. (b)-(d).

[3] *An African Survey* 166 (3d. ed. 1957).

[4] *U. of S.A., Parl. Deb., Senate,* 11th Parl., 2nd Sitting (weekly ed., 1954), Cols. 2618-2619. (Italics added.)

[5] *U. of S.A., Parl. Deb., House of Assembly,* 11th Parl., 1st Sitting (weekly ed., 1953), Col. 3577. The unbridgeable chasm said to exist between the communities was admittedly not based on hereditary or genetic characteristics. The Commission on Native Education headed by Dr. W. M. M. Eiselen (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 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." (*Report of the Commission on Native Education*, 1949-1951, para. 773 (U.G. 53/1951).) (Hereinafter referred to as the "*Eiselen Commission Report.*")

making the attempt. [1] Respondent apparently hopes to avoid this "frustration," in part, by creating a utilitarian scheme of education for 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. As Dr. Verwoerd succinctly stated in a Senate debate in 1954:

> "[I]t is of no avail for [the African] . . . 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.*" [2]

Dr. Verwoerd also maintained that the previous curriculum and teaching methods, "by ignoring the segregation of [*sic*] *apartheid* policy, could not offer preparation for service within the Bantu community." By producing students in the "White" system, "the idle hope was created that [the "Natives"] . . . could occupy positions in the European community in spite of the country's policy. . . . " This was, he stated, "the unhealthy creation of *'white-collar ideals'* and the creation of wide-spread frustration among the so-called educated Natives." [3]

Lord Hailey commented 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." [4]

Although thus denying equality of opportunity to the vast majority of the inhabitants of the Territory, Respondent regards it as appropriate at the same time to "respect the unwillingness of members of the White group to serve in positions of subservience to members of the Bantu groups." [5] To that end, "Native" education is planned so that, in Dr. Verwoerd's words:

> "[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 . . . ." [6]

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[1] See **I**, p. 157, and **III**, pp. 528-529, paras. (e)-(f).

[2] *U. of S.A., Parl. Deb., Senate*, 11th Parl., 2nd Sitting (weekly ed., 1954), Col. 2619. (Italics added.)

[3] *Id.* at Cols. 2598-2599. (Italics added.)

[4] *An African Survey* 166 (3d ed. 1957).

[5] **III**, p. 529; Respondent does not consider the unwillingness of "members of the Bantu groups" to serve in positions of subservience to members of the "White" group for an indeterminate future period.

[6] *U. of S.A., Parl. Deb., House of Assembly*, 11th Parl., 1st Sitting (weekly ed., 1953), Col. 3580.

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] Respondent asserts that it has found it best "to create compensatory opportunities for higher employment of members of the . . . ['Bantu'] groups through acceleration, as far as practicable, of the development of their own homelands and economies." [2]

In contrast with such benevolent form of expression, yet explicitly addressed to the same proposition, is the more forthright admission by the Minister of Bantu Education in 1959:

> ". . . [E]very law concerning the natives which the Nationalist Government has passed or is passing, is being passed with the object of protecting the white man in social and economic spheres; also *to ensure the paramountcy of the white man in South Africa.*
>
> "Further and future relationships between the European and non-European would depend on the schooling given to natives. It was wrong to create the impression that the education he received would be the key that would give him the job which the white man has." [3]

In conclusion, the most concise illumination of Respondent's basic policy was given by Dr. Verwoerd in the 1953 debates, when he said:

> "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.*" [4]

(3) Categorization

Respondent argues that "Colour and racial origin *per se* do not determine the distribution of educational facilities or differential expenditures on education in South West Africa." [5] This is true, but only so far as it goes.

Distribution of facilities and differential expenditures on education are, in fact, determined by the *weight given by Respondent to colour and racial origin.* Throughout its *Counter-Memorial,*

[1] *Eiselen Commission Report,* para. 924. (Italics added.)

[2] III, p. 529.

[3] Speech made by the Minister, Mr. W. A. Maree, on 22 August 1959, broadcast on the South African Broadcasting Corporation, Sunday 7 a.m., 23 August 1959 (statement quoted by Dr. A. B. Xuma in a paper delivered to the South African Institute of Race Relations Annual Council Meeting, 17-20 January 1961, p. 6, by courtesy of the News Department of the South African Broadcasting Corporation, Johannesburg).

[4] *U. of S.A., Parl. Deb., House of Assembly,* 11th Parl., 1st Sitting (weekly ed., 1953), Col. 3586. (Italics added.)

[5] III, p. 385.

Respondent expresses its policy in terms of "groups," of irrevocable and involuntary categorizations thrust upon each of the individual inhabitants of the Territory as a result of his birth. A few examples will suffice:

> ". . . Though standing generally nearer to the level of civilization and development of the White group than the Native groups, [the 'Coloured' group was] . . . nevertheless much less advanced than the White group." [1]

> "In view of the considerable differences in the social background, habits and customs of the various population groups, it has always been Respondent's policy to provide separate hospitalisation and health services for the respective groups, and to make provision for each of the groups to be served as far as possible by its own members. At first, as may readily be imagined, the White group provided such services for all the groups. But as the other groups advance in this sphere, their members are given preference in the service of their own groups. Many members of the non-White groups are still working under the guidance of better-qualified members of the White group, but Respondent's policy envisages that when they have gained sufficient experience and a mature sense of responsibility, complete control of their own health services will be handed over to the respective groups themselves." [2]

Nowhere is there a sign of an individual being considered other than as a member of a group. [3] This rigid tendency to categorize by group designation is the recurrent theme of the metaphysics of *apartheid*; it may be seen in its most extreme form in a speech by the Minister of Bantu Education, quoted by Respondent in its *Counter-Memorial*, in which he characterizes South African tribes as "national units" and "national groups":

> ". . . [I]t is self-evident that a university which in the first instance does not serve a particular national community and which draws its students from heterogeneous national units, will not only find it difficult to provide for the special needs of national units, but more often than not no regard is had at all to the needs of particular national units. That is true, particularly where you have national groups at different levels of development as in South Africa . . . In the third place there is the consideration, of course, that if a university institution serves a particular national group, the students are more easily and better equipped for living in and serving the community to which they belong. . . ." [4]

As a result of the outlook reflected in the final paragraph quoted above, the social interchange and natural competition necessary for the realization of wider horizons is made impossible. Respond-

[1] III, p. 355.
[2] *Id.*, p. 471.
[3] See especially *id.*, pp. 527-530. *Cf. Odendaal Commission Report* (at p. 427, para. 1431): "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."
[4] III, p. 484.

ent's policy serves to harden the lines of demarcation and to render static the elements of society. A striking indication of Respondent's attitude is revealed by the fact that, throughout its *Counter-Memorial*, Respondent attributes to individuals *qualities and characteristics* which may only properly be assigned to groups. Emblematic of this is the ascription, 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:

> "For the White group of South West Africa, which had the advantage of the educational tradition of Western civilization extending over centuries, there was little difficulty in devising a syllabus suitable to its needs." [1]

When Respondent refers to individual human beings, it is in the large. Thus:

> "... [M]embers of the White group were *derived entirely* from peoples and communities regarded as bearers of Western civilization." [2]

On the other hand:

> "In the case of the indigenous groups, however, the situation was vastly different [from the situation with respect to the 'White' group]. There was, on their part, not only an absence of an educational tradition, but, also, because of their background and tradition-bound economies, also of those qualities and incentives which characterize a modern economy and which make for the creation of economic opportunities and potentialities." [3]

It is an inevitable step, or descent, from this concept of the role of the individual in human society to the approach 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. Although Respondent admits that "there were, furthermore, as there still are, vast differences in the levels and stages of development of the various groups, particularly as gauged by standards of what is generally known as Western civilization," [4] Respondent's only acknowledgment in practice of such different "levels and stages of development" is to permit the children of different "Native" groups to be instructed in different "mother tongues." Other than that, the Herero are lumped together with the Dama, the Ovambo with the Bushmen, the Nama with the East Caprivians. All are "Natives"; none has rights or opportunities which the others do not have; all suffer the same restrictions.

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[1] **III**, p. 363.
[2] *Id.*, p. 354. (Italics added.)
[3] *Id.*, p. 383.
[4] *Id.*, p. 354.

Respondent avers:

> "It will appear from what has been said that Respondent 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." [1]

Respondent nevertheless does not attempt to provide for the "particular needs" *of individuals comprising* the groups. On the contrary,

> ". . . 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. . . . 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*." [2]

The 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.

The 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. It also enables Respondent to adopt differentiated policies of expenditure, always to the overwhelming disadvantage of the "Native" groups, [3] the members of which make up the vast majority of the inhabitants.

(B) Nature of Education in the Territory

The nature of application of Respondent's general education policy clearly reflects the basic structure and fallacy of *apartheid*. If the conditions in 1920 were those of divided and underdeveloped "groups" in a difficult situation, as Respondent is at pains to point out, [4] surely the conferral of the Mandate was intended to remedy this situation. To the contrary, 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. The education policy in the Territory segregates all of the inhabitants by race, separates the "Native" inhabitants by tribe, and prepares the "non-European" inhabitants

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[1] **III**, p. 540.
[2] *Ibid.* (Italics added.)
[3] See Part (C) (3) of this Section, p. 393, *infra*.
[4] See **III**, pp. 344-356.

for a subordinate role in the social, economic, and cultural life of South West Africa. This last description is true both of the limitation on opportunity within the areas considered by Respondent to be "European" and of the development of any reasonable opportunities within prospective "homelands" [1] in the Territory.

Such 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" [2] of South West Africa, as is shown below.

(1) Segregation by Race

The natural result of Respondent's exclusive arrangement of individuals into "groups" is that racial and tribal feelings are fostered and, to a large degree, sanctioned. Respondent characterizes a system of open schools as bound to "lead to dissatisfaction and group friction . . . [and to] result in the neglect of the needs of all the groups and in irreparable harm to the Territory as a whole." [3] Nevertheless, by maintaining its present system of racial and tribal segregation, Respondent is inevitably setting the stage for more profound dissatisfaction and group friction than any yet manifested. As Mr. Justice Albert van de Sandt Centlivres [4] wrote when he was Chancellor of the University of Cape Town, concerning "university *apartheid*" in South Africa:

> "As far as the present writer is aware there was neither in 1948 nor 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. . . ." [5]

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." Yet if all able children were in the "White" group, and all "slow" children in "Native" or "Coloured" groups (which is inconceivable), it would constitute a searing indictment of Respondent's past performance as Mandatory. [6] It would not, moreover, justify continuing a policy which produced so grotesque a result.

[1] **III**, pp. 528-529, paras. (b) and (g).

[2] Mandate, Article 2, para. 2.

[3] **III**, p. 382.

[4] Quoted in another context, p. 286, *supra*.

[5] Centlivres, "University Apartheid in the Union of South Africa," 9 *Bulletin of the Commission on Science and Freedom* 25-26 (1956), as quoted in International Commission of Jurists, *South Africa and the Rule of Law*, p. 80 (1960).

[6] The Eiselen Commission, as quoted above (see footnote 5, p. 365), stated in its Report that "the Bantu child comes to school with a basic physical and psychological endowment which differs . . . 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."

Segregation on racial grounds has been condemned in all civilized nations, at least since World War II. [1] 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] 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.

In *Brown* v. *Board of Education*, [3] the United States Supreme Court, holding that separate educational facilities are inherently unequal, said:

> "To separate [children in grade and high schools] . . . 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.*" [4]

The Court quoted, with approval, a finding by the lower court which stated:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the *policy of separating the races is usually interpreted as denoting the inferiority of the Negro group.* A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." [5]

The Supreme Court concluded:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. *Separate educational facilities are inherently unequal.*" [6]

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[1] In 1960, C. W. de Kiewiet made the following statement in the Second T. B. Davie Memorial Lecture at the University of Cape Town:

> "The deprivation by law of free access to open universities by qualified members of the non-White community seems to me to be unjust, uneconomical, and dangerous. I am using these words deliberately. The injustice is plain to see. The law 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. These benefits can be summed up as food, health, dignity, opportunity, and education." (de Kiewiet, *Academic Freedom* 18 (1961).)

[2] See Annex 5, p. 398, *infra*. Lest any misleading impression be created by Respondent's reference, at **III**, p. 374 to "separate educational facilities for different population groups" under the League of Nations, the Court's attention is drawn to the dates of the P.M.C. material quoted by Respondent, being 1923, 1928, 1939, 1928, and 1930, respectively. See also Chapter V, Sec. 5, of this Reply, p. 512, *infra*.

[3] 347 U.S. 483 (1954); discussed in other contexts, pp. 307, 338, *supra*; p. 487, *infra*.

[4] *Id.*, p. 494. (Italics added.)

[5] *Ibid.* (Italics added.)

[6] *Id.*, p. 495. (Italics added.)

This holding by the United States Supreme Court was made on the basis of a clause in the Fourteenth Amendment to the United States Constitution which prohibited state action depriving persons of "the equal protection of the laws." The present Mandate is a constitutional-type document,[1] and the obligations contained in Article 2 are more affirmative and explicit than the general injunction of the "equal protection" clause of the Fourteenth Amendment. Moreover, Respondent's policy of racial 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.

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 . . . ." [2] The "opportunities denied" [3] are not only the opportunities to attend many South African universities; they include the opportunity not to be segregated against one's wishes, the opportunity to be a citizen of equal standing with a "European," and the opportunity to live one's life freely in an open society.

Respondent implies that the Permanent Mandates Commission knew and tacitly approved of its policy of separate schools.[4] Yet as Respondent candidly admits,[5] "Native" education was, during the lifetime of the Permanent Mandates Commission, almost completely in the hands of the missions; 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" [6] which was susceptible of tacit or express approval by the Permanent Mandates Commission. Respondent's policy was, in fact, developed only after the Second World War. It has never been reviewed, with Respondent's co-operation, by an administrative supervisory organ.[7]

A reflection of the proposition that separate facilities are inher-

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[1] See Chapter V of this Reply, p. 476, *infra*.

[2] **III**, p. 527.

[3] **I**, p. 157.

[4] **III**, pp. 372-374.

[5] *Id.*, pp. 372-373.

[6] *Id.*, p. 372. (Italics added.)

[7] It is of course true that the various Committees on South West Africa have reviewed Respondent's policy, but Respondent has never seen fit to *submit* such policy thereto for review. The Report of the Special Committee for South West Africa, written after representatives of the Special Committee had visited the Territory in 1962, stated, *inter alia*, that "the basic policy of the South African Government in the educational field . . . is to restrict Africans to a rudimentary system of schooling and training designed to confine them to menial occupations in order to keep them in a state of subservience to the White minority." (G.A.O.R. 17th Sess., Sp. S.W.A. Comm., Supp. No. 12 at 14 (A/5212).)

ently unequal was contained in the Report of the Eiselen Commission, where it stated that:

> "The Bantu have, for numerous reasons, come to feel that *any differentiation in education must to be 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." [1]

The practice of segregation by race is, moreover, uneconomic. Not only does it inevitably produce duplication of administrative machinery and personnel where there is already a shortage of available help and resources, [2] but it also means that "Native" children must be restricted entirely to facilities intended for "Natives" and thereby go without schooling in situations where there may be facilities for other "groups," but inadequate facilities for "Natives."

One example of this would be the situation with respect to the hostel and teacher shortages suffered by the "Native" children in the Police Zone. [3]

(2) Separation by Tribe

The racial segregation of the children of the Territory is made possible by classification according to skin colour and appearance for "Whites" and "Coloureds," and according to appearance and tribal origin for "Natives." A further degree of segregation practised by Respondent in the educational life of the Territory is separation of "Native" children by linguistic classification. This is the system of

[1] *Eiselen Commission Report*, para. 233. (Italics added.)

[2] The 1961 Education Panel wrote, for example, in its First Report, *Education for South Africa* (1963), that the system of "separate education administrations for the separate groups, each administration itself being centralized . . . underlines group differences to an extent that seems unfortunate in a country where the different groups must co-operate *and it involves the duplication of all administrative personnel, and hinders the pooling of experience even at a high level.*" (*Op. cit.*, p. 57.) (Italics added.)

[3] Respondent, in its *Counter-Memorial*, **III**, p. 493, acknowledges that nearly 40 per cent of the "European" children in the Territory are accommodated in hostels. 40 per cent of the "European" children is approximately 6,800 in number, using 17,000 as the figure for "European" children in the Territory attending school (*Odendaal Commission Report*, p. 245, Table LXXXXII, gives 17,442 for 1962). In its *Counter-Memorial*, **III**, p. 520, Respondent gives the total number of hostels for "European" children as being 67; on the basis of this, a calculation may be made to the effect that one hostel supports an average of 100 pupils. Respondent then states *(ibid.)* that there are 31 schools with hostel facilities for "Native" children in the Police Zone. Assuming 100 children per hostel, this accommodates 3,100 children, or 9.17 per cent of the total "Native" school age population of 34,000 in the Police Zone (*Odendaal Commission Report*, p. 249, Table LXXXXIII). There are 19,160 "Native" children in the Police Zone who do not attend school *(ibid.)*; surely some of them could be accommodated in the hostels now reserved for "European" children. As 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.

"mother-tongue instruction" which Respondent has tried in South Africa and has now applied in South West Africa. [1] By its policy of racial segregation, Respondent in fact excludes the "Native" and "Coloured" majority from the spheres of opportunity reserved to the "European" inhabitants; by its policy of "mother-tongue instruction" Respondent perfects such exclusion with respect to the "Native" inhabitants, encouraging tribalism and thus rendering them ever less "able to stand by themselves under the strenuous conditions of the modern world . . . ." [2]

Respondent has admitted that "[i]t is the ultimate aim that the vernacular be used as the medium of instruction *in all standards.*" [3] This is the central, and most objectionable feature, of the whole plan of educational *apartheid.* At present, the tribal tongues are not yet suited for such instruction, and Respondent states that this "ideal" will only become possible "when the various Native languages have been sufficiently developed to be used as teaching languages in all the standards . . . ." [4] Such development is now in the hands of a "Bureau for Native Languages," the duties of which include the composition of grammars, school readers, textbooks, "the production of wholesome general reading matter for persons at various stages of development," and the "development of subject terminology for school use." [5]

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 languages to be used as instructional medium for arithmetic, social studies, environmental studies, and other subjects.[6] Similarly, the Transkei

[1] **III**, pp. 357-362.

[2] Covenant of the League of Nations, Article 22, para. 1. Thus the Committee on South West Africa noted with regret, in its 1960 Report:

> ". . . that while separate schools for 'European', 'Coloured' and 'Native' children have continued to be maintained under the existing system of education in the Territory, the new system recommended for 'Natives' *is designed to separate 'Natives' from each other on an ethnic basis.*"

(G.A.O.R. 15th Sess., S.W.A. Comm., Supp. No. 12 at 54 (A/4464). (Some italics omitted.))

[3] **III**, p. 361. (Italics added.) *Cf.* the treatment afforded to "White" German-speaking children, which is summarized *id.*, p. 495:

> ". . . As from 1960, as a result of recommendations made by the 1958 Education Commission, German is used as a medium up to the end of Standard V, with the proviso that in Standard IV one, and in Standard V two, subjects are taught in either Afrikaans or English so as to give German-speaking pupils some preparation for their secondary school work which is, as far as Government schools are concerned, limited to English and Afrikaans as media of instruction."

[4] *Id.*, p. 361.

[5] *Ibid.*; "subject terminology" is apparently a synonym for "vocabulary." None of these tasks would be necessary with respect to the German language, yet German is not projected as "the medium of instruction in all standards" for the German-speaking "White" children. (See footnote 3 of this page, *supra.*)

[6] Sneesby, "The Vernacular in Bantu Education in the Union of South Africa," 33 *Oversea Education* No. 2, p. 75 (July 1961).

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 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." [1]

The forced nature of Respondent's scheme of complete instruction in the mother tongue was recognized by the 1961 Education Panel:

> "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." [2]

Respondent has not consulted the "Native" groups in the Territory with respect to their wishes on vernacular instruction in all standards. Indeed, the present Chief Minister of the Transkei has stated that the Transkei would abolish Xhosa as medium of instruction after Standard II. [3]

An authority on "Bantu education" has concluded:

> "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." [4]

It was to this limited end, indeed, that the Eiselen Commission favoured a method of instruction so that ". . . the Bantu child will be able *to find his way in European communities; to follow oral or written*

[1] *Report of the Commission of Enquiry into the Teaching of the Official Language and the Use of Mother Tongue as Medium of Instruction in Transkeian Primary Schools*, pp. 17-20, R.P. 22 (1963).

[2] *Education for South Africa*: The 1961 Education Panel First Report, p. 56 (1963). (Italics added.)

[3] See footnote 4, p. 377, *infra*.

[4] MacQuarrie, "The New Order in Bantu Education," 1 *Africa South* No. 1, pp. 40-41 (October-December 1956).

instructions; and to carry on a *simple conversation* with Europeans *about his work* and other subjects of common interest." [1]

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. As a petitioner before the Special Committee on *Apartheid* stated:

> "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." [2]

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. [3] Chief Matanzima of the Transkei, according to a news report, is quoted 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." [4]

C. W. de Kiewiet [5] 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 depend upon *an escape from the tribe and a deeper entry into the life of the West.*" [6]

Respondent in effect concedes this evil of its plan by quoting a recommendation of the Eiselen Commission providing for 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.*' " [7]

In view of the central purpose of the Mandates System, to render peoples not previously capable of doing so "able to stand by themselves under the strenuous conditions of the modern world,"

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[1] *Eiselen Commission Report*, para. 924. (Italics added.) This is clearly attuned to Respondent's general policy as outlined in Part (A) of this Section, p. 362, *supra*.

[2] Quoted in S.C.O.R., Sp. Comm. on *Apartheid*, at 96 (S/5426) (also issued as A/5497).

[3] A policy of division such as this naturally saps the energies and the powers of "Native" opposition to the policies of the Respondent.

[4] M. Friedmann, "The Hungry Sheep Look Up," 208 *The Spectator* 234 (23 February 1962).

[5] Cited in a different context, p. 281, *supra*.

[6] de Kiewiet, *The Anatomy of South African Misery* 54 (1956). (Italics added.)

[7] III, p. 365. (Italics added.)

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,[1] is in direct contradiction to the purpose of the Mandate.

The language quoted by Respondent from Mme. Wicksell's report submitted to the Permanent Mandates Commission is addressed generally to the problem of language instruction, but cannot be reduced to authority in support of tribal vernacular instruction at all levels: "the number of different languages . . . [in Africa make] it necessary to teach a foreign language and, in some territories, even to carry on instruction in a foreign language."[2] None of the quotations cited by Respondent from the minutes of the Permanent Mandates Commission can reasonably be adduced as authority for the plan of mother-tongue instruction as recently introduced into the Territory. They stand, rather, for a different and laudable objective, that of "*more systematic instruction* in the mother tongue."[3] The difference between "systematic" instruction and total education in such vernaculars as Ndonga, Kuanyama, Kuangali, Nama, Lozi or Herero is obvious. Indeed, Lord Lugard, whose approval of "more systematic instruction in the mother tongue" is noted by Respondent[4], wrote that:

> ". . . No greater benefit can be conferred on the African, whether as a means of enabling him to make known his desires, or for purposes of trade, or as affording an access to a great literature, *than the teaching of English as a universal medium.*"[5]

Not only does Respondent's policy thwart the social progress of "Natives" by isolating them from each other, and from the modern world, but it is also impractical and unworkable. Respondent admits that "the Native peoples in the Territory had no literary culture," and that "although their vocabularies are rich enough to meet the day to day needs of people living in a subsistence environment, they are all poor vehicles of abstract thought."[6] In addition, Respondent acknowledges that, "because of insufficient development [of Ndonga, Kuanyama, Kuangali, Herero, Nama and Tswana] . . . mother-tongue instruction is generally not yet feasible beyond the Standard II level in these languages."[7] As a result, the inhabitants are being held in suspension while their languages

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[1] See *Odendaal Commission Report*, para. 1090, where English or Afrikaans is referred to as "a foreign language."

[2] P.M.C. Min., 12th Sess., p. 186, as quoted in **III**, p. 359.

[3] P.M.C. Min., 26th Sess., p. 59, as quoted in **III**, p. 360. (Italics added.)

[4] *Ibid.*

[5] Lugard, *The Dual Mandate in British Tropical Africa* 454 (1922). (Italics added.)

[6] **III**, pp. 415-416.

[7] *Id.*, p. 416.

are being "developed" into vehicles suitable for general communication. Indeed, the Odendaal Commission stated:

> "It is important that each of the various language groups (inter alia, *Bushmen, Nama, Herero, Tswana, Kuanyama, Ndonga, Kuangar, Mbukushu, Lozi*) should have its own medium of instruction, but at the same time this hampers the proper development of reading books, textbooks and general literature." [1]

They are not even being held in suspension in the proper "groups"; indeed, the administrative problems (particularly in the Police Zone) attendant upon Respondent's policy are insoluble:

> ". . . The policy at present is to institute a separate class for a minority group at any school *as soon as they* [*sic*] *number twenty* in all classes from Sub-Standard A to Standard II. . . .
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> "There are certain areas where the pupils of a minority language group are so few in number that *even the establishment of separate classes is not practicable*. . . . Only very rarely does it happen that so many language groups are represented in the same class that no Native language at all can be used as the medium of instruction, but when such a situation does arise, the Administration *allows one of the official languages to be used as medium*. . . .
>
> ". . . Of the 102 schools *in the Police Zone* at present, one offers instruction in three languages, and twenty in two languages. Herero is the medium of instruction in eleven schools, and ten of these are attended *almost exclusively* by Herero pupils. Nama is the medium in sixty-eight schools: in six of these lessons are also explained in Herero, and in the others Nama-speaking pupils form *the overwhelming majority*. Tswana is the medium of instruction in two schools, at both of which Tswana-speaking pupils form *the vast majority*." [2]

Unfortunate Herero children are being subjected to "mother-tongue instruction" in Nama, Nama pupils are being taught in Herero, and various other children, not Tswana, are being instructed in Tswana. Finally, a minority group of nineteen "Native" children are unable to obtain instruction in their "mother tongue"; they must, in fact, be taught in the "mother tongue" of a different group until they reach twenty in number. [3]

With respect to the development of the "Native" languages so as to afford "Native" children adequate education through "mother-tongue instruction," Respondent states that:

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[1] *Odendaal Commission Report*, para. 1089.

[2] III, p. 362. (Italics added.)

[3] *Id.*, p. 362. *Cf.* the stated policy for the recognition of secondary schools (not just separate classes) for "European" children, which may be accorded if, *inter alia*, "a minimum average enrolment of twenty pupils *in the fourth and fifth standards combined* has been maintained for at least one year." (*Id.*, p. 496.) (Italics added.) For the *reductio ad absurdum* of the situation arising when a "Native" South West African who has been fully instructed in his "mother tongue" attends university in the Republic of South Africa, see pp. 382-383, *infra*.

> "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.*" [1]

The "Native" inhabitants of South West Africa are, then, being forced into instruction, eventually in all the standards, by the medium of the same tribal tongues they possessed in 1920. These languages are admittedly not suited for communication with the world at large or even, in the modern context, *inter se.* "Natives" are, in certain cases, instructed in languages of other tribes. They are, finally, left to develop their own languages "to meet all educational needs." These developments have taken place, as a matter of Respondent's policy, since the dissolution of the League of Nations and in the absence of international administrative supervision or accounting.

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

Respondent's policy of "mother-tongue instruction," as currently practised and as intended to be applied, has at least four major defects: (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.

In the first place, Respondent's policy serves to perpetuate existing deficiencies, rather than affirmatively to promote social progress. Applicants insist that a policy whose "ultimate aim [is] that the vernacular be used as the medium of instruction in all standards," [2] involves abandonment of Respondent's duty to promote the social progress of the "Natives" not yet able to stand by themselves under the strenuous conditions of the modern world.

In the second place, such a policy 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. [3] In addition, the policy exacerbates factors which are alleged by Respondent to create a need for tribally separated schools to begin with. [4] The circularity and fallacy of such reasoning is obvious.

Thirdly, "mother-tongue instruction" automatically creates

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[1] **III**, p. 416. (Italics added.)
[2] *Id.*, p. 361.
[3] See **II**, pp. 458-459, 472-474.
[4] **III**, p. 367.

a shortage of teachers and materials, [1] and also lays a heavy burden on the administration of the separate educational facilities. [2] This functional slowing-down of the educational process must in turn lower the level and extent of education, [3] and as a result the "Native" communities, being relatively uneducated, do not appreciate the value of education. [4] This, in turn, aggravates the conditions to which Respondent's reaction is to institute vernacular instruction. [5] The effects of this vicious circle are compounded by Respondent's failure to make education compulsory for "Natives" [6] and its policy of discrimination as to the ultimate opportunities for "Natives" to put their education into practice. [7] Taken separately and together, all of these factors create and maintain the circular pattern of deprivation of education of which Applicants complain in their *Memorials*. Nothing advanced by Respondent in its *Counter-Memorial excuses* its conduct; on the contrary, Respondent's explanations *reinforce* Applicants' allegations.

In the fourth place, "mother-tongue instruction" cannot possibly accommodate all the "Native" children. [8] It cannot even accommodate all the "Native" languages:

> "It would have been an impossible task, however, to prepare school books in each of the various languages or dialects spoken in the Territory, or to convert each of them into a teaching language, and the policy consequently was to concentrate on the development of those languages which are spoken by most of the Natives. Thus 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." [9]

As a result, children whose "mother tongue" is Diriku, Kuambi, Bushman or Sikololo (Silosi) are instructed in Kuangali, Ndonga, Kuanyama, Herero, Nama or Tswana. [10] Thus even were there,

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[1] **III**, pp. 360, 418, and 517 (teachers) and pp. 361, 415-416 (materials).

[2] *Id.*, pp. 360, 433.

[3] *Id.*, p. 450: "The extra year in the case of Native pupils is necessary *largely because of language difficulties. . .*" (Italics added.) See also *id.*, pp. 393, 413, 414-416, and 417-421.

[4] *Id.*, pp. 388-389, 394-395, 407-410, 461-462, and 538-539. See, generally, sec. (1) of Part (C) of this Section, p. 387, *infra*.

[5] ". . . [S]ince the majority of Native pupils leave school after the first few years of schooling." (*Id.*, p. 359.)

[6] See sec. (2) of Part (C) of this Section, p. 390, *infra*.

[7] See Part (A) of this Section, p. 362, *supra*, and sec. (3) of this Part (B), p. 383, *infra*.

[8] **III**, p. 362 (see p. 379, *supra*), and pp. 414-415.

[9] *Id.*, p. 416.

[10] "The principal Native languages spoken were, and still are:
"Kuangali and Diriku (among the Natives of the Okavango); Ndonga, Kuanyama and Kuambi (among the Natives of Ovamboland); Herero, Nama, Bushman, Tswana (in the case of a small section) and Sikololo, also known as Silosi, (among the Natives of the Eastern Caprivi)." (*Id.*, p. 356.)

at a Kuangali-speaking or Ndonga-speaking school, *more* than twenty Diriku- or Kuambi-speaking children, such children could not in any event be taught in their "mother tongue." [1]

Similarly, this wasteful and frustrating pattern continues through the limited university education which is presently offered to "Natives" in the Territory. Respondent cites four South African (not South West African) residential universities as being "available" for South West African "Natives," namely: the University College of Fort Hare, at Fort Hare, Cape Province; the University College of the North, Turfloop, Pietersburg, Transvaal; the University College of Zululand, Ngoye, Natal; and the Medical School for "non-Europeans" of the University of Natal. [2]

The 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." Three of the "universities" cited by Respondent are tribal colleges *for South African "Bantu."* [3] The University College at Fort Hare constitutes ". . . a tribal university for the Xhosa group," [4] and "new students admitted to Fort Hare are selected mainly from the Xhosa group." [5] The University College of the North ". . . admits mainly Sotho students but members of the Tsonga and Venda groups are admitted." [6] Finally, the University College of Zululand, at Ngoye in the Mtunzini District, "caters for Zulu and Swazi students." [7]

In 1962 the first student from the Territory was admitted to the College of the North. [8] Speaking Herero or Ovambo, he would pursue

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[1] *Cf.* Respondent's statement that "The policy at present is to institute a separate class for a minority group at any school as soon as they [*sic*] number twenty in all classes from Sub-Standard A to Standard II." (**III**, p. 362.) See also, *id.*, p. 363.

[2] *Id.*, p. 326. Only three of these would qualify as "universities" in the accepted sense of the term, since a medical school is a professional school only.

[3] The Commission of Enquiry on Separate Training Facilities for Non-Europeans at Universities stated in its Report (1955):

> ". . . As an ultimate ideal, three Bantu university institutions are envisaged, namely—
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> "(1) Fort Hare which should become a Xosa institution;
>
> "(2) A Zulu institution in Natal to serve the Northern Nguni; and
>
> "(3) A Sotho institution in the Transvaal to serve the whole of the Sotho community."

(*Op. cit.*, p. 27.) These refer to the present institutions of Fort Hare, Zululand, and the University College of the North, respectively.

[4] Tatz, *Shadow and Substance in South Africa* 148 (1962).

[5] *Id.*, p. 149; Muriel Horrell, in *A Decade of Bantu Education* (1964), states that "Fort Hare is designed to cater, in the main, for the Xhosa-speaking group, although certain Coloured and Asian students have been permitted to continue courses of study commenced prior to the change of control." (*Op. cit.*, p. 147.)

[6] Tatz, *op. cit.*, p. 148. See also Horrell, *op. cit.*, pp. 142, 147; S.C.O.R., 18th Sess., Spec. Comm. on *Apartheid* at 93 (S/5426).

[7] Tatz, *op. cit.*, pp. 148-49. See also Horrell, *op. cit.*, p. 147.

[8] Horrell, *op. cit.*, p. 147.

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. [1]

(3) Limitation of Objectives in Syllabus

As long ago as 1936, the South African Departmental Commission on Native Education had reported that

> "The Education of the White child prepares him for life in a dominant society, and the education of the Black child for a subordinate society. . . . The limits [of a Native child's development] . . . form part of the whole social and economic structure of the country. . . ." [2]

Such limitation on the education of "Natives," whether 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, inevitably resulted in "Native" education becoming materialistic and utilitarian. Dr. Verwoerd, in a 1954 South African Senate debate, had said that ". . . the school education must equip [the African] . . . to meet the demands which the economic life in South Africa will make upon him," [3] and the Eiselen Commission had concluded that "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.*" [4]

Dr. Verwoerd, introducing the Bantu Education Bill in 1953, said, "What is the use of teaching a Bantu child mathematics, when it cannot use it in practice? That is quite absurd." [5] 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

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[1] Respondent, in its *Counter-Memorial*, III, p. 522, states that "Native students of South West Africa . . . may enrol at agricultural schools for Bantu in South Africa. . . ." (to be provided for each *major Bantu group, e.g.* at Fort Cox in the Ciskei, Tsolo in the Transkei, and Arabie in the Northern Transvaal) "where specific instruction is given in regard to the types and methods of farming practised in each particular area." *(Ibid.)* Thus, South West African Hereros and Ovambos may be directed to a Xhosa-speaking college, specializing in the problems of Transkeian agriculture.

[2] Union of South Africa, *Departmental Commission on Native Education Report*, paras. 458-459 (1936). (U.G. No. 29/1936.)

[3] *U. of S.A., Parl. Deb., Senate*, 11th Parl., 2nd Sitting (weekly ed., 1954), Col. 2606.

[4] *Eiselen Commission Report*, para. 765. (Italics added.)

[5] *U. of S.A., Parl. Deb., House of Assembly*, 11th Parl., 1st Sitting (weekly ed., 1953), Col. 3585.

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.*" [1]

There is a striking contrast between the syllabuses offered for "Natives" and those offered for "European" children. The syllabuses offered in the lower primary courses are roughly similar, except that the "European" children receive one subject entitled "Handwork" where the "Native" children receive instruction in a total of six subjects entitled "Drawing, Cleaning Work, Weaving and Claywork, Needlework (Girls), Scrap Work (Boys), [and] Gardening." [2] The existence of five additional subjects, in the "Native" syllabus, dealing, *inter alia*, with "Cleaning Work" and "Scrap Work," implies only that proportionately *less* of their instruction is devoted to the nine other subjects, eight of which are paralleled in the "European" syllabus, [3] and that the "European" children are given proportionately *more* training in English, Afrikaans, Arithmetic, Environment Study, Health Education, Writing, Music, and Religious Instruction than are the "Native" children, who are kept busy with their manual subjects.

In the higher primary courses the same pattern is present, save that the "Native" subjects have been extended to cover "Gardening, Tree Planting and Soil Conservation (Boys), Wood, Leather and Scrap Work (Boys), Needlework (Girls), [and] Handicrafts." [4] Of these, only "Handwork" is offered to "European" children in the higher primary courses.

The secondary syllabuses for the "Natives" at Onguedira in Ovamboland and at the Augustineum include Agriculture, with the alternative of Needlework for girls (in Ovamboland) as "examination subjects" for the Junior Certificate examination.[5] Respondent states that "in the first year of the . . . [Agriculture] course, instruction in Leatherwork, Scrapwork, and Tinwork is given to boys, while girls do Needlework." [6]

"European" children may, on the other hand, follow [7] a "strictly academic course," "a general course," "a practical course," with "Woodwork and Metalwork for boys, and Needlework and Domestic Science for girls," [7] and a "Commercial course," which includes "Bookkeeping and Typewriting at high and secondary schools, and Shorthand at high schools." [7] The commercial courses

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[1] *Report of the Commission of Enquiry into the Teaching of the Official Language and the Use of Mother Tongue as Medium of Instruction in Transkeian Primary Schools*, p. 14, R.P. 22 (1963). (Italics added.)

[2] III, p. 449.

[3] *Id.*, pp. 449, 501.

[4] *Id.*, p. 449.

[5] *Id.*, pp. 450, 466.

[6] *Id.*, p. 466.

[7] *Id.*, p. 501.

are taught at all "European" high and secondary schools.[1] The contrast between the options open to "Europeans," and the "Native" syllabus, at school—and consequently in later life—is self-evident. [2]

Thus 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." [3]

Turning to "industrial" courses, Respondent states that the Augustineum "offers a three-year training course in one of three trades, Carpentry, Tailoring and Masonry," [4] and also refers to "the poor support given the courses generally. . . ." [5] Further technical or vocational training, states Respondent, may be enjoyed by "Natives" by virtue of assistance in the form of loans and bursaries.[6] There are only six bursaries available for further industrial or vocational training; these are open to *all* students in the Territory; in addition there has been recently established *one* bursary "to a deserving Native student who proposes to follow a post-Matriculation course in South Africa." [7] Thus, it would appear that the chances for a "Native" student to proceed with "industrial" training other than woodwork, tailoring and bricklaying are practically limited to the one bursary mentioned, or to loans. Respondent avers

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[1] **III**, p. 501.

[2] Respondent has expressed the "European" reaction to the Gammams and Stampriet agricultural schools (*id.*, p. 507) when it acknowledged that:

> "By 1943 both these attempts at providing vocational training for future farmers had been abandoned for lack of support. Most parents, it appeared, preferred to let their children take the academic course offered at the secondary and high schools." (*Id.*, pp. 507-508.)

These agricultural schools offered curricula which appear to be only slightly less "humanistic" than those presently offered at Onguedira and the Augustineum. ("Cultural subjects, such as Religious Instruction, Languages, History and Civics, were also taught.") (*Id.*, p. 507.) The "Native" parents, however, cannot express such a preference even if they have it (with the exception of the school at Doebra).

[3] G.A.O.R. 15th Sess., S.W.A. Comm., Supp. No. 12 at 54 (A/4464). (Italics omitted.)

[4] **III**, p. 466.

[5] *Id.*, p. 467. The *Odendaal Commission Report* refers to these courses in "Carpentry, Tailoring and Masonry" as being courses in "woodwork, bricklaying and tailoring." (Para. 996.)

[6] **III**, p. 468.

[7] *Id.*, p. 477.

that "thus far no Native student has *in any way meritea* . . . [one of the six bursaries open to all students]." [1]

What, on the other hand, are the industrial courses available for "Europeans"? In addition to the two-year practical course in agriculture offered at the Neudam Agricultural College, there are the differentiated secondary courses offered in Woodwork, Metalwork, Domestic Science, Needlework, Bookkeeping, Typewriting, and Shorthand, and the evening classes for apprentices offering courses in Motor Mechanics Theory, Mathematics and Machine Construction and Drawing. [2] The last seven of these courses are not available to the "Natives" of the Territory, who are restricted in the Territory to training to be woodworkers, tailors, and bricklayers and whose chances of obtaining aid to pursue such other courses as they may wish are limited, in practice, to borrowing money from the Administration and to *one* merit bursary, available only since January 1964.

This situation is not surprising, since it 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." [3]

Thus did Dr. Verwoerd state in 1953:

> "Racial relations cannot be improved if the wrong type of education is given to Natives. They cannot improve if the result of Native education is the creation of frustrated people who, as a result of the education they receive, have expectations in life which circumstances in South Africa do not allow to be fulfilled immediately, when it creates people who are trained for professions not open to them, when there are people who have received a form of cultural training which strengthens their desire for the white-collar occupations to such an extent that there are more such people than openings available." [4]

(C) Extent of Education in the Territory

Applicants have shown that the *nature and objectives* of education in the Territory are a violation by Respondent of its obligation to promote in any degree the material and moral well-being and the social progress of the inhabitants. Applicants now show that the *extent* of education in the Territory is a violation by Re-

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[1] III, p. 477. (Italics added.)
[2] *Id.*, p. 508.
[3] See, generally, Part (A) of this Section, p. 471, *supra*.
[4] *U. of S.A., Parl. Deb., House of Assembly*, 11th Parl., 1st Sitting (weekly ed., 1953), Col. 3576.

spondent of its obligation to promote *to the utmost* the well-being and progress of the inhabitants.

Respondent has failed in this dynamic obligation in at least three respects: (1) it has adopted a policy of *"laissez-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. Applicants will deal with these points in order.

(1) *"Laissez-faire"*

In the 18th session of the Permanent Mandates Commission, M. Rappard criticized Respondent's Annual Report for 1929, stating:

> "In the native reserves, there were not only few or no schools, but the Administration seemed to be reluctant to consider the possibility of building them. It put forward as its reason that there was a good deal of opposition to education and schools on the part of the natives. *It seemed difficult, however, to regard this as a good reason for not providing schools.* It was also said in paragraph 329 that, '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, it 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'. This seemed a somewhat complicated procedure, *and appeared to throw the initiative and the sole cost of obtaining education on to the native."* [1]

This statement treats two aspects of Respondent's attitude toward "Native" education. In the first place, Respondent has professed extraordinary solicitude concerning the attitudes of the "Natives" toward education, and has shaped its policy in deference to such attitudes, notwithstanding the fact that it was upon Respondent, rather than upon the "Natives," that the Mandate was conferred. Such deference, and Respondent's lack of initiative with respect to methods of instruction, compulsory education, wider syllabuses, mixed schools and intensified education, is all the more inexplicable in the light of Respondent's characterization of the "vast differences in the levels and stages of development of the various groups, particularly as gauged by standards of Western civilization." [2]

Applicants turn to a consideration of 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.

[1] P.M.C. Min., 18th Sess., pp. 135-36. (Italics added.)
[2] III, p. 354.

(a)

Respondent is at pains to demonstrate that the situation in the Territory was bad in 1920;[1] it reiterates that the "Natives" feel little "need" for schooling; it quotes liberally from the Permanent Mandates Commission's minutes to show that the "Natives" little understood or desired education for their children: "The Hereros as a race do not believe in education for their children." [2] According to Respondent, the situation remains unchanged today; there is still "insufficient desire for education" on the part of the "Natives." In view of Respondent's duty to promote to the utmost the social progress of the inhabitants, the attitudes of the "Natives" should have served to induce and stimulate Respondent to undertake positive and dynamic efforts to instill a sense of values in the population. Although, in the absence of effective political representation or consultation, it is not known on what basis Respondent's assertions concerning "Native" opinion can be made, Applicants nevertheless accept such assertions (but only as an indictment of the passivity and negligence of Respondent's conduct of the Mandate). That such attitudes should still exist to any significant degree, more than forty years after the Mandate's inception, is an accusation in itself; that Respondent should rely upon such attitudes to justify passivity and negligence compounds the offence.

Thus, discussing educational expenditures, Respondent states:

> "The 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." [3]

Applicants submit that the very reverse of the foregoing proposition was true in 1920 and remains true today. The inhibiting factors referred to by Respondent should have made "inevitable" *proportionately higher expenditures on the "Native" group*. The extent to which Respondent has permitted its attitude of *laissez-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, in Book VII of its *Counter-Memorial*:

> ". . . The introduction of a mixed school system would have run directly counter to the prevailing social order, and would, for that very reason, have failed." (**III**, p. 367.)

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[1] **III**, pp. 344-349, 354-356.

[2] Quoted *id.*, p. 408; see also *id.*, pp. 408-410.

[3] *Id.*, p. 535 (footnote omitted). (Italics added.) This statement apparently refers to *total* expenditure, which in view of the population ratio renders Respondent's negligence the more egregious.

"The attitude of the respective groups is, as far as possible, respected by providing separate facilities for them." (p. 368.)

"The policy of separate education as applied in the past is also in accordance with the wishes of the vast majority of the population of the Territory." (p. 376.)

". . . Not only would [schools open to all groups] . . . lead to dissatisfaction and group friction. . . ." (p. 382.)

". . . There is, to this day, a large body of parents who do not send their children to school, even when schools are available nearby, for no other reason than that they do not want to do so and see no good in schools . . . ." (p. 393.)

". . . [Until] parent communities [desiring compulsory education] . . . fully appreciate what it entails, its introduction can only create hardship and cause resentment." (p. 393.)

". . . [T]here are still many parents who do not send their children to school for no other reason than that they see no good in schools. . . ." (p. 410.)

". . . [M]any parents [in the Eastern Caprivi Zipfel] believe that by attending school their daughters become lazy, and, accordingly, less attractive to prospective husbands." (p. 461.)

". . . [T]he system of separate schooling [is] in accordance with the wishes of the vast majority of the population of the Territory. . . ." (p. 513.)

(b)

The second element of abdication of the dynamic duties of the Mandate consists in Respondent's professed reliance upon the initiative of the "Natives" to promote their own material and moral well-being and advance their own social progress. Respondent has thus formulated its conception of its obligation as Mandatory:

> "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." [1]

In the words of M. Rappard, this "appear[s] to throw the initiative . . . of obtaining education on to the native." [2] 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," [3] to the question of compulsory education, and to the financing of education.

Thus, with respect to the "community school" system, Respondent states that "it is hoped that all Native parent communities will in time utilize to the full the opportunity which has been given

[1] **III**, p. 537. (Italics added.)
[2] P.M.C. Min., 18th Sess., p. 136.
[3] **III**, pp. 371-372.

them *of promoting education through their own efforts.*" [1] The "Natives" have thus been delegated the duty of promotion of their own social progress which, in the Mandate, was entrusted to Respondent; these are the same "Natives" whom Respondent characterizes as having a "slow response . . . to education, owing, no doubt, to the absence of a keen feeling for the need for . . . [teachers, nurses, policemen and civil servants] at their present stage of social evolution." [2]

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." [3]

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." [4] This is not altogether surprising, since Respondent itself has only granted two bursaries for such purpose. [5]

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 *laissez-faire* and are wholly incompatible with the dynamic nature of the Mandate. [6] Thus: "so many Native pupils leave school at an early stage," "so few Native students enrol for the [senior secondary] course," "the number of pupils that enrol for the various [industrial] courses is disappointing," "the response to the opportunities offered [for training as nurses] has been slower than was hoped for, but probably no slower than could really have been expected," and "students soon lost interest [in the evening classes for adult 'Natives'], and seemed to be incapable of the sustained effort necessary to achieve success." [7]

(2) Compulsory Education

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. Thus:

[1] **III**, p. 371. (Italics added.)

[2] *Id.*, p. 388.

[3] *Id.*, p. 413; see also *id.*, p. 520: "One of the reasons why the provision of hostels for Natives cannot proceed on the same scale as for Europeans, is that in the case of the latter the parents to a great extent bear the cost of the facilities provided." Thus many "Native" children in the Police Zone are not able to attend school, even if they should wish to do so.

[4] *Id.*, p. 462.

[5] *Ibid.*

[6] *E.g.*: "*Separate Industrial Schools*" (*id.*, p. 466); "*Industrial Courses at the Augustineum*" (*id.*, pp. 466-467); "*Teacher Training Schools*" (*id.*, pp. 467-468); "*Nursing*" (*id.*, p. 468); and "*Adult Education*" (*id.*, pp. 489-491).

[7] *Id.*, pp. 449, 451, 467, 470, and 489, respectively.

"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. She had examined the programme of instruction given in the annex to the report and could only express her complete approval." [1]

Similarly:

"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]

Since the dissolution of the League of Nations, the organized international community has frequently emphasized the importance and desirability of compulsory education. Respondent in its *Counter-Memorial* describes the difficulties attendant upon any compulsory educational scheme for the "Natives" in the Territory. [3] Paramount among such difficulties are that the "Native" groups do not desire compulsory education for their children, or, if they desire it, do not understand the sanctions attendant thereupon. Respondent's passivity with respect to these difficulties has been noted above, and represents a partial abandonment of its obligations under the Mandate. [4] The fact that such difficulties should exist at this point in time with respect to *all* of the "Native" groups, and even with respect to the "Coloured" group, [5] is in itself proof that Respondent has failed in its responsibilities.

Applicants have not insisted in their *Memorials*, [6] nor do they now insist, that education be made compulsory for all the "Native" children in the Territory. Applicants reaffirm their objection 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." [7] Remedies for such imbalance would have been for Respondent to undertake positive measures to encourage "Native" parents to send their children to school, to render education compulsory for certain groups of "Natives," to make it financially possible for more "Native" children to stay in hostels, to encourage more "Natives" to become teachers, and to employ more "European" or "Coloured" teachers

[1] P.M.C. Min., 5th Sess., p. 145.
[2] P.M.C. Min., 26th Sess., p. 115.
[3] **III**, pp. 390-395.
[4] See sec. (1) of this Part (C), p. 387, *supra*.
[5] **III**, p. 392.
[6] See **I**, pp. 153, 154, 160 and 165-166.
[7] *Id.*, pp. 165-166. (Italics added.)

in "Native" schools. Respondent has not done so; on the contrary, Respondent has increased the minimum scholastic attainment, for exemption of "European" children from compulsory school attendance, to the *eighth year of schooling*. [1]

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.

Respondent states that "an insurmountable obstacle to universal compulsory education ... is the scarcity of teachers." [2] Although universal compulsory education is not at issue, Applicants are constrained to point out that the shortage of teachers in the Territory is also the result of Respondent's failure to acquit itself of its duties, not only with respect to adequate expenditure of funds, [3] but also with respect to education in the first place. [4] Respondent's educational policy reflects in every light the same basic circularities; a solution to the teacher shortage would have been the use of more "European" teachers, yet Respondent's policy of "mother-tongue instruction" raises new barriers in this regard. Similarly, 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 [5] in itself places a damper upon any nascent enthusiasm among young "Natives" to seek educational opportunities which, as Respondent concedes, would merely produce "frustration."

In conclusion, Applicants assert that Respondent's total failure to narrow the educational discrepancy between the "European"

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[1] **III**, p. 391.

[2] *Id.*, p. 394.

[3] See sec. (3) of this Part (C), p. 393, *infra*.

[4] See **III**, p. 421.

"... The numbers who enrol for teacher training remain disappointing, and of those that do enrol a large percentage are lost on the way by reason of either moral instability or *inability to maintain the sustained effort required* to complete the prescribed two year course. ... [T]he main hope for improvement in the qualifications of Native teachers seems to be a *gradual raising of the minimum requirements for admission* to the various training schools." (Italics added.)

And *id.*, p. 418:

"... The only solution to the problem [of the shortage of "Native" teachers] was to try to achieve a gradual improvement in the quality of Native teachers *and in the general standard of education*." (Italics added.)

[5] See p. 419, *infra*.

and the "non-European" children of the Territory has violated its obligations under Article 2, paragraph 2, of the Mandate.

(3) Disparity in Expenditure

(a) *On Education in General*

Respondent admits that the "amounts spent on Native education have at all times been substantially less than the amounts spent on European education," [1] but denies that there has been unfair discrimination. Respondent concedes that "the expenditure on *non-European* education amounted to 25.6 per cent of the total amount spent on education" [2] in 1962-1963. This means that 74.4 per cent of the total education expenditure in 1962-1963 was made for 13.79 per cent of the population of the Territory. [3] Respondent argues that such a comparison "cannot *per se* be indicative of unfair discrimination against the Native groups." [4] To the contrary, Applicants 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. 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.

The *per capita* expenditure by Respondent for 1962-1963 strikingly confirms the discrepancy between Respondent's expenditures for education of the "European" and "Native" inhabitants of the Territory, as the following table shows:

	Per capita expenditure, in Rand, on all children of school age [5]	*Per capita* expenditure, in Rand, on all children attending school
"NATIVE" CHILDREN		
1. Police Zone:	11.92	27.32
2. Northern Territories:	3.92	8.19
3. Eastern Caprivi Zipfel:	4.02	10.17
4. Territory as a whole:	6.59	14.28

[1] III, p. 534.
[2] *Id.*, p. 537.
[3] *Odendaal Commission Report*, p. 245, Table LXXXXII.
[4] III, p. 534.
[5] Applicants consider that Respondent's *per capita* figures (given at III, pages 458-459 and 507) are misleading in that they are calculated over the total number of *children attending school* rather than the total number of *children*. Applicants

	"EUROPEAN" CHILDREN	
1. Including net estimated hostel expenditure: [1]	156.50	157.02
2. Including 20% of gross estimated hostel expenditure:	121.43	121.83
3. Excluding hostel expenditure:	108.09	108.45.

(b) *On Teachers in Particular*

Respondent identifies the shortage of teachers with many of its difficulties in the field of "Native" education. [2] Such shortage hinders the introduction of compulsory education; [3] it limits the number of schools which may be operated; [4] it hinders vernacular instruction; [5] it affects the availability of hostels; [6] it limits education in general. [7] Respondent, *inter alia*, attributes this shortage 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," [8] asserting, for example, that "the Herero, in particular, show very little interest in the teaching profession. . . ." [9]

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submit that a calculation made over the number of *pupils* does not present a true picture of the actual disparity in educational expenditure as between "European" and "Native" children, since 99.66 per cent of "European" children attended school in 1962, as opposed to only 46.16 per cent of "Native" children (*Odendaal Commission Report*, p. 245, Table LXXXXII). Thus Respondent has been able to render the comparison between "Native" and "European" expenditures less shocking by pro-rating the "Native" expenditures over a much smaller number of children than the total. A true comparison should reflect the total efforts made on behalf of the total number of "*inhabitants* of the territory subject to the present Mandate," broken down into the number of children of school age in the "Native" and "European" groups (see I, p. 159). In order to avoid statistical disputation before the Court, Applicants have given *per capita* figures for 1962-1963 *calculated on both bases*. It is readily apparent that the discrepancy between "European" and "Native" *per capita* figures is flagrant on *either* basis, although Applicants regretfully insist that the lower *per capita* figures are, for the reasons given, a truer reflection of Respondent's efforts toward the "Native" children as a whole. (The figures used have been calculated using the population figures given for 1962 in the *Odendaal Commission Report*, pp. 245 and 249. Tables LXXXXII and LXXXXIII.)

[1] See South West Africa Administration: *Estimates During the Year Ending 31st March, 1964*, pp. 6, 47, 49, 50, and 52.

[2] This shortage is of "Native" teachers; the situation is of course aggravated by Respondent's over-all policy of racial segregation (see sec. (1) of Part (B) of this Section, p. 371, *supra*).

[3] III, pp. 393-394.

[4] *Id.*, p. 413.

[5] *Id.*, p. 415.

[6] *Id.*, p. 520.

[7] *Id.*, pp. 417-421, 516, 518.

[8] *Id.*, p. 388.

[9] *Id.*, p. 360.

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.*" [1]

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. In the 36th session of the Permanent Mandates Commission, Mlle Dannevig stated:

> "During the previous year's discussion, she had expressed the view that the offer of higher salaries would perhaps induce more young natives to be trained as teachers. She thought that that observation still held good." [2]

At the same time, higher salaries are openly recognized as incentives by Respondent, with respect to "Europeans":

> "Since the war there has been a considerable increase in the number of teacher trainees, both for primary and secondary work. *This is probably to be ascribed largely to increased salary scales for teachers,* and to the financial aid offered since 1950 by the Administration in the form of bursaries and loans." [3]

Yet "Native" teachers are offered salaries and allowances far lower than those available for "European" teachers in the Territory. [4] The commencing salary of a married male "European" teacher in the lowest category, including a special allowance, is R1,406. [5] The commencing salary of married male "Native" teacher with comparable qualifications, [6] together with his cost-of-living allowance, is R696. [7]

Respondent attempts to justify this extraordinary disparity by stating that "Native" teachers are not as well qualified as "Europeans," that there are more economic alternatives open to "Europeans," that to pay "Native" teachers higher salaries than they presently receive might result in their becoming "separated or estranged from [other members of their group] . . . as a result of an artificial financial barrier" so created, and that such disparity

[1] **III**, p. 369.

[2] P.M.C. Min., 36th Sess., p. 39. Worthy of note was the response given to this remark:

> "Mr. ANDREWS said that he would not fail to transmit Mlle. Dannevig's views on the salary question. There were, however, arguments against the idea of teachers who were such from lucrative motives only. Doctor Vedder, for example, had said that the ideal at present to be found with young teachers was a religious one, and that teachers without ideals were not fit to educate primitive peoples." *(Ibid.)*

[3] **III**, p. 508. (Italics added.)

[4] See tables, *id.*, pp. 452-457, and *cf.* tables, *id.*, pp. 502-506.

[5] *Id.*, p. 506.

[6] Standard X plus a teacher's training course (Grade 3: *id.*, p. 455; *cf. id.*, p. 388).

[7] *Id.*, pp. 455-456.

exists "also in other African territories." [1] To the contrary, as has just been shown, it is entirely possible to have equally qualified "European" and "Native" teachers; [2] furthermore, 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. With regard to "other African territories," Applicants need only repeat that such comparisons are meaningless and serve no useful purpose, since there are no other African territories subject to Mandate. [3]

With respect, however, to Respondent's statement that to pay higher salaries to "Native" teachers would "separate" and "estrange" them from "other members of [their] . . . group," Applicants insist that this 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. Yet Respondent states:

> "It could, however, do *incalculable harm* to anticipate [the process of the narrowing discrepancy between 'European' and 'Native' teacher salaries] . . . 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]

Respondent has thus stated that it will harm a man to pay him more. Where does this "incalculable harm" arise? Respondent's answer to this question is to be found in a statement of Dr. Verwoerd in the South African Senate:

> "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 become frustrated and rebellious when this does not happen, and he tries to make his community dissatisfied because of such misdirected and alien ambitions." [5]

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[1] III, pp. 532-533.

[2] *Cf.* Respondent's statement at *id.*, p. 388: "And, because the Native teacher *is not so well qualified* as the Coloured or White teacher, he naturally commands a lower salary than those whose education has cost more," with its statement at *id.*, p. 533: "These factors result in a situation that salaries paid to Native teachers are lower than those paid to European teachers, *even where qualifications may be comparable.*" (Italics added.)

[3] 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.

[4] III, p. 533.

[5] *U. of S.A., Parl. Deb., Senate,* 11th Parl., 2nd Sitting (weekly ed., 1954), Cols. 2606-2607. (Italics added.)

(c) *Conclusion*

In conclusion, Applicants submit that this last-mentioned discrimination is but another example of implementation of Respondent's basic policy of educational *apartheid*. It 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. "Natives" remain uneducated because there are not enough "Native" teachers; there are not enough "Native" teachers because not enough "Natives" are attracted to teaching; "Native" teachers' salaries remain low because "the socio-economic structures within the Native groups are still at much lower levels than those within the White group, [and] it is inevitable that their teachers should at present command lower remuneration than the teachers of the White group." [1] The "socio-economic structures within the Native groups" remain at "lower levels of development" because of lack of education, and the "Natives" remain uneducated because of a lack of "Native" teachers. [2]

Similar circularities exist in every aspect of the education of "Natives" in the Territory. Such patterns rest upon the same assumptions, and move toward a common objective. With respect to classification by group, segregation by race, separation by tribe, "mother-tongue instruction," limitation of syllabuses and opportunities, lack of active encouragement, abdication of the affirmative responsibilities of the Mandate, and failure to provide even a bare semblance of parity in expenditure: all of these aspects relate to, and are informed by, the essential design and assumptions of *apartheid*:

> "... Whatever segment or sector of the life of the Territory may be examined, the import of the facts is identical. Each part of the record supports and confirms every other part. The record as a whole supports and confirms the record in detail. Indeed, the record taken as a whole has an impact greater than a mere arithmetical sum of the several parts. The record as a whole reveals the deliberate design that pervades the several parts." [3]

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[1] III, p. 389.

[2] In the 34th Session of the P.M.C., the following opinion was expressed:

"M. VAN ASBECK thought the present system represented a vicious circle in which there was no primary education because there were no teachers and no teachers because there was no primary education." (P.M.C. Min., 34th Sess., p. 91.)

[3] I, p. 161.

ANNEX 5

RACIAL SEPARATION IN EDUCATION IN DEPENDENT TERRITORIES, AS VIEWED BY THE UNITED NATIONS

The 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. Speaking through such organs, the United Nations has specifically 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.

(a) Separation on account of race is incompatible with the broad goals of education. In its eighth session, the General Assembly resolved that the objectives of education in the Non-Self-Governing Territories require that "the process of education should be designed to familiarize the inhabitants with and train them in the use of the tools of economic, social and political progress, with a view to the attainment of a full measure of self-government." [1] In its eleventh session, the General Assembly recalled this resolution and further resolved that to attain the objectives of education "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.[2]

(b) *Apartheid* is incompatible with the meaning of education itself. In a brief but considered report on education, which was specifically approved by a resolution of the General Assembly, the Committee on Information stated that "the principle of non-discrimination is essential to and is an essential part of education." [3]

(c) Separation in education is incompatible with the principle of equality of opportunity. The Committee on Information stated that "in 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." [4]

In order to assure equal opportunity, there must be equal treatment, not separate treatment, of the population. In its fourth session the

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[1] G.A. Res. 743 (VIII), 27 November 1953, G.A.O.R. 8th Sess., Supp. No. 17 at 24 (A/2630).

[2] G.A. Res. 1049 (XI), 20 February 1957, G.A.O.R. 11th Sess., Supp. No. 17 at 26 (A/3572).

[3] G.A.O.R. 11th Sess., Comm. on Info., Supp. No. 15 at 23 (A/3127).

[4] G.A.O.R. 5th Sess., Rep. of the Sub-Comm. on Education in N-S-G T's, Supp. No. 17 at 21 (A/1303/Add. 1); repeated in G.A.O.R. 14th Sess., Comm. on Info., Supp. No. 15 at 16 (A/4111); and in G.A.O.R. 15th Sess., Comm. on Info., Supp. No. 15 at 52 (A/4371). Approved by G.A. Res. 445 (V), 12 December 1950, G.A.O.R. 5th Sess., Supp. No. 20 at 54 (A/1775); and by G.A. Res. 1462 (XIV), 12 December 1959, G.A.O.R. 14th Sess., Supp. No. 16 at 34 (A/4354).

General Assembly resolved that the Administering Members "establish equal treatment in matters related to education between inhabitants of the Non-Self-Governing Territories under their administration whether they be indigenous or not." [1]

(d) Separation in education inevitably leads to the development or encouragement of racial prejudice. The Committee on Information held that "the development of a system of common education plays a major role in the establishment of improved race relations, while children of different races attending separate schools are bound to develop racial attitudes." [2] In its *Progress Report of 1960* the Committee on Information looked back upon its extensive experience with educational matters, and found that "the separation of systems of education in a manner which, even if not racially motivated, coincided with racial divisions in the communities concerned was obviously open to increasing risk of fostering interracial suspicion and, indeed, of contributing to discriminatory practices." [3]

(e) *Apartheid* is incompatible with the goal of a unified territory capable of striving toward self-government and social progress. The Trusteeship Council has resolved that "the system of separate schools [is] an obstacle to the evolution of a unified and integrated society . . ." [4] One of the most important questions concerning the relation of education to social unification has been the problem of a suitable language of instruction. Language barriers have often been cited as an excuse for postponing inter-racial schools.[5] Yet separate schooling may be the cause, and not the result, of social disunity stemming from language barriers.

The Committee on Information has reported that "the 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." [6] Accordingly, the Trusteeship Council, concurrently with its recommendations to the Administering Authority of Tanganyika that the trend toward inter-racial schools be continued, stated that it was aware of the importance of a common language as a unifying factor in education and agreed with the Administering Authority "as to the desirability of English being taught in the primary schools at the lowest possible levels. . . ." [7]

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. The Committee on Information advised that

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[1] G.A. Res. 328 (IV), 2 December 1949, G.A.O.R. 4th Sess., Resolutions at 41 (A/1251).

[2] G.A.O.R. 14th Sess., Comm. on Info., Supp. No. 15 at 16 (A/4111). Approved by G.A. Res. 1462 (XIV), 12 December 1959, G.A.O.R. 14th Sess., Supp. No. 16 at 34 (A/4354).

[3] G.A.O.R. 15th Sess., Comm. on Info., Supp. No. 15 at 51 (A/4371).

[4] G.A.O.R. 11th Sess., T.C. Rep., Supp. No. 4 at 61 (A/3170).

[5] See *e.g.*, **III**, p. 356.

[6] G.A.O.R. 5th Sess., Rep. of the Sub-Comm. on Education in N-S-G T's, Supp. No. 17 at 20-21 (A/1303/Add. 1). Approved by G.A. Res. 445 (V), 12 December 1950, G.A.O.R. 5th Sess., Supp. No. 20 at 54 (A/1775).

[7] G.A.O.R. 12th Sess., T.C. Rep., Supp. No. 5 at 50-51 (A/3995).

"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."[1] Later the Committee wrote:

> "As long as separate school systems must exist, they can only be defended as a transitional arrangement from which their integration should progressively evolve; and even in this transitional period when they may have to be predominantly racial they should not be exclusively so, but should admit all children who qualify for entry to them, regardless of their racial origin."[2]

It is clear that the operative part of the Committee's statement is its insistence upon the principle of equal opportunity. As the Committee states later in its Report, "the Committee has come to the conclusion that every child of every racial, religious or cultural group should have an equal opportunity for education at all stages, and it recommends that efforts should be directed to the development of a common system of education, open to all children, both at the primary and the secondary stage."[3] And the fact that primarily separate schools may quickly become completely inter-racial without increasing the quantum of practical difficulties is evident from the conclusion of the Trusteeship Council with respect to educational conditions in the Cameroons under French Administration:

> "... *The Council notes with satisfaction* the policy of the Administering Authority which has led to the establishment of schools open to students of all races, without any discrimination, and considers that the lack of any difficulty in the functions of these schools is indicative of a praiseworthy attitude."[4]

With the problem of practical difficulties firmly in mind, the appropriate organs of the United Nations have held that "on no ground whatsoever can education on a racial basis be justified."[5] Insofar as Trust Territories are concerned, the General Assembly has resolved that "discrimination on racial grounds as regards educational facilities available to different communities in the Trust Territories is not in accordance with the principles of the Charter, the Trusteeship Agreements and the Universal Declaration of Human Rights."[6] And with respect to Non-Self-Governing Territories in general, the General Assembly "condemns resolutely" racial discrimination and segregration[7] and "solemnly reaffirms its resolute condemnation."[8] In its most recent resolution on

[1] G.A.O.R. 10th Sess., Comm. on Info., Supp. No. 16 at 30 (A/2908).

[2] G.A.O.R. 14th Sess., Comm. on Info., Supp. No. 15 at 16 (A/4111). Approved by G.A. Res. 1462 (XIV), 12 December 1959, G.A.O.R. 14th Sess., Supp. No. 16 at 34 (A/4354).

[3] *Ibid.*

[4] G.A.O.R. 12th Sess., T.C. Rep., Supp. No. 4 at 144 (A/3595).

[5] G.A.O.R. 14th Sess., Comm. on Info., Supp. No. 15 at 16 (A/4111). Approved by G.A. Res. 1462 (XIV), 12 December 1959, G.A.O.R. 14th Sess., Supp. No. 16 at 34 (A/4354), and by G.A. Res. 1464 (XIV), 12 December 1959, G.A.O.R. 14th Sess., Supp. No. 16 at 34 (A/4354).

[6] G.A. Res. 324 (IV), 15 November 1949, G.A.O.R. 4th Sess., Resolutions, at 40 (A/1251).

[7] G.A. Res. 1693 (XVI), 19 December 1961, G.A.O.R. 16th Sess., Supp. No. 17 at 37 (A/5100).

[8] G.A. Res. 1850 (XVII), 19 December 1962, G.A.O.R. 17th Sess., Supp. No. 17 at 43 (A/5217).

the elimination of all forms of racial discrimination, the General Assembly condemned "*apartheid*" and the "segregation and separation" of races in education. [1]

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. This pattern of compliance reveals international acquiescence and acceptance of the requirements laid down by the appropriate organs of the United Nations. Specifically, compliance has been demonstrated with respect to (a) higher education; (b) secondary education; (c) primary education; (d) vocational education; and (e) teaching conditions.

(a) Apart from South West Africa, "all university institutions in the Non-Self-Governing Territories are organized on non-racial principles and are open to students without any discrimination on grounds of race or colour. This is a point of outstanding importance." [2] This fact was adduced after study of reports of visiting missions, of the Economic and Social Council, of UNESCO, and of the Secretariat, in a report of the Committee on Information delivered in 1956. [3] Nor is this fact based merely upon passive compliance with the principle of non-separation of races as laid down by the appropriate organs of the United Nations. Rather, in the period 1954 to 1957 alone, "seven centres of higher education, open to all races, have been established in the Non-Self-Governing Territories, four of these in East and Central African Territories." [4]

(b) Dependent territories have increasingly responded to United Nations' requirements of integrated secondary schools. In the 1954 to 1957 period, four inter-racial secondary schools were opened in the Belgian Congo and one in Kenya. Steps were also taken to initiate inter-racial secondary schools in Uganda. [5] In 1954 the Trusteeship Council approved of a projected establishment of an inter-racial secondary school at Usumbura, in Ruanda-Urundi. [6] The school was established in 1955. [7] A Visiting Mission in 1957 was favourably impressed by the degree to which the secondary schools in Ruanda-Urundi were inter-racial. [8] This pattern has been repeated in many dependent territories. [9] For example, in 1957 the Trusteeship Council noted the prospective

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[1] G.A. Res. 1904 (XVIII), 20 November 1963, G.A.O.R. 18th Sess., Supp. No. 15 at 35 (A/5515).

[2] G.A.O.R. 11th Sess., Comm. on Info., Supp. No. 15 at 21 (A/3127). Approved by G.A. Res. 1048 (XI), 20 February 1957, G.A.O.R. 11th Sess., Supp. No. 17 at 25 (A/3572). See also G.A.O.R. 10th Sess., Comm. on Info., Supp. No. 16 at 30 (A/2908).

[3] *Ibid.*

[4] G.A.O.R. 14th Sess., Comm. on Info., Supp. No. 15 at 16 (A/4111).

[5] *Ibid.*

[6] G.A.O.R. 9th Sess., T.C. Rep., Supp. No. 4 at 93 (A/2680).

[7] G.A.O.R. 11th Sess., T.C. Rep., Supp. No. 4 at 84 (A/3170).

[8] G.A.O.R. 13th Sess., T.C. Rep., Supp. No. 4 at 59 (A/3822, Vol. II).

[9] See, *e.g.*, G.A.O.R. 6th Sess., T.C. Rep., Supp. No. 4 at 220 (A/1856); and G.A.O.R. 14th Sess., T.C. Rep., Supp. No. 4 at 165 (A/4100).

establishment of two inter-racial secondary schools in Tanganyika, and urged the Administering Authority to continue this trend. [1] Within two years a secondary school and a preparatory school were operating on an inter-racial basis. [2] And coincident with the independence of Tanganyika, a comprehensive system of ordinances which had been in the formulative stage for several years was coming into effect establishing a complete integrated system of education. [3]

(c) Apart from South Africa, no Administering Authority has contested the principle of inter-racial schools on the primary level. All are taking steps to integrate these schools. In Ruanda-Urundi, for example, any child regardless of race is admitted to schools run on European lines if he speaks French and his standard of education is up to that of his age group. Aware of the limitations that even these rules imply, the Administering Authority was noted to be seeking to evolve a system of inter-racial education by a positive program. [4] In the Cameroons under French Administration, by 1957 all schools were open to students of all races. [5]

(d) Vocational schools are increasingly established upon an inter-racial basis. This is true of the Technical Institute of Dar es Salaam in Tanganyika [6] and the vocational schools at Yaoundé, Douala and Garua in the Cameroons under French Administration. [7] From 1958 on, there was no distinction as to race in any aspect of vocational training in Tanganyika. [8]

(e) In 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. As early as 1949, European and indigenous teachers in Togoland under French Administration were placed on a completely equal footing. [9] Statistics for New Guinea demonstrated to the Trusteeship Council in 1960 and 1962 that many non-indigenous teachers were employed in schools having a majority of indigenous students. [10]

The 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. 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 kilometre). Finally, unlike South West

[1] G.A.O.R. 12th Sess., T.C. Rep., Supp. No. 4 at 50 (A/3595).
[2] G.A.O.R. 14th Sess., T.C. Rep., Supp. No. 4 at 38 (A/4100).
[3] G.A.O.R. 16th Sess., T.C. Rep., Supp. No. 4 at 28 (A/4818).
[4] *Ibid.*
[5] G.A.O.R. 12th Sess., T.C. Rep., Supp. No. 4 at 144 (A/3595).
[6] G.A.O.R. 15th Sess., T.C. Rep., Supp. No. 4 at 57 (A/4404).
[7] G.A.O.R. 6th Sess., T.C. Rep., Supp. No. 4 at 151 (A/1856).
[8] G.A.O.R. 15th Sess., T.C. Rep., Supp. No. 4 at 57 (A/4404).
[9] G.A.O.R. 6th Sess., T.C. Rep., Supp. No. 4 at 199 (A/1856).
[10] G.A.O.R. 16th Sess., T.C. Rep., Supp. No. 4 at 145 (A/4818); G.A.O.R. 17th Sess., T.C. Rep., Supp. No. 4 at 27 (A/5204).

Africa, Somaliland was very poorly endowed with natural resources, and as a result the Territory could ill afford high expenditures on education. [1]

At the outset of the Trusteeship period, petitions filed before the Trusteeship Council claimed that Somali and Italian pupils in elementary schools were completely segregated. [2] Four years later, however, the Trusteeship Council found that the "Italian" schools (which offered a metropolitan curriculum, as opposed to the Somali schools, which were "adapted" to the Territory) were open to Somali students. Out of a total enrollment of 816 in the "Italian" elementary schools, 236 were Somalis. [3] In 1956 the Representative of India noted in a meeting of the Trusteeship Council that there was no segregation in the schools of the Somaliland Territory. [4] And by 1957, of a total enrollment of 971 in the "Italian" elementary schools, 405 were found to be indigenous inhabitants of Somaliland. [5]

[1] G.A.O.R. 6th Sess., T.C. Rep., Supp. No. 4 at 96 (A/1856).
[2] *Id.*, p. 137.
[3] G.A.O.R. 10th Sess., T.C. Rep., Supp. No. 4 at 140 (A/2933).
[4] G.A.O.R. 11th Sess., T.C. Rep., Supp. No. 4 at 114 (A/3170).
[5] G.A.O.R. 12th Sess., T.C. Rep., Supp. No. 4 at 97 (A/3595).

2. THE ECONOMIC ASPECT

(A) INTRODUCTION

Respondent's purported explanations of the particular measures by which it effectuates the policy of *apartheid* evade Applicants' central point, which is that the policy of *apartheid* itself violates Respondent's obligation to promote the well-being and progress of the inhabitants of the Territory. Thus, Respondent asserts that

> "... Applicants have formulated certain specific duties which they allege are included within the ambit of Article 2 of the Mandate." [1]

So stated, Respondent's characterization is a misleading half-truth; indeed, it misses the central point at issue in this context.

Applicants' references to, and complaints concerning, such "specific duties" [2] set forth standards or objectives which are indispensable prerequisites to promotion of well-being and social progress. Specific measures of implementation of the general policy of *apartheid*, or separate development, merely illuminate and confirm the nature and consequences of that policy, the inherent evil of which lies in the allotment of status, rights, duties, opportunities and burdens on the basis of membership in a "group" or tribe.

It follows that, although examination of specific measures of implementation is highly relevant to an appraisal of the basic policy of *apartheid*, inasmuch as these measures give dimension and effect to that policy, they must be viewed not as isolated details or events, but in light of Applicants' contention that:

> "The record as a whole supports and confirms the record in detail. Indeed, *the record taken as a whole has an impact greater than that of a mere arithmetical sum of the several parts.* ... [T]he details are not isolated events or phenomena. They are significant not only in themselves, but in their mutual and multiple relationships and their cumulative effect." [3]

In Applicants' submission, a specific measure designed to effectuate an unacceptable policy is not extenuated by argument, or even by demonstration, that it may produce a tolerable side-effect in certain instances.

Although the bulk of the *Counter-Memorial*, including Book V, thereof, is concerned with largely irrelevant *minutiae*, the admittedly discriminatory predicate of specific measures invalidates

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[1] **III**, p. 1.
[2] See *e.g.*, **I**, pp. 107-108.
[3] *Id.*, p. 161. (Italics added.)

them in terms of Respondent's obligations under Article 2, paragraph 2, of the Mandate.

Thus, in conceding that only "Europeans" may be employed in levels above common labour in mining enterprises "owned by a European" (as, indeed, all such enterprises in the Police Zone are owned), Respondent reiterates the premise underlying its education and other *apartheid* policies:

> "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." [1]

If, as Applicants contend, such a premise and policy is wholly repugnant to Respondent's obligation to promote the well-being and social progress of the inhabitants of the Territory, little if any purpose is served by Respondent's lengthy examination of the details of restrictive laws and regulations designed to effectuate that policy. [2]

Furthermore, as in the case of restrictions upon rights of residence and movement, [3] 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. 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*." [4]

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, [5] any possibility of a "real home" in 70 per cent of the Territory (whatever the quoted phrase signifies).

(B) General Considerations

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. [6] "Each part of the record supports and confirms every other part." [7] The education

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[1] **III**, p. 55.
[2] See, *e.g.*, *id.*, pp. 47-63.
[3] *Infra*, p. 458.
[4] **III**, p. 219. (Italics added.)
[5] The latter admittedly number more than 170,000. (**II**, p. 402.)
[6] See p. 362, *supra*.
[7] **I**, p. 161.

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. The Committee on South West Africa, *in its Report to the General Assembly for 1960, stated that* "beyond some minor teaching and menial positions at the lowest levels, their training and education seems directed merely to preparing the 'Natives' as a source of cheap labour for the benefit of the 'Europeans.' [1] 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" [2] of the life of the Territory, but also as an inevitable *consequence of the lack of educational training.*[3] Education and economic status are inseparable,[4] as are economic status and political rights and opportunities.[5]

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[1] G.A.O.R. 15th Sess., S.W.A. Comm., Supp. No. 12 at 56 (A/4464).

[2] I, p. 161.

[3] Thus the Eiselen Commission reported in 1951, with respect to the "Bantu" desire for equal educational rights, facilities, and opportunities:

> "The insistence on exactly the same curricula and examinations as are found in European schools is linked with the desire for the same certificates. This has also an economic motivation for the Bantu feel that if they do not follow the same curricula and pass the same examinations they cannot obtain certificates of equal value. Consequently they would not have a claim to equal pay, and, although the Bantu do not receive the same pay, the possession of the same qualifications is held to be a powerful instrument in pressing for improved financial treatment."

(*Eiselen Commission Report*, para. 235.)

[4] Thus did the Group of Experts report to the Secretary-General in 1964, with respect to the educational needs of "Bantu" in South Africa:

> "Technical education and vocational training must be given top priority, bearing in mind the opening up of wide fields of employment to those hitherto restricted by law from skilled work in mines, in building and all other fields."

(S.C.O.R., Report of S.G. at 30 (S/5658).) Similarly, the *Annex* to I.L.O.: *Report of the Committee on Questions Concerning South Africa*, G.B. 158/2/5 (International Labour Conference, 158th Session, Geneva (1964)) states, with respect to South Africa, that "discriminatory treatment to the detriment of the 'non-white' sections of the population . . . is the result principally of the inequality of opportunities for vocational training established by the legislation, which organises all education on a separate and unequal basis for persons of different races." (*Annex*, p. 1, paras. 2 and 3.) (The *Annex* is entitled "An I.L.O. Programme for the Elimination of '*Apartheid*' in Labour Matters in the Republic of South Africa.")

[5] "A special theory is developed in which the economic life of society is subordinated to its political objectives, so that non-European workers are not free to improve their standard of living *if thereby they seek also to gain added political opportunity or social advancement.*"

(de Kiewiet, *The Anatomy of South African Misery* 25 (1956).) (Italics added.) The converse of the above was succinctly expressed by Dr. W. M. M. Eiselen of the Commission on Native Education (the "Eiselen Commission," see footnote 5 on p. 365, *supra*) in 1959, when he wrote that ". . . the maintenance of white political supremacy over the country as a whole is a sine qua non for racial peace and economic prosperity in South Africa." (9 *Optima* 8 (No. 1, March 1959); as quoted in Roskam, *Apartheid and Discrimination* 87 (1960).) (See p. 439, *infra*.)

Inasmuch as precisely the same considerations and circumstances apply in the Territory, the foregoing comments regarding South Africa itself are relevant in all respects to the Territory.

Economic *apartheid* is necessarily based upon the same major premises as is educational *apartheid*,[1] and produces identical results with respect to the inhabitants affected. 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 "Coloureds" are likewise wholly allotted on the basis of membership in a group.[2]

Areas 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," [3] and since the "Native" population is proportionally great, it follows that an inevitable result of territorial *apartheid* is that "Native" labour will, to a significant degree, be drawn from the reserves to service the more advanced "European" economy on a migratory basis.[4]

Another consequence of economic *apartheid* is that the balance of the "Native" labour force within the Police Zone is recruited from among the inhabitants of the "Native" reserves within the Police Zone,[5] or is obtained from "Natives" resident on "European" farms or in urban areas. With respect to these latter two groups, Applicants show in the *Memorials* that their status in the "White" economy is both interminable and impermanent, by reason of the sweeping powers of the Administration with respect to "Native" rights of residence anywhere in the Territory.[6] *De jure* and *de facto*,

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[1] See p. 362, *supra*.

[2] *Cf.* pp. 144-145, *supra*. "Whatever segment or sector of the life of the Territory may be examined, the import of the facts is identical. Each part of the record supports and confirms every other part." (**I**, p. 161.)

[3] The 1960 figures were as follows: "Natives" living in "Home Areas" in the Southern and Northern Sectors totalled 315,342, or 74.35 per cent of the total "Native" population of 424,047. Of the remainder, 48,919 (11.53 per cent) were distributed in urban areas (all in the Police Zone) and 59,786 (14.09 per cent) in rural areas (on farms in the Police Zone). (Computed from *Odendaal Commission Report*, pp. 39 and 41, Tables XVIII and XIX, but excluding from "Natives" in rural areas and from the total amount of "Natives" the "4,528 employees mostly from Angola" listed in footnote "§" to Table XVIII.)

[4] Respondent, at **III**, p. 74, points out that 41 per cent of the adult male "Natives" employed in the Police Zone in 1960 came from Ovamboland and the Okavango territory. The same figures (27,771 and 850, respectively) are given in the *Odendaal Commission Report*, p. 39, para. 147; what Respondent has not set forth in its *Counter-Memorial* is the fact that "these 28,621 workers represent approximately 10 [per cent] of the population of the Northern Sector." *(Ibid.)* 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, or all of the male "Natives" between twenty and thirty-two calculating life expectancy of sixty years as a base. Manifestly, such a drain of manpower is, in the life of the Northern reserves, an extremely significant factor.

[5] Of which the population in 1960 was 28,866, or 6.8 per cent of the total "Native" population. (*Odendaal Commission Report*, p. 41, Table XIX.)

[6] **I**, pp. 146-148.

the entire "Native" population of the Territory is so controlled and powerless with respect to rights of residence and freedom of movement that any labour drawn therefrom is temporary in its essence; the difference between a "Native" labourer in an urban area or on a farm and a "Native" labourer imported from outside the Police Zone is one of degree.

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" [1] (on which Respondent's educational policy so heavily rests), [2] assures that the horizon of "Native" economic potential remains confined to the semi-skilled level.[3]

The Special Committee for South West Africa reported in 1962, after a visit by two of its officers to the Territory:

> "Under this discriminatory policy [*apartheid*], certain inadequate areas are reserved as the homelands of the indigenous groups. Outside those areas, the country is regarded as belonging to the White population and the presence of indigenous inhabitants is considered to be temporary and as not giving grounds for political or related rights. The entry of indigenous inhabitants into the area outside the reserves, in particular into urban areas, and their continued residence there, are regulated by a pass system. In town, they live in segregated townships and locations and, except for a few minor activities in those townships or locations, have no economic possibilities other than wage labour." [4]

Apartheid, whether territorial, economic, social or educational, thus imposes upon inhabitants of the Territory an interlocking series of consequences.

A factor contributing to economic stagnation of the Northern reserves is the prolonged absence of approximately one-half of the adult male population therefrom. Were the families of "Native" labourers permitted to accompany them to their work, population pressure upon the land inevitably would decrease [5] 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. In the Northern reserves

> "There is virtually no artisan tradition; [the inhabitants] . . . consume what they produce and there is consequently little building up of permanent capital assets . . . animal husbandry and crop production

[1] **III**, p. 56.
[2] *Id.*, pp. 529-530.
[3] See p. 419, *infra*.
[4] G.A.O.R. 17th Sess., Sp. S.W.A. Comm., Supp. No. 12 at 13 (A/5212).
[5] See **III**, p. 8. for a description of the recent "rapid increase in population" in the Northern reserves.

> are practised mainly for self-maintenance, [and] there is always a certain proportion of the male population who, as temporary employees in the money or exchange sector, could put their abilities to more profitable use than in their own subsistence sector." [1]

If 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; 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. Not only would production be more efficient, but a natural modernization of agricultural methods would take place rather than either of the two extremes suggested by Respondent.[2]

Similarly, the reasons given by Respondent why "Northern Natives . . . do not acquire greater skill than they actually do" [3] would tend to disappear. These are mainly as follows:

> ". . . the shortness of their period of contract service . . . the difficulties which they experience in adapting themselves to forms of work which are strange to them, and . . . the tendency on the part of many of them, when they return to the Police Zone for a second or further period of service, to explore new avenues of employment rather than to return to their former field of work. These factors naturally militate against acquiring any considerable degree of skill in any particular occupation." [3]

In the present situation in the Territory, not only do the Northern "Natives" fail to acquire any considerable degree of skill, but when they have returned to their reserves the few skills they may have acquired do not match the requirements of the area. Thus the Northern reserves are deprived, on the one hand, of the presence of a large percentage of the able-bodied men and, on the other, of their effectiveness when they return. At the same, time, the initiative for effecting changes devolves upon the women inhabitants in addition to their accustomed labour on the land. [4] Together with the foregoing, the inhabitants cannot generate capital owing to the subsistence economy which is fostered, in turn, by the large population and by the lack of adult males devoting themselves exclusively to farming. It is one of the vicious circles of the policy of *apartheid*.

The foregoing consequences of the policy are impossible to reconcile with the positive obligations of Article 2 of the Mandate. They would violate Respondent's obligations toward the inhabitants even if they were not based upon "group" differentiation. A policy producing such effects by means of "group" differentiation,

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[1] *Odendaal Commission Report*, p. 315, para. 1286.

[2] **III**, p. 22. For policy and results in comparable areas, see Annex 6, Section (1), *infra*, p. 426.

[3] **III**, p. 75.

[4] **II**, p. 325.

then, is *a fortiori* a violation of the obligations of the Mandate.

Respondent has not concealed the racially discriminatory motivation of economic *apartheid*. Thus, the Administrator of the Territory, in 1960, announced:

> "I want to make a very special plea tonight here to all our municipalities, industries, business concerns and private people: Do your duty for the welfare of the people in this country and *do with as little non-European labour as possible. We must create a surplus of labour.* There are thousands of Europeans who are willing to come to this country to take over work. We have got to see and realise our prospects for the future if we are to remain a European race in this country and be happy. . . ." [1]

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*:

> ". . . Respondent could not reasonably have pursued a policy permitting individual Natives, or small groups of Natives, to live on, or to roam over large tracts of potentially useful land." [2]
>
> "The *only way* in which Respondent could have ensured the possession of land by Natives, was by creating reserves." [3]
>
> "There can be no objection to granting a right to a farmer to have persons removed from his land if they are not prepared to work for him. The only possible objection relates to the fact that land was granted to farmers *despite the presence thereon of Natives.*" [4]
>
> "In the Police Zone, the Natives were at the inception of the Mandate *to a considerable extent landless.* . . ." [5]

Similarly, mutually contradictory contentions of Respondent underscore its preoccupation with "European" interests and its abdication of responsibilities with respect to "Native" interests. Thus, Respondent asserts that

> ". . . it has always been open to any Native to purchase land in the so-called European farming areas. Their failure to do so, or *even to show any interest in this possibility*, confirms Respondent's view . . . that the Native population is on the whole not yet ripe for individual ownership of land." [6]

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[1] G.A.O.R. 15th Sess., S.W.A. Comm., Supp. No. 12 at 40 (A/4464), quoting *The Windhoek Advertiser*, 14 January 1960. (Italics added.) The Committee noted the policy implications of this statement with "grave concern." (*Id.*, p. 43.)

[2] III, p. 24. It is apparent in pages 28-33, *id.*, that Respondent's introduction of "European" farmers from South Africa was at no time accompanied by any condition as to the share or participation, present or future, of the "Natives" in the agricultural life of the Police Zone; rather, they were relegated to a status in reserves conducive only to the profits and development of the Police Zone.

[3] *Id.*, p. 31. (Italics added.) The "Natives" acknowledged as living on land in the preceding quotation were not, of course, in "possession" thereof.

[4] *Id.*, p. 25. (Italics added.)

[5] *Id.*, p. 31. (Italics added.)

[6] *Id.*, p. 11. (Italics added.)

And, further, that

> "It is notable that outside the reserves in the Police Zone, no Native has ever purchased land, *despite the absence of any legal impediment in that regard.*" [1]

On the other hand, Respondent states with respect to the leasing of land by "Natives":

> "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." [2]

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." [3] Furthermore, any such purchase 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" [4] by a government in which he is not represented.

Similarly, with respect to mining, Respondent asserts that

> ". . . despite the fact that prospecting and mining in the Native reserves have for all intents and purposes been reserved to them, the Native population of the Territory have thus far generally *shown a lack of interest in mining activities.* This is probably only natural when regard is had to their background and traditional subsistence economy." [5]

On the other hand, Respondent points out:

> "As much as 96 per cent of the mining output in South West Africa is controlled by two companies. This state of affairs is ascribable to the nature of local mineral deposits and the high cost of exploitation resulting from poor, or a lack of, water supplies, lack of fuel and transport difficulties. These factors necessitate large-scale operations requiring the employment of qualified and experienced technical personnel, and substantial capital funds." [6]

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*.

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[1] **III**, p. 31. (Italics added.)

[2] *Id.*, p. 33. (Footnotes omitted and italics added.)

[3] *Id., p. 26; for reference to such assistance, see* **I**, p. 115, para. 26.

[4] Sec. 1 of the Native Administration Proclamation, No. 15 of 1928, *The Laws of South West Africa 1928*, pp. 58 *ff.*; see **I**, pp. 139-140. For a survey of a number of such removals in the past, see G.A.O.R. 12th Sess., S.W.A. Comm., Supp. No. 12 at 15-17 (A/3626).

[5] **III**, p. 56. (Italics added.)

[6] *Id.*, p. 49.

Respondent concedes, with respect to the discriminatory provisions of the Mining Regulations,[1] that they "... constitute one of the 'unpopular control methods' which are considered desirable in the phase of transition from guardianship to separate self-realisation, and which are *destined to fall away* when developments in the latter respect remove the reason for them." [2] The 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 quotations set forth hereinabove; the second alternative would lead to the labour surplus desired by the Administrator, [3] but to neither the material well-being nor the social progress of the "Natives."

In fact, the actual result will be that the "Native" labour force 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. Thus, Respondent cites a letter written by its representative to the Permanent Mandates Commission in 1928, which advised the Commission that

> "Owing, however, to the present low state of civilisation among the natives, no native is at present employed either by the Administration or by the Railway Department on work involving the risk of human life, such as driving a motor-car or working an engine. A certain colour bar is therefore being observed in practice, but it is certainly not a statutory enactment *and is purely temporary*, that is until such time as the native is sufficiently advanced to be able to undertake this responsible work." [4]

Similarly, any prospect for the disappearance of the policy of racial discrimination applied in the Railways and Harbours Administration, [5] by "Natives" becoming "eventually ... able to occupy the highest posts in their own areas," [6] 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. [7]

Conjoined with the above elements is Respondent's abdication of the positive and progressive obligations of the Mandate by its

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[1] *See* **I**, p. 121, para. 46.
[2] **III**, p. 56. (Footnote omitted and italics added.)
[3] See p. 411, *supra*.
[4] **III**, p. 69. (Italics added.)
[5] **I**, p. 122.
[6] **III**, p. 68.
[7] *Odendaal Commission Report*, Fig. 57, facing p. 376; the Commission in its Report stated that "no railway expansion in South West Africa is contemplated for the near future," (*id.*, p. 381) and none of the Five-Year Development Plans contained in the Report contemplate expansion (*id.*, pp. 481, 483).

policy of *"laissez-faire"* with respect to tribalism.[1] Thus, with regard to the widely-criticized policy of preventing the families of "Natives" from the Northern reserves from accompanying them on their tours of employment, Respondent states:

> "Employers in the Police Zone have often requested that an employee's family should be allowed to accompany him to his place of employment, but *the tribal authorities have always sternly opposed such suggestions.*"[2]

An illuminating comparison may be made to Book III of the *Counter-Memorial*:

> "Already during the German period, numbers of Ovambo were employed in the Police Zone. The general practice was for Ovambo men to work in the Police Zone for a period and then to return home. *This accorded with the wishes of the leaders of the various tribes, who where jealously on guard against all factors which could lead to detribalisation.*"[3]

Thus tribalism, which was one of the reasons why "Native" inhabitants were "not yet able to stand by themselves under the strenuous conditions of the modern world," has been deliberately fostered through *apartheid*.

Inasmuch as Respondent's policy is assertedly founded upon an "evolution towards separate self-realisation for Natives in homelands of their own,"[4] 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. An exposition of economic *apartheid* in this respect has been given by an authority with unquestioned first-hand knowledge:

> "The economic principles of *apartheid* are bad simply because they are upside down. By trying to herd the native population back into separate economic and political areas the Nationalist government 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."[5]

Although, as this Honourable Court has held, Respondent is under no legal obligation to conclude a Trusteeship Agreement with respect to the Territory, and has obdurately refused to do so despite repeated requests of the United Nations that it do so, policies pursued by Governments which have assumed such responsibilities, and standards enunciated by United Nations organs with 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.

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[1] *Cf.* p. 387, *supra*.
[2] **III**, p. 73. (Italics added.)
[3] **II**, p. 325. (Footnote omitted and italics added.)
[4] **III**, p. 56.
[5] de Kiewiet, *The Anatomy of South African Misery* 71 (1956).

Applicants accordingly include, as Section (1) of Annex 6 hereto,[1] a summary of policies and practices in Trusteeship Territories involving situations analogous to those in South West Africa. The said Section (1) of Annex 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.

(C) The Reserves

Respondent has introduced its discussion of economic policy in the "Native" reserves with a false dichotomy. Thus Respondent states that the remoteness of the Northern territories from

> "... the principal areas of modern economic development ... could have been altered in *one of two ways, viz.*, 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."[2]

Respondent's options were not in fact limited to such extremes. 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. 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." [3]

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 [4] 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'." [5]

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[1] *Infra*, p. 426.

[2] **III**, p. 22. (Italics added.)

[3] The stimulation of economic development and activity in the Northern territories, according to Respondent, "would *necessarily have required* exploitation by Europeans of the only available natural resources of those areas (*i.e.*, the agricultural potential), *with a resultant loss of land by the Natives.*" (*Id.*, p. 22; italics added.) It is from this first incorrect assumption that Respondent's incorrect conclusions flow, *e.g.*: "Applicants' complaint [that] ... Respondent failed to create 'areas of modern economic development and activity' in [the Northern territories] ... or to make them 'part of the modern monetary economy' ... *in effect amounts to a complaint that Respondent failed to introduce European farmers into these areas.*" (*Id.*, pp. 30-31; footnote omitted and italics added.)

[4] **I**, p. 115, para. 25, and p. 118, para. 33(i).

[5] *Id.*, p. 118, para. 33(i). *Cf.* **III**, pp. 30-31.

To this Respondent merely replies:

> "It was Respondent's duty to strike a balance between [the] conflicting considerations [of providing reserves for the 'Natives' and farms for the 'Europeans'], and, *bearing in mind that Natives are entitled to purchase agricultural land in any part of the Police Zone*, it is submitted that the provisions that have been made, are not unreasonable." [1]

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, [2] there is no valid basis for Respondent's conclusion that ". . . the provisions that have been made, are not unreasonable." [3]

In contrast with Respondent's policies on the "land question," a noted scholar is reported to have declared before the July 1960 Science Congress held in Johannesburg:

> ". . . [B]oth the Covenant of the League of Nations and the Charter of the United Nations described the mandate as a 'sacred trust' on the part of a civilised state towards the indigenous people. . . . Posing the question of whether South Africa had failed in her sacred duty towards the Natives Professor Wellington commented, 'We *seem to have looked after ourselves very well*'." [4]

The policy of "looking after ourselves very well" likewise appears from Respondent's admissions concerning the disparity in drought relief as between "Europeans" and "Natives." [5] Respondent states that "the picture drawn by Applicants is misleading, largely because they fail to distinguish between the types of 'assistance' given to the European population and the Native population respectively." [6] Respondent proceeds to distinguish between loans, on the one hand, and "free grants," [6] on the other. Without explaining why the "Natives," with far fewer financial resources to begin with, should be less damaged in the over-all by the drought than the "Europeans," Respondent asserts that "there was no question of [the 'Natives'] being forced off the land by reason

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[1] III, p. 31. (Italics added.)

[2] See discussion at p. 411, *supra*.

[3] Footnote 1 of this page, *supra*.

[4] Professor J. H. Wellington, formerly Professor of Geography, University of Witwatersrand. (*The Windhoek Advertiser*, 5 July 1960, p. 1.) *Inter alia*, Professor Wellington was reported to have stated that "South Africa . . . had allocated only a small area to the Hereros in 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." (*Ibid.*)

[5] III, pp. 33-37; *cf.* I, pp. 116-117.

[6] *Id.*, p. 34.

of failure to pay interest or capital instalments on mortgages, or inability to meet other obligations." [1] The figures produced by Respondent afford the following comparisons, *distinguishing between types of assistance given*: [2]

(IN RAND)

"EUROPEANS"		"NATIVES"
	Total Loans	
4,900,000		120,500
	Loans per capita	
66.70		.28
	Total Grants	
300,000		170,000
	Grants per capita	
4.08		.40

The "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. These figures 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.

This discrimination with respect to drought relief is consistent with other legislative policies in the Territory as a whole. For example, the Workmen's Compensation Act, No. 30 of 1941, [3] 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

[1] III, p. 35.

[2] Population figures employed in arriving at *per capita* estimations were the figures given for 1960 by the *Odendaal Commission Report* (pp. 39 and 41; Tables XVIII and XIX), being 424,047 "Natives" and 73,464 "Europeans," respectively; financial data is derived solely from examination of *Counter-Memorial*, Vol. V, pp. 36-40.

[3] Act No. 30 of 1941, *Statutes of the Union of South Africa 1941*, pp. 366-481, I *The Laws of South West Africa 1956*, pp. 4-129, as amended by: the Workmen's Compensation Amendment Acts, No. 27 of 1945 (*Statutes of the Union of South Africa 1945*, pp. 214-41; I *The Laws of South West Africa 1956*, pp. 129-55); No. 36 of 1949 (*Statutes of the Union of South Africa 1949*, pp. 306-27; I *The Laws of South West Africa 1956*, pp. 157-78); No. 5 of 1951 (*Statutes of the Union of South Africa 1951*, pp. 18-21; I *The Laws of South West Africa 1956*, pp. 179-83); No. 51 of 1956 (II *Statutes of the Union of South Africa*, pp. 938-57, brought into force by Proc. No. 173 of 1956 (S.A.), I *The Laws of South West Africa 1956*, pp. 206-07); and No. 7 of 1961 (I *Statutes of the Republic of South Africa 1961*, pp. 36-49; I *The Laws of South West Africa 1960*, pp. 10-23).

family receives a lump-sum settlement;[1] a "European" or "Coloured" workman's family receives £45 for burial expenses, and a "Native" workman's family receives £15.[2] Benefits for disability under The Workmen's Compensation Act are calculated by percentages of wages, and therefore are not visibly discriminatory by themselves.[3] Highly discriminatory, however, are the benefits for pneumoconiosis under the Pneumoconiosis Compensation Act.[4]

Similarly, the Social Pensions Amendment Ordinance[5] extended old age, disability, and blind persons' pensions or grants to "Coloured" persons in the Territory, although on a discriminatory basis. The minimum income entitling a "European" person to a pension is fixed at a higher rate than it is for "Coloureds," and the maximum pension benefits payable to "Coloured" persons are fixed at lower rates than for "Europeans." "Natives," who form the overwhelming majority of the population in the Territory and whose wages are often lower than the minimum income fixed for the receipt of social pensions, are excluded from these public pension schemes.

(D) The Police Zone

The I.L.O. *Programme* annexed to the *Proposed Declaration*[6] is a study of conditions in the Republic of South Africa concerning (i) equality of opportunity in admission to employment and training, (ii) freedom from forced labour (including practices which may involve an element of coercion to labour), and (iii) freedom of association and the right to organize. Applicants include the I.L.O. *Programme* among the documentation herein, inasmuch as it expresses the judgment of the Organisation with respect to recognized

[1] Act No. 30 of 1941 (*loc. cit. supra*, p. 416, footnote 3), secs. 40 and 86.

[2] Act No. 30 of 1941 (*loc. cit. supra*, p. 416, footnote 3), secs. 40(2) and 86(2).

[3] The wages paid to "Native" labourers are extraordinarily low. 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. for 1956. (G.A.O.R. 15th Sess., S.W.A. Comm., Supp. No. 12 at 41 (A/4464).) The Special Committee for South West Africa reported after its visit to the Territory in 1962 that "the basic wage under [the contracts for Northern labour] . . . is 18 cents a day, increasing slightly with length of service." (G.A.O.R. 17th Sess., Sp. S.W.A. Comm., Supp. No. 12 at 14 (A/5212) (footnote omitted).)

[4] Act No. 64 of 1962, II *Statutes of the Republic of South Africa 1962*, pp. 1020-183, which took effect in South West Africa by virtue of Proc. No. 202 of 1962 (S.A.), in *Official Gazette Extraordinary of South West Africa*, No. 2425 (1 September 1962). *Cf.* III, pp. 62-63, para. 59; Respondent asserts that the new Act is "in no way relevant to mine workers within the Territory." (*Id.*, p. 62.) 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.

[5] Ord. No. 2 of 1962, *The Laws of South West Africa 1962*, pp. 4-21.

[6] See footnote 4 on p. 406, *supra*.

standards applicable to the three said areas, and is based upon examination of a legal and administrative system which is analagous, in all relevant aspects, to that existing in the Territory.[1]

The parallels between the Territory and the Republic were expressly recognized in the second area (freedom from forced labour) by the United Nations—I.L.O. *Ad Hoc* Committee on Forced Labour in 1953; with respect to complaints concerning the pass law situation in South West Africa, the Committee "refer-[red] to its conclusions with regard to pass laws and their possible effect on the Natives concerned in the Union of South Africa, which apply also in the case of the territory of South-West Africa." [2]

Similarly, with respect to compulsory labour, the Committee found that "the legislation in force in the territory concerning, for example, habitually unemployed Natives, breaches of contracts of service, and the master and servants laws is similar to that applied in the Union itself." [3] Consequently, "the Committee's findings on these allegations [concerning compulsory labour] are the same as those which it reached in the case of the Union of South Africa regarding the compulsory nature of labour contracts for 'non-whites'."[4] Similarly, the Committee stated in its final conclusions on the Territory that "the evidence before the Committee leads it to confirm in the case of South-West Africa the conclusions it reached with regard to the Union of South Africa itself." [5]

The United Nations Committee on South West Africa has accurately and expressly acknowledged the standards approved by the I.L.O. in its Reports for the years 1957-1960:

> "The Committee continues to recommend that the labour laws of the Territory should *conform to the standards approved by the International Labour Organisation for non-metropolitan Territories*

[1] Of the three operative sections of the I.L.O. *Programme*, the first applies in its entirety to similar patterns in the Territory (with the exception that there is no parallel for the explicit provisions contained in sec. 18); the laws described in the second section differ from Territorial legislation and practice only with respect to the modalities of labour bureaux and farm prisons (secs. 49-54 and 62); and the situation described in the third section is analogous save for certain details concerning unions (secs. 88-101), the specific language of sec. 103, and the offence of "sabotage" discussed in secs. 115-20 (which is not applicable to the Territory).

[2] *Report of the Ad Hoc Committee on Forced Labour*, Studies and Reports (New Series) No. 36 at 81 (U.N. Doc. E/2431) (1953). For the convenience of the Court, Applicants have set forth the relevant conclusions of the *Ad Hoc* Committee, applicable to both South Africa and the Territory, as Section (2) of Annex 6, p. 431, *infra*; for the conclusions with respect to the pass laws, see paras. 340-51 of section (2) thereof, pp. 431-433, *infra*, and for the language quoted above see para. 382, p. 437, *infra*.

[3] *Id.*, para. 384, p. 218. For such "legislation in force in the territory," see I, pp. 124-127.

[4] *Id.*, para. 385, p. 219. For the conclusions with respect to the compulsory nature of labour contracts for "non-Whites," see paras. 352-60 of Section (2) of Annex 6, pp. 433-434, *infra*.

[5] *Id.*, p. 219. For such conclusions with respect to South Africa, see sec. (2) of Annex 6, paras. 370-75, pp. 435-436, *infra*.

and with the principles of the Mandates System and, in particular, recommends that penal sanctions for the breach of labour contracts should be abolished." [1]

Keeping these standards in mind, Applicants will now turn to a discussion of the three areas of economic rights discussed in the I.L.O. *Programme*, with respect to the Territory in general, and the practices in the Police Zone, in particular.

(1) *Racial Discrimination in Respect of Admission to Employment and Access to Vocational Training*

The Apprenticeship Ordinance of 1938 [2], as amended,[3] provides that in designated industries a minor may be employed only if he has executed a contract of apprenticeship with his employer. [4] It is further provided, however, that only "European" minors (with certain qualifications) may execute contracts of apprenticeship. [5] The Ordinance, as supplemented from time to time by various Government Notices, [6] presently controls the following industries: boot making, building, [7] clothing, carriage building, electrical and mechanical engineering, food (baking and butchery), furniture, leather, mining, [8] motor industry, printing, painting and decorating. These Government Notices also establish criteria for courses, practical work, and examinations required for qualification in the trades specified.

Because of the restrictions imposed under the Apprenticeship Ordinance of 1938, it has not been necessary to promulgate legisla-

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[1] G.A.O.R. 12th Sess., S.W.A. Comm., Supp. No. 12 at 21 (A/3626). (Italics omitted in part.) Substantially the same language appears in the Committee's Reports for 1958 (G.A.O.R. 13th Sess., S.W.A. Comm., Supp. No. 12 at 23 (A/3906)), for 1959 (G.A.O.R. 14th Sess., S.W.A. Comm., Supp. No. 12 at 24 (A/4191)), and for 1960 (G.A.O.R. 15th Sess., S.W.A. Comm., Supp. No 12 at 43 (A/4464)).

[2] Ord. No. 12 of 1938, *The Laws of South West Africa 1938*, pp. 214-35.

[3] Amended by Apprenticeship Amendment Ordinance No. 15 of 1948, *The Laws of South West Africa 1948*, pp. 224-26; Apprenticeship Amendment Ordinance No. 25 of 1957, *The Laws of South West Africa 1957*, pp. 252-54; and by Apprenticeship Amendment Ordinance No. 20 of 1959, *The Laws of South West Africa 1959*, pp. 520-25.

[4] *The Laws of South West Africa 1948*, p. 224, sec. 1, amending Ord. No. 12 of 1938, *loc. cit.*, footnote 2 of this page, *supra*.

[5] Ord. No. 12 of 1938 (*loc. cit.*, footnote 2 of this page, *supra*), sec. 8(1).

[6] See, *e.g.*, G.N. No. 28 of 1957 (S.W.A.), in *Official Gazette Extraordinary of South West Africa*, No. 2056 (1 February 1957), p. 84; G.N. No. 42 of 1957 (S.W.A.), in *Official Gazette Extraordinary of South West Africa*, No. 2058 (15 February 1957), p. 124.

[7] As specified in G.N. No. 122 of 1957 (S.W.A.), *The Laws of South West Africa 1957*, p. 480, the building industry includes the following trades for the purposes of the Ordinance: bricklaying, plastering, carpentry, joinery, painting, decorating, plumbing, sheetmetal working, sign-writing and wood-machining.

[8] As specified in G.N. No. 128 of 1957 (S.W.A.), *id.* at 482, the mining industry now consists of the following trades for the purposes of the Ordinance: blacksmithing, boilermaking, masonry, carpentry and joinery, electrician, fitting and turning, motor mechanic, plumbing and sheet metal working, radiotrician, rigging, welding, diesel fitter and upholstering.

tion similar to the South African legislation which prevents "Natives" from being employed "on skilled work" in any urban area other than a "Native" area. [1]

With respect to the converse of job exclusion, namely the opening up of jobs, the Committee on South West Africa included the following in its 1956 Report to the General Assembly:

> "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'." [2]

In addition to the skilled trades which Respondent has closed to persons other than "Europeans," the fields of mining, [3] railways and harbours, [4] and public transportation [5] are subject to the effects of economic and social *apartheid.*

In addition to the clear violation of the duty to promote the inhabitants' social progress which such practices involve, they are wasteful, in the extreme, of available human resources. Thus Mr. S. G. Menell, Chairman of the Anglo-Transvaal Consolidated Investment Company, Limited, stated on 6 December 1963:

> "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." [6]

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[1] Native Building Workers Act, No. 27 of 1951, *Statutes of the Union of South Africa 1951*, pp. 106-53, sec. 15(1) *(a)* (as amended by Act No. 60 of 1955); see I.L.O. *Programme*, p. 18, para. 23.

[2] G.A.O.R. 11th Sess., S.W.A. Comm., Supp. No. 12 at 23 (A/3151).

[3] See **I**, p. 121, and **III**, p. 55 (Respondent has omitted two "European" positions from its list, *ibid.*: that of operator of a winding engine used for the conveyance of persons, and that of "onsetter," *i.e.* a person authorized to give signals for the raising and lowering of persons) (G.N. No. 33 of 1956 (S.W.A.) in *The Laws of South West Africa 1956*, p. 541, secs. 66(2) and 71(1)).

[4] See **I**, p. 122.

[5] Motor Carrier Transportation Act, No. 39 of 1930, *Statutes of the Union of South Africa 1930*, pp. 460-83, as amended by: Motor Carrier Transportation Amendment Act, No. 39 of 1932, *Statutes of the Union of South Africa 1932*, pp. 236-59; Motor Carrier Transportation Amendment Act, No. 50 of 1949, *Statutes of the Union of South Africa 1949*, pp. 552-61; Motor Carrier Transportation Amendment Act, No. 44 of 1955, *Statutes of the Union of South Africa 1955*, pp. 422-67; and Motor Carrier Transportation Amendment Act, No. 42 of 1959, I *Statutes of the Union of South Africa 1959*, pp. 424-31, *The Laws of South West Africa 1959*, pp. 20-26. The principal Act, as amended, establishes separate transport services or, in certain cases, facilities for "Natives," and discriminates by race in the use of public transportation.

[6] *The Financial Mail*, Vol. X, No. 15, 13 December 1963, p. 887, col. 2. (Italics added.)

With respect to Respondent's discriminatory practices in vocational training, the Court's attention is respectfully directed to the section of this Reply on Education, [1] and to the I.L.O. *Proposed Declaration*. [2]

(2) *Measures Having the Effect of Compulsion to Labour Which Involve Racial Discrimination*

The exposition in Applicants' *Memorials* of Respondent's coercive legislation concerning the relationship between "masters" and "servants" [3] is correct in all respects. Although it is true that the Master and Servants Proclamation of 1920, as originally enacted [4], did not define "Servant" in terms of race, [5] it is also true that the 1923 amendment referred to by Respondent [6] added to such definition the category of "Natives" employed by the Administration, the Railways and Harbours Administration, any local authority, or employed under contract in railway or harbour construction. 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," [7] but which *are* included in the amendment of 1923 (which is specifically confined to "Natives" employed in those sectors). [8]

In addition, Respondent's explanation of the background to the legislation conclusively shows that it was in fact aimed at the members of the "Native" group. [9] Thus the *Ad Hoc* Committee on Forced Labour had no difficulty in weighing the effect and the character of such legislation, [10] and the I.L.O. *Programme* found with respect to similar legislation in the Republic that in areas other than those where specific provisions are directed at "Natives," "provisions for penal sanctions for breaches of contracts of employment, although not limited to 'native' workers, are in practice applied overwhelmingly to such workers." [11]

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[1] See, in particular, pp. 383-386, *supra*.

[2] Paras. 3, 10-15, 35, 145, 146, 148, and 149.

[3] I, pp. 124-126.

[4] Proc. No. 34 of 1920 (S.W.A.), *The Laws of South West Africa 1915-1922*, pp. 336-66.

[5] III, p. 81, para. 6.

[6] Proc. No. 19 of 1923 (S.W.A.), sec. 2 (b), in *The Laws of South West Africa 1923*, p. 40, cited in III, p. 81.

[7] "[E]very person employed for hire, wages or other remuneration to perform any handicraft or other bodily labour in agriculture, manufactures, industries or in domestic service or as a boatman, porter or other occupation of a like nature. . . ." (Proc. No. 34 of 1920 (S.W.A.), sec. 2, as set out in III, p. 81.)

[8] See [1961] South African Institute of Race Relations, *A Survey of Race Relations in South Africa* 219 (1962).

[9] III, pp. 82-83.

[10] See Annex 6, Section (2), paras. 352-60, 372-75, pp. 433-434 and 436, *infra*.

[11] Para. 42; see also paras. 66, 74, 145, 146, 148 and 149. With respect to Respondent's contention that the Master and Servants Proclamation inures equally to the

The Permanent Mandates Commission was highly critical of the Master and Servants Proclamation. Thus:

> "Mr. Grimshaw called attention to the labour legislation of 1927 [for South West Africa]. *It was, in his view, a somewhat unhappy fact that that during that year there should have occurred in a territory under mandate a change in labour legislation directly opposed to the tendency shown in almost every other country of the world which had similar problems to face.* An advance had been made towards increased liberalism in Australia and the Argentine—to name two countries which had been mentioned in the discussion—in regard to the treatment of the natives. The Masters and Servants Proclamation of 1920 in South-West Africa, however, had been amended and made much more severe by Proclamation No. 10 of 1927. The monetary penalties for offences under the Ordinance committed by natives had been generally doubled. The maximum fines had been increased from £3 to £7; that was to say, seven months' wages. The periods of imprisonment had been extended and a new punishment, that of whipping, had been introduced. Could Mr. Werth inform the Commission whether these severe measures had been productive of that better feeling between the white man and the natives which all desired to see?" [1]

Penal sanctions for breach of labour contracts illustrate the dominance and privilege afforded "European" interests. As was found by the United Nations—I.L.O. *Ad Hoc* Committee in 1953:

> "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." [2]

Respondent's laws with respect to "Native" labour in the Police Zone are inherently repugnant to the social progress or material well-being of the "Natives." The Master and Servants Proclamation forms an integral part of such restrictions, together with the "pass laws" in effect in the Territory,[3] and denial, to "Native" labour,

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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*" (secs. 46(1),. 46(2), and 48(5)), whereas the employer must not commit certain acts "without *reasonable and probable cause* for believing" that his action is justified (secs. 65, 67, and 73) (italics added). 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."

[1] P.M.C. Min., 14th Sess., p. 104. (Italics added.)

[2] See Annex 6, Section (2), para. 360, pp. 433-434, *infra*.

[3] For a discussion of Respondent's policies with respect to freedom of movement, see pp. 464-473, *infra*; see also I.L.O. *Programme*, paras. 38, 40, 41, 43, 65, 71, 74, 145, 146, 148, and 149; and Annex 6 Section (2), paras. 340-51, at pp. 431-433, *infra*.

of the right to organize. The comment of a Member of the South African Parliament, with respect to pass laws, 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." [1]

Finally, the Vagrancy Proclamation of 1920 [2] permits a first offender to be committed for work on a private farm. [3] Such practice likewise was condemned by the Permanent Mandates Commission in an early report to the Council of the League. The Commission found that "this power of imposing forced labour for the benefit of private individuals in lieu of the sentence of the Court is a practice *which cannot be approved.*" [4] Such practice has been criticized and condemned by both the *Ad Hoc* Committee on Forced Labour [5] and the I.L.O. *Programme.* [6]

(3) *Racial Discrimination in Respect of Freedom of Association and the Right to Organize*

The Committee on Freedom of Association of the Governing Body of the International Labour Organisation has concluded, with the approval of the Governing Body, that provisions of law involving

> ". . . 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." [7]

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[1] *U. of S.A., Parl. Deb., House of Assembly,* 9th Parl., 5th Sess. (weekly ed., 1948), Col. 1670.

Similarly, a perusal of Respondent's description of the operation of the labour recruiting system (**III**, pp. 72-73) 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] Proc. No. 25 of 1920 (S.W.A.), *The Laws of South West Africa 1915-1922,* pp. 280-86, as amended by Proc. No. 32 of 1927 (S.W.A.), *The Laws of South West Africa 1927,* pp. 244-46, and by the Trespass Ordinance, No. 3 of 1962 (S.W.A.), *The Laws of South West Africa 1962,* pp. 21-23.

[3] Other than on a farm belonging to a magistrate or to a person at whose instance the prosecution was brought. (Proc. No. 25 of 1920 (S.W.A.) (*loc. cit.,* footnote 2 of this page, *supra*), sec. 14.)

[4] P.M.C. Min., 3rd Sess., p. 293. (Italics added.)

[5] See Annex 6, Section (2), paras. 361-69, pp. 434-435, *infra.*

[6] Paras. 43, 60-62, 67, 71, 74, 145, 146, 148 and 149.

[7] 15th Report of the Committee of Freedom of Association, Case No. 102, para. 185(2), as quoted in the I.L.O. *Programme,* para. 124.

The I.L.O. *Programme* supports this view. [1]

Respondent justifies its failure to recognize "Native" trade unions (of which there are none in the Territory) for the purposes of collective bargaining and the conciliation of industrial disputes [2] by assertions that "the Native employees of the Territory have not as yet displayed any real interest in trade unionism," [3] that "the interests of Native workers, if left to the protection of trade unions, could be neglected and . . . such workers could be exploited by unscrupulous individuals," [4] and that "the Native employees of the Territory have generally not yet reached a stage where they can partake in collective bargaining on an equal footing with their employers." [5] The 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. Furthermore, the reasons advanced by Respondent for its restrictive policy should call for encouragement, training, and fostering of participation by "Natives" as representatives of "Native" workers, rather than the converse.

The conditions of the employment of "Natives" are thus left entirely to the judgment and management of members of the "European" group, as are the terms of their contracts, the places of their residence, and the limitations upon their jobs. Administrative action by government officials can be no substitute for collective bargaining; this becomes true *a fortiori* when the government is representative of the employers, but not of the majority of employees. Applicants submit that such a policy is repugnant to the positive obligations contained in Article 2 of the Mandate.

(E) Conclusion

Applicants have demonstrated that Respondent's policy of economic *apartheid* is inconsistent with the Mandate in that it degrades and frustrates what Respondent is obliged to promote. 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. As the Chairman of the Anglo-Transvaal Consolidated Investment Company, Limited, stated (with respect to South Africa) in December 1963:

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[1] Paras. 143, 145, 146, 148, and 149.
[2] See I, pp. 129-130.
[3] III, p. 92.
[4] *Ibid.*
[5] *Id.*, p. 93.

> "We have no shortage of unskilled labour and the overseas methods of collective bargaining have limited application in this country. These circumstances work against changes in present employment policies. This, in its turn, tends to restrict the wage-earning and spending power of the community, and thus its economic growth. Consequently, we are presented with a vicious circle from which, as always, there is only one way of escape—through acts of free will on the part of enlightened, intelligent, well-informed and determined individuals acting in concert." [1]

Economic *apartheid* is, moreover, wasteful and impractical by its very nature. Thus, a noted authority has commented:

> "The moment will certainly come when a competent study of the policy of developing separate native economic and industrial systems will reveal the shocking balance sheet of impossible expense, inefficiency and social waste which must be the result of trying to herd men into separate areas of life and labour." [2]

Apartheid 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. It reflects and assures domination of the many by the few, of the underprivileged by the privileged, of the ward by the guardian.

[1] *The Financial Mail*, Vol. X, No. 15, 13 December 1963, p. 887, cols. 2-3.
[2] de Kiewiet, *The Anatomy of South African Misery* 48-49 (1956).

ANNEX 6

SECTION (I)

INTEGRATION OF INHABITANTS INTO THE ECONOMIES OF DEPENDENT TERRITORIES, AS VIEWED BY THE UNITED NATIONS

1. The organs of the United Nations have adhered to the standard that indigenous inhabitants of dependent territories be allowed and encouraged to participate in the economic life of such territories. In a formulation of economic policy for all Non-Self-Governing Territories, the Committee on Information laid down the following requirement in two Reports to the General Assembly, each of which was approved by General Assembly resolutions:

> "[The] fundamental aim of economic policy in the Non-Self-Governing Territories must be to develop these Territories 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 each Territory in order to make possible a higher standard of social services and administration. There emerge from this fundamental aim the following concrete objectives. . . .
>
> "(e) To secure the equitable distribution amongst the peoples of the material benefits of the economy as expressed in the national income . . .
>
> "(g) To conserve and develop the natural resources of the Territories for the benefit of the peoples. . . ." [1]

The Trusteeship Council has made many recommendations along similar lines. It recommended, for example, that the French Administering Authority of Togoland "take all appropriate measures to encourage and facilitate participation by the indigenous inhabitants in the industrial and mining activities of the Territory . . . ." [2] Increased native participation "in the development of the abundant resources" of New Guinea was urged by the Council in 1949. [3] In the same year it recommended that the French Authority in Togoland "do everything in its power, by making grants and loans or other forms of assistance available, to encourage and enable indigenous inhabitants to take a full part in industrial development." [4]

In calling for more participation by the indigenous inhabitants in the economy of the Cameroons under British Administration, the Council called for "the expansion of the system of credit facilities, the develop-

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[1] G.A.O.R. 9th Sess., Comm. on Info., Supp. No. 18 at 16 (A/2729); reiterated *verbatim* in G.A.O.R. 12th Sess., Comm. on Info., Supp. No. 15 at 13 (A/3647). Approved by G.A. Res. 846 (IX), 22 November 1954, G.A.O.R. 9th Sess., Supp. No. 21 at 26 (A/2890); and by G.A. Res. 1152 (XII), 26 November 1957, G.A.O.R. 12th Sess., Supp. No. 18 at 26 (A/3805).

[2] G.A.O.R. 12th Sess., T.C. Rep., Supp. No. 4 at 151 (A/3595).

[3] G.A.O.R. 4th Sess., T.C. Rep., Supp. No. 4 at 65 (A/933).

[4] *Id.*, p. 46.

ment of the co-operative movement, and the encouragement of the technical training of the indigenous inhabitants." [1]

Many long-range economic plans were formulated with respect to Trust Territories in the early 1950's, and with respect to each of them the Council recommended goals similar to the one expressed with reference to Ruanda-Urundi, that the plan "place special emphasis on increasing the participation of the indigenous inhabitants, on a more responsible level, in the economic life of the Territory." [2] Although in individual cases the recommendations were tailored to suit the particular economies involved, the general recommendation remained the same. Thus, with respect to Tanganyika:

> "The Council considers that, in the economic development of the Territory, measures should be taken to increase the participation of the inhabitants in the development of the Territory, particularly as regards the exploitation of minerals and other natural resources and the production of basic raw materials and consumer goods." [3]

In addition, recommendations addressed to the problem of raising the standard of living of inhabitants and increasing minimum wage scales have been correlated to the importance of maximizing participation of all inhabitants directly in the modern economy of the Trust Territories. For example, the Council explicitly recognized that the raising of the standard of living in Tanganyika "should be a natural result, and is also one of the primary objectives, of the policy of the Administering Authority to increase African productivity and participation in the economic life of the territory. . . ." [4]

2. The legally enforced separation of the peoples of South West Africa into a predominately 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. In the words of the Economic Commission for Africa in a 1963 report to the Economic and Social Council:

> ". . . 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." [5]

The Commission found that separation of heavy industry from the African reserves has "turned these areas generally into economically inactive

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[1] G.A.O.R. 13th Sess., T.C. Rep., Supp. No. 4 at 75 (A/3822, Vol. II).
[2] G.A.O.R. 6th Sess., T.C. Rep., Supp. No. 4 at 68-69 (A/1856).
[3] G.A.O.R. 5th Sess., T.C. Rep., Supp. No. 4 at 12 (A/1306).
[4] G.A.O.R. 9th Sess., T.C. Rep., Supp. No. 4 at 62 (A/2680).
[5] U.N. Doc. E/CN.14/132/Rev. 1, *Economic and Social Consequences of Racial Discriminatory Practices* (U.N. Publication, Sales No. 63.11.K.1), at 38.

centres—denuded of the prime of their manhood, and incapable of attracting private European capital." [1]

Furthermore, 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. [2] But 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. In the words of the Committee on Information (approved by resolution of the General Assembly)

> ". . . 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. In the Non-Self-Governing Territories, it is the proud responsibility of the Administering Members to seek a broader natural basis for prosperity, creative initiative and contentment." [3]

3. Administering Authorities have progressively responded to such directives by increasing the participation of indigenous inhabitants in the economies of the whole of the respective territories. There is no Mandated Territory or former Mandated Territory, other than South West Africa, in which land is divided along "racial" lines Such stark dissociation of groups from centres of modern economic development would be illegal in any dependent territory. Apart from the negative observation that geographical segregation is not allowed, the dependent territory administrations have contributed positively to the economic development of the indigenous inhabitants in response to legal requirements as laid down by the appropriate organs of the United Nations.

In Tanganyika, for example, the Administering Authority instituted "special credit facilities" for peasant farmers in the form of a "Local Development Loans Fund, which makes loans at low-interest rates for agricultural purposes." [4] In Ruanda-Urundi, steps were taken to increase the number of indigenous trading centres and to organize indigenous co-operatives. The Council noted "with satisfaction" the development of co-operatives and of "the increasing participation of Africans in retail trade." [5]

In its 1953 report, the Administering Authority of Ruanda-Urundi stated,

> ". . . as evidence of increased participation of indigenous inhabitants in the money economy . . . their deposits with the Savings Bank of the Belgian Congo and Ruanda-Urundi increased during 1952 from 2.7 million francs in 2,377 accounts to 12.1 million francs in 15,272 accounts." [6]

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[1] *Id.*, p. 61.

[2] *Id.*, pp. 46, 47.

[3] G.A.O.R. 6th Sess., Comm. on Info., Supp. No. 14 at 39-40 (A/1836). Approved by G.A. Res. 564 (VI), 18 January 1952, G.A.O.R. 6th Sess., Supp. No. 20 at 59 (A/2119).

[4] G.A.O.R. 9th Sess., T.C. Rep., Supp. No. 4 at 53 (A/2680).

[5] G.A.O.R. 12th Sess., T.C. Rep., Supp. No. 4 at 63 (A/3595).

[6] G.A.O.R. 9th Sess., T.C. Rep., Supp. No. 4 at 84 (A/2680).

In the Cameroons, under British Administration, one of the most important measures to secure the participation of the indigenous population in the Territory's economy was the establishment, in the first year of Trusteeship, of the Cameroons Development Corporation. This Corporation has managed former German plantation lands and has also operated hospitals, schools, and communication facilities. [1] Its policy includes extensive training of Africans in technical capacities, with a view towards promotion to senior positions in the Corporation. [2] In 1954 the Corporation's board consisted of nine members, four of whom were Africans. [3] In response to the recommendations of the Trusteeship Council, the Administering Authority's policy had consistently been one of eventually entrusting the operation of the Corporation "to selected representatives of the indigenous population." [4] This policy was entirely consistent with commercial profit and efficiency, as shown in the Corporation's records through 1952. [5]

With respect to the Cameroons under French Administration, the Council commended the Administering Authority "for the establishment of producing, processing, marketing and consumer co-operatives among the indigenous inhabitants as a means of bringing about their more effective participation in the economy of the Territory." [6] In the following year the Council commended the Administering Authority "for the vigorous economic activity in the Territory," and recommended a continuance of the policy of "necessary assistance and encouragement" to the indigenous inhabitants. [7]

The Administering Authority received another commendation for its policy of associating the indigenous inhabitants with the Territory's industrial development "by reserving for them 50 per cent of the shares in the palm oil processing plants" when a huge palm oil plant complex began operations in 1950. [8] In 1957 the Council further commended the Administering Authority "for developing the saving habits of the population, providing credit facilities, and increasing financial aid to agriculture." [9]

In 1957 the Council was able to say of New Guinea, a territory badly ravaged by the war and extremely backward in its indigenous economy in 1946:

> ". . . The Council notes the economic progress being made by the Territory and the increasing part which the indigenous people are playing in it. It hopes that the Administering Authority will continue to assist indigenous enterprise and that it will devote particular attention to encouraging indigenous commercial and trading activities." [10]

The case of Nauru offers a clear example of compliance with United Nations recommendations to increase the participation of the indigenous

[1] *Id.*, p. 134.
[2] *Id.*, p. 135.
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] G.A.O.R. 5th Sess., T.C. Rep., Supp. No. 4 at 52 (A/1306).
[7] G.A.O.R. 6th Sess., T.C. Rep., Supp. No. 4 at 136 (A/1856).
[8] *Id.*, p. 140.
[9] G.A.O.R. 12th Sess., T.C. Rep., Supp. No. 4 at 134 (A/3595).
[10] *Id.*, p. 186.

inhabitants in economic development and the wealth resulting therefrom. In Nauru "the proceeds of the sales of phosphate . . . provide the only means of economic progress of the indigenous population." [1] Yet even by 1949 there was full employment of the indigenous inhabitants as a result of phosphate mining, as well as a rise in indigenous expenditures for clothing and luxuries. [2] The royalties paid by the British Phosphate Commissioners on the phosphate proved adequate even for setting up "special trust funds . . . which will mature with later generations of Nauruans." [3] The Trusteeship Council noted that "since the Trusteeship Agreement was concluded, the percentage benefit to the Nauruans against the value of phosphate at the point of export had increased from just 4 per cent to 24 per cent." [4] In addition, the total payments to the Nauruans increased in the same time span by a factor in excess of thirty-four.

In its summation of a massive report on Economic Conditions in the Non-Self-Governing Territories prepared by various agencies of the United Nations in 1960, [5] the Committee on Information stated that

> ". . . in most cases the dividing lines between compartments of economic activity are no longer fixed either by policy or by prejudiced conceptions of the capacity of indigenous persons to take part in more complex branches of the economy; the lines are in fact being crossed at an increasing rate, limited only by the time needed to acquire skills and capital. Most Governments and many private enterprises are actively encouraging the steps by which indigenous people can play a fuller part in all branches of the economy: such steps as promotion in employment from unskilled to skilled labour and from there to supervisory and managerial positions; the provision of credit, training and encouragement for the establishment of independent enterprises; and the reform of land tenure and the organization of loan finance for the modernization and expansion of agriculture and cattle raising. A favourable climate for these developments is being established in Territories where the people are acquiring a full share in the formulation of economic and educational policies and in the planning and implementation of programmes of economic development." [6]

[1] G.A.O.R. 4th Sess., T.C. Rep., Supp. No. 4 at 73 (A/933).
[2] *Id.*, p. 74.
[3] *Ibid.*
[4] *Ibid.*
[5] See *Progress of the N.S.G.T.'s Under the Charter* (ST/TRI/SER.A/15/Vol. 2).
[6] *Progress of the N.S.G.T.'s Under the Charter*, p. 3 (ST/TRI/SER.A/15/Vol. 3).

ANNEX 6

SECTION (2)

EXTRACT FROM REPORT OF THE U.N.-I.L.O. *AD HOC* COMMITTEE ON FORCED LABOUR

(U.N. Document E/2431; 1953)

UNION OF SOUTH AFRICA AND SOUTH-WEST AFRICA[1]

Union of South Africa

The Question of Pass Laws.

340. The various pass laws in force in the Union of South Africa are alleged to be a means of supplying European employers with African labour, under the menace of a penalty. Non-whites, it is said, are compelled to remain where they work through the application of such laws.

341. These charges seem serious enough to the Committee to warrant an investigation of the relevant legislation and of how it affects the people to whom it is applied. It can indeed be argued that if, by such devices as passes, freedom of movement is sufficiently restricted to compel great numbers of persons to remain where they are, they will be forced to accept work at the conditions offered at their place of residence. Furthermore, the existence of such laws may also enable the Government to direct workers towards areas where labour is required. Legislation of this kind may, therefore, be used as a direct or indirect means of carrying out the economic plans or policies of the Government or of private interests important for the economy of the country.

342. A *prima facie* case as to the relevancy of the allegation seems therefore to be established.

343. Legislation on pass laws has been summarised in the document transmitted by the Chairman to the Government of the Union of South Africa. It is evident from this summary that the legislation concerned severely restricts the movements of Natives, that urban authorities may direct Natives to live in certain areas and may remove them from such areas, that Natives may not come to or be introduced into such areas without the written permission of the competent authorities, that contracts of service may have to be registered under regulations issued by the Governor-General, that pass areas may be defined by Proclamation in the *Gazette* and that regulations for the control and prohibition of the movement of Natives into, within, or from such areas may be prescribed. Natives arriving in pass areas must report at the police station or Native Commissioner's office and authorised officers may refuse to issue or endorse passes for any Native to enter or leave or travel within a pass area, for any reason appearing to such an officer

[1] [Footnotes partially omitted; the balance renumbered.]

to be sufficient (for instance, if the Native concerned is under an unexpired contract of employment).

344. Violations of this legislation by Natives are punished by fines, or imprisonment with hard labour in case of non-payment of the fines.

345. The report of the Native Laws Commission (1946 to 1948) considers such legislation necessary because the settlement of Native communities in proximity to European ones and contacts between the Europeans and the Natives will, according to the Commission, be regarded by a large portion of the white population as a danger to the economic life of the country. The legislation is also considered essential for the maintenance of the principle of residential segregation.

346. In its comments and observations the Government states that pass laws have now been repealed by the Natives (Abolition of Passes and Co-ordination of Documents) Act, 1952.

347. This Act, which consolidates the pass legislation, enables the authorities to issue reference books to Natives having attained the age of 16 years, in lieu of the various passes. The Native has to carry this reference book with him and to exhibit it upon request to a competent officer. It contains the holder's identity card as well as other essential particulars, such as his employment contract, tax receipts and so on.

348. The South African Government states that the pass system was originally intended as a protection for Natives compelled by economic circumstances to seek employment in the towns and cities of the Union. Passport systems were also evolved, according to the Government, not to control the movement of Natives but purely for identification purposes. The mass migration of the Bantu population into the industrial areas, newly developed since the First World War, has resulted in unemployment, a decline in health and an increase in crime, and has compelled the Government to convert the passport into a means of controlling and often preventing the movement of Natives towards the towns. The registration of contracts of employment, curfews and the expulsion of idle and undesirable persons have served the same purpose.

349. In view of the evidence briefly examined above, the Committee has found that the pass legislation in the Union of South Africa constitutes a serious handicap to the freedom of movement of the Native population and that it has, or may have, important economic consequences.

350. The Committee is of the opinion that this legislative device may be used for the control and regulation of the flow of Native labour from one part of the territory to the other. There can be no doubt that such control may serve the purpose of directing a supply of ample, and consequently cheap, labour towards regions where it is required for economic reasons.

351. The former pass laws and the Natives (Abolition of Passes and Co-ordination of Documents) Act, 1952, which replaces them, may therefore be considered as an indirect means of implementing economic plans and policies, whether emanating from the Government or from private interests powerful enough to command Government support.

The State, through the operation of this legislation, is in a position to exert pressure upon the Native population which might create conditions of indirect compulsion similar in its effects to a system of forced labour for economic purposes.

The Compulsory Nature of Labour Contracts for Non-Whites.

352. It has been alleged that, under the Native Labour Regulation Act, 1911, a breach of a labour contract by an African, or his refusal to obey a lawful order, is a criminal offence. The Committee was of the opinion that such legislation might be conducive to forced labour exacted for economic purposes. It therefore examined the relevant South African legislation—the Native Labour Regulation Act, 1911, as amended by Act No. 56 of 1949.

353. This legislation is applied to those Natives (approximately 500,000) who are recruited for employment or are employed or working on any mine or works, *i.e.*, a place where machinery is used. The legislation contains provisions designed to protect the Native against unscrupulous dealings by labour agents. The Act also punishes by fines or, in default of payment, by imprisonment with or without hard labour for a period not exceeding two months, any Native worker who deserts or absents himself from his place of employment or fails to carry out the terms of his contract.

354. The Natives (Urban Areas) Consolidation Act, 1945, and the relevant regulations also contain detailed provisions punishing breaches of contract by Native workers and failure to do work which it is their duty to do by virtue of such contracts.

355. When passing sentence the presiding judicial officer dealing with such matters may, if the employer so desires, direct the Native concerned, after the sentence imposed upon him has expired, to return to work with his employer and complete his contract.

356. The Government in its observations explains these provisions by the fact that Natives have no conception of the binding nature of civil contracts. Abolition of the penal sanctions provided by law for any breach of contract would, in the opinion of the Government, leave the employer without means of obtaining redress, if, for instance, the labourer deserted from his place of employment.

357. The evidence briefly examined above appears to substantiate the allegation that the legislation in force in the Union of South Africa makes it "a criminal offence to refuse to obey an order or to break a contract".

358. It remains to be seen whether this legislation constitutes forced labour within the meaning of the Committee's terms of reference.

359. The Committee notes, in the first place, that at least the recruitment of Natives for work in mines or works is not compulsory. The Native enters voluntarily into the agreement. Penal sanctions are applied only in the event of a breach of contract or some other violation of the law.

360. 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] Since the total number of Africans working under such contracts of employment is very large, legislation of this kind, if abused or vigorously implemented, might lead to a system of forced labour for economic purposes.

The Use of Penal Laws to obtain a Supply of Africans for Work in Industry and Agriculture.

361. The allegations reproduced under this heading referred to the right of a magistrate to declare that a Native leads an idle, dissolute or disorderly life and to sentence him to be detained until he is assigned to suitable employment. The allegations also mentioned that convict labour is hired out to farmers and industrial enterprises at a nominal amount per day.

362. With regard to the first of these allegations, Section 29 of the Native (Urban Areas) Consolidation Act, 1945, as amended by Section 36 of the Native Laws Amendment Act, 1952, reproduced in the comments and observations of the Government of the Union of South Africa lays down that Natives may be ordered to be detained in a work colony established under the Work Colonies Act, 1949, that if a Native is declared to be an idle person he may be sent for a period not exceeding two years to a farm colony, work colony or similar institution and that, if the Native agrees, he may be ordered to enter a contract of employment with an employer and may be detained pending his removal to the place where he will be employed.

363. This Act aims, according to the Government's observations, at removing vagrant Natives to some place where they may be rehabilitated and at giving them a chance to prove that they are prepared to lead an industrious life.

364. The report of the Penal and Prison Reform Commission, examined by the Committee in connection with these allegations, shows that prison labour is hired out to railways, harbours, local authorities, certain gold mines, farmers and other private persons.

365. The report states that it has been the practice since 1934 to hire out to farmers at 6d. per day non-European male first offenders undergoing sentences of less than three months. Also, according to the report, it is a widespread practice in the Union to hire out to private persons at 2s. per unit per day non-European prisoners serving sentences of hard labour. In its comments and observations, the Government of the Union declares that pass offenders are not sent to farm prison outstations. Under a scheme inaugurated 20 years ago, a petty offender admitted to gaol could intimate his preparedness to work in a rural area at a fixed wage, but it is only at his express wish that he is engaged as a labourer

[1] The Government of the Union of South Africa has not ratified international labour Convention No. 65 concerning penal sanctions for breaches of contracts of employment by indigenous workers.

for the period of his sentence. It was recently decided to extend this scheme to persons with sentences of up to four months.

366. In the statement on farm prison outstations prepared by the Department of Prisons, the Government of the Union declares that in certain areas there are associations of farmers formed at the Government's request. These associations are authorised to construct prisons in accordance with specifications laid down by the Department of Prisons. A proper contract is entered into with these associations determining, *inter alia*, the basis on which the Department would make prisoners available to the association. The prisons themselves remain under the supervision of the staff of the Department.

367. The only persons transferred to these stations are those who have received sentences ranging from six months upwards for serious offences. The districts where these prisons are situated include the country's highest food-producing centres, where labour is extremely short.

368. The Committee also noted that in the 1950 report addressed by the Government of the Union of South Africa to the International Labour Office on the Forced Labour Convention (No. 29) it is stated that "the advisability of abolishing the practice of hiring convict labour to private companies and individuals has been the object of further study; however, the situation remains unchanged, and the Union of South Africa is accordingly unable to ratify the Convention".

369. In reviewing the evidence examined above the Committee has found that the allegations made with regard to the use of penal labour for work in industry and agriculture are substantiated by the legislation in force in the Union of South Africa and by the comments and observations of the Government of the Union. It also seems certain that the use of such labour is of some economic importance. The Committee has noted in this connection that, in its comments and observations, the Government states that farm prison outstations are situated in regions where labour is scarce. Since, moreover, a very considerable number of Natives are committed for short terms for minor offences, the Committee found that labour of the kind described above is of importance for the economy of the country and that the laws might be applied in such a way as to increase the Native labour force at the disposal of the national economy and thereby lead to a system of forced labour for economic purposes.

Conclusions

370. No allegation has been made regarding the existence of forced labour as a means of political coercion in the Union of South Africa. The Government of the Union of South Africa, in its comments and observations, referred to the Suppression of Communism Act, 1950. Its attention having been drawn to this legislation, the Committee has examined its provisions in some detail. The Act, amended by Act No. 50 of 1951, prescribes various penalties up to ten years' imprisonment for offences against its main provisions, such as furthering the achievement of any of the objects of communism. The Government of the Union of South Africa states that under the Act the propagation of the doctrine of communism is a criminal offence but that no attempt is made to

influence the opinion of any offender while he is serving his sentence, and that the number of convictions under these Acts has been so insignificant that "it could not conceivably be suggested that it plays any part at all in the economy of the country".

371. In the Committee's view these Acts could be used as an instrument for the correction of the political opinions of those who differ from the ideology of the State. Whether these laws will remain as a simple deterrent for potential political offenders planning to overthrow the constitutional Government by illegal means, or whether they will become an instrument of political persecution and oppression, thereby leading to a system of forced or corrective labour as a means of political coercion or punishment, will depend on the meaning placed by the competent judicial and administrative authorities on the numerous and important provisions of these Acts which are susceptible to a variety of interpretations.

372. With regard to the economic aspect of its terms of reference, the Committee is convinced of the existence in the Union of South Africa of a legislative system applied only to the indigenous population and designed to maintain an insuperable barrier between these people and the inhabitants of European origin. The indirect effect of this legislation is to channel the bulk of the indigenous inhabitants into agricultural and manual work and thus to create a permanent, abundant and cheap labour force.

373. Industry and agriculture in the Union depend to a large extent on the existence of this indigenous labour force whose members are obliged to live under the strict supervision and control of the State authorities.

374. The ultimate consequences of the system is [*sic*] to compel the Native population to contribute, by their labour, to the implementation of the economic policies of the country, but the compulsory and involuntary nature of this contribution results from the particular status and situation created by special legislation applicable to the indigenous inhabitants alone, rather than from direct coercive measures designed to compel them to work, although such measures, which are the inevitable consequence of this status, were also found to exist.

375. It is in this indirect sense therefore that, in the Committee's view, a system of forced labour of significance to the national economy appears to exist in the Union of South Africa.

South-West Africa

376. Allegations concerning the existence of forced labour in the territory of South-West Africa were made during the debates on forced labour in the Economic and Social Council by the representative of Poland.

377. These allegations refer in substance to the following points:

(a) the conditions to which indigenous workers are subjected, as reported in a memorandum addressed to the General Assembly of the United Nations by the Reverend Michael Scott;

(b) compulsory labour imposed on indigenous workers.

378. At its Fourth Session the Committee had before it the allegations, the documentary material concerning them, the comments and observations of the Government of the Union of South Africa and its reply to the Committee's questionnaire. [1] The following are the Committee's findings and conclusions concerning the alleged existence of forced labour in South-West Africa.

The Conditions of Indigenous Workers.

379. The first of the allegations of this point refers to certain documents, including petitions by South-West Africans. [2] The complaints of the petitioners refer, *inter alia*, to the existence of pass laws and the oppressive use that is made of them by Government authorities, to the low wages paid for their work, and to the fact that Native workers wishing to complain about ill-treatment by their masters, and appearing before the police without a proper pass, are gaoled, and have later to return to their place of employment.

380. In a report by the South-West Africa Native Labourers Commission, also quoted in the document in question, it is stated that Natives are unanimous in their criticism of the low wages paid to farm labourers.

381. The Committee noted the comments of the Government of the Union of South Africa to the effect that the main object of the pass laws is to provide identification papers for those members of the indigenous population who have not advanced sufficiently to be able to do without them, and that persons who have progressed beyond this stage have been exempted from the provisions of these laws.

382. The Committee refers to its conclusions with regard to pass laws and their possible effect on the Natives concerned in the Union of South Africa, [3] which apply also in the case of the territory of South-West Africa. As to the low wages paid to workers, the Committee considers that investigation of this question would be outside its terms of reference. It noted the observations of the Government of the Union on this matter.

383. Concerning the allegation that workers wishing to complain about their employers have to carry a pass to be able to go to the nearest police station and that failure to carry such a document is punished with imprisonment, the Government of the Union states that, according to the law, Native workers in such circumstances may proceed without a pass to the nearest authorised officer.

Compulsory Labour Imposed on Indigenous Workers.

384. In connection with the second allegation, concerning compulsory labour imposed on indigenous workers in South-West Africa, the Committee had before it the information contained in United Nations document T/175. It is evident from this document that the legislation in force in the territory concerning, for example, habitually unemployed Natives, breaches of contracts of service, and the master and servants laws is similar to that applied in the Union itself. The Committee noted the comments of the Government of the Union referring *(a)* to a judg-

[1] United Nations document E/AC.36/11.

[2] Reproduced in United Nations document A/C.4/L.66.

[3] [See paras. 340-51, pp. 431-433, *supra*.]

ment of one of the Supreme Courts of the Union of South Africa; *(b)* to the necessity of maintaining penal sanctions for breach of labour contracts because of the impossibility of enforcing such contracts otherwise; and *(c)* to the protection afforded to the employee by the master and servants laws.

Conclusions

385. The Committee's findings on these allegations are the same as those which it reached in the case of the Union of South Africa regarding the compulsory nature of labour contracts for "non-whites". [1]

386. The evidence before the Committee leads it to confirm in the case of South-West Africa the conclusions it reached with regard to the Union of South Africa itself. [2]

[1] [See paras. 352-360, pp. 433-434, *supra*.]

[2] [See paras. 370-375, pp. 435-436, *supra*.]

3. *GOVERNMENT AND CITIZENSHIP*

(A) INTRODUCTION

In section 4 of Chapter V of the *Memorials*,[1] Applicants have set out several respects in which Respondent has failed to promote to the utmost the welfare of the preponderant part of the population of the Mandated Territory of South West Africa. In summary, Applicants have alleged that contrary to current and generally accepted standards of administration, Respondent has:

(1) Totally denied rights of suffrage to the "Native" population;

(2) Denied to the "Native" population any participation whatever at the political level of the Government of the Territory, and confined to the lowest levels of skill and responsibility "Native" participation in the administrative structure of that Government;

(3) Excluded the "Native" population from any meaningful participation in the affairs of local government units, and of the "Native" reserves.

Applicants allege that Respondent

> ". . . by law and by deliberate and consistent practice . . . 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]

It was further submitted by Applicants that the terms of Article 2, paragraph 2, of the Mandate must be construed to include the obligation of promoting political advancement of the peoples of the Territory "through rights of suffrage, progressively increasing participation in the processes of government, development of self-government and free political institutions." [3]

Respondent attributes to the foregoing contentions the premise 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]

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[1] I, pp. 131-143.
[2] *Id.*, p. 143.
[3] *Id.*, p. 131.
[4] III, p. 105.

Respondent argues that such a "premise on Applicants' part is wholly unfounded, in fact and in law." [1]

Respondent thus begs the central question, namely: which "distinctions or differentiations" are permissible, and which constitute violations of the obligation to promote to the utmost the well-being and social progress of the inhabitants?

The answer to this question rests upon Applicants' submission 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.

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.

In respect of Government and citizenship, Respondent's policies—as might be expected—are ruthlessly consistent with its pervasive policy of *apartheid*, or separate development, and are merely specific measures of implementation thereof.

Just 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*.

True to its philosophy of regarding its subjects as species arranged in "groups," rather than as individual persons, Respondent formulates the premises of its policy with respect to political institutions and activity as follows:

> "... Its approach involved recognition of the White *population group* as one that could appropriately enjoy a measure of self-government and participation in processes of central government, subject *inter alia* to control of Native affairs being the responsibility of the Mandatory itself. The approach further involved recognition of the separate identity, politically as in other respects, of each of the *non-White groups*, and according to each an opportunity of developing on the basis of its own institutions and culture. In regard to the *indigenous groups*, the process of adaptation to modern conditions was foreseen as one that would necessarily have to be slow, and which could not be divorced from other facets of advancement and progress." [2]

The hollow and inhumane nature of such a premise 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"—so "slow" indeed, that after more than forty years of Mandatory administration no single member of a "non-White group" has been

[1] III, p. 105.
[2] *Id.*, p. 106. (Italics added.)

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, nor at other than the lowest levels of skill and responsibility in its administrative structure.

Under these circumstances, the voluminous detail with which Respondent bulks its *Counter-Memorial* has at best a highly tenuous relevance. Measures of political implementation of a fundamentally defective policy, resting on an intolerable premise, hardly justify an elaborate refutation.

In deference however to the importance of the issues presented to the Court in these Proceedings, Applicants deem it appropriate to indicate, at least illustratively, in what respects Respondent's purported explanations and justifications of its measures of political *apartheid* are as fallacious as the systematic policy which those measures are designed to effectuate.

(B) Statement of Law

With regard to political rights, the relevant and generally accepted norms by which the obligations stated in Article 2, paragraph 2, of the Mandate should be measured, have been established by the United Nations. These include the institution of universal adult suffrage and the promotion of participation on the part of all qualified individuals in all levels of government and administration, within the framework of a single territorial unit.

For an elaboration of the views of the United Nations which have given rise to this standard, and of compliance by Administering Powers therewith, the Court is referred to Annex 7 hereof. [1]

In referring to the practice of the Trusteeship Council and the General Assembly in respect of Trust Territories, Applicants do not, of course, imply that as a matter of law the Territory for South West Africa is subject to the Trusteeship Council or that the Mandate must be construed as if it were a Trusteeship Agreement. Applicants are well aware that, of all territories previously under Mandate, South West Africa alone has not been placed under Trusteeship, despite persistent urging by the organized international community that Respondent follow the example of all other mandatory Powers and the clear expectation of the Charter.

The practice of the Trusteeship Council, approved by the General Assembly, is adduced as evidence in support of the proposition: that there exist established principles and processes pertaining to problems and objectives analagous in all respects to those involved in Article 2, paragraph 2, of the Mandate; that such principles and processes are generally accepted by States comprising the Trusteeship Council and members of the organized international

[1] *Infra*, p. 451.

community; that these established principles and processes constitute norms by which the obligations stated in Article 2, paragraph 2, of the Mandate, and Article 22 of the Covenant of the League of Nations, should be measured; and that Respondent's policies and practices in the Territory are inconsistent with and repugnant to such principles and processes generally accepted as applicable in respect of government and citizenship in dependent areas.

(C) SUFFRAGE AND PARTICIPATION IN THE TERRITORIAL GOVERNMENT

Applicants show, with respect to suffrage in the Territory, [1] that Respondent's electoral requirements preclude "non-White" inhabitants of the Territory from voting for members of the Legislative Assembly. Insofar as participation in the Territorial Government is concerned, Applicants show that "non-Whites" are excluded by law from serving as members of the Legislative Assembly, the Executive Committee of the Territory, and the South African Parliament, and are excluded by uniform practice from being appointed as Administrator of the Territory. [2]

By way of reply, Respondent

> ". . . does not dispute the allegations . . . but wishes to point out that these allegations concern only political institutions devised and intended solely for the White population group." [3]

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," even excluding therefrom persons "who, although in appearance are obviously white, are generally accepted as Coloured persons." [4]

Respondent proceeds to set forth details of arrangements concerning the "indigenous population groups" in South West Africa, both within and outside the Police Zone. [5]

From these, it will be seen that such arrangements are envisaged as "channels of communication," for the purpose of providing a "link" with such groups and maintaining "close contact" with them. [6]

Applicants submit as a self-evident proposition, that such "links," "contacts," or "channels" do not provide an acceptable substitute for rights of franchise.

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"

[1] I, p. 134.
[2] *Id.*, p. 135.
[3] III, p. 132.
[4] See I, p. 109. Respondent nowhere alleges, however, that such persons are "slow" in the "process of adaptation to modern conditions."
[5] III, pp. 112-130.
[6] *Id.*, p. 113.

elected by the "all-White" Territorial Assembly, "whenever matters of policy or administration concerning non-Whites were considered by the Executive Committee." [1]

In reply to Respondent's assertion that it has "regularly consulted" tribal leaders with regard to expenditure of "their funds," [2] the Court's attention is respectfully drawn to the discussion, in another context herein, of the limits imposed by Respondent upon meaningful "consultation" with the "non-White" inhabitants of the Territory. [3]

Even such "consultation" as does take place can have small significance in light of the powers reserved by Respondent:

(1) to appoint and depose chiefs and headmen;

(2) to pay them for discharge of their official duties, insofar as they receive compensation; and

(3) to override, modify or abolish any authority delegated to them. [4]

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

With regard to its plans for "future development," Respondent refers to the alleged success of Bantu Authorities in South Africa," [6] as suggesting "that a similar system may be fruitfully applied in the Territory." [7] To this end, Respondent refers to the work of the Odendaal Commission, the *Report* of which has been released since the filing of the *Counter-Memorial.* [8]

As previously pointed out, [9] Respondent has endorsed the principles and accepted "the main features of the argument and recom-

[1] **III,** p. 112; and see *id.*, p. 116 with reference to a similar procedure in Ovamboland.

[2] *Id.*, p. 118.

[3] *Supra*, pp. 312-327.

[4] See **I,** pp. 139-140.; **III,** pp. 133 *ff.*

[5] **III,** p. 148.

[6] In respect of Respondent's repeated reliance upon its policies in South Africa to justify its present and future course in the Territory, the Court's attention respectfully is drawn to Applicants' discussion, p. 260, *supra*, of the dilemma with which they are confronted by this method of pleading on Respondent's part. Respondent, although correctly pointing out that such policies "are not in themselves matters for adjudication" (**II,** p. 477) nevertheless adduces such policies, notably its "Bantustan," or "Homelands," policies, as evidence relevant to its defence in the instant Proceedings. Insofar as such evidence has any probative value in respect of the issues joined herein, Applicants submit that it goes no further than demonstrating the essential short-comings and fallacies of the policy of *apartheid*, or separate development, itself. The repugnance of such policy, and its manifest inconsistency with Respondent's obligations under the Mandate are, it is submitted, amply demonstrated by Applicants' showings with respect to the purpose, nature and consequences of the policy of *apartheid* as it is applied to the inhabitants of the Territory.

[7] **III,** p. 131.

[8] *Supra*, p. 133.

[9] *Ibid.*

mendations [of the Commission] as an indication of the general course to be adopted in the next phase of the development of South West Africa." [1] One of the basic conclusions reached by the Commission, which Respondent explicitly approves, is 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 multi-racial central authority in which the whole population could potentially be represented." [2]

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. [3]

Applicants submit that Respondent's presently pursued policy of political *apartheid* violates its obligations, as stated in Article 2, paragraph 2, of the Mandate, and that such policy would be aggravated and rendered even more repugnant to the said Article, by the policies projected in the *Report* of the Odendaal Commission.

Respondent's references to policies alleged to have been followed in other areas have no relevance to the issues in these Proceedings. [4] Conceding, *arguendo*, the accuracy of the facts set forth therein—as distinguished, however, from the inferences, particularly the fallacious interpretation given by Respondent to the policy of "indirect rule"—in none of the areas in question did the governing Power apply the policy of *apartheid*, on the basis of which the status, rights, duties, opportunities and burdens of the population were, or are, systematically allotted on the basis of race, colour or tribe. [5] Furthermore, none of the areas cited by Respondent is presently administered under Mandate. In respect of policies pursued in Trust Territories, however, the Court's attention is invited to Annex 7, herein. [6]

In the premises then, Applicants respectfully submit that Respondent's refusal after more than forty years of Mandatory administration, to grant to the indigenous peoples of South West Africa rights of suffrage and participation in government, within the framework of the Territorial Government, constitutes a failure

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[1] *Memorandum*, 29 April 1964, Sec. B.5.

[2] *Id.*, Sec. E. (c) 21.

[3] The corollary to this would be the establishment of "Homelands," as recommended by the Commission. Although Respondent has announced its decision to defer implementation of this proposal pending the Court's Judgment in the present Proceedings, Respondent has endorsed the principle in question and has announced its decision to purchase large areas of "White-owned" lands for no other purpose than eventual incorporation into the "Homelands." (*Id.*, Sec. C. 14.)

[4] See, *e.g.*, II, pp. 430-456, and Annexes A and B, *id.*, pp. 489-527.

[5] The sole exception, Southern Rhodesia, has similarly incurred the opprobrium of the overwhelming weight of the international community.

[6] *Infra*, p. 451.

to promote the political advancement of such peoples, and is therefore a violation of the obligations of Article 2 (paragraph 2) of the Mandate agreement.

(D) General Administration (Civil Service)

With regard to the general administration (civil service) of the Mandated Territory, Applicants allege that

> "At 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." [1]

Respondent does not dispute the fact that in general the senior posts in the Public Service in the Territory are exclusively occupied by "Europeans," but contends that the absence of "Natives" in senior posts is due to the lack of suitably qualified candidates for such posts, [2] and that it envisages advancement of Native officials to positions of responsibility in the higher categories of the Public Service in those areas and departments *designed to serve the ethnic group* of which the official concerned is a member. [3]

The first of these contentions is, if true, 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* [4] explains the result.

Such 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 the 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.*" [5]

Moreover, 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." [6]

This, in turn, explains its second purported justification for the absence of "non-Whites" in senior civil service posts, *viz.*, that their advancement is envisaged in connection with serving "the ethnic group of which the official concerned is a member."

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[1] I, p. 142.
[2] See, *e.g.*, III, p. 142.
[3] *Id.*, p. 164. (Italics added.)
[4] *Supra*, pp. 362 *ff.*
[5] Annex 7, sec. C. I., p. 455, *infra.*
[6] III, p. 132.

This is, of course, a mere corollary of the basic policy of *apartheid* and is designed to effectuate its most aggravated form, the policy of territorial *apartheid*, or "Homelands."

(E) Local Government

Applicants contend that:

> "In the government of the established local units within the Territory—the municipalities and the village management board areas—the 'Native' population is almost entirely excluded from participation or even any semblance of participation. The sole faint approximation of any kind of participation is to be found in the limited advisory role of the Native Advisory Boards with respect to the 'locations,' 'Native villages' and 'Native hostels,' and even this minimal role is carried out under the firm control of the 'white' local authorities and the Administrator (after April 1, 1955, the Minister of Native Affairs and currently the Minister of Bantu Administration and Development)." [1]

The refusal to permit the indigenous inhabitants of the Mandated Territory 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. [2]

Thus, with respect to municipal councils and village management boards in the Territory, which are responsible for the local government of the urban and town areas, Respondent does not dispute that:

(1) the population of the said areas includes a significant number of non-White inhabitants;

(2) only "Europeans" may be members, or may participate in the election of members, of any of the municipal councils; no non-White inhabitant is in fact a member of any of the village management boards; and

(3) the only local government institutions for "Natives" in the urban areas are Native Advisory Boards, such boards having no legislative or executive powers whatsoever. [3]

The 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." [4]

[1] I, p. 142.
[2] III, p. 167-193.
[3] See I, pp. 137-138.
[4] III, p. 168.

Respondent explains that

> "... These people came not because of any need or desire for the type of residential facilities of a *European town* [sic], but specifically to seek and find remunerative employment in the White man's monetary economy." [1]

It is submitted 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.

Respondent misdescribes this policy as a "system of indirect rule," [2] citing its earlier discussion in which "integration" is contrasted with the "use of indigenous institutions." [3] 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*.

Respondent seeks to justify exclusion of "non-Whites" from local government on the further ground that Respondent has

> "... looked upon the administration and control of Native Affairs as being its own responsibility to the exclusion of local authorities in the Territory—at any rate as far as the formulation of policy was concerned." [4]

In fact, local urban authorities exercise powers which have a major impact upon the welfare of all the inhabitants subject to their jurisdiction. Thus,

a. the local authority may exempt a "Native" from the obligation to reside in a segregated area; [5]

b. the authority may condemn and demolish dwellings on grounds of public health; [6]

c. the authority may be, and in practice usually is, entrusted with the exercise of the far-reaching powers involved in "influx control," [7] including the power to expel from the urban area any "Native" who becomes unemployed, and to refuse entry to the area to any "Native" who is not needed in terms of the labour requirements of the area;

d. the authority may adopt regulations as to the terms and con-

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[1] *Ibid.* (Italics added.) Respondent describes this as the "position before and when Respondent assumed the Mandate." Nevertheless, Respondent's policy of exclusion persists, even though, in Respondent's language, "Natives" have gained "a basic degree of knowledge and experience of the organization and machinations of urban and peri-urban society. . . ." (*Id.*, p. 170.)

[2] *Ibid.*

[3] *Id.*, **II**, p. 422.

[4] *Id.*, **III**, p. 173.

[5] Proc. No. 56 of 1951 (S.W.A.), sec. 9(2) (d), in *The Laws of South West Africa 1951*, pp. 104-06.

[6] *Id.*, sec. 16, pp. 116-18.

[7] *Id.*, sec. 22(1), pp 130-36.

ditions of residence in locations, native villages and native hostels, the prohibition or regulation of the entry of non-residents, the imposition of penalties in respect of the failure to pay rents, the summary ejection of persons who fail to pay rents, the control and restriction of meetings and assemblies of "Natives," and numerous other matters affecting the daily lives of residents in urban and village areas; [1]

e. the authority acts as prosecutor in criminal charges for failure to pay rents and other breaches of its regulations, and the fines paid in such cases accrue to the authority. [2]

Although subject to varying degrees of control on the part of higher authority, such bodies exercise a discretion important to the community as a whole, in which the welfare of *all* the inhabitants is involved.

(F) Government within the "Native" Tribes and "Native" Reserves

In respect of government within the "Native" tribes and "Native" reserves, Applicants contend that

> "In the administration of the 'Native' reserves, the same pattern of discrimination, negation and frustration prevails. All significant authority is confined to 'Europeans'. The 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 Police Zone. As has been pointed out, even this shadowy participation is kept subject to complete, comprehensive and pervasive control by 'Europeans.' [3]

With regard to government in the reserves, outside the Police Zone, Respondent contends that

> ". . . in Ovamboland, as in the other tribal areas beyond the Police Zone, the Native inhabitants to all intents and purposes govern themselves through their chiefs and headmen according to their own laws and customs." [4]

As already pointed out, [5] however, such officials are appointed by, paid by, answerable to, and removable by, Respondent. [6]

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[1] *Id.*, sec. 32, pp. 154-62.

[2] Proc. No. 30 of 1935 (S.W.A.), Sec. 15(d), in *The Laws of South West Africa 1935*, pp. 158-424; Proc. No. 56 of 1951 (S.W.A.), Sec. 17(1) (a), in *The Laws of South West Africa 1951*, p. 118.

[3] I, p. 143.

[4] III, p. 118.

[5] *Supra*, p. 443.

[6] Thus, Proclamation No. 15 of 1928, Sec. 1 (a) provides:
"The Administrator shall be vested with the following powers and authorities in any part of the mandated Territory of South West Africa, that is to say—
(a) He may recognise or appoint any person as a chief or headman in charge of a tribe, or of a location or a native reserve, and is hereby authorised to

In purported explanation of the grant of broad powers to the Administrator, including those of defining the boundaries of the area of any tribe or of a location, dividing existing tribes into two or more parts, or amalgamating tribes or parts of tribes into one tribe or constituting a new tribe, and ordering the removal of any "Native" tribe or individual from any place to any other place in the Territory, Respondent agrees that such powers

> "... correspond to those enjoyed by any Native chief in South Africa or South West Africa, by virtue of Native law and custom, in relation to headmen and tribesmen subservient to him, and ... it was necessary for the system of tribal government under the control of a modern head of State to recognize a supreme chief in charge of all chiefs and headmen, and to confer such powers upon him." [1]

Such an explanation, however, is beside the point: the inhabitants of the Territory subject to the Administrator's authority have no voice or vote in respect of his selection or the manner of exercise of his powers.

Possibly the most significant of the governmental powers in the reserves (in terms of the well-being and progress of the indigenous inhabitants) concerns the expenditure of funds from the various Trust Funds established from time to time by Respondent. Here again, 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)." [2]

The lack of practical significance of "consultations," which Respondent asserts are maintained with the tribal leaders concerning this matter, has already been noted. [3]

With regard to indigenous political institutions within the Police Zone, the same situation prevails as in the reserves. The Native Reserve Boards, of which a "European" is chairman, may discuss possible expenditures from the Reserve Trust Funds, but the actual process of decision-making is not permitted to any degree to the "non-White" members of the Boards. Respondent asserts that the Board "assists the superintendent generally in the development of the reserves," [4] but policy making with regard to reserve development is entirely in the hands of "Europeans."

Respondent concedes the central point at issue, in its argument that

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make regulations prescribing the duties, powers and privileges of such chiefs or headmen. Any such recognition may at any time be withdrawn, and such appointments may be either permanent, temporary, or in an acting capacity, and may be on such conditions as to emoluments or otherwise as he may deem fit." (*The Laws of South West Africa 1928*, p. 158.)

[1] **III**, p. 134.
[2] *Id.*, p. 118.
[3] *Supra*, p. 443.
[4] **III**, p. 127.

"Although it is correct that *magistrates have general control of the Native reserves*, these officials have consistently encouraged the headmen and the residents to assume full responsibility for the proper control of their reserves, and where such responsibility has been assumed, the superintendent concerned *merely* supervises their actions." [1]

(G) Conclusions

It is submitted that, by virtue of the policy of *apartheid*, as applied in the Territory with regard to government and citizenship, Respondent has failed in any degree to promote the well-being and social progress of the inhabitants of the Territory, and has thereby violated its obligations as stated in Article 2, paragraph 2, of the Mandate, and in Article 22 of the Covenant of the League of Nations.

[1] **III**, p. 137. (Italics added.)

ANNEX 7

GOVERNMENT AND CITIZENSHIP IN DEPENDENT TERRITORIES, AS VIEWED BY THE UNITED NATIONS

(A) *United Nations policy regarding establishment of universal adult suffrage.* [1]

1. "Among the forms of development supported by the actions of the [Trusteeship] Council either by approval of existing policies or by recommendation, ha[s] been . . . the introduction of methods of suffrage leading eventually to elections by universal adult suffrage . . . ." [2] The continuing reaffirmation of this policy and the increasing compliance therewith by all Trusteeship Territories, including all former class "C" Mandates, evidences a clear standard from which substantial deviation is illegal under the practice of the United Nations. In statements of Administering Authorities of Trust Territories, there has been no deviation from this principle.

2. The Trusteeship Council has consistently recommended "such democratic reforms as will eventually give the indigenous inhabitants of the Trust Territory the right of suffrage and an increasing degree of participation in the executive, legislative and judicial organs of government . . . ." [3] Following upon this recommendation to the British administering authority of Togoland, the Trusteeship Council in 1950, noted with satisfaction

> ". . . that a beginning has been proposed by the Coussey Committee in the introduction of methods of suffrage on all levels of government, appreciating the difficulty of introducing at once a modern system of suffrage, recommends that all necessary educative measures be undertaken to prepare the population for the adoption of universal suffrage with the least possible delay." [4]

In its 1954 report to the General Assembly, the Trusteeship Council noted with satisfaction "the decision to extend direct, universal adult suffrage to the whole of the Trust Territory . . . ." [5] Togoland under British administration achieved its independence on 5-6 March 1957. [6]

In its 1957 report, the Trusteeship Council noted the establishment of universal adult suffrage in three Trust Territories — The Cameroons under French administration, [7] Togoland under French administration, [8]

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[1] I, pp. 131-134.
[2] 4 *Repertory of Practice of United Nations Organs* 109 (1955); *accord, id.* (Supp. No. 1, at 181 (1958)).
[3] G.A.O.R. 4th Sess., T.C. Rep., Supp. No. 4 at 36 (A/933).
[4] G.A.O.R. 5th Sess.,T.C. Rep., Supp. No. 4 at 73 (A/1306).
[5] G.A.O.R. 9th Sess., T.C. Rep., Supp. No. 4 at 185 (A/2680).
[6] See G.A.O.R. 12th Sess., T.C. Rep., Supp. No. 4 at 23 (A/3595).
[7] *Id.* p. 129.
[8] *Id.*, p. 149.

and Nauru. [1] All such extensions of suffrage were effectuated in response to prior Council recommendations. The principle of universality of suffrage has never been in doubt. Thus, in an early recommendation concerning New Guinea, the Council called for "increasingly greater participation in the Legislative Council to the indigenous inhabitants, leading to the eventual establishment of an indigenous majority." [2]

Achievement of independence of all the Trust Territories in Africa by 1962 demonstrates the peaceful transition from the status of administered territory to one of democratic majority rule with full franchise by adult indigenous inhabitants.

A concise summary of the attitude of the Trusteeship Council favouring the introduction of methods of suffrage based upon a wide and democratic franchise may be found in 4 *Repertory of Practice of United Nations Organs* 111-12 (1955).

(B) *United Nations policy regarding the treatment of a territory as an integrated unit.* [3]

1. The *Repertory of Practice of United Nations Organs* summarizes the Trusteeship Council's attitude toward this question as follows:

> "Among the forms of development supported by the actions of the Council either by approval of existing policies or by recommendation, have been the development of a sense of territorial unity or national consciousness on the part of the inhabitants, the development of executive and legislative organs through which the inhabitants might play a progressively larger part in territorial affairs, mainly by means of greater representation and the extension of powers and responsibilities of the organs; the development of broadly representative organs of local government, especially where tribal or similar systems of authority prevail; the introduction of methods of suffrage leading eventually to elections by universal adult suffrage; and the intensification of the training of local persons, and particularly indigenous persons, to equip them to take increasingly higher administrative and technical posts." [4]

The Trusteeship Council has encouraged "the development of a sense of territorial consciousness among all the inhabitants" as "an essential ingredient of . . . political evolution." [5] To this end, the Visiting Mission to Tanganyika

> ". . . considered that the Administering Authority should encourage African political associations, particularly those working in tribal areas, and that it should foster the development of a territorial consciousness extending beyond the bounds of purely local or communal interests." [6]

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[1] *Id.*, p. 198.
[2] G.A.O.R. 4th Sess., T.C. Rep., Supp. No. 4 at 65 (A/933).
[3] I, pp. 137-142.
[4] 4 *Repertory of Practice of United Nations Organs* 109 (1955).
[5] G.A.O.R. 9th Sess., T.C. Rep., Supp. No. 4 at 41 (A/2680).
[6] G.A.O.R. 7th Sess., T.C. Rep., Supp. No. 4 at 30 (A/2150).

2. The importance attached to the development of territorial integrity, with identical political rights for all, by the Trusteeship Council is evidenced by its recommendations concerning local tribal authorities in African dependent territories. In 1952 the Administering Authority of Tanganyika reported that it was encouraging "amalgamations and federations of tribal units" as a step in the direction of territorial consciousness. [1] The Council in 1954 reaffirmed its approval of efforts of the Administering Authority "to amalgamate or federate" tribal units, noting explicitly that "the great number of separate tribal authorities" [2] involved, was an obstacle to progress toward self-government of the Territory as a whole.

With respect to Ruanda-Urundi, the Trusteeship Council recommended a sweeping although gradual change in local government without reference to the wishes of the inhabitants as follows:

> "The Council, noting that the Administering Authority has preserved the indigenous political and tribal structure of the Territory, commends the Administering Authority for not forcibly uprooting the indigenous institutions and customs, but suggests that the present system does not offer sufficient opportunity for the development of *a sense of political responsibility among the indigenous inhabitants as a whole,* and that their political, economic, social and educational advancement could better be promoted by the progressive establishment of local organs of self-government. The Council invites the Administering Authority to study the desirability and feasibility of gradually establishing *one system of government in which both Europeans and indigenous inhabitants would participate,* and in which the indigenous inhabitants would assume eventually the principal functions and responsibilities." [3]

Such recommendations underline the importance attached by the Council to a unified political structure for each territory in which all inhabitants would have equal rights in the government and before the law.

3. A further example of the Council's requirement of a totally integrated political unit for each Territory is its discussion with respect to a "multi-racial" society in Tanganyika, an African former class "B" mandate of roughly the same territorial size as South West Africa. The 1954 Visiting Mission found that the government of the territory was only "multi-racial" in the sense that each of the three main "races" had equal representation in the Legislative Council. [4] In the view of the Council, the principle of majority rule clearly called for government of the Territory "mainly by Africans," [5] hence the Council recommended, at its Eleventh Session, that although the principle of equal representation "represents a useful step as an interim measure, this proposal does not offer a satisfactory long-term solution . . . ." [6]

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[1] *Ibid.*
[2] G.A.O.R. 9th Sess., T. C. Rep., Supp. No. 4 at 41-42 (A/2680).
[3] G.A.O.R. 3rd Sess., T.C. Rep., Supp. No. 4 at 29 (A/603). (Italics added.)
[4] G.A.O.R. 10th Sess., T.C. Rep., Supp. No. 4 at 31 (A/2933).
[5] *Ibid.*
[6] G.A.O.R. 7th Sess., T.C. Rep., Supp. No. 4 at 32 (A/2150).

In its 1959 report to the General Assembly, the Council noted

> "... with satisfaction the statement made by the Governor of Tanganyika at the opening of the Legislative Council on 14 October 1958, in which he declared that in view of the fact that Africans were and would remain an overwhelming majority of the population of Tanganyika, African participation both in the legislature and in the executive should steadily increase; that it had never been intended to make parity a permanent feature of the Tanganyika scene; that the fact that the legislature and the government of a self-governing Tanganyika were likely to be predominantly African should in no way affect the security of the rights and interests of the minority communities; and that there was complete agreement on this matter among the responsible leaders of major political parties.
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> "The Council also notes with great satisfaction that this statement of policy was warmly welcomed throughout the Territory ...." [1]

According to the 1960 Visiting Mission, African participation in the legislature and executive continuously increased, without attendant insecurity on the part of minority groups. [2] Constitutional developments in Tanganyika, announced for 1960, involved reconstitution of the Legislative Council on the basis of a broad franchise, with a majority of the seats occupied by African elected members. In the Trusteeship Council's words:

> "The Visiting Mission observed that the most noteworthy feature of the political situation in Tanganyika was the peaceful and harmonious atmosphere of good will. Nowhere, the Mission stated, did it get the impression that there were any political tensions or any current threat to law and order. It found excellent relations existing between persons of different races and it considered that the present situation in Tanganyika was an encouraging example to other multiracial societies." [3]

Accordingly, the Council resolved at its Twenty-sixth Session:

> "The Council welcomes the important constitutional reforms taking place in Tanganyika and notes with great satisfaction that the Territory is moving into the last stages of political evolution before independence in an atmosphere of harmony and good will." [4]

On 9 December 1961, fifteen years after it became a Trust Territory, Tanganyika was granted full political independence.

4. South West Africa is not the only territory consisting of a diversity of peoples and cultures, as the following statement of the French administering authority for the Cameroons suggests:

> "The indigenous population consists of a great diversity of races, with different languages and customs; they vary from the Bantu tribes, who occupy the forest areas in the south and have rudimentary social and political organizations, to Sudanese in the north, who until recently lived under a feudalistic system." [5]

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[1] G.A.O.R. 14th Sess., T.C. Rep., Supp. No. 4 at 23 (A/4100).
[2] G.A.O.R. 15th Sess., T.C. Rep., Supp. No. 4 at 31 (A/4404).
[3] *Ibid.*
[4] *Ibid.*
[5] G.A.O.R. 4th Sess., T.C. Rep., Supp. No. 4 at 16 (A/933).

Nonetheless, unity was not beyond the capacity of a willing Administering Authority:

> "The Council, noting with interest the statement of the Administering Authority that, in spite of the artificiality of the boundaries and the heterogeneity of the inhabitants, a sense of territorial unity is being developed, and, being of the opinion that *full development of such a sense of unity and common identity is essential in the evolution of the Trust Territory as a distinct political entity*, recommends that the Administering Authority foster this development by all possible means, such as the intensification of education, the improvement of communications *and the encouragement of common political activities in the Territory.*" [1]

Achievement of universal adult suffrage and a single electoral college in this Territory in 1956, [2] and complete independence on 1 January 1960, attests to the success of this policy.

(C) *United Nations policy regarding encouragement of meaningful native participation in government and administration.* [3]

1. The Trusteeship Council has constantly urged greater participation of indigenous inhabitants in the government and administration of the Territory in which they live. Thus, with respect to Ruanda-Urundi,

> "The Council recommends that the Administering Authority, in order to grant the indigenous inhabitants a progressively important share in the conduct of their own affairs and those of the Territory as a whole, *should provide increased facilities for training indigenous inhabitants to fill responsible posts in the administration*, and should study the possibility of granting them, at the earliest possible moment, *direct representation in the higher administrative organs.*" [4]

At its Ninth Session, the Council recommended that the French Administering Authority for Togoland "assimilate the chiefs into the administrative structure" after having noted the "successful reorganization of indigenous administration and the modification of the role of the chiefs." [5] The Council has often stressed the importance of training in this regard. It drew the attention of the Administering Authority of New Guinea "to the desirability of training indigenous inhabitants in increasing numbers to assume increasingly responsible positions and thus to participate to a greater extent in the administration of the Territory." [6]

With respect to Nauru, the Council urged not only "wider facilities for the training of Nauruans in administrative positions" but also "opportunities for experience in public office". [7]

In its consideration of contentions concerning the requirement of experience in office, the Council rejected the question-begging argument that experience is a prerequisite to public office, noting that the only

[1] *Id.*, p. 21. (Italics added.)
[2] G.A.O.R. 12th Sess., T.C. Rep., Supp. No. 4 at 128-29 (A/3595).
[3] I, pp. 135-137.
[4] G.A.O.R. 3rd Sess., T.C. Rep., Supp. No. 4 at 9 (A/603). (Italics added.)
[5] G.A.O.R. 6th Sess., T.C. Rep., Supp. No. 4 at 184 (A/1856).
[6] G.A.O.R. 5th Sess., T.C. Rep., Supp. No. 4 at 123-24 (A/1306).
[7] G.A.O.R. 4th Sess., T.C. Rep., Supp. No. 4 at 77 (A/933).

way to achieve such experience is by providing suitable training and opportunities therefor:

> "The Council . . . noting the statement of the Administering Authority that it could not, without failing in its duty and ignoring its responsibilities, contemplate the risk involved in placing Nauruans in any of the positions calling for professional or technical qualifications until they obtain the required qualifications and experience . . . endorses the view of the Visiting Mission that it should not be too reluctant to take a certain amount of risk in placing them in positions where they can obtain the necessary experience." [1]

2. There has been general compliance with the Trusteeship Council's recommendations for greater indigenous participation in government and administration in all the Trust Territories. Thus, the British Administering Authority for the Cameroons in 1951 assured the Council that it was "fully in sympathy" with the Council's recommendation "to increase the number of administrators and technical officers to advise the indigenous inhabitants and train them progressively to assume increasing responsibilities in the Administration." [2] The Administering Authority stated that this end was ensured not only by an increase in the technical staff,

> ". . . but also by the selection of Cameroons inhabitants for scholarships and training schemes, by technical education such as that which would be provided at a new trade centre in the south near Victoria, and by appointments to important positions, for example, on the board of the Cameroons Development Corporation." [3]

That this Territory achieved independence in 1961 was due in no small measure to the success of the training program for indigenous inhabitants in the Territory's administration.

In the Cameroons under French administration, the first year of trusteeship saw the creation of a common civil service for Africans and Europeans, which was commended by the Council. [4] This section of the Cameroons achieved its political independence on 1 January 1960.

The reports of the Trusteeship Council are replete with notations of progress in indigenous participation in civil service. By 30 June 1951 it noted that of 302 persons employed by the Administration of Nauru, 250 were Nauruans. [5] By the end of 1958, 4,713 out of 5,251 persons in the public service of Somaliland under Italian administration were Somalis. [6] The Council noted that in many cases these were positions of high authority:

> "The Council, taking note that fourteen of the nineteen departments of the Territory's Government are directed by Somalis . . . commends

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[1] G.A.O.R. 14th Sess., T.C. Rep., Supp. No. 4 at 157-58 (A/4100).
[2] G.A.O.R. 6th Sess., T.C. Rep., Supp. No. 4 at 106 (A/1856).
[3] *Ibid.*
[4] G.A.O.R. 4th Sess., T.C. Rep., Supp. No. 4 at 22 (A/933).
[5] G.A.O.R. 7th Sess., T.C. Rep., Supp. No. 4 at 259 (A/2150).
[6] G.A.O.R. 14th Sess., T.C. Rep., Supp. No. 4 at 69 (A/4100).

the Administering Authority for the continued progress in the Somalization of the Administrative services of the Territory." [1]

As a result of such steady and progressive improvement, Somaliland achieved its political independence on 1 July 1960.

3. Finally, the Committee on South West Africa has consistently found that Respondent's policies in the Territory with regard to political rights are repugnant to its Mandate objectives. A typical illustration of the Committee's views, often repeated in the years since 1954, is:

"The Committee deplores the continued implementation of a system of administration based on *apartheid*, which *inter alia*, deprives the Territory of political institutions representative of the population as a whole, and denies the 'Non-European' inhabitants of the right to vote and seek office and the opportunity to participate in the administration as well as to participate fully in the economic, social and educational development of the Territory. The Committee reiterates that the policy of *apartheid* is a flagrant violation of the Charter, the Mandate and the Universal Declaration of Human Rights, and reaffirms its considered opinion that the practice of *apartheid* will eventually operate to the detriment of all sections of the population of the Territory.

"The Committee is deeply concerned at the continued failure of the Union Government to take steps to comply with the previous recommendations of the Committee that measures be taken to provide the Territory with organs representative of all sectors of the population, to recognize political rights for the 'Non-European' inhabitants and their right to participate in the administration, to eliminate all discriminatory legislation and practices which operate to the disadvantage of the 'Non-European' population, and to ensure the revision of existing policies and practices of administration so as to make them consistent with Article 22 of the Covenant of the League of Nations and the Charter of the United Nations.

"The Committee urges that priority be given to the training of the 'Non-Euopean' inhabitants of the Territory to enable them to play their full and rightful part in the executive, legislative and judicial branches of Government." [2]

[1] *Ibid.*

[2] G.A.O.R. 15th Sess., S.W.A. Comm., Supp. No. 12 at 19 (A/4464).

4. *SECURITY OF THE PERSON, RIGHTS OF RESIDENCE, AND FREEDOM OF MOVEMENT*

In their Memorials,[1] Applicants summarize 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 colour, are subject to restrictions on their security, rights of residence and freedom of movement.

As in the case of related measures for implementation of economic, educational and political *apartheid*, described above, 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." Respondent seeks to explain and justify its restrictions upon the "non-European" inhabitants, as it likewise purports to do in the case of other aspects of its *apartheid* policy, in terms of premises which Applicants submit are unsound and unacceptable.

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," [2] 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." [3]

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.

Although Respondent's historical survey deals with South Africa itself, thus raising a question of relevance in respect of the international obligations assumed with respect to the Mandate, Applicants are constrained to set straight the historic record, inasmuch as Respondent places so heavy an emphasis upon its own version. [4]

Applicants, accordingly, feel it necessary to correct the fundamentally false impression Respondent creates of a kind of historic

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[1] **I**, pp. 143-152.
[2] See, *e.g.*, **III**, p. 214.
[3] *Id.*, p. 219. (Italics added.)
[4] See *e.g.*, **II**, p. 462.

"separateness" or *apartheid*, which it asserts as an explanation and justification for its present policies[1] based upon the fiction that reserves are the only "real home" of the "Natives."

(A) Relevant Historical Resumé

Contrary to Respondent's account that before the whites began to settle in the seventeenth century Southern Africa was "nearly empty," the eastern half of the country was effectively occupied by Bantu-speaking farming tribes,[2] and the western half was occupied more thinly, but effectively, in relation to their economy, by hunting and herding peoples whom the whites were to call Bushmen and Hottentots.[3] Thereafter any prospect that distinct racial communities might develop along their own lines in separate territories in Southern Africa was rapidly undermined. The Dutch (1652-1795, 1803-1806) and British (1795-1803, 1806 and after) governments of the Cape Colony did try to keep the area of white settlement separate, first, from the Hottentots and Bushmen, and later from the Bantu-speaking tribes; but they failed, because the white settlers themselves took occupation of land previously used by Bushmen, Hottentots and Africans, and because the white settlers themselves became dependent on the use of Bushmen, Hottentot and African labour, as well as the labour of imported slaves. The white South Africans' appetite for land, and for the labour of the previous inhabitants of the land, has long since destroyed any prospect there might have been of dividing Southern Africa into self-sufficient, autonomous, uni-racial territories; and South African society, within the frontiers of white settlement, has always been a plural or multiracial society, dominated by its white minority.[4]

Today nearly all the productive land in seven-eighths of the Republic is owned by white South Africans. Until about 1870 the labour needs of the whites were limited by the fact that most of them were pastoral farmers; but now that the mineral resources are being exploited and there is a wide range of manufacturing industries most of the non-whites as well as the whites are involved in a modern exchange economy. At the time of the 1960 census only about 39 per cent of the Africans in South Africa were in the "Bantu Areas," which are scattered lands amounting to about one-eighth of the Republic, producing very little for internal exchange and virtually nothing for sale in the "white areas," let alone for export,

[1] II, pp. 462 *ff.*

[2] Wilson, "The Early History of the Transkei and Ciskei," *African Studies*, Vol. 18, No. 4, 1959, pp. 167-79.

[3] Schapera, *The Khoisan Peoples of South Africa*, 27-31, 40-43 (1930); Marais, *The Cape Coloured People 1652-1937*, 5-8, 13-16 (1939).

[4] Marais, *op. cit.*, 282-284; van der Horst, *Native Labour in South Africa*, 319-322 (1942); de Kiewiet, *A History of South Africa: Social and Economic*, 19-20, 24 (1941); Walker, *A History of Southern Africa* (3d ed. 1957).

and *de facto* having the economic function of labour reservoirs for white-owned farms and white-controlled industries. [1] Consequently now, more than ever, the real task confronting the government of the Republic is the task of dealing with the realities of a plural or multi-racial society.

White settlement and economic development started in South West Africa much later than in most other parts of Southern Africa. Nevertheless the 1960 census figures, as reported by the Odendaal Commission, show that at the time of the census ten per cent of the total population of the northern sector of South West Africa (and thus about twenty per cent of the *male* population and perhaps fifty per cent of the *male adult* population of that sector) were working (for "Whites") in the southern sector; and that of the people domiciled in the southern sector, 47 per cent were in the towns, 37 per cent were in the ("White") rural areas and only 16 per cent were in what the Commission calls their "Home areas". [2] In South West Africa, as in the Republic itself, a plural or multi-racial society is a fact; policies based upon a contrary premise rest upon fiction. [3]

Before the nineteenth century the government of the Cape Colony failed to exert effective control over the situation beyond the vicinity of the Cape peninsula, with the result that most of the white settlers became very much a law unto themselves. Since the only non-whites they encountered were their slaves, their servants, or their enemies, and since they were imbued with a simplistic version of Calvinism, they became an exceptionally colour-conscious people. [4] The Great Trek of the 1830's-1840's, in which many of the Afrikaner farmers left the Cape Colony, was in large measure an ideological protest against the attempts which the colonial government had been making to apply the rule of law to the entire colony and to abolish legal discrimination on racial grounds. Thereafter in the South African Republic and the Orange Free State the Afrikaner Voortrekkers established a caste system in which only "Whites" were deemed to be members of the body politic and all non-"Whites" were subject peoples. In the Cape Colony, on the other hand, the idea that the law should not discriminate between people on account of their race or religion gained considerable support among all sections of the population. Thus

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[1] Union of South Africa, *Social and Economic Planning Council Report No. 9: The Native Reserves and their place in the Economy of the Union of South Africa: U.G. 32/1946* (1946); *Summary of the Report of the Commission for the Socio-Economic Development of the Bantu Areas within the Union of South Africa: U.G. 61/1955* (1955).

[2] *Odendaal Commission Report*, pp. 39, 41, paras. 146-49 and tables XVIII-XX.

[3] Thus, 170,720 "Natives" and 23,590 "Coloureds" reside and work in the "White" Police Zone, which comprises 70 per cent of the Territory. (IV, p. 21.)

[4] MacCrone, *Race Attitudes in South Africa: Historical, Experimental and Psychological Studies* (1957), 107-108, 129-130.

J. W. Sauer, a leading Cape politician, told the South African Native Affairs Commission of 1903-1905:

> "I do not believe that where representative institutions exist . . . a class that is not represented will ever receive political justice, because after all it is material interests that will eventually prevail and, therefore, the class or classes having no political power will suffer." [1]

On the eve of the National Convention, which met in 1908 and 1909 to draw up a constitution for a united South Africa, Olive Schreiner, the authoress of *The Story of a South African Farm*, warned her fellow "White" South Africans that

> ". . . if we, as a dominant class, realize that the true wealth of a nation is the health, happiness, intelligence, and content of every man and woman born within its borders . . . then I think the future of South Africa promises greatness and strength. But if we fail in this?— . . . then I would rather draw a veil over the future of this land." [2]

Moreover the Cape delegates to the Convention, of both parties, pledged themselves to uphold the Cape system. For the ruling South African party F. S. Malan announced that

> "The South African Party is against drawing a colour line for political purposes." [3]

On the other hand the delegates from the northern colonies, including Natal, were determined to debar all non-whites from exercising political power in the Union, for the sentiments complained of by Landdrost Alberti of Uitenhage a century earlier were still expressed in their parliaments. In the Orange River Colony parliament, for example, J. P. G. Steyl declared in 1909 that

> "The Hon. the Attorney-General said that the native was a man and that he was entitled to rights. He did not agree with that. If he were, then he would grow long hair. Providence had decreed that he should remain a drawer of water and a hewer of wood." [4]

The result was that the Cape delegates agreed that only "Whites" should be eligible to become members of the South African parliament and that the franchise laws of the four colonies should remain in force in the respective provinces of the Union, until they were altered by parliament; and the way was thus paved for the establishment and maintenance of a caste system throughout South Africa.

Between 1910 and 1948 racial discrimination was embodied in a series of laws restricting the rights of Africans in politics, and

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[1] Quoted in Thompson, *The Unification of South Africa, 1902-1910* 114 (1960).
[2] Schreiner, *Closer Union* 28-29 (2nd ed., n.d. [*c.* 1961]).
[3] Thompson, p. 116, cited footnote 1 of this page, *supra*.
[4] Quoted *id.*, p. 333.

in land ownership and in industry outside the reserves. [1] The slogan that was used by the South African government to describe this policy was "Segregation", and segregation was justified on the assumption that Africans had a real choice between living their traditional lives in their reserves or coming out to work for "Whites," and the further assumption that if they chose the latter they could fairly be treated as temporary migrants. But as time went by it became more and more evident to anyone who tried to discover the facts that the choice was not a real one, for most Africans were economically obliged to earn wages, at least intermittently, and many of them had become permanent residents of the "White areas" completely divorced from the reserves and from the tribal structures.

These facts were actually embodied in a series of official publications. In 1932 the Holloway Commission reported:

> "Views have been expressed which would mean that the Natives should live in a part of the country set aside for them, and that individuals should be admitted into the European area on temporary permit to work; they should not, however, make their homes in the European area, and those who have so made their homes should gradually be transferred to the Native area. Your Commission cannot give any support to this view. Besides being impracticable, it would be unfair to Natives who have already become permanent town-dwellers or dwellers on European farms. Moreover it would mean that Native labour in the European area would always be casual labour, and if this were to continue there would be great difficulties in the way of increasing its efficiency." [2]

In 1946 the government-appointed Social and Economic Planning Council declared

> "...that the utmost extension of the Reserves possible under the present law, and their utmost development, will still leave outside them large masses of the Native population to be provided for. No Reserve policy . . . will make it possible for South Africa to evade the issues raised by the presence of the Native in European farming areas and in urban areas. These must be considered on their own merits . . . ." [3]

In 1948 the Fagan Commission warned:

> "From what we have already said it should be clear, firstly, that the idea of total segregation is utterly impracticable; secondly, that the movement from country to town has a background of economic necessity—that it may, so one hopes, be guided and regulated, but that it cannot be stopped or be turned in the opposite

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[1] Roskam, *Apartheid and Discrimination* 55-58 (1960).

[2] Union of South Africa, *Report of Native Economic Commission 1930-1932: U.G. 22/1932* (1932), p. 101, para. 694.

[3] Union of South Africa, *Social and Economic Planning Council Report No. 9: The Native Reserves and their place in the Economy of the Union of South Africa: U.G. 32/1946* (1946), p. 3, para. 13.

direction; and, thirdly, that in our urban areas there are not only Native migrant labourers, but there is also a settled, permanent Native population. These are simply facts, which we have to face as such. The old cry, 'Send them back!'—still so often raised when there is trouble with Natives—therefore no longer offers a solution." [1]

And in the same year the Social and Economic Planning Council made an accurate appraisal of the realities of the South African situation:

"South Africa, in short is pursuing the experiment in race relations of finding a basis on which a multi-racial society, composed of people of varying standards of education and culture, can develop in harmony in the same country.

"The essential fact is that South African society to-day is divided, firstly, into two main castes, a smaller upper caste of Europeans, and a larger lower caste of non-Europeans. This lower caste is also sub-divided into three, Asiatics, Coloured and Natives, though the caste barriers are in this case less rigid. Each caste is again divided into classes, mainly on an economic and occupational basis." [2]

In 1929, when he was Leader of the South African Opposition, General J. C. Smuts admitted that

"These urbanized natives living among the whites constitute the real crux, and it is a difficulty which goes far beyond the political issue. They raise a problem for the whole principle of segregation...." [3]

In the same work Smuts said that an industrial colour-bar was "both impracticable and an offence against the modern conscience", and that all classes and colours should have some sort of representation in the South African parliament. [4]

In 1941 Dr. C. W. de Kiewiet, who had been brought up as a white South African, but had left South Africa to become, successively, professor of history in the State University of Iowa and professor of history in Cornell University, and who later became President of Rochester University, wrote:

"Segregation is a myth, a fancy, anything but a fact. As a word it describes a hope or a policy but not a real situation. It is denied by the sight of hundreds of thousands of natives dwelling permanently in the towns and upon European farms. The census-takers of 1936 found 559,675 more natives outside the reserves than inside them. It is denied by the recruiters of native labour for the mines, by the farmers who possess the bulk of good land, by the taxes which compel the natives to go out to earn money by their labour. It is denied above all by the fact that industry has been, in the language of the horticulturalist, budded or grafted on to the stock

[1] Union of South Africa, *Report of the Native Laws Commission 1946-48: U.G. 28/1948* (1948), p. 19, para. 28.

[2] Union of South Africa, *Social and Economic Planning Council Report No. 13: The Economic and Social Conditions of the Racial Groups in South Africa: U.G. 53/1948* (1948), p. 108, para. 162.

[3] Smuts, *Africa and Some World Problems* 98 (1930).

[4] *Id.*, pp. 94, 96.

> of native labour. It is denied by the fact that the native population was no longer homogeneous. The greatest differences had developed in their ranks. . . . What has been twisted together by history cannot be readily disentangled by laws. To unwind the woven cord of native and European life is simply to require history to retrace its steps." [1]

Applicants submit that, on the basis of the foregoing correct version of developments in South Africa and in the Territory, no tenable basis exists for the premise that the "Europeans" and "Coloureds" in the Police Zone are the only inhabitants entitled to regard it as their "real home," making use of the "Natives" so far as necessary to the prosperity of the dominant group.

As demonstrated in the Memorials, [2] and elaborated below, Respondent's restrictive and discriminatory laws and practices justify the conclusion of an authority that

> ". . . the conventions and laws which inhibit the flow of men and their families to the towns can only become a sentence of poverty and deprivation. . . . The segregation laws are an embargo upon the development of the non-European population. . . . These laws seek to imprison the population within its own backwardness and set up blockades against the flow of experience, skills, and amenities on which modern progress is based. . . . The whole myth of separate native culture collapses when it is recognized that, for the African, progress and emancipation depend upon an escape from the tribe and a deeper entry into the life of the West." [3]

Respondent's concept and premise, however, upon which the policy of *apartheid* rests, and the restrictions upon security, residence and movement which effectuate that policy, relegates to "the tribe," as their "real home", inhabitants whose "progress and emancipation" Respondent undertook in 1920 to promote to the utmost.

(B) Analysis of Measures of Implementation of Apartheid with Respect to Residence, Freedom of Movement, and Security of the Person

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.

Respondent concedes that "Natives" from beyond the Police Zone, although possessing rights of residence within the reserves, are not permitted to effect a permanent change of residence so as to live in the Police Zone generally, or in urban areas within

[1] de Kiewiet, pp. 242-43, cited p. 281, *supra*.
[2] I, pp. 143-152.
[3] de Kiewiet, *op. cit.*, 48, 54 (1956).

the Police Zone.[1] It is conceded further that labourers recruited from the reserves for the purpose of employment within the Police Zone must return to the reserves after two and a half years at the most.[2]

Respondent admits also that "non-Whites" working in urban areas in the Police Zone are restricted to "non-White" areas of the cities and towns and are not permitted to reside in what are considered "White" areas;[3] 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] In order "to control the influx of Natives into [urban or proclaimed] areas"[5] and to implement the restrictions on freedom of residence imposed by Respondent on "non-White" inhabitants, "Native" work-seekers must register with designated officers[6] upon entering such areas.

The entire complex of laws and regulations implementing *apartheid* by restricting freedom of residence of the indigenous inhabitants of South West Africa is supplemented and complemented by what have become generally known as the "pass laws." Thus it is admitted by Respondent that upon pain of criminal conviction and punishment, a "Native" must upon demand produce a pass if he is travelling within the Police Zone but beyond the confines of his location or reserve or away from the farm or place where he resides or is employed;[7] must produce a pass upon demand if his domicile is beyond the Police Zone and he is within the Zone;[8] must have a written permit enabling him to remain in an urban or proclaimed area;[9] and must have a written permit to avoid possible curfew restrictions in "White" urban areas.[10]

Insofar 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. Thus, should a "Native" be declared

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[1] See **III**, pp. 266-275.

[2] *Id.*, p. 276, paras. 148-49. See Proc. No. 29 of 1935 (S.W.A.), Sec. 6(4), in *The Laws of South West Africa 1935*, Vol. XIV, p. 152, as amended by Proc. No. 38 of 1949 (S.W.A.), Sec. 2, in *The Laws of South West Africa 1949*, Vol. XXVIII, p. 760.

[3] **III**, pp. 277-297; see Proc. No. 56 of 1951 (S.W.A.) in *The Laws of South West Africa 1951*, Vol. XXX, pp. 90-171.

[4] **III**, p. 289. Although Section 25 of Proclamation No. 56 of 1951 has not been invoked in terms, a policy calling for the removal of "Natives" "in excess of the reasonable labour requirements" of a given area is endorsed and maintained by Respondent (see *id.*, pp. 208-209. paras. 184-88).

[5] *Id.*, p. 291.

[6] *Ibid.*

[7] *Id.*, p. 315; see Proc. No. 11 of 1922 (S.W.A.), Sec. 10, in *The Laws of South West Africa 1915-1922*, pp. 751-52. Applicants concede the existence of class exemptions (see *id.* p. 316, para. 64) but these cannot change the essence of the complaint.

[8] *Id.*, p. 322, para. 85; see Proc. No. 29 of 1935 (S.W.A.), in *The Laws of South West Africa 1935*, Vol. XIV, pp. 148-58, particularly Sec. 9, at p. 154.

[9] *Id.*, pp. 324-327.

[10] *Id.*, pp. 327-329.

an "idle person" he will be ordered removed from the urban or proclaimed area, or if he had previously agreed to enter into a contract of employment, he may be ordered into employment under the terms of the contract. [1] If a "Native" in a reserve within the Police Zone remains idle, the superintendent of the reserve may "order such person to take up employment on essential public works or services at a sufficient wage to be determined by the superintendent." [2]

Respondent defends its reserve policy by emphasizing the existence of different population groups in the Territory, the need to restore tribal life, differences in systems of land tenure, and the need to prevent alienation of "non-White" land. [3] The fallacy of such premises has been demonstrated in Applicants' analysis of the nature and consequences of the policy of *apartheid* as a whole. [4]

Respondent asserts [5] that the Permanent Mandates Commission was aware of and approved the reserve policy. During the early years of Mandatory administration, the Commission was deeply interested in the economic and political development of the reserves. The Commission, however, 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. Thus, at the Third Session of the Commission, the Chairman asked the South African representative (Sir E. Walton): "What was the policy of the South African Government in regard to these Reserves? Was it its intention to maintain these reserves and to constitute new ones, *or did it contemplate in the near future the possibility of bringing the native population in contact with civilization?*" [6]

At the same session, the Chairman inquired "whether this [reserve] system could be reconciled with the spirit of the mandates and the civilising mission with which the Mandatory was entrusted." [7] Similarly, during the Fourth Session of the Commission, M. Beau stated that " . . . he wanted to draw attention to the difficulties which resulted from the system of reserves, as at present practised, in connection with the development of the natives, *confined as they were in a sort of 'watertight compartment.'* " [8]

Respondent further seeks to justify its policy on the ground that ". . . the exclusion of residence by White persons in the Native reserves is absolute." [9] The false equivalence is clear; reserves provide no more than a subsistence economy, whereas the seventy

[1] **III**, pp. 214-216, paras. 65-69.
[2] *Id.*, p. 220, paras. 89-90.
[3] *Id.*, pp. 240-245.
[4] *Supra*, pp. 268 *ff.*
[5] **III**, pp. 253-257.
[6] P.M.C. Min., 3rd Sess., p. 104. (Italics added.)
[7] *Id.*, p. 105.
[8] P.M.C. Min., 4th Sess., p. 63. (Italics added.)
[9] **III**, p. 267, para. 119.

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. Indeed, as Respondent concedes,[1] this is precisely why indigenous inhabitants wish to come to the "White" areas in the first place. As Lord Hailey has stated:

> "... 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."[2]

Respondent asserts as a justification for its reserve policy and pass system, the objective of "influx control," assertedly to prevent a rush of "Natives" to the urban areas, thus causing unemployment and attendant social evils, such as prostitution, venereal disease, alcoholism, crime and the like.[3]

The 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 attribute of the system Respondent nowhere seeks to justify, generates many of the evils the influx control policy is designed to meet. Thus, the United Nations Economic Commission for Africa has found that

> "In brief, the system of migratory labour produces two economic ills—neglect of agricultural production on the reserves and an unstable, uneconomic labour force. Besides, there are the many evil social consequences, particularly the disruption of family life. Urban centres are crowded with men whose wives and families are on the reserves, creating the problem of a disproportionate number of men to women in the cities and, conversely, more women than men on the reserves; situations which breed the problems of venereal disease, prostitution, crime and delinquency."[4]

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[1] **III**, p. 299, para. 5.

[2] Hailey, *An African Survey* 764 (3d ed. 1957). The unjustifiable nature of the discrimination practised against indigenous inhabitants is compounded by the fact that the reserves within the Police Zone are not, in fact, tribal. Thus Lord Hailey has pointed out that such reserves "... have not been proclaimed in the name of particular tribes or sections of tribes; many of them indeed contain a considerable variety of tribes. Herero are to be found in at least six of the Reserves; in several of them there is almost an equal number of Hottentot and Bergdama, together with a slightly larger number of Herero." *(Ibid.)* His conclusion is that the reserves in the Police Zone "are not in the true sense tribal Reserves." (*Id.*, p. 697.)

[3] See **III**, pp. 279-287.

[4] U.N. Doc. E/CN.14/132/Rev. 1, *Economic and Social Consequences of Racial Discriminatory Practices* (U.N. Publication, Sales No.: 63.11.K.1) at 27. The Commission also stated that "under the migratory labour system the able-bodied male population spends part of its time on the native reserves and part working in industry, living in compounds in towns or on the mines. The result is that in the cities there is a preponderance of males over females, while in the reserves the contrary is true. African homes are in fact chronically 'broken homes', which

Lord Hailey, in a discussion of the migratory labour system, stated that

> "It is not difficult to visualize the social effect on an indigenous society of the absence of large numbers of its adult males; it is to be seen in the loosening of kindred and tribal ties and the weakening of the influence of the traditional rules regulating social conduct. The effect on the wives remaining behind in the villages may well be imagined. Equally unfortunate has been the growth of prostitution in the urban centres and the consequent spread of venereal disease among migrant workers." [1]

It would seem then, that the best that can be said for Respondent's "influx control" policy is that it is designed to ameliorate the effects of another of Respondent's policies, *i.e.*, the preservation of a system of migratory labour. The two policies taken together are at the core of the implementation of the policy of *apartheid*.

With respect to unemployment, which "influx control" assertedly eliminates, 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. The position is then, that under "influx control" the "Natives," who have a far greater need for employment than most of the white inhabitants of the Territory, are given at most two weeks to find such employment. If they do not succeed, they are sent back to the very areas they had tried to escape—to areas where "one realizes the difficulty of assuming that the Native can ever achieve a really adequate standard of living." [2]

As in the case of other aspects of implementation of the policy of *apartheid*, the basic fallacy and evil of the "influx control" measures, pass laws, and other restrictive devices, consist in the premise that all "Natives" are to be treated alike, whatever their individual merit, capacity or potential. The 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"; he is to be relegated to his "real home" in a reserve. [3]

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. The unconscionable implications of so double a standard justify the conclusion that:

> "The sum of segregation laws are an effort to prevent failure in a white man and success in a black man." [4]

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unavoidably results in a high rate of divorce, polygamy, prostitution, drunkenness, crime and general restlessness in the towns. In the reserves women's morality tends to become more and more loose." (*Id.*, p. 46.)

[1] Hailey, p. 1386, cited p. 467, *supra*.

[2] *Id.*, p. 764.

[3] III, p. 219.

[4] de Kiewiet, *The Anatomy of South African Misery* 55 (1956).

Respondent seeks to justify its "influx control" policy by reference to assertedly similar policies in other countries. In 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. [1] "Influx control" cannot justify the *total* ban on residence by "Natives" in the urban areas of the Territory. Housing problems, no matter how serious, cannot rightly be the basis for "Native" urban residence limited to "European" labour requirements.

Respondent asserts that restrictions on "Native" liberty of movement and residence are designed to "protect . . . tribes from disintegration" [2] or "detribalization." [3]

This again serves as an instructive example of Respondent's policy of classifying all inhabitants on the basis of "group" or tribe, ignoring individual merit or need.

Conceding that Proclamation No. 29 of 1935 requires "Natives" recruited from reserves beyond the Police Zone to return to reserves after two and a half years at most, Respondent contends that such a requirement

> ". . . was made at the specific request of the tribal authorities in the Northern areas who wish to protect their tribes from disintegration and to maintain tribal relations." [2]

Not a word is said concerning the wishes or needs of the *individual* who has come from the reserves to work as a labourer in the Police Zone. Respondent's professed solicitude for preservation of traditional forms of tribalism is, in fact, self-serving. As Lord Hailey stated in 1956:

> "In the prevailing philosophy of South Africa the Native in the urban areas is a transitory resident who in the words used in the Transvaal 'should depart therefrom when he ceases to minister to the needs of the White man.'" [4]

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

> ". . . Natives are not entitled to obtain permanent residential rights or ownership in the urban areas in the Police Zone. Since Natives are, however, allowed to enter these areas in order to

[1] **III**, pp. 285-287, paras. 176-81.
[2] *Id.*, p. 276, para. 149.
[3] *Id.*, p. 323, para. 87.
[4] Hailey, p. 428, cited p. 467, *supra*.

> obtain employment, it has been necessary to provide proper accommodation for them *for the purpose of such employment.*" [1]

Similarly, the pass system is the mechanism enabling Respondent to keep "Natives "and "Europeans" apart, except for purposes of migratory labour. Respondent states that pass laws do "not unduly restrict the movement of Natives" [2] because "Respondent has endeavoured to make it as easy as possible for Natives to obtain passes." [3] The 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.

The inherent evil of the system has been widely recognized and commented upon, by authorities both within and outside South Africa.

Thus, a leading South African industrialist has concluded that

> ". . . there was a time when it might have been reasonable to regard the bulk of the Africans in the urban areas as temporary residents. But that time is long past and today . . . there is a very large and increasing African population in the towns whose connexion with their original tribal homes has almost or entirely ceased to exist. Moreover these urban Africans are absolutely indispensable to the industrial life of the country. Nevertheless they are treated as though they were migrants and the pass laws and other legislation operate to prevent their obtaining the right of permanent occupation of the only homes they have. If they lose their jobs and do not find another one within a short period they may be uprooted and forced to go to quite a different part of the country. In this way, families are broken up and the urban African is denied that sense of permanence and security which is one of the prime needs of all human beings.
>
> It is difficult to exaggerate the sense of frustration these features of African urban life cause, particularly among the growing number of intelligent and educated men who hold responsible positions." [4]

The International Commission of Jurists, in a study dealing with South Africa, found that

> "The most basic, and at the same time perhaps the most resented, application of apartheid is to be found in the restrictions imposed upon the movement and residence of non-whites. Particularly as applied to the African these restrictions reveal the fundamentally economic purpose of the policy of separation. In short, the movement and residence of the African labour force is regulated to meet the industrial and agricultural requirements of the European." [5]

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[1] **III**, p. 294, para. 205. (Italics added.)

[2] *Id.*, p. 314, para. 61.

[3] *Id.*, p. 316, para. 66.

[4] H. F. Oppenheimer, Chairman of the Anglo-American Corporation of South Africa, Ltd., quoted in *South Africa and the Rule of Law* (1960), p. 37. (Pub. of International Commission of Jurists.)

[5] *Op. cit.*, p. 27. The Commission also stated that ". . . an objective analysis of the presently existing restrictions of movement can only bring forth the conclusion

When regard is had to statements made by Respondent such as

> "Permission to be in a proclaimed area may be refused if there is a surplus of Native labour available in such area. . . ." [1]

it is difficult to reach any conclusion other than that reached by the International Commission of Jurists.

Other restrictions on "Native" freedom of movement are directed at the same objective. Legislation differentiating between "White" and "Native" people also controls egress from and entry into the Territory. [2] In respect of egress from the Territory, Respondent states the "reason for this differential treatment is 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 ventures." [3] Thus "Natives" require passes to go to South Africa. Exempted from the requirement, however, are "Native" females and "Native" males fourteen 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.

Similarly, curfew restrictions on "Natives" are said to protect against "disturbances" and "crime." [4] Yet such curfew restrictions apply only in "White" areas, and only to "non-White" peoples.

The system is rounded off by Respondent's legislation restricting the security of the person. Thus, although Respondent gives many reasons why the Vagrancy Proclamation in South West Africa [5] is justifiable, it cannot be denied that it is much easier for a "Native" to be found a vagrant, than it is for a "White" man. The Proclamation is not applied in the areas beyond the Police Zone, nor in reserves within the Police Zone. [6] 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. [7]

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that the Government has for the purpose of allocation of labour between industry and agriculture erected a careful system of discriminatory legislation. This legislation does not seem or even pretend to protect, but only restricts the African and is cleverly designed to complement equally discriminatory restriction of residence." (page 31.)

[1] **III**, p. 324, para. 93.

[2] *Id.*, pp. 319-322.

[3] *Id.*, p. 320, para. 78.

[4] *Id.*, p. 328, para. 107.

[5] Proc. No. 25 of 1920 (S.W.A.), in *The Laws of South West Africa 1915-1922*, p. 280. See **III**, pp. 198-214.

[6] **III**, p. 333, para. 127.

[7] Indeed, Respondent concedes that vagrancy was one of the reasons the pass system was devised in the first place. Respondent quotes from a Commission Report of 1921 that a pass system is desirable since "it cannot now be readily ascertained whether a Native found travelling along a road or across country is a vagrant or not . . ." (*Id.*, p. 311.)

Respondent's version of the attitude of the Permanent Mandates Commission toward the pass system and the Vagrancy Proclamation is not correct. The Report

Respondent's policy of *apartheid* in the Territory is further implemented by the Natives (Urban Areas) Proclamation of 1951, as amended in 1954. [1] Under the Proclamation, an idle "Native" in urban or proclaimed areas may be removed from such area, or if he had previously agreed to a contract of employment, may be ordered to carry out the employment, regardless of his wishes; [2] if he is removed to a reserve within the Police Zone, he may be ordered to work on essential public works within that reserve. Respondent's defence is its argument concerning the policy of "influx control." [3]

The 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 [4] and permitting the Administrator to remove "undesirable" "Natives" from certain reserves within the Police Zone. [5]

In sum, Respondent's measures restricting rights of residence, freedom of movement, and security of the inhabitants are based upon

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of the Commission to the League Council (3rd Session) criticized the Proclamation on the ground, *inter alia*, that a magistrate was authorized ". . . in lieu of the punishment prescribed, to adjudge the accused to a term of service on public works or to employment under any municipality or private person other than the complainant, for a term not exceeding that for which imprisonment might be imposed, at such wages as the magistrate deemed fair. This power of imposing forced labour for the benefit of private individuals in lieu of the sentence of the Court is a practice which cannot be approved." (P.M.C. Min., 3rd Sess., p. 293.)

As for the pass system, it is instructive to note the views of Lord Lugard. At the third session of the Commission he is reported to have "called attention to the system of passes which was *imposed* on the natives" (italics added) and the Chairman thought "it would be well to ask the reasons for these restrictions upon personal liberty". (P.M.C. Min., 3rd Sess., p. 61.) At the fourth session, Sir Lugard asked "whether the pass system—which was a *form of class legislation which one would, if possible, desire to abolish*—was absolutely necessary, together with the obligation to obtain permits to enter or to leave the country or to travel." (P.M.C. Min., 4th Sess., p. 64 (italics added).)

[1] See **III**, pp. 214-219.

[2] See *Id.*, paras. 66-68.

[3] *Supra*, pp. 467-468.

[4] **III**, pp. 220-221. Applicants concede that the provisions relating to farm colonies are not applicable in the Territory, but the policy of ordering idle "Natives" to work is admitted by Respondent to be implemented, as discussed above.

Respondent states that ". . . no objection can be raised against the habitually idle and unemployed resident of a Native reserve within the Police Zone being compelled to take up employment in lieu of being sentenced as a criminal offender to imprisonment under the provisions of the Vagrancy Proclamation." (*Id.*, p. 220, para. 91.) The views of the International Labour Organisation regarding such practices are discussed *infra*, pp. 474-475.

[5] **III**, pp. 222-224. That the powers given must be exercised in a *bona fide* manner (p. 221, para. 93; p. 224, para. 104) is not responsive to Applicants' complaint that the power is largely a discretionary one. Discretion 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.)—see *id.*, p. 274, para. 143, and the essence of the complaint regarding the power of arrest under the vagrancy and pass laws.

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.

As Lord Hailey has stated:

> "From time to time Europeans who have settled in other territories have shown an inclination to look to South Africa for countenance in their effort to maintain policies based on separatist ideas, while to those who look forward to a greater measure of integration, the regime of the Union has become a natural target for attack. But there is here something more than a contrast of philosophies. Both sides realize that the essence of the matter lies in the fact that the doctrine of *apartheid implies that the European community must continue to hold a position of control over the non-European communities*. It is actually on this basic issue, and not because of any argument about the maintenance of a European pattern of civilization, that the two schools of thought tend to range themselves so decisively in opposite camps." [1]

(C) Statement of Law

By reason of the fact that in no dependent territory other than South West Africa does there exist a system of restrictions on security, rights of residence, and freedom of movement, based solely upon membership in a "group," current standards in this area have not had to be evolved either by the Trusteeship Council or the Committee on Information from Non-Self-Governing Territories.

The Committee on South West Africa, however, whose annual reports have been approved by the General Assembly, has dealt explicitly with such restrictions on inhabitants of the Territory and has consistently viewed such restrictions as a violation of the Mandate agreement.

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.

Several illustrations make clear the Committee's views. In 1954 the Committee on South West Africa reviewed the restrictive legislation described above and concluded that "[t]he Committee feels that the measures enumerated above speak for themselves. The Committee observes that such measures are clearly inconsistent with the principles and purposes of the Mandates System. In the opinion of the Committee, any further comment on these measures would be superfluous." [2]

In 1958 the Committee stated that it had

> ". . . drawn attention to the stringent control measures which are applied to 'Native' labour in the Territory. It has recommended,

[1] Hailey, p. 169, cited p. 467, *supra*. (Italics added.)

[2] G.A.O.R. 9th Sess., S.W.A. Comm., Supp. No. 14 at 25 (A/2666).

> and continues to recommend, that every effort should be made to promote awareness in the Territory of the fundamental principle that labour is not a commodity, and that the labour laws of the Territory should be altered to conform to the standards approved by the International Labour Organisation for non-metropolitan Territories and to the principles of the Mandates System." [1]

With regard to freedom of movement, the Committee noted that it had "drawn the attention of the General Assembly to the severe restrictions placed on the freedom of movement of 'Non-Europeans' in the Territory, and particularly the 'Native' majority, as well as to the extensive controls established to ensure the application of the restrictions. Many of these restrictions and controls . . . largely related to the labour requirements of the 'European' community. Considering them as a whole, the Committee finds it impossible to regard them as compatible with the social, moral and material welfare of the 'Native' inhabitants of the Territory and therefore with the 'sacred trust' undertaken by the Union of South Africa when it accepted the responsibilities of the Mandate." [1]

The General Assembly approved the Report of the Committee on South West Africa on 30 October 1958. [2]

Current standards in this area have similarly been established by the International Labour Organisation. Thus, the *Ad Hoc* Committee on Forced Labour of the International Labour Office found in 1953 that "the pass legislation in the Union of South Africa constitutes a serious handicap to the freedom of movement of the Native population and that it has, or may have, important economic consequences." [3]

The Committee concluded also that the pass laws

> ". . . may be used for the control and regulation of the flow of Native labour from one part of the territory to the other. There can be no doubt that such control may serve the purpose of directing a supply of ample, and consequently cheap, labour towards regions where it is required for economic reasons." [4]

The Committee accordingly concluded that the pass system may "... be considered as an indirect means of implementing economic plans and policies, whether emanating from the Government or from private interests powerful enough to command Government support. The State, through the operation of this legislation, is in a position to exert pressure upon the Native population which might create *conditions of indirect compulsion similar in its effects to a system of forced labour for economic purposes.*" [5]

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[1] G.A.O.R. 13th Sess., S.W.A. Comm., Supp. No. 12 at 23 (A/3906).

[2] G.A. Res. 1245 (XIII), 30 October 1958, G.A.O.R. 13 Sess., Supp. No. 18 at 30 (A/4090).

[3] ECOSOC, *O.R.*, 16th Sess., Supp. No. 13, 1953, p. 75, para. 349. This and other findings by the Committee with regard to pass laws were made directly applicable to South West Africa (*Id.*, p. 81, para 382). (See Annex 6, Sec. (2), paras. 382-86, at pp. 437-438 *supra*.)

[4] *Id.*, p. 75, para. 350.

[5] *Id.*, para. 351. (Italics added.)

In February of 1964, the Committee on Questions concerning South Africa (a Committee appointed by the Governing Body of the International Labour Office) called for the abolition of provisions regulating the entry of "Natives" into urban and proclaimed areas and their stay in such areas, and called for the abolition of the pass system (in the form of the Natives (Abolition of Passes and Co-ordination of Documents) Act, 1952). The Committee also called for the repeal of the vagrancy provisions contained in the Natives (Urban Areas) Consolidation Act, 1945. [1] These recommendations were part of a larger program calling for an end of all legislation which involves any *"form of direct or indirect compulsion to labour, including discrimination on grounds of race in respect of travel and residence."* [2]

Although the recommended program is in terms applicable to South Africa, the policies underlying the legislation to which the Committee objected are similarly implemented in the Territory. [3] As such, the recommendations are relevant in all significant respects to the Territory.

(D) Legal Conclusions

Applicants reaffirm the Legal Conclusions, set forth in the *Memorials*, [4] 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, violate Respondent's obligations toward the inhabitants of the Territory.

Such policies and practices 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.

The findings and conclusions of the Committee on South West Africa and of the I.L.O. *Ad Hoc* Committee on Forced Labour confirm 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.

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[1] I.L.O. *Annex: Proposed Declaration Concerning the Policy of "Apartheid" of the Republic of South Africa* (Feb. 1964), p. 35, para. 74, cited p. 406, footnote 4, *supra*.

[2] *Id.*, pp. 34-35, para. 73. (Italics added.)

[3] See for example, Proc. No. 29 of 1935 (S.W.A.), Sec. 6 (4), in *The Laws of South West Africa 1935*, Vol. XIV, p. 152, as amended by Proc. No. 38 of 1949 (S.W.A.), Sec. 2, in *The Laws of South West Africa 1949*, Vol. XXVIII, p. 760; Ord. No. 25 of 1954 (S.W.A.), Secs. 3 and 4, in *The Laws of South West Africa 1954*, Vol. XXXIII, pp. 736-41; Proc. No. 11 of 1922 (S.W.A.), Sec. 10, in *The Laws of South West Africa 1915-1922*, pp. 751-52.

[4] I, pp. 164-165.

CHAPTER V

LEGAL BASIS AND LEGAL NATURE OF RESPONDENT'S OBLIGATIONS TOWARD THE INHABITANTS OF THE TERRITORY

In the foregoing sections of this Reply, Applicants have analysed: (1) the nature of the Mandate, generally considered and as viewed both by this Honourable Court and the Permanent Mandates Commission; [1] (2) Respondent's policy with respect to the inhabitants of the territory; [2] and (3) Respondent's measures of implementation of its aforesaid policy. [3]

Applicants now consider the legal basis and legal nature of Respondent's obligations toward the inhabitants of the Territory, as stated in Article 2, paragraph 2, of the Mandate.

Before turning to a demonstration of the legally cognizable norms according to which Respondent's obligations under Article 2, paragraph 2, can and should be judicially determined, an observation is in order concerning Respondent's contention that the Mandate as a whole has lapsed "and that Respondent is consequently no longer subject to any legal obligations thereunder." [4]

As will be elaborated more fully below in Applicants' analysis of Respondent's arguments with regard to the asserted lapse of Articles 6 and 7 of the Mandate, [5] Respondent's contention that the Mandate as a whole has lapsed is based upon re-argument of points twice previously laid before this Honourable Court; the first time in the Proceedings leading to the *Advisory Opinion of 1950*, [6] and the second time in the Proceedings in respect of the Preliminary Objections herein. [7]

As has been pointed out above, [8] the Court, in its *Judgment of 21 December 1962*, reaffirmed the law of the case, as declared in the *Advisory Opinion of 1950*, in the following terms, *inter alia:*

> "The unanimous holding of the Court in 1950 on the survival and continuing effect of Article 7 of the Mandate, continues to reflect the Court's opinion to-day. . . . The validity of Article 7, in the Court's view, was not affected by the dissolution of the

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[1] Chapter III, *supra*, pp. 231-254.
[2] Chapter IV (B), secs. 1-3 inc., *supra*, pp. 260 to 327.
[3] *Id.*, sec. 3.c. *supra*, pp. 362-475.
[4] **II**, p. 1. See generally **II**, pp. 165-256.
[5] *Infra*, pp. 520-546.
[6] *Advisory Opinion of 11 July 1950*; I.C.J. Rep. 1950, p. 128.
[7] *Judgment*, p. 319
[8] *Supra*, p. 220.

League, *just as the Mandate as a whole is still in force* for the reasons stated above."[1]

Upon the premise that the obligations set forth in Article 2, paragraph 2, of the Mandate are in force, together with the whole of the Mandate, as the Court has held, there remain for consideration the questions whether such obligations are of a legal character and, if so, whether they are justiciable, both of which propositions Applicants affirm and Respondent denies. [2]

Respondent's arguments dealing with the legal principles involved in Applicants' Submissions regarding alleged breaches of the provisions of Article 2, paragraph 2, of the Mandate are largely subsumed under the heading "Statement of the Law," set forth in the *Counter-Memorial*, Vol. IV, Chapter II. [3]

As Applicants understand these arguments and their underlying premises, both explicit and implicit, they may fairly be summarized for clarity of reply, by the six following propositions:

1. The Mandate assertedly creates no legal obligations justiciable as between Applicants and Respondent, in terms of the compromissory clause contained in Article 7 of the Mandate;

2. Article 2, paragraph 2, does not, in any event, create or embody obligations of a legal nature, but is assertedly a merely political or moral exhortation; this argument Respondent seeks to reinforce by reference to the generality of the terms of the Article;

3. Even if Article 2 be deemed to embody a legal obligation, it is assertedly one of a political character which should be left for determination by a political body rather than by a Court; and in any event, Respondent argues compliance with the Article could be judged by the Court only upon the basis of Respondent's good or bad faith;

4. Even if the obligations under the Article were justiciable, there exist, Respondent insists, no legal norms or standards for judging the actions which Applicants contend to be in violation thereof;

5. If any such norms or standards were applicable, they would,

[1] *Advisory Opinion of 11 July 1950*; I.C.J. Rep. 1950, pp. 153, 334, 335. (Italics added.)

[2] Respondent's contentions on both points are summarized as follows: (1) "Reading Article 2 as a whole and in light of the provisions of Article 22 of the Covenant . . . *no limits in respect of subject-matter* were placed on the full power of administration and legislation granted by the article . . ." (**II**, p. 387) (italics added.); and (2) "if the Court were to decide whether in fact a particular policy promoted the 'well-being' of the inhabitants 'to the utmost', it would have to consider that policy and weigh it against other policies which might be followed in an attempt to achieve such a purpose. . . . The Court's function in so deciding would be one which is, in its very nature, not a judicial one." (*Id.*, p. 391.)

[3] **II**, pp. 384-403.

Respondent implies, be those governing as of the time the Mandate was entrusted to Respondent; and

6. Even if current standards existed and were deemed applicable, Respondent's policy with respect to the inhabitants of the Territory is asserted to be in compliance with them.

* * *

Consideration will be given to each of these six propositions in turn, in order to demonstrate their insupportability.

1. The first proposition, *viz.*, that the Mandate creates no legal obligations between Applicants and Respondent has already been decided by this Honourable Court in its *Judgment* in respect of the Preliminary Objections herein. [1] Respondent's endeavour to reopen and re-argue the Court's holding with regard to the effectiveness and scope of the compromissory clause in Article 7 of the Mandate, already referred to, is more fully discussed below. [2]

2. In Applicants' submission, Article 2, paragraph 2, creates and embodies obligations of a legal nature, notwithstanding the generality of the terms in which it is expressed.

In the *Judgment of 21 December 1962*, the Court rejected Respondent's contention, in support of its Third Preliminary Objection, that Applicants "have no legal right or interest in the observance by the Mandatory of its duties to the inhabitants." [3] If, as the Court held, Applicants have such a legal right or interest, it follows that Respondent's obligations are of a legal nature or, at the very least, inasmuch as the Court held that the Mandate created legal obligations between the parties in respect of the application and interpretation of its clauses, the Court should construe such clauses as having a legally binding character.

Respondent argues that Article 2, paragraph 2, because of the generality of its formulation, is merely "an expression of an idealistic objective," [4] and that it is of a "purely political character." [5]

Respondent's interpretation of the scope of its obligations under this Article reflects the same misconception, noted in other contexts in this Reply, [6] regarding the fiduciary nature of the Mandate institution and the human ends sought to be served thereby.

The legally binding, rather than merely exhortatory character of Article 2, paragraph 2, is confirmed, *inter alia*, by its origins.

Lord Milner's proposed draft "C" Mandate of 28 June 1919 contained the following formulation of Article 2, paragraph 2:

[1] *Judgment*, pp. 335-42.
[2] *Infra*, pp. 520-546.
[3] *Judgment*, p. 343.
[4] II, p. 387.
[5] *Id.*, p. 184.
[6] *Supra*, pp. 231-254 and *infra*, pp. 520-546.

> "The mandatory Power . . . accepts the mandate to govern the mandated territory . . . *as guarantor* of the well-being and the development of its inhabitants."[1]

A new and strengthened draft was adopted by the Milner Commission on 10 July 1919:

> "The mandatory Power *agrees to increase, by all means in its power,* the material and moral well-being and the social progress of the natives [of the Mandated Territory]."[2]

The final draft from the Milner Commission, approved on 5 August 1919, rephrased the clause as follows:

> "The mandatory Power *agrees to develop, as much as is in its power,* the moral and material well-being as well as the social progress of the inhabitants subject to this Mandate."[3]

The latter draft was submitted to the legal advisors of the Drafting Committee of the Peace Conference, whose task was not to change the substance of the wording, but to put the words in the form of a legal obligation. The result was a draft submitted by the Milner Commission to the Principal Allied and Associated Powers on 24 December 1919:

> "The Mandatory Power *undertakes to promote to the utmost* the material and moral well-being and the social progress of the inhabitants of the territory subject to this Mandate."[4]

The final draft of the Mandate Agreement approved by the Council of the League of Nations on 17 December 1920 substituted the word "shall" for the words "undertake to."

The several drafts thus show a progression in the scope of the Mandatory's obligation: from Lord Milner's original "accepts the mandate . . . as guarantor of the well-being and the development of its inhabitants" to the final formulation "shall promote to the utmost the material and moral well-being and the social progress of the inhabitants." It would seem evident that the founders of the Mandate System were aware that basic legal obligations were being imposed upon the Mandatories and were careful to produce an acceptable wording.

President Wilson, in a statement to the Council of Four on 17 May 1919 said that

> "The whole theory of mandates is not the theory of permanent subordination. *It is the theory of development, of putting upon the mandatory the duty of assisting in the development of the country under mandate, in order that it may be brought to a capacity for self-government and self-dependence which for the time being it has not reached,*

[1] *Conférence de la Paix, 1919-1920, Recueil des Actes de la Conférence,* Partie VI A, p. 330. (1934). (Italics added.)

[2] *Id.,* p. 379. (Italics added.)

[3] *Id.,* p. 407. (Italics added.)

[4] [1919] IX *Foreign Relations of the United States* (Paris Peace Conference) 655-56 (1946). (Italics added.)

and that therefore the countries under mandate are candidates, so to say, for full membership in the family of nations." [1]

That the Mandates, including the Mandate for South West Africa, were conceived and executed as legally binding instruments —as a whole and in each of their parts—is confirmed by the views of the Permanent Mandates Commission, [2] scholarly authority and opinions of judicial tribunals.

Thus, Quincy Wright has stated:

"The mandate texts or charters have been regarded by the League and the mandatories as the fundamental law for the areas. Legislation contrary to their terms has been criticized by the League Council and usually considered void by the mandatory's own courts. They are, it is true, documents of international law, resting on international agreement and interpretable by the Permanent Court of International Justice, but they are also the fundamental constitution from which internal governing authority in the areas derives. In each of these areas there is also a local constitution. . . . These documents . . . are considered subordinate to the mandate texts, by the League organs and also in most cases by the mandatories' courts. They usually recite that document as the basis of authority, are interpreted in accord with it, and are void if in violation of it." [3]

Courts in the Mandated and Mandatory areas have frequently held that legislation within the Mandated Territories must be consistent with the obligations of the Mandate charters. The theme runs throughout these cases that the Mandate charter is the basic ordinance for the Mandated Territory, thus positing their legally binding nature.

Thus, in the case of *District Governor, Jerusalem-Jaffa District* v. *Murra* [1926] A. C. 321 (P.C.), [1925-1926] Ann. Dig. 46 (No. 32), the British Privy Council held, *inter alia*, that the Supreme Court in Palestine "was fully justified in entertaining an argument as to the validity of the Ordinance [of the Government of Palestine]. The Ordinance was made under the authority of the Order in Council of May 4, 1923, and if so and so far as it infringed the conditions of that order in Council the local Court was entitled and indeed bound to treat it as void. Among those conditions was the stipulation that no Ordinance should be promulgated which was repugnant to or inconsistent with the provisions of the Mandate, and in view of this stipulation it was the right and duty of the Court to examine the terms of the Mandate and to consider whether the Ordinance was in any way repugnant to those terms." [4]

In *Attorney-General* v. *Altshuler* (Palestine Supreme Court, May 1928), [5] a municipal by-law passed by the Local Council of Tel-

[1] V *id.* at 700. (Italics added.)
[2] *Supra*, pp. 246-254.
[3] *Mandates Under the League of Nations* 516-17 (1930).
[4] [1926] A.C. at 327.
[5] [1920-1933] L.R. Palestine 283; [1927-1928] Ann. Dig. 55 (No. 33).

Aviv was held to be invalid as contrary to the provisions of the Mandate since it tended to discriminate on the basis of religion.

In *Winter* v. *Minister of Defence* (South Africa, Supreme Court (Appellate Division), 13 December 1939),[1] Chief Justice de Wet stated that the power of administration and legislation of the Mandatory "is given subject to the terms of the Mandate" [2] and the learned Justice went on to hold that the Proclamation of Emergency Regulations in question were not "in conflict with the duty to promote the well-being of the inhabitants of the territory." [3] Thus, the Court had no difficulty in deciding whether or not legislation was consistent with the broadly formulated obligations of Article 2, paragraph 2, of the Mandate.

The Permanent Court of International Justice, in the *Mavrommatis Palestine Concessions* cases, [4] was concerned with an alleged infringement of Article 11 of the Palestine Mandate by the Mandatory power because of the granting by the latter of various concessions. Quincy Wright summed up the significance of these cases by stating that the Permanent Court "evidently regards a mandate as a document limiting the competence of the mandatory and susceptible of judicial interpretation *in all its parts*. . . ." [5]

The fact that Article 2, paragraph 2, is stated in general terms does not in any degree modify, or detract from, its legally binding character. On the contrary, the generality in which the obligation is couched is consistent with, and indicative of, the institutional and constitutional nature of the Mandates System. Basic ordinances, constitutions and charters are characteristically drawn in broad terms, as befits their fundamental and dynamic objectives. Far from depriving them of a legal character, their generally stated obligations endow them with an enduring vitality as standards to be applied by organs of government and, in many systems, to be interpreted by the judiciary.

The Charter of the United Nations is, perhaps, the most noteworthy example of international undertakings, typically formulated in general terms, the interpretation and application of which may be, and have been repeated subjects of judicial determination. [6]

[1] [1940] So. Afr. Rep. App. Div. 194 (1939); [1938-1940] Ann. Dig. 44-46 (No. 20).

[2] *Id.* at 197; [1938-1940] Ann. Dig. at 46.

[3] *Id.* at 198; [1938-1940] Ann. Dig. at 46.

[4] P.C.I.J., Ser. A, Nos. 2 (1924), 5 (1925), and 11 (1927).

[5] Wright, p. 158, cited p. 480, footnote 3, *supra*. (Italics added.)

[6] Article 65 of the Statute of the Court, authorizing the Court to "give an advisory opinion on any legal question" obviously would be deprived of its intent and importance if the phrase "legal question" were interpreted to refer only to specifically formulated provisions. *Cf., e.g.*, the case concerning *Conditions of Admission of a State to Membership in the United Nations*, I.C.J. Rep. 1947-1948, p. 57 (advisory opinion); the case concerning *Competence of the General Assembly for the Admission of a State to the United Nations*, I.C.J. Rep. 1950, p. 4 (advisory opinion); the case concerning *Certain Expenses of the United Nations*, I.C.J. Rep., 1962, p. 151 (advisory opinion); and, most pertinently to the Cases at bar, the case of the *International Status of South-West Africa* itself, I.C.J. Rep., 1950, p. 128 (advisory opinion).

Numerous other illustrations are set forth in the Separate Opinion of Judge Jessup, in the Court's *Judgment of 21 December 1962*.[1]

The context in which these illustrations are set forth does, it is true, relate to the question whether Applicants' interest in the interpretation and application of the Mandate in respect of the inhabitants of the Territory is an interest of a legal nature. What is significant for the purposes of the discussion here, however, is the fact that many of the illustrations embody *generally formulated obligations, or sets of obligations*, which provide for, or have actually been the subject, of judicial interpretation.

Thus, Judge Jessup refers, *inter alia*, to:

(a) The Minorities Treaties at the end of World War I; illustrated by the provision in Article 11 of the Treaty of St. Germain-en-Laye, 10 September 1919;[2] and the same provision in Article 69 of the Peace Treaty with Austria, and Article 60 of the Treaty of Trianon with Hungary.

(b) The Genocide Convention, which came into force on 12 January 1951, Article IX of which provides for submission to the Court of disputes between the Parties relating to the "interpretation, application or fulfilment" of the Convention, "including those relating to the responsibility of a state for genocide. . . ."[3]

(c) The Constitution of the International Labour Organisation and conventions concluded thereunder.[4] The generality of the obligations formulated therein, and made subject to judicial interpretation, is exemplified by Convention No. 105 (Abolition of Forced Labour, 1957),[5] as to which proceedings of a judicial nature have been conducted, referable in each instance to the International Court of Justice under Article 29 of the Constitution of the I.L.O.[6]

It is clear from the foregoing examples, to which many others could be added, that interests and obligations of an economic, political or humanitarian nature are normally formulated in general terms in instruments of an institutional or constitutional nature, and that this fact does not deprive them of a justiciable character.

The European Convention for the Protection of Human Rights

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[1] *Judgment*, pp. 425-33.

[2] Quoted *id.*, p. 425; I. Hudson, *International Legislation* 312, 318-19 (1931).

[3] Quoted I.C.J. Rep., 1962, p. 426; 78 *United Nations Treaty Series* 278, 282(1951). The crime of "genocide," as defined in Article II of the Convention, comprises such broadly formulated acts, *inter alia*, as "causing serious bodily or mental harm" to members of a group, "with intent to destroy, in whole or in part a national, ethnical, racial or religious group, as such."

[4] Cited and quoted in *Judgment*, pp. 426-28.

[5] 320 *United Nations Treaty Series* 292 (1959).

[6] *Judgment*, pp. 427-28.

and Fundamental Freedoms [1] embodying a comprehensive clause on non-discrimination, guarantees civil and political rights taken from the Universal Declaration of Human Rights of the United Nations. These include such broadly formulated rights as the right to life, the right to liberty and security of persons, the right to respect for family life, the right to freedom of thought, conscience and religion, and many others. Procedures provided for remedy in the event of violation include submission to the European Commission of Human Rights. Following a decision by the Commission, the issue may be referred to the European Court of Human Rights by the Commission or by a State Party concerned. [2]

The Mandate for South West Africa, as was true of all Mandates, falls precisely within this category, as has been demonstrated in this Reply.

In addition to the instruments of an international character referred to above, Judge Jessup similarly points out that, *e.g.*, in respect of the United States Constitution:

> "Certainly courts can determine and have determined whether particular laws or actions comply with general broad criteria such as 'due process,' 'equal protection' and 'religious freedom' .... There is no reason why this Court should be unable to determine whether various laws and regulations promote the 'material and moral well-being and the social progress of the inhabitants' of the mandated territory." [3]

3. Closely related is Respondent's contention that the generality of the obligations stated in Article 2, paragraph 2, of the Mandate stamps them with a "political" rather than legal character, which should be left for determination by a "political body." One aspect of this proposition, as Respondent contends, is that, in the light of the assertedly "political" nature of the Article, Respondent's compliance therewith in any event could be judged by the Court only on the basis of Respondent's "good or bad faith." [4]

The foregoing proposition, as formulated by Respondent, runs as follows:

a. The decision whether a particular policy promotes the well-being and progress of the inhabitants "can only be based on social, ethnological, economic and political considerations." [5] It is "for-

[1] 213 *United Nations Treaty Series* 222 (1955), signed at Rome, 4 November 1950; entered into force 3 September 1953, upon deposit of the tenth instrument of ratification.

[2] The Court has had before it two cases: *De Becker* v. *Belgium*, European Court of Human Rights, ser. A, No. 4 (27 March 1962), involving an alleged violation of Article 10 of the Convention guaranteeing the right to freedom of expression; the other, *Lawless* v. *Ireland*, European Court of Human Rights, ser. A, No. 3 (1 July 1961), involving alleged violation of the right, guaranteed by Article 5 of the Convention, of an accused person to be brought to trial "*within a reasonable time.*"

[3] *Judgment*, pp. 428-29; relevant decisions of the United States Supreme Court cited p. 428.

[4] See, *e.g.*, **II**, p. 390.

[5] *Id.*, p. 391.

eign to the essential nature and purpose of the Court to entertain matters of a purely political character, and it is unlikely that the authors of the Mandate intended that the Court should perform such a function in the Mandate System. . . ." [1]

b. It was "in the nature of things impossible . . . for the authors of the Mandate to reduce the objective of promoting the well-being and development of the inhabitants of the Territory to a series of specific injunctions or prohibitions, breaches of which would be capable of objective determination. . . ." [2] The formulation of Article 2, paragraph 2, in its context consequently indicates "the objective to be pursued by the Mandatory, *or the spirit with which he should be imbued*, in exercising his power of administration and legislation." [3]

c. "Whatever the Court may think of the merits of a particular legislative or administrative act, practice, or policy, if it was devised and performed or practised in the exercise of the Mandatory's discretion with the *bona fide* intention of benefiting the inhabitants of the Territory, it could not constitute a violation of Article 2 of the Mandate." [4]

Applicants submit that the foregoing propositions are based upon a false syllogism, which may be stated as follows:

1. An obligation phrased in broad terms, such as promotion of well-being and social progress, is a "political" obligation;

2. Only "political" bodies should deal with such obligations; Therefore: 3. Such obligations are not justiciable.

The syllogism is wrong in each of its parts and as a whole; the proposition based upon it is untenable.

It is untenable, in Applicants' submission, in that it misconceives (a) the role of the Court in respect of the Mandates System, in particular; and (b) the true nature of the judicial process in general.

(a) The role of the Court in affording judicial protection in the Mandates System and its applicability to Article 2 of the Mandate has been established as the law of the case. The Court, in its *Judgment of 21 December 1962*, held:

> "While Article 6 of the Mandate under consideration provides for administrative supervision by the League, Article 7 in effect provides, with the express agreement of the Mandatory, for judicial protection by the Permanent Court by vesting the right of invoking the compulsory jurisdiction against the Mandatory for the same purpose in each of the other Members of the League. Protection of the material interests of the Members of their nationals is of

[1] **II**, p. 184.
[2] *Id.*, p. 386.
[3] *Ibid.* (Italics added.)
[4] *Id.*, p. 392.

course included within its compass, but the well-being and development of the inhabitants of the Mandated territory are not less important." [1]

The Court's attention is respectfully drawn to the discussion of the role of the Court in the Mandates system, in the context of Applicants' reply to Respondent's re-argument in respect of Article 7 of the Mandate. [2]

(b) Applicants turn now to an analysis of Respondent's misconception of the nature of the judicial process, implicit in its proposition that the Court should leave to a "political body" determination of the obligation stated in Article 2, paragraph 2, of the Mandate, even if such obligation is deemed to have a legal character. [3]

For the purpose of this analysis, Applicants will defer for subsequent consideration [4] Respondent's contention that "there are no norms of a legal (as distinct from a political or technical) nature for deciding on merit whether a Mandatory has or has not promoted well-being and progress to the utmost." [5]

As Applicants have demonstrated, [6] courts have found no difficulty in dealing with political, economic or humanitarian issues, even when formulated in general terms.

When passing upon issues of this character, courts—both international and national—customarily apply knowledge extracted from experience, from social, physical and political sciences, and from all other sources from which man derives guidance in the conduct of his life and relationships with others.

In municipal systems, courts do not hesitate to pass upon such questions as the reasonableness of rates charged by enterprises affected with a public interest, fair or unfair methods of competition, disputes concerning patents or copyrights, and countless other conflicts of legal claims in the conduct of society.

Similarly, international tribunals have often derived their judgments from sources, and upon the basis of considerations, which Respondent would characterize as "social, ethnological, economic and political." [7]

Thus, in the case of the *Customs Régime Between Germany and*

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[1] *Judgment*, p. 29. The Court held accordingly that the dispute in the Cases at bar "is a dispute as envisaged in Article 7 of the Mandate." (*Ibid.*)

[2] *Infra.*, pp. 520-546.

[3] In Respondent's formulation, as pointed out *supra*, p. 256, the Court can only pass upon Respondent's "*bona fide* intention," whatever the Court "may think of the merits" of Respondent's acts, practices or policies.

[4] See discussion of Respondent's Proposition 4, *infra*, pp. 491-501.

[5] II, p. 394. Applicants submit, as will be shown, that such legal norms do exist, are readily ascertainable and are determinative of the issue joined with respect to Article 2, paragraph 2, of the Mandate.

[6] *Supra*, pp. 480-481.

[7] II, p. 391.

Austria,[1] the question before the Permanent Court was whether a proposed customs union was consistent with Austria's treaty obligation to abstain from engagements which would compromise her "independence". The Court gave an Opinion on a problem which clearly involved an assessment of future political contingencies.

In *Lawless* v. *Ireland*,[2] the European Court of Human Rights determined that an Irish Proclamation of 1957 was justified by a "public emergency threatening the life of the nation," and that the Irish Republican Army was "seriously jeopardizing the relations of the Republic of Ireland with its neighbour."[3]

The International Court has similarly applied concepts derived from the natural sciences in cases such as *Diversion of Water from the Meuse*[4] and the *Corfu Channel Case*.[5]

The case of *Jerusalem-Jaffa District Governor* v. *Murra*, cited by Respondent as showing that "the functions of courts of law do not normally extend to the realm of politics,"[6] held merely that whether fair provision had been made for compensation for expropriation, depended "upon principles of sound legislation." The Judicial Committee of the Privy Council pointed out that the Ordinance in question was subject to an Order in Council stipulating that no Ordinance might be promulgated which was incompatible with the Mandate. The Court stated explicitly that "it was the right and duty of the Court to examine the terms of the Mandate and to consider whether the Ordinance was in any way repugnant to those terms."[7]

Respondent also cites Dr. Rosenne, "with regard to the functions of international courts."[8] In the passage quoted by Dr. Rosenne, the learned author emphasizes, quite properly, that "the Court is a court of justice and not of ethics or morals or of political expediency. Its function is to 'declare the law.'"[9] With this, Applicants fully concur.

In the *Corfu Channel Case*,[10] the Court held that the obligation incumbent upon the Albanian Government to notify the existence of a minefield in Albanian territorial waters was based "on certain general and well-recognized principles, namely: elementary considerations of humanity."[11] In a Separate Opinion, Judge

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[1] P.C.I.J., Ser. A/B, No. 41 (1931).
[2] European Court of Human Rights, ser. A, No. 3 (1 July 1961).
[3] *Id.*, p. 56.
[4] P.C.I.J., Ser. A/B, No. 70 (1937).
[5] I.C.J. Rep. 1949, pp. 4, 21-22 (merits); *cf. Fisheries Case*, I.C.J. Rep. 1951, pp. 127-28.
[6] II, p. 184.
[7] [1926] A.C. 321, 327 (P.C.).
[8] II, p. 184.
[9] Rosenne, *The International Court of Justice* 62 (1957).
[10] I.C.J. Rep. 1949, p. 4.
[11] *Id.*, p. 22.

Alvarez stated that the "characteristics of an international delinquency are that it is an act contrary to the sentiments of humanity." [1]

It is, of course, in the highest traditions of courts in all civilized systems to draw upon humane, moral and political standards in deriving the sources of law.

In the United States, Justice Felix Frankfurter, concurring in *Louisiana ex rel. Francis* v. *Resweber*, argued that

> "a State may be found to deny a person due process by treating even one guilty of crime in a manner that violates *standards of decency* more or less universally accepted . . . ." [2]

Justice Frankfurter stated further that "we cannot escape acknowledging that it [the issue of 'cruel and unusual punishment'] involves the application of *standards of fairness and justice very broadly conceived. They are not the application of merely personal standards but the impersonal standards of society which alone judges, as the organs of Law, are empowered to enforce.*" [3]

In *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Supreme Court of the United States found that separation of Negro school 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," and that "whatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson* [1896], this finding is amply supported by modern authority." [4]

Judicial process in civil law systems similarly draws upon humane, moral and political standards as sources of law, and does so particularly where legal rights or duties are not explicitly defined.

Examples, derived from French jurisprudence, are the doctrines of *abus de droit, bonnes moeurs* and *ordre public.*

> "2. — . . . la doctrine moderne a énoncé la règle qu'une personne peut être responsable dans l'exercice de son droit lorsqu'il y a abus du droit. La théorie de l'abus du droit est devenue classique. L'expression a cours devant les tribunaux. Il est fréquent de voir l'un des plaideurs prétendre que l'autre a abusé de son droit. Des travaux importants ont été consacrés dans la doctrine à cette théorie. . . ."
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> "11. — La difficulté vient ici de ce que la loi ne détermine pas toujours d'une façon précise les limites d'un droit. Lorsque le tribunal saisi admet qu'il y a abus du droit, il décide par là même que le droit ne comprend pas certaines prérogatives qui paraissent pourtant incluses dans sa définition ou sa nature. La jurisprudence

[1] *Id.*, p. 45.
[2] 329 U.S. 459, 469 (1947). (Italics added.)
[3] *Id.*, p. 470. (Italics added.)
[4] *Id.*, p. 494.

a été ainsi amenée à préciser le contenu des droits, ce qui constitue une tâche difficile et suscite pour chaque droit une série de controverses." [1]

Similarly, with regard to *ordre public:*

"1. — La notion de l'ordre public est difficile à définir: elle vise à reconnaître une force plus grande à une source ou à une règle de droit. L'ordre public ne saurait, par exemple, être identifié avec la loi impérative dont ni l'objet, ni la méthode, ni les caractères, ni la sanction ne sont nécessairement d'ordre public. Il a pour objet de faire triompher les intérêts généraux de la société sur les intérêts particuliers, alors que la loi impérative peut viser à protéger un intérêt privé. D'autre part, tandis que la loi détermine l'impératif selon une méthode générale et abstraite, l'ordre public étant défini concrètement par la contradiction que lui porte la source de droit le menaçant, seul le juge peut procéder à cette détermination qui suppose une comparaison entre deux sources de droit contraires. En conséquence, l'ordre public a des caractères de relativité, puisque sa détermination est actuelle à la contradiction qui lui est faite, de variabilité, car la société n'a point toujours les mêmes objectifs fondamentaux, et de gradation, pour que la sanction s'adapte aux buts qu'il sauvegarde. . . ."

"10. — L'ordre public a pour source principale la loi, car il est, selon les termes mêmes de l'article 6 du code civil, une manière d'être de la loi. (Conf. Cass. belge, 9 déc. 1948, Pasicrisie 1948. 1. 699.)." [2]

Related to the foregoing doctrine is that of *bonnes moeurs*, authoritatively described as follows:

"1. — Le droit entend consacrer un certain minimum de moralité sociale et refuse de protéger les actes qui en sont dépourvus. La notion de bonnes mœurs, à côté de celle d'ordre public, vient apporter des limites toutes naturelles au grand principe de la liberté contractuelle; par une prohibition générale édictée en tête du code civil, il est défendu de porter atteinte à l'ordre public et aux bonnes mœurs (art. 6). Ces deux notions, qui ont les mêmes effets, sont liées, mais distinctes. Tous actes qui leur sont contraires sont illicites par le fait même, sans avoir besoin d'être interdits par une disposition légale. Leur rôle est précisément de compléter ce qui échappe à la loi, pour donner des critères assez compréhensifs de ce qui doit être jugé illicite.

2. — Le caractère moral de ce critère empêche de le définir en termes juridiques. La jurisprudence se contente de le déterminer relativement à chaque sorte d'application. La doctrine se réfère assez vaguement aux règles de la morale courante ou communément admises. La conception des bonnes mœurs est essentiellement relative à un pays et à une époque, par conséquent variable avec l'évolution des mœurs et des idées. . . ."

"6. — Cette notion constitue un recours aux règles non écrites

[1] Dalloz, *Encyclopédie de Droit Civil (Jurisprudence Générale Dalloz)*, Vol. I, p. 29 (1951).
[2] *Id.*, Vol. III, p. 668.

de la morale sociale pour suppléer à l'insuffisance des règles juridiques. . . ."[1]

It is readily apparent, therefore, that it is in the nature of the judicial process in all systems to adjudicate upon issues in which laws do not determine "*d'une façon précise les limites d'un droit*," and that, in such cases, courts will draw from "*règles de la morale courante ou communément admises*."

The judicial objective, as in the cases at bar, is the protection of "*les intérêts généraux de la société sur les intérêts particuliers*." It was precisely the general interest of the organized international community in the promotion of the well-being and social progress of the inhabitants of Mandated Territories which the authors of Article 22 of the Covenant of the League of Nations intended to protect. Denial of a legal basis upon which this Court may and should assure the achievement of this objective would, it is respectfully submitted, reduce the "sacred trust" to an idealistic abstraction.[2]

In respect of obligations of humanitarian objective, of which the Mandates System is a classic example, it is instructive to consider the human rights provisions of the Charter of the United Nations which, as an international treaty, clearly embodies obligations of a legal character.

A penetrating analysis of the legal import of such provisions, in particular Article 56,[3] has been made by Oscar Schachter, Director, United Nations Legal Department.[4]

The analysis considers, *inter alia*, whether the obligation is by its "nature" capable of execution by the Courts—the same issue raised by Respondent in respect of the obligations set forth in Article 2, paragraph 2, of the Mandate—in the following terms:[5]

> "As there is no explicit provision in the Charter itself, or any evdence [*sic*] of legislative intent, which would deprive Article 56 of self-operative effect, we are left with the question of whether the obligation is by its 'nature' capable of execution by the courts. For it has been asserted that the pledge to take action to promote respect for and observation of human rights is too vague and indefinite to enable a court to give it practical effect in a concrete situation; and, hence, that legislative measures are required in order that the obligation might have the degree of precision and clarity necessary for judicial action.

[1] *Id.*, Vol. I, p. 491.

[2] *Cf.* Applicants' analysis, *infra*, pp. 520-546, of Respondent's interpretation of the compromissory clause in Article 7 of the Mandate, which would likewise and for the same reason, strip Article 22 of the Covenant of its legal significance.

[3] "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." (Article 55 provides, *inter alia*, for promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.")

[4] "The Charter and the Constitution: The Human Rights Provisions in American Law," 4 *Vanderbilt Law Review* 643 (April 1951).

[5] *Id.*, at 655.

"This point requires careful consideration. It is, of course, true that the supremacy clause of the Constitution does not compel a court to enforce a treaty provision which is so incomplete or indefinite that it cannot be applied in a particular case. [1] It must also be granted that the meaning of human rights and fundamental freedoms is in many respects a subject of controversy and that even where a particular right has been generally agreed upon, it is by no means clear just how far a court may go to promote its observance.

"These are certainly important considerations in determining the extent to which the Charter obligation may be deemed self-operative; but it does not follow from them that there are no cases at all in which the courts may give effect to this obligation. There is, in the first place, no ground for assuming that because 'human rights and fundamental freedoms' are broad and elastic concepts, American courts are for that reason unable to apply them in the absence of legislative definition. These concepts, as we have shown above, do have specific content based on the Charter itself and on precedent and practice; the important and recognized rights and freedoms are no vaguer than any number of well-known constitutional and statutory expressions which have been left to the courts to apply. [2] Probably even more pertinent is the fact that the concepts of human rights and fundamental freedoms are closely akin to the basic rights and freedoms which American courts have traditionally been required to define, in varying circumstances, for the purpose of determining the scope of constitutional protection." [3]

Respondent's contention that the obligations of Article 2, paragraph 2, even if of a legal nature, are not appropriate for judicial decision, but should be remitted to "political" bodies, involves a dual fallacy.

In the first place, it erroneously assumes that courts and judges, if not unused to dealing with legal issues, the resolution of which

[1] "Thus, in Foster v. Neilson, 2 Pet. 253, 7 L. Ed. 415 (1829), the court considered that the provision regarding ratification and confirmation of grants of land required a legislative act for full effect. But it is interesting that this construction was later overruled in United States v. Percheman, 7 Pet. 51, 8 L. Ed. 604 (1833), in which it was held that the treaty itself ratified and confirmed the grants by its own force. See also Cameron Septic Co. v. Knoxville, 227 U.S. 39, 33 Sup. Ct. 209, 54 L. Ed. 407 (1913), which held the provisions of a treaty on patent rights to lack the specific terms necessary for judicial enforcement in a case involving individual rights." [Footnote in original.]

[2] "It cannot be said that a greater degree of precision is required in a treaty provision than in an act of Congress." [Footnote in original.]

[3] "The Supreme Court has often been required to decide which fundamental rights are entitled to constitutional protection. For example, see Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 59 Sup. Ct. 232, 83 L. Ed. 208 (1938); Meyer v. Nebraska, 262 U.S. 390, 399, 43 Sup. Ct. 625, 67 L. Ed. 1042 (1923); Buchanan v. Warley, 245 U.S. 60, 38 Sup. Ct. 16, 62 L. Ed. 149 (1917); Truax v. Raich, 239 U.S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131 (1915); Vick Wo v. Hopkins, 118 U.S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220 (1885). In addition, the specific rights and freedoms enumerated in the first ten amendments and in the Fourteenth Amendment, such as freedom of speech, of press, of religious worship, freedom from self-incrimination, equal protection of law, etc., have been mainly the subject of judicial rather than legislative application." [Footnote in original.]

depends largely on economic, political or sociological considerations, at least tend to shy away from the intricacies of such matters. Thus, Respondent asserts that:

> "It is true that a particular provision of a statute in municipal law, or of a treaty in international law, could have the effect of requiring a Court to venture on to one or other of these terrains."[1]

To the contrary, as has been demonstrated, a court, no less than a political body, ventures on to such terrains whenever the judicial duty is engaged to adjudicate upon legal rights and interests of litigants with standing to invoke the competence of the Court.

The second fallacy is that, for reasons unexplained, Respondent appears to assume that it is not as difficult for a political body to deal with a generally stated obligation, or with one based upon economic, social or political considerations, as it is for a court. Human experience, both in respect of national and international parliamentary bodies, belies such an assumption.

Finally, Respondent's contention that the Court should leave to a political body determination of the "social, ethnological, economic and political considerations" [1] underlying Article 2, paragraph 2, of the Mandate would have more weight if Respondent's violation of the obligations stated therein were less patent and pervasive. On the basis of considerations adduced in the *Memorials*, [2] and in this Reply, *supra*, pages 260-475, Respondent's negation of its duty to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory by the systematic application of the policy of *apartheid*, or separate development, is so clear as to obviate any need for technical specialization or political expertise, which otherwise might be called for in a close case or marginal situation.

4. Respondent's fourth proposition (in the series which Applicants have sought to formulate, in aid of a clear Reply to Respondent's legal analysis of Article 2, paragraph 2) is that even if the obligations stated in that Article were deemed to be of a legal nature, and to be justiciable—both of which premises Respondent denies—no legal norms exist for judging the actions which Applicants contend are in violation of the said Article.

It is apparent that the propositions thus formulated are interrelated. Respondent's contention concerning the assertedly "political" nature of the obligations of Article 2, paragraph 2, is based upon the erroneous premise that

> "there are no norms of a legal (as distinct from a political or technical) nature for deciding on merit whether a Mandatory has or has not promoted well-being and progress to the utmost."[3]

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[1] II, p. 391.
[2] Chapter V.
[3] II, p. 394.

Accordingly, in demonstrating that such legal norms do exist and are readily ascertainable, Applicants regard as relevant to their demonstration the considerations adduced above, showing that the obligations stated in Article 2, paragraph 2, are of a legal nature and are justiciable. In this connection, Applicants reiterate their contention that Respondent's purported distinction between "legal" norms, on the one hand, and norms of a "political or technical" nature, on the other, misconceives the true nature of the judicial process. As has been shown, Courts customarily and necessarily draw upon all sources relevant to a just disposition of conflicts of legal rights or interests, and do not shun the judicial duty in the face of technical, political or other complexities.

* * *

Before turning to a demonstration of the existent and ascertainable legal norms governing Respondent's obligations pursuant to Article 2, paragraph 2, of the Mandate, Applicants consider it important to make clear the precise nature of the alleged violation thereof.

As set forth in the *Memorials*,[1] Applicants contend that Respondent's violation of its obligations under the said paragraph 2 of Article 2 consists in a "systematic course of positive action which inhibits the well-being, prevents the social progress and thwarts the development of the overwhelming majority" of the inhabitants of the Territory. In pursuit of such course of action, and as a pervasive feature thereof, Respondent has, by governmental action, installed and maintained the policy and practice of *apartheid*, or separate development. In the language of the *Memorials*:

> "Under *apartheid*, the status, rights, duties, opportunities and burdens of the population are determined and allotted arbitrarily on the basis of race, colour and tribe, in a pattern which ignores the needs and capacities of the groups and individuals affected, and subordinates the interests and rights of the great majority of the people to the preferences of a minority."[1]

The point of departure of an examination of the legal norms relevant to judicial interpretation of Article 2, paragraph 2, of the Mandate may be taken from the contrasting contentions of the Parties to the present Proceedings:

Respondent denies that

> "the policy of separate development runs counter to modern conceptions of human rights, dignities and freedoms, irrespective of race, colour or creed."[2]

Applicants, on the other hand, insist that the allotment, by governmental policy and action, of rights and burdens on the

[1] I, p. 108.
[2] II, p. 467.

basis of membership in a "group," irrespective of individual quality or capacity, is impermissible discrimination, outlawed by legal norms well established in the international community.

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

As is shown below, there has evolved over the years, and now exists, a generally accepted international human rights norm of non-discrimination or non-separation, as defined in the preceding paragraph. Such a norm is evidenced by international undertakings in the form of treaties, conventions and declarations, by judicial decisions, the practice of States and constitutional and statutory provisions by which such a norm is incorporated into the body of laws of States.

The existence and virtually universal acceptance of the norm of non-discrimination or non-separation, as more fully described below, gives a concrete and objective content to Article 2, paragraph 2, of the Mandate.

Such a norm of non-discrimination is, moreover, generally accepted as a *minimum* norm of official policy and practice on the part of a government toward persons subject to its jurisdiction. The obligation stated in Article 2, paragraph 2, of the Mandate is to "promote *to the utmost*" the well-being and social progress of the inhabitants. Failure to apply the *minimum* norm, accordingly, involves, *a fortiori*, failure to comply with the more demanding standard of the Mandate.

The sources which, severally and in their totality, comprise the generally accepted norm, described above, and which impart specific content and objective meaning to Article 2, paragraph 2, of the Mandate are, for purposes of convenience, set out in enumerated sections, as follows:

1. League of Nations Period

As has been pointed out,[1] as a consequence of the exercise by the Permanent Mandates Commission of its function of supervision, there evolved over the nineteen-year period of its existence, a substantive content in respect of the generally formulated obligation stated in Article 2, paragraph 2, of the Mandate. Such a content was developed through continuous application of general

[1] *Supra*, p. 251.

criteria or norms to specific situations involving Respondent's policies and practices, as well as those of other Mandatories.

In view of the manner in which such a content evolved, consideration thereof in this Reply is given in the context of analysis of Respondent's measures of implementation of its obligations toward the inhabitants of the Territory. [1]

As evidenced by the standards which guided the Commission in its work, Mandates were regarded, first and foremost, as what would be described, in the universally accepted current terminology, as "human rights documents."

Although numerous examples could be given from the Commission's proceedings, several typical illustrations may suffice.

Thus, upon request of the Council of the League of Nations, the Commission formulated certain "General Conditions which must be fulfilled before the Mandate Regime can be brought to an end in Respect of a Country placed under that Regime." The report by the Commission, which was endorsed by the Council, prescribed, *inter alia*, that:

> "1. The mandated territory 'must possess laws and a judicial organization which will afford *equal and regular justice to all.*'
> "2. 'The new State should ensure and guarantee the effective protection of racial, linguistic and religious minorities.'"[2]

A noteworthy statement was made to the Commission by the Right Honourable Malcolm MacDonald, then United Kingdom Secretary of State for Colonies, the following excerpt from which is of particular relevance here:

> ". . . [T]he well-being to which paragraph 1 of Article 22 of the Covenant referred did not simply mean material and physical well-being, it meant the physical, mental and moral well-being of the people, and, above all, Mr. MacDonald would have thought, the latter. The mandate system was very much concerned with the moral well-being of all peoples. Surely that term meant that *these peoples should be regarded as having an equal moral status with any other people in the world*, and that *they had certain fundamental rights as human beings and as a people*. They were equal with the other peoples who came under the mandates system in their possession of certain fundamental rights, and *the whole purpose of the mandates system was that those fundamental rights should not be interfered with in the stresses* of the modern world, that they should not be injured or destroyed by forces which were materially or physically more powerful than they were."[3]

Concern was often expressed in respect of Respondent's policies or actions involving discrimination or separation on the basis of membership in a race or group.

[1] See Chapter IV, *supra*.
[2] P.M.C. Min., 36th Sess., p. 279. (Italics added.)
[3] P.M.C. Min, 36th Sess., p. 125. (Italics added.)

Thus, during one of the earliest Sessions of the Commission, one of the Members observed that:

> "from the general spirit of the report [Respondent's annual report], it might be inferred that there was a tendency ... to effect a complete separation between the two races."

"The Chairman agreed with these observations." [1]

During the same Session,

> "The Chairman [the Marquis Theodoli] enquired what were the motives and what were the advantages and disadvantages of this separation of the two races. Was it in the interests of the native or of the white population that this segregation was imposed?"

Following Respondent's reply,

> "The Chairman enquired whether *this system* could be reconciled with the spirit of the mandate and the civilising mission with which the Mandatory was entrusted."[2]

In more specific contexts, the Commission frequently made inquiries or commented critically concerning such rights, *inter alia*, as participation in processes of government; [3] freedom of movement and security of the person; [4] discriminatory and repressive labour legislation; [5] and rights of land tenure. [6]

The standards developed and applied by the Pernament Mandates Commission with respect to non-discrimination or non-separation were entirely consistent and, indeed, identical with those which were proclaimed or prescribed in other international contexts as well.

Thus, the several Minorities Treaties which entered into force following the First World War had features in common insofar as concerns the development of an international norm of non-discrimination. These were, in summary, the general protection of fundamental rights, such as life and liberty without distinction as to race; equality of treatment before the law; equal enjoyment of political and civil rights; and a rule preventing the States concerned from barring persons from admission to public employment or functions, or the exercise of professions because of race. [7] An example of protective clauses is the Albanian agreement of 2 October 1921, in force from 17 February 1922:

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[1] P.M.C. Min., 3rd Sess., p. 61.
[2] *Id.*, pp. 104-05. (Italics added.)
[3] P.M.C. Min., 26th Sess., p. 52; P.M.C. Min., 36th Sess., p. 18.
[4] P.M.C. Min., 4th Sess., p. 64; *id.*, p. 79.
[5] P.M.C. Min., 14th Sess., p. 104; P.M.C. Min., 15th Sess., pp. 121-22.
[6] P.M.C. Min., 5th Sess., p. 178.
[7] For the texts of the minorities provisions, see L. of N. Doc. C.L. 110. 1927. I. Annex, in *League of Nations Pub.* I.B. minorities (1920-33).

ARTICLE 2

"Full and complete protection of life and liberty will be assured to all inhabitants of Albania, without distinction of birth, nationality, language, race or religion. . . .

ARTICLE 4

"All Albanian nationals shall be equal before the law, and shall enjoy the same civil and political rights without distinction as to race, language or religion. . . .

ARTICLE 5

"Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. . . .

ARTICLE 6

". . . In towns and districts where there is a considerable proportion of Albanian nationals belonging to racial, religious or linguistic minorities, these minorities will be assured an equitable share in the enjoyment and application of sums which may be provided out of public funds under the State, municipal or other budgets, for educational, religious or charitable purposes."[1]

The League of Nations acted as the guarantor of the rights established by the Minorities Treaties.

Beyond the League system for the protection of minorities, the norm of non-discrimination was given further impetus by private bodies of noted juridical or political standing. Thus in 1929, the Institut de Droit International adopted a Declaration of International Rights of Man, which included the following provisions:

ARTICLE I

"It is the duty of every State to recognize the equal right of every individual to life, liberty and property, and to accord to all within its territory the full and entire protection of this right, without distinction as to nationality, sex, race, language, or religion. . . .

ARTICLE IV

"No motive based, directly or indirectly, on distinctions of sex, race, language, or religion empowers States to refuse to any of their nationals private and public rights, especially admission to establishments of public instruction, and the exercise of the different economic activities and of professions and industries.

ARTICLE V

"The equality herein contemplated is not to be nominal, but effective. It excludes all discrimination, direct or indirect."[2]

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[1] L. of N. Doc. C.L. 110. 1927. I. Annex, in *League of Nations Pub.*, I.B. minorities (1920-33), pp. 4-5.

[2] *Annuaire de l'Institut de Droit International*, Vol. II, at 298-99 (1929), translated in 35 *American Journal of International Law* 664 (1941).

The significance of the Declaration was evaluated by Philip Marshal Brown, shortly after its adoption, as follows:

> "Such a revolutionary document, while open to criticism in terminology and to the objection that it has no juridical value, cannot fail, however, to exert an influence on the evolution of international law. It marks a new era which is more concerned with the interests and rights of sovereign individuals than with the rights of sovereign states. . . . "[1]

In 1936, the Declaration on the Foundations and Leading Principles of Modern International Law was approved by the International Law Association, the Académie Diplomatique Internationale, and the Union Juridique Internationale. Article 28 of the Declaration provides:

> "Every State shall afford to every individual in its territory full and complete protection of the right to life, freedom and property, without any discrimination based on nationality, sex, race, language, or religion."[2]

In 1944, the Commission To Study the Organization of Peace, in a report dealing with the international safeguard of human rights, recommended, *inter alia*, the establishment of a United Nations Commission on Human Rights, one of whose primary functions "would be to seek avoidance of discrimination based on fortuitous factors like race, religion, language, sex, or country of national origin."[3]

Although of insubstantial juridical value, these early forerunners of the norm of official non-discrimination on the basis of group or race foreshadowed the generally accepted norm which attended the establishment of the United Nations.

2. The United Nations Charter

One of the most significant of sources for the norm of non-discrimination is the Charter of the United Nations. The Preamble of the Charter stipulates that one goal of the United Nations is "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."

Article 1 (3) of the Charter provides that among the purposes and principles of the United Nations is that of

> "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . ."

Article 13(b) states, *inter alia*, that the General Assembly shall initiate studies and make recommendations for the purpose of

[1] Editorial Comment, 24 *American Journal of International Law* 126, 127 (1930)
[2] 39 International Law Association, Conference Rep. 338 (1936).
[3] Fourth Report, Part III, p. 19 (1944).

> "assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Article 55(c) enumerates as one of the tasks of the Organization the promotion of

> "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Article 56 provides that "all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."

Article 62(2) gives the Economic and Social Council the power to "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all."

Article 76(c) states that one of the basic objectives of the Trusteeship System is

> "to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. . . ."

All of these provisions taken together make manifest the concern of the international community for the protection of basic human rights; the most fundamental norm—non-discrimination—is repeated no less than four times. Thus, even though the Charter does not make explicit the human rights and fundamental freedoms of which it speaks, it does make clear that, irrespective of the right in question, a fundamental norm lies at its base: official non-discrimination on the basis of membership in a group or race.

The legal obligation of Member States not to discriminate or distinguish on the basis of membership in a group or race (whatever specific human right or freedom may be involved) is set out in Article 56 of the Charter. [1]

The legally binding character of the human rights provisions of the Charter is confirmed by the highest scholarly authority, as the following citations demonstrate: Judge Jean Spiropoulos (when a Delegate to the United Nations):

> "As the obligation to respect human rights was placed upon Member States by the Charter, it followed that any violation of human rights was a violation of the provisions of the Charter." [2]

Judge Philip C. Jessup:

> "Since this book is written *de lege ferenda*, the attempt is made throughout to distinguish between the existing law and the future goals of the law. It is already the law, at least for Members of the

[1] See Schachter, *op. cit. supra* p. 489, footnote 4, at 646-59.
[2] G.A.O.R. 3rd Sess., 6th Comm., 138th mtg., 7 December 1948, p. 765.

United Nations, that respect for human dignity and fundamental human rights is obligatory. The duty is imposed by the Charter, a treaty to which they are parties."[1]

Quincy Wright:

"Article 56 of the Charter in form imposes obligations upon the Members of the United Nations. The word 'pledge' implies obligation and the reference to 'separate' action as distinct from 'joint' action indicates that the Members are individually bound to act 'for the achievement' of 'universal respect for, and the observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. . . .'

"[C]ommon sense suggests that 'separate action in cooperation with the organization' implies, as a minimum, abstention from separate action, such as enforcement of racially discriminating land laws, which would oppose the purpose of the organization. . . . It is reasonable to infer from the phrase 'in cooperation with the organization' that the Members, in fulfilling their pledge to take 'separate action,' shall be guided by the purposes stated in the Charter and by the more detailed interpretation of the meaning of those purposes and the appropriate methods for keeping them, which organs of the United Nations have recommended." [2]

Paul Guggenheim:

"Différentes dispositions admettent explicitement que les Etats *sont obligés d'accorder* aux individus qui dépendent d'eux les droits fondamentaux. Un engagement formel de ce genre se trouve par exemple à l'art. 55, litt. c, de la Charte. . . . Cette obligation n'est pas annulée, bien que sa valeur en soit certainement diminuée, par le fait qu'elle ne contient pas de définition précise de ce qu'il faut entendre par 'droits de l'homme' et n'établit pas le catalogue des droits à protéger." [3]

C. Wilfred Jenks (quoting the human rights provisions of the Charter):

"The principle of non-discrimination has been internationally recognized in the most solemn form." [4]

James Brierly (in a discussion of the legal effect of the human rights clauses of the Charter:

"[S]ome even argue that the Charter clauses only contain a pious injunction to co-operate in promoting respect for human rights and do not impose any legal obligation on members with regard to their own nationals. The latter argument seems in any event to go too far, since a pledge to co-operate in promoting at least implies a negative obligation not so to act as to undermine human rights; for this

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[1] *A Modern Law of Nations* 91 (1948).

[2] *"National Courts and Human Rights—the Fujii Case,"* 45 *American Journal of International Law* 62, 70, 72 (1951).

[3] I *Traité de Droit international public* 301-02 (1954). (Italics added.)

[4] *Human Rights and International Labour Standards* 74 (1960). (Italics added.)

reason *South Africa's racial segregation policies appear to be out of harmony* with her obligations under the Charter." [1]

The statements quoted above concerning the legal nature of the human rights clauses of the Charter and the norm of non-discrimination in the Charter are not exhaustive. [2]

There is also a body of case law which upholds the proposition that the human rights provisions of the Charter contain legally binding commitments prohibiting Member States from discriminating or distinguishing on the basis of race.

In *Oyama* v. *California*, 332 U.S. 633 (1948), a case dealing with the Alien Land Law of California, Mr. Justice Black, joined by Mr. Justice Douglas, said in a concurring opinion:

> "There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperation with the United Nations to 'promote . . . universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language, or religion.' How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?" [3]

A decision of lesser authority is that of *Fujii* v. *California*, [4] decided by the District Court of Appeals of California. This case also concerns the Alien Land Law of California. The Court quoted from Articles 1, 2, 55 and 56 of the United Nations Charter, saying:

> "A perusal of the Charter renders it manifest that restrictions contained in the Alien Land Law are in direct conflict with the plain terms of the Charter above quoted and with the purposes announced therein by its framers. It is incompatible with Article 17 of the Declaration of Human Rights which proclaims the right of everyone to own property.
>
> "Clearly such a discrimination against a people of one race is contrary both to the letter and to the spirit of the Charter which, as a treaty, is paramount to every law of every state in conflict with it. The Alien Land Law must therefore yield to the treaty as the superior authority. The restrictions of the statute based on eligibility to citizenship, but which ultimately and actually are referable to race or color, must be and are therefore declared untenable and unenforceable." [5]

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[1] *The Law of Nations* 293 (6th ed. 1963). (Italics added.)

[2] See, *e.g.*, statements made before the International Law Commission in 1949 by Judge Roberto Cordova, Judge Vladimir Koretsky, Georges Scelle, and Judge Ricardo Alfaro, [1949] *Yearbook of the International Law Commission* 148, 169-70. See also the discussion by Lauterpacht in *International Law and Human Rights* 147-48 (1950).

[3] *Id.* at 649-50.

[4] 217 P.2d 481, *rehearing denied*, 218 P.2d 595 (1950), *vacated*, 38 Cal. 2d 718, 242 P.2d 617 (1952) (reversing trial court on different grounds).

[5] *Id.* at 488.

It should be noted that in each of the above-cited cases, racial or religious discrimination is regarded as a violation of, *inter alia*, the human rights provisions of the Charter. The issue in the above cases is not so much the bare denial of a right or privilege, as it is the discriminatory denial of a right or privilege. The explicit or implicit assumption that such conduct is incompatible with the Charter, even though the human rights and fundamental freedoms referred to are not explicitly spelled out therein, confirms that a legal norm of official non-discrimination is to be found in the Charter of the United Nations.

3. The Universal Declaration of Human Rights

Further evidence for the proposition that official non-discrimination has become a generally accepted international human rights norm is the Universal Declaration of Human Rights, adopted by the General Assembly in 1948. Article 2 of the Declaration states:

> "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. . . ." [1]

4. Draft Declaration on Rights and Duties of States

The Declaration, which was intended to supplement the statement of Principles in Article 2 of the United Nations Charter, was adopted by the International Law Commission in 1949 by 11 votes to 2.

Article 6 of the Draft Declaration provides:

> "Every State has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language, or religion." [2]

5. Trust Territories Agreements

Each of the eleven Trust Territories Agreements contains a provision which contributes to the universal acceptance of the norm of official non-discrimination, or non-separation on the basis of membership in a group or race. The various provisions are all worded with reference to Article 76(c) of the United Nations Charter. [3] The general tenor of each of the provisions is a commitment to administer the Territory in such a manner as to achieve the

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[1] G.A.O.R. 3rd Sess., Resolutions, at 71 (A/810).
[2] G.A.O.R. 4th Sess., Rep. of the Int'l Law Comm'n, Supp. No. 10, at 8 (A/925).
[3] See G.A.O.R. 1st Sess., Part 2, Supp. No. 5.

objectives of the Trusteeship System as set out in Article 76 of the Charter.

The prohibition against racial discrimination was expressed most clearly in the Agreement for the Territory of Somaliland under Italian Administration. After reference to the Trusteeship articles of the Charter, Article 3(3) of the Agreement provides that the Administering Authority shall "promote the social advancement of the inhabitants, and to this end shall protect the rights and fundamental freedoms of all elements of the population without discrimination." [1]

Article 20 of the Agreement states that:

> "The Administering Authority shall guarantee to the inhabitants of the Territory complete freedom of speech, of the Press, of assembly and of petition, without distinction as to race, sex, language, political opinion or religion, subject only to the requirements of public order." [2]

Finally, Article 8 of the annexed Declaration of Constitutional Principles provides that:

> "The Administering Authority, in accordance with the principles laid down in its own Constitution and legislation, shall guarantee to all inhabitants of the Territory human rights and fundamental freedoms and full equality before the law without distinction as to race, sex, language, political opinion or religion." [3]

6. Resolutions of the General Assembly

Since the founding of the United Nations, there have been more than thirty resolutions of the General Assembly specifically condemning racial discrimination or segregation, whether in South Africa itself, South West Africa, or generally in Non-Self-Governing Territories. [4]

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[1] G.A.O.R. 5th Sess., Supp. No. 10 at 6 (A/1294).

[2] *Id.* at 8.

[3] *Id.* at 10.

[4] See General Assembly Resolutions: 103 (I), 19 November 1946, G.A.O.R. 1st Sess., Resolutions at 200 (A/64); 328 (IV), 2 December 1949, G.A.O.R. 4th Sess., Resolutions at 41 (A/1251); 395 (V), 2 December 1950, G.A.O.R. 5th Sess., Supp. No. 20 at 24 (A/1775); 511 (VI), 12 January 1952, G.A.O.R. 6th Sess., Supp. No. 20 at 19 (A/2119); 616 (VII), 5 December 1952, G.A.O.R. 7th Sess., Supp. No. 20 at 8 (A/2361); 644 (VII), 10 December 1952, G.A.O.R. 7th Sess., Supp. No. 20 at 32 (A/2361); 721 (VIII), 8 December 1953, G.A.O.R. 8th Sess., Supp. No. 17 at 6 (A/2630); 820 (IX), 14 December 1954, G.A.O.R. 9th Sess., Supp. No. 21 at 9 (A/2890); 917 (X), 6 December 1955, G.A.O.R. 10th Sess., Supp. No. 19 at 8 (A/3116); 1016 (XI), 30 January 1957, G.A.O.R. 11th Sess., Supp. No. 17 at 5 (A/3572); 1178 (XII), 26 November 1957, G.A.O.R. 12th Sess., Supp. No. 18 at 7 (A/3805); 1248 (XIII), 30 October 1958, G.A.O.R. 13th Sess., Supp. No. 18 at 7 (A/4090); 1328 (XIII), 12 December 1958, G.A.O.R. 13th Sess., Supp, No. 18 at 35 (A/4090); 1360 (XIV), 17 November 1959, G.A.O.R. 14th Sess.. Supp. No. 16 at 28 (A/4354); 1375 (XIV), 17 November 1959, G.A.O.R. 14th Sess., Supp. No. 16 at 7 (A/4354); 1464 (XIV), 12 December 1959, G.A.O.R. 14th Sess., Supp. No. 16 at 35 (A/4354); 1536 (XV), 15 December 1960, G.A.O.R. 15th Sess.,

Almost all the resolutions state explicitly that racial discrimination, or the policy of *apartheid*, are in violation of the Charter of the United Nations, and most of the resolutions concerned specifically with South West Africa state that such policies of racial segregation or *apartheid* are also in violation of the Mandate agreement.

Although resolutions of the General Assembly are not in themselves legally binding on Members of the United Nations, the repeated and strongly worded judgments by the General Assembly that racial discrimination, separation, or *apartheid* are in violation of the Charter, and in the case of South West Africa, also in violation of the Mandate, are significant evidence of the general acceptance of a legal norm of non-discrimination or separation on the basis of race.

7. Resolutions of the Security Council

The Security Council has also, on three occasions, stated its view that the general policy of *apartheid* is a violation of the Charter of the United Nations. [1]

The following excerpts provide clear statements of the Security Council's view, within the context of South Africa itself, of Respondent's policies of *apartheid*:

(a) "*The Security Council* ...

> "*Strongly deprecates* the policies of South Africa in its perpetuation of racial discrimination as being inconsistent with the principles contained in the Charter of the United Nations and contrary to its obligations as a Member State of the United Nations;
>
> "*Calls upon* the Government of South Africa to abandon the policies of apartheid and discrimination. . . ." [2]

(b) "*The Security Council* ...

> "*Strongly deprecating* the policies of the Government of South

Supp. No. 16 at 27 (A/4684); 1565 (XV), 18 December 1960, G.A.O.R. 15th Sess., Supp. No. 16 at 31 (A/4684); 1567 (XV), 18 December 1960, G.A.O.R. 15th Sess., Supp. No. 16 at 32 (A/4684); 1568 (XV), 18 December 1960, G.A.O.R. 15th Sess., Supp. No. 16 at 33 (A/4684); 1596 (XV), 7 April 1961, G.A.O.R. 15th Sess., Supp. No. 16 A at 7 (A/4684/Add. 1); 1598 (XV), 13 April 1961, G.A.O.R. 15th Sess., Supp. No. 16A at 5 (A/4686/Add. 1); 1663 (XVI), 28 November 1961, G.A.O.R. 16th Sess., Supp. No. 17 at 10 (A/5100); 1698 (XVI), 19 December 1961, G.A.O.R. 16th Sess., Supp. No. 17 at 37 (A/5100); 1702 (XVI), 19 December 1961, G.A.O.R. 16th Sess., Supp. No. 17 at 39 (A/5100); 1761 (XVII), 6 November 1962, G.A.O.R. 17th Sess., Supp. No. 17 at 9 (A/5217); 1779 (XVII), 7 December 1962, G.A.O.R. 17th Sess., Supp. No. 17 at 32 (A/5217); 1780 (XVII), 7 December 1962, G.A.O.R. 17th Sess., Supp. No. 17 at 32 (A/5217); 1805 (XVII), 14 December 1962, G.A.O.R. 17th Sess., Supp. No. 17 at 38 (A/5217); 1850 (XVII), 19 December 1962, G.A.O.R. 17th Sess., Supp. No. 17 at 43 (A/5217); 1899 (XVIII), 13 November 1963, G.A.O.R. 18th Sess., Supp. No. 15 at 46 (A/5515); 1904 (XVIII), 20 November 1963, G.A.O.R. 18th Sess., Supp. No. 15 at 35 (A/5515); 1979 (XVIII), 17 December 1963, G.A.O.R. 18th Sess., Supp. No. 15 at 51 (A/5515).

[1] S.C. Res., 1 April 1960 (S/4300); S.C. Res., 7 August 1963 (S./5386); S.C. Res., 4 December 1963 (S/5471).

[2] S.C. Res. 7 August 1963 (S/5386).

Africa in its perpetuation of racial discrimination as being inconsistent with the principles contained in the Charter of the United Nations and with its obligations as a Member State of the United Nations,

"*Recognizing* the need to eliminate discrimination in regard to basic human rights and fundamental freedoms for all individuals within the territory of the Republic of South Africa without distinction as to race, sex, language or religion,

"*Expressing the firm conviction* that the policies of *apartheid* and racial discrimination as practised by the Government of the Republic of South Africa are abhorrent to the conscience of mankind and that therefore a positive alternative to these policies must be found through peaceful means . . .

"*Urgently requests* the Government of the Republic of South Africa to cease forthwith its continued imposition of discriminatory and repressive measures which are contrary to the principles and purposes of the Charter and which are in violation of its obligations as a Member of the United Nations and of the provisions of the Universal Declaration of Human Rights. . . ."[1]

8. Human Rights Covenants

The several articles of the Draft Covenant on Civil and Political Rights, and of the Draft Covenant on Economic, Social and Cultural Rights, have been the subject of discussion in the Third Committee of the General Assembly for many years, beginning in 1954. The Draft Covenants as a whole, intended to constitute legally binding obligations, will not be considered by the Assembly itself until all the articles have been adopted by the Committee. Nevertheless the Committee has already, by overwhelming majorities, approved articles of the Draft Covenants which preclude the application of the policy of *apartheid*.

Thus, paragraph 1 of Article 2 of the Draft Covenant on Civil and Political Rights provides:

"Each State Party hereto undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in this Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[2]

The overriding weight attached to the norm of non-discrimination may be seen from the wording of paragraph 1 of Article 4 of the same Covenant:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties hereto may take measures derogating from their obligations under this Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent

[1] S.C. Res., 4 December 1963 (S/5471).

[2] Adopted by the Third Committee of the General Assembly at its 1259th meeting, 11 November 1963, by a vote of 87-0-2. Text in Report of 3rd Comm. (A/5655, Annex).

with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."[1]

Article 24 of the Draft Covenant on Civil and Political Rights reads:

"All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[2]

Finally, Article 2, paragraph 2, of the Draft Covenant on Economic, Social and Cultural Rights provides:

"The States Parties hereto undertake to guarantee that the rights enunciated in this Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[3]

9. United Nations Declaration on the Elimination of All Forms of Racial Discrimination

On 20 November 1963, the Eighteenth Session of the General Assembly unanimously adopted (Respondent taking no part) the Declaration on the Elimination of All Forms of Racial Discrimination.[4] The Declaration makes it clear that racial distinctions, be they called racial discrimination, segregation, separate development, or *apartheid*, are unacceptable.[5]

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[1] Adopted unanimously by the Third Committee at its 1262nd meeting, 13 November 1963. (*Ibid.*)

[2] Adopted by the Third Committee at its 1102nd meeting, 13 November 1961, by a vote of 72-0-5. Text in Report of Third Comm. (A/5000, para. 98 and Annex).

[3] Adopted by the Third Committee at its 1206th meeting, 10 December 1962, by a vote of 86-0-5. Text in Report of Third Comm. (A/5365, Annex).

[4] G.A. Res. 1904 (XVIII), 20 November 1963, G.A.O.R. 18th Sess., Supp. No. 15 at 35 (A/5515).

[5] The first seven operative articles of the Declaration are particularly relevant to the case at bar:

Article 1

"Discrimination between human beings on the ground of race, colour or ethnic origin is an offence to human dignity and shall be condemned as a denial of the principles of the Charter of the United Nations, as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, as an obstacle to friendly and peaceful relations among nations and as a fact capable of disturbing peace and security among peoples.

Article 2

"1. No State, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on the grounds of race, colour or ethnic origin.

Of particular relevance, insofar as Respondent's policies in South West Africa are concerned, is Article 2 (3). This provision specifically prohibits the use of special measures of development as a justification for allotting rights and burdens on the basis of membership in racial groups. This is reinforced by Article 5, which bans racial discrimination, segregation, separation and *apartheid*.

Although the Declaration on the Elimination of All Forms of Racial Discrimination does not in itself have legally binding force, its importance is nonetheless great, as a solemn instrument attesting

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"2. No State shall encourage, advocate or lend its support, through police action or otherwise, to any discrimination based on race, colour or ethnic origin by any group, institution or individual.

"3. Special concrete measures shall be taken in appropriate circumstances in order to secure adequate development or protection of individuals belonging to certain racial groups with the object of ensuring the full enjoyment by such individuals of human rights and fundamental freedoms. These measures shall in no circumstances have as a consequence the maintenance of unequal or separate rights for different racial groups.

Article 3

"1. Particular efforts shall be made to prevent discrimination based on race, colour or ethnic origin, especially in the fields of civil rights, access to citizenship, education, religion, employment, occupation and housing.

"2. Everyone shall have equal access to any place or facility intended for use by the general public, without distinction as to race, colour or ethnic origin.

Article 4

"All States shall take effective measures to revise governmental and other public policies and to rescind laws and regulations which have the effect of creating and perpetuating racial discrimination wherever it still exists. They should pass legislation for prohibiting such discrimination and should take all appropriate measures to combat those prejudices which lead to racial discrimination.

Article 5

"An end shall be put without delay to governmental and other public policies of racial segregation and especially policies of *apartheid*, as well as all forms of racial discrimination and separation resulting from such policies.

Article 6

"No discrimination by reason of race, colour or ethnic origin shall be admitted in the enjoyment by any person of political and citizenship rights in his country, in particular the right to participate in elections through universal and equal suffrage and to take part in the government. Everyone has the right of equal access to public service in his country.

Article 7

"1. Everyone has the right to equality before the law and to equal justice under the law. Everyone, without distinction as to race, colour or ethnic origin, has the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution.

"2. Everyone shall have the right to an effective remedy and protection against any discrimination he may suffer on the ground of race, colour or ethnic origin with respect to his fundamental rights and freedoms through independent national tribunals competent to deal with such matters. . . ."

to the general acceptance of the norm of non-discrimination in the international community.

10. International Convention on the Elimination of All Forms of Racial Discrimination

In Resolution 1906 (XVIII) of 20 November 1963, the General Assembly requested the United Nations Commission on Human Rights to give "absolute priority" to the preparation of a draft international convention on the elimination of all forms of racial discrimination. A draft [1] was adopted by the Human Rights Commission at its twentieth session, ending in March of 1964, and a request was made to the Economic and Social Council to transmit the draft to the General Assembly for consideration at its nineteenth session beginning in the autumn of 1964. [2]

[1] U.N. Doc. E/CN.4/L.109/Add.5 (16 March 1964).

[2] The general provisions of the Draft Convention most relevant, in terms of Respondent's policies in South West Africa, are as follows:

"*The States Parties to this Convention,*

"*Considering* that the Charter of the United Nations is based on the principle of the dignity and equality inherent in all human beings, and that all States Members have pledged themselves to take joint and separate action in co-operation with the Organization for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

"*Considering* that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin. . .

"*Concerned* by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of *apartheid*, segregation or separation. . .

"*Have agreed* as follows:

Article I

"1. In this Convention the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, [national] or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. [In this paragraph the expression 'national origin' does not cover the status of any persons as a citizen of a given State.]

"2. Special measures taken for the sole purpose of securing adequate development or protection of certain under-developed racial groups or individuals belonging to them in order to ensure to such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article II

"1. States Parties to the present Convention condemn racial discrimination

As with the equivalent articles of the Declaration on racial discrimination, special emphasis should be placed on Articles I (2) and III of the Draft Convention. They make clear the Human Rights Commission's view that Respondent's policy of separate development, or *apartheid*, is not acceptable to the world community.

II. International Labour Organisation Constitution and Conventions

The principle of equality of opportunity and treatment was formulated as follows in the Declaration of Philadelphia, adopted by the International Labour Conference in 1944, and incorporated into the I.L.O. Constitution:

> ". . . 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. . . ." [1]

According to the International Labour Office, "this principle, which, from the very beginning, has constituted one of the bases for all the standard-setting activities of the International Labour Conference, has been enunciated in greater detail in the Convention and Recommendation concerning discrimination in respect of employment and occupation, adopted by the Conference in 1958." [2] The Convention is an attempt to achieve the elimination of "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation" (Article 1 (1)). Article 2 of the Convention provides:

> "Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof." [3]

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and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms. . . .

Article III

"States Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate, in territories subject to their jurisdiction, all practices of this nature."

[1] I.L.O. Const., Annex, art. II, para. 6, 15 *United Nations Treaty Series* 36, 106 (1948), incorporating Declaration Concerning the Aims and Purposes of the I.L.O., International Labour Conference, 26th Sess., *Record of Proceedings* 621, 622 (1944).

[2] U.N. Doc. No. A/AC.115/L.29, 10 September 1963.

[3] Convention Concerning Discrimination in Respect of Employment and Occupation (Convention No. 111), in International Labour Conf., 42nd Sess., *Record of Proceedings* 834 (1958).

The Convention concerning Social Policy in Non-Metropolitan Territories of 1947 provides that:

> "It shall be an aim of policy to abolish all discrimination among workers on grounds of race, colour, sex, belief, tribal association or trade union affiliation in respect of:
>
> "(a) labour legislation and agreements which shall afford equitable economic treatment to all those lawfully resident or working in the territory;
>
> "(b) admission to public or private employment;
>
> "(c) conditions of engagement and promotion;
>
> "(d) opportunities for vocational training;
>
> "(e) conditions of work;
>
> "(f) health, safety and welfare measures;
>
> "(g) discipline;
>
> "(h) participation in the negotiation of collective agreements;
>
> "(i) wage rates, which shall be fixed according to the principle of equal pay for work of equal value in the same operation and undertaking to the extent to which recognition of this principle is accorded in the metropolitan territory." [1]

12. Regional Treaties and Declarations

(A) *The European Convention for the Protection of Human Rights and Fundamental Freedoms*

The Convention, signed at Rome on 4 November 1950 and entered into force on 3 September 1953, is evidence of European practice with regard to the norm of non-discrimination. Article 14 of the Convention provides:

> "The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinions, national or social origin, association with any national minority, property, birth or other status." [2]

The rights protected by the European Convention do not mark an advance beyond the rights already enjoyed by citizens of each of the parties. Thus it has been said that "the rights and freedoms provided for in the Convention consist of the lowest common denominator of those guaranteed in practically each of these countries." [3] This is further evidence that the norm of non-discrimination is a basic and fundamental right which is comprised within a legal commitment to "promote to the utmost" the welfare of the inhabitants of a mandated territory.

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[1] Art. 18(1), I.L.O. Convention No. 82, 218 *United Nations Treaty Series* 346, 358 (1955).

[2] 213 *United Nations Treaty Series* 222, 232 (1953).

[3] Ganji, *International Protection of Human Rights* 271 (1962).

(B) *Charter of the Organization of American States*

The Charter, which was signed at Bogotá on 30 April 1948 and entered into force on 13 December 1951, contains two articles which confirm the general acceptance of the norm of non-discrimination. Chapter II of the Charter is entitled "Principles", and contains only Article 5:

"The American States reaffirm the following principles . . .

"j) The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex . . . ."

Article 29 of the Charter, which is in Chapter VII ("Social Standards") contains the following provision:

"The Member States agree upon the desirability of developing their social legislation on the following bases:

"a) All human beings, without distinction as to race, nationality, sex, creed or social condition, have the right to attain material well-being and spiritual growth under circumstances of liberty, dignity, equality of opportunity, and economic security . . . ." [1]

(C) *American Declaration of the Rights and Duties of Man*

The Declaration, which is the Final Act of the Ninth International Conference of American States (1948), provides in Article II:

"All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." [2]

(D) *Draft Declaration of the International Rights and Duties of Man*

Prepared by the Inter-American Juridical Committee, this Draft Declaration of 31 December 1945 provides, *inter alia*, in Article XVIII that:

"All persons shall be equal before the law in respect to the enjoyment of their fundamental rights. There shall be no privileged classes of any kind whatsoever." [3]

CONCLUSION

Applicants submit that the general acceptance of the norm of non-discrimination on the basis of membership in a group or race is of decisive relevance to the Cases at bar.

Whether or not the norm of non-discrimination or separation on the basis of race has become a rule of customary international law, it is submitted that as a generally accepted legal norm, non-

[1] 119 *United Nations Treaty Series* 3, 52-53, 60-62 (1952).
[2] 43 *American Journal of International Law* Supplement 133, 134 (1949).
[3] 40 *American Journal of International Law* Supplement 93, 99 (1946).

discrimination imparts a specific and objective content to Article 2, paragraph 2, of the Mandate.

First, it would seem clear that non-discrimination on the basis of race is generally considered to be a basic, fundamental, and *minimum* right. Thus, for example, Lauterpacht has written that "the claim to equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all other liberties." [1]

The International Commission of Jurists, in a Report published in 1960, stated that the policy of *apartheid* is "contrary to generally accepted concepts of justice and principles of human rights." [2]

Given the basic and fundamental nature of the norm of non-discrimination on the basis of group or race, it would seem evident that the violation of this rule by Respondent is *ipso facto* a violation of Article 2, paragraph 2, of the Mandate agreement. To fall short of a basic *minimum* standard is *a fortiori* to fall short of the more demanding standard and obligation to "promote to the utmost" the welfare of the inhabitants of South West Africa.

That the policy of *apartheid* is contrary to the terms of the Mandate has been stated repeatedly by the General Assembly of the United Nations. [3]

The International Commission of Jurists expressed its support of this determination, adding that Article 2, paragraph 2, of the Mandate was limited by the "explicit requirement" that the Mandatory "shall promote to the utmost the material and moral well-being and social progress of the inhabitants" of South West Africa, and that

> ". . . When full consideration is given to the nature and extent of the legislation pertaining to *apartheid*, which we have reviewed above, the impossibility of reconciling the application of these laws with the latter requirement becomes manifestly apparent." [4]

Applicants accordingly submit that, by undertaking a legal commitment to promote the welfare of the inhabitants of South West Africa "to the utmost," Respondent has obligated itself, at the very least, to carry out in the Mandated Territory the generally recognized minimum basic norm of non-discrimination on the basis of membership in a group or race.

It is undoubtedly true that the content of international legal norms regulating human rights and fundamental freedoms is in many respects still in a state of evolvement. Nevertheless, certain minimal aspects are clear; under any conception of current standards, a policy so extreme in its discriminatory and repressive

[1] Lauterpacht, *An International Bill of the Rights of Man* 115 (1945).

[2] *South Africa and the Rule of Law* 91 (1960).

[3] See, *e.g.*, G.A. Res. 1567 (XV) of 18 Dec. 1960, G.A.O.R. 15th Sess., Supp. No. 16 at 32-33 (A/4684).

[4] *South Africa and the Rule of Law* 88 (1960).

character as *apartheid*, must be found to violate even the most minimal standards universally accepted (except by Respondent) as governing the relations between a State and its subjects.

* * *

5. Attention is now turned to the fifth in the series of Respondent's propositions, which Applicants have formulated in their own terms in an endeavour to present to the Court a clear and responsive reply to Respondent's arguments, as understood by Applicants.

The proposition in question, which arises by implication rather than explicitly, embodies Respondent's apparent contention that if legal norms existed for judging Respondent's obligations under Article 2, paragraph 2, of the Mandate, they would be those governing at the time the Mandate was entrusted to Respondent. [1]

In the light of the nature and purposes of the Mandate institution, analyzed above, [2] as well as the explicit language of the Article in question, the untenability of such a proposition appears to be self-evident.

The relevance of the evolving practice and views of States, growth of experience and increasing knowledge in the political and social sciences, to the determination of obligations bearing the nature and purpose of the Mandate in general, and Article 2, paragraph 2, thereof in particular, far from being "obviously absurd," as Respondent suggests, is of the very essence of the obligation itself.

Discharge of the obligation to *promote* well-being and social progress necessarily involves continuous, dynamic and ascending growth. The requirement that *utmost* efforts be directed toward that end, adds both urgency and dimension to the undertaking. The proposition, implied by Respondent, that its obligation is to be measured by its so-called "intentions" as of 1920 is manifestly incompatible with, and repugnant to, the essence and purpose of the obligation itself.

Indeed, by its very method of presenting its case to the Court, Respondent reveals awareness of this fact.

Thus, in introducing an exposition of its policies, under the heading of "Post-War Adjustments," Respondent avows that it

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[1] In disputing Applicants' contention concerning applicability of the doctrine of *in pari materia* in respect of interpretation of the Mandate in the light of cognate provisions of the United Nations Charter (I, pp. 104-108) Respondent argues:

> "To assert, however, that a convention concluded in 1945 can be used as an aid to ascertain the intentions of the parties to a convention concluded between different states in 1920, is, in Respondent's submission, so obviously absurd as not to warrant serious consideration." (II, p. 395.)

[2] *Supra*, pp. 231-254.

> "did not set about its task of administering South West Africa with a set of fixed and unalterable ideas, or with a policy based on an inflexible political or economic philosophy." [1]

Throughout the Chapter, the very title of which concedes the need for continuing "adjustments" of policy, Respondent refers to asserted "adaptations" to changing needs, interests and circumstances in the Territory. Most significant in this context, is Respondent's purported explanation for the slower, so-called "progress" in the implementation in the Territory of a policy of separate development, on the ground that Respondent assertedly wished first to establish its "soundness in practice in South Africa itself." [2]

Applicants have elsewhere in this Reply addressed themselves to the lack of merit in the foregoing contention; it is cited here as demonstrating Respondent's awareness—however faultily it has in practice discharged its obligations—that such obligations, in their very nature, must be measured and appraised in accordance with changing and evolving social, economic, scientific and political experience, knowledge and requirements.

The practical necessity and wisdom of applying current standards in interpreting obligations, such as those embodied in the Mandate, are confirmed by the fundamental or organic nature of the Mandate instrument itself, as well as the dynamic and evolving character of the rights of the inhabitants which it protects, and the correlative obligations of the Mandatory which it enjoins.

The view of the Permanent Mandates Commission that the Mandates were "the constitutional law of the territories under mandate" has been demonstrated. [3] The history of Article 22 of the Covenant confirms the validity of such a view. Not only is the term "mandate" itself significant in this respect, but it was used synonymously with "charter." Thus, Marshal J. C. Smuts early recommended that

> " . . . the degree of authority, control, or administration exercised by the mandatory state shall in each case be laid down by the League in a special act or charter . . ." [4]

All three of President Wilson's Paris drafts of the Covenants referred to "charter" in the same context, as did the text agreed upon by Wilson and Lord Cecil on 18 March 1919 and the draft of 26 March 1919, presented to the Drafting Committee. [5]

The Mandate instrument shares, in common with all typical charters, constitutions and basic ordinances, generality in formula-

[1] II, p. 457 and Chapter VII, *passim*.

[2] *Id.*, p. 476.

[3] *Supra*, pp. 480-481.

[4] *The League of Nations — A Practical Suggestion* (1918); cited in Miller *The Drafting of the Covenant*, Vol. 2, pp. 23, 32 (1928).

[5] *Id.*, pp. 88, 104, 153, 589 and 655, respectively. Deletion of the term by the Drafting Committee did not reflect an intention to change substance. (*Id.*, Vol. 1, p. 47.)

tion and dynamic flexibility in application. The obligations created by Article 22 of the Covenant and the Mandate must, accordingly, be construed in the light of current standards, as determined by contemporary knowledge, conditions and requirements.

The highest judicial authority confirms such an imperative of interpretation of the obligations created by the Mandates System.

Thus Judge Eustamante, in the Preliminary Objections phase of the Cases at bar, stated in his separate Opinion:

> "An international Mandate is, by its very nature, temporary and of *indeterminate duration. Its duration is limited* by the fulfilment of the essential purpose of the Mandate, that is to say, by the completion of the *process of development* of the people under tutelage through their acquisition of full human and political capacity." [1]

In the *Case of the Readaptation of the Mavrommatis Jerusalem Concessions* (Jurisdiction) Judge Caloyanni, discussing the "full powers" clause in Article 11 of the Mandate for Palestine, said:

> "It is by reference to the spirit of Article 22 of the Covenant of the League of Nations that one finds the essential element underlying the Mandate from the point of view of the full powers in question; indeed, *it is upon the idea of 'development' that the principles of Article 22 are mainly based*; whenever the exercise of the full powers is therefore concerned, the Administration has an *obligation* to exercise them, because *in the development of the country a great deal of its mission and all its activities are comprised.* It could not be otherwise, having regard to the responsibility voluntarily assumed by the Mandatory when accepting the Mandate." [2]

The significance of the foregoing judicial references to the necessity for determining constitutional-type obligations in terms of current and developing norms is highlighted by the case of *Brown* v. *Board of Education*, in which the United States Supreme Court held unanimously that state legislation requiring schools to be segregated on the basis of race violated the Fourteenth Amendment of the Constitution of the United States, which assures to all persons the "equal protection of the laws":

> "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education *in the light of its full development* and its *present place* in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." [3]

The central issue in the *Brown* decision is, of course, analogous to that in the instant Cases, *viz.*, the question whether separation

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[1] *Judgment*, p. 357.

[2] P.C.I.J., Ser. A, No. 11 (1927) (Judgment No. 10), p. 51 (dissenting opinion). (Italics added in part.)

[3] 347 U.S. 483, 492-93 (1954). (Italics added.)

of individuals, by governmental policy, on the basis of membership in a group or race, is consistent with the well-being and progress of the persons affected by such a policy.

As has been pointed out, [1] the *Brown* case is relevant to Applicants' contention that obligations are not deprived of a legal character merely by reason of being formulated in general terms, nor do Courts hesitate to exercise their judicial function even when issues, in Respondent's phrase, fall also within "the realm of politics." [2] Nor do Courts fear "to venture onto one or other of ... [the] terrains" [3] of "social, ethnological, economic and political considerations," [4] even in complex and controversial issues, in which individual human rights are asserted against governmental action or policy.

In the present context, the *Brown* case, as has been said, is particularly illuminating in respect of the judicially perceived necessity to interpret broadly-formulated, constitutional-type obligations, on the basis of current standards, rather than on the basis of the presumed "intentions of the parties" at the time the obligations were conferred and accepted.

The Supreme Court of the United States, in the light of experience and insights which had evolved during a period not much longer than that in which the Mandate for South West Africa has existed, unanimously rejected the earlier doctrine, announced by the same Court, that governmental separation of races, on pretext of equality, afforded to the individuals affected the "equal protection of the laws." A governmental policy considered acceptable in 1896 has now become impermissible in the light of change and experience.

Representative of scholarly authority similarly confirming the necessity for applying current standards in interpreting the obligations fixed by the Mandates System are the views of J. Stoyanovsky and Quincy Wright.

Stoyanovsky concludes:

> "... *le système du mandat est, essentiellement, un système dynamique, un système d'évolution; pour en établir les principes, c'est l'évolution elle-même qu'il faut envisager, et non pas un point statique quelconque.*" [5]

To the same effect, Wright states:

> "Article 22 ... seeks not so much to define a status as to *guide an evolution*. It attempts not merely to provide for the transfer of the territories and for the government of their inhabitants, but for the *evolution* in them of communities eventually capable of self-determination .... We must attempt to define the status of these

[1] *Supra*, p. 487.
[2] II, p. 184.
[3] *Id.*, 391.
[4] *Ibid.*
[5] *La Théorie générale des mandats internationaux* 81 (1925). (Italics added.)

territories in terms of the future as well as of the present and the past." [1]

To similar effect is a resolution of L'Institut de Droit International, adopted in 1931, which states:

> "Les pouvoirs conférés à l'Etat mandataire le sont dans l'intérêt exclusif des populations sous mandat. Il est du devoir de l'Etat mandataire de *favoriser le développement politique de ces populations de manière à tendre vers la réduction progressive du degré d'autorité, de contrôle ou d'administration exercés par le mandataire.*" [2]

Judicial and scholarly authority, cited above, demonstrates the necessity of interpreting Respondent's obligations toward the inhabitants of the Territory on the basis of relevant and accepted current norms. The character of such norms has also been shown by reference to the practice of States and to international organizations, international agreements, judicial decisions and scholarly authority.

Applicants turn now to a demonstration that Respondent's obligations must be measured on the basis of current standards, upon the additional ground that, inasmuch as Respondent has accepted the applicability of such standards by reason of its ratification of the Charter of the United Nations, interpretation of Respondent's obligations on the basis of standards prevalent in 1920 would lead to an anomalous and intolerable result.

Article 73 of Chapter XI of the Charter [3] embodies obligations which, as Respondent concedes, "may be in advance of what was current thought in 1920." [4] There can be no question as to the validity of this proposition, in the light of the frequent application and interpretation of Article 73, by United Nations resolutions and actions since the inception of the Organization. [5]

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[1] Wright, *op. cit.*, p. 500. (Italics added.)

[2] Quoted in Pelichet, *La Personalité Internationale Distincte des Collectivités sous Mandat* 29-30 (1932).

[3] Article 73 provides, in part:

"Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and *accept as a sacred trust the obligation to promote to the utmost,* within the system of international peace and security established by the present Charter, the *well-being of the inhabitants of these territories, and, to this end:*

"a. *to ensure,* with due respect for the culture of the peoples concerned, *their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;*

"b. *to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions,* according to the particular circumstances of each territory and its peoples and their varying stages of advancement. . . ."

[4] II, pp. 396-397.

[5] The United Nations has fostered economic, social and educational advancement in the territories through measures not formerly applied to Mandated Territories as such. Thus, *e.g.*, all recommendations, in these fields, of the General Assembly

It is not necessary, for the purposes of the present Proceedings, to consider in detail the scope of Respondent's obligations under Article 73 of the Charter, inasmuch as Applicants' Submissions do not allege violations by Respondent of such obligations.

The point made by Applicants in the present context is, insofar as the provisions of Article 73 of the Charter may be in advance of what was current thought in 1920, an interpretation of the Mandate text in terms of 1920 standards could result in the application of standards short of the Charter (Article 73) standards. It could, in principle, thus be found that Respondent had met the 1920 standards by policies and practices which nonetheless failed to meet the requirements of Article 73. Such a result is impermissible, whether or not Article 73 is legally applicable to Mandated territories.

On the assumption that Article 73 is applicable to Mandated Territories, in order to avoid conflict with the obligations of the Charter, its standards must govern insofar as the 1920 standards fall short of the Charter standards.

Article 103 of the Charter is designed to preclude such a conflict:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

Alternatively, if Article 73 is not legally applicable to Mandated territories, the relationship between the principles of Article 73 and the principles of the Mandate nonetheless is extremely close. The two sets of principles are addressed to the same type of problem and subject-matter, and are strikingly similar in language and intent.[1] The League of Nations Resolution of 18 April 1946, provides, *inter alia*, that the League Assembly:

> "Recognizes that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII, and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League. . . ."[2]

Application of the standards of 1920 to the interpretation of the Mandate, could, in principle, result in a finding that the standards of Article 73 had not been met. The practical effect of such a result

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and the Economic and Social Council, are equally applicable to Non-Self-Governing Territories and independent nations; certain principles contained in the Declaration of Human Rights and in the draft Covenants were drawn up specifically with reference to such territories; dependent territories participate in some Specialized Agencies. For a fuller discussion, see Asher *et al.*, *The United Nations and Promotion of the General Welfare* 871-933 (1957).

[1] This is the basis of Applicants' contention, I, pp. 105-106, that the doctrine of *"in pari materia"* is applicable as a guide to the construction of the Mandate and of Article 22 of the Covenant of the League of Nations.

[2] League of Nations Off. J., 21st Ass., Sp. Supp. No. 194 at 58 (1946).

would be to establish three distinct sets of standards: those for Mandates, those for other Non-Self-Governing Territories, and those for Trusteeship areas. The lowest standards would be those for the Mandates.

Nothing in the history of the system of international supervision of the administration of non-independent territories would justify such a result. Nor is there anything in that history to justify a contention that a Mandated territory may properly be governed by standards below those required of other Non-Self-Governing Territories.

The use of currently accepted standards in the interpretation of the Mandate charter, accordingly, becomes logically imperative. Even if Article 73 were not applicable in all its particulars to Mandated territories, the use of the old standards in interpreting the Mandate texts would be equivalent to rewriting the League Resolution of 18 April 1946 so as to say that Chapter XI of the Charter embodies principles *not* corresponding to those of Article 22 of the Covenant. For such a result no justification can be found.

Precisely the same reasoning applies in respect of Articles 55 and 56 of the Charter, relating to the promotion of, *inter alia*, "observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

It must be concluded, on the basis of the foregoing, that the norms, in accordance with which Respondent's obligations as stated in Article 2, paragraph 2, of the Mandate are to be judged, are the relevant norms currently and generally accepted, rather than standards or criteria which may have been deemed applicable or acceptable at the time the Mandate was conferred and undertaken.

6. Respondent's final proposition—in the series formulated by Applicants as a framework for this section of their Reply—is that even if current standards existed and were deemed applicable, Respondent's policy with respect to the inhabitants of the Territory is in compliance with such norms or standards.

It is submitted, for all the reasons set forth above in respect of the nature and consequences of the policy of *apartheid*, or separate development, as applied in the Territory, and on the basis of the norms relevant to a determination of Respondent's obligations as stated in Article 2, paragraph 2, of the Mandate, that Respondent's conduct has been and remains in violation of these obligations.

In Applicant's submission, the policy and practice of *apartheid* is, *ipso facto*, a violation of international law, in terms of Article 38, paragraphs 1 (b) and (c) of the Statute of the International Court of Justice. [1]

[1] The standard of "separate but equal" treatment of the inhabitants of the Territory, which is asserted by Respondent to underlie the policy of *apartheid* (see II, p. 471), is, in fact and in law, a standard which, in application and effect, is "separate" and systematically unequal, as has been demonstrated in the *Memorials*, Chapter V, and in this Reply, *passim*.

The "international custom" outlawing discrimination and separation, as defined above, [1] together with the wide introduction of such a norm into "the general principles of law recognized by civilized nations," warrants a determination that the policy of *apartheid*, which strikes at the heart of the Mandate and of Article 22 of the Covenant of the League of Nations, is a violation of international law.

Even in the absence of such a determination, however, it is submitted that the policy and practice of *apartheid*, or separate development, as defined and analyzed in the *Memorials* and in this Reply, violates Respondent's obligations, as stated in Article 22 of the Covenant of the League of Nations and in Article 2, paragraph 2, of the Mandate, as measured by the relevant and generally accepted legal norms and standards described in the *Memorials* and in this Reply.

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[1] *Supra*, p. 493.

CHAPTER VI

RESPONDENT'S VIOLATIONS OF ITS OBLIGATIONS TOWARD THE UNITED NATIONS

A. The Relevant Submissions

Applicant's Submissions relevant to contentions in this Chapter VI of the Reply are as follows: [1]

> "1. South West Africa is a territory under the Mandate conferred upon His Britannic Majesty by the Principal Allied and Associated Powers, to be exercised on his behalf by the Government of the Union of South Africa, accepted by his Britannic Majesty for and on behalf of the Government of the Union of South Africa, and confirmed by the Council of the League of Nations on December 17, 1920;
>
> "2. the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted. . . .
>
> "7. the Union has failed to render to the General Assembly of the United Nations annual reports containing information with regard to the Territory and indicating the measures it has taken to carry out its obligations under the Mandate; that such failure is a violation of its obligations as stated in Article 6 of the Mandate; and that the Union has the duty forthwith to render such annual reports to the General Assembly;
>
> "8. the Union has failed to transmit to the General Assembly of the United Nations petitions from the Territory's inhabitants addressed to the General Assembly; that such failure is a violation of its obligations as Mandatory; and that the Union has the duty to transmit such petitions to the General Assembly;
>
> "9. the Union, by virtue of the acts described in Chapters V, VI, VII and VIII of this Memorial coupled with its intent as recounted herein, has attempted to modify substantially the terms of the Mandate, without the consent of the United Nations; that such attempt is in violation of its duties as stated in Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary prerequisite and condition precedent to attempts on the part of the Union directly or indirectly to modify the terms of the Mandate."

B. Decisive and Undisputed Facts

Respondent does not dispute or deny Applicants' showing that it has failed and refused, and continues to fail and refuse,

[1] I, pp. 197-198.

1. to render to the General Assembly annual (or other) reports containing information with regard to the Territory and indicating the measures it has taken to carry out its obligations under the Mandate, and

2. to transmit petitions to the United Nations from the inhabitants of the Territory.

On the contrary, starting from the premise that "the Mandate as a whole has lapsed," [1] Respondent contends that its

> ". . . Obligations to report and account to, and submit to the supervision of, the Council of the League of Nations, lapsed upon dissolution of the League *and have not been replaced by obligations to submit to the supervision of any organ of the United Nations or any other organization or body.*" [2]

As shown by the history of the Mandate, [3] Respondent has acted in a manner consistent with the foregoing contention and

> ". . . expressly disclaims that its right of administration is based on continued existence of the Mandate." [4]

C. Analysis of Legal Basis and Nature of Respondent's Obligations Toward the United Nations

Respondent's arguments in Book II of the *Counter-Memorial* centre essentially on two points: that the Mandate has ceased to exist; and that Respondent, accordingly, has no obligation to report to the United Nations for its administration of the territory of South West Africa, or in any other manner submit to its supervision. [5]

The Court held in 1950, in unanimous judgment, that the Mandate does, as a matter of law, continue to exist. In 1950, the Court likewise ruled, two Judges dissenting, that Respondent has an obligation to report to the United Nations for its administration of the Territory of South West Africa. [6] In 1955 and in 1956, the Court rendered further Opinions concerning the obligations of South Africa under the Mandate. [7] These several Opinions are briefly summarized in the *Memorials*. [8]

In the Proceedings leading to the *Advisory Opinion of 1950*, the Court had received Respondent's Written Statement and had heard its Oral Statement thereon. In both, Respondent presented arguments underlying its contention that the Mandate has lapsed and that its obligation to submit to international supervision likewise has lapsed.

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[1] **II**, pp. 97, 173.
[2] *Id.*, p. 164. (Italics added.)
[3] **I**, pp. 43-82; and Chapters II and III, *passim*.
[4] **II**, p. 174; see p. 244, *supra*.
[5] *Id.*, p. 164.
[6] *Advisory Opinion of 11 July 1950*; I.C.J. Rep. 1950, p. 128.
[7] I.C.J. Rep. 1955, p. 67 and *id.* (1956), p. 23, respectively.
[8] **I**, pp. 51-54.

In its *Preliminary Objections* to the present Proceedings, Respondent reiterated these contentions and presented Arguments in support thereof, both in written and oral statements. In its *Judgment of 21 December 1962*,[1] rejecting the Preliminary Objections, the Court indicated that it saw no reason to depart from its holding in the 1950 *Advisory Opinion*.

The opinion of 1950 was, it is true, an Advisory Opinion and is not, therefore, binding upon Respondent in the strict sense of *res judicata*. It is also true that the Court's 1962 *Judgment* related to the issue of competence, and did not constitute an adjudication upon the merits of the dispute. As a practical matter, nevertheless, lapse of the Mandate and lapse of the obligation to respond to international supervision are issues which twice have been fully presented to the Court by Respondent in written statements and in oral statements in 1950 and in 1962. As a result, the *Counter-Memorial* is on these issues an argument *de novo* against the law of the case.

It is in the nature of legal proceedings, and perhaps especially so of a Proceeding before this Honourable Court, that the parties are entitled to the fullest opportunity to be heard. Applicants cannot, and do not, dispute Respondent's privilege to reassert in a contentious proceeding that the Mandate, and the obligation to respond to international supervision, have lapsed, even though the arguments are the same as those twice before considered in 1950 and 1962. In reasserting these arguments, however, Respondent confronts Applicants with two difficulties which may appropriately be mentioned at the outset.

Because the arguments with respect to lapse of the Mandate and lapse of international accountability already have been considered by the Court, it is difficult to restate the arguments without cutting across Opinions already given on the matter by Judges now sitting on the case. Moreover, in re-arguing the law of the case as declared by the Court, the *Counter-Memorial* does not merely maintain positions inconsistent with several of these Opinions. In many instances, Respondent singles them out for critical analysis.

Without suggesting that Respondent is not at liberty to proceed in this manner, Applicants would prefer not to join issue with the *Counter-Memorial* in its critical analyses of Opinions by members of this Honourable Court. It is one thing to maintain positions inconsistent with Opinions expressed by Judges now sitting. Applicants themselves will respectfully maintain views in this Reply that may not always be consistent with all these Opinions. It is quite a different thing to place such Opinions in controversy. Applicants do not believe that any useful purpose would be served by replying to what the *Counter-Memorial* has to say about them.

Furthermore, inasmuch as the issues of lapse of the Mandate and

[1] *Judgment*, p. 334.

lapse of international accountability already have been presented to the Court by the parties, it is difficult for Applicants to deal with these issues without engaging in mere repetition of arguments already made in the *Preliminary Objections* phase of these Cases. The *Counter-Memorial* repeats, often without rephrasing, [1] arguments already advanced by Respondent in the *Preliminary Objections* herein. Applicants deem it appropriate to refrain in their Reply from a merely mechanical repetition of the replies previously given to Respondent's arguments. Applicants therefore venture a somewhat different approach to the task of presenting to the Court their arguments concerning this aspect of the merits of issues in dispute.

Applicants consider that such a course may make the arguments already advanced on both sides more meaningful by placing them in a slightly different context. Applicants therefore endeavour in this Reply to identify the nature and apparent explanation underlying differences between the parties. In this manner, Applicants show that the parties reach divergent and mutually inconsistent conclusions concerning interpretations of the relevant texts, because of essentially differing views in respect of the nature of the obligation of international accountability.

Issues in dispute, relevant to Respondent's obligations toward the United Nations, may be summarized as follows:

(1) The legal import and enforceability of the "sacred trust" and "tutelage," as formulated in Article 22, paragraph 1, of the Covenant of the League of Nations. This issue has been analyzed herein. [2]

(2) Continuing effectiveness of the Mandate and of Respondent's obligations thereunder. Respondent contends that such obligations as it owed under the Mandate have lapsed, together with the asserted lapse of the Mandate as a whole; at the same time, its rights of possession and administration over the Territory are asserted to have survived, on a theory Respondent has not sought to disclose. Applicants contend, to the contrary, that the Mandate is in effect and that, in the words of the Court,

> "To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified." [3]

(3) Among the obligations which have lapsed, in Respondent's submission, are those embodied in the compromissory clause in Article 7 of the Mandate, and in Article 6 of the Mandate. It is common cause that international accountability is of the essence

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[1] *Cf., e.g.*, I, p. 30 with II, pp. 103-104.

[2] *Supra*, pp. 476-519 (Ch. V).

[3] *Advisory Opinion of 11 July 1950*; I.C.J. Rep. 1950, p. 133; quoted in *Judgment*, p. 333.

of the Mandate.[1] Respondent contends that if, as it asserts, the duty of international accountability lapsed with the dissolution of the League, it is "impossible for a Court to presume that the authors of the Mandate would have intended it to continue in existence. . . ." [2] Applicants, to the contrary, contend that international accountability must survive so long as rights or powers over the Territory are asserted, as the Court has twice made clear.[3] Applicants contend, furthermore, that the restrictive significance attributed by Respondent to the compromissory clause would both deprive it of meaning and would strip the "sacred trust" principle of all legal significance.

It will readily be apparent that each of these interrelated sets of conflicting contentions revolves about divergent major premises concerning the essential role of accountability under the Mandates System. Arguments in support of each of the points have been presented by Respondent in two previous appearances before the Court, and have twice been considered and rejected by the Court in fundamental aspects. The similarity of the arguments previously addressed to the Court on the same issues is apparent, from a summary thereof, which Applicants have set out in Annex 8, herein,[4] including a summary of the Court's holdings with respect thereto. The Court's attention is respectfully drawn to the aforesaid Annex, including the conclusion thereof governing "the law of the case."

* * *

The divergence of the views of the parties with respect to the issue of international accountability has been noted in Applicants' demonstration[5] that the "sacred trust" and the legal nature of the "tutelage" principles of Article 22 of the Covenant imported obligations of a legal nature, compliance with which is an interest of the organized international community.

Respondent's contention that its obligations were merely contractual with the League of Nations and lapsed when the League terminated is, of course, irreconcilable with Applicants' contention, already sustained by the Court, that the Mandate was a "new international institution," and that an essential principle thereof was "the recognition of 'a sacred trust of civilization' laid upon the League *as an organized international community*."[6]

In this section of its Reply, Applicants respectfully show that

1. Respondent's obligation, as stated in Article 6 of the Mandate,

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[1] II, p. 170.
[2] *Ibid.*
[3] *Supra*, footnote 3, p. 243.
[4] *Infra*, p. 547.
[5] *Supra*, pp. 231-254 (Ch. III).
[6] *Judgment*, p. 329. (Italics added.)

is in effect, and Respondent is accountable thereunder to the United Nations, as the "organized international community;" [1] and

2. The compromissory clause in Article 7 of the Mandate is in effect, and the said clause, in nature and purpose, assures judicial protection of the legal interest of the organized international community in respect of the "sacred trust."

1. *Respondent's obligation as stated in Article 6 of the Mandate is in effect, and Respondent is accountable thereunder to the United Nations as the "organized international community."*

a. *The League of Nations as the "organized international community"*

Several alternatives were considered by the authors of the Covenant of the League of Nations and of the Mandates System in their search for agreement upon methods of implementation of the legal obligation inherent in the "sacred trust" and "tutelage" principles of Article 22 of the Covenant. [2]

Consideration of the origin and nature of such alternative methods is relevant to an appraisal of Respondent's obligations of international accountability and explain why such obligations survived the dissolution of the League of Nations and continue to exist so long as Respondent asserts or exercises powers of administration or possession, or any other rights whatever, with regard to the Territory.

One alternative was for the League of Nations itself to assume direct discharge of the responsibility, creating for that purpose an international administration. In this manner, the organized international community could have assured, by its own direct action, the well-being and social progress of the inhabitants of mandated territories.

Another possibility, which was the one adopted, was to entrust administration of the territories to a Power, under a mandate to discharge on behalf of the organized international community a trust with regard to the well-being and social progress of the inhabitants.

Various combinations of the foregoing alternatives likewise were considered.

Thus, the League might have assumed authority over a territory, but designate a State or States to carry out the task under the League's direct instructions. Alternatively, such a territory could have been entrusted to a mandatory, subject only to loose and occasional inquiry on the part of the League.

General Smuts was among those who started from the premise that direct authority and control over the colonial possessions

[1] *Ibid.*

[2] The legal nature of such principles is demonstrated in Chapter III, p. 231, *supra.*

should be placed in the League of Nations. In a pamphlet published on 16 December 1918, entitled *"The League of Nations: A Practical Suggestion,"* elaborating his ideas for international control of colonial areas in Africa and Asia, [1] General Smuts recommended that "any authority, control or administration which may be necessary in respect of these territories and peoples, other than their own self-determined autonomy, *shall be the exclusive function of and shall be vested in the league of nations* and exercised by or on behalf of it." [2] His plan envisaged the right on the part of the League of Nations "to delegate its authority, control, or administration in respect of any people or territory to some other state whom it may appoint as its agent or mandatery [*sic*] . . . ." [3]

In the draft Covenant for a League of Nations presented by President Wilson at the Peace Conference, a Mandatory would be, in effect, an agent of the League of Nations. The League would assume the guardianship of inhabitants and would commission mandatories to exercise such guardianship for it. President Wilson's first Paris draft adopted almost intact the plan for a mandate system proposed by General Smuts in December, 1918.

Thus, it provided:

> "Any authority, control, or administration which may be necessary in respect of these peoples or territories other than their own self-determined and self-organized autonomy shall be the exclusive function of and shall be vested in the League of Nations and exercised or undertaken by or on behalf of it."

It further provided:

> "It shall be lawful for the League of Nations to delegate its authority, control, or administration of any such people or territory to some single State or organized agency which it may designate and appoint as its agent or mandatory. . . ." [4]

The first Paris draft of President Wilson further provided:

> ". . . the degree of authority, control, or administration to be exercised by the mandatory State or agency shall in each case be explicitly defined by the League of Nations in a special Act or Charter which shall reserve to the League of Nations *complete power of supervision and of intimate control* . . .". [5]

In his second Paris draft, President Wilson included similar provisions and provided in addition:

> "The object of all such tutelary oversight and administration on the part of the League of Nations shall be to build up in as short a time as possible out of the people or territory under its guardianship

[1] South West Africa was not included.
[2] Smuts, *The League of Nations: A Practical Suggestion* 14 (1919).
[3] *Id.*, p. 17.
[4] II Miller, *The Drafting of the Covenant* 88 (1928).
[5] *Id.*, p. 88. (Italics added.)

a political unit which can take charge of its own affairs, determine its own connections, and choose its own policies." [1]

The plans of both General Smuts and President Wilson, accordingly, were based upon a concept akin to *tutelle*, as made clear by the latter's references to "tutelary oversight" and "guardianship." President Wilson's proposal, however, envisaged "complete power of supervision and of intimate control" on the part of the League, with the objective of self-determination, or at least self-management, "in as short a time as possible."

The British "Draft Convention Regarding Mandates," [2] on the other hand, proposed a plan whereby so-called "vested territories" would be entrusted to States which would be "invested with all powers and rights of a sovereign government," but which would "report annually to the League of Nations on all matters relating to the discharge of their obligations" under the Convention. [3]

The British draft also provided for the establishment by the League of a commission

"to assist the League in the supervision of the *mandatory* states. . . ." [4]

The draft was accompanied by a Note suggesting, *inter alia*, a preamble in which the parties would recognize

". . . that the League of Nations must be regarded as the *guardian* of the settlement thus arrived at, and in all matters not so finally settled, as *Trustee* for the peoples of the territories. . . ." [5]

The second paragraph of Article 22 of the Covenant emerged and crystallized from a full consideration by the authors of the System of the various alternatives thus put forward. In the final text, three concepts—*trust*, *tutelage*, and *mandate*—were interwoven. These concepts underlie and explain the method adopted for effectuating the Mandates System.

It is necessary at the outset to point out the fallacy in Respondent's contention that *tutelage* was merely intended in a "broad, metaphorical sense," [6] and that the *mandatum* concept "could hardly have been known to the Peace Conference as a whole." [7]

Such a comment is impossible to reconcile with the insistent repetition of the terms by the wartime leaders and their wide public discussion by authorities, as noted above in this Reply. [8] There is little room for doubt that the concept of *trust* incorporated in the Covenant was an adaptation to the needs of the Mandates System of the same concept in municipal legal systems.

[1] *Id.*, p. 104.
[2] *Id.*, Vol. I, pp. 106-07.
[3] *Id.*, p. 107.
[4] *Ibid.* (Italics added.)
[5] *Id.*, p. 108. (Italics added.)
[6] II, p. 103.
[7] *Ibid.*
[8] *Supra*, pp. 234-242.

This is not to suggest that the term "mandate" is used in the same sense as in such systems, nor that the law of "trust," as developed in the domestic field, was incorporated as such into international law.

International law develops by adaptation into its system of legal relationships and concepts having their origin in municipal law. Thus, development of the rules of international law relating to international agreements surely owes much to the law of contracts in domestic systems. In their references to common and civil law concepts of trust and mandate, Applicants proceed from the point of departure not that the Mandates System incorporated rules of domestic law as such, but that this new international institution adapted to its own purposes and needs analogous concepts of municipal systems. [1]

The concept of trust involves essentially a splitting between "control" and "benefit." The trustee is put in a position where he controls the trust, yet must use it for the benefit of another.

That the concept is familiar to Respondent's legal system is made clear by a noted scholar, as follows:

> "The trust of English law . . . is but one species of the genus 'trust'. As the very word indicates, the characteristic feature of the trust is not the division between legal and equitable ownership—this is the specific device employed by English law to achieve the purposes of the trust—but the separation between the control which ownership gives and the benefits of ownership." [2]

Dean Hahlo, pointing out that the essence of the concept is separation between "control" and "benefit," concludes:

> "there can be but few civilian systems that do not have some form of trust or trust-like institutions." [3]

Although civil law systems do not favour the concept of a limited ownership, in the sense of the common law distinction between "equitable" and "legal" ownership of a trust *res*, it is clear that such a distinction is "in no way essential to an effective law of trusts." [4]

Hence, when distinguished from common law concepts of property interests, the concept of trust is universal.

Thus, Professor Lepaulle points out that the concept of trust does not rest upon the common law distinction between legal and equitable estates, but is a broader principle, which he formulates as

[1] In so doing, Applicants conceive that they follow the guideline set forth in the Individual Opinion of Judge Lauterpacht in the *Case Concerning Norwegian Loans*, that, when international law on a subject is not sufficiently abundant to permit generalization, "some help may justifiably be sought in applicable general principles of law as developed in municipal law." (I.C.J. Rep. 1957, p. 56.)

[2] Hahlo, "The Trust in South African Law," 2 *Inter-American Law Review* 229-30 (1960).

[3] *Id.*, p. 241.

[4] Lawson, *A Common Lawyer Looks at the Civil Law* 203 (1953).

follows: "l'essence du trust n'est pas, nous croyons l'avoir démontré, une forme nouvelle de propriété: c'est l'affection à un but déterminé." [1]

He concludes, as do Dean Hahlo and Dr. Lawson, that the trust concept is consistent with the legal institutions of civil law countries, because it rests on a concept of division between control and benefit, which is familiar to them. [2]

Adaptation of the concept of trust, as thus understood in all civilized municipal legal systems, was particularly appropriate to the objective of assuring the legal obligation to protect and promote the well-being and social progress of inhabitants of mandated territories.

It provided a solution for those who opposed vesting in the League of Nations direct operational control of the territories, whether by control either by its own administration or by delegation to a State as, in effect, its operating agent. The solution involved vesting of responsibility in the organized international community, with accountable administration in the hands of a mandatory under "trust."

The mandatory would administer the territory, not for its own benefit, but for that of the inhabitants. It was the solemnity of this undertaking which justified the characterization "sacred," which was neither cynical nor merely figurative rhetoric.

It is, undoubtedly, this intention to split benefit from control which accounts for the holding of the Court that

> "To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified." [3]

Surely, the word "justified" is intended in a legal, rather than merely moral, sense; the reason why such a posture is unjustified is precisely because it claims *benefits* for the trustee, whereas Respondent, under the Mandate, was given control *only for the benefit of the inhabitants of the Territory.*

When the concept of trust is seen as a splitting between control and benefit, the legal nature of "tutelage" becomes obvious. "The trust is but one of several institutions in which there is a splitting between control and benefit. Other examples that immediately come to mind are the various forms of guardianship and the administration of an insolvent or deceased estate." [4] The distinction between trust, as an institution, and other similar institutions, is the degree of control accorded to the trustee. In the Common Law, the trustee is given the maximum control possible, which is an estate of ownership. In the Civil Law, a guardian would generally

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[1] Lepaulle, *Traité Théorique et Pratique des Trusts* 354 (1932).

[2] *Id.*, Chapter X, *passim.*

[3] *Advisory Opinion of 11 July 1950*; I.C.J. Rep. 1950, p. 133; repeated, with implied approval in *Judgment*, p. 333.

[4] Hahlo, p. 241, cited p. 528, footnote 2, *supra.*

be given, not ownership, but lesser forms of control over the property of the ward. After examining the degree of control vested in a trustee, Professor Lawson comments:

> "But if you are still dissatisfied with the protection afforded to the beneficiary, you can make him owner and give the trustee limited powers of management. This is not at all inadmissible in the Civil Law, for it takes place every day where guardians and executors are concerned." [1]

Whether the control be limited to powers of management, as in the case of guardian, or whether it be as extensive as legal ownership, as in the case of a common-law trustee, it is to be exercised not for the benefit of the person in control but for the benefit of another. From this basic division between control and benefit flow two consequences: there must be an accounting concerning the exercise of the control; there must be supervision by a public authority.

The trustee is generally required to account for the exercise of his control over property in the Common Law system.

> "In many states trustees, at least trustees acting under a will, are under a duty to account in court before they are discharged. In some states it is the duty of trustees to render an accounting in court at periodic intervals. In some states if a trustee fails to render an accounting in court, the court can on its own motion cite him to render an accounting... The refusal of a trustee to make an accounting is a ground for his removal." [2]

Comments, such as the foregoing, concerning the law of trusts in the United States are indicative of the importance of the duty of accounting usually incumbent upon a trustee. Lepaulle emphasized the role played by Courts in the supervision of the trustee: "*Le trust vit à l'ombre du Palais de Justice qui lui apporte à la fois le conseil et le contrôle.*" [3]

> "A guardian of the property of a person who is under an incapacity is a trustee in the broad sense of the term. He is under a duty to his ward to deal with the property for the latter's benefit. Like a trustee, a guardian is a fiduciary." [4]

Even though he is not a trustee in the strict sense of the term, a guardian is under a duty "to render accounts from time to time, usually annually." [5] In the United States,

> "... courts of equity often retain a general jurisdiction over the persons and estates of infants, though, as a rule, the matter of guardianship is exclusively delegated by statute to the probate court or other similar tribunal." [6]

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[1] Lawson, p. 203, cited p. 528, footnote 4, *supra*.
[2] Scott, *The Law of Trusts*, Vol. II, p. 1289 (2nd ed., 1956).
[3] Lepaulle, p. 207, cited p. 529, footnote 1, *supra*. (Italics added.)
[4] Scott, *op. cit.*, Vol. I, p. 70.
[5] Madden, *Handbook of the Law of Persons and Domestic Relations* 508 (1931).
[6] *Id.*, p. 461.

The practice in civil law countries is to specify in codes a requirement of accounting applicable to guardians. Thus, Articles 469, 470 and 471 of the French Civil Code require accounting on demand from the family council for tutors other than the father or the mother, and final accounting at the end of the tutelage for all tutors. Inasmuch as the requirement is dictated by public policy, the tutor cannot by agreement in advance avoid the requirement. In speaking of the law of France and in Quebec on this point, Rodys states:

> *"La reddition de compte est une obligation que la loi impose au tuteur. Nul ne peut l'en dispenser à l'avance, ce serait contraire à l'ordre public et aux principes essentiels de la tutelle."* [1]

Codes of a number of Latin American countries explicitly provide that the duty of accounting by the tutor cannot be avoided, for the reason that such duty is an expression of public policy. [2] Judicial supervision of the tutor in some form is usual in civil law countries. Speaking of the role assumed in the matter by the French courts, a treatise states:

> "Ce recours *de caractère contentieux* aboutit à faire du tribunal le véritable arbitre souverain de la tutelle." [3]

In a number of States of Latin America, the tutor may act only after appointment by judicial decree. [4] In some of these States, administrative as well as judicial supervision is provided. [5]

In the context of the problem presented by the colonial issue at the Peace Conference, the institution of guardianship readily suggested itself as a means of providing legal protection for the inhabitants of the territories to be placed under mandate. Reliance was explicitly placed upon accounting and supervision as means of insuring an effective splitting between control and benefit, exactly as in the case of trusts in municipal systems.

Contrary to Respondent's contention, [6] tutelage was a universally accepted concept, designed for the protection of persons "not yet able to stand by themselves." [7] Delegates to the Peace Conference from States outside the common-law system were familiar with the institution of *tutelle*, or tutelage; those from common-law jurisdictions found it convenient to express the principle of guardianship in terms of "trust," which ran through the British and United States proposals for the disposition of the colonial issue.

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[1] Rodys, *Cours Elémentaire de Droit Civil Français et Canadien* 56 (1956).

[2] *E.g.*, Argentina, arts. 385, 414, 458, 459; Chile, arts. 415; Mexico, arts. 590, 600.

[3] Colin & Capitant, *Cours Elémentaire de Droit Civil Français*, Vol. I, p. 590 (1947). *Cf.* Lepaulle, as cited p. 530, footnote 3, *supra*.

[4] *E.g.*, Civil Codes of: Argentina, arts. 388, 399; Chile, art. 373; Mexico, art 498; Panama, art. 268; Peru, art. 346.

[5] *E.g.*, Civil Codes of: Argentina, arts. 381, 491-494; Panama, art. 255.

[6] II, p. 103.

[7] Covenant of the League of Nations, Article 22, para. 1.

In short, the institution of "guardianship" in domestic law, just as the concept of "trust," was adapted to the needs of the organized international community, in accordance with the international legal objective sought to be achieved in the Mandate System.

The third concept embodied in Paragraph (2) of Article 22 of the Covenant was that of *mandate*.

Situations in which this concept previously had been used in international practice are summarized in the Study of the Mandates System published by the League of Nations in 1945.[1] The Study points out that Great Britain took over protection of the Ionian Islands in 1815 under a "mandate" conferred by Russia, Prussia and Austria at the Conference of Paris of 1815. Moreover, the intervention of France in Lebanon in 1860 to protect the Christian population of that country was based on a "mandate" from the Great Powers. Other instances given in the Study indicate an international connotation of the concept of "mandate," prior to the drafting of the Covenant.[2]

In addition to the cases cited in the Study is the plan for government of the Samoan Islands, offered by a special three-power commission in 1899, according to which Great Britain, Germany and the United States would concur in the appointment of an adviser to the Government of Samoa. This adviser was to act as a mandatory of the three Powers, charged with the duty of maintaining peace and protecting the interests of foreign subjects in Samoa.[3]

The implication of these historical antecedents is that a "mandate" was an authorization or direction given by States to another State to act for them and in their stead. The concept of mandate reflected in such historical antecedents is analagous to, though not the same as, the concept of *mandatum* in Civil Law.

In Roman Law, the mandate, originally, was a gratuitous contract. "Mandate is a contract whereby one person (mandator) gives another (mandatorius) a commission to do something for him without reward, and the other accepts the commission."[4] A mandate is not necessarily gratuitous in the modern civil law, but in other respects resembles what it was in Roman law. Although sometimes translated as "agency," and used to create agency, it is not, in principle, an agency as such. A mandate is, in essence, conferment by one person upon another of responsibility for management of designated transactions.[5]

In the period immediately preceding the Peace Conference, however, the word "mandatory" in the international field had, in

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[1] *Supra*, pp. 233, 237 and 242.

[2] *The Mandates System: Origin—Principles—Application, op. cit.*, pp. 11-12, *supra*.

[3] [1899] *Foreign Relations of the United States*, pp. 614, 632, 638, 640-48, 653-55, 657-659 (1901).

[4] Lee, *Elements of Roman Law* 327 (1st ed., 1944).

[5] See, *e.g.*, art. 1984 of the French Civil Code and art. 2116 of the Chilean Civil Code.

any event, acquired a special meaning in the context of the colonial issue.

Whereas in municipal law systems it is in the nature of a contract of "representation," in the context of the discussions leading to the Covenant of the League and the Mandates System, the term "mandate" served to provide a formula of compromise between the Wilson-Smuts proposals that "authority, control or administration" should be the "exclusive function" of the League, [1] or should be under the League's "complete power of supervision and of intimate control," [2] and, on the other hand, proposals, such as the British, which favoured a more broadly delegated authority over the mandated territory.

Under these circumstances, the municipal law concept of "mandate" could not have been, and was not, imported literally into the System. The term, rather, was employed as a descriptive one, set alongside "trust" and "tutelage"; it made clear that the "tutelle" was not vested in the League, yet the tutor, or trustee, was responsible and accountable to the League of Nations as the organized international community.

Applicants conceive, with respect, that it was in this sense and for this reason that the Court correctly stated in the Advisory Opinion of 1950 that

> "The League was not . . . a 'mandator' in the sense in which this term is used in the national law of certain States,"

and that

> "The 'Mandate' had only the name in common with the several notions of mandate in national law." [3]

In proposals made with a view to ensuring legal protection for inhabitants, the word "mandate" was used to indicate that a colonial power was not entitled to administer a colonial possession as beneficial owner. Rather, it would receive a commission, or "mandate," to administer the territory solely for the benefit of the inhabitants. Hence, the term "mandatory" had come to be synonymous with "non-annexation."

Notwithstanding differences in terminology, all formulas rejected proposals for annexation. In its first meeting on 23 January 1919, the Council of Ten agreed to hear territorial claims before all others. On 24 January 1919, Prime Minister Hughes of Australia, General Smuts of South Africa and Prime Minister Massey of New Zealand presented their claims for annexation of former German colonies. On 27 January, Japan advanced her request for annexation of the former German Pacific Islands north of the Equator. On

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[1] *Supra*, p. 526 (Smuts).
[2] *Ibid.* (Wilson).
[3] *Advisory Opinion of 11 July 1950*; I.C.J. Rep. 1950, p. 132.

28 January 1919 the French Colonial Minister claimed the right of annexation of German Equatorial Africa.

President Wilson opposed annexation,[1] and the conference approached a breakdown. President Clemenceau, however, expressed sympathy for the position of President Wilson. Reversing his Colonial Minister, he announced that France was willing to make concessions. Conciliatory statements also were made by Lord Balfour and by Lloyd George.[2]

The principal difficulty of the British Dominions in accepting the mandates was the principle of the open door, embodied in both the British draft and the draft proposed by President Wilson. Australia was particularly intent upon the maintenance of a closed door policy with respect to trade and immigration in German New Guinea.[3]

The Covenant did not embody the plan of President Wilson, under which the League of Nations itself would have directly administered the Mandate, or done so through a State as its administrative agency. Instead, the Covenant vested responsibility in the organized international community to assure that mandatories would promote the well-being and social progress of inhabitants of mandated territories.

Paragraph 2 of Article 22 makes clear that the use of the word "trust" in the first paragraph, meant "tutelage." The interest of peoples not yet able to stand by themselves were declared to be a responsibility of the organized international community, as then represented by the League of Nations.

Inasmuch as the League was not invested with direct authority, control or administration over the inhabitants of mandated territories, the mandatories could not act as *agents* of the League. They were commissioned to exercise, on behalf of the organized international community, a tutelage of peoples not yet able to stand by themselves.

The function of administrative supervision as distinguished from direct administration, accordingly, devolved upon the League as the then existing body politic of the organized international community. Such supervision, as Respondent concedes, was "an integral portion of the Mandate System,"[4] in the light of its central feature: the splitting of control from benefit.

Respondent's conception of the relationship between itself and the League (as the organized international community) as one of mere contract, likewise misconstrues the nature of the interest

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[1] See pp. 236-240, 526-527, *supra*.

[2] [1919] *Foreign Relations of the United States*, Vol. III (Paris Peace Conference), pp. 718-28, 738-48, 758-71, 785-95, 797-808 (1943).

[3] Scott, *Official History of Australia in the War of 1914-1918*, Vol. XI, pp. 763-89 (1938); Latham, *The Significance of the Peace Conference from an Australian Point of View* 11-12 (1920).

[4] II, p. 169. (So much so, indeed, that in Respondent's submission, the Mandate as a whole cannot be deemed to have survived without such supervision.) (*Id.*, pp. 173-174.)

of a public body, in any system of law, in the proper performance of a trust or tutelage obligation. The public body, whether administrative or judicial, performs such a function not to serve an interest of its own, but to serve a public interest. The beneficiaries are, on the one hand, the ward or other person protected and, on the other, the organized community, whose interest it is to assure protection of those "not yet able to stand by themselves." [1]

Similarly, in the Mandates System, the Mandatory was assigned the function of exercising guardianship and of reporting its accomplishments for the benefit of the peoples concerned. The League was to examine such reports in order to ensure the protection and promotion of the interests of the inhabitants. Hence, the Mandatory and the League served, respectively, the interest of peoples not able to stand by themselves and the interests of the organized international community, in seeing to it that such peoples were adequately protected.

The acting Secretary-General of the League of Nations put the matter clearly:

> "Co-operating in the fulfillment of their respective tasks, under the searchlight of public opinion, the mandatory administrations and the organs of the League of Nations have, in general, ensured the application of the principles enunciated in favour of the natives and of *the community of nations.*" [2]

No other interpretation of the nature of the mandates would be consistent with the principle of promoting the welfare of the peoples concerned which, in the words of a leading authority

> ". . . is the real heart of the system. . . . Only the native-welfare part of the mandate system was accepted as universally valid." [3]

The exercise of the function of Mandatory necessarily was linked to the League, as the sole organization then existing able to receive reports and supervise the administration of the territories through a Commission established by it for that purpose. The words "on behalf of the League" indicated that the League and its members were parties in interest to the System. The French text is more accurate than the English text in stating that Mandatories were to exercise the tutelage *"au nom de la Société."*

The compromise in paragraph 2 of Article 22 consisted in the surrender by President Wilson of his plan to vest in the League direct administrative responsibilities for the inhabitants. Instead, the Mandatory would act "on behalf," or "in the name of," the League of Nations. The compromise did not surrender the principle of the "sacred trust," nor produce a situation "close to annex-

[1] Covenant of the League of Nations, Article 22, para. 1.

[2] *The Mandates System: Origin—Principles—Application,* p. 6 (League of Nations Pub. 1945. VI. A. 1). (Italics added.)

[3] Hall, *Mandates, Dependencies and Trusteeships* 65 (1948).

ation," as Respondent contends. The Mandates System, rather, involved adaptation of the institution of guardianship, familiar to all municipal law systems, and termed the result "mandate."

An analysis by Fauchille of the true significance and effect of Article 22, paragraph 2, of the Covenant fully confirms the foregoing interpretation. [1]

M. Fauchille's comments appear to Applicants of sufficient relevance and importance to warrant extensive quotation, as follows:

> "C'est dans le texte même de l'article 22 du pacte qu'il faut chercher la nature juridique du mandat international. Or ce texte indique d'une manière très nette les deux traits qui le caractérisent: 1° Le mandat est une tutelle. 2° Il s'exerce au nom de la Société des Nations. En déclarant que le mandat international est une tutelle, l'article 22 a introduit dans le droit des gens une notion qui n'était jusqu'alors connue qu'en droit privé. Constituant une tutelle, le mandat présente un caractère personnel beaucoup plus qu'un caractère territorial: ce n'est pas la protection du territoire placé sous mandat, c'est la protection des peuples habitant ce territoire que le mandataire doit assurer. La tutelle, en effet, est donnée à la personne même du mineur, et si le tuteur a des pouvoirs sur les biens de celui-ci, c'est seulement en vue d'en protéger la personne. . . ."
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> "En droit privé, la tutelle implique une mainmise complète sur la personne du pupille: celui-ci ne peut rien faire; c'est le tuteur qui, le représentant, agit à sa place. Il en est de même en principe dans le mandat international: le mandataire assume l'administration du territoire dans l'intérêt de ceux qui l'habitent. . . ."
>
> "La seconde notion essentielle du mandat international est que l'Etat désigné pour administrer un autre peuple n'agit pas en son propre nom, mais uniquement 'en qualité de mandataire, au nom de la Société des Nations': il ne possède vis-à-vis des peuples dont il a la charge qu'une autorité *déléguée*. La situation juridique du mandataire est ainsi absolument différente de celle d'un Etat colonisateur: c'est en effet en son nom personnel et sous sa souveraineté qu'une puissance administre ses territoires coloniaux, et ce n'est qu'à titre de devoir moral, non à titre d'obligation juridique, en ne tenant compte que de ses seuls intérêts, qu'elle peut exercer une mission de civilisation sur les peuples arriérés. Les régions sous mandat n'appartiennent pas au contraire au mandataire, elles lui sont seulement confiées en vue d'une gestion conforme aux intérêts des habitants; en acceptant d'exercer le mandat 'au nom de la Société des Nations', le mandataire s'impose des obligations, pour une mission de civilisation, vis-à-vis de la communauté internationale, comme le tuteur en contracte en acceptant la tutelle. Ce ne sont pas des droits que le mandataire acquiert, mais ce sont des devoirs qu'il assume, et ces devoirs sont juridiquement sanctionnés, car, comme le tuteur, il doit en rendre compte. . . ."
>
> "Création anglo-saxonne, car les principaux inspirateurs en furent le général Smuts et le président Wilson, l'institution du mandat

[1] Fauchille, *Traité de Droit International Public*, Tome 1, 2e Partie, pp. 820-24 (1925).

international offre une réelle analogie avec le système des *trustees*, qui est en vigueur en Grande-Bretagne et aux Etats-Unis. Le *'trustee'* est, en effet, celui qui administre un bien pour le compte d'autrui. La constitution d'un *trust* peut avoir lieu en termes exprès ou résulter de l'intention des parties ou de l'effet de la loi: nul ne peut devenir *trustee* sans sa volonté. Le degré de soins qu'un *trustee* doit apporter à l'exécution de son trust est celui d'un homme d'affaires ordinaire prudent dans l'administration de ses affaires semblables; un *trustee* ne peut pas faire de profit personnel sur le *trust.*" [1]

b. *The United Nations as the "organized international community"*

Applicants have demonstrated that, in the words of Fauchille, quoted directly above, [2]

> "Les régions sous mandat n'appartiennent pas au contraire au mandataire, elles lui sont seulement confiées en vue d'une gestion conforme aux intérêts des habitants; en acceptant d'exercer le mandat 'au nom de la Société des Nations', le mandataire s'impose des obligations, pour une mission de civilisation, *vis-à-vis de la communauté internationale*, comme le tuteur en contracte en acceptant la tutelle." [3]

The obligations of the Mandatory, since the dissolution of the League of Nations, have been and are now owed to the United Nations as the organized *"communauté internationale."*

Under the Mandate, Respondent was entrusted with power of administration and legislation over the Territory, on the basis that it was not to benefit thereby, but was to promote to the utmost the well-being and social progress of the inhabitants of the Territory. Article 6 of the Mandate obliged Respondent to make to the Council of the League of Nations annual reports, containing information with regard to the Territory and indicating the measures taken to carry out its obligations. The Council of the League of Nations was empowered to supervise the observance of such obligations with the assistance of a Permanent Commission which would receive and examine the annual reports and advise the Council in respect of its supervision of the Mandate.

Respondent contends that its obligations to report on its administration of the Mandate and the right of the League to supervise and verify its observance of these obligations, were undertakings of a contractual character. It argues that the obligation to report and the right to supervise were intended to give practical effect to the words "mandatories on behalf of the League" in accordance with the principle of *"mandatum,"* which is a contractual principle. The suggestion is that the League delegated authority to the mandatories and received in exchange their promise to report to the League and to submit to its supervision. On this basis,

[1] Fauchille, *op. cit.*, pp. 822-824.
[2] *Supra*, p. 536, footnote 1.
[3] *Op. cit.*, p. 823. (Italics added.)

Respondent contends that on dissolution of the League, the notion of "mandatories on behalf of the League" fell, and with it Respondent's undertaking to report and to submit to international supervision.

Applicants submit that the meaning ascribed by Respondent to the phrase "Mandatories on behalf of the League," in paragraph 2 of Article 22 of the Covenant distorts its intended significance and effect.

Applicants have shown that the League of Nations was not vested with direct administrative responsibilities over "peoples not yet able to stand by themselves." The proposal of President Wilson to that effect was not adopted. Hence, the League could not delegate to mandatories a power it did not possess; the provisions for reporting to the League and supervision by the League were intended, in the sense put forward in the British proposals, as a commission, or mandate, from the organized international community, which had assumed responsibility of a legal nature with regard to the tutelage of certain peoples. In order to ensure effective supervision, it was necessary to require accounting to the League of Nations, in its capacity as the only existing institution through which the organized international community at that time could act.

Applicants already have demonstrated that it was inherent in the nature and purpose of the Mandates System that powers of administration and legislation over mandated territories were entrusted to Mandatories solely for the purpose of promoting the well-being of peoples not yet able to stand by themselves and preparing them for self-determination.

Reporting by the Mandatory and supervision by the League were incorporated in paragraphs 7 and 9, respectively, of Article 22 of the Covenant as necessary corollaries of the fiduciary character of the mandates. Inasmuch as the Mandatories were entrusted with responsibilities toward peoples not yet able to stand by themselves, solely for their benefit, it was necessary to verify that such responsibilities were discharged fully and fairly.

As has likewise been demonstrated, in the concepts of trust and tutelage, adapted from analagous municipal law systems, the obligation of a trustee or tutor to account to public authority is *not* an obligation resting upon contract. The obligation is founded upon public interest and public policy; the community is responsible, in the last analysis, for the proper care of wards and others who are beneficiaries of tutelage.

Similarly, the duty of international accountability in the case of Mandates was imposed in order to protect the public interest and responsibility of the organized international community in the promotion of the well-being and social progress of the inhabitants of territories under Mandate. The international community, as shown above, had undertaken such responsibility, and mani-

fested such interest, in paragraph 1 of Article 22 of the Covenant.

It follows that, in performing its supervisory function with respect to Mandates, the League of Nations was, in the words of this Honourable Court, acting not as party to a contract, but "as an organized international community." [1]

The United Nations has replaced the League of Nations as such "organized international community," and Respondent's obligation of international accountability, accordingly, is owed to the United Nations in that capacity. No other result would be consistent with the fact

> ". . . that each Mandate under the Mandates System constitutes a new international institution, the primary, overriding purpose of which is to promote 'the well-being and development' of the people of the territory under Mandate." [2]

Consistently with the foregoing, and as was to be expected in the light of such "overriding purpose" of the Mandate, the proceedings at the period of the dissolution of the League of Nations and the organization of the United Nations, manifested the clear intention of all concerned to preserve and assure proper discharge by the organized international community with respect to its responsibilities toward the inhabitants of mandated territories.

The facts concerning such proceedings have twice been fully presented to the Court. The Court has held that

> ". . . obviously an agreement was reached among all the Members of the League at the Assembly session in April 1946 to continue the different Mandates as far as it was practically feasible or operable with reference to the obligations of the Mandatory Powers and therefore to maintain the rights of the Members of the League, notwithstanding the dissolution of the League itself." [3]

The Court's holding, it is submitted with respect, is to be read in the light of its further holding that

> "The findings of the Court on the obligation of the Union Government to submit to international supervision are thus crystal clear. Indeed, to exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate." [4]

The foregoing holdings, together with the holding that "the Mandate as a whole is still in force," [5] constitute the law of the Case. [6]

As has been shown, [7] and as is obvious from the history of the Mandate since the inception of the United Nations, that Organi-

[1] *Judgment*, p. 329.
[2] *Ibid.*
[3] *Id.*, p. 338.
[4] *Id.*, p. 334.
[5] *Id.*, p. 335.
[6] No "new facts," or other relevant evidence, are adduced by Respondent to justify reopening or reconsidering of issues twice previously presented to the Court and twice decided by it.
[7] *Supra*, Chapter II, pp. 222-230; I, pp. 43 *ff.*

zation has consistently maintained its right and duty to exercise supervisory authority over the Mandate, and such a position has reflected the virtually unanimous expression of the organized international community.

Thus, by overwhelming majority, the General Assembly, in resolution 749 (VIII) of 28 November 1952, declared that "without United Nations supervision the inhabitants of the territory are deprived of the international supervision envisaged by the Covenant of the League of Nations." The resolution further states that the United Nations "would not fulfil [sic] its obligations towards the inhabitants of South West Africa if it were not to assume the supervisory responsibilities with regard to the Territory of South West Africa which were formerly exercised by the League of Nations." [1]

The views of the organized international community, thus clearly expressed and consistently maintained, are obviously entitled to weight in determining the nature and purpose of the obligations to which they relate.

2. *The Compromissory Clause in Article 7 of the Mandate is in effect, and the said Clause assures the judicial protection of the legal interest of the organized international community in respect of the "sacred trust."*

Respondent's contentions [2] concerning the compromissory clause of the Mandate illuminate the contrasting views of the parties in respect of the legal nature and scope of the "sacred trust." As is shown below, Respondent's contention that the compromissory clause has lapsed and that, in any event, it does not extend to the judicial protection of the interests of the inhabitants of the Territory, strips the "sacred trust" of its significance.

Respondent's contention with respect to the assertedly limited scope of the compromissory clause no doubt is essential to its argument that the lapse of Article 6 of the Mandate collapsed the Mandate as a whole. Unless Respondent succeeds in showing that the compromissory clause is so inconsequential in purpose and consequence as, in effect, to be *de minimis* in the scheme of the Mandate, Respondent obviously cannot carry its contention that the Mandate as a whole has lapsed by reason of the asserted lapse of Article 6.

The clause, set out in Article 7 of the Mandate, provides for reference to the Permanent Court of International Justice of disputes "relating to the interpretation or the application of the provisions of the mandate." The text raises the question, twice presented to and adjudged by the Court: what are the provisions of the Mandate, as to which disputes concerning interpretation or application are properly referable to the Court?

[1] G.A.O.R. 8th Sess., Supp. No. 17 at 26 (A/2630).
[2] **II**, pp. 175 *ff.*

The relevant Mandate provisions include Articles 2, 3, 4, 5, 6, and the first paragraph of Article 7. Article 2 defines the powers of the Mandatory in the Territory, explicitly requiring that the Mandatory shall promote the material and moral well-being and the social progress of the inhabitants of the Territory. In Article 3, the slave trade is prohibited; likewise the traffic in arms and ammunition; likewise, the supply to the "natives" of intoxicating spirits and beverages. Article 4 prohibits the military training of "natives," except under certain conditions. Article 5 insures freedom of conscience and the free exercise of all forms of worship. Article 6 requires the Mandatory to report on measures taken by it to carry out its obligations under the previous Articles. The first paragraph of Article 7 prohibits the unilateral modification by the mandatory of the terms of the Mandate.

In order to fall within the scope of the compromissory clause, a dispute with the Mandatory must, therefore, concern compliance on the part of the Mandatory with its duty to promote the well-being and social progress of the inhabitants to ensure that they are not enslaved, to protect them from traffic in arms and ammunition, to deny them intoxicating spirits and beverages, to draft them for military service only as permitted, to assure their freedom of conscience and worship, to report on the discharge of its obligations to them, and to refrain from unilateral modification of the terms of its obligations. Respondent, on the other hand, contends that, at least as to certain of these obligations, Applicants have no standing to submit to the Court a dispute concerning their interpretation and application. Respondent argues that a dispute with respect to their application and interpretation does not involve a legal interest; that Applicants do not have, and may not assert, a legal interest in the well-being and the social progress of inhabitants of the Territory. In other words, Respondent contends that it is under no cognizable legal responsibility for the proper performance of its obligation toward the inhabitants of the Territory. The legal untenability of this contention has been analyzed above.

What is more directly relevant in this context, however, is that Respondent's contention renders the compromissory clause meaningless.

In an effort to avoid so patently absurd a result, Respondent suggests that there are, in the Mandate, provisions which do not deal with the interests of the inhabitants, and that the compromissory clause has meaning, because it may be deemed applicable to this type of provision.[1] The difficulty with the suggestion is twofold.

First, there are no organic provisions in the Mandate that do not deal in some manner with the interests of the inhabitants. The

[1] II, p. 386; *id.*, pp. 189 *ff.*

prohibition against the building of military bases and fortifications in Article 4, is, *inter alia*, incidental to the general prohibition against the improper use of the inhabitants for military purposes. [1] It is obviously deemed to be in the interest of the inhabitants to preclude Respondent from making a military base of the Territory. Article 5, assuring entry and travel to foreign missionaries, manifestly is incidental to the Article's general guarantee of freedom of conscience and worship for the natives.

Secondly, as the Court has already held, the phrase "any dispute whatever" clearly refers to disputes concerning interpretation or application of any and all provisions of the Mandate. [2]

Applicants submit that the scope of the compromissory clause, thus determined by the Court, makes clear that it is the international community of states which has a legal responsibility for the protection of inhabitants of the Territory. Under the scheme of the Mandate, certain States members of the community, such as Applicants herein, accepted the rights and duties of membership in the "organized body," [3] representing the international community, by becoming members of such organized body—formerly the League of Nations, now the United Nations.

Among the rights and duties thus accepted by Applicants, is that of submitting for adjudication by this Honourable Court a dispute concerning Respondent's conduct of its obligations toward the inhabitants of the Territory.

Respondent's interpretation of the compromissory clause does more than deprive the clause of meaning; it puts into issue the basic nature of the Mandates System. It seeks to transmute the concept of "sacred trust" into a moral principle, rather than one of legal effectiveness.

Respondent bases its construction of the clause upon the compromissory clauses as formulated in "B" Mandates. In contrast to the "C" Mandates, the organic provisions of which are concerned with the well-being and social progress of the inhabitants of the Territory, "B" Mandates contained two types of provisions; one, like the "C" Mandates, dealt with the duties of the Mandatory with respect to the well-being of the inhabitants; the others gave to nationals of Members of the League of Nations certain rights, including particularly so-called "open door" rights, ensuring them equality of treatment in economic matters.

The compromissory clause, which was first introduced by the United States in connection with the drafting of the "B" Mandates, made clear the legal distinction between the two types of provisions. One paragraph of the draft provided that, if any dispute arose regarding the interpretation or application of the provisions of the Mandate, such dispute would be referred to the Permanent Court

[1] See p. 553, *infra*.
[2] *Judgment*, p. 343.
[3] *Id.*, p. 346.

of International Justice. Another paragraph of the draft likewise provided that, if nationals of Members of the League of Nations were denied rights granted to them in the Mandate, they could similarly refer such disputes to the Court. [1]

Hence, the legal interest of a Member of the League concerning the manner in which the Mandatory was discharging its obligations under the Mandate toward the inhabitants was distinguished from the legal interest of a national of a Member of the League with respect to the rights granted to him.

When the United States proposed the foregoing compromissory clause to the Milner Commission, which was preparing the draft Mandates, no objection was raised to the division of the clause into the two aforementioned paragraphs. It was understood that the distinction was required by the presence in the draft "B" Mandates of two different types of legal interests. The French Delegate and Lord Milner, however, objected to permitting nationals of Members of the League individually to institute proceedings against a Mandatory for infractions of the rights given to them in the Mandate. [2]

In the view of Lord Milner, proceedings involving the rights of nationals of Members of the League should be instituted only by the States of their nationality. Lord Cecil thereupon proposed a modification of the second paragraph of the compromissory clause. As modified, it provided that "States members of the League of Nations, may also, on behalf of their subjects or citizens, bring claims before the Court" for infractions of the rights granted to their nationals. [3]

Accordingly, although the compromissory clause proposed for the "B" Mandates remained divided into two paragraphs, in each case, a State Member of the League could institute proceedings in the Permanent Court of International Justice.

On 10 July 1919 the Commission approved the version of the second paragraph of the clause, as amended in accordance with Lord Cecil's suggestion. Both the first and second paragraphs of the clause were incorporated in the draft "B" Mandates, and both remained in the draft when approved by the Milner Commission on 5 August 1919. [4]

Far from the foregoing history supporting Respondent's contention that the compromissory clause in the "C" Mandates does not mean what it says, on the very same days, 9 and 10 July 1919, that the Milner Commission prepared and approved the incorporation in the draft "B" Mandates of the aforesaid first and second paragraphs of the clause, the Commission proposed and approved the incorporation in the draft "C" Mandates of only the first

[1] *Conférence de la Paix, 1919-1920, Recueil des Actes de la Conférence*, Partie VI A 1, p. 342 (1934).
[2] *Id.*, p. 349.
[3] *Id.*, p. 350.
[4] *Id.*, pp. 402-03, 406.

paragraph of the clause. In other words, the Commission inserted merely the paragraph dealing with the interest of a State Member of the League concerning the manner in which the Mandatory discharged its obligations toward the inhabitants of the Territory. [1]

The significance of this action is likewise clear from the record. Japan was pressing for inclusion in the draft of the "C" Mandates of "open door" rights for its nationals. The answer, as Lord Cecil put it, was that "the stipulations of the C mandates [apply] only to the interests of the natives." It was repeatedly stressed during the discussion that "the sole obligations of the [C] Mandatory Power are those which concern the protection of the natives." [2]

There was no need, therefore, and it would have been incongruous, to insert into the compromissory clause of the draft "C" Mandates a paragraph dealing with the interest of Members of the League concerning the discharge by the Mandatory of its obligations with respect to their nationals. All that was required was a clause dealing with the interest of Members of the League concerning the discharge by the Mandatory of its obligations toward the inhabitants of the Territory.

Accordingly, only the first paragraph of the clause was incorporated in the final draft of the Mandate for South West Africa when it was approved by the Milner Commission on 5 August 1919. [3]

Not only does the foregoing history confirm the obvious textual meaning of the clause; it also makes clear the understanding that the clause vested in Members of the League a right to submit to the Court a dispute concerning the discharge by the Mandatory of its obligations toward the inhabitants of a Mandated Territory. [4]

The contrasting views of Applicants and Respondent, as they emerge from the foregoing analysis of the latter's contentions in respect of the compromissory clause may fairly be summarized as follows:

In Applicants' view, the drafters of the Covenant intended to give legal effect to the concept "sacred trust." The design was assumption of legal responsibility on the part of the international community with regard to designated inhabitants of Africa and Asia. The exercise of such responsibility, insofar as concerned the inhabitants of South West Africa, was entrusted to Respondent. A member of the community, by becoming a Member of the League, accepted the right and duty to assure that Respondent exercised this responsi-

[1] *Id.*, pp. 354, 356.

[2] *Id.*, p. 336.

[3] *Id.*, p. 408.

[4] The significance of elimination of the second paragraph of the clause in the "B" Mandates is not relevant to the issues in dispute here. It is sufficient to note that the question arose in the first *Mavrommatis Case*, although in the context of an "A" rather than a "B" Mandate; The Court was divided as to whether Greece could institute a proceeding for violation of a right of one of its nationals by the Mandatory; on analysis of the arguments and opinions, it would appear that the action brought by Greece would have been proper, in the view of all concerned, if the dispute had involved a proceeding for violation by the Mandatory of its obligations toward the inhabitants of the Mandated Territory. (*Mavrommatis Case*, P.C.I.J., Ser. A, No. 2 (1924).)

bility. The clause thus gave effect to the purposes of the Covenant.

In Respondent's view, to the contrary, "sacred trust" imparted a merely moral obligation; the international community assumed no legally enforceable responsibility for well-being and progress of the inhabitants concerned. A member of the community, by becoming a Member of the League, acquired a merely moral interest in the treatment accorded the inhabitants of the Territory. Insofar as the organic provisions of the Mandate relate to the treatment of inhabitants of the Territory, the compromissory clause served no purpose and is legally meaningless.

In order to avoid the clear and natural meaning of the text of the compromissory clause, Respondent asserts that the drafters could not have intended to subject it to judicial proceedings with respect to the discharge of its obligations to inhabitants, for two reasons. One is that, otherwise, the clause would open Respondent to a multiplicity of proceedings.[1] Secondly, inasmuch as the clause has been invoked only once in the history of the Mandates, it could not have been intended to permit the institution of such proceedings.[2]

Compromissory clauses are to be found in many multilateral agreements.[3] All hold in theory a possibility of multiplicity of proceedings. Some are rarely invoked, inasmuch as compliance with obligations is, fortunately, the rule rather than the exception. It does not follow that such clauses do not mean what they say.

Respondent advances two additional theses to support its contention. One is that Respondent's obligations toward the inhabitants are political or technical, rather than legal obligations; hence the drafters could not have intended to have them determined by judicial process.[4] Applicants have already analyzed the reasoning underlying such a thesis, and submit that it is untenable.[5] At best, it begs the question of the proper interpretation of the clear text of the clause.

Respondent argues also that if its obligations toward the inhabitants were covered by the clause, the Permanent Court would have been in a position to overrule decisions of the Council approving the manner in which the Mandatory performed its obligations; the drafters could not have intended this result.[6] This also begs the issue. It assumes that the obligations of the Mandatory were not legal in nature, hence that they were for the Council to decide rather than for the Court.

In making provision for judicial action with respect to a Mandatory, the drafters of the Mandates System acted in accordance with a general and salutary policy of reliance upon international judicial process. The compromissory clause in the Minorities Trea-

[1] **II**, pp. 191-192.
[2] *Id.*, p. 192.
[3] *E.g.*, the Minorities Treaties, discussed in other contexts, pp. 482, 495, *supra*.
[4] **II**, p. 183.
[5] *Supra*, Chapter V, pp. 476-519.
[6] **II**, pp. 181 *ff*.

ties is significant in this respect. It indicates that there was nothing unique in the inclusion in the Mandate instruments of a clause permitting a Member of the League to submit to judicial determination the conduct of a Mandatory with respect to the inhabitants of a mandated territory.

The exercise of the right of judicial recourse was, it is true, restricted to States on the Council of the League, in the case of the Minorities Treaties. The effect of the clause was nevertheless the same, inasmuch as such clauses afforded judicial protection to the treatment of minorities, [1] just as Article 7 affords such protection to the inhabitants of the Territory.

The Covenant of the League itself expressed a policy of reliance upon international adjudication in Articles 12 and 13. Article 12 required Members of the League to submit to either arbitration, or judicial settlement, or the Council of the League, any dispute between them likely to lead to "a rupture" and in no case to resort to war until three months after the award of the arbitrators, or the judicial decision, or the report of the Council. Such a general policy of reliance upon judicial process may explain the absence of any indication in the legislative history of the Mandates System that any of the parties concerned questioned the inclusion of the compromissory clause.

In conclusion, Respondent's interpretation of the compromissory clause reflects Respondent's assumption, discussed elsewhere herein, that the Mandate has lapsed, that the Mandate was, in effect, "close to annexation" and that it is vested with "day to day . . . attributes of sovereignty" over the Territory. [2]

D. Conclusion

As this Honourable Court has held:

> "The unanimous holding of the Court in 1950 on the survival and continuing effect of Article 7 of the Mandate, continues to reflect the Court's opinion today. Nothing has since occurred which would warrant the Court reconsidering it. All important facts were stated or referred to in the proceedings before the Court in 1950 . . . . The validity of Article 7, in the Court's view, was not affected by the dissolution of the League, just as the Mandate as a whole is still in force for the reasons stated above." [3]

Applicants submit, with respect, that the foregoing holdings constitute the Law of the Case and that nothing has occurred since the Court's *Judgment of 21 December 1962* which would warrant the Court's reconsideration of that Judgment.

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[1] See, for examples, Article 12 of the Treaty Between the Principal Allied and Associated Powers and Roumania, 9 December 1919, 5 *League of Nations Treaty Series* 337, 343, 345 (1921), and Article 7 of the Declaration Concerning the Protection of Minorities in Albania, 2 October 1921, 9 *League of Nations Treaty Series* 175, 179 (1922).

[2] *Supra*, p. 240.

[3] *Judgment*, pp. 334, 335.

ANNEX 8

BRIEF SURVEY OF LEGAL ARGUMENTS PREVIOUSLY ADVANCED BY RESPONDENT, AND DISPOSITIONS THEREOF PREVIOUSLY MADE BY THIS HONOURABLE COURT, WITH RESPECT TO RESPONDENT'S OBLIGATIONS TOWARD THE UNITED NATIONS

1. Proceedings Leading to the Advisory Opinion of 1950

Respondent first presented to the Court arguments in support of the several points enumerated, pages 520-546, *supra*, in the Proceedings leading to the *Advisory Opinion of 11 July 1950*.[1] In its written and oral statements therein, Respondent adduced the following considerations, set forth below in its own formulations:

> "Now, these phrases — 'sacred trust of civilization,' 'the world acting as trustee through a mandatory,' and 'the world community as the ultimate holder of the Mandate' — are, I would submit, political phrases from which I much confess I see no way of extracting any precise legal meaning." [2]
>
> "Mandatories were never responsible to the world at large. The international community, i.e., the community of all recognized States, I would submit, is not a distinct legal entity, capable as such of having any rights or obligation. . . .[3] Mandatories, then, were responsible not to this vague fictional entity, the world community, not to each and every recognized State, but only to the League, and only members of the League were recognized to have any *locus standi* to question the manner in which a mandatory fulfilled its obligations under the Mandate.[4]
>
> "Apart from this concept of the world community, no Government has attempted to explain how a mandatory relationship is to be continued without a mandator or to whom the obligations of the mandatory would in such a case be owing, or by whom or how these obligations could be invoked against the mandatory." [5]
>
> "Clearly, the Union of South Africa can have no obligations under the Mandate towards the non-existent League of Nations, so that assuming that that organization had no successor in law, the Mandate as a legally enforceable instrument must be regarded as having ceased to exist." [6]
>
> "It appears to be correct to say, therefore, that the United Nations can have legal rights only in respect of those functions previously

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[1] *Advisory Opinion of 11 July 1950*; I.C.J. Rep. 1950, p. 128. *(International Status of South-West Africa.)*

[2] *International Status of South-West Africa*—Pleadings, Oral Arguments and Documents 277.

[3] *Ibid.*

[4] *Id.*, p. 278.

[5] *Id.*, p. 279.

[6] *Id.*, pp. 74-75.

exercised by the League of Nations which the United Nations has specifically assumed." [1]

"It is clear, therefore that whereas the United Nations assumed none of the League's functions or powers with respect to mandates, and whereas the League recognized that its own functions in that respect have come to an end, there could be no continuation of obligations under the mandates towards the United Nations. The mandates, and in particular the Mandate for South-West Africa, must, therefore, necessarily have ceased to exist as legally enforceable instruments." [2]

"But if... in spite of the considerations which I have advanced, it should nevertheless be held that the Mandate has continued to exist, I would submit that there could scarcely be found a more appropriate set of circumstances on the basis of which the doctrine of *rebus sic stantibus* could be invoked. It being clear that the United Nations has neither succeeded to, nor assumed, the functions of the League of Nations relating to the Mandates System, certain essential elements of that System must necessarily have ceased to exist in consequence of the dissolution of the League... All these circumstances indicate a change of so radical a nature in the application of, and in the method of implementing, the Mandates System, that the Union Government would, in my submission, be fully justified in claiming that they are no longer bound by the terms of the Mandate." [3]

2. The Advisory Opinion of 1950

In its *Advisory Opinion of 11 July 1950*, the Court considered and disposed of the foregoing contentions as follows:

In respect of the Mandates System, the Court held that "two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form 'a sacred trust of civilization.'" [4]

In respect of the meaning of the word "mandatory," the Court said: "The League was not . . . a 'mandator' in the sense in which this term is used in the national law of certain States . . . The 'Mandate' had only the name in common with the several notions of mandate in national law." [5] The Court held further: "The Union Government was to exercise an international function of administration on behalf of the League, with the object of promoting the well-being and development of the inhabitants." [6]

The Court, in respect of the effect of the dissolution of the League, held:

"For the above reasons, the Court has arrived at the conclusion that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Terri-

[1] *Id.*, p. 76.
[2] *Id.*, pp. 76-77.
[3] *Id.*, p. 288.
[4] *Advisory Opinion of 11 July 1950*, I.C.J. Rep. 1950, p. 128, at 131 (*International Status of South-West Africa*).
[5] *Id.*, p. 132.
[6] *Ibid.*

tory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it."[1]

The Court held explicitly that the Mandate had not lapsed, saying: "It is now contended on behalf of the Union Government that this Mandate has lapsed, because the League has ceased to exist. This contention is based on a misconception of the legal situation created by Article 22 of the Covenant and by the Mandate itself." [2] The Court added:

> "If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified." [3]

The Court, referring to the obligations established in the Mandates System for the benefit of inhabitants, held:

> "These obligations represent the very essence of the sacred trust of civilization. Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon." [4]

3. The Preliminary Objections

In the *Preliminary Objections* herein, Respondent re-argued the basic issues previously argued, and which were decided by the Court in its *Advisory Opinion of 1950*.

In respect of Article 22 of the Covenant, Respondent contended:

> "The wording of the Article as a whole, as well as its historical background, suggest strongly that these references to 'trust,' 'tutelage' and 'Mandatory' were not intended to bear technical legal meanings, by exact or close analogy to municipal law institutions of *trust, tutelage* and *mandatum*." [5]

To the same effect, Respondent added:

> "It seems then that what was said in the opening paragraphs of Article 22 concerning a 'sacred trust' and 'tutelage,' must be regarded as being descriptive of the idealistic or humanitarian objectives involved in the mandates system, and that the reference to 'mandatories on behalf of the League' is to be understood as affording a broad indication of the method whereby those objectives would be sought to be attained." [6]

Respondent also contended:

> "The source and origin of this obligation to report and account was contractual, the Mandatories becoming bound thereto by their

[1] *Id.*, p. 137.
[2] *Id.*, p. 132.
[3] *Id.*, p. 133.
[4] *Ibid.*
[5] I, p. 301.
[6] *Id.*, pp. 301-302.

agreement to the Mandate instruments," [1] adding that "by nature and content, too, the obligation and the right correlative thereto were of a purely contractual or 'personal' nature, as distinct from 'real' rights and obligations." [2]

With respect to the dissolution of the League of Nations, Respondent argued that

> ". . . the League of Nations and all its organs ceased to exist, and it accordingly became impossible for any Mandatory to comply with the obligation that had been imposed upon it by the Mandate agreements to report and account to the Council of the League, or with the subsidiary obligation to forward petitions to it from inhabitants of the Territory." [3]

To the same effect: "Respondent submits that the Court will in this case, for the reasons advanced above, conclude that Respondent's obligation, derived from the Mandate agreement, to report and account to, and submit to the supervision of, the Council of the League of Nations, lapsed upon dissolution of the League and has not been replaced by any similar obligation to submit to the supervision of any organ of the United Nations or any other organisation or body." [4]

Respondent concluded its *First Preliminary Objection* with the contention that: ". . . [I]n the sense that the mandate was in the time of the League of Nations a treaty or convention, it had lapsed and was no longer in force within the meaning of Article 37 of the Statute of the Court," [5] and insisted that the dispute was not with "another member of the League of Nations," that there was no "dispute" in the sense intended by Article 7 of the Mandate; and that there had been no "negotiations" in the sense required by that Article.

4. Judgment on the Preliminary Objections

In its *Judgment of 21 December 1962*, the Court referred to its *Advisory Opinion of 1950*, and rejected Respondent's contentions in all respects.

In its *Counter-Memorial*, Respondent reiterates all arguments previously made in the Proceedings leading to the *Advisory Opinion of 1950* in support of its Preliminary Objections herein.

> Respondent contends: "It seems then, that what was said in the opening paragraphs of Article 22 concerning a 'sacred trust' and 'tutelage,' must be regarded as being descriptive of the idealistic or humanitarian objectives involved in the Mandate System, and that the reference to 'Mandatories on behalf of the League' is to be understood as affording a broad indication of the method whereby those objectives would be sought to be attained." [6]

Respondent likewise reiterates its contention with respect to the concept of Mandates:

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[1] *Id.*, p. 104.
[2] *Id.*, p. 105.
[3] *Id.* p. 109.
[4] *Id.*, p. 138.
[5] *Id.*, p. 148.
[6] II, p. 104. *cf.* Respondent's identical language in I, pp. 301-302.

"The Mandates System, whilst also containing provisions in accordance with the 'sacred trust' and 'tutelage' ideals, sought to overcome this weakness and uncertainty by the introduction, in accordance with the *mandatum* concept, of international accountability in the form of League supervision." [1]

It further argues:

"The *only* provisions whereby practical effect was sought to be given to the notion of 'Mandatories on behalf of the League,' were those requiring report and accountability to, and thus supervision by, the Council of the League. . . ." [2]

On this premise, Respondent concludes:

"In the result, the dissolution of the League brought about not only a cessation of the notion of 'Mandatories on behalf of the League,' but also of all provisions whereby practical effect was sought to be given to that notion. . . ." [3]

Respondent argues that there is no basis for "rejecting the *prima facie* conclusion that the mandatory's obligation to report and account, together with the subsidiary function of forwarding petitions, lapsed on dissolution of the League." [4]

Respondent concludes, on the basis of its analysis of actions taken by the League of Nations and by the United Nations:

"These statements show unmistakably a general understanding amongst Members of the United Nations that no supervisory functions regarding Mandates . . . had been taken over, and thus refute any suggestion of a general tacit intention to the contrary. . . ." [5]

hence that "the Mandate as a whole must be held to have lapsed consequent upon the lapse of the Mandatory's obligations of report and accountability to the Council of the League." [6]

Respondent adds:

"A contention that the Mandate as a whole has lapsed has, on occasions in the past, resulted in the raising of the further questions whether, in such event, Repondent would have to rely on a basis other than the Mandate as such for a right or title to administer the Territory of South West Africa and if so, what the basis would be." [7]

Denying that this is an issue within the ambit of the present case, Respondent avers that it "does not claim, but on the contrary expressly disclaims, that its right of administration is based on continued existence of the Mandate." [8]

In its argument with respect to lapse of the Mandate as a whole, Respondent reiterates the contentions advanced in support of the *Preliminary Objections*. It argues that the present dispute is not one

[1] II, p. 117.
[2] *Id.*, p. 170.
[3] *Ibid.*
[4] *Id.*, p. 124.
[5] *Id.*, p. 148.
[6] *Id.*, p. 173.
[7] *Ibid.*
Id., p. 174.

between "members of the League," that it is not a "dispute" in the legal sense, and that there have been no "negotiations."

Respondent repeats all arguments advanced in the *Preliminary Objections* in support of its contention that the *Advisory Opinion of 1950* is not controlling and that it should be reconsidered and reversed. Respondent re-asserts that "newly discovered information," allegedly not placed before the Court in 1950, would have led the Court to a contrary result.

All such assertedly "new facts" were placed before the Court in the *Preliminary Objections* and in Respondent's Oral Arguments thereon. The Court nonetheless reaffirmed its *Advisory Opinion* and, in the words of the Court:

> "All important facts were stated or referred to in the proceedings before the Court in 1950." [1]

Accordingly, no purpose would be served by showing, as Applicants submit, that Respondent's reiteration of the alleged "new facts" add nothing "new."

5. The Law of the Case

On the basis of the foregoing, it is submitted that the contentions of Respondent in respect of the lapse of the Mandate, or any of its provisions, are *res judicata* by virtue of the Judgment on the *Preliminary Objections*.

If not *res judicata*, technically speaking, by virtue of the *Advisory Opinion of 1950*, they are nonetheless *res judicata* within the broad meaning of the doctrine, on the basis of the Advisory Opinion. The rationale of the doctrine is that there must be an end to litigation. Respondent has now re-argued the same points three times. Its arguments have been in some cases identical to, or a mere repetition of, those advanced in 1950 and considered by the Court then. It is fair to say that Respondent has had its day in Court on these issues.

If the *Opinion of 1950* is not *res judicata*, it is at least the law of the case, hence precedent, in the sense that the Opinion ought to be followed in the interest of the reliance to which Opinions of this Honourable Court are entitled, particularly when reaffirmed by a Judgment in a contentious proceeding.

Applicants do not contend that the Court is bound by a rule of precedent. It is submitted, however, that all judicial systems favour giving effect to prior holdings of the same Court, in the absence of overriding reasons to the contrary. This is true both in the civil law and common law, although each system achieves the same result through different processes.

Precedent "operates as a sign of impartiality and objectivity in the legal system, and helps to lift the adjudicative process above the immediate controversy." In following precedent, a Court "not merely uses precedent, but creates it as well; objectivity is built upon objectivity; source upon source." [2]

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[1] *Judgment*, p. 334.

[2] Kaplan and Katzenbach, *The Political Foundations of International Law* 258 (1961).

CHAPTER VII

RESPONDENT'S VIOLATIONS OF ITS OBLIGATIONS BOTH TOWARD THE INHABITANTS OF THE TERRITORY AND TOWARD THE UNITED NATIONS

A. Respondent's Violations of Article 4 of the Mandate

1. *Statement of Law*

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. [1] A narrow meaning is, however, 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.

a. The military clauses had a broad general purpose and the terms therein cannot be narrowly interpreted. Their basic principle was ". . . the complete neutralisation of mandated territories in the event of war, whether the mandatory is belligerent or not." [2] Their language is sweeping and categorical. Respondent qualifies this, however, 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," [3] and, secondly, by stating that there is "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*," [4] since "the duty—and the right—to defend the Territory, is that of Respondent . . . ." [5]

With respect to the first qualification, that military bases must somehow be related to aggressive designs, Applicants submit that the purpose of the Mandate is to benefit the inhabitants of the Territory and that even though military and naval bases, or fortifications, may have no presently intended offensive purpose—at least as unilaterally defined by Respondent—they are inconsistent with the Mandate because they are susceptible of offensive use. The Court should not be asked to examine the subjective attitude of a particular government at a given moment of time in order to ascertain the character of the violation. What the Mandate and Article 22 of the Covenant prohibit is the "establishment of

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[1] "Consequently, 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." **IV**, p. 50. (Italics omitted.)

[2] Stoyanovsky, *La théorie générale des mandats internationaux* 174 (1925), quoted in P.M.C. Min., 7th Sess., p. 157.

[3] **IV**, p. 48.

[4] *Id.*, p. 50. For further discussion of this point, see Annex 9, sec. (1), p. 565, *infra*.

[5] *Id.*, p. 48.

fortifications or military and naval bases," not merely the formulation of aggressive plans or purposes for their use.

Respondent's second qualification, that Respondent 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. The objective of the military clauses being the "complete neutralization of mandated territories in the event of war," [1] the primary safeguard for such territories did not reside in the strength of the Mandatory, but in the system of collective security established by the League. [2] As Duncan Hall wrote in *Mandates, Dependencies and Trusteeship*, ". . . the Mandate System was designed to function inside the general framework of a collective security which it was assumed would preserve peace." [3] As has been elsewhere described in this Reply, the Mandates System was founded upon a new, dynamic concept of collective responsibility. [4] It is consistent with this 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." In addition, the framers of the "A" Mandates felt that it was necessary to insert specific language to permit the "A" Mandatories so much as to transport their own forces in the Mandated Territories. [5]

Finally, Respondent attempts to exclude military training camps from the definition of "military base," [6] referring to "considerable permanent military forces stationed within [the] boundaries [of practically all the African territories under Mandate]," yet failing to point out that such forces were almost entirely composed of *natives*. All of the other "African territories under Mandate" were under "B" Mandates, the language of which prohibited the Mandatories from organising ". . . any *native military forces* in the territory except for local police purposes and for the defence of the territory." [7] Respondent's whole argument [8] becomes strained as soon as the word "native" is added to all of Respondent's assertions concerning "permanent military forces." [9]

For the reasons given, it is submitted that the intention and the result was to frame the prohibition against military bases in broad and sweeping language.

[1] *Supra*, footnote 2, p. 553.
[2] See Article 1, and Articles 8-17, of the Covenant of the League of Nations.
[3] Hall, *Mandates, Dependencies and Trusteeship* 69 (1948).
[4] See Chapter VI of this Reply, *supra*.
[5] For further discussion of this point, see Annex 9, sec. (2), p. 565, *infra*.
[6] **IV**, p. 50.
[7] P.M.C. Min., 7th Sess., p. 157.
[8] **IV**, p. 51.
[9] With respect to the question and answer given in the 18th Session of the P.M.C. concerning Tanganyika, the troops involved were native troops and the concentration of "the battalion in reserve" was a "native military force" being trained precisely for the purposes permitted. (P.M.C. Min., 18th Sess., p. 34.)

b. Since the language of the mandates expressly recognized that natives of the Mandated Territories may be trained for police and defence purposes, and since it is obvious that such trained natives (or, in the case of the "B" Mandates, such "native military forces in the territory") must be based somewhere, obviously the correct reading of the provision respecting bases and fortifications is that it is inapplicable to natives trained for the permissible purposes. [1]

The distinction between the objectives of the first and second sentences of Article 4 is that natives who have been given military training only for purposes of police and local defence do not threaten the neutrality of the Mandated Territory, either as a possible base of aggression or serving otherwise to attract military attack from outside, either for offensive or defensive purposes. Nor are they available for service in the armed forces of the Mandatory. On the other hand, military or naval bases established by the Mandatory, or any fortifications erected thereby, for whatever purpose, increase the Mandatory's offensive capability, thereby serving as targets for capture or for exploitation by other Powers.

Finally, the discussions cited by Respondent in the Council of Ten demonstrate a preoccupation with the raising of large African armies. [2] Such "great armies" could hardly have been raised *without* the creation of bases. If the prohibition on military bases *had been considered to be applicable to native forces*, the discussions recited on pages 49 and 50 **(IV)** of Respondent's *Counter-Memorial* would have been wholly unnecessary. The prohibition on military bases could not, therefore, have been considered as being applicable to native forces.

This conclusion is in keeping with the obvious purpose of Article 4, which was to effect ". . . the complete neutralisation of mandated territories in the event of war. . . ." [3]

c. The 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. [4] A broad interpretation of the phrase

[1] For further discussion of this point, see Annex 9, sec. (3), p. 566, *infra*.

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

[3] Stoyanovsky, p. 174, cited p. 553, footnote 2, *supra*; cited in P.M.C. Min., 7th Sess., p. 157.

[4] See, *e.g.*, the Memorandum by M. Van Rees, "What is the Military Organisation Allowed in Territories Under B and C Mandates?" (P.M.C. Min., 7th Sess., pp. 156-58). The following year, a Report by Mr. Freire d'Andrade, "Military Organisation of Territories under B and C Mandate," was appended as Annex 4 to the Minutes of the 9th Session (P.M.C. Min., 9th Sess., pp. 193-95), and its second sentence stated:

> "As regards fortifications and military or naval bases, the position is quite clear; the mandatory Power may not establish any military or naval bases nor erect any fortifications in the mandated territory." (Id., p. 193.)

Similarly, the first of Mr. d'Andrade's four conclusions was that "the Mandatory cannot establish any naval or military base or erect any fortifications in the mandated territory."

"military or naval base" is consistent with this, as well as with the great concern shown by the Commission from 1932 to 1935 with respect to rumours that Japan had constructed a naval base in one of the islands under Mandate. [1]

In the debates on the alleged Japanese naval base in the Pacific, the Chairman (Marquis Theodoli) "... emphasised that the application of an extremely important principle of the mandates was involved..." [2] While questioning the representative of Japan (Mr. Ito), M. Rappard asked him if he could,

> "state that he knew from a reliable source that no establishment existed in the South Sea Islands that *could be called a naval base?*
>
> "The Chairman stated that he was anxious that there should be no ambiguity on this point. A naval base might not be self-evident since harbour works permitting of the entry of ships could be used by submarines. He preferred therefore to ask M. Ito to state quite frankly whether the works undertaken were *intended only to promote mercantile navigation.*" [3]

The sweeping approach of the Commission ("no establishment ... that *could be called a naval base*") is even more strikingly reflected in the Minutes of the 28th Session, where again Mr. Ito of Japan was being questioned about the Pacific Islands:

> "The Chairman drew attention to Chapter XVII of the report relating to military clauses (page 93 of the report). The terms of this chapter were extremely definite, and the Chairman asked M. Ito to confirm that the inference was that there was *not a single soldier or a single sailor* belonging to the navy *in the entire territory under mandate.*
>
> "M. Ito replied that there was not in the entire territory a single soldier or sailor on the active list. The policemen were often former non-commissioned officers of the army.
>
> "The Chairman requested the Commission to take note of this clear and definite statement, which it would certainly record with great satisfaction." [4]

This question, posed in 1935, well illustrates the problem presented in the Cases at bar. Applicants respectfully contend that the only meaning which may be given to the second sentence of Article 4, in the context of the Covenant and of the purpose and scope of the Mandates System, is the broadest possible interpretation consistent with complete neutrality of the Mandated Territory. The evil the injunction against bases and fortifications aimed at preventing was clearly the destruction of moral and material well-being

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[1] P.M.C. Min., 22nd Sess., pp. 114-15; P.M.C. Min., 28th Sess., pp. 134, 138.
[2] P.M.C. Min., 22nd Sess., p. 115.
[3] *Ibid.* (Italics added.)
[4] P.M.C. Min., 28th Sess., p. 134. (Italics added.)

of the inhabitants of the Mandated Territories, and the thwarting of their social progress, by such Territories in any manner becoming engaged in hostilities. The remedy was to place a ban on the construction of fortifications and the establishment of bases. The evil was sufficiently great and the remedy sufficiently sweeping that, taken in conjunction with the system of collective responsibility and security expressed by the Mandates System and the League itself, 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.

Respondent has given, on its part, three definitions from "well-known dictionaries," one of which is dated 1880. [1] Respondent's argument is that "a common feature of these definitions is that a base is something utilised by a force or an army for the purposes of operations or a campaign" [2] and that, therefore, if an installation fails to possess such a feature, it fails to be a base. 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.

On the other hand, the Mandates contain no language which can be interpreted as prohibiting military installations *only in time of war*. In fact, the reverse is true. The purpose and application of Article 4 is obviously *in time of peace*; a time of peace, moreover, which was viewed, at least by the more optimistic founders of the League of Nations, as a permanent state of the world. 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]

For the reasons advanced, Applicants submit that a broad and flexible meaning must be given to the term "military base" in Article 4. Such interpretation would be fully consistent with the test advanced by Applicants 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." [4]

2. *Statement of Facts*

a. *Regiment Windhoek*

The Burgher Force established by Proclamation No. 2 of 1923 (S.W.A.) and the Burgher Force established by the Burgher Force

[1] **IV**, p. 50.
[2] Id. p. 50. (Italics omitted.)
[3] For further discussion of this point, see Annex 9, sec. (4), p. 567, *infra*.
[4] **I**, p. 181. For further discussion of this point, see Annex 9, sec. (5), p. 567, *infra*.

Proclamation, No. 19 of 1927 (S.W.A.), [1] both appear to be different in nature and in purpose from the wartime First South West Africa Infantry Battalion, [2] and from the South West African Infantry and its successors, the Regiment Suidwes-Afrika and Regiment Windhoek. 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 Administrator had the power to call them up for service; the Administrator appointed the burghers' officers. Training appears exclusively to have consisted of rifle practice, and for this purpose the burghers were summoned by the Administrator. [3] In the case of the 1927 Burgher Force, it was commanded and controlled by a Chief Commandant appointed by the Administrator. [4] Not only has the nature of the activity [5] and the equipment [6] changed since Respondent's Reports for the year 1925 [7] and for the year 1929 [8] but the chain of command and administrative position have also apparently been seriously altered since 1939. [9]

Respondent admits that, in 1964:

> ". . . the Regiment is a part of the South African Armoured Corps of the Citizen Force, which forms an integral part of the South African Defence Forces, and admits that . . . at present this Regiment consists of 20 officers and 221 other ranks. . ." [10]

It is submitted that 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. This

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[1] **IV**, p. 54, footnote 2, and p. 55.

[2] *Id.*, p. 56.

[3] *Id.*, pp. 54-55.

[4] *Id.*, p. 55, and Annex A, p. 64.

[5] *Vide* Respondent's statement, *id.*, p. 56, para. 4: "The defence organization described above remained unchanged until 1939. Military training never developed to a point beyond rifle practice and during the years 1931 to 1935 financial considerations led to a curtailment even of that. The Burgher Force was never called up for military training, and during the period 1936 to 1939 its organization came to an almost complete standstill." (Footnote omitted.)

[6] *Vide* Respondent's statement, *id.*, p. 57, para. 7: "The Regiment [Windhoek] is . . . equipped with what are internationally known, and used, as light reconnaissance vehicles, *viz.*, armoured cars."

[7] *Id.*, pp. 54-55, para. 2.

[8] *Id.*, Annex A, p. 64.

[9] Applicants here recall the last sentence of their second paragraph in the "Statement of Law" contained in **I**, p. 181: "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." (Italics added.)

[10] **IV**, p. 56. For further discussion of this point, see Annex 9, sec. (6), p. 568, *infra*.

entire development has taken place since the dissolution of the League of Nations, [1] with benefit of supervision neither by the League nor the United Nations.

Is it possible for Respondent to confirm that ". . . there [is] not a single soldier or a single sailor . . . 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?" [2] To the contrary, Respondent's Minister of Defence, Mr. J. J. Fouché, made the following statement in the South African Senate on 28 March 1960:

> "Greater mobility, armoured protection and increased striking power have been given to twelve of the infantry units at strategic places in the form of Saracens [armoured cars]. These Citizen Force units, together with the two Mobile Watches which are organized as Saracen units for internal security, form a shock element in the Army." [3]

The nature of the training of this "shock element" is not known, but some indications exist that it is closely concerned with riot control.

> "Subsequently, in July 1960, it was reported that frightened residents of the old location had streamed to the municipal offices to register for Katutura on hearing the noise of guns in a mock battle carried out by the Windhoek Regiment. Part of the exercise being taught some 150 of the Active Citizen Force which is contained in the Regiment was how to throw cordons around a riot-torn area and how to use the latest methods for dealing with rioters." [4]

In conclusion, with respect to Regiment Windhoek Applicants would remind the Court that Respondent is applying its own narrow and inappropriate definition of "military base" to the Regiment in order to conclude that there has been no violation of Article 4. Applicants reaffirm the broad thrust of the language of Article 4 as illustrated in Part I of this Chapter and reiterate their own articulation of the proper elements for consideration:

> "...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." [5]

In view of the broad principles of the Mandates System and the correspondingly strict standards of interpretation outlined in Part I of this Chapter, there is little room for doubt that Regiment Windhoek, in its present form and strength, in organization

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[1] Commencing on exactly the date of the dissolution resolution of 18 April 1946; see Respondent's footnote 6, IV, p. 56.

[2] P.M.C. Min., 28th Sess., p. 134; cited p. 556, *supra*.

[3] As quoted in S.C.O.R., Report of S.G. at 15 (S/5658) (1964).

[4] *South West News*, 23 July 1960, as cited in G.A.O.R. 16th Sess., S.W.A. Comm., Supp. No. 12 at 23 (A/4957).

[5] I, p. 181.

and in operation, involves the maintenance of a "military base," within the meaning of Article 4 of the Mandate and is consequently in violation of the obligations thereunder.

b. *Swakopmund and Walvis Bay*

With respect to the military landing ground in the Swakopmund District, Applicants accept Respondent's geographical explanation. [1]

It is relevant, however, to note that the apparently continual build-up and reinforcement of military strength in Walvis Bay is in *itself* a violation of the Mandate. 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. 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. The 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. [2] This purpose has been increasingly frustrated by the apparently continuously intensified military reinforcement of Walvis Bay.

In June of 1961 the South African Minister of Defence made the following statement in Parliament:

> ". . . The mandate provides that no naval bases and military strongholds may be established in the territory. This provision refers to *permanent* bases and strongholds. The spirit of those provisions was honoured in peace-time. The South African Government, however, has a responsibility in regard to the defence of the territory. That is admitted in the mandate by implication. In view of what is happening in South West Africa and in the adjoining territory, arrangements are being made at present to protect South West Africa against any threat from beyond its borders. The Government would be neglecting its duty if it did not take immediate action in case of any such threat. These measures will not continue for longer than is regarded as essential for the defence of the territory. The Government is taking immediate steps to provide the necessary military force in Walvis Bay, an area which, although it is being administered as part of South West, is republican territory where the Government is entitled to take any steps consistent with its own sovereignty. Furthermore, the South African Navy pays

[1] Applicants point out, however, that Government Notice No. 636 of 1958 (S.A.) was egregiously wrong, since such Government Notice was published on 3 October 1958 and since the proclamation of the separate magisterial district of Walvis Bay was published on 21 July 1958 (see **IV**, p. 58, footnotes 2 and 7).

[2] See Part I of this Chapter, pp. 553-557, *supra*.

> periodical visits there to enable us to keep the necessary supervision over the territorial waters and the coastline of South West Africa. Arrangements have also been made for flights along the coastline and for observations to be made along the northern border of the territory, by aircraft of the South African Air Force." [1]

At page 13 of the Report of the Committee on South West Africa concerning the implementation of General Assembly Resolutions 1568 (XV) and 1596 (XV), it was reported that:

> "The port of Walvis Bay had been completely transformed into a full-time military operational base and [the Committee] had been informed that an additional garrison of 1,500 troops was expected in South West Africa in a few weeks." [2]

Without the safeguard of adequate administrative supervision, the presence of a large military and naval base such as Walvis Bay entirely within the Mandated Territory, with an indeterminate and undetermined effect on the surrounding area and its inhabitants, is in violation of Article 4 of the Mandate, as is all the more clear in the light of the general considerations adduced below.[3]

c. *Airstrips*

Finally, with respect to the temporary military camp and the natural surface strips referred to at **I**, page 182,[4] Applicants reiterate their concern that there has been a violation of both the spirit and the letter of Article 4 of the Mandate. Respondent states that the landing strip at Ohopoho in the Kaokoveld [5] " . . . is one of a few landing strips at various places in South West Africa which are used . . . intermittently by aircraft of the South African Air Force." [6]

Even if Respondent's narrow definition of "military base" [7] is employed, it is clear that airfields which are maintained for use by military aircraft and available for such use at any time, are places which may be "utilised . . . for the purposes of operations or a campaign." [8] Even if such use may be characterized as being

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[1] *R. of S.A., Parl. Deb., House of Assembly*, 1st Parl., 1st Sess. (weekly ed., 1961), Cols. 7394-7395; this statement reflects the same erroneous interpretation of "the duty—and the right—to defend the Territory, [as being] that of Respondent . . . who is responsible not only for the maintenance of order in the Territory, but also for its safety" (**IV**, p. 47, para. 4) which has been discussed, *supra*, in Part 1 of this Section. In this connection, it is significant that Respondent has never presented to the United Nations any information concerning an alleged "threat from beyond its borders," nor invoked the protection of the United Nations.

[2] G.A.O.R. 16th Sess., S.W.A. Comm., Supp. No. 12A at 13 (A/4926). Additional information supplements the conclusion that increased military activity is taking place in Walvis Bay, for which see Annex 9, sec. (7), p. 570, *infra*.

[3] See sec. **d.** of this Part **2**, p. 562, *infra*.

[4] Discussed in Respondent's *Counter-Memorial*, **IV**, pp. 58-61.

[5] Erroneously spelled "Chohopoho" in **IV**, p. 59.

[6] *Ibid.*

[7] *Id.*, p. 50.

[8] *Ibid.* (Italics omitted in part.)

but "intermittent and occasional," as long as there has been intent to clear such airstrips in part for such military use and as long as there remains an intent to use such strips and to maintain them therefor, 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. [1]

The fact that these natural surface strips, or any airstrips, are capable of serving both administrative civil aircraft and the South African Air Force illustrates the necessity for administrative supervision by the United Nations. [2] Given adequate administrative supervision of Respondent's activities, civil and military, in the Territory, there might be no objection to the maintenance of these airstrips for their proper civilian administrative purpose. Absent such supervision, however, there is no way of determining the character or the amount of use of these facilities by Respondent's military air forces. As a consequence, Respondent may not be heard to say that to place a ban on all such airstrips is unreasonable. So 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 any degree directed toward military ends (as Respondent concedes).

d. *Military Activity in General*

There appears to be little doubt concerning Respondent's ever-increasing military activity in the Territory. [3] The Committee on Implementation was informed in 1961 that:

> ". . . The South African defence line on the border of South West Africa and Angola now consisted of over 4,000 soldiers, South African aircraft patrols in the areas of Ohopoho, in the Kackoveld *[sic]*, and in the Caprivi Strip bases, and a Mobile Force from Potchef-

[1] Respondent does not specify how many such strips there are, nor does it give a clear idea of what "intermittent and occasional use" might amount to. In addition, Respondent admits that:

> "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." (IV, p. 59.)

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 it into a direct violation of Article 4 of the Mandate. (See Part I of this Section, *supra*; *cf.* the statement by Respondent's Minister of Defence, p. 559 *supra*.)

[2] See Chapter VI, *supra*, p. 520.

[3] With respect to Respondent's reference (in IV, pp. 60-61), to the unauthorized "Joint Statement" purported to have been released by the Chairman and Vice-Chairman of the Special Committee on South West Africa on 26 May 1962, see Annex 9, sec. (8), p. 570, *infra*.

stroom (Transvaal) patrolling in co-operation with the Portuguese soldiers." [1]

Great expansion in the school cadet corps of the Territory was announced on 10 April 1963, and as from 1 April the Territory had thirteen cadet divisions (four having been formed at the end of March); such divisions were to be trained in the art of drilling and shooting, [2] and a hitherto unnoticed form of paramilitary force or organization, presumably also integral parts of the South African Defence Forces, entitled "Commando units," are being trained in the use of Bren guns. [3]

In three resolutions at its Seventeenth Session, the General Assembly of the United Nations:

> 1. ". . . *Urge[d]* the Government of South Africa to refrain from: "Using the Territory of South West Africa as a base for the accumulation, for internal or external purposes, of arms or armed forces. . . ." [4]
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> 2. "*Not[ed] with increased disquiet* the progressive deterioration of the situation in South West Africa as a result of the ruthless intensification of the policy of *apartheid*, the deep emotional resentments of all African peoples, accompanied by the rapid expansion of South Africa's military forces, and the fact that Europeans, both soldiers and civilians, are being armed and militarily reinforced for the purpose of oppressing the indigenous people, all of which create an increasingly explosive situation which, if allowed to continue, will endanger international peace and security. . . ." [5]
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> 3. "*Not[ed] with the gravest concern and regret* that South African military troops stationed in the Territory have been considerably reinforced, and that the local police, aided by the military forces, have raided Native homes, locations and reserves in search of evidence of political activity and to clear urban areas, which are regarded as European, of passless Natives. . . ." [6]

Consequently, Applicants contend that 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, coupled with the increasing build-up of military strength in Walvis Bay, taken together with the apparently ever-increasing amount of military activity by cadet corps and "Commando units" in the schools, communities and countryside of the Territory, joined with Regiment Windhoek, have created a situa-

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[1] G.A.O.R. 16th Sess., S.W.A. Comm., Supp. No. 12A at 13 (A/4926).

[2] *The Windhoek Advertiser*, 10 April 1963.

[3] *Id.*, 25 April 1963; it is not clear precisely what such "Commando units" consist of. See Annex 9, sec. (6), p. 568, *infra*.

[4] G. A. Res. 1805 (XVII), 14 December 1962, G.A.O.R. 17th Sess., Supp. No. 17 at 38 (A/5217).

[5] G.A. Res. 1702 (XVI), 19 December 1961, G.A.O.R. 16th Sess., Supp. No. 17 at 39 (A/5100).

[6] G.A. Res. 1703 (XVI), 19 December 1961, *id.* at 40.

tion 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 co-ordinated to the extent that the Territory has been transformed into a "military base" within the meaning and intent of the Covenant and the Mandate. These conditions have been reflected in three recent resolutions of the General Assembly and constitute a clear violation of the letter and spirit of Article 4 of the Mandate.

ANNEX 9

SUPPLEMENTARY MATERIAL WITH RESPECT TO RESPONDENT'S VIOLATIONS OF ARTICLE 4 OF THE MANDATE

(1) The implication contained in this assertion relates to non-native inhabitants of the Mandated Territory. With respect to the discussion in the Council of Ten cited by Respondent as authority for its proposition that there is "no doubt that a Mandatory was to be entitled . . . etc.," Applicants submit that such 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 also point out that the discussion was, at best, singularly opaque.

After the conversation cited by Respondent, there seems to have been manifest confusion on the part of the Secretariat as to the meaning of the statements made and the conclusions reached (if any). In Baker, *Woodrow Wilson and World Settlement*, there is the following commentary on the interchange among Messrs. Clemenceau, Lloyd George, and Wilson quoted by Respondent: [1] "It was not surprising that, as a result of this colloquy, the secretariat should have been puzzled as to what was really meant." [2]

It was at least clear, however, that the interchange did not bear the meaning ascribed thereto by Respondent, and that it 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. (It would seem obvious that there was no need to discuss it, since the restriction on military and naval bases and fortifications would logically place a clear limitation on the presence of troops other than native; see p. 555, *supra*).

(2) Quincy Wright wrote in *Mandates Under the League of Nations*:

> "Though [requirements as to restrictions on the recruiting of natives in mandated territories] assure the natives against military exploitation in the interest of the mandatory, doubtless the interest of third states in the disarmament of the mandated areas was an even more important reason for their inclusion in the Covenant and the mandates. This is less true of the military provisions in A mandates. While the mandatories for Palestine (art. 17) and Syria (art. 2) are permitted to organize local military units only for police and defense of the territory, *they are not forbidden to secure local financial assistance and transportation for their own forces* in the territories. The Iraq treaty (art. 7) contemplates British assistance to Iraq military forces." [3]

Duncan Hall wrote as follows:

> "The 'A' mandates—Palestine and Syria—do not preclude the use, with the consent of the mandatory, of local forces for defense

[1] **IV**, pp. 48-49.
[2] Baker, *Woodrow Wilson and World Settlement* 428 (1922).
[3] Wright, *Mandates Under the League of Nations* 472 (1930). (Italics added.)

> of the territory outside its actual frontier. The mandatory could *maintain his own armed forces in the territory, and use railways and communications of the territory for the passage of his armed forces and the carriage of fuel and supplies.*" [1]

Even if there were, *arguendo*, a duty and right to defend the Territory, it must necessarily be limited by the terms of the Mandate; this was true in all "B" and "C" Mandated Territories, since the military clauses in all of the "B" and "C" Mandates were essentially uniform (with the exception of the additional provisions relating to the extra-territorial use by France of native troops raised in Mandated Territory, contained in Article 3 of the Mandates for the French Cameroons and for French Togoland, which have no bearing on the present discussion). Such "duty and right" to defend the Mandated Territory 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. (The texts of all "B" and "C" Mandates prohibited the establishment of military or naval bases and the erection of fortifications, *without any exception* for police or defence.)

(3) Essentially, there must have been three possible trains of reasoning which could have occurred to the framers of the Mandate language. Although there is no record of their deliberations on this point, the question of the incompatibility of the two propositions contained in the "B" and "C" Mandates must have arisen; and, if in fact it did not arise, the most reasonable interpretation possible must in any event be placed on the Article. These three trains of reasoning are:

> (i) bases and fortifications are forbidden, even if their purpose is solely to assist the training of natives for police and local defence;
>
> (ii) bases and fortifications are forbidden, except that a facility for training natives for police and local defence work, even though similar to a base or fortification, is excluded from such prohibition; or
>
> (iii) 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.

Of these, the first is unacceptable because it creates an internal limitation upon the effectiveness or upon the accomplishment of certain of the express permissible aims of the training of natives. The second is unacceptable, since express language ought to be adduced to produce a result which is so clearly an exception to the language of the Mandate. The third possibility is the most likely, and the only reasonable, explanation. It accommodates the affirmative nature of the exclusion with respect to training natives, and at the same time stands in obedience to the absolute negative prohibition on bases and fortifications. The 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. This interpreta-

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[1] Hall, *Mandates, Dependencies and Trusteeship* 68 (1948). (Italics added.)

tion is reinforced by the juxtaposition, in the "B" Mandates, of the language permitting certain *"native military forces"* with the language prohibiting bases. Lastly, the word "establish" 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 military training of the natives under the "C" Mandates or the maintenance of native military forces under the "B" Mandates.

(4) 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' " [1] is wholly incorrect. Applicants assert that any confusion on the part of Respondent, as to the standards applied to the facilities examined, be resolved by reference to the concluding sentence of Applicants' "Statement of Law" at **I,** page 181.

Since all of Respondent's military facilities exclude members of the "Native" population of the Territory (a fact learned from Respondent's *Counter-Memorial*), [2] all of such facilities must then 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." Even if the immediate reason for part of Applicants' previous formulation has fallen away, 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."

Applicants fail to understand how Respondent can complain about Applicants' partial application of a narrow criterion. [3] In fact, Applicants have been encouraged by Respondent's argument to reiterate and repeat the far broader criteria of Applicants' last sentence in their "Statement of Law."

(5) Quite apart from this compelling argument, Applicants 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." In fact, other definitions of the term "military base" are:

> (a) Gaynor, *The New Military and Naval Dictionary* 32 (1951): "*base*—A locality from which operations are projected or supported; the term may be preceded by a descriptive word such as 'air' or 'submarine,' to indicate its primary purpose."
>
> (b) *The Concise Oxford Dictionary of Current English* 95 (4th ed. 1958):
> "*base:*
>
> "1. That on which anything stands or depends, support, bottom, foundation, principle, groundwork, starting point. . . ."
>
> "6. (Mil.) town or other area in rear of an army where drafts, stores, hospitals, etc., are concentrated (also [base] of operations)."

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[1] **IV,** pp. 51-52.
[2] *Id.*, pp. 48, 52, 54, 55 and 56.
[3] *Id.*, pp. 51-53, paras. 13-16.

(c) Funk & Wagnalls, *New "Standard" Dictionary For the English Language* 232 (1961) defines "base" as:

> "*6. Mil.* (1) A place or region constituting a basis of operations or a point from which supplies and reenforcements *[sic]* may be drawn; as, a *base* of supply."

Paul H. Clyde, in his book *Japan's Pacific Mandate*, wrote:

> "Any discussion of Article 4 of Japan's mandate is complicated by the fact that the terms employed in the Article lack explicit definition. To the general public it may appear that a 'naval base,' a 'military base,' or a 'fortification' are terms that are clear in themselves and require little explanation. To naval and military experts, however, they are quite otherwise. Explicit definitions in some phases of naval and military science are regarded as dangerous, since they may limit future action. It is more expedient from the strategic point of view to employ general terms lacking precise limitations. To do otherwise might be to solve the riddle: When is a fortification not a fortification? In other words, military men are by no means always in agreement as to what is and what is not a fortification. Their definitions have consisted in general statements." [1]

(6) Emblematic of the change in status which has occurred since the days of the Burgher Forces is this small news item from *The Windhoek Advertiser* of 6 August 1963:

"New Commanding Officer"

> "Commandant F. W. Loods *[sic]* of the Army Gymnasium in Pretoria has been transferred to Windhoek as the new commanding officer of the South West Africa Command.
>
> "He succeeds Colonel P. E. Ferguson who has been transferred to the Western Province after two years with the S.W.A. Command."

In fact, Regiment Windhoek is an integral part of the South African Defence Force, and the power to appoint its commanding officer appears to have been transferred to Respondent's military staff. It is referred to as the "South West Africa Command," or, if in fact it is not the "South West Africa Command," Applicants would wish to raise a question as to what units other than Regiment Windhoek go to make up such command.

For example, Applicants cite as noteworthy, without otherwise commenting thereon, the following news item from *The Windhoek Advertiser* of 12 November 1963:

"Formation of Commando Discussed"

> "Commandant Loots *[sic] of the S.W.A. Command* in Windhoek addressed a crowded meeting on Friday on the possibility of establishing *a Command unit* at Oranjemund.

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[1] Clyde, *Japan's Pacific Mandate* 204-05 (1935).

"The meeting unanimously voted for the establishment of a local unit, subject to the approval of the C.D.M. management.

"A committee was elected to proceed with organisational work pending the management's decision." (Italics added.)

Applicants must confess that they cannot yet conceive clearly the exact nature of Regiment Windhoek. [1] On the one hand, Respondent (a) admits that the Regiment's "administrative headquarters" are at Windhoek. [2] On the other hand, Respondent (b) denies "that the Regiment is stationed at Windhoek." [3] Finally, Respondent (c) states that "only a small permanent force administrative staff . . . is permanently stationed at Windhoek." [4] These statements seem to imply the following conclusions (in order), which may or may not have been correctly inferred by Applicants:

(a) Regiment Windhoek's field operations and other headquarters are at a place other than Windhoek;

(b) the Regiment is, in fact, "stationed" at a place other than Windhoek; and

(c) a larger group is either (1) from time to time "stationed" at Windhoek, or (2) "permanently stationed" elsewhere.

Applicants are also confused by Respondents' statement that there is an "administrative headquarters" at Windhoek, taken together with Respondent's statement that there is a "training camp in Windhoek." [5] The two concepts do not appear to mesh, yet Respondent has not described any possible interrelationship which they might have. Both the phrases "administrative headquarters" and "training camp" imply that there exist other elements of Regiment Windhoek, such as "tactical" or "field" headquarters, and an "operational" or "active" camp.

Applicants are equally confused by Respondent's statement that "the Citizen Force recruits of the Regiment are ordinary civilians of South West Africa," [6] since all military recruits would initially appear to be, of necessity, civilians. Finally, Respondent's statement that "for the major part of the year, therefore the camp is not used for military training purposes *[sic]*" [7] introduces several ambiguities; it may be equally interpreted to mean that "the camp is used for training purposes other than military" or that "the camp is used for purposes other than military or training."

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[1] With respect to Respondent's statement (**IV**, p. 57) that Regiment Windhoek is not an armoured unit (supported by the assertion that "Regiments are grouped for convenience"), Applicants find it difficult to decide in what category Regiment Windhoek might properly fall. The determinative factor would seem to be its possession of armoured cars. Applicants find it difficult to imagine what reasonable classification the Regiment might bear, other than that of being "an armoured unit," as long as it is equipped with armoured vehicles. It could hardly be argued that it is actually a unit of infantry, artillery, signals, or engineers.

[2] **IV**, p. 56.

[3] *Ibid.*

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

[7] *Ibid.*

(7) (a) "The Secretary for Defence in South Africa Mr. J. P. de Villiers has been published as saying: 'that the territorial sea area within three nautical miles of the coast, between latitude 23 degrees 42 minutes South has been proposed as a training area for the defence. The area can be roughly described as stretching from a point half a mile south of the mouth of the Swapo-river to a point eleven miles south of the Walvis Bay Harbour.' The recent erection of heavy artillery along the Coast of this particular area has attracted much attention. . . ." [1]

(b) " 'Ten miles out into the semi-desert but within the boundaries between South Africa owned Walvis Bay and mandated South West Africa is parked some 30 centurion tanks, 25 armed cars (including Saracens), 20 anti-aircraft guns, 26 field guns and 45 troop carriers. They are painted desert brown, and are hard to count against the background of the sand. Among them are dunes lurk armed guards *[sic]*; try to get nearer and one pops up from behind a sandhill and waves a rifle. There are 500 trainees in the Camp nearer the town. Many more are in other Camps.' " [2]

(c) "A Hercules troopcarrier of the South African Air Force landed at Windhoek yesterday with a number of trainees and members of the Mobile Watch on board.

"The trainees were en route from Pretoria to Walvis Bay where they will undergo desert training.

"Colonel Pienaar who accompanied them, told reporters that he could not comment on the activities of the members of the Mobile Watch. The flight was 'an ordinary one.' He added: 'Nothing particular in it. At Pretoria it is dry and you have had sufficient rain for seven years.' " [3]

(8) With respect to Respondent's reference to the unauthorized "Joint Statement" purported to have been released by the Chairman and Vice-Chairman of the Special Committee on South West Africa on 26 May 1962, [4] Applicants do not feel required to reply other than by quoting the letter of transmittal of 3 August 1962, from the Chairman of the Special Committee for South West Africa to the Chairman of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, of which the third paragraph reads:

> "You will note that this report [of the Chairman and Vice-Chairman, reproduced immediately following, as Part II of A/5212] makes no mention of the alleged joint communiqué issued by the South African Government on 26 May 1962. This, as explained by the Chairmen of this Special Committee, is due to the fact that the alleged communiqué was not an official act of this Committee nor

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[1] Material in single quotes from *The Windhoek Advertiser* of 1 January 1963, as cited in a Memorandum submitted to the Secretary-General of the United Nations by SWANU and SWAPO; reprinted in Sp. Comm. on Implementation, *Petitions* at 6 (A/AC. 109/Pet. 215) (1964).

[2] "Out in the Desert Tanks and Guns," *The Star*, Johannesburg, 14 May 1962, as quoted *ibid.*

[3] *The Windhoek Advertiser*, 2 April 1963.

[4] IV, pp. 60-61, para. 15.

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 communiqué. This Committee, therefore, does not consider or recognize said communiqué as anything official or of any binding effect whatever." [1]

This "Joint Statement" has been dealt with elsewhere in this Reply. [2]

[1] G.A.O.R. 17th Sess., Sp. Comm. on S.W.A., Supp. No. 12 at 3 (A/5212).
[2] See pp. 225-226, *supra*.

B. Respondent's Violations of Article 2 (1) of the Mandate and Article 22 of the Covenant

1. *Introduction*

In Submission 5, Applicants request the Court to adjudge and declare that:

> "... the Union, by word and by action, in the respects set forth in Chapter VIII of this Memorial, has treated the Territory in a manner inconsistent with the international status of the Territory, and has thereby impeded opportunities for self-determination by the inhabitants of the Territory; that such treatment is in violation of the Union's obligations as stated in the first paragraph of Article 2 of the Mandate and Article 22 of the Covenant; that the Union has the duty forthwith to cease the actions summarized in Section C of Chapter VIII herein, and to refrain from similar actions in the future; and that the Union has the duty to accord full faith and respect to the international status of the Territory ...." [1]

The bases for this Submission, as set out in Chapter VIII of the *Memorials*, [2] are: (1) the avowed intentions of Respondent, and (2) acts of Respondent inconsistent with the international status of South West Africa. Such acts include (a) general conferral of Respondent's citizenship upon inhabitants of the Territory; [3] (b) inclusion of representatives from South West Africa in the South African Parliament; [4] (c) administrative separation of the Eastern Caprivi Zipfel from the Territory; [5] and (d) the vesting of South West Africa Native Reserve Land in the South Africa Native Trust, and the transfer of administration of "Native" affairs to the Respondent's Minister of Bantu Administration and Development. [6]

It is submitted by Applicants that Respondent, in treating the Territory in a manner inconsistent with the international status of a Mandated area, has at the same time and by reason of such treatment, impeded opportunities for self-determination by the inhabitants of South West Africa.

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[1] I, p. 198.
[2] *Id.*, pp. 184-195.
[3] *Id.*, pp. 190-192.
[4] *Id.*, pp. 192-193.
[5] *Id.*, pp. 193-194. The caption of subsection c. of the *Memorials* (I, p. 194) refers to "the Union," a typographical error which should properly read "the Territory."
[6] *Id.*, pp. 194-195.

Respondent, in Section C of Book VIII of its *Counter-Memorial*,[1] conceding its obligation not to annex or incorporate the Territory, or to commit acts inconsistent with the separate international status of the Territory, denies an intention to incorporate South West Africa, denies that any of the cited statements or acts evidence such intent, and denies that such statements or acts are inconsistent with the international status of the Territory. Respondent contends further that its acts of association with the Territory are not a *per se* violation of the duty to respect the international status of the Territory, and that only an act the *purpose* or *motivation* of which involves unilateral incorporation or annexation would constitute a violation of Respondent's obligations. This is so, Respondent asserts, on the ground that so long as Respondent observes the "specific" obligations of the Mandate and its "duty towards the inhabitants," "[a] *de facto* relationship could . . . legitimately develop, which in most respects would be indistinguishable from the *de facto* position obtaining under annexation or incorporation." [2] Finally, Respondent denies that any of the acts of closer association cited above, impede opportunities under which the Territory's inhabitants may progress toward self-determination. [3]

2. *Argument*

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. It will be convenient, therefore, to discuss the acts and the intent cited by Applicants, within the context and framework of the following legal conclusions:

a. In so far 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;

b. Respondent's policies and acts complained of by Applicants, including its rejection of international accountability, and its insistence upon the right to govern the Territory on the basis of an unreviewable discretion, 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; and

c. Respondent's policies and acts complained of by Applicants, constitute a violation of Respondent's duty to promote conditions

[1] **IV**, pp. 67-133.
[2] *Id.*, p. 69.
[3] *Id.*, pp. 70-74.

under which the inhabitants of the Territory may progress toward self-determination of the future status of the Territory.

Applicants turn now to a consideration of each of the foregoing propositions.

a. *Respondent's purpose or motive to incorporate or annex the Territory,* in derogation of its separate international legal status, clearly appears from the record herein; in decisive respects, indeed, such a purpose is conceded in Respondent's own avowals.

Thus, Respondent explicitly asserts that:

> ". . . 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." [1]

Moreover, according to Respondent:

> ". . . The 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." [2]

The essence of sovereignty has been defined as including "the power to do everything in a State without accountability . . . ." [3]

Respondent does, it is true, assert that the "only limitations which fetter or condition" its powers in the Territory are 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.'" [4]

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* [5] to an attempted demonstration that the Mandate "lapsed *in toto* upon dissolution of the League of Nations." [6] 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.*" [7]

Moreover, Respondent has devoted a substantial portion of its *Counter-Memorial* [8] to an alternative contention that its "former obligations to report and account to, and to submit to the super-

[1] II, p. 91.

[2] IV, p. 69. (Italics in original.) (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.)

[3] *Black's Law Dictionary* 1568 (4th ed., 1951).

[4] IV, p. 69.

[5] *Id.*, II, pp. 165-256.

[6] Respondent's Submission (a), *id.*, p. 257.

[7] I, p. 47.

[8] II, pp. 97-164.

vision of, the Council and the League of Nations, lapsed upon 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] This proposition, moreover, is one which has guided Respondent in its conduct toward the Territory and its inhabitants, at least since November 1948.

In the light of these contentions and this practice, there is a hollow, and indeed cynical, aspect to Respondent's characterization of the "prohibitions" of the Mandate and its "duty" thereunder, as constituting a "fetter or condition" upon its "day-to-day exercise of the attributes of sovereignty" over the Territory.

Respondent does, it is true, aver that its policies in the Territory are carried out "in the spirit of the Mandate," [2] 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.

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 Territory in the face of Respondent's insistence that the Mandate was in "practical effect, not far removed from annexation." [3] Two illustrations will suffice to demonstrate the extent of difference between the Commission and Respondent in this respect.

Thus, the Commission noted a statement made by General Smuts before the South African Parliament in which the General had said:

> ". . . I do not think it is necessary for us to annex South-West to the Union. The mandate for me is enough, and it should be enough for the Union. It gives the Union such complete power of sovereignty, not only administrative but legislative, that we need not ask for anything more." [4]

A member of the Commission, Mr. Orts, commented upon the General's statement as follows, *inter alia*:

> "the declaration of General Smuts was of interest in so far as it explained certain decisions of the mandatory Power—for example, regarding State lands and more particularly the railways—of which the legitimacy had been contested by the Permanent Mandates Commission. The Government of South Africa had maintained that the railways of South-West Africa existing at the time at which

[1] Respondent's Submission (b), **II**, p. 257.
[2] **IV**, p. 92.
[3] **II**, p. 14.
[4] Quoted in P.M.C. Min., 9th Sess., p. 33.

> the mandate had been conferred upon it had been handed over to the Union in 'full dominion.' This conception was contrary to the opinion of the Commission and of the Council of the League of Nations. If the idea, which was a totally false one, predominated in South Africa that there was very little difference between annexation and the mandate, then this view was explained. If the independence of South-West Africa were recognized, the railways would certainly belong to South-West Africa and not to the Union." [1]

On another occasion, disagreement arose between the Commission and Respondent over the terms of a boundary agreement with Portugal, in which it was stated that Respondent "possesses sovereignty over the Territory of South-West Africa . . . lately under the sovereignty of Germany." [2]

In a report to the League Council concerning the matter, the Commission stated that "the parallel drawn in the [treaty] between the sovereignty assumed by the Government of the Union of South Africa over the territory in question and the sovereignty over that territory previously held by Germany, seems to imply a claim to legal relations between the mandatory Power and the territory it administers under its mandate, which are not in accordance with the fundamental principles of the mandates system." [3]

Respondent's current contention that the Mandate (now asserted to have lapsed *in toto*) was, in any event, "not far removed from annexation" thus reflects its continuing and long-standing posture of denial to the Territory of a separate international status. The conclusion is inescapable that Respondent's purpose and motive has been, and remains, that of incorporating or annexing the Territory, in violation of its obligation as stated in Article 22 of the Covenant of the League of Nations and Article 2 of the Mandate.

b. Respondent's policies and acts, enumerated in the *Memorials,* [4] and as more fully described below, give practical effect to Respondent's explicit and implicit avowals of purpose, cited above.

Such *policies and acts,* including its 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 international status of the Territory.*

1. *Conferment of South African Citizenship*

Conferment of South African citizenship upon the inhabitants of the Territory has the inescapable legal and practical consequence

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[1] *Id.,* p. 34.
[2] P.M.C. Min., 10th Sess., p. 22.
[3] P.M.C. Min., 11th Sess., pp. 199, 204; and *cf.* P.M.C. Min., 14th Sess., p. 116.
[4] **I,** pp. 190-195.

of identifying the Territory and the Republic as a single political entity. As the Permanent Mandates Commission, in its proposals to the League Council in 1922, recognized:

> "... It is important, in order that the principles laid down in Article 22 of the Covenant may be respected ... that the native inhabitants of B and C mandated territories should be granted a national status wholly distinct from that of the nationals of the mandatory Power." [1]

The Commission's policy in this regard was subject only to the limited exception, that it was:

> "... open to mandatory Powers to which B and C mandated territories have been entrusted to make arrangements, in conformity with their own laws, for the *individual and purely voluntary* acquisition of their nationality by inhabitants of these territories." [2]

The League Council adopted a resolution [3] explicitly providing, *inter alia*:

> "The status of the native inhabitants of a mandated territory is distinct from that of the nationals of the mandatory Power and *cannot be identified therewith by any process having general application.*"

In accordance with the proposals of the Permanent Mandates Commission, the resolution left it open for inhabitants of such territories *voluntarily* to obtain naturalization from a mandatory Power.

Respondent concedes that the South African Citizenship Act [4] confers South African citizenship upon the inhabitants of the Mandated Territory, but contends that what the Council of the League really objected to, in the cited resolution "was a particular manner of conferment of nationality, and not the fact of conferment of nationality by itself." [5] Respondent also argues that "if individual inhabitants could legitimately acquire the nationality of a Mandatory, a *de facto* position could arise where a large number of, or even all, the inhabitants could be endowed with such nationality." [5]

It is submitted that neither of these contentions is consistent with the essential purpose of the resolution which, in the words of the Permanent Mandates Commission quoted above, 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."

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[1] P.M.C. Min., 2nd Sess., p. 68.

[2] *Ibid.* (Italics added.)

[3] League of Nations Off. J., p. 604 (1923), quoted in **I**, p. 190. (Italics added.)

[4] Act No. 44 of 1949, Sec. 2 (2), as amended, South African Citizenship Amendment Act, Act No. 64 of 1961, Sec. 2, as amended, Commonwealth Relations Act, Act. No. 69 of 1962, Sec. 29.

[5] **IV**, p. 99.

The 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.

As the Permanent Mandates Commission also stated in this regard:

> "It seems contrary to the spirit of the Covenant and to the essence of the institution of mandates to permit the *compulsory* naturalisation, by a single act, of all the inhabitants of territories under B and C Mandates." [1]

The Commission's views were based largely on a memorandum prepared by its Chairman, Marquis Theodoli, which stated, *inter alia*:

> "The proposals which I venture to submit to you herewith on my own behalf will, doubtless, not astonish any of our colleagues. They are, indeed, in conformity, not merely with the views expressed by the representatives of the mandatory Powers as set forth in our report of January 12th, 1922, but also, in my opinion, with the spirit of Article 22.
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> "A.—First, I consider that it is desirable to give the Council most clearly to understand that, in our opinion, it would be contrary to the spirit of the Covenant and to the fundamental principles on which the institution of mandates is based, that the inhabitants of the areas in question should unconditionally be assimilated to the citizens or subjects of the mandatory Power.
>
> "In view of the fact that, in the course of history, annexations have not always resulted in the imposition on the inhabitants of the annexed territories of the nationality of the Annexing Power, is it not evident, *a fortiori*, that the relations of the Mandatory to a mandated area cannot entail that consequence? . . .
>
> "C. If we state that the assimilation of the inhabitants of the B and C mandated territories to the nationals of the mandatory Power would be regarded by us as contrary to the spirit of the mandates system, and if we declare, that any national status which respects this fundamental principle and the rights of these inhabitants would be regarded by us as admissible, I consider that we shall be fulfilling both the recommendation of the Council and the duty entrusted to us . . . .
>
> "Are we to recognise the right of the mandatory Power to naturalise the inhabitants of the territories under its mandate?
>
> "In so far as naturalisation of this kind is a purely individual and voluntary action, it does not appear to me to have sufficient international importance to justify the intervention of the League of Nations. If the laws of a mandatory Power, in this case, of the Union of South Africa, should provide for the voluntary naturalisation of foreigners living outside its actual territory, it is evident that there is nothing in the Covenant of the League of Nations forbidding the offer of such naturalisation to the inhabitants of the mandated territories by the mandatory Power and its acceptance by them." [2]

[1] P.M.C. Min., 15th Sess., p. 276. (Italics added.)
[2] P.M.C. Min., 2nd Sess., p. 86.

Upon consideration of the views of the Commission Chairman, the Permanent Mandates Commission itself, and of the League Council, it would seem apparent that Respondent's conferment of South African citizenship upon the inhabitants of South West Africa in 1949, by a process "having general application," is a violation of the basic premises of the Mandates System, and a violation of the duty to respect the separate international status of the Territory.

2. *Inclusion of Representatives from South West Africa in the South African Parliament*

Inclusion of representatives from South West Africa in the South African Parliament is another act whereby Respondent violates the duty to respect the separate international status of the Mandated Territory. Respondent denies that participation by South West African representatives (all "White"), in all matters before the South African Parliament, is inconsistent with the international status of the Territory. Respondent contends that it, "as a sovereign state, has full authority to allow anyone it wishes to participate in its Government," [1] that the United Nations has permitted similar arrangements in the past, and that opportunities for self-determination are not thereby impeded.

The actual attitude of the United Nations on the matter is reflected in findings of the Committee on South West Africa. Thus, in 1954, a report stated, *inter alia*:

> "The Committee, while reserving its opinion on the strictly legal aspect of this question, believes that any representation of the Territory of South West Africa in the Union Parliament and its continued representation therein by Union nationals of European descent is likely to prejudice the development of the Territory as a separate political entity." [2]

Respondent quotes [3] from a 1956 report of the same Committee the comment that the Committee could

> "... conceive of circumstances in which representation of a Mandated Territory in the legislative institutions of the Mandatory Power might be of certain advantage to the inhabitants, after due consultation with them *and with proper safeguards for their special status*, as a means of extending to them political and parliamentary experience and an opportunity to take part in making the laws under which they live, especially if it were not feasible for the Territory to have a legislative organ of its own." [4]

These qualifications are not, however, present in the instant case, as the Committee itself made clear in the balance of the paragraph from which Respondent quotes the above excerpt:

[1] **IV**, p. 102.
[2] G.A.O.R. 9th Sess., S.W.A. Comm., Supp. No. 14 at 16 (A/2666).
[3] **IV**, p. 102.
[4] G.A.O.R. 11th Sess., S.W.A. Comm., Supp. No. 12 at 8 (A/3151). (Italics added.)

"It [the Committee] is unaware, however, of any such motive in this case. The existing arrangements are indeed of such a nature as to have excluded either the consultation or the representation of the largest section of the population, and that section most in need of opportunities for political education. The Territory, furthermore, possesses a legislative body of its own. Finally, the members who represent the Territory in the Union Parliament have a voice and a vote there not only in matters relating to the Territory, but in all matters affecting the Union itself in which the Parliament is competent. This latter fact appears to the Committee to imply an assumption by the Union of sovereignty over the Mandated Territory—that sovereignty which spokesmen of the Union Government have in fact claimed on the Union's behalf." [1]

The Committee's views in effect reaffirm the views earlier expressed by the Permanent Mandates Commission on the same subject.

The issue of participation of representatives of the Territory in Respondent's Parliament arose frequently in the Commission's proceedings. Thus, during deliberations on a proposal by the Territorial Legislative Assembly that the Territory be recognized or treated as Respondent's "fifth province" (—a key element of which proposal was the issue of parliamentary representation [2]—) members of the Commission objected in the following terms:

". . . [I]f effect were given to the motion of the Legislative Assembly, South West Africa would share in the sovereignty of the mandatory Power. Its representatives would sit in the legislative bodies of the Union of South Africa and would have a share in the expression of the will of the mandatory Power . . . ." [3] (Commissioner Rappard.)

". . . [I]f South West Africa were incorporated politically in the Union of South Africa and thus shared in the latter's sovereignty, it would mean that the obligations and part of the charges of the South African Commonwealth would devolve upon South West Africa, which would be contrary to the mandate." [4] (Commissioner Merlin.)

". . . [T]he very idea of the incorporation of the territory of South West Africa in the Union was contrary to the mandate. That territory indeed was treated as a minor and had been placed for that reason under mandate. The situation could not be altered, unless South West Africa were declared to have attained its majority. If South West Africa were incorporated in the Union, that would create the paradoxical situation of a minor participating in the sovereignty of the State under whose guardianship it had been placed, because the resolution of the Legislative Assembly of South West Africa said that South West Africa would be represented in the House of Assembly of the Union of South Africa and the Senate thereof. *That was quite contrary to the present status of the territory.* Seeing that the population of South West Africa included

[1] *Ibid.*
[2] Proposal quoted in P.M.C. Min., 26th Sess., p. 50.
[3] *Id.*, p. 164.
[4] *Id.*, p. 165.

about 300,000 natives, it was doubtful whether that territory could be declared to have attained its majority and be given an independent status . . . ." [1] (Commissioner Sakenobe.)

In the light of these foregoing views of responsible organs of both the United Nations and the League of Nations, opposing inclusion of representatives from South West Africa in the South African Parliament (particularly when taken together with general and automatic conferment of Respondent's citizenship upon inhabitants of the Territory), it is submitted that such a policy defeats Respondent's duty to respect the separate international status of the Territory. It is accordingly a violation of Article 22 of the Covenant of the League of Nations and of Article 2, paragraph 1, of the Mandate.

3. *Administrative Separation of the Eastern Caprivi Zipfel from the Territory*

Administrative separation of the Eastern Caprivi Zipfel from the Mandated Territory by Respondent is another act which, Applicants submit, violates Respondent's duty to respect the separate international status of the Mandated Territory.

Respondent's explanation of the reasons underlying transfer of administration of the Eastern Caprivi Zipfel from the Administrator of South West Africa to the South African Government [2] centres on its assertion that "ever since the inception of the Mandate, it has been found impracticable to administer the area from South West Africa." [3]

In Applicants' submission, and conceding that the Eastern Caprivi Zipfel is not readily accessible from the rest of the Territory, Respondent has taken unjustified and improper advantage of an exceptional situation. In support of such submission, Applicants refer to the "General Conditions which must be fulfilled before the Mandate Regime can be brought to an End in Respect of Country placed under that Regime," approved by the Council of the League of Nations on 4 September 1931, after referral by the Permanent Mandates Commission. [4]

In the *Memorials*, Applicants cite, and accept as their own, the view of the United Nations Committee on South West Africa that such separation is likely to prejudice General Condition (b), *viz.*, that the Mandated Territory "must be capable of maintaining its territorial integrity and political independence." [5]

Respondent contends that the said General Condition was "intended to arise for consideration only when it is proposed to

[1] *Ibid.* (Italics added.)
[2] Proc. No. 147 of 1939 (S.A.), cited in **IV**, p. 110, footnote 5.
[3] **IV**, p. 111.
[4] P.M.C. Min., 20th Sess., p. 228.
[5] Cited in **I**, p. 194, footnote 1.

bring the Mandatory régime in respect of a particular territory to an end by the grant of independence. It would, for example, have no application in a case where the Mandatory régime in respect of a territory is terminated by lawful incorporation of that territory in another independent State. . . ." [1]

It seems clear, however, 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.

Moreover, the General Condition is applicable even in a situation in which a Mandated régime 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."

Administrative separation of the Eastern Caprivi Zipfel necessarily prejudices this Condition, at least in so far as the area itself is concerned. Even if problems of accessibility make administrative separation expedient, it is incumbent upon Respondent 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. Such a responsibility is implicit in the undertaking of the Mandate itself.

Far from taking measures, the Proclamation of transfer provided that, thenceforward,

> ". . . the Eastern Caprivi Zipfel shall cease to be administered as a part of the Mandated Territory of South West Africa. . . ." [2]

The 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.

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.

[1] **IV**, p. 115.

[2] Proc. No. 147 of 1939, (S.A.) in *The Laws of South West Africa, 1939*, Vol. XVIII, p. 28.

4. *Vesting of South West Africa Native Reserve Land in the South Africa Native Trust*

Vesting of South West Africa Native Reserve Land in the South Africa Native Trust is a fourth measure which, it is submitted, violates the duty to respect the separate international status of the Mandated Territory. [1]

As a justification for such a measure, Respondent cites the views of Commissioner van Rees (as stated in 1923), on the question of ownership of property within the Mandated Territory, [2] the views of the Legal Section of the Secretariat on the same problem, [3] and the Resolution of the Permanent Mandates Commission of 7 July 1924, as later endorsed by the Council of the League. [4]

In Applicants' submission, the foregoing make it abundantly clear that property within a Mandated Territory may not be owned by a Mandatory Power in the same legal sense that a State may own property subject to its own sovereignty. Thus, Commissioner van Rees commented that:

> "the mandatory State is merely the governor of a territory which does not belong to it. . . . This consideration excludes the possibility of the territory being regarded as legally the property of the mandatory Power and, consequently, as part of the Mandatory's territory.
>
> "That which has been handed over to the mandatory State . . . has been handed over to him as governor and not as State; consequently, there has been no final alienation and no real rights have been acquired by that State. . . ." [5]

M. van Rees concluded by stating that:

> "Whatever may be the extent of the legislative competence of the Mandatory, there would appear to be no doubt that he could not deduce from that competence the right to take advantage of it so as to make the whole or part of the territory his own property . . . .
>
> ". . . [N]o enactment by those [mandatory] Powers can make any portion of the territories under their administration form part of the State lands of the mother-country." [6]

The Legal Section of the Secretariat came to a similar conclusion:

> ". . . the right over lands and other public property has not become a right of absolute ownership such as that which the State possesses over State domains in its own territory." [7]

Finally, the Resolution of the Permanent Mandates Commission

[1] The legislative and administrative actions by which this measure was effected are described in **IV**, pp. 126-128.

[2] *Id.*, pp. 122-123.

[3] *Id.*, p. 124.

[4] *Id.*, p. 125. (Text of Resolution found in P.M.C. Min., 4th Sess., p. 157.)

[5] P.M.C. Min., 3rd Sess., p. 221.

[6] *Id.*, pp. 222-23.

[7] P.M.C. Min., 4th Sess., p. 164.

adopted on 7 July 1924 and subsequently endorsed by the Council of the League, stated that Mandatory Powers do not possess:

> "... any right over any part of the territory under mandate other than that resulting from their having been intrusted with the administration of the territory." [1]

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. Thus, Section 5 of the Act provides:

> "(1) Notwithstanding anything to the contrary in any law contained the Governor-General may, by proclamation in the *Gazette* and in the *Official Gazette* of the territory, with the approval by resolution of both Houses of Parliament, rescind any reservation of or setting apart of any land or area referred to in sub-section (1) of section *four*, or of any portion of such land or area, subject to land of at least an equivalent pastoral or agricultural value being reserved or set apart, in terms of any law in force in the territory, for the sole use and occupation of natives.
>
> "(2) Any land or area in respect of which the reservation or setting apart is rescinded in terms of sub-section (1) shall become unalienated State property and may be dealt with as such, and the provisions of sub-section (1) of section *four* shall apply to any land reserved or set apart in pursuance of the provisions of sub-section (1)." [2]

The power, reserved to Respondent by the terms of Section 5 (2) above, to reserve or set apart lands in the Territory and treat them as "unalienated State property" is, *ipso facto*, a violation of Respondent's duty to respect the territorial integrity of the Mandate. Such 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.

For the foregoing reasons, Applicants submit that the measures here complained of must be regarded as elements of Respondent's plan to incorporate and annex the Territory into the Republic.

5. *Transfer of Administration of "Native" Affairs to the South African Minister of Bantu Administration and Development*

Finally, Applicants submit that the transfer of administration of "Native" affairs to the Minister of Bantu Administration and Development is inconsistent with Respondent's duty to respect the separate international status of the Mandated Territory.

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[1] P.M.C. Min., 4th Sess., p. 157.

[2] Act No. 56 of 1954, Sec. 5, *Statutes of the Union of South Africa 1954*, 563.

Respondent seeks to justify this measure on the grounds that:

> ". . . transfer of the administration of Native Affairs from one organ, or agent, of the State to another can in no way affect the international status of the Territory, and, also, that it can in no way amount to integration not permissible in terms of the Mandate. It is submitted, furthermore, that the choice of the organ, or agent, through which the administration of Native affairs is to be conducted is a matter which has, from the very inception of the Mandate, lain entirely in the discretion of Respondent." [1]

Applicants submit that the transfer of the administration from the Administrator to the South African Minister of Bantu Administration and Development signifies more than a mere change of agent.

The measure should be viewed as merely one of many measures identifying the Territory and the Republic as a single political entity. As found by the United Nations Committee on South West Africa, such transfer "forms part of the process and policy of progressive political integration of the Territory with the Union. . . ." [2]

Moreover, such transfer is clearly designed, again in the words of the Committee on South West Africa, 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. The Committee recognizes that the Union Government might have been able to bring about this assimilation [of policy] by leaving powers in respect of 'Native' administration in the hands of the Administrator, as its agent. The Committee had hoped, however, that with the constitutional and political development to which the people of the Territory are entitled, the Administrator's powers in this field would progressively be tempered and ultimately wholly controlled by fully respresentative, executive and legislative organs to be established in the Territory. . . . [H]is presence in the Territory and the authority vested in him for the management of its affairs are capable of serving and should serve to the international community, to which the Union Government is responsible, as a symbol of that Government's respect for the special status and the integrity of the Territory." [3]

For the foregoing reasons, Applicants submit that, in itself and viewed as one of many measures (described in the *Memorials* and in this Reply) by which Respondent has manifested its intention to incorporate and annex the Territory in derogation of its separate international status, the transfer of administration of "Native" affairs from the Administrator of the Territory to Respondent's Minister of Bantu Administration and Development is a violation

[1] IV, p. 120.
[2] G.A.O.R. 11th Sess., S.W.A. Comm., Supp. No. 12 at 11 (A/3151).
[3] *Ibid.*

of Respondent's obligations as stated in Article 22 of the Covenant of the League of Nations and Article 2 of the Mandate. [1]

c. The policies and measures above described are severally, and in their totality, *incompatible with Respondent's duty to promote conditions under which the inhabitants of the Territory may progress toward self-determination.* [2]

Such policies and measures, particularly in the light of Respondent's denial of international accountability, 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. It is to the contrary, consistent only with Respondent's avowed purpose and manifest plan to treat the Mandate as "being, in effect, close to annexation," [3] and in line with Respondent's explicit disclaimer:

> "... that its right of administration is based on continued existence of the Mandate." [4]

For all the foregoing reasons, Applicants submit that the Respondent's policies and acts, described in Chapter VIII of the *Memorials* constitute a violation of its duty to respect the international status of South West Africa and to promote the social progress of the inhabitants of the Territory, including their progress toward self-determination and, accordingly, violate its obligations as stated in Article 22 of the Covenant of the League of Nations and Article 2 of the Mandate agreement.

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[1] 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, cited *supra*, p. 313. Among its findings and proposals, the Commission has recommended that twenty-two branches of the South West Africa Administration concerned with "Native" affairs be transferred to the direct control of Respondent's Government, thus placing under such control all matters affecting the overwhelming majority of the inhabitants of the Territory.

[2] I, p. 195.

[3] II, p. 15.

[4] *Id.*, p. 174.

C. Respondent's Violations of Article 7 (1) of the Mandate

Applicants reaffirm their contention [1] that Respondent's policies and actions complained of in the *Memorials*,[2] constitute an attempt on the part of Respondent unilaterally, and without consent of the United Nations, to modify the terms of the Mandate.

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.

No more drastic or effective "modification" of the terms of the Mandate is imaginable than one which disclaims duties while asserting rights.

Respondent misconstrues Applicants' Submission 9 [3] as being limited to a complaint that Respondent is, or has been "motivated by an intent to modify the terms of the Mandate." [4]

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 and Respondent 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.

* * *

[1] I, p. 196.
[2] Chapters V, VI, VII, and VIII.
[3] I, p. 198.
[4] IV, p. 136.

CHAPTER VIII

SUBMISSIONS

Upon the basis of the allegations of fact in the *Memorials*, supplemented by those set forth herein or which may subsequently be adduced before this Honourable Court, and the statements of law pertaining thereto, as set forth in the *Memorials* and in this Reply, or by such other statements as hereafter may be made, Applicants respectfully reiterate their prayer that the Court adjudge and declare in accordance with, and on the basis of, the Submissions set forth in the *Memorials*,[1] which Submissions are hereby reaffirmed and incorporated by reference herein.

Applicants further reserve the right to request the Court to declare and adjudge in respect of events which may occur subsequent to the date of filing of this Reply.

Applicants further reiterate and reaffirm their prayer that it may please the Court to adjudge and declare whatever else it may deem fit and proper in regard to the *Memorials* or to this Reply, and to make all necessary awards and orders, including an award of costs, to effectuate its determinations.

Agents for the Government of Ethiopia:

(Signed) TESFAYE GEBRE-EGZY

(Signed) ERNEST A. GROSS

Agents for the Government of Liberia:

(Signed) NATHAN BARNES

(Signed) ERNEST A. GROSS

The Hague, 20 June 1964

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[1] I, pp. 197-198.

ANNEX 10

OBSERVATIONS CONCERNING THE *MEMORANDUM* ON THE RECOMMENDATIONS OF THE COMMISSION OF THE ENQUIRY INTO SOUTH WEST AFRICA AFFAIRS REPRODUCED IN THE *SUPPLEMENT TO THE COUNTER-MEMORIAL*

In the *Memorandum*[1] submitted as "Annex A" to the *Supplement to the Counter-Memorial*, Respondent expressed the intention of the Government, during the pendency of these Proceedings, to defer, *inter alia*, decisions "on any of the recommendations concerning the constitution of Homelands as self-governing areas."[2]

Respondent also stated that:

> "... Until the [instant] case has been concluded, the Government will therefore refrain from action which may be regarded—even theoretically—as detrimental or prejudicial to the alleged rights of the Applicant States, or which may unnecessarily aggravate or extend the dispute before the Court."[3]

Respondent has nevertheless indicated its intention to proceed with certain measures of implementation of recommendations of the *Odendaal Commission Report*, and such measures include the following which clearly depend, *inter alia*, upon the basic premises of *apartheid*:[4]

(1) **IV**, p. 204, *Sec.* 7 *(b)* (v): Irrigation Scheme for Orange River Settlement for "Coloured" farmers [paras. 422 and 1476 A. (10)].

(2) *Page* 205, *Sec.* 8 *(a)* (i): 700 miles of roads as internal connecting links in "non-White" areas (to be administered by the Department of Bantu Administration and Development) [paras. 1370 and 1509 (8)].

(3) *Page* 207, *Sec.* 9 *(b)*: Assisting and encouraging the inhabitants of the "non-White" areas in prospecting for and exploiting the mineral occurrences in such areas [para. 1481 (g)].

(4) *Page* 207, *Sec.* 10 *(a)-(f)*: Industrial development, with the assistance of the Bantu Investment Corporation, of:

(a) livestock, canning factory, and hides [para. 1482 (k) (i)];
(b) furniture factory in Ovamboland [para. 1482 (k) (ii)];
(c) decortication of jute in the Okavango [para. 1482 (k) (iii)];
(d) exploitation of salt pans in Ovamboland [para. 1482 (k) (iv)];
(e) "Native" handiwork and home industries [para. 1482 (k) (v)];
(f) a clothing factory in Ovamboland [para. 1482 (k) (vi)].

(5) *Page* 207, *Sec.* 11: Provision of experimental farms, demonstration farms and training facilities for "non-White" groups [para. 1283(10)-(12), (14), (15)].

(6) *Pages* 208-209, *Sec.* 12: Provision for (1) more advanced and

[1] Approved by a resolution of the House of Assembly of the South African Parliament on 8 May 1964 (*Supplement to the Counter-Memorial*, **IV**, p. 197, para. 1).

[2] *Memorandum*, Sec. E, para. 21 (*id.*, p. 214).

[3] *Memorandum*, Sec. F, para. 22 (*id.*, p. 215.)

[4] In the following description of measures of implementation, the page references given in italics are to the *Supplement to the Counter-Memorial*, the sectional references immediately following (also in italics) are to sections of the *Memorandum* contained therein, and the relevant paragraph references to the *Odendaal Commission Report* follow, in brackets, a brief description of the relevant measure of implementation.

greater number of schools, hostel facilities and facilities for training of teachers (applying "mainly to the areas of non-White groups"); and (2) giving effect to the Commission's recommendations concerning the extension and improvement of the nature of the educational services ("particularly for the non-White population groups": this being in accordance with the policy on "Native" Education) [(1) paras. 1023-54; (2) paras. 1055-97].

(7) *Page* 209, *Sec. 13*: Erection of at least twenty new hospitals and clinics ("for the non-White groups") [paras. 893, 896, 899, 901, 902, 904 and 909].

(8) *Page* 210, *Sec. 14*: Purchase of "White"-owned farms "in contemplated non-White homelands." (*Cf.* fourth sentence under "Homelands," in Sec. 21 at p. 23; fourth full sentence on p. 24; ". . . [the Government] shares the view that there should be no unnecessary delay in taking the next steps in regard to [making available to certain non-White groups]" "considerable additional portions of the Territory, including areas now owned by white persons . . . ") [1]

(9) *Page* 210, *Sec. 14*: Purchase of (1) Welwitschia township and townlands and (2) Gibeon township and townlands [(1) para. 337; (2) para. 393].

(10) *Page* 210, *Sec. 14*: Purchase of farms necessary for the Irrigation Settlement on the Orange River for "Coloured" farmers ("an ordinary settlement scheme for needy and rural Coloured persons") [para. 422].

(11) *Pages* 210-211, *Sec. 15*: Appointment of Committee of Experts (whose terms of reference are "to enquire into and submit a report on all the practical problems to be taken into account *when* the rearrangement of administrative and financial relationships are considered") (italics added) [para. 236].

(12) *Page 211, Sec. 16*: Making funds available for "coloured" housing and community centres [para. 1509 (4)]. [2]

Under Section D of the *Memorandum* ("Matters on which the Authorities concerned will take their own decisions"), Respondent has likewise

[1] A survey of the farms referred to in the *Odendaal Commission Report* will readily show the extent of possible implementation. The paragraphs of the Report naming the ("White"-owned) farms to be purchased, and the total hectareage of such farms, are: para. 326(b) (11): *Ha. 15,531*; para. 339: *Ha. 1,872,794.4216*; para. 353: *Ha. 126,181.4002*; para. 388: *Ha. 73,789.6520*; and para. 395: *Ha. 1,234,951.9122*. The combined hectareage of the Weltwitschia and Gibeon ("White") townships and townlands (paras. 337 and 393) is 82,920.3. The total "White" land to be purchased is then *Ha. 3,406,168.686*, or (at Ha. 1,000=3.86 square miles) 13,147 square miles. This is 302 square miles more than the combined areas of the states of Connecticut and New Jersey (5,009 and 7,836 miles, respectively), and 169 and 1,368 square miles more than the areas of The Netherlands and Belgium (12,978 and 11,779 square miles, respectively).

[2] For the decision with respect to the construction and extension of sixteen principal and thirty-one secondary airfields, see *Memorandum*, Sec. 8 *(b)* (i) and (ii) (*Supplement to the Counter-Memorial*, **IV**, p. 206); see, in this connection, the discussion with respect to the potential military use of airfields in the Territory, p. 561, *supra*.

indicated its intention to permit the "authorities concerned" to proceed with the certain measures. [1]

Under Section G of the *Memorandum* ("Financial Implications of Decisions and Interim Arrangements for Their Implementation"), Respondent has stated that "a special temporary committee will be appointed to serve as a link between the Central Government and the Administration of South West Africa, in order to ensure the smooth working of the above-mentioned interim arrangements." [2]

The "interim arrangements" are those described in Section 25. [3] Section 25 initially states that responsibility (for the administrative implementation of decisions) will rest with the Republic Government or the Territorial Administration, "depending upon which authority is at present responsible for matters of the relevant nature." It continues, however, to offer the suggestion that the Territorial Administration may "enlist the co-operation of expert bodies . . . or *even of a State department of the Republic* . . ." if the Territorial Administration is "not equipped to take action itself, *or for other reasons prefers to appoint an agent to carry out the work* . . . ."[4]

Taken together with the reference in Section 27 to the "link between [the Governments] . . . to ensure the smooth working of the above-mentioned interim arrangements," this entire section appears to be designed to lay a foundation for implementation of the recommendations of the *Odendaal Commission Report* relating to the transfer of State services from the Territorial to the Republic Administration. As such, this would involve a step toward incorporation or annexation of the Territory, and would, in any event, be inconsistent with the international status of the Territory. [5] Similarly, it would appear that the contemplated action allows a substantial modification of the terms of the Mandate, without the consent of the United Nations. [6]

Applicants have analyzed the *Memorandum* in order to identify measures contemplated therein as measures which, potentially or in practice, would be "detrimental or prejudicial to the . . . rights of the Applicant States," [7] and inconsistent with Applicants' Submissions herein as well as with the relief which Applicants pray from this Honourable Court.

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[1] *Memorandum*, Sec. 17 (*Supplement to the Counter-Memorial*, **IV**, p. 211): ". . . the necessary steps will be taken" concerning:

(a) hostels (for Basters and "Coloureds") [para. 1033];

(b) syllabuses (mother tongue instruction) [para. 1064];

(c) teacher training (in mother tongue instruction context) [paras. 1072-78];

(d) technical and special education (clearly based on general plan for the alleged "homelands") [paras. 1080-84]; and

(e) improvement of agricultural services and activities (clearly based on general plan for the alleged "homelands") [para. 1283(7)-(15)]; and

(f) airfields [paras. 1375(e)-(h)].

[2] *Memorandum*, Sec. 27 (**IV**, p. 217).

[3] *Id.*, p. 216. Sec. 24 is descriptive only; Sec. 26 involves a consideration of the financing of the recommendations; the only operative section is Sec. 25.

[4] *Ibid.* (Italics added.)

[5] *Vide* Applicants' Submission 5, **I**, p. 198.

[6] *Vide* Applicants' Submission 9, *ibid.*

[7] *Memorandum*, Sec. 22 (*Supplement to the Counter-Memorial*, **IV**, p. 215).

Such possible implications and consequences of the *Memorandum* are underscored by Respondent's explicit endorsement of

> "... the main features of the [the Commission's] argument and recommendations as an indication of the general course to be adopted in the next phase of the development of South West Africa...."[1]

With specific reference to the Commission's proposals for partition of the Territory, Respondent announced also that it

> "... 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."[2]

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[1] *Memorandum*, Sec. 5 (**IV**, p. 203).
[2] *Memorandum*, Sec. 21 (*id.*, p. 213).

ANNEX II

SUPPLEMENTARY MATERIAL CONTAINING ADDITIONAL VIEWS OF SOUTH AFRICANS WITH "FIRST-HAND KNOWLEDGE" OF RESPONDENT'S POLICIES

(Supplemental to excerpts quoted supra, *pp. 280-293.)*

(1) "White" South Africans

(a) *Scholarly Authorities*

(i) Dr. Leo Marquard, a historian of Afrikaner origin, living in Cape Town, in a Presidential address to the Council of the South African Institute of Race Relations:

"Our problem is fundamentally the same as that of any other colonial power; how to terminate colonialism reasonably and peacefully. Our problem is not unique unless we want to make it so. Nor is the solution unique. It is to renounce political power over colonial subjects. For Europe, this takes the form of withdrawing political authority; for us it must take the form of sharing political authority with our colonial subjects. But in both cases, a renunciation of political power is involved. . . .

"The task of those who have discarded the gloomy creed of apartheid which is, in plain English, perpetual colonialism, is perfectly clear. It is no less than to persuade South Africa to see colonialism for what it really is; to tell her that the cost of ending it will be enormous; but it will not be measured in pounds, shillings and pence—it will be measured in the renunciation of pride and political power; to tell her that it will involve the painful process of liberating all South Africans, white and non-white, from the colonial chains that are holding her down.

"As a liberal South African, a republican burgher by birth, I can only plead that you throw everything into this task of bringing white and non-white together before it is too late. . . ." [1]

(ii) Report of Academicians, Jurists and others, opposing the "Extension of University Education Act of 1959" (prohibiting education of "Whites" and "non-Whites" in the same university):

"The open universities declare that legislative enforcement of academic segregation on racial grounds is an unwarranted interference with university autonomy and academic freedom. These are values which should not be interfered with, save with the utmost circumspection; and the onus lies upon any government which contemplates such interference to justify its proposed action clearly and irrefutably.

"The open universities believe that the policy of academic non-

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[1] *South Africa's Colonial Policy* 25-26 (1957).

segregation provides the conditions under which the pursuit of truth may best be furthered; and that it has promoted interracial harmony and understanding. They are convinced that to impose academic apartheid upon them would deprive the South African community as a whole, both white and non-white, of a service which has proved beneficial. . . .

"It should be noted, first, that ever since the days of van Riebeeck the white settlers and their descendants in South Africa have been dependent on the services of non-white labourers, with the result that whites and non-whites have become intermingled to such an extent that complete territorial separation is beyond the bounds of possibility . . . South Africa cannot now be transformed into a number of separate uniracial states. It is a single multiracial state.

"Secondly, there are *two* distinct 'established traditions' among white South Africans as to how a multiracial state should be organized. . . .

"The policy of the two open universities in admitting non-white students stems from one of the established South African traditions—the one moreover which is more in accord with the values of Western civilization. . . ." [1]

(iii) Dr. Leo Kuper, formerly Professor of Sociology, University of Natal; presently Professor, University of California (U.S.A.):

". . . Apartheid is an exclusive or tribal ethic with the familiar emphasis on one's own group as *the* people; the Arikaners are *die volk*, the chosen of God, with a heavenly mission in Africa. There is also the familiar double standard of morality. Apartheid idealizes the white man and debases the non-white; it offers the former unbounded opportunities and the monopoly of the developed industrial wealth of the country, while it carefully restricts the life-chances of non-white and compensates for this restriction with the illusory promise of opportunities in areas still to be developed. Within the white group apartheid emphasizes solidarity, respect for person and property; outside the white group, it compels separation and denies personal and property rights which do not fit within the master plan. . . .

"In a broad way, the conflict between the races in South Africa is a conflict between the exclusive ethic of apartheid and the universal ethic of democracy. The non-whites are moving away from caste and tribalism, while the whites are moving towards these systems; the non-whites increasingly give their allegiance to a universal ethic, the whites proclaim an exclusive ethic." [2]

(iv) Dr. P. V. Pistorius, Professor of Greek, University of Pretoria (Afrikaans-medium):

"The problem of human relations has overtaken us. We have to accept the hard inescapable fact that the Bantu and the Europeans are together in this country and together they will remain. They must either solve their problems or perish, and the solution of those problems cannot be one-sided. The whites alone cannot solve them. It must be done by sincere co-operation. In the face of the rising Bantu nationalism of today, of which we are to a large extent the

[1] *The Open Universities in South Africa* 5-6, 30-31 (1957).
[2] *Passive Resistance in South Africa* 210 (1956).

creators, it is folly to suppose that a white parliament, a white church or a white Sabra can unilaterally prescribe the fate of the Bantu. We, the whites and the Bantu, must reach agreement on the most fundamental and basic aspects of our lives, in the sphere of our national ideals, economic interests, political aspirations and whatever other sphere there is that is basic to modern man, and we have to realize that we have no platforms on which to meet. No responsible committee would hire its hall for a meeting of whites and Bantu because the chances are that the hall would be wrecked by those who object to mixed gatherings. Only a small fraction of the white population can speak or understand a native language. We live in the same country, work in the same factory, meet in the relation of master and servant in the same house, face the same common doom of either living together or perishing together, and yet we are strangers, ill at ease when we attempt to discuss anything beyond the ordinary task of the day. When a native clergyman for once preaches in a white church, it is a political incident of the greatest interest. Pictures are taken, resolutions passed, protests made, letters written to the Press! Even the highest university degree or the most erudite learning and culture would not give the native the right to enter the lowliest white home as a guest, not because of the animosity of that white family, but because it is not done. It is not our tradition. It has been our tradition to close the doors and the doors are closed. How closed they are!" [1]

(b) *Religious Leaders*

(i) Rev. Trevor Huddleston, C.R. (South African Anglican); presently Bishop of Masasi, Tanganyika:

"... There has been little imagination in the planning and none at all in the approach to a community-conscious town in a place such as Orlando [Township outside Johannesburg]. It is a 'location'—a 'place for natives'—that is the South African ideal: an abstraction which will serve its purpose and which will be conveniently forgotten. It is a 'location' in another sense also—a 'place' which to-day is and to-morrow can be elsewhere. That the people living in it should care where they live, or have a love for their homes, or dream dreams of having somewhere to spend their old age: that is a secondary consideration. In the eyes of Dr. Verwoerd it is not worth considering at all, for it is undesirable. The African is in the town to work. That is his function. If he desires a fuller life and a sense of 'belonging,' then he must go to the Reserves. 'The apartheid policy' he said, 'is one of getting the natives to grow from their own roots out of their own institutions and from their own powers. It is a policy of gradual development through mother tongue and own environment, to bring the natives to literacy and usefulness in their own circle.' And so although there are to-day millions of Africans in the urban areas, and of those millions, hundreds of thousands who have been born and bred there: the town is not and must not be their home. Although their labour is the foundation of the whole South African economy and forces them into daily contact with the industrialized society of Western man, their future is in their past, 'in their own circle,' in the tribalism that

[1] *No Further Trek* 38-39 (1957).

the white man has done his best to smash to bits and that migratory labour destroys more swiftly than anything else could." [1]

(ii) Members of the Catholic hierarchy in South Africa, Archbishop McCann of Cape Town and Archbishop Dennis E. Hurley of Durban, have roundly criticized Respondent's policy. For example, in January 1964 Archbishop Hurley declared, in the Hoernlé Memorial Lecture, that none of the four conditions required for the "just implementation" of Respondent's policy was being fulfilled or showed any likelihood of being fulfilled:

"We have no evidence that the policy will succeed.

"There will be no consultation with the parties most deeply affected with a view to obtaining their consent.

"No independent arbitrator will be called in to see that there is a proportionate share of sacrifice.

"And finally there is no guarantee of a protection of rights during the time of transition.

"Elementary justice demands that the consent of all parties be sought and obtained to a policy which can have such far-reaching repercussions on the residential and economic rights of people." [2]

(c) *Political Leaders*

(i) Mrs. Helen Suzman, Member of Parliament; former lecturer in Economics, University of the Witwatersrand (commenting in Parliament on the project for "self-government" in the Transkei [*supra*, p. 312]):

". . . If one looks at the Assembly (of the Transkei) you see that 64 of the members are to be nominated and 45 are to be elected. What is the value of one-man one-vote in an assembly of that kind? As I say, under Proclamation 400 what sort of free election is there going to be? Even for those 45 elected members. So much for satisfying the political ambitions of the Africans inside the Transkei. How much less will this satisfy the political ambitions of those outside the Transkei. Have hon. members forgotten that the urbanized Africans are the most Westernized and most advanced of our African people? Do they seriously think that postal votes in the Transkei are going to satisfy the aspirations of those people? What absolute nonsense, especially, Sir, as this is meant to be the substitute for all claims to all normal civil rights within the Republic of South Africa! . . .

". . . [The actual goal of the Bill] is not sovereign independence or self-government but . . . to turn the entire African population into one vast migratory labour force with no claims on any permanent rights in the so-called White areas of South Africa. . . .

". . . This solves nothing, Sir. It will not alter in any way the basic structure of the Black/White relationship—except to worsen it because racial grievances build up with every drastic measure which comes into being. Therefore I say that this plan is doomed to failure before it starts. What is more, Sir, the Government knows it is doomed to failure and that is why it is building up this vast Defence Force, not to protect us from external agression, but to protect us against internal risings. . . .

[1] *Naught for Your Comfort* 53-54 (1956).

[2] As quoted in *The Star*, Johannesburg, weekly edition, 25 January 1964, p. 5.

"... I want to point out that 14 years is the halfway point between the Government's getting into power and 1978, the magic year; the magic year when somebody is going to press a button and all the Africans who have been streaming into the towns will turn back and stream back to the reserves again. So we have 14 years to go. What have we achieved in the past 14 years? Have we even, Sir, achieved what the Prime Minister called an 'immediate forcing down in the curve of influx into the towns'? Not even that, Sir ... there are 1,000,000 more Africans in the towns than there were ten years ago. ..." [1]

(ii) Mrs. Margaret Ballinger, Representative of "Africans" in the House of Assembly, 1937-1960 (commenting on Address of Prime Minister Verwoerd, quoted in **II**, pp. 465 *ff*.

"... The thing that bothers me is not only is there nothing new in what the hon. the Prime Minister has told us this Session—except, of course, his intention to abolish Native representation in this House, and that is only new in time and not in intention ... but ... he is endeavouring to support this thesis by equating his own actions to those of Great Britain in regard to Basutoland. I think it is bad enough to have a policy, the justice of which nobody can see, not even his own side, but, as a good South African, I think that it is terribly sickening to have that supported by the sort of arguments which expose us to the ridicule of even moderately well-educated people. This situation is really becoming quite absurd. ..." [2]

(d) *Journalists*

The Star (Johannesburg):

"Few advocates of apartheid really believe the day will ever come when the 'White' areas of South Africa will be totally denuded of Africans.

"It has, however, been a comfortable myth which the Government understandably has been loath to shatter too rudely. But its cultivation gives rise to dangerous illusions, and at the Nationalist Party congress in Pretoria this week, the Minister of Bantu Administration, Mr. Nel, felt it necessary to go further than any of his colleagues in the past to disillusion the whole-hoggers and put an end to false hopes.

"Quite categorically he said he did not believe the time would ever come when there would be no Africans in the White areas. And in a further concession to reality he said something else which should be self-evident but which is too often obscured by the mists of ideology: 'We will never be able to get along completely without them. Our mines and industries would come to a standstill.'

"The most important implications of this somewhat belated admission is that the urban African population can no longer be regarded as transitory. And since it is here to stay provision must be made for it on the understanding that there are millions of men, women and children who have broken with a tribal past and look ahead to a future divorced from the reserves.

"The Tomlinson Commission estimated that unless the drift from

[1] *R. of S. A., Parl. Deb., House of Assembly*, 2nd Parl., 2nd Sess. (weekly ed., 1963), Cols. 2384-2389.

[2] *U. of S. A., Parl. Deb., House of Assembly*, 12th Parl., 2nd Sitting (weekly ed., 1959), Col. 88.

reserves was slowed down or stopped, there would be 21 million Africans living in urban areas outside the reserves in the year 2000. Even if that figure is halved, the fact emphasizes that this and not the situation in the reserves is the heart of South Africa's race problem. Even within the elastic framework of separate development, provision must be made to give these people a political outlet at least comparable to that planned for the Bantustans.

"Mr. Nel's recognition of their permanence should now be translated into action for treating them as such. Even in the world of apartheid it is not possible to eat one's cake and still have it." [1]

(2) South African "Natives"

(i) Robert Sobukwe, former Lecturer, University of the Witwatersrand; President, Pan-Africanist Congress (sentenced upon conviction of leading protests against the "Pass Laws"):

". . . Freedom of the Africans means freedom of everyone, including Europeans in this country. People will live and be governed as individuals, and not as sectional groups. We reject apartheid and so-called multi-racialism. Multi-racialism is pandering to European arrogance, a method of safeguarding white interests. The logical meaning of multi-racialism is proportional representation, and implies basic differences between national groups . . . and that the best course is to keep them apart in a form of democratic apartheid . . . We believe that everyone prepared to accept and give loyalty to Africa is an African." [2]

(ii) Phyllis Ntantala, writer:

"Widowhood—a life of void and loneliness . . . this is the daily lot of tens of thousands of African women whose husbands are torn away from them to go and work in the cities, mines and farms—husbands who because of the migratory labour system cannot take their wives with them and, because of the starvation wages they receive, are forced to remain in the work centres for long periods—strangers in a strange land—but equally strangers at home to their wives and children. . . ." [3]

(3) South African "Asiatics"

(i) Nana Sita, trader in Pretoria since 1913 (sentenced in 1962 upon conviction for refusal to move from the house and shop, occupied by him for 39 years, which was "proclaimed" within a "White Group Area") (statement to the Court during trial):

"It is known to this Honourable Court that we Indians had no saying in the passing of the Act since we do not possess the vote. At no time were we ever given an opportunity to present our objection. The Act had been passed and promulgated not only without our consent but in the face of the unanimous opposition of our people. . . .

"The Government has from time to time declared the Act as the corner-stone of the Apartheid policy. In order to bring that policy

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[1] "The End of a Myth," *The Star*, Johannesburg, weekly edition, 14 September 1963.

[2] *Africa South*, pp. 24-25 (July-September 1959).

[3] "The Widows of the Reserves," 2 *Africa South*, No. 3, p. 9 (April-June 1958).

to fruition separate areas are being proclaimed in practically every town and city in the country. In doing so, in my opinion, the Government desires to achieve two objects: success of the Apartheid policy and the total economic ruination of the Indian community. This would oblige its members to leave the country 'on their own accord.'

"... Implementation of this policy against us through the Act brands us as inferior people in perpetuity, degrades our self-respect as human beings, condemns us as uncivilized barbarians having no culture and no spiritual background, thereby deriding our serene philosophy and way of life. The 13 million Non-Europeans of South Africa—African, Indian and Coloured—are branded as untouchables. My conscience and my religious training obliges me to resist such a doctrine with all the force my mind and body is capable of. This much for the Apartheid policy of the Government." [1]

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[1] M. Friedmann (ed.), *I Will Still Be Moved: Reports from South Africa*, pp. 18, 19, 20 (1963).

ANNEX 12

SUPPLEMENTARY MATERIAL CONTAINING ADDITIONAL VIEWS OF CONTEMPORARY SCIENTIFIC AUTHORITIES

(Supplemental to excerpts quoted supra, *pp. 305-312.)*

(i) Dr. Clyde Kluckhohn, late Professor of Psychology, Harvard University:

". . . There is no evidence whatever that the genes which determine skin color or hair form are correlated with genes influencing temperament or mental capacity."[1]

(ii) Dr. G. M. Morant, University of London:

". . . Evidence provided by tests of mental characters also appears to give strong support to the hypothesis that all men have basic mental qualities of the same kind."[2]

(iii) M. E. Morgaut noted:

"Quoi qu'il en soit, cette 'Intelligence pratique à vocation technique' est diversement répartie entre les populations examinées, avec d'assez sensibles différences, mais sans que l'on puisse dire:

(a) que les Blancs en soient mieux dotés que les Noirs
(b) que certaines populations autochtones soient d'une supériorité écrasante sur d'autres. . . ."[3]

(iv) Dr. Juan Comas, National Autonomous University of Mexico:

"*There is no scientific basis whatsoever* for a general classification of races according to a scale of relative superiority, and racial prejudices and myths are no more than a means of finding a scapegoat when the position of individuals and the cohesion of a group are threatened."[4]

(v) Report of Panel of Social Scientists convened by the United Nations Educational, Scientific and Cultural Organization, July 1950:

"According to present knowledge there is no proof that the groups of mankind differ in their innate mental characteristics, whether in respect of intelligence or temperament. The scientific evidence indicates that the range of mental capacities in all ethnic groups is much the same."[5]

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[1] *Mirror for Man* 125 (1949).

[2] *The Significance of Racial Differences* 39 (1952). Otto Klineberg, of the University of Paris, also argues that racial difference in innate capacity is contradicted by the evidence. *Cf. Race and Psychology*, p. 17 (1951). Professor Dr. Alejandro Lipschutz of Chile affirms too that there can be no objective measurement of biological worth. See *El Indoamericanismo y el Problema Racial en las Américas* 97 (1944); see also Fernando Ortiz, *El Engano de las Razas* 264-67 (1946).

[3] "Note sommaire sur quelques comparaisons psychologiques entre des populations Africaines, Malgaches et Européennes," 9 *Revue de Psychologie Appliquée*, No. 1 p. 28 (January 1959).

[4] *Racial Myths* 10 (1951). (Italics in original.)

[5] UNESCO "Statement on Race," in *What is Race? Evidence from Scientists* 79 (1952).

(vi) L.C. Dunn and T. Dobzhansky, of the Department of Zoology of Columbia University (U.S.A.) testify:

"... The differences between the so-called 'race psychologies' are determined by the cultural differences to an extent assuredly greater than they may be influenced by biological heredity. Furthermore, psychic differences between individuals are certainly much greater than the average differences between nations or races."[1]

(vii) Arthur Ramos, of the University of Brazil:

" 'Superioridades' e 'inferioridades', em relação aos tipos formadores, quando ocorrem, estão ligadás a fatôres de ordem social e cultural, e nadá têm a ver com o aspecto biológico de mestiçagem."[2]

[" 'Superiority' and 'inferiority,' in relation to the resulting patterns, when they occur, are linked to social and cultural factors and have nothing to do with the biological aspect of race-mixture."][3]

(viii) Dr. Claude Lévi-Strauss, Collège de France (discussing contributions to world civilization by various races and cultures):

"... If their contributions are distinctive—and there can be little doubt that they are—the fact is to be accounted for by geographical, historical, and sociological circumstances, not by special aptitudes inherent in the anatomical or physiological make-up of the black, yellow, or white man."[4]

(ix) Dr. Juan Comas:

"In comparisons of the position of the white and Negro races today there is a tendency to assume the inferiority of the latter from the fact that their economic, political and cultural evolution is far behind that of the whites. This, however, is not due to an 'innate racial inferiority,' but is purely the result of circumstances and due to the régime of exploitation under which almost all Negroes live today as a result of white colonization and of the existence, if not of slavery in law, of conditions equivalent to it in practice."[5]

(x) Similarly, M. Leiris, of the Musée de l'Homme, Paris, argues that

"... Race prejudice only began to develop ... with the opening of the period of colonial expansion by the European peoples, when it becomes necessary to excuse violence and oppression by decreeing the inferiority of those enslaved or robbed of their own land and denying the title of men to the cheated peoples ...."

"... Racial prejudice is not innate."[6]

(xi) Dr. A. Cryns:

"... The sum total of the research cited seems to indicate that a definite effect of certain environmental factors upon test performance cannot possibly be denied: for instance, education has

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[1] *Heredity, Race and Society* 134 (3d ed. 1957).

[2] *Introdução à Antropologia Brasileira* 360, Vol. II (1947).

[3] *Ibid.* [translation].

[4] *Race and History* 6 (1952).

[5] *Racial Myths* 24-25 (1951). A. Lipschutz terms this practice "racial hypocrisy" (justifying social privileges by psychological pseudo-arguments). See *El Indoamericanismo y el Problema Racial en las Américas* 75 (1944).

[6] *Race and Culture* 41-42 (1951).

consistently the effect of improving African intelligence test scores."[1]

(xii) Dr. Anthony Richmond:

"Racial classifications take no account of cultural differences between groups of people. There is no necessary connexion between race and, for example, language, nationality, or religion. These are cultural traits which are the consequence of environmental influences. So also are most expressions of temperament and personality. Intelligence, which most psychologists believe to be determined more by heredity then by environment, appears to show a normal curve of distribution in all races. Where the average performance of Europeans appears to have been superior to the average performance of non-Europeans this is almost certainly due to the difficulty of creating satisfactory tests of intelligence which are independent of culture. In any case, almost all such investigations show that some non-Europeans far exceed some Europeans in intelligence and vice versa."[2]

[1] "African Intelligence: A Critical Survey of Cross-cultural Intelligence Research in Africa South of the Sahara," 57 *Journal of Social Psychology*, No. 2, p. 299 (1962).
[2] *The Colour Problem: A Study of Racial Relations* 16-17 (1961 ed.).

LIST OF THE RELEVANT DOCUMENTS

I. Documents of the United Nations

A. *Resolutions of the General Assembly*

1. G.A.O.R. 1st Sess., Resolutions (A/64)
2. G.A.O.R. 3rd Sess., Resolutions (A/810)
3. G.A.O.R. 4th Sess., Resolutions (A/1251)
4. G.A.O.R. 5th Sess., Supp. No. 20 (A/1775)
5. G.A.O.R. 6th Sess., Supp. No. 20 (A/2119)
6. G.A.O.R. 7th Sess., Supp. No. 20 (A/2361)
7. G.A.O.R. 8th Sess., Supp. No. 17 (A/2630)
8. G.A.O.R. 9th Sess., Supp. No. 21 (A/2890)
9. G.A.O.R. 10th Sess., Supp. No. 19 (A/3116)
10. G.A.O.R. 11th Sess., Supp. No. 17 (A/3572)
11. G.A.O.R. 12th Sess., Supp. No. 18 (A/3805)
12. G.A.O.R. 13th Sess., Supp. No. 18 (A/4090)
13. G.A.O.R. 14th Sess., Supp. No. 16 (A/4354)
14. G.A.O.R. 15th Sess., Supp. No. 16 (A/4684)
15. G.A.O.R. 15th Sess., Supp. No. 16A (A/4684/Add.1)
16. G.A.O.R. 16th Sess., Supp. No. 17 (A/5100)
17. G.A.O.R. 17th Sess., Supp. No. 17 (A/5217)
18. G.A.O.R. 18th Sess., Supp. No. 15 (A/5515)

B. *Reports of the Trusteeship Council*

1. G.A.O.R. 3rd Sess., Supp. No. 4 (A/603)
2. G.A.O.R. 4th Sess., Supp. No. 4 (A/933)
3. G.A.O.R. 5th Sess., Supp. No. 4 (A/1306)
4. G.A.O.R. 6th Sess., Supp. No. 4 (A/1856)
5. G.A.O.R. 7th Sess., Supp. No. 4 (A/2150)
6. G.A.O.R. 9th Sess., Supp. No. 4 (A/2680)
7. G.A.O.R. 10th Sess., Supp. No. 4 (A/2933)
8. G.A.O.R. 11th Sess., Supp. No. 4 (A/3170)
9. G.A.O.R. 12th Sess., Supp. No. 4 (A/3595)
10. G.A.O.R. 13th Sess., Supp. No. 4 (A/3822, Vol. II)
11. G.A.O.R. 14th Sess., Supp. No. 4 (A/4100)
12. G.A.O.R. 15th Sess., Supp. No. 4 (A/4404)
13. G.A.O.R. 16th Sess., Supp. No. 4 (A/4818)
14. G.A.O.R. 17th Sess., Supp. No. 4 (A/5204)

C. *Reports of the Committee on Information from Non-Self-Governing Territories*

1. G.A.O.R. 6th Sess., Supp. No. 14 (A/1836)
2. G.A.O.R. 9th Sess., Supp. No. 18 (A/2729)
3. G.A.O.R. 10th Sess., Supp. No. 16 (A/2908)
4. G.A.O.R. 11th Sess., Supp. No. 15 (A/3127)
5. G.A.O.R. 12th Sess., Supp. No. 15 (A/3647)
6. G.A.O.R. 14th Sess., Supp. No. 15 (A/4111)
7. G.A.O.R. 15th Sess., Supp. No. 15 (A/4371)

D. *Reports of the Committees on South West Africa*

1. G.A.O.R. 9th Sess., Supp. No. 14 (A/2666)
2. G.A.O.R. 11th Sess., Supp. No. 12 (A/3151)

3. G.A.O.R. 12th Sess., Supp. No. 12 (A/3626)
4. G.A.O.R. 13th Sess., Supp. No. 12 (A/3906)
5. G.A.O.R. 14th Sess., Supp. No. 12 (A/4191)
6. G.A.O.R. 15th Sess., Supp. No. 12 (A/4464)
7. G.A.O.R. 16th Sess., Supp. No. 12 (A/4957)
8. G.A.O.R. 16th Sess., Supp. No. 12A (A/4926)
9. G.A.O.R. 17th Sess., Supp. No. 12 (A/5212)

E. *Resolutions of the Security Council*

1. S/4300, 1 April 1960
2. S/5386, 7 August 1963
3. S/5471, 4 December 1963

F. *Meetings of the Security Council*

1. S.C.O.R. 13th year, 1053rd mtg. (S/PV.1053)
2. S.C.O.R., 15th year, 852nd mtg. (S/PV.852)
3. S.C.O.R., 15th year, 854th mtg. (S/PV.854)
4. S.C.O.R., 18th year, 1052nd mtg. (S/PV.1052)
5. S.C.O.R., 18th year, 1055th mtg. (S/PV.1055)

G. *Records of the Fourth Committee*

1. G.A.O.R. 15th Sess. (A/C.4/SR.1113) (1960)
2. G.A.O.R. 16th Sess. (A/C.4/507) (1961)
3. G.A.O.R. 17th Sess. (A/C.4/SR.1380) (1962)
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