

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

SOUTH WEST AFRICA CASES

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

VOLUME I

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COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAEDOIRIES ET DOCUMENTS

AFFAIRES DU SUD-OUEST AFRICAIN

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

VOLUME I



1. MEMORIAL SUBMITTED BY THE GOVERNMENT OF ETHIOPIA

I

STATEMENT OF THE CASE

A. This Memorial is submitted to the Court pursuant to an Order of the Court issued under the date of January 13, 1961, following upon the Application submitted to the Court on behalf of the Government of Ethiopia (hereinafter sometimes referred to as "Applicant"), on November 4, 1960, to institute proceedings against the Government of the Union of South Africa (hereinafter sometimes referred to as the "Union") for causes stated therein.

B. The dispute between Ethiopia and the Union, to which this Memorial is addressed, relates to the interpretation and application of the Mandate for South West Africa. The subject of the dispute concerns the continued existence of the Mandate for South West Africa and the duties and performance of the Union, as Mandatory, thereunder. Ethiopia insists that the Mandate is still in force; that the Union continues to have duties thereunder; that the United Nations is the proper supervisory organ to which annual reports and petitions should be submitted by the Union, and whose consent is a legal prerequisite and condition precedent to modification of the terms of the Mandate; and that the Union has violated and is violating Article 22 of the Covenant of the League of Nations and Articles 2, 4, 6, and 7 of the Mandate.

The Union disputes, and has disputed the above contentions, and such dispute has not been, and cannot be settled by negotiation.

II

HISTORY AND BACKGROUND OF THE DISPUTE

A. HISTORY OF THE MANDATE PRIOR TO THE ESTABLISHMENT OF THE UNITED NATIONS

I. *Origins of the Mandate System*

The Allied and Associated Powers at Versailles in 1918 were concerned with the disposition of the former German overseas colonies, whose people were regarded at that time as being unable to stand by themselves. Restoration of the *status quo ante* or immediate grant of independence were considered unacceptable solutions. Beyond this, there was little agreement among the Allied and Associated Powers. Pursuant to Articles 118 and 119 of the Treaty of Versailles¹, Germany undertook to renounce completely her overseas possessions in favor of the Principal Allied and Associated Powers. Secret agreements had been exchanged among Great Britain, France and Japan prior to the signing of the armistice, mutually acknowledging so-called "special interests" in particular areas of the German empire. Thus, France was to be permitted to annex part of the Cameroons and Togo; three British dominions interested were to have the right to annex, respectively, German South West Africa (hereinafter sometimes referred to as the "Territory"), New Guinea, and German Samoa. On the other hand the Allies had publicly announced opposition to territorial annexation as a legitimate end of victory. Spokesmen both at Versailles and elsewhere expressed the opinion that some form of international administration of the conquered lands should be established under the aegis of the League of Nations to be formed. 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. First

¹ "Article 118. In territory outside her European frontiers as fixed by the present Treaty, Germany renounces all rights, titles and privileges whatever in or over territory which belonged to her or to her allies, and all rights, titles and privileges whatever their origin which she held as against the Allied and Associated Powers.

"Germany hereby undertakes to recognize and to conform to the measures which may be taken now or in the future by the Principal Allied and Associated Powers, in agreement where necessary with third Powers, in order to carry the above stipulation into effect.

"In particular Germany declares her acceptance of the following articles relating to certain special subjects."

"Article 119. Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions."

priority was accorded to the well-being of the people concerned, rather than to the special interests of the victorious Powers. The mandated territories were in each case to be administered on behalf of the League of Nations by individual mandatory powers, in accordance with allocations made by the Principal Allied and Associated Powers. The mandatories were to promote to the utmost the material and moral well-being and social progress of the inhabitants. They were, moreover, to account for their actions both to the Council of the League and to individual League Members. The latter were to be given the ultimate right to seek judicial recourse in the event of a dispute concerning the mandate, if such dispute could not be settled by negotiation.

Marshal Jan Christian Smuts took a leading part in conceiving the framework for the Mandate System. In his *The League of Nations, A Practical Suggestion* (London, 1918),¹ he advanced the notion (referring to the peoples and territories formerly belonging to Russia, Austria-Hungary and Turkey) that the League of Nations

“should be considered as the reversionary in the most general sense and as clothed with the right of ultimate disposal in accordance with certain fundamental principles. Reversion to the league of nations should be substituted for any policy of national annexation.”²

Marshal Smuts further expressed the view:

“The delegation of certain powers to the mandatory [*sic*] state must not, however, be looked upon as in any way impairing the ultimate authority and control of the league, or as conferring on the mandatory [*sic*] general powers of interference over the affairs of the territory affected. For this purpose it is important that in each such case of mandate the league should issue a special act or charter, clearly setting forth the policy which the mandatory [*sic*] will have to follow in that territory. This policy must necessarily vary from case to case, according to the development, administrative or police capacity, and homogeneous character of the people concerned. The mandatory [*sic*] state should look upon its position as a great trust and honour, not as an office of profit or a position of private advantage for it or its nationals. And in case of any flagrant and prolonged abuse of this trust the population concerned should be able to appeal for redress to the league, who should in a proper case assert its authority to the full, even to the extent of removing the mandate, and entrusting to some other state, if necessary.”³

2. *The Covenant of the League of Nations*

Article 22 of the Covenant in its final form extended this concept of League control to the German territories. The text of Article 22 of the Covenant is here set forth in full:

¹ Reprinted in II Miller, *The Drafting of the Covenant*, Document 5, at 23-60.

² *Id.* at 27.

³ *Id.* at 32.

"Article 22.

"1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

"2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

"3. The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

"4. Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

"5. Other peoples, especially those of Central Africa are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defense of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

"6. There are territories, such as South West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

"7. In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

"8. The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by

the Members of the League, be explicitly defined in each case by the Council.

"9. 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."

The concept of "sacred trust," or tutelage of peoples not yet able to govern themselves is, of course, analogous to the traditional doctrines of trust or *tutelle* in municipal law. Extension of these doctrines to international practice and principle reflected a maturing sense of international responsibility for the dignity and well-being of the individual person. In the case of Mandates, the principle of "sacred trust" succeeded to the doctrine of rights of conquest over territory. The legal rights of Mandatories in the territory for which they assumed responsibility were limited to and defined in the terms of the trust which was conferred by the League. The League had a legal interest in the administration, as did each member of the League. The League's interest was to be exercised through administrative supervision. The legal interests of the Members of the League in the Mandatory's compliance with its duties were to be protected by the right to invoke the compulsory jurisdiction of the Permanent Court of International Justice. This aspect of control and supervision made the ideal of "sacred trust" a living and enforceable reality, rather than a mere pretension.

The Mandate for South West Africa was allocated by the Principal Allied and Associated Powers to the Union of South Africa on May 5, 1919. A draft mandate was prepared by the British government, conferring the Mandate upon his Britannic Majesty on behalf of the Union Government. The Mandate was submitted to the Council of the League on December 14, 1920 and was confirmed by the Council on December 17. The Mandate belonged to the category of "C" Mandates, viz., those applying to the least economically and politically developed of the former German colonies.¹

In essence, the Union undertook in the Mandate to promote to the utmost the material and moral well-being and social progress of the inhabitants, to render reports to the League, to refrain from altering the terms of the mandate unilaterally, to submit to the jurisdiction of the P.C.I.J. any dispute with another League Member concerning the interpretation or application of the Mandate, if such dispute could not be settled by negotiation.

The Union by accepting the Mandate became the effective authority in an area of roughly 320,000 square miles. South West Africa was the largest of the mandated territories, with a white population of 15,000, consisting largely of German settlers and an indigenous population of 81,000, comprising various ethnic and linguistic groups. Germany had concentrated her colonizing efforts

¹ The other territories under "C" Mandates were Western Samoa, Nauru, a portion of New Guinea and numerous Pacific islands.

in South West Africa on the exploitation of mineral wealth and the development of agriculture. In doing so, it had encountered stubborn resistance among the native African tribes, especially the Hereros. Terroristic measures were taken by the Germans to suppress such resistance. The end of German control left a legacy of poverty for the natives and deep resentments. The Union of South Africa in 1920 assumed the duty to transform this legacy into a condition of well-being and social progress. It was a solemn duty, voluntarily and expressly undertaken.

Annual reports called for in Article 6 of the Mandate for South West Africa were for a time submitted by the Union to the Council of the League of Nations, beginning with a report for 1919. A separate body, the Permanent Mandates Commission was entrusted by the League Council, with responsibility for reviewing the Reports, along with those of the other mandatory powers, and advising the Council as to the course of administration in the mandated territories. The Commission's organization and procedures were governed by a Constitution and Rules approved by the Council. The Commission, composed of nine (later ten, then eleven) members, normally held two sessions a year, when the reports were examined and discussed. It was assisted in its work by the presence of an accredited representative of each Mandatory power who was available to answer questions put by members of the Commission and to amplify or correct statements in the reports. The Commission formulated a set of 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 these 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 inhabitants of the mandated territories were received and evaluated by the Commission.

3. Attitude and Policy of the Union

Although the Union was not at first overtly hostile towards the Permanent Mandates Commission (as it has been to the United Nations Committee on South West Africa, as will be shown later in this Memorial) nevertheless, officials of the Union Government from the outset viewed the Mandate as tantamount to annexation.

In an article appearing in the *Cape Times* on September 18, 1920, Marshal Smuts was reported to have "emphasized that the League of Nations had nothing to do with the giving of the Mandates." He was reported to have said: "In effect, the relations between the South-West Protectorate and the Union amount to annexation in all but name."¹

¹ Reprinted in P.M.C., Min., 2nd Session (Annex 6), 92.

In the light of so striking a reversal of concept toward the Mandate System, the Permanent Mandates Commission felt obliged on more than one occasion to call the Union to task with respect to its attitude toward the legal status of the Territory. Thus, when the Union concluded a series of Agreements with Portugal regarding the boundary between Angola and South West Africa, the Commission drew attention to the fact that in the Preamble to one such Agreement, the Union asserted "full sovereignty over the territory of South West Africa, lately under the sovereignty of Germany." In its report to the Council of the League of Nations following its Eleventh Session, the Committee stated:

"Because of the fundamental importance of this question the Committee feels obliged to bring it to the attention of the Council. Two considerations have led the Commission to take this decision.

In the first place, the parallel drawn in the above-mentioned preamble between the sovereignty assumed by the Government of the Union of South Africa over the territory in question and the sovereignty over that territory previously held by Germany, seems to imply a claim to legal relations between the mandatory Power and the territory it administers under its mandate, which are not in accordance with the fundamental principles of the mandates system.

Secondly, the Prime Minister of the Union made the following declaration in the Union Parliament on March 11th, 1927:

'I would refer the honourable member to the decision of the Supreme Court of South Africa (Appellate Division) in the case of *Rex v. Christian*, A.D. 1924, at page 122, wherein it was laid down that "the majestas or sovereignty over South-West Africa resides neither in the Principal Allied and Associated Powers, nor in the League of Nations, nor in the British Empire, but in the Government of the Union of South Africa, which has full powers of administration and legislation only limited in certain definite respects by the Mandate." The Government of the Union entirely adheres to this decision.'

In view of these statements and the interpretations to which they have given rise, the Commission is anxious to know the exact meaning which is to be attributed to the expressions referred to.

The Commission notes that the accredited representative of the Mandatory Power was not able to give the opinion of the Government of the Union of South Africa on this question, and it hopes that that Government will be so good as to explain whether, in its view, the term 'possesses sovereignty' expresses only the right to exercise full powers of administration and legislation in the territory of South-West Africa under the terms of the mandate and subject to its provisions and to those of Article 22 of the Covenant, or whether it implies that the Government of the Union regards itself as being sovereign over the territory itself."¹

At its Fifteenth Session the Commission referred again to the question of the legal status of South West Africa:

¹ P.M.C., Min., 11th Session (Annex 6), 204-205.

"The Permanent Mandates Commission notes with regret that, in spite of all its previous discussions on this subject and all the correspondence exchanged between the Council of the League of Nations and the Government of the Union of South Africa in 1927 and 1928, it has never received an explicit answer to its repeated question on the meaning attached by that Government to the term 'full sovereignty' used to define the legal relations existing between the mandatory Power and the territory under its mandate.

That question may be formulated as follows: In the official view of the Government of the Union of South Africa, does the term 'possesses sovereignty' express only the right to exercise full powers of administration and legislation in the territory of South West Africa under the terms of the mandate and subject to its provisions and to those of Article 22 of the Covenant, or does it imply that the Government of the Union regards itself as being sovereign over the territory itself?

As long as no clear reply to this question is received, the Commission fears that a regrettable misunderstanding will subsist, which it therefore hopes the Council may succeed in finally clearing up."¹

In addition to its assertion of the possession of sovereignty over the mandated territory, the Union gave indications at an early date of its intention to incorporate the territory of South West Africa as a fifth province. At the 6th Session of the Permanent Mandates Commission, this question was discussed. Mr. Smit, the accredited Union Representative, stressed that the term "incorporation" was not descriptive and that if the Territory joined the Union it would do so as an independent state.

These remarks prompted the following rejoinder by Mr. Rappard of the Commission:

"... the territories had been handed over to certain Governments to be administered by them in the name of the League of Nations. It would be contrary to the spirit of this arrangement if, upon the demand of some ten thousand white settlers, a mandated territory were, in fact, to be incorporated with the territory of the mandatory Power. This was not a question of degree, but of principle. The mandated territory of South West Africa, though administered as an integral part of the territory of the Union, was administered on behalf of the League of Nations."²

Thereafter, the proposal frequently drew the Commission's attention and, in 1934, the Legislative Assembly of South West Africa adopted a resolution contemplating the incorporation of the Territory. The Commission again expressed its misgivings:

"As the guardian of the integrity of the institution of mandates, the Commission therefore expects to be informed of the Mandatory Power's views on the question, which it will not fail to subject to that careful examination that its international importance demands.

¹ P.M.C., Min., 15th Session (Annex 20), 294.

² P.M.C., Min., 6th Session, 60-61.

The Commission wishes, on this occasion, to draw attention to the mandatory Power's fundamental obligation to give effect, not only to the provisions of the mandates, but also to those of Article 22 of the Covenant."¹

In the meantime, the Union had established a "South West Africa Commission" (known informally as the "Constitution Commission") to deal further with the matter of incorporation. The Constitution Commission, in a Report dated March 2, 1936, concluded:

"(a) The present form of government of the Territory is a failure and should be abolished.

(b) There is no legal obstacle to the government of the Mandated Territory as a province of the Union subject to the Mandate."²

The Union, in its Annual Report of 1936 voiced the opinion that no legal obstacle existed to the incorporation of the Territory as a fifth province of the Union. It stated however, that "sufficient grounds had not been adduced for taking such a step."³ There the matter rested for nearly a decade, the Commission confining itself to "making all legal reservations on the question."⁴

The question of the legal status of the Territory was perhaps the most serious area of disagreement persisting between the Union and the Permanent Mandates Commission. However, the Commission repeatedly deemed it necessary to criticize other phases of the Union's administration of the Territory, as well. Examples were: the programme of segregating the native population on reserves;⁵ inadequate sums spent on health and education of the natives;⁶ programmes of land tenure;⁷ liquor control⁸; and labor conditions.⁹

Substantive violations by the Union of the Mandate are developed and discussed in detail in subsequent chapters of this Memorial.

The last Report submitted by the Union covered the year ending March 31, 1939. It was not reviewed by the Commission, the activities of which were suspended due to the outbreak of the Second World War.

¹ P.M.C., Min., 27th Session (Annex 36), 229.

² Report of South West Africa Commission (Pretoria, 1936), p. 77.

³ Report Presented by the Government of the Union of South Africa to the Council of the League of Nations Concerning the Administration of South West Africa for the Year 1936 (Pretoria, 1937), 4.

⁴ P.M.C., Min., 31st Session (Annex 7), 192.

⁵ P.M.C., Min., 4th Session, 62-63.

⁶ P.M.C., Min., 26th Session (Annex 20), 207; P.M.C., Min., 14th Session (Annex 16), 275; P.M.C., Min., 31st Session (Annex 7), 193.

⁷ P.M.C., Min., 6th Session (Annex 11), 178.

⁸ P.M.C., Min., 9th Session (Annex 9), 220.

⁹ P.M.C., Min., 14th Session (Annex 16), 274-275.

4. *The United Nations Charter*

The United Nations Charter, formulated at San Francisco in 1945, embodies provisions dealing with "the administration of territories whose peoples have not yet attained a full measure of self-government." Pursuant to Chapter XI of the Charter, United Nations Members having responsibilities for the administration of the above-described territories agree to promote to the utmost the well-being of the inhabitants, and agree, as well, to submit information to the Secretary-General.¹

The foregoing provisions of the Charter apply whether or not the territories are placed under trusteeships. In Chapter XII, Article 77, provision is made for placing under trusteeship "territories now held under mandate." In order to make explicitly clear that the foregoing provisions do not contemplate the termination of mandates, except in accordance with other provisions of the Charter, the first paragraph of Article 80 provides:

"Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties."

5. *Dissolution of the League of Nations*

The League of Nations met at the end of World War II to wind up its affairs and to arrange for orderly transition to the new regime of the United Nations. The Mandate System figured importantly in such arrangements.

In this connection, League Members took note both of the provisions of the United Nations Charter and the expressed intentions of Mandatories. Applicable provisions of the United Nations Charter have been referred to above.

The expressed intentions of the Union, on which the League relied, were conveyed by the Union representative, Mr. Leif Egeland, who stated in an address to the League in April, 1946:

"Since the last League meeting, new circumstances have arisen obliging the mandatory Powers to take into review the existing arrangements for the administration of their mandates. As was fully explained at the recent United Nations General Assembly in London, the Union Government have deemed it incumbent upon them to consult the peoples of South West Africa, European and non-European alike, regarding the form which their own future Government should take. On the basis of those consultations, and having

¹ Except in 1947, the Union has never rendered any reports to the Secretary-General.

regard to the unique circumstances which so signally differentiate South West Africa—a territory contiguous with the Union—from all other mandates, it is the intention of the Union Government, at the forthcoming session of the United Nations General Assembly in New York, to formulate its case for accordng South West Africa a status under which it would be internationally recognized as an integral part of the Union. As the Assembly will know, it is already administered under the terms of the Mandate as an integral part of the Union. In the meantime, the Union will continue to administer the territory scrupulously in accordance with the obligations of the Mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.

The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the Mandate. *The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory.*¹ (Italics added.)

On the basis of the United Nations Charter and the expressed intention of the Mandatories, including that of the Union as quoted above, the League of Nations adopted the following resolution, *the Union voting in its favor*:

“The Assembly,

“Recalling that Article 22 of the Covenant applies to certain territories placed under mandate the principle that the well-being and development of peoples not yet able to stand alone in the strenuous conditions of the modern world form a sacred trust of civilization:

“1. Expresses its satisfaction with the manner in which the organs of the League have performed the functions entrusted to them with respect to the mandates system and in particular pays tribute to the work accomplished by the Permanent Mandates Commission;

...

“3. 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;

“4. Takes note of the expressed intentions of the Members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates *until other arrangements have been agreed between*

¹ League of Nations Off. J., 21st Ass., 32-33 (plenary, 1946).

*the United Nations and the respective mandatory Powers."*¹ (Italics added.)

No such "other arrangements" have ever been concluded; the United Nations has refused consent to incorporation and the Union has refused to enter into a trusteeship agreement.

All territories, other than South West Africa, which were under "C" mandates have been converted into trust territories pursuant to Chapter XII of the Charter of the United Nations. With the exception of certain islands formerly under Japanese mandate, which were allocated to the United States and became international trusteeships, all the former Mandatory powers retained their responsibilities under trusteeship agreements, submitted by them and approved by the United Nations. The Union alone of all the Mandatories has followed a different course. Its attitudes and policies with respect to the Territory are set out fully below.

B. HISTORY OF THE MANDATE SUBSEQUENT TO THE ESTABLISHMENT OF THE UNITED NATIONS

1. *The Period 1946-1949*

As described above, at the time the League of Nations was terminating its affairs and the United Nations was being established, the declared intention of the Union was to seek United Nations approval for incorporation of the Territory, but, in the meantime, to honor its obligation as Mandatory. In accord with these intentions, the Union submitted a memorandum to the United Nations on October 17, 1946, in which it stated that "this responsibility of the Union Government as Mandatory is necessarily inalienable."² Again, on November 4, 1946, the Prime Minister of the Union, in a statement to the United Nations Fourth Committee, repeated what the Union had stated before the League, that it desired incorporation, but that, in the meantime, it would abide by the Mandate.² The Union also placed before the General Assembly its plan to incorporate the Territory.

On the 14th of December, 1946, the United Nations General Assembly considered the Union plan for incorporation. By Resolution, the Assembly withheld its consent and recommended a Trusteeship for the territory. The terms of the Resolution follow:

"The General Assembly,

Having considered the statements of the delegation of the Union of South Africa regarding the question of incorporating the mandated territory of South West Africa in the Union;

¹ *Id.* at 58.

² *International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950, p. 128 at 135.*

Noting with satisfaction that the Union of South Africa, by presenting this matter to the United Nations, recognizes the interest and concern of the United Nations in the matter of the future status of territories now held under mandate;

Recalling that the Charter of the United Nations provides in Articles 77 and 79 that the trusteeship system shall apply to territories now under mandate as may be subsequently agreed;

Referring to the resolution of the General Assembly of 9 February 1946, inviting the placing of mandated territories under trusteeship;

Desiring that agreement between the United Nations and the Union of South Africa may hereafter be reached regarding the future status of the mandated territory of South West Africa;

Assured by the delegation of the Union of South Africa that, pending such agreement, the Union Government will continue to administer the territory as heretofore in the spirit of the principles laid down in the mandate;

Considering that the African inhabitants of South West Africa have not yet secured political autonomy or reached a stage of political development enabling them to express a considered opinion which the Assembly could recognize on such an important question as incorporation of their territory:

The General Assembly, therefore,

Is unable to accede to the incorporation of the territory of South West-Africa in the Union of South Africa; and

Recommends that the mandated territory of South West Africa be placed under the international trusteeship system and invites the Government of the Union of South Africa to propose for the consideration of the General Assembly a trusteeship agreement for the aforesaid territory."¹

In spite of the above recommendation of the General Assembly that the Union conclude a trusteeship agreement, as well as an earlier recommendation to the same effect, the Union declined to do so.

The Union, however, continued to declare that it would honor its obligations under the Mandate even though the U.N. had expressly refused to accede to incorporation of the Territory in the Union.

In the Fourth Committee of the General Assembly, "Mr. Lawrence (Union of South Africa) recalled that the General Assembly had found itself unable to accede to his Government's request for incorporation of South West Africa in the Union of South Africa and had recommended that a trusteeship agreement should be submitted. His Government was not proceeding with its proposal to incorporate South West Africa in the Union. To this degree it was complying with the resolution of the General Assembly ... Although the General Assembly had not thought to take into account the wishes of the

¹ General Assembly Resolution 65 (I) of 14 December 1946, U.N. Doc. No. A/64/Add. I at 123 (1947).

inhabitants, the Government of the Union of South Africa, in deference to the wishes of the General Assembly, did not propose to proceed with incorporation."¹

In a letter dated July 23, 1947 to the Secretary-General of the United Nations, the Union referred to a resolution of the Union Parliament in which it was declared "that the Government should continue to render reports to the United Nations Organisation as it has done heretofore under the Mandate."² The Union stated further in the same letter that "In the circumstances the Union Government have no alternative but to maintain the *status quo* and to continue to administer the Territory in the spirit of the *existing Mandate*."³ (Italics added.) The Court, in its Advisory Opinion of 11 July 1950, characterized the foregoing assertions "as constituting "recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government."⁴

In 1947, the General Assembly again invited the Union to conclude a trusteeship agreement. In its Resolution of 1 November 1947, the General Assembly noted that "the Government of the Union of South Africa has not carried out the aforesaid recommendations of the United Nations" and that "it is a fact that all other States administering territories previously held under mandate have placed these territories under the Trusteeship System or offered them independence." The Assembly reaffirmed that it "*Firmly maintains* its recommendation that South West Africa be placed under the Trusteeship System" and "*Urges* the Government of the Union of South Africa to propose for the consideration of the General Assembly a trusteeship agreement for the Territory of South West Africa . . ."⁵

The Union failed and refused to heed this Resolution.

In 1947 the Union submitted to the General Assembly a report on the Territory for the year 1946. In 1948, the Trusteeship Council of the United Nations commented on the Union report, declaring, *inter alia* :

(1) "The Council, being convinced of the desirability of increased participation by indigenous populations in the direction of their own affairs, notes that the indigenous inhabitants of the Territory have no franchise, no eligibility to office and no representation in the governing bodies or in the administration of the Territory.

(2) "The Council notes that the total expenditure devoted directly to non-European administration and welfare in the year 1946-47

¹ U.N. Gen. Ass. Off. Rec. 2d Sess., 4th Comm. at 3-4 (1947).

² U.N. Doc. No. A/334 at 1 (1947).

³ *Id.* at 2.

⁴ *International status of South-West Africa*, Advisory Opinion: I.C.J. Reports 1950, p. 128 at 135.

⁵ General Assembly Resolution 141 (II) of 1 November 1947, U.N. Gen. Ass. Off. Rec. 2nd Sess. at 47 (A/519) (1948).

amounted to £246,605, and that this amount represented 10.16 per cent of the entire budget of the Territory. The Council also notes, in examining this expenditure, that the non-European population was estimated at 336,552, in 1946, as against a European population of 38,020.

"The Council observes that this is an expenditure of little more than ten per cent of the budget on the indigenous inhabitants, who comprise approximately 90 per cent of the entire population.

.....

(3) "The Council is opposed, as a matter of principle, to racial segregation. The Council, while lacking precise information as to the reasons for the urban segregation policy in the Territory, considers that great efforts should be made to eliminate, through education and other positive measures, whatever reasons may exist that explain segregation.

"The Council considers also that even within the system of urban segregation great attention should be paid to the well-being of the indigenous inhabitants in the way of the improvement of housing conditions, the preservation of family life and the encouragement of a greater degree of responsibility.

.....

(4) "The Council notes that the master and servant laws applicable to civil contracts between employer and employee provide criminal penalties for breaches by the employees, and that in this connexion there were 2,100 convictions in 1946.

"The Council considers that the large number of criminal convictions reveals an abnormal situation and that contractual relations between employer and labour should not be subject to criminal penalties.

.....

(5) "The Council notes that, while it is the policy of the administration to employ convict labour on public works, it is the practice at small gaols to hire out hard-labour convicts occasionally to private persons when the administration is unable to provide work for them.

"The Council considers that the hiring out of prison labour to private persons is a practice which may lead to abuses.

.....

(6) "The Council notes that, in 1946, there were, in the Territory, only six indigenous official schools, with 555 pupils, all in the Police Zone, as against 53 European official schools with 6,415 pupils. The Council notes also that indigenous education is still largely in the hands of missions, which are assisted by the Government, and which in 1946 maintained, in the Police Zone, 72 indigenous schools with 4,935 pupils and in the outside areas 154 schools, of which only 25 were conducted by European teachers and which had altogether 15,062 pupils.

"The Council notes that no educational facilities are provided by the Government in the purely indigenous areas, inhabited by some 192,000 people, which lie beyond the Police Zone. The Council is of the opinion that the provision of urgently-needed educational

facilities for the indigenous population is vital to their political, economic and social development..."¹ (Footnotes omitted.)

The report submitted by the Union in 1947 was the last and only report filed. In its letter of July 11, 1949 to the Fourth Committee, the Union Government stated that "it can no longer see that any real benefit is to be derived from the submission of special reports on South West Africa to the United Nations, and have regretfully come to the conclusion that in the interest of efficient administration, no further reports should be forwarded."² The Union also stated that "the submission of information has provided an opportunity to utilize the Trusteeship Council and the Trusteeship Committee as a forum for unjustified criticism and censure of the Union Government's administration, not only in South West Africa but in the Union as well ... Furthermore, the very act of submitting reports has created in the minds of a number of Members of the United Nations an impression that the Trusteeship Council is competent to make recommendations on matters of internal administration in South West Africa and has fostered other misconceptions regarding the status of this Territory."³

The Union's announcement signalled its repudiation of previous explicit commitments.

By November, 1948, the Union Government was openly denying its obligations under the Mandate and, insisting—in contradiction to its statements of a year earlier—that the Mandate had expired. Thus, Mr. Eric Louw, the representative of South Africa in the Fourth Committee, described an agreement between the Union Government and certain political parties in South West Africa, as providing "for a closer association and integration of South West Africa with the Union of South Africa along the lines envisaged in the *previous Mandate, since expired*."⁴ (Italics added.)

The following year, the representative of Liberia in the Fourth Committee presented his Government's view of the matter. At the 132nd meeting of the Fourth Committee, held on November 22, 1949, the Liberian delegate stated that the question of South West Africa had several aspects, and that the judicial aspect, as the Union of South Africa viewed it, was that South West Africa had been entrusted to it by the League of Nations and that with the dissolution of the League the United Nations was not competent to deal with the question. The Liberian delegate adverted to the fact that the Union wished to have the annexation of South West Africa accepted as a *fait accompli*. He stated, however, "that the

¹ U.N. Gen. Ass. Off. Rec. 3rd Sess., Supp. No. 4 at 43-44 (A/603) (1948).

² U.N. Doc. No. A/929, U.N. Gen. Ass. Off. Rec. 4th Sess., 4th Comm., Annex to Summary Records of Meetings at 7 (1949).

³ *Ibid.*

⁴ As paraphrased in U.N. Gen. Ass. Off. Rec. 3rd Sess., 1st part, 4th Comm. at 293 (1948).

United Nations had the right to determine whether such a measure was legally justified."¹

The Liberian delegate affirmed that the question had a moral aspect as well, and that the human rights of people in the Territory should be respected by all States and Members of the United Nations. Finally, the Liberian representative argued that the administration of South West Africa should be considered as a part of the foreign affairs of an administering power and was not, as the Union argued, solely within the national competence of the Union of South Africa.²

It is apparent from the history summarized above that in the period 1946-1949, the Union's policy concerning the Mandate underwent a marked change. At the beginning of the period, the Union conceded the existence of the Mandate and its obligations thereunder, including that of rendering reports to the United Nations. By the end of the period, the Union was referring to the Mandate as "the previous Mandate, since expired,"³ insisting that the administration of the Territory was a matter solely of internal concern, and refusing to render reports to the United Nations.

In this same period, the Union rejected three General Assembly resolutions⁴ calling upon it to follow the example of all other "C" mandatories and place the Territory under the Trusteeship system.

By the end of 1949, it was obvious that the Union's concepts of its legal obligations under the Mandate were essentially at variance with those of most other United Nations Members, including the Applicant. Accordingly, the General Assembly deemed it advisable to ask the International Court of Justice for an advisory opinion regarding the Mandate. The Court rendered its Opinion on July 11, 1950 in *International Status of South West Africa*.⁵ The Court's rulings, together with ensuing negotiations based upon them, are discussed immediately below.

2. The Period 1950-1960

(a) Introduction

A complex of interlocking events affecting the Mandate transpired during 1950-1960. For the convenience of the Court, the

¹ As paraphrased in the Summary Records of 132nd meeting of the 4th Committee, U.N. Doc. No. A/C.4/SR. 132 at 228, para. 57 (1949).

² *Id.* at para. 69.

³ As paraphrased in U.N. Gen. Ass. Off. Rec. 3rd Sess., 1st part, 4th Committee at 293 (1948).

⁴ General Assembly Resolution 65 (I) of 14 December 1946, U.N. Doc. No. A/64/Add. I at 123 (1947).

⁵ General Assembly Resolution 141 (II) of 1 November 1947, U.N. Gen. Ass. Off. Rec. 2nd Sess. at 47 (A/519) (1948).

⁶ General Assembly Resolution 227 (III) of 26 November 1948, U.N. Gen. Ass. Off. Rec. 3rd Sess. at 89 (A/810) (1948).

⁷ *International status of South-West Africa*, Advisory Opinion: I.C.J. Reports 1950, p. 128.

period as a whole will be briefly summarized, and then each major event will be separately examined.

The International Court of Justice in its Advisory Opinion of 11 July, 1950, by a vote of eight to six, held that the Union was not legally obligated to place the Territory under the Trusteeship System. Regarding the Mandate itself, however, the Court ruled: (1) "that South West Africa is a Territory under the international Mandate assumed by the Union of South Africa on December 17th, 1920" (unanimously);¹ (2) "that the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted, and the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court" (by twelve votes to two);² (3) "that the Union of South Africa acting alone has not the competence to modify the international status of the Territory of South West Africa, and that the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations" (unanimously).³

The Advisory Opinion of the Court thus set forth certain basic legal principles relevant to the Mandate. The United Nations General Assembly determined that the future of South West Africa should be based upon law. The Assembly therefore established various agencies from time to time with the mission of seeking to give effect to the rulings of the Advisory Opinion.

The first agency established was the *Ad Hoc* Committee, which functioned between 1950 and 1953. Its initial duty was "to confer with the Union of South Africa concerning the procedural measures necessary for implementing the advisory opinion of the International Court of Justice and to submit a report thereon ..." ⁴ In 1952, the Committee's duty was modified slightly: it was to seek "means of implementing" the Advisory Opinion. ⁵ Several years of effort by the *Ad Hoc* Committee to negotiate with the Union were unavailing, however, because of the Union's insistence that the Committee's term of reference had a "restrictive nature." ⁶

Upon the failure of negotiation between the Union and the *Ad Hoc* Committee, the General Assembly in 1953 established the

¹ *Id.* at 143.

² *Ibid.*

³ *Id.* at 144.

⁴ General Assembly Resolution 449 (V) of 13 December 1950, U.N. Gen. Ass. Off. Rec. 5th Sess., Supp. No. 20 at 55 (A/1775) (1950).

⁵ General Assembly Resolution 570 (VI) of 19 January 1952, U.N. Gen. Ass. Off. Rec. 6th Sess., Supp. No. 20 at 63 (A/2119) (1952).

⁶ As paraphrased in the Summary Records of the *Ad Hoc* Committee, U.N. Doc. No. A/AC.49/SR.21 at 3 (1952).

Committee on South West Africa. One duty of this Committee was to negotiate with the Union for the purpose of having the Court's Opinion implemented. While this Committee was also authorized by the General Assembly to "examine ... reports and petitions which may be submitted", it was further authorized to examine "such information and documentation as may be available in respect of the Territory", and to "transmit to the General Assembly a report concerning conditions in the Territory taking into account, as far as possible, the scope of the reports of the Permanent Mandates Commission of the League of Nations."¹

The Committee on South West Africa continues actively to pursue its mission. It has transmitted to the Assembly annual reports concerning conditions in the Territory. These published reports have annually criticized the Union sharply for the manner in which the Union administers the Territory and have been annually approved by the General Assembly.

Attempts by the Committee to negotiate with the Union have failed, just as the efforts of the *Ad Hoc* Committee failed. The Union has refused to co-operate with the Committee.

In 1957 the General Assembly sought a new initiative. The Committee on South West Africa was to continue to render reports and examine petitions. However, negotiations were to be attempted by a new committee of the General Assembly, called the Good Offices Committee. This was composed of the United Kingdom, the United States and Brazil.

The Good Offices Committee was directed "to discuss with the Government of the Union of South Africa a basis for an agreement which would continue to accord to the Territory of South West Africa an international status."²

While the Union met with this Committee, no basis of agreement was acceptable both to the Union and to the General Assembly. The Union refused to recognize the existing rights of the United Nations to supervise the administration of the Mandate or to conclude any new agreement providing for United Nations supervision over the Territory as a whole. It remained willing to negotiate an agreement with the Governments of France, the United Kingdom and the United States of America as the three remaining Principal Allied and Associated Powers. It was also willing to investigate the practicability of partitioning the Territory with a view to placing the northern part under the International Trusteeship System and annexing the balance of the Territory into the Union. The General Assembly had already rejected in 1953 the negotiation of an agreement with the three remaining Principal Allied and Associated Powers as violating the requirements of the Mandate as

¹ General Assembly Resolution 749A (VIII) of 28 November 1953, U.N. Gen. Ass. Off. Rec. 8th Sess., Supp. No. 17 at 26 (A/2630) (1953).

² General Assembly Resolution 1143 (XII) of 25 October 1957, U.N. Gen. Ass. Off. Rec. 12th Sess., Supp. No. 18 at 25 (A/3805) (1957).

interpreted by the Assembly and by this Court.¹ In 1958, the General Assembly decided "not to accept the suggestions contained in the report of the Good Offices Committee on South West Africa that envisage partition and annexation of any part of the Territory as a basis for the solution of the question of South West Africa."²

Throughout the period 1950-1960, the Fourth Committee of the General Assembly has regularly placed the question of South West Africa on its agenda. Repeated debates and resolutions have failed to bring about the Union's compliance with the Mandate.

The above, in general, are the highlights of 1950-1960 in regard to the question of South West Africa. Because the Court's Advisory Opinions have been so central to the abortive negotiations between the several United Nations Committees and the Union, the opinions will be discussed immediately below as a preface to a chronological examination of the relevant history of the Mandate, year by year.

(b) *Brief Summary of the Court's Advisory Opinions*

The Court has rendered three Advisory Opinions relating to South West Africa in response to questions addressed to the Court in each instance by the General Assembly.

The basic Opinion is that of July 11, 1950. The others were delivered June 7, 1955 and June 1, 1956 and deal with questions arising out of the fundamental principles laid down by the July 11, 1950 Opinion.

Each Advisory Opinion has been accepted by the General Assembly by appropriate resolution, the Applicant voting with the majority in each case.

(1) Advisory Opinion of July 11, 1950³

The General Assembly, by Resolution 338 (IV), December 6, 1949,⁴ requested the Court for an Advisory Opinion on certain questions, set out in full in the Court's Opinion.

Upon receiving the request for an Advisory Opinion, the Court gave notice of the request to all States entitled to appear before the Court. Along with four other States, the Union of South Africa presented a written statement to the Court.⁵ The Union also presented oral argument.⁶ The Union's main contention was that the dissolution of the League caused the Mandate to expire since "the League was the mandator; the Union Government the mandatory. From its very nature, this mandatory relationship, in whichever way we construe it, requires more than one party, one

¹ General Assembly Resolution 749A (VIII) of 28 November 1953, U.N. Gen. Ass. Off. Rec. 8th Sess., Supp. No. 17 at 26 (A/2630) (1953).

² General Assembly Resolution 1243 (XIII) of 30 October 1958, U.N. Gen. Ass. Off. Rec. 13th Sess., Supp. No. 18 at 30 (A/4090) (1958).

³ *International status of South-West Africa*, Advisory Opinion: I.C.J. Reports 1950, p. 128.

⁴ U.N. Gen. Ass. Off. Rec. 4th Sess. at 45 (A/1251/Corr. I) (1949.)

⁵ *International status of South-West Africa*, Pleadings, Oral Arguments, Documents, p. 72 (I.C.J. Reports 1950).

⁶ *Id.* at 273.

of whom must be the mandator. It could not stand with only a mandatory as a party to it. That ... would be a legal impossibility."¹ The Court, after consideration of this argument, unanimously rejected it.

In its Advisory Opinion, the Court held that "South West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17, 1920."² In rejecting the Union's contention that the Mandate lapsed with the dissolution of the League, the Court pointed out: "The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization."³ It added that the Union's obligations under the Mandate "represent the very essence of the sacred trust of civilization. Their *raison d'être* and original object remain. Since their fulfillment 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 Hence, the Court concluded, the Territory has an international status, and "if the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed."⁴

The Court affirmed the Union's international obligations under Article 22 of the Covenant and under the Mandate, including the duty to render annual reports and to transmit petitions from inhabitants of the Territory, and confirmed as well the power of the United Nations to exercise supervisory functions and to receive the annual reports and petitions.⁵ The Court's rationale for these rulings was that "the obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision ... The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System. It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical supervisory functions."⁶ The Court stated that

¹ *Id.* at 277.

² *International status of South-West Africa*, Advisory Opinion: I.C.J. Reports 1950, p. 128 at 143.

³ *Id.* at 132.

⁴ *Id.* at 133.

⁵ *Id.* at 137.

⁶ *Id.* at 136.

the degree of supervision should not "exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations."¹ The Court also held that the International Court of Justice replaced the Permanent Court of International Justice in adjudging disputes in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court.¹

The Union's obligations related (1) to its own administration of the Territory and (2) to international machinery for supervising its administration. The Court stated that both sets of obligations survived and that, in connection with the latter, "the General Assembly of the United Nations is legally qualified to exercise the supervisory functions."²

The Court considered that the Union was not bound to place the Territory under the United Nations trusteeship system. (Six Judges of the Court dissented from this conclusion.)³

Finally, the Court held that the Union acting alone lacked competence to modify the international status of the Territory. The Court said that "the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations."³

(2) Advisory Opinion of June 7, 1955⁴

The Court was requested by the Ninth General Assembly for an Advisory Opinion concerning a rule of voting procedure adopted by the Assembly at that session.⁵ The rule provided that questions relating to reports and petitions concerning South West Africa are "important" questions within the meaning of Article 18, paragraph 2, of the United Nations Charter and therefore required a two-thirds majority vote.⁶

On June 7, 1955 the Court affirmed the validity of the rule, holding that the Assembly had correctly interpreted the Court's Advisory Opinion of July 11, 1950. A majority of the Court expressed the view that the Assembly, operating under a Charter which differed from the Covenant of the League, could not follow a system of voting identical with that of the League Council, the procedure of which may have required unanimous approval on matters concerning the Mandates System. Hence, the Assembly should reach its decisions in accordance with a method consistent with the require-

¹ *Id.* at 138.

² *Id.* at 137.

³ *Id.* at 144.

⁴ *South-West Africa—Voting Procedure*, Advisory Opinion of June 7th, 1955: I.C.J. Reports 1955, p. 67.

⁵ General Assembly Resolution 904 (IX) of 23 November 1954, U.N. Gen. Ass. Off. Rec. 9th Sess., Supp. No. 21 at 55 (A/2890) (1954).

⁶ General Assembly Resolution 844 (IX) of 11 October 1954, *Id.* at 25.

ments of the Charter; in this case the provisions of Article 18 of the Charter.¹

(3) Advisory Opinion of June 1, 1956.²

During its Tenth Session, the General Assembly on December 3, 1955, requested an Advisory Opinion on the question whether it was consistent with the Court's opinion of July 11, 1950 for the Committee on South West Africa "to grant oral hearings to petitioners on matters relating to the Territory of South West Africa."³

The Court ruled on June 1, 1956, that it would not be inconsistent with its earlier opinion for the General Assembly to authorize a procedure for the grant of oral hearings by the Committee on South West Africa to petitioners who had previously submitted written petitions.⁴

The Court's conclusion proceeded from the fact that "The general purport and meaning of the opinion of the Court of 11 July 1950 is that the paramount purpose underlying the taking over by the General Assembly of the United Nations of the supervisory functions in respect of the Mandate for South West Africa formerly exercised by the Council of the League of Nations was to safeguard the sacred trust of civilization through the maintenance of effective international supervision of the administration of the Mandated Territory."⁵ Since the Union Government failed to co-operate with the Committee, the Assembly considered it necessary to authorize the Committee to grant oral hearings to petitioners. The Assembly's right to exercise effective supervision of administration of the Territory entitled it to authorize the Committee to grant oral hearings, if the Assembly "was satisfied that such a course was necessary for the maintenance" of such supervision.⁶

(c) *Year-by-Year Chronology of Relevant Events*

(1) 1950

As related above, the Court rendered its Advisory Opinion on July 11, 1950. In Resolution 449 A (V) of 13 December, 1950,⁷ the General Assembly voted to accept the Advisory Opinion, the Applicant voting with the majority. By the same resolution, the Assembly established the *Ad Hoc* Committee, consisting of representatives of Denmark, Syria, Thailand, the United States of

¹ *South-West Africa—Voting Procedure*, Advisory Opinion of June 7th, 1955: I.C.J. Reports 1955, p. 67 at 76.

² *Admissibility of hearings of petitioners by the Committee on South West Africa*, Advisory Opinion of June 1st, 1956: I.C.J. Reports 1956, p. 23.

³ General Assembly Resolution 942 (X) of 3 December 1955, Gen. Ass. Off. Rec. 10th Sess., Supp. No. 19 at 24 (A/3116) (1955).

⁴ *Admissibility of hearings of petitioners by the Committee on South West Africa*, *loc. cit.*, *supra*, fn. 2 of this page at 32.

⁵ *Id.* at 28.

⁶ *Id.* at 32.

⁷ U.N. Gen. Ass. Off. Rec. 5th Sess., Supp. No. 20 at 55 (A/1775) (1950).

America and Uruguay "to confer with the Union of South Africa concerning the procedural measures necessary for implementing the Advisory Opinion."

The Union, however, made it clear very early that it would not act in accord with the Advisory Opinion, and, in effect, proceeded to reargue its case before the Fourth Committee, alleging that the Court had not been aware of all the facts.

At the 196th meeting of the Fourth Committee held on December 4, 1950, the Union representative made clear his Government's attitude toward United Nations efforts to obtain compliance with the Mandate in accordance with the Court's Opinion. The Union representative did not rest upon the mere assertion that "an Advisory Opinion is not binding on anybody as would be a judgment in the strict sense of the term."¹ At the same time, he insisted that, notwithstanding the unanimous ruling of the Court to the contrary, the League of Nations had not intended the United Nations to succeed to supervisory powers over the Mandates System. His argument involved a reconstruction of history: "If the resolution had indeed intended such a transfer of functions to the United Nations, it would not have secured the unanimous vote of the League Assembly as required by Article 5 of the Covenant and Rule 19 of the Rules of Procedure of the League Assembly, as South Africa, at any rate, would have voted against it with a result that no resolution would have been adopted."²

The Union, at the same session of the Fourth Committee, contended that inasmuch as a resolution, proposed by China, and making explicit reference to transfer of the League's supervisory powers to the United Nations was not accepted, it must follow that the League had intended no such transfer.³

However, the summary records of the Fourth Committee record the nature of the Union's contention. The summary records of the Committee meeting state: "Mr. Liu (China) observed that the South African representative had stressed the draft resolution submitted to the League of Nations by the Chinese delegation; he feared that that representative's remarks might create a wrong impression in the Fourth Committee. The resolution finally adopted by the League did not, it was true, contain any specific provision for the transfer of supervisory functions, but neither did it forbid such transfer. In view of the importance of that point, he wondered why the South African Government had not considered it earlier but had waited until the advisory opinion of the Court had been discussed in the Fourth Committee. Dr. Steyn, who had represented, his Government at the deliberations of the International Court of Justice, could have raised the question at the time.

¹ U.N. Doc. No. A/C.4/185 at 3 (1950).

² *Id.* at 13.

³ *Id.* at 12-13.

"The Chinese delegation was therefore unable to accept the argument that the Court had been ignorant of the facts."¹

The Union's rejection of the Court's rulings in its Advisory Opinion was made manifest from the outset. An illustration of the Union's attitude is found in a resolution passed on September 28, 1950, by the South West African Legislative Assembly. The Assembly was composed entirely of "Europeans" who, for the most part, were members of the political party then in power in the Union. The resolution proclaimed:

"(1) That this House gives its wholehearted support, and expresses its appreciation and thanks to the Government of the Union of South Africa for its assurance that it will not—

(a) submit any annual reports on South West Africa, to the United Nations Organization;

(b) permit that South West Africa, directly or indirectly, in connection with its internal or external affairs, be placed under the authority of the United Nations Organization;

(c) under any circumstance enter into a trusteeship agreement in regard to South West Africa with the Trusteeship Council of the United Nations Organizations; and

(2) that this House declares that the closer connection with the Union of South Africa, by which South West Africa, *inter alia*, obtained representation in the Union Parliament, meets with its whole approval and only recognizes the sovereignty of the Union over South West Africa and no other."²

(2) 1951

In 1951 the *Ad Hoc* Committee held many meetings with the Union of South Africa's representative in attempting to implement the Advisory Opinion of July 11, 1950. It was apparent from the start that an agreement would be difficult to negotiate, since the Committee's duty was to negotiate on the basis of the Advisory Opinion, the validity of which the Union was openly contesting. For example, at a meeting of the *Ad Hoc* Committee on June 27, 1951, the Union representative stated, according to the summary records, that "the International Court had expressed the view that these obligations remain legally in force, a view to which apparently the majority of the United Nations subscribed. His Government did not agree with the opinion of the Court as endorsed by the majority of the United Nations on this point. It held that, since one of the two parties to the contractual arrangement had disappeared, the Mandate had lapsed and it could no longer be regarded as a legally bind-

¹ As paraphrased in the Summary Records of the 196th meeting of the 4th Committee, U.N. Doc. No. A/C.4/SR.196 at 364-365, paras. 63-64 (1950).

² South West Africa, Legislative Assembly, 1950, p. 4.

ing contract and that, in consequence, the Government of the Union, in contrast to the opinion of the Court and of the majority of the United Nations was of the opinion that it no longer was legally bound to carry out the provisions of the Mandate in question. Here, therefore, there was disagreement."¹

At the same meeting, the Union representative is recorded as saying that "a second point on which there was disagreement, a point which was closely related to the previous one, was the view expressed by the Court, with which the majority in the United Nations agreed, that the Union continue to have international responsibility for implementation of the Mandate. The Union Government, contending that the Mandate had lapsed, also disagreed on this point."²

The Union Government informed the *Ad Hoc* Committee of its willingness to conclude a new agreement with the Principal Allied and Associated Powers of World War I (the United Kingdom, the United States of America and France). Under such an arrangement, in the Union's view, the three Powers would be acting as principals, not as agents of the United Nations.³ This proposal was unacceptable to the *Ad Hoc* Committee since it did not fall within the terms of reference conferred upon the Committee by the General Assembly. The Committee pointed out that such an arrangement could not be regarded as an implementation of the Advisory Opinion of the International Court of Justice inasmuch as the Union's proposal explicitly rejected a supervisory function for the United Nations over the Mandated Territory.⁴

During the year 1951, as in other years, South West Africa figured on the agenda of the Fourth Committee of the General Assembly. At its 223rd meeting, on December 10, 1951, the Delegate from Liberia voiced the regret of his Government "that a State which claimed to be peace-loving and democratic and which had signed the United Nations Charter should openly disregard the opinion of the International Court of Justice and the decisions of the General Assembly."⁵

(3) 1952

Early in 1952, the General Assembly reviewed the abortive negotiations between the Union and the Assembly's *Ad Hoc* Committee. The General Assembly's findings were embodied in Resolution

¹ As paraphrased in the Summary Records of the 3rd meeting of the *Ad Hoc* Committee, U.N. Doc. No. A/AC.49/SR.3 at 3 (1951).

² *Ibid.*

³ *Id.* at 4.

⁴ Report of the *Ad Hoc* Committee on South West Africa, U.N. Doc. No. A/1901 at 5 para. 27 (1951).

⁵ As paraphrased in the Summary Records of the 4th Committee, U.N. Doc. No. A/C.4/SR.223 at 135, para. 4 (1951).

570A (VI) passed on 19 January, 1952,¹ the Applicant voting with the majority. The resolution stated that the General Assembly,

"... 2. *Regrets* the fact that, in the course of the negotiations with the *Ad Hoc* Committee, the Union of South Africa, while prepared to negotiate on the basis of certain articles of the Mandate, indicated its unwillingness to give adequate expression to its international obligations with respect to South West Africa, and in particular with regard to the supervisory responsibility of the United Nations towards this Territory;

3. *Declares* that, since the Government of the Union of South Africa cannot avoid its international obligations by unilateral action, the United Nations cannot recognize as valid any measures taken unilaterally by the Union of South Africa which would modify the international status of the Territory of South West Africa;

4. *Appeals solemnly* to the Government of South Africa to reconsider its position, and urges it to resume negotiations with the *Ad Hoc* Committee for the purpose of concluding an agreement providing for the full implementation of the advisory opinion of the International Court of Justice; and urges it further to submit reports on the administration of the Territory of South West Africa and to transmit to the United Nations petitions from communities or sections of the population of the Territory."

Following upon this "solemn appeal" by the General Assembly, the *Ad Hoc* Committee again sought to resume negotiations with the Union Government for the implementation of the 1950 Advisory Opinion. Mr. G. P. Jooste, then Delegate of the Union of South Africa, however, frankly admitted to the Committee at a meeting on September 10, 1952, that his Government entertained serious doubts whether the proposed negotiations could possibly serve a useful purpose. These doubts, he attributed to three considerations:

"1. The great divergence in the views of the United Nations and the Union Government on the matter;

2. The manner in which the question of South West Africa had been dealt with in the United Nations in previous years; and

3. The restrictive nature of the *Ad Hoc* Committee's terms of reference."²

The Union's frustration of the *Ad Hoc* Committee's efforts at negotiation constrained the Committee to conclude in its Annual Report for the year 1952: "As at the date of the present report, 18 November 1952, consultations between the Committee and the representative of the Government of the Union of South Africa have been inconclusive and have not brought about an agreement concerning means of implementing the advisory opinion of the

¹ U.N. Gen. Ass. Off. Rec. 6th Sess., Supp. No. 20 at 63 (A/2119) (1952).

² As paraphrased in the Summary Records of the *Ad Hoc* Committee, U.N. Doc. No. A/AC.49/SR.21 at 3 (1952).

International Court of Justice as required by the resolution of the General Assembly.”¹

(4) 1953

In 1953, the *Ad Hoc* Committee resumed its efforts to negotiate with the Union Government in an attempt to reach a settlement in accordance with the Mandate and the Court's Advisory Opinion.

As a consequence of the failure of the *Ad Hoc* Committee to reach a settlement with the Union, the Fourth Committee, at the 364th meeting on November 12, 1953,² adopted a resolution sponsored by 15 members of the United Nations, including Liberia, setting up the Committee on South West Africa. The General Assembly in the 8th Session approved the proposal, embodied in General Assembly Resolution 749A (VIII) of 28 November, 1953. The Applicant voted with the majority. The resolution stated:³

“*The General Assembly...*

1. *Commends* the *Ad Hoc* Committee on South West Africa for its earnest and constructive efforts to find a mutually satisfactory basis of agreement;

2. *Records with deep regret* that the Government of the Union of South Africa continues in its refusal to assist in the implementation of the advisory opinion of the International Court of Justice concerning South West Africa, and continues to maintain that the Union of South Africa has no international commitments as the result of the demise of the League of Nations, and that the Government of the Union of South Africa is prepared only to enter into new arrangements for the Territory of South West Africa with the Principal Allied and Associated Powers of the First World War (France, the United Kingdom and the United States of America), and not with the United Nations;

3. *Notes with concern* that, as required by paragraph 6 of General Assembly resolution 570A (VI), the *Ad Hoc* Committee was unable to examine reports on the administration of the Territory of South West Africa because again no such reports were submitted by the Government of the Union of South Africa;

4. *Notes with further regret* that the Union of South Africa has refused to co-operate with the United Nations concerning the submission of petitions in accordance with the procedures of the Mandates System;

5. *Notes* the contents of the communications relating to South West Africa received by the *Ad Hoc* Committee in 1951, 1952 and 1953 from sources within and outside the Territory of South West Africa and contained in the aforesaid reports of the *Ad Hoc* Committee;

6. *Affirms* that, in order to implement the advisory opinion of the International Court of Justice with regard to South West Africa,

¹ U.N. Doc. No. A/2261 at 5, para. 22 (1952).

² U.N. Doc. No. A/C.4/SR.364 at 312-314, paras. 30-42 (1953).

³ U.N. Gen. Ass. Off. Rec. 8th Sess., Supp. No. 17 at 26 (A/2630) (1953).

(a) The supervision of the administration of South West Africa, though it should not exceed that which applied under the Mandates System, should be exercised by the United Nations; judicial supervision by the International Court of Justice, which the Union Government is prepared to accept, is not in accordance with the advisory opinion expressed by that Court and accepted by the General Assembly;

(b) The Union Government should assume its obligations to the United Nations and not, as proposed by the Union Government, to the three Powers (France, the United Kingdom and the United States of America) as principals;

7. *Appeals solemnly* to the Government of the Union of South Africa to reconsider its position, and urges it to continue negotiations with the Committee on South West Africa, established under paragraph 12 below, in accordance with the aforesaid principles for the purpose of concluding an agreement providing for the full implementation of the advisory opinion of the International Court of Justice; and urges it further to resume submission of reports on the administration of the Territory of South West Africa and to transmit to the United Nations petitions from individuals or groups of the population of the Territory;

8. *Recalls and reaffirms* that the Territory of South West Africa is a Territory under the international Mandate assumed by the Union of South Africa on 17 December 1920;

9. *Reaffirms further* that the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations to which the annual reports and the petitions are to be submitted;

10. *Considers* 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;

11. *Believes* that it would not fulfill its obligation 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;

12. *Establishes*, until such time as an agreement is reached between the United Nations and the Union of South Africa, a Committee on South West Africa, consisting of seven Members, and requests this Committee to:

(a) Examine, within the scope of the Questionnaire adopted by the Permanent Mandates Commission of the League of Nations in 1926, such information and documentation as may be available in respect of the Territory of South West Africa;

(b) Examine, as far as possible in accordance with the procedure of the former Mandates System, reports and petitions which may be submitted to the Committee or to the Secretary-General;

(c) Transmit to the General Assembly a report concerning conditions in the Territory taking into account, as far as possible, the scope of the reports of the Permanent Mandates Commission of the League of Nations;

(d) Prepare, for the consideration of the General Assembly, a procedure for the examination of reports and petitions which should conform as far as possible to the procedure followed in this respect by the Assembly, the Council and the Permanent Mandates Commission of the League of Nations;

13. *Authorizes* the Committee to continue negotiations with the Union of South Africa in order to implement fully the advisory opinion of the International Court of Justice regarding the question of South West Africa;

14. *Requests* the Committee to submit reports on its activities to the General Assembly at its regular sessions."

It is noteworthy that by the foregoing resolution the General Assembly charged the Committee of South West Africa not only with the duty to negotiate, but, also the duty to perform, to the extent practicable, the functions performed by the Permanent Mandates Commission during the League of Nations period.

The General Assembly's action in so doing was consonant with the Court's Advisory Opinion, upholding the United Nations' power and duty to supervise the administration of the Territory.

During 1953, the Fourth Committee again considered the question of South West Africa. At its meeting on November 6, 1953, the Union Delegate, Mr. Jooste, again explicitly repudiated the Court's Advisory Opinion, stating: "... The International Court also expressed the view that the obligations which South Africa had assumed originally with regard to the sacred trust remain legally in force—i.e. that South Africa continued to have an international responsibility with regard to the sacred trust. This view was subscribed to by the majority in the United Nations. My Government, on the other hand, did not—and in fact does not—agree with this view—holding, that since one of the two parties to the original contractual arrangement had disappeared, the mandate had lapsed and that it could no longer be regarded as a legally binding contract. Here, therefore, we have an important divergence of views—where, if a settlement was to be found, concessions would have to be made."¹

(5) 1954

The Committee on South West Africa commenced its dual function of negotiation and supervision early in 1954. Participation by the Union was, of course, an essential precondition of fruitful negotiation. With respect to its reporting function, the Committee

¹ Press Release, Delegation of the Union of South Africa to the United Nations, November 6, 1953, at 4.

has regularly rendered reports to the Assembly, notwithstanding the Union's failure to co-operate.

On January 21, 1954, the Chairman of the Committee on South West Africa addressed a communication to the Minister of External Affairs of the Union inviting his Government to designate a representative to meet with the Committee in order to "confer with it".¹ By the same letter the Committee invited the Union to resume the submission of annual reports.

The Union Government replied by a communication dated March 25, 1954, signed by Mr. G. P. Jooste, and addressed to the Chairman of the Committee on South West Africa. This communication sets forth basic elements of, and confirms, the dispute between the Union Government and the Members of the United Nations, including the Applicant:

"I have the honour to acknowledge receipt of your letter TRI. 132/1/06 dated 21 January, 1954, informing me that the Committee on South West Africa established by resolution 749 A (VIII) of the General Assembly to the United Nations has now been formally constituted and that the Committee at its 2nd meeting on 21 January 1954, requested you to inform me that, in accordance with paragraph 13 of the resolution, it is ready to continue negotiations with the Government of the Union of South Africa in order to implement fully the advisory opinion of the International Court of Justice regarding the question of South West Africa. The Committee therefore invites the Government of the Union of South Africa to designate a representative to confer with it.

"2. Throughout the negotiations with the *Ad Hoc* Committee established by resolution 449 A (V) of 13 December 1951, and in a written communication to that Committee the Union Government's representative to the United Nations informed the Committee of the standpoint of the Union Government in regard to South West Africa, namely:

"(a) The Union Government maintain that the Mandate in respect of South West Africa has lapsed and that while they continue to administer the Territory in the spirit of the trust they originally accepted, they have no other international commitments as a result of the demise of the League [of Nations]. Nevertheless, in order to find a solution which would remove this question from the United Nations, they are prepared to enter into an arrangement with the three remaining Allied and Associated Powers, namely France, the United Kingdom and the United States.

"(b) The Union Government's responsibilities in regard to South West Africa should not in any way exceed those which they assumed under the Mandate.

"The Union Government have maintained that proposals hitherto made by the *Ad Hoc* Committee have not met these two basic

¹ Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 9th Sess., Supp. No. 14 at 6 (A/2666) (1954).

elements. They would not, *inter alia*, safeguard the rule of unanimity which was provided for in the Covenant of the League of Nations whilst they would confer on certain countries, who are Members of the United Nations but who were not members of the League, rights which they did not have under the Mandates System of the League.

"3. By resolution 449 A (V) of 13 December 1951, an *Ad Hoc* Committee was established for the purpose of conferring with the Union of South Africa 'concerning the *procedural measures* necessary for implementing the advisory opinion of the International Court of Justice'.

"By resolution 651 (VII) of 20 December 1952, the *Ad Hoc* Committee was reconstituted to resume negotiations with the Union Government. The Committee was called upon 'to confer with the Government of the Union of South Africa' concerning *means of* implementing the advisory opinion of the International Court of Justice;

"4. Despite lengthy discussions between the representative of the Government of the Union of South Africa and the *Ad Hoc* Committee in terms of the above-mentioned recommendations it was not possible to reach agreement. The proposals made by the Union Government were not acceptable to the Committee because it did not consider that they provided means whereby the advisory opinion of the International Court of Justice could be implemented and because the proposals did not recognize the principle of supervision of the administration of South West Africa by the United Nations. *On the other hand the Union Government are not prepared to consider proposals which do not meet their basic requirements as set out in paragraph 2 above.* (Italics added.)

"5. As the terms of reference of your Committee appear to be even more inflexible than those of the *Ad Hoc* Committee the Union Government are doubtful whether there is any hope that new negotiations within the scope of your Committee's terms of reference will lead to any positive results.

"6. Your letter also refers to the submission of reports on the administration of the Territory of South West Africa and petitions from individuals or groups of the population of the Territory. *The Union Government have never recognized any obligation to submit reports and petitions to any international body since the demise of the League of Nations.* (Italics added.)

"In 1947, the South African delegation transmitted copies of the report on the administration of South West Africa for 1946, which had been laid before the Union Parliament.

"It was then clearly stated that the Union Government had at no time recognized any legal obligation on their part to supply information on South West Africa to the United Nations, but in a spirit of goodwill, co-operation and helpfulness offered to provide the United Nations with reports on the administration of the territory, with the clear stipulation that this would be done on a voluntary basis, for the purpose of *information only* and on the distinct understanding that the United Nations had no supervisory jurisdiction in South West Africa.

"The provision of this report, however, afforded an opportunity for the utilization of the Trusteeship Council and the Trusteeship Committee as a forum for unjustified criticism of the Union Government's administration, not only in South West Africa but in the Union as well, with undesirable effects on the harmonious inter-racial relations which had previously existed and which were so essential to successful administration. Furthermore the very act of submitting a report had created in the minds of some Members of the United Nations an impression that the Trusteeship Council was competent to make recommendations on matters of internal administration of South West Africa.

"On 11 July 1949, a letter was addressed to the Secretary-General of the United Nations bringing this unfortunate development to his notice and informing him that in the interests of efficient administration the Union Government had decided to discontinue the submission of reports."¹

By letter dated April 1, 1954, the Chairman of the Committee on South West Africa replied to the above-quoted communication. The Chairman expressed the Committee's regret that the Union's reply and its failure to appoint a representative to confer with the Committee could only be interpreted as a refusal to co-operate or negotiate with the Committee.² Since it was clear that the Committee would not receive an annual report from the Union, the Committee, by a letter dated May 12, 1954,³ through its acting Chairman, informed the Union of the date when it would be ready to examine available information and documentation in respect to the Territory and invited the Union to authorize a representative to meet with it. The Union answered that it had expressed its position in its previous letter and that it had not changed.³

Despite the Union's non-cooperation, the Committee was able to publish its first annual report on conditions in the Territory in 1954. The Committee derived its information from a variety of available sources. Chief reliance was placed by the Committee on what it described as "official documentation issued by the Government of the Union of South Africa and, under its authority, by the Territory of South West Africa."⁴

The report condemned the Union's administration of the Territory, concluding that:

"... after thirty-five years of administration under the Mandates System, the Native inhabitants are still not participating in the political development of the Territory, that their participation in the economic development is restricted to that of labourers and that the social and educational services for their benefit are far from satisfactory... The Committee regrets the failure of the Union

¹ *Id.* at 6 and 7.

² *Id.* at 7 and 8.

³ *Id.* at 8.

⁴ *Id.* at 14.

Government to resume submission of reports on the administration of the Territory of South West Africa as well as its failure to appoint a duly authorized representative to meet with the Committee in order to examine the information and documentation that was available to it, with a view to preparing the present report."¹

The General Assembly in Resolution 851 (IX) of 23 November 1954² expressed appreciation for the work done by the Committee. The Assembly noted "the report and observations regarding conditions in the Territory of South West Africa, contained in annex V of the report of the Committee," and noted "*with concern* that, in the opinion of the Committee, the administration of South West Africa is in several aspects not in conformity with the obligations of the Government of the Union of South Africa under the Mandate."

On the same date, the General Assembly passed another resolution, 852 (IX) of 23 November 1954,³ reiterating prior resolutions "to the effect that the Territory of South West Africa be placed under the International Trusteeship System."

The Fourth Committee again also considered the question of South West Africa at its 1954 session.

During the debates in the Fourth Committee the Union's Delegate, Mr. D. B. Sole, adverted to the failure of the Government and the *Ad Hoc* Committee to reach a settlement. He reiterated the Union's rejection of the Court's advisory opinion, and stated to the Committee:

"... one principal reason why a settlement had not been achieved had been the *Ad Hoc* Committee's insistence that negotiations must be either with the United Nations or one of its agencies. The Union of South Africa had refused to negotiate on that basis because of its conviction that the conclusion of any instrument with the United Nations would oblige it to accept responsibilities more onerous than those which it had assumed under the Mandate..."⁴

The representative of Liberia, at a meeting of the Fourth Committee on October 15, 1954, expressed his Government's views, in opposition to those of the Union. He reminded the Union Delegate that the International Court of Justice had made it clear that South West Africa was still a Mandated Territory. The Liberian delegate pointed out to the Union that, as a mandatory power, it had the opportunity to place the Territory under the Trusteeship System, in accordance with Chapter XII of the United Nations Charter. Instead of doing so, the Liberian delegate reminded the Union, it had elected to administer the Territory in accordance with the "sacred trust" set forth in Article 22 of the Covenant.

¹ *Id.* at 31, paras. 160-161.

² U.N. Gen. Ass. Off. Rec. 9th Sess., Supp. No. 21 at 28 (A/2890) (1954).

³ *Id.* at 29.

⁴ As paraphrased in the Summary Records of the 4th Committee U.N. Doc. No. A/C.4/SR. 399 at 15-16, para. 19 (1954).

Inasmuch as South Africa had chosen to do so, it could not now deny that whatever rights it possessed in connection with South West Africa derived from the Mandate. The Liberian delegate reminded the Union that since the Covenant provided that the terms of the Mandate could not be modified without the permission of the Council of the League, the Union was not entitled to do so unilaterally by the process of annexation of the Territory. Under Article 22 of the Covenant, the interest of the inhabitants of South West Africa was paramount. Hence, said the Liberian delegate, it was the duty of South Africa to assist the inhabitants to develop politically, economically and educationally, with a view towards ultimate self-determination. Under the Mandates System, the mandatory power was accountable for its actions to the Council of the League. Accordingly, the Union was bound to exercise its functions in regard to South West Africa under international supervision and to submit reports on its activities.¹

The Liberian delegate disputed the contention of the Union Government that the Mandate had lapsed with the demise of the League. In the view of the Liberian Government, "if it (South Africa) continued to insist that the Mandate had lapsed, it must agree that its authority to administer the Territory had also lapsed unless, of course, it was merely exercising the rule of force."²

The Liberian delegate concluded that "the efforts of the Committee on South West Africa to negotiate with the Union of South Africa had proved futile."³

While the Applicant and other members of the United Nations were informing the Union of their views, and were urging the Union to implement the Court's Advisory Opinion, the Union by pronouncements from the highest level of authority was making its contrary views clear.

On August 24, 1954, Dr. Malan, then South African Prime Minister, stated that "the following five propositions ... reflected the position for internal political and administrative purposes in the territory: (1) that the mandate no longer existed; (2) that the Union and South West Africa had become one territory and one people so far as the outside world was concerned; (3) no other territory had the right to interfere in mutual arrangements between the Union and South West Africa; (4) South West Africa had outgrown its status as a mandated territory and had become sovereign by sharing the sovereignty of the Union; (5) the benefits enjoyed by South West Africa in financial arrangements with the Union were more than those obtained by the Union in terms of money."⁴

¹ As paraphrased in the Summary Records of the 4th Committee, U.N. Doc. No. A/C.4/SR. 407 at 62-63, para. 14 (1954).

² *Id.* at 63, para. 15.

³ *Id.* at para. 17.

⁴ *Chronology of International Events*, Vol. 10, No. 17, 19 August-1 September 1954, at 567.

The Union thus explicitly rejected the Advisory Opinion, in which the Court declared: (1) that the mandate continues to exist; (2) that the Territory of South West Africa is a mandated territory; (3) that members of the former League of Nations continue to have an interest in the proper exercise of the mandate; (4) that the Union may not unilaterally alter the terms of the mandate.

A further issue which arose in 1954 concerned voting in the General Assembly. The Court, in its 1950 Advisory Opinion, ruled that the United Nations was the appropriate organ to carry on the supervisory functions formerly performed by the League. The Union Government had argued that under the League's voting system, questions regarding mandates required unanimous votes whereas such questions under the General Assembly's Rules of Procedure, as "important questions", would require a two-thirds majority vote. The Assembly therefore addressed to the Court the question whether the voting rule adopted by the General Assembly was a correct interpretation of the Court's 1950 Advisory Opinion. The Court ruled in 1955 that, since the supervisory functions were to be performed by the General Assembly, it would be appropriate to follow the Assembly's normal methods of voting procedure.

The Union refused to participate in the proceedings before the Court in 1954. However, after the opinion was rendered, the Union expressed its views thereon. Mr. Eric Louw, then, as now, Minister for External Affairs, referred to the Court and its Opinion in the following terms:

"We do not care tuppence whether the United Nations observes the two-thirds majority rule or the unanimity rule in dealing with South West African affairs because we have consistently said the United Nations has no right to concern itself with the affairs of South West Africa. . .

"It is suggested that the International Court has by this decision implied that the United Nations need not follow the same rules as the League of Nations in regard to mandated territories. On the other hand, the Court at a previous hearing held that the same principles should be applied by the United Nations as were applied by the mandates commission of the old League.

"If this interpretation is correct, the Court seems to have departed from its previous attitude.

"It is obvious that the reason why the Court has taken up this attitude is that it did not want to accord the same veto right to those countries which had agreed to recognise the jurisdiction of the trusteeship committee of the United Nations.

"This rather suggests that the Court in this case seems to have been guided by other than strictly legal motives."¹

Mr. Sole, Delegate of the Union to the United Nations, officially advised the Fourth Committee of the General Assembly "that his

¹ 235 *South Africa* 511, June 25, 1955.

Government could not recognize or accept the 1955 advisory opinion. There were various contradictions to be found between statements in the Court's 1955 opinion and statements in its earlier opinion, but he did not propose to analyse them as they bore no relation to his Government's attitude on the matter.

"His Government did not recognize the General Assembly's competence to exercise any supervision over the Territory of South West Africa. As the authority responsible for the administration of South West Africa, his Government *was therefore not concerned as to what voting procedure was adopted in that respect by the General Assembly or as to whether it had the endorsement of the Court's opinion.* For that reason South Africa had made no submission to the Court in respect of the General Assembly's 1954 request for an advisory opinion. His Government's attitude derived from the stand it had taken in relation to the original 1950 opinion, of which the 1955 opinion was merely an interpretation."¹ (Italics added.)

(6) 1955

In January, 1955, the Chairman of the Committee on South West Africa again invited the Union to designate a representative to confer with the Committee.²

The Union replied, by letter of May 21, 1955, and reiterated its previous views that the Mandate had lapsed and that the Union had no international commitment, in view of the dissolution of the League. The letter stated: "As there has been no material change in the position as outlined in my communication of 25 March, 1954, the Union Government has come to the same conclusion as they did last year, namely, that they cannot see that further negotiations would lead to any positive results."³

The refusal of the Union Government to meet with the Committee on South West Africa caused the Committee's Chairman to write as follows to the Union on June 10, 1955: "From this statement the Committee can only conclude that the Union of South Africa is not prepared to assist the Committee in the discharge of its mandate by the General Assembly, in particular that the Government of the Union of South Africa is unwilling even to enter into negotiations in order to implement fully the Advisory Opinion of the International Court of Justice in regard to the question of South West Africa. The Committee wishes me to state that it sincerely regrets they cannot accept this attitude of the Government of the Union of South Africa."³

In line with the Union's policy toward the Committee on South West Africa, the Union declined again in 1955 to furnish to the

¹ As paraphrased in the Summary Records of the 4th Committee, U.N. Doc. No. A/C.4 SR. 491 at 130, paras. 8-9 (1955).

² Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 10th Sess., Supp. No. 12 at 6 (A/2913) (1955).

³ *Id.* at 7.

Committee information on the Territory. Nevertheless, the Committee reported to the General Assembly, in accordance with its terms of reference. The report discussed political, economic, social and educational conditions in the Territory. The report concluded:

"The Committee reiterates that after nearly four decades of administration under the Mandates System, the Native inhabitants are still not participating in the political development of the Territory, their participation in the economic development is restricted to that of labourers and the social and educational services for their benefit are far from satisfactory. Racial discrimination is prevalent throughout the Territory. After examining for the second successive year conditions in the Territory, the Committee has found no significant improvement in the moral and material welfare of the Native inhabitants. It is apparent that the main efforts of the Administration are directed almost exclusively in favour of the European inhabitants of the Territory, often at the expense of the Native population."¹

The Committee's report was approved by the General Assembly by Resolution 941 (X) of December 31, 1955,² the Applicant voting with the majority.

The Committee's report was also the subject of discussion in the Fourth Committee of the General Assembly. At its 491st session, on October 31, 1955, Mr. D. B. Sole, the Union representative, commented that "In view of his Government's contention that the Mandate had lapsed, and in view of the circumstances in which the Committee on South West Africa had been established it was unable to recognise the legality of the Committee, or of its report, or of the resolutions it had submitted for consideration."³

At the close of 1955, the General Assembly by Resolution 942 (X)⁴ requested the International Court of Justice to render an advisory opinion on the legality of granting oral hearings to petitioners. This question was raised inasmuch as it had not been the practice of the Permanent Mandates Commission to grant such hearings. On the other hand, the Permanent Mandates Commission had the benefit of co-operation from the Union in accord with its obligation as Mandatory. In view of the Union's unwillingness to transmit written petitions to the United Nations, or, indeed to forward *any* information whatever, the General Assembly considered it necessary to acquire information from other available sources, including oral hearings. The Assembly, however, thought it appropriate that an Advisory Opinion should be sought before it authorized the Com-

¹ *Id.* at 32, para. 198.

² U.N. Gen. Ass. Off. Rec. 10th Sess., Supp. No. 19 at 23 (A/3116) (1955).

³ As paraphrased in the Summary Records of the 4th Committee, U.N. Doc. No. A/C.4/SR. 491 at 134, para. 44 (1955).

⁴ U.N. Gen. Ass. Off. Rec. 10th Sess., Supp. No. 19 at 24 (A/3116) (1955).

mittee on South West Africa to grant oral hearings. The Court's opinion was rendered in 1956, and is noted in the next subsection.

(7) 1956

At the beginning of 1956, the Chairman of the Committee on South West Africa again communicated with the Union Minister of External Affairs, inviting the Union to designate a representative to meet with the Committee to negotiate.¹ The Union repeated its prior practice, declining the invitation. In substance, the Union advised the Committee that it adhered to the position outlined by the Government in its previous refusals to negotiate with the Committee and repeated that the attitude of the Union Government remained unchanged.¹

The Committee's report for 1956 advised the Assembly:

"Co-operation and assistance have once more been refused: the Committee has had the benefit of neither the systematic submission of information by the Mandatory Power nor the participation of a representative of that Government in its work. In denying such co-operation and assistance the Union Government continues to show disregard not only of the various resolutions previously adopted by the Assembly, but also of the advisory opinions of the International Court of Justice, a fact which the Committee, and no doubt the Assembly, cannot fail to note with deep regret and concern".²

At the end of its report for 1956 the Committee made the following concluding remarks:

"For the third year in succession, the Committee has been unable to escape the conclusion that conditions in the Territory after nearly four decades of administration under the Mandates System are for the most part—and particularly for the 'Native' majority—still far from meeting in a reasonable way the standards of either endeavor or achievement implicit in the purposes of the Mandates System and in the attitudes prevailing generally today in respect of peoples not yet able to stand by themselves. The 'Native' of South West Africa still has no part whatsoever in the management of the Territory's affairs; he lives and works in an inferior and subordinate status in relation to a privileged 'European' minority and his opportunities for advancement in his own right are limited not only by the inadequacy of technical facilities but also by a restrictive system of law and practice. The Committee deplors the existing conditions of the 'Native' and other 'Non-European' inhabitants and the slow rate of their improvement. It is even more seriously disturbed by the absence of any sign of the radical changes which must be made in these policies if they are to conform with the principles which led to the establishment of the Mandates System. It finds no ground for altering its belief that the main efforts being

¹ Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 11th Sess., Supp. No. 12 at 4 (A/3151) (1956).

² *Id.* at 27, para. 164.

made in the administration of the Territory are directed almost exclusively in favour of the 'European' inhabitants, often at the expense of the 'Native' population.

"To this grave concern over conditions as they exist in the Mandated Territory, the Committee has felt obliged to add its profound misgivings as to the future course of the administration of the Territory. These misgivings arise from actions and statements of the Union Government itself: in particular, the transfer to its direct control of 'Native' administration in the Territory, and its stated aim that a policy of racial segregation be applied in the Territory; and the steps taken towards integration of the Territory with the Union on the political level as well, by means of parliamentary representation, considered in the light of all the circumstances which at present surround it.

"In view of the foregoing account of conditions in the Territory, all of these elements constitute, in the Committee's opinion, a situation which is neither in conformity with the principles of the Mandates System nor with the Universal Declaration of Human Rights, nor with the advisory opinions of the International Court of Justice, nor with the resolutions of the General Assembly. Accordingly the Committee considers that the situation of South West Africa requires close re-examination at the present time by the Assembly, particularly in respect of the failure of the Union Government to co-operate in the implementation of the advisory opinion of the Court of 11 July 1950, as endorsed by the Assembly in resolution 449 A (V) of 13 December 1950."¹

The foregoing report was approved by the General Assembly by Resolution 1054 (XI) of 26 February, 1957,² the Applicant voting with the majority.

The Fourth Committee considered the question of South West Africa again in 1956, as it had for many years.

The Liberian delegate at the 575th meeting of the Fourth Committee, on December 14, 1956,³ expressed in substance the views of his Government as follows:

"In view of the fact that the Union of South Africa was a member of the United Nations and a signatory to the Charter, under which it had certain obligations as well as rights, that South West Africa was a Mandated Territory which the South African Government had held as a sacred trust, and that the Charter of the United Nations provided for the protection of the fundamental rights of the indigenous inhabitants, it was clear that the abuse of the international mandate by the South African Government could not and must not be perpetuated."⁴

¹ *Id.* at paras. 166-168.

² U.N. Gen. Ass. Off. Rec. 11th Sess., Supp. No. 17 at 28 (A/3572 and Corr. 1) (1957).

³ U.N. Gen. Ass. Off. Rec. 11th Sess., 4th Comm. Summary Records of Meetings, 1956-1957 at 132.

⁴ *Id.* at para. 29.

The Union repeated its rejection of the foregoing contentions. The Union Prime Minister stated before the Union Senate:

... "it is well within our power and fully within our power to incorporate South West Africa as part of the Union. Up to now we have declared unto the world that legally and otherwise that is the position, but that in the meantime we are prepared, although we do not for one moment recognize the rights of the United Nations organization, even should we one day incorporate South West Africa, to govern South West Africa in the spirit of the old mandate. So, whether we will proceed at a later stage to carry out and put into effect what we regard as our rights over which nobody has anything to say, that will depend on how circumstances develop in the future."¹

The Court in 1956 rendered its Advisory Opinion on the question of granting oral hearings to petitioners. The Court concluded that it "would not be inconsistent with its Opinion of 11 July 1950 for the General Assembly to authorize a procedure for the grant of oral hearings by the Committee on South West Africa to petitioners who had already submitted written petitions: provided that the General Assembly was satisfied that such a course was necessary for the maintenance of effective international supervision of the administration of the Mandated Territory."²

In a separate opinion, the late Judge Lauterpacht expressed the view that "the Opinion of 11 July 1950 has been accepted and approved by the General Assembly. Whatever may be its binding force as part of international law—a question upon which the Court need not express a view—it is the law recognized by the United Nations. It continues to be so although the Government of South Africa has declined to accept it as binding upon it and although it has acted in disregard of the international obligations as declared by the Court in that Opinion."³ Consequently, went on Judge Lauterpacht, since the Union has acted in disregard of its obligations, "the potency of the two principal instruments of supervision is substantially reduced and ... other means, not fundamentally inconsistent with that Opinion, must be found in order to give effect to its essential purpose. The crucial question which the Court has now to answer is: Are oral hearings one of these means? Are they truly necessary and effective for filling the gap that has arisen? Do they secure the reality of the task of supervision otherwise reduced below the level contemplated by and underlying the Opinion of 1950? I am of the view that, in the circumstances, they fulfil that purpose."⁴

¹ *Union of South Africa, Senate Debates*, 1956, No. 15, cols. 3631-32; cited in Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 12th Sess., Supp. No. 12 at 7, para. 12 (A/3626) (1957).

² *Admissibility of hearings of petitioners by the Committee on South West Africa*, Advisory Opinion of June 1st, 1956: I.C.J. Reports 1956, p. 23 at 32.

³ *Id.* at 46-47.

⁴ *Id.* at 51.

(Illustrative extracts from petitions received by the Committee are set forth for the convenience of the Court in Chapter VI of this Memorial.)

(8) 1957

Continued frustration of United Nations policies led the General Assembly in the Twelfth Session to establish a Good Offices Committee (U.S., U.K. and Brazil) to discuss with the Union "a basis for an agreement which would continue to accord to the Territory of South West Africa an international status."¹ The Good Offices Committee met with Union representatives in 1958 and rendered its report. The report is discussed in the next sub-section.

The Committee on South West Africa continued its activities in 1957 with the addition of two new members, Finland and the Applicant.

The Committee decided at its 73rd meeting on 5 March, 1957 that since the General Assembly was utilizing other means to negotiate with the Union, it would for the moment withhold further approaches to the Union Government, although it retained authority to do so.²

In its annual report, the Committee, for the fourth time, criticized the manner in which the Union administers the Territory. The Committee made the following conclusions and recommendations, *inter alia*:

"The Committee is of the opinion that the administration of South West Africa, in which political, economic, social and educational rights are governed by the practice of *apartheid*, or racial separation, operates to the detriment of the population, particularly the 'Native' majority, and is contrary to the spirit and purposes of the Mandates system, the Charter of the United Nations, and the Universal Declaration of Human Rights. The Committee reiterates its previous recommendations that the Mandatory Power take steps to safeguard the special status of the Territory and the real interests of all its inhabitants by ensuring that responsibility for their administration shall pass progressively to fully representative institutions proper to the Territory and, as a first step to this end, to transform the territorial legislature into a properly representative body by extending representation to all inhabitants of the Territory. The Committee recommends as a matter of urgency that the Mandatory Power take steps to repeal all racially discriminatory legislation and practices in the Territory and that it take urgent measures to revise the existing policies and practices of 'Native' administration in a manner which will ensure the fulfilment of its obligations and responsibilities under the Mandate."³

¹ General Assembly Resolution 1143 (XII) of 25 October 1957, U.N. Gen. Ass. Off. Rec. 12th Sess., Supp. No. 18 at 25 (A/3805) (1957).

² Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 12th Sess., Supp. No. 12 at 1, para. 8 (A/3626) (1957).

³ *Id.* at 11, para. 37.

The Committee's 1957 report concluded as follows:

"The continued and increasing political, social and economic pressures and restrictions imposed in all walks of life on the vast majority of the inhabitants and especially on the indigenous African population reveal, in the Committee's opinion, a policy intended to give paramount importance to the interests of the population of European origin, to maintain and reinforce the entrenchment of government control in the hands of this minority, and to secure as an ultimate goal the incorporation of the Territory into the Union of South Africa in a manner which would represent a modification of the international status of the Territory by means contrary to the relevant international agreements, the advisory opinion of the International Court of Justice of 11 July 1950 and the interests of the vast majority of the inhabitants of the Territory.

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"The Committee considers that existing conditions in the Territory and the trend of the administration represent a situation contrary to the Mandates system, the Charter of the United Nations, the Universal Declaration of Human Rights, the advisory opinions of the International Court of Justice and the resolutions of the General Assembly.

"The Committee, after examining conditions in the Territory for the fourth successive year and after studying the statements of policy made by the Prime Minister and other high-ranking officials of the Union Government, has found no evidence that the Mandatory Power intends to change the course of the administration of the Territory to bring it into conformity with the Mandates system. The Committee therefore considers that the General Assembly should weigh the gravity of the present situation and consider the need for acting without further delay in the matter by taking immediately such measures as are possible and feasible to ensure and to safeguard the well-being and development of the inhabitants of South West Africa and to preserve the international status of the Territory pending its being placed under the International Trusteeship System."¹

The Committee report was approved by the General Assembly by Resolution 1140 (XII) of 25 October 1957,² the Applicant voting with the majority.

The Fourth Committee at its 659th meeting on October 2, 1957, again had on its agenda the report of the Committee on South West Africa. In the course of the general debate at that meeting, the Liberian delegate again disputed the contentions of the Union Government. He repeated the views of the Liberian Government,

¹ *Id.* at 26, paras. 159, 161-162.

² U.N. Gen. Ass. Off. Rec. 12th Sess., Supp. No. 18 at 24 (A/3805) (1957).

saying in substance that "The Union of South Africa had violated the Mandates System, the Charter of the United Nations, the Universal Declaration of Human Rights, the advisory opinions of the International Court of Justice and the resolutions of the General Assembly. Some action should be possible if all the Members of the United Nations were to co-operate. The contention of the Union Government that the Mandate had lapsed with the demise of the League of Nations was neither legally nor morally valid."¹

By Resolution 1060 (XI) of 26 February, 1957, the Applicant voting with the majority, the General Assembly had requested the Committee on South West Africa to study the question of "What legal action is open to the organs of the United Nations, or to the members of the United Nations, or to the former Members of the League of Nations, acting either individually or jointly, to ensure that the Union of South Africa fulfills the obligations assumed by it under the Mandate, pending the placing of the Territory of South West Africa under the International Trusteeship System?"² Later the same year, the Committee submitted a special report to the General Assembly containing its answers to the question posed by the above resolution.³

(9) 1958

In 1958, the Committee on South West Africa reported back to the General Assembly, suggesting various questions which might serve as the subject of an advisory opinion as it had been requested by Resolution 1142 B (XII) of 25 October 1957.⁴ The Committee divided such questions into two categories: (a) those relating to the international status of the Territory, and (b) those relating to the moral and material well-being and social progress of the inhabitants. Included in the former category were: representation of the Territory in the Union Parliament; the degree and nature of integration of the Territory into the Union; administrative separation of the Eastern Caprivi Zipfel from the balance of the Territory and its administration as an integral part of the Union; and the vesting of South West Africa Native Reserve Land in the South African Native Trust.

Included in the second category were: the practice of *apartheid*; the application of racially discriminatory legislation in the political, economic, social and education fields; restrictions on freedom of

¹ As paraphrased in the Summary Records of the 4th Committee, U.N. Doc. No. A/C.4/SR. 659 at 36, para. 12 (1957).

² U.N. Gen. Ass. Off. Rec. 11th Sess., Supp. No. 17 at 30 (A/3572 and Corr. 1) (1957).

³ Special Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 12th Sess., Supp. No. 12A (A/3625) (1957).

⁴ U.N. Gen. Ass. Off. Rec. 12th Sess., Supp. No. 18 at 25 (A/3805) (1957).

movement; vagrancy legislation; allocation and alienation of land; and legislation which permits the expulsion from the Territory of persons who are under the protection of the Mandates System.¹

The Committee in 1958 made no effort to negotiate with the Union, that attempt being made by the Good Offices Committee.

The Committee's annual report concluded with the following remarks:

"In view of the continued unwillingness of the Government of the Union of South Africa to co-operate with it, the Committee once again has had to exercise its judgment concerning conditions in the Territory on the basis of information gathered, as systematically as possible, from public sources. It has done so in view of its desire to reach objective conclusions as to the fulfillment by the Mandatory Power of its obligation under the Mandate.

"The Committee feels that it should point out that its present assessment of conditions in the Territory is the result not of an isolated study of those conditions but the continuation of a process in which it has been engaged for five years. The new information coming before it in each of those years has served to confirm, not to cast doubt upon, its conclusions as to the main lines of policy in the administration of the Territory and as to the manner in which that policy has been applied.

"No important changes have appeared in the situation previously described by the Committee. The life of the Territory continues to present two distinct and separate aspects. On the one hand, the Committee has been able to report the continued free political activity of the 'European' section of the population, the influential role which it plays in the institutions of government, and the further expansion and prosperity of the mining, agricultural and commercial enterprises which it owns or controls or which otherwise provide it with a livelihood. On the other hand, the Committee has shown that the vast majority of the population, classified as 'Non-European', continues to be deprived on racial grounds of a voice in the administration of the Territory and of opportunities to rise freely, according to merit, in the economic and social structure of the Territory. The 'European' community, which alone enjoys political rights, shares with the Mandatory Power, to the exclusion of the 'Non-Europeans', control over the allocation and development of the principal resources of the Territory, reserving for itself a disproportionate interest in those resources. The inferior political, economic and social status of the 'Non-Europeans' results from arbitrary and racially discriminatory laws. By means of discriminatory legislative and administrative acts, authority and opportunity are retained as a matter of policy in the hands of the 'European'

¹ Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 13th Sess., Supp. No. 12 at 7, para. 39 (A/3906) (1958).

population, while the 'Non-European' majority is confined to reserves except to the extent that its manpower is needed in the 'European' economy in the form of unskilled labour and under strict regulation.

"The Committee therefore reaffirms its conclusion that existing conditions in the Territory and the trend of the administration represent a situation not in accord with the Mandates System, the Charter of the United Nations, the Universal Declaration of Human Rights, the advisory opinions of the International Court of Justice and the resolutions of the General Assembly."¹

The Good Offices Committee met with the Union during 1958. The Union was only willing to consider an agreement with the remaining Principal Allied and Associated Powers, or, alternatively, the possible partitioning of the Territory.

In its report to the General Assembly, the Good Offices Committee stated "The Committee accordingly expresses to the General Assembly (a) the opinion that a form of partition might provide a basis for an agreement concerning the Territory of South West Africa, and (b) the hope that the General Assembly will therefore encourage the Government of the Union of South Africa to carry out an investigation of the practicability of partition, on the understanding that if the investigation proves this approach to be practicable it will be prepared to submit to the United Nations proposals for the partitioning of the Territory."²

The Fourth Committee discussed the report of the Good Offices Committee.

At the 756th meeting of the Fourth Committee, on October 10, 1958, the Ethiopian delegate expressed his Government's rejection of the position taken by the Union and the partition proposal. He contended, in substance, that:

"the Good Offices Committee had rightly concluded that it could not entertain any proposal envisaging an agreement to which the United Nations would not be a party, such as the first of the two alternatives discussed with the Union Government. The idea that the latter's international obligations should be limited to what it called the three remaining Principal Allied and Associated Powers failed to take account of present-day reality. In fact, the proposal was not new and had in fact already been rejected by the United Nations in General Assembly resolution 749A (VIII). His delegation found it puzzling that, under the guise of the so-called new approach, the Union Government should put forward once again a proposal which was entirely contradictory to the letter and spirit of the relevant Chapters of the Charter, the numerous resolutions on South West Africa passed by the General Assembly and the advisory opinions which the Fourth Committee had requested

¹ *Id.* at 28-29, paras. 168-171.

² U.N. Doc. No. A/3900, U.N. Gen. Ass. Off. Rec. 13th Sess., Agenda item 39, Annexes at 10, para. 7 (1958).

from the International Court of Justice. The second proposal discussed in the report of the Good Offices Committee, namely partition, was even more puzzling, and the answers given to the questions asked by a number of representatives had not made it any more comprehensible to his delegation...

"His delegation would be ready to consider any suggestion for the further exploration of the South West African problem provided that it was in accordance with the relevant provisions of the Charter, the resolutions of the General Assembly and the advisory opinions of the International Court of Justice."¹

The General Assembly in Resolution 1243 (XIII) of 30 October 1958, voted "not to accept the suggestions contained in the report of the Good Offices Committee on South West Africa that envisage partition and annexation of any part of the Territory as a basis for the solution of the question of South West Africa", and invited the Good Offices Committee "to renew discussions with the Government of the Union of South Africa in order to find a basis for an agreement which would continue to accord to the Mandated Territory of South West Africa as a whole an international status, and which would be in conformity with the purposes and principles of the United Nations."²

(10) 1959

In 1959, the Good Offices Committee again met with representatives of the Union Government in an effort to reach a settlement of the dispute. Prior to opening its discussions with the Union, however, the Committee made it clear that the partition proposal had been ruled out as a possible solution. During the course of discussions with the Union, the Good Offices Committee suggested that future negotiations should concern themselves with the negotiation of an agreement to which the United Nations would be a party and which would provide for United Nations supervision of the Territory.³

The Committee's proposal was not acceptable to the Union delegation, which insisted that the United Nations had no right to supervise the administration of the Territory by the Union of South Africa.⁴

The Good Offices Committee concluded, in its 1959 Report, that "the Committee, therefore, regrets to inform the General Assembly that it has not succeeded in finding a basis for an agreement under its terms of reference."⁵

¹ As paraphrased in the Summary Records of the 4th Committee, U.N. Doc. No. A/C.4/SR. 756 at 57, paras. 1 and 3 (1958).

² U.N. Gen. Ass. Off. Rec. 13th Sess., Supp. No. 18 at 30 (A/4090) (1958).

³ U.N. Doc. No. A/4224, U.N. Gen. Ass. Off. Rec. 14th Sess., Agenda item 38, Annexes at 2-3, para. 10 (1959).

⁴ *Id.* at 3, para. 11.

⁵ *Id.* at 4, para. 16.

The Committee on South West Africa during 1959 made no effort to negotiate with the Union so as not to interfere with the attempts of the Good Offices Committee.

The Committee on South West Africa did, however, again invite the Union to submit an annual report.¹ The Chairman of the Committee received the perennial negative response from the Union.¹

The Committee once more also made a detailed report on conditions in the Territory. Its report concluded with the following:

"After almost four decades of administration of South West Africa under the international Mandate System, whose guiding principle is that the well-being and development of the Territory's inhabitants 'form a sacred trust of civilization', the Union of South Africa has failed and continues to fail to carry out the obligation it undertook to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory.

"The Mandatory Power bases its administration of the Territory on a policy of *apartheid* and 'White supremacy' contrary to the Mandates System and to the Charter of the United Nations, and its goal is the annexation of the Territory. The Union Government has reserved political authority in the Territory, by law, to a 'European' minority, has transferred a major portion of the Mandated Territory and its resources to 'European' citizens of the Union of South Africa, has allocated the bulk of the public funds of the Territory to 'Europeans', and has reserved to them the larger share of the economic, social and educational opportunities available in the Territory. It has at the same time denied to 'Non-European' inhabitants of the Territory, not only a recognition of their paramount interests, but also the right to participate on the basis of equality and merit in the political, economic, social and educational life of the Territory. The indigenous 'Native' majority of the population in particular have been subjected to unnatural restrictions on their freedom of movement and regulation of their daily life, and have suffered damaging removals and threats of removals from their lands to places even beyond the boundaries of the international Mandated Territory."²

The General Assembly approved the Committee's report in Resolution 1360 (XIV) of 17 November 1959,³ the Applicant voting with the majority.

The Committee's report also was the subject of debate in the Fourth Committee. At the 900th meeting of the Fourth Committee,

¹ Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 14th Sess., Supp. No. 12 at 34 (A/4191) (1959).

² *Id.* at 32-33, paras. 229-230.

³ U.N. Gen. Ass. Off. Rec. 14th Sess., Supp. No. 16 at 28-29 (A/4354) (1959).

Mr. Eric Louw, Union Minister of External Affairs, discussed the report at length. Excerpts of his comments are set out in detail:

"In spite of the fact that we have every year, consistently, warned this Committee against accepting the evidence, or the statements or the allegations of either prejudiced persons or unreliable witnesses, they have proceeded to continue to do so.

"What is interesting—and it is shown particularly in the statement by the Rapporteur—is that a great part of this report was not based on reports or statements made by these witnesses and petitioners but was based on extracts from official documents and reports. Here we have the extraordinary situation—as I shall now proceed to show—that, in dealing with information received from official documents and reports, this Committee came to entirely unjustified conclusions, although in this respect I must remind you that the Rapporteur also said that a great part of their work was taken up with the consideration of petitions, and here, again, they based their conclusions upon information which was in many cases entirely biased.

.....

"A perusal of this and previous reports of the Committee on South West Africa, show that this Committee has gone far beyond its terms of reference and that little attempt has been made to conform to the procedure of the Mandates Commission. As I informed this Committee on a previous occasion, I on two occasions presented the Union Government's report on South West Africa to the former Mandates Commission and for a period of two or three days on these two occasions I was questioned by that Commission. I can thus speak with personal and intimate knowledge of the procedure followed by the former Mandates Commission. Having regard to the directive contained in the United Nations Assembly's terms of reference, which I quoted, I have the right to ask now—and I put the question pertinently—how many members of the Committee, if any, have taken the trouble to read the reports of the previous Mandates Commission of the League of Nations, so as to acquaint themselves thoroughly with the procedure followed by that Commission, on which their own reports are expected to be modelled.

.....

"There is another interesting point in this Committee's report, an entirely unjustified conclusion. The Committee indirectly links these alleged—alleged, I say—contemplated mass removals of Native peoples against their will with the heavier penalties imposed for the illegal possession of arms and ammunition.

"Mr. Chairman, since the time that the Union Government took over the previous Mandate of South West Africa in 1920, it has, in accordance with the terms of article 3 of the lapsed Mandate, controlled traffic in arms and ammunition. I may ask: Does the Committee on South West Africa object to that? It would be interesting to know if they do. It would be surprising if they did.

.....

"I may be pardoned for saying that the Committee on South West Africa seems to search for ulterior or bad motives in every single act of the South West Africa Administration.

.....

"I hope that the Committee will, as the result of this, bear in mind the repeated warnings of the South African delegation regarding witnesses who give evidence before this Committee. Here, we again have proof of the irresponsible and unreliable types of persons who give oral evidence. It shows how little reliance can be placed on statements by so-called witnesses..."¹

It is noteworthy that although the Union was at pains to criticize the accuracy of oral testimony and certain selected allegations of the Committee, the Union made no real attempt to deal with the practice of *apartheid*. Nor did the Union dispute the existence of an interlocking series of legislation which the Committee deemed oppressive.

The Committee, prior to publication of this report, as in previous years, had requested information, which request the Union had denied.

At the 913th meeting of the Fourth Committee, the Rapporteur of the Committee on South West Africa adverted to the Union's tactic of refusing to supply information and then denying the accuracy of information gathered from other sources. He answered charges by the Union that the report contained "misstatements" and "unjustified conclusions." He pointed out that the Committee had not gone beyond the procedures and practices of the Permanent Mandates Commission of the League of Nations. He made the following remarks (*inter alia*):

"... There is of course one vital, major difference between the operation of the mandates system in the League of Nations and the work of our Committee in the United Nations. It is a difference that must be clear to all. The difference is this: The Permanent Mandates Commission was able to consider voluminous and detailed reports submitted by the Union Government and to seek further information on many points by questioning the Special Representatives of the Mandatory. That is the main difference, and it is in my opinion a most important difference, between the work of the Permanent Mandates Commission and that of the Committee on South West Africa. The information available to the Committee, that is, the laws, Gazettes, commission of enquiry reports and other official information, the budget as well as Press reports and petitions, were also available to and used by the Permanent Mandates Commission in its consideration of conditions in South West Africa. The difference is that these official and unofficial texts, which form the basis of this Committee's work, served in the Permanent Mandates Commission only to supplement the annual reports and the information obtained by questioning the Special Representatives of the Mandatory. In other words, we are denied the co-operation of the Union Government. This is the main difference between the procedure in our Committee and that under the Mandate, although I hardly feel it is a difference the Union Government will wish to stress.

¹ U.N. Doc. No. A/C.4/421 at 17, 18-26, 23, 32, 33-35, 42 (1959).

In the second place, the distinguished Minister suggested that the Committee on South West Africa had gone beyond the scope of the questionnaire approved by the League of Nations. Far from that being so, I regret to have to say that the Committee has not even been able to report on all of the questions covered in the League questionnaire. We have not been able to go even as far as the questionnaire of the League on which we base our work. As only one example, I might mention that the Committee has been unable to furnish complete trade statistics because the trade statistics of the Territory are incorporated in those of the Union."¹

(11) 1960

In June of 1960, the Second Conference of Independent African States met at Addis Ababa. States participating in the Conference were Ethiopia, Ghana, Guinea, Libya, Liberia, Morocco, Sudan, Tunisia, and the United Arab Republic. There were also observers from Algeria, Cameroon, Nigeria and Somalia.

The Secretary of State of Liberia, H.E., Mr. J. Rudolph Grimes, in addressing the Conference, referred to the special interest of his Government in the question of South West Africa:

"We do not think it necessary to review at this time all events in the matter of the mandated territory of South West Africa, the failure of the United Nations Good Offices Committee, etc.

"In the light of the resolutions passed at the last session of the United Nations Assembly, my Government, as a former member of the League of Nations at the time of its dissolution, has already indicated its determination on behalf of all the African States, to pursue further action to get this territory placed under the Trusteeship provisions of the Charter. We are pleased to know that in this we have the support and co-operation of other African States. This matter will be discussed at this conference and it is hoped that final decision for further action will be taken before we adjourn."²

The Conference thereafter gave full consideration to the question of South West Africa. A resolution was unanimously adopted on June 23, 1960, setting forth, *inter alia*, that the Conference:

"1. Concludes that the international obligations of the Union of South Africa concerning the Territory of South West Africa should be submitted to the International Court of Justice for adjudication in a contentious proceeding;

2. Notes that the Governments of Ethiopia and Liberia have signified their intention to institute such a proceeding..."³

For its part, the Committee on South West Africa continued its activities in 1960. It sought, as in the past, to find a basis for settle-

¹ U.N. Doc. No. A/C.4/426 at 5-6 (1959).

² "Second Conference of Independent African States, Addis Ababa, 14-26 June, 1960" published by the Ministry of Information of the Imperial Ethiopian Government (1960), at 32.

³ *Id.* at 101-102.

ment of the dispute. It should be noted that the General Assembly at this point by Resolution 1360 (XIV) of 17 November 1959, authorized the Committee to negotiate with the Union "with a view to placing the Mandated Territory under the International Trusteeship System."¹ The Committee again invited the Union to send a representative to meet with the Committee. The Union again rejected the invitation, repeating that "the Union Government still believe that negotiations on the basis proposed would not lead to any positive results."²

The Union offered "to enter into discussions with an appropriate United Nations *ad hoc* body that may be appointed after prior consultation with the Union Government and which would have a full opportunity to approach their task constructively, providing for fullest discussion and exploration of all possibilities—*on the understanding, of course, that this is without prejudice to the Union's consistently held stand on the judicial aspect of the issue.*"² (Italics added.)

The Committee's report for 1960 on the Union's administration of the Territory embodies the following conclusions:

"The Mandatory Power has continued to administer the Territory on the basis of a policy of *apartheid* and 'White supremacy' which is contrary to the Mandate, the Charter of the United Nations, the Universal Declaration of Human Rights, the advisory opinions of the International Court of Justice and the resolutions of the General Assembly.

"For several years, particularly since the transfer of direct control over the administration of 'Natives' and 'Native' areas in the Territory to the Union Department of Native Affairs, the Committee has become increasingly concerned at the trend of the administration which subordinates the well-being and paramount interests of the 'Native' and 'Coloured' population to those of 'Europeans'.

"In its present report, the Committee welcomes a discernible increase in the territorial expenditures and appropriations, improvements in the field of public health, assurances by the Union Government that the Bushmen and the people of three of the smaller 'Native' reserves are not to be moved, and certain of the developments in the field of education, however inadequate all these may be.

.....

"Lastly, the Committee considers that, as far as the 'Native' and 'Coloured' population of the Territory are concerned, the basic ills of administration stem directly or indirectly from the rigid enforcement of the policy of *apartheid* based on the concept of 'White supremacy' over all other races. Unless and until this basic

¹ U.N. Gen. Ass. Off. Rec. 14th Sess., Supp. No. 16 at 28-29 (A/4354) (1959).

² Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 15th Sess., Supp. No. 12 at 58 (A/4464) (1960).

policy is changed, there can be no hope for the maintenance of a peaceful and orderly administration of the Mandated Territory. The Committee is therefore gravely concerned at the continued failure of the Union Government to comply with previous recommendations of the Committee, approved by the General Assembly, for the revision of policies and methods of administration to make them conform with the sacred trust embodied in Article 22 of the Covenant of the League of Nations and the Charter of the United Nations." ¹

The Committee on South West Africa, in its 1960 report, also endorsed the intention expressed at the Second Conference of Independent African States at Addis Ababa. The Committee on South West Africa expressed its recognition of "the importance of the constructive intention expressed at the Second Conference of Independent African States held in Addis Ababa, which is in conformity with General Assembly resolution 1361 (XIV) dealing with the legal action open to Member States to institute judicial proceedings. The Committee wishes to commend this intention on the part of the Governments of Ethiopia and Liberia to the General Assembly as one of the practical approaches for the implementation of resolution 1361 (XIV)." ²

At the close of 1960, following fourteen years of frustration of efforts on the part of numerous agencies of the United Nations to negotiate with the Union, the General Assembly, in Resolution 1565 (XV), concluded, that:

"... the Government of the Union of South Africa has failed and refused to carry out its obligations under the Mandate for the Territory of South West Africa", and that "the dispute which has arisen between Ethiopia, Liberia and other Member States on the one hand, and the Union of South Africa on the other, relating to the interpretation and application of the Mandate has not been and cannot be settled by negotiation." ³

The full text of the foregoing Resolution is set out for the Court's convenience:

"The General Assembly,

"Recalling its Resolution 1361 (XIV) of 17 November 1959, in which it drew the attention of Member States to the conclusions of the special report of the Committee on South West Africa concerning the legal action open to Member States to submit to the International Court of Justice any dispute with the Union of South Africa relating to the interpretation or application of the provisions of the Mandate for the Territory of South West Africa, if such dispute cannot be settled by negotiation,

"Noting with grave concern that the administration of the Territory, in recent years, has been conducted in a manner contrary to

¹ *Id.* at 56, paras. 444-446, 453.

² *Id.* at 4, para. 27.

³ U.N. Gen. Ass. Off. Rec. 15th Sess., Supp. No. 16 at 31-32 (A/4684) (1960).

the Mandate, the Charter of the United Nations, the Universal Declaration of Human Rights and the resolutions of the General Assembly, including resolution 449 A (V) of 13 December 1950, by which the Assembly accepted the advisory opinion of 11 July 1950 of the International Court of Justice on the question of South West Africa,

"Noting that all negotiations and efforts on the part of the General Assembly, of its several committees and organs constituted and authorized for this purpose, and of Member States acting through such committees and organs, have failed to bring about compliance on the part of the Government of the Union of South Africa with its obligations under the Mandate, as is evidenced, *inter alia*, by the following reports of the said committees and organs to the Assembly:

(a) Reports of the *Ad Hoc* Committee on South West Africa to the General Assembly at its sixth, seventh and eighth sessions,

(b) Reports of the Committee on South West Africa to the General Assembly at its ninth to fifteenth sessions,

(c) Reports of the Good Offices Committee on South West Africa to the General Assembly at its thirteenth and fourteenth sessions,

"Noting the aforesaid reports, and in particular the reports of the Committee on South West Africa concerning the failure of negotiations with the Government of the Union of South Africa and the Committee's conclusions that the Union has at all times declined to co-operate in any way with the Committee in the discharge of its functions,

"1. *Notes with approval* the observations of the Committee on South West Africa concerning the administration of the Territory as set out in the Committee's report to the General Assembly at its fifteenth session, and finds that the Government of the Union of South Africa has failed and refused to carry out its obligations under the Mandate for the Territory of South West Africa;

"2. *Concludes* that the dispute which has arisen between Ethiopia, Liberia and other Member States on the one hand, and the Union of South Africa on the other, relating to the interpretation and application of the Mandate has not been and cannot be settled by negotiation;

"3. *Notes* that Ethiopia and Liberia, on 4 November 1960, filed concurrent applications in the International Court of Justice instituting contentious proceedings against the Union of South Africa;

"4. *Commends* the Governments of Ethiopia and Liberia upon their initiative in submitting such dispute to the International Court of Justice for adjudication and declaration in a contentious proceeding in accordance with article 7 of the Mandate."

C. SUMMARY

Upon the dissolution of the League of Nations the Union did not conceal its desire to annex the Territory. The Union announced to

the League, and later to the United Nations, its wish to do so, although expressing a willingness to comply with the spirit of the Mandate until full incorporation of the Territory or other arrangements were made with the United Nations. The United Nations General Assembly withheld its consent to incorporation, on the ground that the inhabitants of the Territory had not yet reached a level of political maturity enabling them to "express a considered opinion" on a matter as vital as incorporation. The Assembly, instead, recommended that the Union place the Territory under the Trusteeship System, as had been the case with all other "C" mandates. This, the Union has always refused to do.

Instead, shortly after the United Nations refusal to permit incorporation of the Territory, the Union contended that the United Nations had no rights of supervision, or other powers, with respect to the Territory. The Union argued in essence that with the dissolution of the League the Mandate had expired. The General Assembly thereupon requested the Court for an Advisory Opinion, submitting certain questions involving the legal status of the Mandate. The Union appeared, and argued its case both in written and oral presentation.

The Opinion of the Court being unsatisfactory to the Union, the latter denounced the Opinion as being in error, and proclaimed its intention not to comply therewith.

There followed years of patient, though unavailing, efforts on the part of the General Assembly to obtain implementation of the Opinion, by means of negotiation and appeal.

The Committee on South West Africa has been the main, though not the sole, medium of the Assembly in such efforts. It has also rendered its reports on the basis of the most diligent research and in the face of the Union's refusal of co-operation.

The Committee's repeated findings of Union violations of the Mandate and recommendations thereon have been as unavailing as the Committee's efforts to negotiate.

The Committee's findings have merely evoked the Union's professed intention to "continue to administer South West Africa in the spirit of the lapsed Mandate."¹

The policies and practices actually pursued by the Union in the Territory are set forth in detail in Chapter V of this Memorial. As will be seen, the Union has not, in fact, administered the Territory either according to the letter or the spirit of the Mandate.

The Applicant has repeatedly expressed grave concern concerning the violations by the Union of its duties with respect to the Territory and the well-being of its inhabitants. It has communicated this concern by statements made in the Fourth Committee, by votes on numerous resolutions, through its participation as a member of the Committee on South West Africa and in international conference.

¹ U.N. Doc. No. A/C.4/421 at 42 (1959).

The Applicant has, moreover, repeatedly urged the Union to change its course of action. Along with other Members of the United Nations, it has thus made its views known to the Union through appropriate organs and through agencies of the United Nations. Having concluded after fourteen years of fruitless efforts to obtain compliance on the part of the Union with the Mandate, that its dispute with the Union has not been, and cannot be, settled by negotiation, the Applicant has deemed it necessary to institute the present proceedings, pursuant to Article 7 of the Mandate.

III

JURISDICTION OF THE COURT

The Applicant founds the jurisdiction of the Court on Article 7 of the Mandate and Article 37 of the Statute of the International Court of Justice, having regard to Article 80, paragraph 1, of the United Nations Charter.

The second paragraph of Article 7 of the Mandate provides:

"The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations."

Article 37 of the Statute of the International Court of Justice, to which the Applicant and the Union have subscribed by joining the United Nations, provides:

"Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

Article 80, paragraph 1, of the United Nations Charter provides:

"Except as may be agreed upon in the individual trusteeship agreements ... and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties."

A. THE MANDATE, INCLUDING ARTICLE 7 THEREOF, IS IN FORCE, AND IS A "TREATY OR CONVENTION" WITHIN THE MEANING OF ARTICLE 37 OF THE STATUTE OF THE COURT

In its Advisory Opinion of July 11, 1950, the Court ruled:

"According to Article 7 of the Mandate, disputes between the Mandatory state and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, if not settled by negotiation, should be submitted to the Permanent Court of International Justice. Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1, of the Charter, the Court is of the opinion

that this clause in the Mandate is still in force and that, therefore, the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions."¹

In the following Chapter, the Applicant sets forth the grounds for its submission that the Court should reaffirm its aforesaid ruling and should hold that the said ruling sets forth the law of this case.

Assuming that the Mandate is thus in force within the meaning of Article 37 of the Statute of the Court, we turn now to an analysis of Article 7 of the Mandate to show its applicability to this proceeding.

B. THE CRITERIA OF ARTICLE 7 HAVE BEEN SATISFIED

I. *There is a "dispute"*

In the *Mavrommatis Palestine Concessions Case*,² the Permanent Court of International Justice was called upon to interpret the term "dispute" in connection with Article 26 of the Mandate for Palestine, a provision identical with Article 7 of the Mandate for South West Africa. The Court said in that case: "*A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.*"³ (Italics added.)

The record of the present case makes clear that, for more than ten years, the Applicant herein has had a disagreement on points of law and fact, as well as a conflict of legal views and interests, with the Union. The Applicant has maintained at all times that the Mandate is in force; the Union, that the Mandate has lapsed. The Applicant has insisted that the Union has violated the Mandate; the Union has denied doing so. The Applicant has contended that the United Nations has supervisory powers over the Union as Mandatory; the Union has repeatedly rejected its contention. The Applicant has asserted a legal interest in, and the right to object to, the manner in which the Union administers the Territory; the Union insists that it alone has a legal interest in what occurs in the Territory.

The General Assembly, as the United Nations organ through which the Applicant herein has consistently made known its contentions, has found as a fact that a "dispute ... has arisen between Ethiopia, Liberia and other Member States on the one hand, and the Union of South Africa on the other, relating to the interpretation and application of the Mandate ..."⁴

¹ *International status of South West Africa*, Advisory Opinion: I.C.J. Reports 1950, p. 128 at 138.

² *Case of the Mavrommatis Palestine Concessions*, P.C.I.J., Ser. A, No. 2 (1924).

³ *Id.* at 11.

⁴ Resolution 1565 (XV) of 18 December 1960, U.N. Gen. Ass. Off. Rec. 15th Sess. Supp. No. 16 at 32 (A/4684) (1960).

2. *The dispute is between the Mandatory and "another Member of the League of Nations" in the sense of Article 7 of the Mandate*

The Applicant was a member of the League of Nations. It joined the League on September 28, 1923, and continued as a member until the League's dissolution. As a member of the League, it had a legal interest in the proper exercise of the Mandate. There is no disagreement with the Union on this point; the Union has stated as much. (See p. 93 herein.) The question before the Court is whether the Applicant's legal interests have survived the dissolution of the League. It is submitted that the phrase "another Member of the League of Nations" as used in Article 7 of the Mandate, should be construed as referring to former members of the League, as well as to members of the United Nations.

In holding that Article 7 is in force, the Advisory Opinion must have assumed the survival of the legal interests of former League members in the Mandate, since otherwise the holding would be meaningless.

Judge McNair's separate opinion makes this point in the following terms:

"... every state which was a Member of the League at the time of its dissolution still has a legal interest in the proper exercise of the Mandate ... I have endeavored to show that the agreement between the mandatory and other members of the League embodied in the Mandate is still 'in force.' The expression [in Article 7] 'member of the League of Nations' is descriptive, in my opinion, not conditional, and does not mean 'so long as the League exists and they are members of it.'" ¹

The basic principles of the Mandate System and the means devised by the League of Nations for their enforcement affirm the soundness of this reasoning.

As has been said earlier in this Memorial (p. 36), the idea of "sacred trust", or tutelage of peoples not yet able to govern themselves, was not new, being close to the concept of trust or *tutelle* in municipal law. However, effective application of the idea to international law and practice was new. Imbedded in the Mandates System was the doctrine that the mandatory, whose only legal right in the mandated territory, in the first place, lay in its assumption of a trust conferred by the League of Nations, could not conclusively determine for itself how to administer the territory. The League had a legal interest in the administration, and so did each member of the League.

The League's interest was to be exercised through administrative supervision. The interest of League Members was to be exercised,

¹ *International status of South West Africa*, Advisory Opinion: I.C.J. Reports 1950 p. 128 at 158-159

ultimately, through invoking the compulsory jurisdiction of the Permanent Court of International Justice. This aspect of control and supervision gave to the ideal of "sacred trust" a meaningful reality.

Supervision over Mandates necessarily has a dual character; it is both administrative and judicial. Judicial supervision is an indispensable feature of the Mandates System, since, if administrative supervision should fail, as in this case, there is no other method of enforcing the sacred trust which the mandatory power has assumed on behalf of civilization.

This fact has been given cogent expression by Norman Bentwich, scholar and Attorney-General of Palestine during the British Mandate for Palestine:

"The International Court has not yet been called upon to deal with the application or interpretation of any of the other Articles concerning public rights, the principle of the open door, or any of the international obligations undertaken by the mandatory. But it stands there, behind, as it were, the Mandates Commission and the Council of the League, as the *supreme guardian* of the rights of nations in the fulfilment of the international trust which is conferred on the Mandatory, and as the embodiment of international justice. It is the Palladium of justice in the development of the mandated countries, just as the Mandate Commission is the Areopagus." (Italics added.)¹

If the Mandate is in force, judicial supervision must likewise be in force, since the former is empty without the latter. Inasmuch as only States may be parties in cases before the Court (Article 34 of the Statute of the Court), it follows that unless the Applicant is entitled to institute a contentious proceeding, there is no method for obtaining an enforceable decision. If that were so, judicial supervision over the Mandate would be a nullity.

3. *The dispute relates to the "interpretation or application of the provisions of the Mandate", as the phrase is used in Article 7 thereof*

The provisions of the Mandate have been set forth in full as an annex hereto. The Applicant alleges, and the Union has denied, that the Union has violated and is violating Articles 2, 4, 6 and 7 of the Mandate. There is therefore a dispute concerning both the interpretation and the application of these Articles of the Mandate. The Applicant's contentions in this respect are set forth in Chapters V, VI, VII, VIII and IX of this Memorial, and submissions relating thereto are contained in Chapter X.

Article 7 of the Mandate refers to any dispute "whatever".

¹ Bentwich, *The Mandates System*, 134 (1930).

The Applicant has a legal interest in seeing to it through judicial process that the sacred trust of civilization created by the Mandate is not violated. As Quincy Wright, the American scholar has written in *Mandates under the League of Nations*:

“Every Member of the League can regard its rights as infringed by every violation of the mandatory of its duties under the mandate, even those primarily for the benefit of natives, and can make representations which, if not effective, will precipitate a dispute referable to the Permanent Court of International Justice if negotiation fails to settle it.”¹

In the *Mavrommatis Case*,² the Court took it for granted that Article 26 of the Palestine Mandate (as stated above such Article is identical to Article 7 of the Mandate herein) embraced disputes pertaining to the welfare of the inhabitants of the mandated territory. The issue discussed by the Court was whether “disputes relating to the interpretation or application of the Mandate” included claims made on behalf of a national *not* an inhabitant of the territory. Judge Oda’s dissenting opinion in the *Mavrommatis Case* takes the right for granted in case of an inhabitant:

“Under the Mandate, in addition to the direct supervision of the Council of the League of Nations ... provision is made for indirect supervision by the Court but the latter may only be exercised at the request of a Member of the League of Nations (Article 26). It is therefore to be supposed that an application by such a Member *must be made exclusively with a view to the protection of general interests* and that it is not admissible for a State simply to substitute itself for a private person in order to assert his private claims.”³ (Italics added.)

The opinion of Judge Bustamante in the same case, contains the following language:

“Whenever Great Britain as Mandatory performs in Palestine under the Mandate *acts of a general nature affecting the public interest*, the Members of the League—from which she holds the Mandate—are entitled, provided that all other conditions are fulfilled, to have recourse to the Permanent Court. On the other hand, when Great Britain takes action affecting private interests and in respect of individuals and private companies in her capacity as the Administration of Palestine, there is no question of juridical relations between the Mandatory and the Members of the League from which she holds the Mandate, but of legal relations between third Parties who have nothing to do with the Mandate itself from the standpoint of public law.”⁴ (Italics added.)

¹ At 475.

² *Case of the Mavrommatis Palestine Concessions*, P.C.I.J., Ser. A, No. 2 (1924).

³ *Id.* at 86.

⁴ *Id.* at 81-82.

Moreover, although the Union has denied that Article 7 is in force¹, the Union has nonetheless conceded that Article 7, if in force, entitled League members to institute proceedings to uphold the rights of inhabitants of the Territory.

Thus, the Union has stated:

"It was only in their capacity as Members of the League that third States were competent to uphold the rights of the inhabitants of mandated territories or to claim rights, for themselves in those territories"²

The Union has argued further:

"... Nor have individual Members of the United Nations any *locus standi* in respect of the administration of South West Africa. They could have had such a *locus standi* only as Members of the League."²

4. *The dispute "cannot be settled by negotiation", in the meaning of Article 7 of the Mandate*

The United Nations General Assembly has created agencies to negotiate directly on behalf of the members of the United Nations, including the Applicant herein, with the Union concerning the mandate. The Applicant has, therefore, appropriately manifested its viewpoints within the forum, and in accordance with the procedures established for the settlement of international disputes. The record of this case reveals that negotiations looking toward compliance with the Mandate have been attempted from the beginning of the United Nations. These negotiations have been fruitless, despite the Court's Advisory Opinion.

Such negotiations have been attempted through an *Ad Hoc* Committee, a Good Offices Committee, the Fourth Committee of the General Assembly and the Committee on South West Africa. After more than ten years of frustrated efforts at negotiation, the General Assembly concluded in a Resolution adopted in 1960, that "the dispute which has arisen between Ethiopia, Liberia and other Member States on the one hand, and the Union of South Africa on the other, relating to the interpretation and application of the Mandate *has not and cannot be settled by negotiation.*"³ (Italics added.)

¹ Presumably, the Union denies that Article 7 is in force since it states that the Mandate is not in force. It is well to note, however, that on 7 December 1950 the Union's representative to the Fourth Committee stated: "Any State which was a member of the League at its dissolution could therefore still implead the Government of the Union of South Africa before the International Court of Justice in respect of any dispute between such a Member State and the Government of the Union of South Africa relating to the interpretation or the application of the provisions of the Mandate."

"The importance of the continued existence of the judicial supervision provided by article 7 of the Mandate cannot be overlooked . . ." (U.N. Doc. No. A/C.4/185 at 8 (1950).)

² *International status of South West Africa*, Pleadings, Oral Arguments, Documents at 290 (I.C.J. 1950), Dr. Steyn's statement on Behalf of the Union.

³ Resolution 1565 (XV) of 18 December 1960, U.N. Gen. Ass. Off. Rec. 15th Sess., Supp. No. 16 at 32 (A/4684) (1960).

C. CONCLUSION

It is respectfully submitted that the Court has jurisdiction to hear and adjudicate disputes arising under the Mandate; that the Court has jurisdiction over the parties to the present proceedings; that a dispute has arisen which is the subject-matter of these proceedings; and that the Court has jurisdiction to hear and adjudicate the dispute, inasmuch as it cannot be settled by negotiation.

IV

LEGAL BASIS OF THE UNION'S OBLIGATIONS
UNDER THE MANDATE

A. INTRODUCTION

As described above, the Applicant and the Union have a long-standing dispute regarding the status of the Mandate and the Union's duties and obligations thereunder. The Union, before and since the Court's Advisory opinion of 11 July 1950, has adopted the position that the Mandate has lapsed and that it has no duties and obligations thereunder. The Applicant has insisted that the Mandate continues to exist and that all of the duties and obligations stated therein are binding upon the Union.

B. APPLICANT'S SUBMISSIONS ON THIS POINT

To resolve the dispute in a manner which will unquestionably bind the Union formally, the Applicant in this contentious proceeding, requests the Court to declare the following as law:

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; and that the aforesaid Mandate is a treaty or convention in force, within the meaning of Article 37 of the Statute of the International Court of Justice;

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 petitions are to be submitted, and whose consent is a legal prerequisite and condition precedent to modification of the terms of the Mandate.

The International Court of Justice has already pronounced upon these identical questions [see pp. 23, 24], and has held in favor of the above submissions of law. These holdings were pronounced after full hearings of the Union's point of view, and after the Union had submitted both written and oral argument to the Court.¹

¹ See footnotes 4 and 5, p. 51, *supra*.

C. EFFECT OF THE PREVIOUS ADVISORY OPINION

The Applicant respectfully urges the Court to follow the rationale of the Permanent Court of International Justice in *Case Concerning German Interests in Polish Upper Silesia*, P.C.I.J., Series A, No. 7, (1926) ("*Upper Silesia*"). This was a contentious proceeding, brought by Germany against Poland, involving the question whether Article 256 of the Treaty of Versailles justified Article 5 of the Polish Law of July 14, 1920, under which Poland claimed the right to expel German colonists settled in Polish territory formerly belonging to Germany. The Permanent Court had pronounced upon the identical question in an Advisory Opinion, *German Settlers in Poland*, P.C.I.J., Series B, No. 6 (1923), ("*German Settlers*"), after consideration of oral and written arguments of Poland and Germany. In its Advisory Opinion, the Permanent Court had held that Article 256 of the Versailles Treaty did not justify Article 5 of the aforementioned Polish Statute, and gave its reasons for the holding. In its judgment in the contentious proceeding, the Court reaffirmed its ruling that Article 256 of the Treaty of Versailles did not justify Article 5 of the Statute. The relevant excerpt from the Opinion of the Court follows:

"As regards Article 5 of the Polish Law of July 14th, 1920, Poland claims to have acquired, free from all charges, the property mentioned in Article 256 of the Treaty of Versailles.

This question has already been considered by the Court in its Advisory Opinion No. 6 [German Settlers in Poland.] The Court has held that Article 256 of the Treaty of Versailles cannot be regarded as justifying Article 5, because, although the Treaty does not expressly and positively enunciate the principle that in the event of a change in sovereignty, private rights must be respected, this principle is clearly recognized by the Treaty. Nothing has been advanced in the course of the present proceedings calculated to alter the Court's opinion on this point."¹ (Italics added.)

It is submitted that the Permanent Court's express reasons for reaffirming in the contentious proceeding, its prior advisory ruling are fully applicable here: (a) relevant issues in the present case are identical to those considered by the Court in *International Status of South West Africa*, just as in *Upper Silesia* the issue in the contentious proceeding was identical to that ruled on in the advisory proceeding, *German Settlers in Poland*; (b) issues raised and decided in *International Status of South West Africa* involve the same State, the Union, just as the issue in *Upper Silesia* and *German Settlers* involved the same State, Poland; (c) prior to deciding *International Status of South West Africa*, the Court received oral and written argument from the Union, just as in *German Settlers*, the Court had

¹ *Case Concerning German Interests in Polish Upper Silesia*, P.C.I.J., Ser. A, No. 7 at 31 (1926).

received Poland's written and oral argument; (d) the facts upon which the Court rested its Advisory Opinion in 1950 have not changed, just as the facts forming the basis for the Permanent Court's Advisory Opinion in *German Settlers* had not changed.

The doctrine enunciated by the Permanent Court embodies the recognition that (1) advisory opinions are not enforceable and do not have the force of *res judicata*; nevertheless, they state what the law on a given question is, and when that question concerns an actual dispute, the advisory opinion, especially if rendered after full hearing of the disputants' submissions is "substantially equivalent to deciding the dispute;" (2) the International Court does not adhere to the doctrine of *stare decisis*; nevertheless it will not readily depart from a prior ruling, especially if the subsequent proceeding involves issues of fact and law identical in every respect to those in the prior proceeding.

The above two elements underlying the Permanent Court's practice in *Upper Silesia* are grounded on the understanding that the substance of a ruling and the enforceability of a ruling are two separate matters. There is no reason to suppose that the absence of the latter impairs the quality of the former, or that the Court will find the law to be one thing in an advisory proceeding and another thing in a contentious proceeding. This assumes participation in the advisory proceeding by the State whose rights and duties are the subject of the ruling on the merits of a dispute. (Such participation occurred in *International Status of South West Africa*.)

The practice of the Permanent Court in *Upper Silesia* and the foregoing explanations of that practice are supported by the weight of long-standing judicial and scholarly opinion, as well as the practice of States.

I. *Judicial and Scholarly Opinion*

(a) *Judicial Opinion*

In the *Eastern Carelia Case*,¹ the Permanent Court of International Justice considered the nature of advisory opinions, inasmuch as a preliminary question in the case was whether an advisory opinion concerning the rights and duties of Russia should be rendered, in the absence of Russian consent and participation. The Permanent Court refused to deliver an advisory opinion on the ground that it would not decide a dispute concerning Russia without Russia's consent. The Court affirmed that an advisory opinion, while not binding, is nevertheless "substantially equivalent to deciding a dispute." These are the Court's words:

"The Court is aware of the fact that it is not requested to decide a dispute, but to give an advisory opinion. This circumstance, however, does not essentially modify the above considera-

¹ *Eastern Carelia Case*, P.C.I.J., Ser. B, No. 5 (1923).

tions. The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia, and can only be decided by an investigation into facts underlying the case. *Answering the question would be substantially equivalent to deciding the dispute between the parties.* The Court, being a Court of Justice, cannot even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."¹ (Italics added.)

It is submitted that the rationale of this decision is fully applicable to the converse case, present here, involving full participation of the State whose duties were litigated, with its consent and participation in the Advisory Opinion of 11 July 1950.

This Court considered the nature of advisory opinions in the *Peace Treaties* case,² involving the question whether procedures for settlement instituted by certain Peace Treaties were applicable to a given dispute. The Court rendered an advisory opinion even though some of the States parties to the treaties did not participate in the hearings.³ Majority and dissenting opinions alike recognized implicitly or explicitly the principle of *Eastern Carelia*, namely that an advisory opinion as to a dispute is "substantially equivalent to deciding the dispute". The main disagreement in *Peace Treaties* was whether the subject-matter of the advisory opinion involved the merits of the dispute and not whether the principle of *Eastern Carelia* was valid. To illustrate this point, and, also, to show that the majority opinion recognized the validity of the Permanent Court's holding in *Eastern Carelia*, the following excerpt from the majority opinion is presented:

"In the opinion of the Court, the circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the *Eastern Carelia* case (Advisory Opinion No. 5), when that Court declined to give an Opinion because it found that the question put to it was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties, and that at the same time it raised a question of fact which could not be elucidated without hearing both parties.

As has been observed, the present Request for an Opinion is solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties, and it is justifiable to conclude that it in no way touches the merits of those disputes."³

The majority opinion thus followed the doctrine of *Eastern Carelia*, but distinguished the two cases.

¹ *Id.* at 29.

² *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion: I.C.J. Reports 1950, p. 65.

³ *Id.* at p. 72.

Dissenting judges, however, considered that *Peace Treaties* could not be distinguished from *Eastern Carelia*, and some of them felt obliged once again to examine in detail the nature of an advisory opinion. Judges Azevedo, Winiarski and Zoričić in *Peace Treaties*, supported the proposition (1) that an advisory opinion is a definitive statement on the law in a given situation, (2) when the situation is an actual dispute, the advisory opinion is substantially equivalent to deciding the dispute, and (3) for these reasons, the Court will not readily depart from an advisory ruling when the identical situation is subsequently presented in a contentious proceeding.

Judge Azevedo stated:

"True, it was generally recognized that an ordinary advisory opinion did not produce the effects of the *res judicata*; nevertheless, that fact is not sufficient to deprive an advisory opinion of all the moral consequences which are inherent in the dignity of the organ delivering the opinion, or even of its legal consequences."¹

Judge Winiarski stated:

"Opinions are not formally binding on States nor on the organ which requests them, they do not have the authority of *res judicata*; but the Court must, in view of its high mission, attribute to them great legal value and a moral authority."² (Italics added.)

Judge Zoričić stated:

"It is clear that an advisory opinion is, in its legal nature, different from a judgment. In a judgment, which is always the result of a contentious case, the Court decides all the issues in dispute, the judgment is unappealable and becomes *res judicata*, so that the rights and obligations of the States are legally and definitively established.

Advisory opinions, on the other hand, are given at the request of an international organ authorized to ask for them; the Court gives its answer to the questions put to it, but the opinion possesses no binding force.

This is certainly the difference between a judgment and an advisory opinion, regarded from a formal and strictly legal point of view. In actual life, however, the matter often assumes a very different aspect and it may be said that, in practice, *an advisory opinion given by the Court in regard to a dispute between States is nothing else than an unenforceable judgment*. The first reason is that, in such a case, the procedure normally follows the same course as in an actual contentious case. The States parties to the dispute submit written and oral statements, the case is argued in open Court, the full Court deliberates, the national judges take part in the deliberations of the Court and in the voting and, finally, the opinion is read out at a public sitting and printed in the Court's publications exactly in the same way as a judgment.

¹ *Id.* at p. 80.

² *Id.* at p. 91.

Secondly, *the Court's advisory opinions enjoy the same authority as its judgments*, and are cited by jurists who attribute the same importance to them as to judgments. The Court itself refers to its previous advisory opinions in the same way as to its judgments.

Thirdly, *an advisory opinion which is concerned with a dispute between States from a legal point of view amounts to a definitive decision upon the existence or non-existence of the legal relations, which is the subject of the dispute.*"¹ (Italics added.)

Another judicial pronouncement on advisory opinions concerned the very Opinion under discussion in this case, the 11 July, 1950 Opinion, *International Status of South West Africa*. Judge Lauterpacht in his separate opinion in *Admissibility of Hearings of Petitioners By the Committee on South West Africa*, Advisory Opinion, June 1, 1956 (I.C.J. Reports 1956) stated, at page 47:

"For it may not be easy to characterize precisely in legal terms a situation in which South Africa declines to act on an Advisory Opinion which it was not legally bound to accept *but which gave expression to the legal position as ascertained by the Court and as accepted by the General Assembly.*" (Italics added.)

At page 46, Judge Lauterpacht characterized the Opinion as stating "the law recognized by the United Nations".

Implicit in Judge Lauterpacht's comments is the recognition that although advisory opinions may not bind a State to guide its actions by law, advisory opinions can and do state what the law requires. There would also appear to be an implicit recognition of the anomalous situation which would occur if the law were one thing for the United Nations and the opposite for the Union of South Africa.

(b) *Opinions of Writers*

Most writers are in substantial agreement with the foregoing judicial precedents, and even those who do not agree fully, nevertheless recognize the high authority of an advisory opinion.

The late Judge Manley O. Hudson placed less emphasis on the effect of advisory opinions than other writers, but he nevertheless recognized the substantial force of an advisory opinion, especially in his later writings. In a note in the "American Journal of International Law",² Judge Hudson stated:

"Advisory opinions are precisely what they purport to be. They are advisory. Not legal advice in the ordinary sense, not views expressed by counsel for the guidance of clients, *but pronouncements as to the law applicable in given situations formulated after 'due deliberation' of the court*

.....

¹ *Id.* at pp. 101-102.

² *American Journal of International Law*. Vol. 42, No. 3, July, 1948 at 630.

"States and organizations interested, whether they have appeared to 'furnish information' or not, continue to have a freedom to determine upon the course which they will adopt with reference to the matter which an opinion relates. *To the extent to which the course adopted follows the law applicable, they will feel impelled to heed the authoritative exposition of that law in an opinion of the Court.*" (Italics added.)

Other writers have gone much further. M. Politis has stated that advisory opinions are "in reality no longer such", and are "equivalent in the eyes of the Council, of public opinion, and of the interested parties to a judgment."²

A middle ground can be found in the writings of Rosenne:

"The [Advisory] opinion has no binding force because in normal advisory proceedings there are no parties upon whom the contractual obligations can be imposed. In that sense only can it be said that no *res judicata* results from an advisory opinion. *This does not affect the quality of the opinion as an authoritative pronouncement of what the law is ...*"³ (Italics added.)

F. Blaine Sloan confirms the foregoing doctrine, cogently describing the rationale of the Permanent Court's ruling in *Upper Silesia*:

"Certainly an advisory opinion will not have greater weight than a judgment in this respect [*stare decisis*]. However, neither does it appear to have lesser weight. International jurisprudence bears witness that the advisory opinions and judgments of the Permanent Court of International Justice are cited with equal authority and respect. While the concept of *stare decisis* is not recognized as a principle, as it is in Anglo-American law, the Court will not lightly depart from the legal reasoning of its prior decisions."⁴

"Suppose ... that after the giving of an [advisory] opinion there is an attempt to bring the identical question to the Court by way of application by the State against whose interest the advisory opinion was given. Formally the court would probably be in a position to entertain the case but from a practical viewpoint, its judgment in all likelihood would be exactly the same as its opinion. It is true, however, that this might depend on the extent to which there were full hearings of the issues in the advisory opinions."⁵

As already noted, there were full hearings of the issue in *German Settlers in Poland*, the advisory case preceding *Upper Silesia*, just

¹ *Id.* at 631.

² Records of 9th Ass. of League of Nations, 1st Comm. at 47.

³ Rosenne, *International Court of Justice* 492-493 (1957).

⁴ "Advisory Jurisdiction of the International Court of Justice", 38 California Law Review 830 at 851 (1950).

⁵ *Id.* at 852.

as there were full hearings of the issues in *International Status of South West Africa*, the advisory proceeding preceding the present case.

2. *The Practice of States*

The general practice of States has been to recognize that an advisory opinion as to a dispute between States is substantially equivalent to a decision on the merits of the dispute. Indeed, it is because of this recognition that States have insisted that the Court may not render advisory opinions concerning their rights and duties without their consent, just as is the case with contentious proceedings. Such an attitude of States is described by Judge Winiarski in his opinion in *Peace Treaties*:

“... the Court, as a judicial organ, will surround itself with every guarantee to ensure thorough and impartial examination of the question [in an advisory proceeding]. For the same reason, States see their rights, their political interests and sometimes their moral position affected by an opinion of the Court, and their disputes are in fact settled by the answer which is given to a question relating to them, which may be a ‘key question’ of the dispute. This explains the interest States have in being heard in advisory proceedings, in being represented and being permitted to designate their national judges, which would be perfectly useless if advisory opinions were mere utterances having no real importance in respect of their rights and interests. This is also why the Permanent Court did not hesitate to grant States the necessary guarantees, and, in order to exclude any possibility of introducing compulsory jurisdiction by the circuitous means of its advisory opinions, it deliberately laid down in Opinion No. 5 [Eastern Carelia] the principle of the consent of the parties (Article 36 of the Statute).”¹

To corroborate the above views of Judge Winiarski, reference may be made to the practice of the United States of America. When the United States acceded to the Protocol of Signature of the Statute of the Permanent Court of International Justice, it did so with the following reservation:

“... Nor shall it [the Court] without the consent of the United States entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.”²

Similarly, the Union of Soviet Socialist Republics has also insisted that the Court may not consider, in advisory proceedings, disputes to which it is a party without its consent, as is exemplified by the *Eastern Carelia Case*.

¹ *Interpretation of Peace Treaties With Bulgaria, Hungary and Romania*, Advisory Opinion: I.C.J. Reports 1950, p. 92.

² L.N.C./166/M/66. 1929. V, p. 97.

D: CONCLUSION

Judicial and scholarly precedent and the views and practices of States confirm and support the practice of the Permanent Court in *Upper Silesia* wherein the Permanent Court stated that it had already ruled upon an issue in an advisory proceeding and then reaffirmed that ruling when the same issue arose in the contentious proceeding.

It is respectfully submitted that in the present case, the Court should similarly reaffirm the advisory opinion it delivered in *International Status of South West Africa*.

V

ALLEGED VIOLATIONS BY THE UNION OF THE SECOND
PARAGRAPH OF ARTICLE 2 OF THE MANDATE

A. STATEMENT OF LAW

The second paragraph of Article 2 of the Mandate for South West Africa provides:

"The Mandatory shall promote to the utmost the *material and moral well-being and the social progress* of the inhabitants of the Territory subject to the present Mandate." (Italics added.)

The second paragraph of Article 2 of the Mandate was derived from, and was intended to give effect to, paragraph 1 of Article 22 of the Covenant of the League of Nations, which reads:

"Article 22

1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the *well-being and development of such peoples form a sacred trust of civilization* and that securities for the performance of this trust should be embodied in this Covenant." (Italics added.)

The purport of the language in Article 2 of the Mandate and Article 22 of the Covenant, quoted hereinabove, is clear and explicit. The Union is not free to administer the Territory in any manner it chooses. It may not subjugate the majority of the inhabitants of the Territory in the interest of a minority. It may not act in disregard of human rights so basic and so fundamental that without them the rules of social intercourse must always be determined by force.

The Applicant is aware that differences of opinion could arise as to close or doubtful issues concerning the application of the terms of Article 22 of the Covenant and Article 2 of the Mandate. In the present case, however, the issues of fact and law, and of the application of law to fact, do not involve conjecture. The violation of the duty to promote "material and moral well-being and social progress" is beyond argument.

Any doubt concerning the interpretation and application of Article 2 of the Mandate and Article 22 of the Covenant to this case is resolved in the light of currently accepted standards as reflected in Chapters XI, XII and XIII of the Charter of the United Nations. The Union, by becoming a member of the United Nations,

not only must have accepted the validity of the principles contained in the Charter, but by the act of membership, undertook to comply therewith.

The above cited Articles of the United Nations Charter are *in pari materia* with Article 2 of the Mandate and Article 22 of the Covenant.

It is a well-settled doctrine of international law that when the provisions of instruments are in *pari materia*, one may be used as a guide to the interpretation of the other.

Chapters XI, XII and XIII of the Charter are addressed to essentially the same subject-matter as was Article 22 of the Covenant. These Chapters were formulated in the context of problems of precisely the same type as those to which Article 22 of the Covenant was addressed.

Chapters XI, XII and XIII of the Charter embody a projection and current application of the principles and methods of Article 22 of the Covenant. This appears plainly, for example, from Article 77 of the Charter, which reads in part:

"Article 77

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

a. territories now held under mandate;".

Chapters XI, XII and XIII of the Charter not only deal with problems similar to those to which Article 22 of the Covenant was addressed, but do so in similar language and intent. For example, Article 77, paragraph 1, of the Charter, quoted in part above, also provides that trusteeships may be established for "territories which may be detached from enemy states as a result of the Second World War". This is a paraphrase of the opening clause of paragraph 1 of Article 22 of the Covenant: "To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them ... "

In view of (a) the historical relationships between Article 22 of the Covenant and Chapters XI, XII and XIII of the Charter, (b) the similarity—indeed, to a degree, the identity—of the problems to which Chapters XI, XII and XIII of the Charter and Article 22 of the Covenant are addressed, and (c) the similarities in subject-matter, structure and expression, reference may properly be made to the terms of Chapters XI, XII and XIII of the Charter in construing Article 22 of the Covenant, as well as Article 2 of the Mandate, which is of course derived from the Covenant.

The doctrine of "*in pari materia*" was given effect by the Permanent Court of International Justice in the case of *Interpretation*

of the 1919 Convention on Employment of Women at Night¹ In its judgment, the Court construed a provision of a Convention adopted in 1919 by the International Labor Conference, taking into account the terms of another Convention—the Eight Hour Day Convention—relating to a comparable subject-matter and problems. The Court said:

“The similarity both in structure and in expression between the various draft conventions adopted by the Labor Conference in Washington in 1919 leads the Court to attach some importance to the presence in one of the other Conventions of a specific exception that the provisions of that Convention should not apply to persons holding positions of supervision or management, nor to persons employed in a confidential capacity.”²

In the present proceeding, reference to Chapters XI, XII and XIII of the Charter is all the more appropriate by virtue of a Resolution of the Assembly of the League of Nations of April 18, 1946, explicitly noting “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.” The Resolution states, in part:

“The Assembly,

Recalling that Article 22 of the Covenant applies to certain territories placed under Mandate the principle that the well-being and development of peoples not yet able to stand alone in the strenuous conditions of the modern world form a sacred trust of civilization;

3. 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;

4. Takes note of the expressed intention of the members of the League now administering territories under Mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective mandates, until other arrangements have been agreed between the United Nations and the respective mandatory powers.”

It is respectfully submitted that Chapters XI, XII, and XIII of the United Nations Charter are in *pari materia* with Article 2 of the Mandate and Article 22 of the Covenant, and, therefore, that the terms of the Charter may be employed in construing Article 2 of the Mandate and Article 22 of the Covenant. Accordingly, we turn

¹ *Interpretation of the 1919 Convention on Employment of Women at Night*, P.C.I.J., Ser. A/B, No. 50 (1932).

² *Id.* at 380-81.

now to a consideration of relevant provisions of Chapters XI, XII and XIII of the Charter.

Article 73 of the Charter provides:

"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; (Italics added).*

Article 76 provides:

"The basic objectives of the trusteeship system shall be...

b. to promote the political, economic, social and educational advancement of the inhabitants of the trust territories and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned...

c. *to encourage respect for human rights and for fundamental freedoms for all without distinction as to race...*" (Italics added.)

It is submitted that the terms of the second paragraph of Article 2 of the Mandate and Paragraph 1 of Article 22 of the Covenant and their stated purposes, read in the light of the terms and stated purposes of Chapters XI, XII and XIII of the Charter, establish clear and meaningful norms marking the duties of the Mandatory. In accordance with these legal norms, the Mandatory's duties to safeguard and promote the "material and moral well-being", the "social progress" and the "development" of the people of the Territory must reasonably be construed to include:

(1) Economic advancement of the population of the Territory—and notably of the "Natives" who constitute the preponderant part of the total population in agriculture and industry;

(2) Rights and opportunities of members of the population employed as laborers in agriculture or industry;

(3) Political advancement of such persons through rights of suffrage, progressively increasing participation in the processes of government, development of self-government and free political institutions;

- (4) Security of such persons and their protection against arbitrary mistreatment and abuse;
- (5) Equal rights and opportunities for such persons in respect of home and residence, and their just and non-discriminatory treatment;
- (6) Protection of basic human rights and fundamental freedoms of such persons;
- (7) Educational advancement of such persons;
- (8) Social development of such persons, based upon self-respect and civilized recognition of their worth and dignity as human beings.

B. STATEMENT OF FACTS: POLICIES AND ACTIONS RELATING TO THE SECOND PARAGRAPH OF ARTICLE 2 OF THE MANDATE

I. Introduction

1. In this section of the Memorial, the Applicant presents the facts bearing upon the obligation of the Union, as the Mandatory, to "promote to the utmost the material and moral well-being" of the inhabitants of South West Africa, to promote their "social progress", and to foster their "development" as a "sacred trust of civilization".

2. The factual record of the Mandatory's conduct, as herein-after more particularly set forth, has a dreary and forbidding consistency. The Union has not only failed to promote "to the utmost" the material and moral well-being, the social progress, and the development of the people of South West Africa, it has failed to promote such material and moral well-being and social progress in any significant degree whatever. On the contrary, efforts of the Union have in fact been directed to the opposite end. 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, color and tribe, in a pattern which ignores the needs and capacities of the groups and individuals affected, and subordinates the interests and rights of the great majority of the people to the preferences of a minority. Since this section of the Memorial is concerned with the record of fact, it deals with *apartheid* as a fact and not as a word. It deals with *apartheid* in practice, as it actually is and as it actually has been in the life of the people of the Territory, and not as a theoretical abstraction. A sober and objec-

tive appraisal of the factual record, as hereinafter detailed, compels the conclusion that *apartheid*, as actually practised in South West Africa, is a deliberate and systematic process by which the Mandatory excludes the "Natives" of the Territory from any significant participation in the life of the Territory except insofar as the Mandatory finds it necessary to use the "Natives" as an indispensable source of common labor or menial service.

2. Background Information: Area and Population

3. The Territory of South West Africa has an area of 318,261 square miles.¹ The Territory has been divided by the Union Government into two main segments. The larger segment is known as the Police Zone. The Police Zone embraces generally the southern and central sections of the Territory, being the richer and better developed portion,² covering 258,571 square miles. The smaller segment, lying to the north, is the poorer and less well developed portion,² covering 59,690 square miles. It is usually referred to as the "northern section" or as the area "outside the Police Zone". A map of South West Africa, showing the division into zones, is appended to the 1958 Report of the Committee on South West Africa, which has been filed herewith.

4. As of 1951, when the latest census was taken, the total population of South West Africa numbered 434,081.³ As of mid-1958, the total population was estimated to have risen to 539,000.⁴ The census report, reflecting the standard usage of the Union Government, refers to the population as divided into four groups. The four groups are described as follows:

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

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

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

"(d) *Coloureds*.—All persons not included in any of the three groups mentioned above."⁵

¹ This figure is taken from U.N. Doc. No. A/AC.73/L.14, Annex I, Table I (1959), which derived the figure from the South West Africa Population Census, 8 May 1951. In U.N. Doc. No. A/AC.73/L.10 at 11 (1957) the area of South West Africa is given as 317,863 square miles (82,347,841 hectares).

² Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 14th Sess., Supp. No. 12 at 21 (A/4191) (1959).

³ South West Africa Population Census 8 May 1951, cited in U.N. Doc. No. A/AC.73/L.14 at 5, para. 11 (1959).

⁴ Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 14th Sess., Supp. No. 12, p. 8, para. 55 (A/4191) (1959).

⁵ *Id.* at 4, para. 9.

The "Whites" are sometimes referred to as "Europeans". The term "Coloured" ordinarily means any person of mixed "European" and "Native" descent. The term "Native" is sometimes applied to persons having one parent who belongs to an "aboriginal race or tribe of Africa".

5. Since the foregoing terms are employed in the laws and other texts of the Union and the Territorial Administration, and represent differences in the legal, as well as in the economic and social status of the inhabitants, the Applicant will employ these terms in the Memorial.

6. Of the total population of the Territory, as of 1951, when the latest census was taken, the "Natives" numbered 366,885; the "Europeans", 49,930; the "Coloured", 17,262; and the "Asians", 4.¹ As of mid-1958, the figures were estimated to have risen to 452,000 "Natives", 66,000 "Europeans", and 21,000 "Coloured."²

7. As of 1951, a majority of the population, 227,912, lived in the smaller northern section, outside the Police Zone. The population of the Police Zone, despite its larger size, numbered only 203,169. Outside the Police Zone, the population was composed of 227,750 "Natives", 136 "Europeans", and 26 "Coloured". Inside the Police Zone, the population was composed of 139,135 "Natives", 49,794 "Europeans", and 17,236 "Coloured".²

8. Of the population outside the Police Zone, the vast majority live in the Ovamboland Native Reserve, the population of which was estimated in 1956 to number slightly over 200,000.²

9. The entire Territory outside of the Police Zone is classed as rural. Urban areas are found only within the Police Zone.²

10. Of the "European" population of the Territory, as of the 1951 Census, the preponderant majority, 45,439 out of 49,930 were citizens of the Union. Classified by their mother tongue, as of mid-1958, 33,091 of the "Europeans" were Afrikaans-speaking, 11,931 German-speaking, and 4,158 English-speaking.³

3. *Well-being, Social Progress and Development: the Economic Aspect*

(a) *Statement of Law*

"In accordance with these legal norms, the Mandatory's duties to safeguard and promote the 'material and moral well-being', the 'social progress' and the 'development' of the peoples of the Territory, must reasonably be construed to include:

¹ U.N. Doc. No. A/AC.73/L.14 at 5-6, paras. 11-16, and Annex I, Table 1 (1959).

² Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 14th Sess., Supp. No. 12 at 8, para. 55 (A/4191) (1959).

³ Report of the Committee on South West Africa, Gen. Ass. Off. Rec. 14th Sess., Supp. No. 12 at 8, para. 56 (A/4191) (1959).

(1) Economic advancement of the population of the Territory—and notably of the 'Natives' who constitute by far the preponderant part of the total population in agriculture and industry;

(2) Rights and opportunities of members of the population employed as laborers in agriculture or industry; ...

(3) Social development of such persons, based upon self respect and civilized recognition of their worth and dignity as human beings."¹

(b) *Statement of Facts*

Background Information:
The Economy of South West Africa

11. Economic activity in South West Africa consists primarily of agriculture, more particularly the raising of livestock; mining; and fishing, together with the processing of fish products.

12. Because of the low and uncertain rainfall, crop farming is feasible only on a limited basis. In the northern areas outside the Police Zone, virtually all agricultural products are consumed locally by the producers. Within the Police Zone, however, much of the produce is sold on the domestic or foreign market, thus entering into the monetary economy. In the northern and central areas of the Police Zone, agricultural activity centres on beef and dairy farming. In the southern reaches of the Police Zone, the sheep industry predominates. The farmers raise Karakul sheep, from which the yield is marketed chiefly in the form of pelts, sold in Europe and North America as "Persian Lamb" or "Astrakhan fur". Exports from the Police Zone in the form of beef, dairy products, and pelts were valued, as of 1956, at some £13 million a year. Agricultural products consumed locally within the Police Zone were estimated at about £600,000 a year.²

13. In the period since the end of World War II, there has been a rapid growth in fishing and in the processing of fish-products. The chief crops are rock lobster tails, sardines, fish meal, and fish oil. In the aggregate, the value of fish products has been estimated at about £6 million a year.³

14. In the same period, since the end of the Second World War, the extent and rate of operations in mining has grown by leaps and bounds. Aggregate sales expanded from about £1.5 million in 1945 to £22.9 million in 1955.⁴ The mineral output includes diamonds, the largest single item in value, copper, lead, and other metals. While small mining enterprises are numerically in the majority,

¹ Pp. 78-79 *supra*.

² U.N. Doc. A/AC.73.L.10 at 12, para. 6; *cf.* p. 80, para. 211 and 81, paras. 215-17 (1957).

³ *Id.* at 80-81, para. 214.

⁴ *Id.* at 80, para. 213.

the greater part of the output of the mining industry is represented by four large producers.¹

15. Total public revenues of the Territory in the year 1955-56 amounted to over £12 million. Of this total, upwards of £5 million were raised through income taxation. In part because of this income, and in part because of a surplus carried over from the previous fiscal year, the Administration of South West Africa was able to budget for a total expenditure of about £10.5 million in the fiscal year 1955-56.²

Well-being, Social Progress and Development in Agriculture

16. As has already been explained, the bulk of the "Native" population of the Territory is to be found in the northern areas outside the Police Zone. In consequence, the "Native" population is in the main far removed from the principal areas of modern economic development and activity. Within the northern areas, the "Natives" survive chiefly by means of subsistence agriculture, including both crops and livestock. While these activities keep the "Native" population alive under normal conditions, they do not make it part of the modern monetary economy. The "Natives" from the northern areas obtain access to the modern monetary economy almost exclusively by serving as laborers on the farms within the Police Zone and in industry.³

17. Until 1954, the land in "Native" reserves remained the property of the Administration of South West Africa, except in the case of the Berseba and Bondels Reserves, in which the land was the property of the tribe. In 1954, the South West African Native Affairs Administration Act was adopted. By its terms, title to all land set apart for the occupation of "Natives" in "Native" reserves was vested in the South African Native Trust. The Minister of Native Affairs of the Union of South Africa serves as the Trustee of the South African Native Trust, and in that capacity exercises much the same powers and functions with respect to "Native" land in South West Africa as he does with respect to such land included within the Union itself.⁴

18. On the commercial farms, owned by "Europeans", "Natives" work mainly as farm laborers and domestic servants. In some cases, they are allowed to graze a certain number of stock of their own on these farms. "Natives" available locally for farm labor on the commercial farms within the Police Zone are supplemented by other "Natives" recruited from the Northern reserves.⁵ The process

¹ *Ibid.*

² *Id.* at 81-82, para. 217.

³ *Id.* at 82, para. 218.

⁴ *Id.* at 83, para. 223.

⁵ *Id.* at 82, para. 218-19.

of recruitment of such "Native" labor for work on the commercial farms is similar to that applied in the case of recruitment of "Native" labor for employment with industry. As a matter of convenience, this process of recruitment is described below, in the paragraphs dealing with industrial employment.¹

19. One source of "Native" labor authorized by law for "European" owned commercial farms merits particular comment. Under land settlement laws, described below, considerable portions of land have been allocated by the Administration for settlement by "Europeans". "Natives" living on such lands at the time of such an allocation may be required under the land settlement laws either to move or to work for the "European" farmer.²

20. In "Native" reserves and other areas reserved for "Native" occupation, neither "Natives" nor "Europeans" are entitled to acquire ownership.³

21. While the Government of the Union made a statement in 1946 which seems to imply a possibility that individual "Natives" may own land, the implication appears to be negated by the evidence.

a. In its reply to the Trusteeship Council questionnaire concerning the administration of South West Africa for the year 1946, the Union Government stated:

"Natives may buy land outside the reserves and they may occupy such land provided it is not situated in an urban area to which the provisions of the Natives (Urban Areas) Proclamation No. 34 of 1924 have been applied."⁴

b. Section 7 of the Natives (Urban Areas) Proclamation, 1951, which supersedes the 1924 Proclamation, prohibits any "native" and any "association, corporate or unincorporate, in which a native has any interest, ... except with the approval of the Administrator, given after consultation with the local authority concerned," from entering "into an agreement or transaction for the acquisition from any person other than a native of any land situated within an urban area or a rural township, or of any right to such land, or of any interest therein or servitude thereover."⁵

Furthermore, as more particularly set forth in paragraph 27 below, the Union Government has stressed its conviction that "the Natives generally have not yet reached the stage of development where they would benefit from individual land ownership, particularly of farms".

¹ See post, paras. 50-57.

² Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 14th Sess., Supp. No. 12 at 17, para. 123 (A/4191) (1959).

³ U.N. Doc. No. A/AC.73/L.10, at 83, para. 224 (1957).

⁴ U.N. Doc. No. A/AC.73/L.3/Add. 1, at 302, para. 2 (1954).

⁵ (1951) Laws of South West Africa, pp. 90ff. (Proc. No. 56 of 1951) § 7 (7).

In sum, on the basis of available information, it may be inferred that no individual "Natives" own land or can own land anywhere within the Territory of South West Africa.¹

22. The significance of the foregoing data can be appreciated more fully in the light of the history of land allocation and land alienation within the Territory. When the Union of South Africa assumed the Mandate, the Union declared all unallocated land within the Territory to be government land. Thereafter the Union transferred authority over government or Crown land to the "European" Legislative Assembly of the Territory.²

23. During the period of the Mandate, a major portion of the land area of the Territory has been transferred to "Europeans" for permanent settlement.³ In the systematic execution of this policy of alienation of land to "Europeans", the Union continued a process which had been begun by the former German Colonial regime. The Union Government, indeed, took cognizance of the prior seizure of land from the "Natives" by the German Colonial regime. In the Union's report to the League of Nations in 1922, it discussed the confiscation of "Native" lands in the following terms:

"The Natives, who of course had been the original owners of the land which had ... been confiscated by the German Government, cut up into farms and sold or allotted to Europeans, had formed the expectation that this Administration (Mandatory) ... would similarly confiscate German-owned farms and thus the Natives would recover the lost land and homes previously occupied by them. Almost without exception each section asked for the allotment of the old tribal areas, in which vested rights had accrued and the utmost difficulty was experienced in making them realize the utter impossibility of complying with such a request."⁴

24. The Mandatory insisted on making the "Natives" realize "the utter impossibility of complying with such a request" that land seized from them be returned to them. It also went much further. It continued and extended the systematic alienation of the land to "Europeans". During the first three years of the administration of the Mandate alone, from 1920 to 1922, 4,884,625 hectares were transferred to "European" settlers. The process has been maintained, subject only to a temporary interruption by the Second World War. Indeed, by 1929, most of the available government land (i.e. previously unallocated land—see para. 22 *supra*) within the Police Zone had been distributed. The Union then began

¹ *Ibid.*; see also U.N. Doc. A/AC.73/L.7, at 333, paras. 154-155.

² Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 14th Sess., Supp. No. 12 at 17, para. 116 (A/4191) (1959).

³ *Id.* at 17, para. 117.

⁴ Union of South Africa, Report of the Administrator of South West Africa for the Year 1922, at 13, as cited in Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 14th Sess., Supp. No. 12 at 17, para. 119 (A/4191) (1959).

buying additional land, mainly from private companies which had large holdings, for division and distribution among European farmers.

25. Following the end of World War II, the process of allocation and alienation was resumed. As the supply of land available for such distribution reached its limits, the Union began to make additional land available by successive extensions of the Police Zone boundary. The Zone was extended by successive steps in 1953, 1954 and 1956. By the end of 1952 (not counting the increases thereafter), "European" farm lands represented 45 per cent of the total area of the Territory;¹ and some of these lands bordered upon the northern "Native" areas outside the Police Zone.² To appreciate the significance of the 45 per cent figure, it must be borne in mind that the entire "European" population of the Territory constituted less than 12 per cent of the total population, and that an extensive portion of the remaining land is desert and cannot be used for agricultural purposes.³

26. The allotment of land to "Europeans" for settlement was facilitated by substantial governmental assistance. The settler obligated himself to occupy the land, to apply approved soil conservation measures, and to develop and maintain certain permanent improvements. The Government gave financial assistance through loans for improvements and loans for the purchase of livestock. The initial allotment was for a probationary period under a renewable one-year lease, during which a nominal rental of one pound per year was charged to the settler. Following the probationary period, the land was leased to the settler for five years. In the first of the five years, no rent was charged. Thereafter, an annual rent was payable, at the rate of 2 per cent of the purchase price of the land for the second and third years; 3½ per cent, for the fourth and fifth years; and 4 per cent thereafter, if the lease should be extended, as it might be, up to a maximum of five additional years. Within the five year period (or any extension of it), the settler might exercise an option to purchase the land. The purchase price would then be payable in half-yearly instalments over a period of thirty years. Even after payment of the full purchase price, the settler could obtain title to the land only if he was a national of the Union and, except for special and unusual cases, if he had occupied the land for ten years.⁴

27. While the Union Government has stated in the past that these land settlement laws apply equally to "Europeans" and

¹ *Id.*, at 17, paras. 120-123; U.N. Doc. No. A/AC.73/L.10, at 85, para. 232 (1957).

² U.N. Doc. No. A/AC.73/L.10, at 85-86, para. 232 (1957).

³ Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 12th Sess., Supp. No. 12 at 15, para. 66 (A/3626) (1957); see also paras. 3-10, *ante*.

⁴ U.N. Doc. No. A/AC.73/L.10, at 85, paras. 229-30 (1957).

"non-Europeans", it has also insisted that "the Natives generally have not yet reached the stage of development where they would benefit from individual land ownership, particularly of farms".¹ Moreover, the standard form of lease contains a condition that, if the lessee marries or habitually cohabits with a "Native" or "Coloured" person, his lease becomes subject to immediate cancellation. While the settler may sublet or transfer his interest in the land with the written consent of the Administrator, he may do so subject only to an express condition that "in no case will consent be given to any hypothecation, assignment, transfer, sub-lease or subletting to natives, Asiatics or coloured persons".¹

28. Reference has already been made to the drastic choice forced upon "Natives" or "Coloured" persons resident on any land at the time of its allocation to a settler.² By the terms of the standard lease, the settler is entitled to insist upon the removal of any such "Native" or "Coloured" person, unless the "Native" or "Coloured" person agrees to become a hired hand. If the "Native" agrees to become a laborer on the farm, by the terms of the standard lease "consideration for such labor or services may take the form of placing at their disposal an area for cultivation or the depasturing of stock, or for both such purposes."³

29. During 1958 and 1959, the Territory experienced a very acute drought. Extensive governmental measures were undertaken for the relief of persons affected. As of May 14, 1959, an aggregate of £2,600,000 from the Territorial budget had been made available for drought relief. This aggregate included £1 million made available through the commercial banks, £1,200,000 to the Land Board and Land Bank of the Administration, £250,000 to two farmer's co-operative societies and the remaining £150,000 for unforeseen emergency relief.⁴

30. The impact of the drought was severe within the "Native" reserves. The Administrator informed the Legislative Assembly, as of May 22, 1959, that stock losses in "Native" reserves within the Police Zone in the period of one year between April 1, 1958 and March 31, 1959 amounted to 49,948 head of small stock. As to the large "Native" reserves in the northern area outside the Police Zone, he stated that no figures were available but that "Ovamboland was hit the hardest, with the Kaokoveld second on the list." In response to a question concerning what measures, if any, had been taken by the Union or by the Territorial Administration to

¹ Quoted in U.N. Doc. No. A/AC.73/L.10, at 86, para. 233 (1957).

² See para. 19, *ante*.

³ Quoted in U.N. Doc. No. A/AC.73/L.10, at 86, para. 233 (1957).

⁴ SWA, Legislative Assembly Votes and Proceedings (1959), pp. 61-62, cited in U.N. Doc. No. A/AC.73/L.14, at 67, para. 185 and footnote 141 (1959).

relieve the "Natives" from the effect of these losses, the Administrator replied:

"No special steps were taken to try to prevent stock losses in the Bantu areas and reserves except that for some reserves lucerne had been ordered early. In addition arrangements were made enabling some of the inhabitants to trek with their stock to another reserve where the grazing is plentiful. At that time they were not disposed to do so. *The inhabitants themselves either paid or otherwise the costs were covered by their own tribal funds.*¹ (Italics added.)

31. When asked whether the Union Government or the Territorial Administration were considering any new measures to assist the "Natives" toward rehabilitation, the Administrator replied (on May 22, 1959) "Up to the present no rehabilitation measures have been considered as the end of the drought and its consequences are not nearly in sight yet."²

32. In 1960, details were made available concerning the distribution of the £2,600,000 of drought assistance to which reference has already been made.³ Of this sum, two items, aggregating £22,271, were specifically identifiable as a relief expenditure for "Natives".⁴ In addition, an unascertainable part of a further item of £41,813 made available generally for a subsidy on mealies, at 3 shillings a bag, appears to have been used to subsidize mealies sold to "Natives".⁵

To sum up the record of the Mandatory in regard to the well-being, social progress and development of the people of South West Africa in agriculture:

33. The foregoing recital requires no elaborate comment or embellishment. The import of the facts, taken as they are, bare and cold, is unmistakable. By a deliberate, systematic and consistent course of conduct, the Mandatory has discriminated against the "Native" population of South West Africa in agriculture. In so doing, it has not only failed to promote to the utmost the well-being of the "Native" population engaged in agriculture, but in major respects it has reduced the degree of their well-being. It has not only failed to promote to the utmost the social progress of the "Native" population engaged in agriculture, but has reversed possibilities of social progress into a steady regression. It has not only failed to promote to the utmost the development of agriculture for the "Native" population of the Territory, but it has reversed that development into a process of deterioration and increasing insecurity, more particularly:

¹ *Id.* at 67-68, paras. 186-87.

² SWA, Legislative Assembly Votes and Proceedings (1959), pp. 107-108, quoted in U.N. Doc. No. A/AC.73/L.14, at 68, para. 188 (1959).

³ See para. 29, *ante*.

⁴ U.N. Doc. No. A/AC.73/L.14, at 69, paras. 193-94 (1959); *cf.* pp. 68-70, paras. 190-95.

⁵ *Id.* at 69-70, para. 194.

(i) 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". This has been carried to the point where less than 12 per cent of the population, being "White", enjoys the use of some 45 per cent of the total land area; while over 88 per cent of the population, being "Native" or Coloured", is confined to 27 per cent. Much of the remaining land area is desert.

(ii) The Mandatory has denied the possibilities of individual ownership of land to the "Native" population, and has confined these rights to the "White" population.

(iii) The Mandatory has limited the role of the "Native" population in agriculture to (a) subsistence farming within "Native" reserves and (b) employment as common laborers or domestics on "European" commercial farms. In consequence, the "Native" population has enjoyed almost insignificant participation in the expanding possibilities of commercial agriculture in the Territory.

(iv) The Mandatory has offered little hope to the "Native" population, and little promise or possibility of future development.

(v) Even in connection with emergency relief made available in time of drought, the Mandatory has used overwhelmingly the larger part of relief funds for the assistance of the small "European" proportion of the population, while the relief funds used to help the large "Native" population have been confined to a comparative pittance.

Well-Being, Social Progress and Development in Industry

Fishing Industry

34. As has been explained, fishing and the processing of fish products constitute one of the principal sectors of the economy of South West Africa.¹

35. The annual value of canned fish, fish meal, fish body-oil and rock lobster tails produced in South West Africa amounts to some £7,000,000.² The administration of South West Africa, in recognition of the importance of the fishing industry, has contributed financial support to research and development for the improvement of the industry and the utilization of its products.³

36. The enterprises in the industry are essentially "European" owned and operated. While more than 3,500 "non-Europeans" are

¹ See paras. 11-14, *ante*.

² South West Africa, Annual (1960), p. 123, also cited in U.N. Doc. No. A/AC.73/L.14, at 78, para. 223 (1959).

³ U.N. Doc. No. A/AC.73/L.13, at 64, paras. 177-78 (1959).

employed in the fishing industry, the role of the "Natives" is substantially confined to unskilled labor.¹

Mining and Minerals

37. The importance of mining to the economy of South West Africa has been attested to vividly by a report of a Commission of Inquiry into Mining Legislation (May 1953), in which the Commission stated: "It is perfectly clear from where the State derives the lion's share of its revenue and to what the present prosperity in the Territory must be ascribed. And whereas it is acknowledged that the expansion of the farming industry, owing to climatic conditions, is, humanly speaking, nearing its saturation point, mining has, with few exceptions, been confined to mere scratching of the Earth's surface."²

38. In numerical terms, most of the mines in the Territory are small, operated by various companies, syndicates or individuals. The bulk of the production, however, is accounted for by four large companies: The Consolidated Diamond Mines of South West Africa, Ltd., which produces diamonds; the Tsumeb Corporation, Ltd., which produces lead, copper, zinc, silver and germanium; the South West Africa Co., Ltd., producers of lead, zinc, tin and vanadium; and the South West Africa Salt Co., Ltd., a producer of salt.³

39. The laws in force in the territory of South West Africa relating to minerals and the operation of mines, mining works and mining machinery, were amended and consolidated by Ordinance No. 26 of 1954, enacted by the Legislative Assembly of the Territory.⁴ By the terms of the Ordinance, the "right of mining for and disposing of precious and base minerals in the Territory, including the territorial waters, is vested in the Administration and no precious or base minerals shall be searched for or won save in accordance with the provisions of this Ordinance."⁵ The Administrator's control of the mining industry is exercised through a department known as the Mines Division, "which shall be subject to the direction and authority of the Administrator through the Secretary for the Territory."⁶

40. Under the terms of the Ordinance, no person may prospect for minerals or peg a claim unless he has been duly licensed.⁷ Except within a "Native" reserve, a licence may be issued for prospecting or pegging claims only to a "European" of the age of 18 years or more, a company registered under the provisions of the Companies

¹ U.N. Doc. No. A/AC.73/L.10, at 80-81, paras. 214-15 (1957).

² U.N. Doc. No. A/AC.73/L.10, at 97, para. 266 (1957).

³ *Id.* at 99-100, para. 275.

⁴ (1954) Laws of South West Africa, pp. 753ff.

⁵ *Id.* at 753, sec. 1.

⁶ *Id.* at 765, sec. 5.

⁷ *Id.* at 779, sec. 20.

Ordinance, 1928, as amended,¹ or a foreign company which has complied with the requirements of the Companies Ordinance, 1928, as amended. Within "Native" reserves, "natives lawfully resident therein, shall possess the same rights to hold prospecting licences and be subject to the same obligations as Europeans."²

41. Even within the foregoing limits, prospecting licences are issued only upon application to the Inspector of Mines, appointed by the Administrator. No prospecting licence may be issued unless the applicant has made a cash deposit or given a bank guaranty for an amount to be fixed by the Inspector, such amount to be in no event less than £50, "as a guarantee for the restoration to a safe condition of the surface of any property which may be rendered unsafe by prospecting or development operations."³ No licence may be issued for a period longer than twelve months. On every licence issued there shall be payable a fee of five shillings for each month or part thereof.⁴ The Inspector, in his discretion, may at any time require the amount of the deposit or bank guaranty to be increased "if in his opinion the circumstances so demand."⁵ No prospector may remove from the site of his prospecting operations any minerals recovered in the course of such operations without the written permission of the Inspector.⁶ Similarly, no mine owner may dispose of any minerals recovered by him during his mining operations except with the written permission of the Inspector.⁷

42. The Administrator has power to supplement the Ordinance with regulations not inconsistent with the Ordinance, in respect of or in connection with an extensive variety of matters enumerated in Section 105 of the Ordinance. Among other matters concerning which the Administrator may issue regulations are prospecting and mining in "Native" reserves.⁸ By Ordinance No. 4 of 1955, however, the Administrator's authority to issue regulations concerning prospecting and mining in "Native" reserves may be exercised only after consultation with the Minister of Native Affairs of the Union of South Africa.⁹

43. The mining of diamonds is also governed by a special proclamation, the Diamond Industry Protection Proclamation, 1939, and amendments thereto.¹⁰ By this proclamation and its amend-

¹ *Id.* at 781-82, sec. 22.

² *Id.* at 782, sec. 22, proviso (iii).

³ *Id.* at 781, sec. 21, para. (5).

⁴ *Id.* at 781, sec. 21, paras. (3) and (4).

⁵ *Id.* at 781, sec. 21, para. (6).

⁶ *Id.* at 793, sec. 37, para. (1).

⁷ *Id.* at 797, sec. 41, para. (2).

⁸ *Id.* at 849-51, sec. 105, para. (c).

⁹ (1955) Laws of South West Africa, pp. 528, 530 (sec. 1), 538 (First Schedule, Item (12)).

¹⁰ (1939) Laws of South West Africa, Proclamation No. 17, pp. 168f.; *Id.*, Proc. No. 25, p. 234; (1941) Laws of South West Africa, Proc. No. 17, p. 276; (1949) Laws of South West Africa, Proc. No. 40, p. 762; (1955) Laws of South West Africa, Ord. No. 30, pp. 632ff.

ments, a Diamond Board in South West Africa has been established, with extensive powers of supervision over the diamond mining industry.

44. Certain minerals of importance for the production or use of atomic energy are also governed by the Atomic Energy Act, 1948, of the Union of South Africa, as amended, which is also applied to the Territory of South West Africa.¹

45. From the foregoing brief description of applicable law and regulations, it is clear that the pattern of systematic discrimination against "Natives" observable in agriculture and in the tenure of land generally is also carried forward in the mining industry. By law, as has been explained, no one other than a "European" may prospect for minerals anywhere outside a "Native" reserve.² While under the applicable law there is a technical possibility that prospecting by "Natives" may take place within the "Native" reserves, the technical possibility can hardly be realized. The numerous conditions prescribed, including particularly the financial conditions and requirements, taken together with the unfettered discretion of the Administrator and the several special Boards, permit and indeed require an inference that for all practical purposes "Natives" are barred from any such activity.³

46. The foregoing restrictions upon prospecting and mine ownership are supplemented by comparable restrictions applicable to employment within mining enterprises. Mining regulations issued in 1956 under the authority of the Administrator provide that, if the mine or works is owned by a "European" (as is always the case), the manager must be a "European"; if the manager is a "European" (as is always the case), every assistant manager and every sectional or underground manager must be a "European". Similarly, the regulations provide that the mine overseer must be a "European"; the shift-boss must be a "European"; the ganger must be a "European"; the engineer must be a "European"; the surveyor must be a "European"; the person in charge of boilers, engines, and other machinery must be a "European".⁴ It is plain that the role of the "Native" is confined to that of unskilled laborer.

47. The relegation of "Natives" exclusively to the status of unskilled labor is underscored by a recent law of the Union of South Africa, applicable to the Territory of South West Africa, concerning compensation to be paid in the event of the contraction by mine employees of certain occupational diseases, notably pneu-

¹ (1948) Union of South Africa, Statutes, Act No. 35, as amended by Act No. 8 of 1950, Act No. 18 of 1952, and Act No. 11 of 1956, cited in U.N. Doc. No. A/AC.73/L.10, at 103, para. 287 (1957).

² See *ante*, para. 40.

³ See *ante*, paras. 39-44.

⁴ Gov. Notice No. 33 of 1956, in Official Gazette of South West Africa, No. 1965, cited in U.N. Doc. No. A/AC.73/L.10 at 135, para. 387 (1957).

moconiosis. In the statute, a "miner" is defined as a male person of "European" descent. By contrast, "Natives" and "Coloured" persons working in mines are classified as "labourers".¹

Railways and Harbors

48. Railways and harbors in South West Africa are operated under the jurisdiction of the Railways and Harbors Administration, an independent government agency with its own budget that operates in both the Union and in the Territory. All graded posts in the Railways and Harbors Administration are reserved to "Europeans", subject to temporary exceptions which are made when a shortage of "European" employees is so acute as to make it necessary to relax the bar. In a statement made in the Union Parliament in March, 1956, the Union Minister of Transport expressly stated that "Non-Europeans" should not be allowed to occupy graded posts. The Minister went on to say:

"We only employ Natives to serve their own people where it is practicable, and where it is acceptable to the rest of the staff. But it will certainly not be acceptable to the staff or the public that Natives should be employed, even on Native trains, as firemen, conductors, or guards. That is not my policy, and it will not happen."²

49. It is well to note here an extract from the Report of the Permanent Mandates Commission on South West Africa (annex 16 of the Minutes of the Permanent Mandates Commission, Fourteenth Session, p. 275), which was approved by the League Council at its 54th Session (Official Journal, April, 1929, pp. 505-508):

"The Commission notes the statement of the Administrator that the Colour-Bar Act of the Union of South Africa is applied in South-West Africa in so far as employment under the Administration and in the railways is concerned. The Commission considers that this Act, the effect of which is to limit the occupations open to native and coloured workers and thus place them at a disadvantage with white workers in the area under Mandate, is based upon considerations which are not compatible with the principles laid down in the Mandate."

Labor: Recruitment

50. As has already been explained, the chief employers of labor in the Territory of South West Africa are the mining companies, the fishing concerns, the "European" commercial farmers, the Territorial Administration (road gangs, etc.) and the Railways and Harbors Administration. The bulk of the labor force is made up

¹ Pneumoconiosis Act, No. 57 of 1956, in Official Gazette of South West Africa, No. 2007. See (1956) Laws of South West Africa, p. xi. See also U.N. Doc. No. A/AC.73/L.10, at 135, para. 387 (1957).

² Union of South Africa, House of Assembly Debates (Hansard, Vol. 7, cols. 2135-6, S182, cited in U.N. Doc. No. A/AC.73/L.10, at 69-70, para. 176 (1957).

of "Native" labor. While such labor is derived to some extent from local sources, it comes in the main from the Ovamboland Native Reserve and the Okavango Reserve.¹ As has also been explained, the "Native" labor force is overwhelmingly an unskilled labor force, and it is deliberately kept in that status by the law, policy and practice of the Territorial Administration and the Union Government.

51. Since the principal reservoirs of "Native" labor are the Northern "Native" reserves, and more particularly the Ovamboland and Okavango Reserves, the process by which labor is recruited from these reserves is of particular interest. All such recruitment is by law vested in a single organization, named the New South West African Native Labour Association (Proprietary), Ltd. This organization is referred to briefly as Nuwe SWANLA.² The functions of this organization are to recruit labor in the "Native" reserves for work in industry and on commercial farms. Nuwe SWANLA operates through recruiting agents stationed in the principal recruiting areas, the Ovamboland and the Okavango "Native" reserves. The recruiting agents keep in regular contact with the chiefs, headmen and sub-headmen within the "Native" reserves.

52. Parades of potential laborers are held at the recruiting centres, at which the initial selection of recruits is made. Following such initial selection, the recruits are examined by medical officers, and classified according to physical fitness for various occupations. The recruiting organization then issues to the recruits identification passes which they must have with them at all times while in the Police Zone.³

53. From the recruiting centers, the recruits are sent by motor transport to Grootfontein, the main transit depot. From Grootfontein, they are sent by rail to the town nearest the place where they will be employed.⁴

54. Laborers are provided to the respective employers in accordance with the terms of contracts entered into between the employers and Nuwe SWANLA. Prior to 1948, it was the practice for the employer to pay the incoming and outgoing rail fare, but the recruited laborer paid the cost of the motor bus transport to and from Grootfontein. The cost was paid through deduction from the first and last month's wages of the recruit. Since 1948, such bus fares have been paid by the employer.⁵

¹ Cf. *ante*, paras. 8, 16, 18, 19. For a discussion of the organization of the "Native" reserves, see *post*, paras. 114-127.

² Proc. No. 11 of 1922 (Native Administration Proclamation 1922), Sec. 19, in (1915-22) Laws of South West Africa (A. J. Waters, Windhoek, South West Africa, 1923), at p. 753, cited also in U.N. Doc. No. A/AC.73/L.10, at 126, para. 362 (1957). Cf. (1952) Laws of South West Africa, Ord. No. 48, p. 794.

³ U.N. Doc. No. A/AC.73/L.10, at 129, para. 369 (1957)

⁴ *Id.* at 129, para. 370.

⁵ *Id.* at 130, para. 372.

55. The laborers thus recruited may remain within the Police Zone only for the period of employment for which the contract provides, in no case exceeding two and a half years. At the termination of the contract, the laborers must be returned to the place of recruitment.¹

56. The Board of Management of Nuwe SWANLA includes representatives of the mining concerns and of the Society of South West African Farmer-Employers of Contracted Natives. The latter society consists of all "bona fide farmers" in the Territory employing contracted "Natives" recruited from the northern "Native" reserves.²

57. The Administration of the Territory also participates in the Board of Management of Nuwe SWANLA. In so doing, the Administration represents not only itself, but also certain departments of the Union of South Africa and the Railways and Harbors Administration of the Territory and the Union, and all other employers of contracted labor in the Territory not directly represented. In recognition of its representation of their interests, such other employers are required to pay two pounds per annum to the Administration. The money so received is held by the Administration until direct representation of these other employers may be deemed by the Administration to be warranted.³

Labor: Conditions Within the Police Zone

58. The entire "Native" labor force within the Police Zone is subject to control in accordance with a number of laws of the Territory. Some relate to "Native" labor as such. Others relate to "Natives" generally, but powerfully affect the conditions of "Native" labor.

59. Among the principal statutes and other regulatory measures which relate to "Natives" generally, and significantly affect labor conditions are the Native Administration Proclamation 1922,⁴ the Extra-Territorial and Northern Natives Control Proclamation of 1935,⁵ the Native (Urban Areas) Proclamation, 1951,⁶ and the Vagrancy Proclamation, 1920.⁷

60. The basic legislative measure governing the relationships among employers and farm and domestic labor is the Master and Servants Proclamation 1920, as amended.⁸ Its effects must be

¹ *Ibid.*; also at 132, para. 377.

² (1952) Laws of South West Africa, Ord. No. 48, pp. 794ff.

³ U.N. Doc. No. A/AC.73/L.14, at 107-09, para. 314 (1959).

⁴ See footnote 2, p. 123, *supra*.

⁵ (1935) Laws of South West Africa (Proc. No. 29 of 1935).

⁶ (1951) Laws of South West Africa, pp. 90ff. (Proc. No. 56 of 1951).

⁷ (1915-22) Laws of South West Africa, pp. 280ff. (Proc. No. 25 of 1920).

⁸ (1915-22) Laws of South West Africa (A. J. Waters, Windhoek, South West Africa, 1923) pp. 336ff. (Proc. No. 34 of 1920), amended; see U.N. Doc. No. A/AC.73/L.10, at 131, para. 376 (1957).

appraised in conjunction with those of Proclamation No. 3 of 1917, concerning the Control and Treatment of Natives in Mines, and amendments thereto.¹

61. Under the foregoing legislation, a "Native" is made guilty of a criminal offence under the following circumstances:

(i) if he fails or refuses to commence service under a contract of service at a stipulated time;

(ii) if "without leave or other lawful cause" he absents himself from his master's premises;

(iii) if he becomes intoxicated during working hours;

(iv) if he neglects to perform any work which it is his duty to perform;

(v) if he "shall carelessly or negligently do any work which from its nature it was his duty under his contract to have performed carefully and properly";

(vi) if he shall refuse to obey any order of his master;

(vii) if he shall "by wilful breach of duty or by neglect of duty" do any act tending to the "immediate loss, damage or serious risk of any property placed by his master in his charge";

(viii) if, being employed as a herdsman, he shall "irrecoverably lose stock by his own act or default"; or

(ix) if he "shall without lawful cause depart from his master's service with intent not to return thereto".²

62. If any "Native" employee or apprentice "is charged with having without lawful cause deserted from his master's service it shall be lawful for any Magistrate to issue his warrant for the apprehension of such servant or apprentice without any previous warning or summons."³

63. Any "Native" laborer who has been sentenced to imprisonment for any of the foregoing offences must, upon the completion of his term of imprisonment "return to his master immediately ... unless the contract of service has been cancelled by the Magistrate

¹ (1915-22) Laws of South West Africa (A. J. Waters, Windhoek, South West Africa, 1923) pp. 89ff. Subsequent proclamations relating to the same subject matter include Proclamation No. 6 of 1924; Native Labour Regulation Proclamation No. 6 of 1925; Native Administration Proclamation No. 15 of 1928; Native Labour Regulation (Mines and Works) Proclamation No. 33 of 1929; Native Labour Regulation (Mines and Works) Amendment Proclamation No. 35 of 1930; Native Labour Regulation Amendment Proclamation No. 27 of 1931; Native Labour Regulation (Mines and Works) Amendment Proclamation No. 4 of 1939; and Regulations contained in Government Notices No. 26 of 1925, No. 64 of 1940, and No. 3 of 1951. See U.N. Doc. No. A/AC.73/L.10, at 131-134, paras. 376, 382 (1957).

² Master and Servants Proclamation 1920 (*loc. cit.*, in fn. 8, p. 124, *supra*), secs. 46-52; *Cf.* Proc. No. 3 of 1917 on the Control and Treatment of Natives in Mines (*loc. cit.*, in fn. 1 of this page, *supra*), sec. 3.

³ Master and Servants Proclamation 1920 (*loc. cit.*, in fn. 2 of this page, *supra*), sec. 74.

... and in case he shall neglect to do so he may be convicted of being absent without leave from his master's premises and be sentenced to imprisonment with or without hard labor, with or without solitary confinement and with or without spare diet for any period not exceeding one month and so on for successive periods of one month until he shall consent to resume his service under the contract." ¹

64. According to the Report of the Union Government on the Administration of South West Africa for the year 1946, 2,100 "servants" were convicted in that year under the Masters and Servants Proclamation 1920. No more recent figures concerning convictions are available.²

65. Reference has already been made to the fact that no "Native" from outside the Police Zone may enter the Police Zone or hold employment there without an identification pass issued by an authorized officer. The "Native" must at all times carry his identification pass with him and produce it on the demand of any authorized officer, any member of the South West Africa police and any person who employs him.³

66. In rural areas, all male "Natives" over the age of 18 years who reside on a farm belonging to a "European" must be in the employ of the farmer. As has already been pointed out, if a "Native" was resident on such land before it was allocated to the "European" farmer, the farmer may require the "Native" to become his employee or to be removed from his property.⁴

67. If a "Native" is unemployed within a proclaimed urban area in the Police Zone, he must report to a prescribed officer and take up his residence at a point indicated by the officer until he has found employment. If he does not succeed in finding a job within a fourteen day period, he must leave the area. If the "Native" was born in the area in which he is found unemployed, or has otherwise been qualified for residence there, the approval of the Minister of Native Affairs is required before he may be removed.⁵

68. Certain areas within the Police Zone are set aside as "Proclaimed Areas". In any such proclaimed area, if a "Native" is habitually unemployed, or if any authorized officer has reason to suspect that he is habitually unemployed or that he lacks a sufficient means of livelihood, the "Native" may be arrested without a warrant. Any "European" police officer or any "European" officer appointed as a manager or inspector of "Native" affairs in urban

¹ Master and Servants Proclamation 1920, *loc. cit.*, sec. 53 (as amended by Proc. No. 58 of 1920, sec. 3).

² U.N. Doc. No. A/AC.73/L.10, at 134, para. 386 (1957).

³ See *ante*, para. 52; Extra-Territorial and Northern Natives Control Proclamation, 1935, as amended, *loc. cit.*, in fn. 5, p. 124, *supra*, at p. 154, sec. 9.

⁴ See paras. 19, 28 *ante*.

⁵ U.N. Doc. No. A/AC.73/L.10, at 152, para. 437 (1947).

areas may bring such a "Native" before a magistrate or a "Native" commissioner. If the "Native" is found to be habitually unemployed or to lack a means of livelihood, the "Native" may either be removed from the area (to be sent either to his own home or to a place indicated by the commissioner or magistrate) or he may be ordered into employment.¹

69. Under the Vagrancy Proclamation 1920,² any "Native" "found wandering abroad and having no visible lawful means, or insufficient lawful means of support" and who "shall not give a good and satisfactory account of himself" shall be deemed "an idle and disorderly person".³ Upon conviction as an idle and disorderly person, he may be imprisoned with or without hard labor and with or without solitary confinement for a period up to three months.⁴ The category of "an idle or disorderly person" is also extended by the Proclamation to cover any "Native" "found without the permission of the owner ... wandering over any farm, in or loitering near any dwelling house, shop, store, stable, outhouse, gardens, vineyard, kraal or other enclosed place", and also any "Native" "loitering upon any road" crossing a farm, or "loitering at or near any hut, house or other building upon any farm".⁵ A "Native" who falls within the category of an "idle and disorderly person" may be arrested with or without warrant by any magistrate or police officer or by any owner or occupier of the land upon which he may be found.⁶ Similarly, every owner of a farm, "for the purpose of searching for any idle and disorderly person" may "enter without a warrant and make search in any hut, house, or other building upon such farm."⁷

70. By a regulation issued under Section 20 of the Native Administration Proclamation 1922⁸ "Any Superintendent who, after investigation, is satisfied that any male resident of a Reserve [excluding Ovamboland and Okavango] has no regular and sufficient lawful means of support, or leads an idle existence, may order such person to take up employment on essential public works or services within or without the Reserve at a sufficient wage to be determined by such Superintendent." The regulation goes on to provide that "Any male resident of a Reserve ... who fails to take up such employment as ordered within a reasonable time after such order by the Superintendent, or any order of the magistrate

¹ Native (Urban Areas) Proclamation, 1951 (*loc. cit.*, fn. 6, p. 124 *supra*) sec. 26: see also U.N. Doc. No. A/AC.73/L.10, at 153, para. 440 (1957).

² *Loc. cit.*, fn. 7, p. 124, *supra*.

³ *Id.* at 280, sec. 1.

⁴ *Id.* at 280, sec. 3 (1).

⁵ *Id.* at 280-281, sec. 3 (1), 3 (2).

⁶ *Id.* at 282, sec. 8 (1).

⁷ *Id.* at 282, sec. 8 (2).

Loc. cit., fn. 2, p. 123, *supra*.

... as the case may be, shall be guilty of an offence."¹

71. Since 1955, "Natives" entering twenty proclaimed urban areas are not only required to register but must also pay a fee of a shilling. In addition, the employer of any such "Native" must pay two shillings upon registration and each month thereafter.² Any such "Native", upon registration, is held within a reception depot until he obtains employment or until he is required by order to leave the proclaimed area.³

72. In mines, every employer is required to "grant to every European employed by him in or about a mine or works in respect of each period of 310 ordinary working shifts of employment with him ... leave of absence on full pay of not less than 24 consecutive working days." Similarly, upon termination of his employment, the "European" employee is entitled to full pay "in respect of any period of leave which has accrued to him but was not granted before the date of termination of the employment."⁴ No comparable provision is made for "Native" employees.

73. Under the terms of the Factories, Machinery and Building Work Ordinance, 1952, every employer must grant to every employee "in respect of each period of twelve months' employment" leave of absence on full pay for not less than two consecutive weeks. In computing the period of employment for the purpose of determining the amount of leave to which the employee is entitled, a period of absence owing to illness, certified to by a medical practitioner, shall be deemed to be employment.⁵ However, by a specific regulation, the foregoing provisions for leave are made *inapplicable* to employers "in respect of extra-territorial and northern 'Natives' ... who are employed in or in connection with their factories under valid contracts of service."⁶

74. Under the Pneumoconiosis Act, No. 57 of 1956, adopted by the Union and made applicable to South West Africa by Proclamation No. 156 of 1956,⁷ persons under 16 years of age and females are prohibited from working in dusty atmospheres in controlled mines except that governmental authorities may grant permission

¹ (1952) Laws of South West Africa, pp. 834-835 (Govt. Not. 121, adding Reg. 27 bis).

² (1955) Laws of South West Africa, pp. 751ff. (Govt. Not. 65), sec. 6 (1).

³ *Id.* at 754, Reg. 2 (1) (b).

⁴ (1956) Laws of South West Africa, pp. 499, 721 (Govt. Not. 33 of 1956) Reg. No. 282.

⁵ (1952) Laws of South West Africa, pp. 404, 430ff. (Ord. No. 34, sec. 21).

⁶ (1953) Laws of South West Africa, p. 599 (Govt. Not. 257).

⁷ Pneumoconiosis Act, 1956, although referred to in the index of (1956) Laws of South West Africa, is not printed in that official collection. The text does appear in the Official Gazette of South West Africa, No. 2019, of 1956. Cited in U.N. Doc. No. A/AC.73/L.10, at 145, para. 417 and at 146, para. 419 (1957).

for the employment of a *non-European female* in such a dusty atmosphere (Italics added.) The Act provides compensation rates for employees who suffer injury or illness in the course of their employment. For the contraction of pneumoconiosis, compensation rates differ sharply as between "European miners" and "Native labourers". For a "European miner", the rates range from a lump-sum payment of £480 (for the first stage of pneumoconiosis) to a lump-sum of £480 plus a monthly pension of £25 and pensions for his dependents, including £6 10s. per month for his wife and £4 10s. per month for each dependent child (for the fourth stage, or tuberculosis with pneumoconiosis). The "European miner" may also be awarded £7 10s. per month if he needs a constant attendant. If he should die from the disease, his dependents are entitled to pensions, in the amount of £12 15s. per month to the widow, and £6 7s. 6d. per month for each dependent child. "Coloured" laborers are entitled to the following benefits: For pneumoconiosis in the first stage, a lump-sum payment of £175; for pneumoconiosis in the fourth stage, a monthly pension of £10 10s. and pensions for his dependents, including £3 monthly for the wife and £1 10s. monthly for each dependent child. If the "Coloured" laborer should die from the disease, his widow is entitled to a pension ranging up to £6, and each dependent child is entitled to a pension ranging up to £3. In sharp contrast, a "Native" workman may receive as compensation for pneumoconiosis, whatever the stage of the disease, and even if the disease is contracted in combination with tuberculosis, a maximum lump-sum payment of £240. No monthly pension is available to him. No monthly pension is available to his dependents. If he should die from the disease, his dependents are only entitled to the sum which he would have received if he had not died. If he has previously been awarded his maximum of £240, and has then died, no benefits are provided for his widow or dependents. Any award to which a "Native" laborer or his dependents may be entitled is paid over not to him or to his dependents, but to the appropriate "Native" authority, which may choose to pay the benefit to the laborer or his dependents either in full, or in instalments.¹

75. Chapter II of Wage and Industrial Conciliation Ordinance, 1952,² deals with the registration of trade unions and the settlement of industrial disputes.³ The Ordinance came into effect in the Territory of South West Africa under Proclamation No. 28 of 1953.⁴ The Ordinance defines a "trade union" as "any number of employees in any particular trade, associated together primarily for the purpose of (a) regulating relations between themselves or some of them and their respective employers; or (b) protecting or furthering the in-

¹ U.N. Doc. No. A/AC.73/L.10, at 147, para. 423 (1957).

² (1952) Laws of South West Africa, pp. 464ff. (Ord. No. 35 of 1952).

³ *Id.* at 488ff.

⁴ (1953) Laws of South West Africa p. 125 (Proc. No. 28 of 1953).

terests of the employees ...” The definition of trade union obviously gives key significance to the term “employee”. By the terms of the Ordinance, the term “employee” means any person employed or working for any employer “except in Chapter II”.¹ For the purposes of Chapter II, however, the term “employee” means “any person employed by, or working for any employer ... *but does not include a Native*”² (Italics added.) The term “Native” is defined to mean “a member of any aboriginal race or tribe of Africa.”²

76. Chapter II provides for the application of its provisions concerning the registration of trade unions, collective bargaining and conciliation, to disputes which exist “in any trade in any area between” or among trade unions, employees and employers.³ In consequence, the provisions concerning labor disputes and conciliation do not apply to disputes among or between “Native” laborers and the others.

To sum up the record of the Mandatory in regard to the well-being, social progress and development of the people of South West Africa in industry, industrial employment and labor relations:

77. In the industrial phases of the economic life of the Territory, as in the agricultural aspects of the economic life of the Territory, the Mandatory has failed to promote to the utmost the well-being, the social progress and the development of the larger part of the population. It has not even made any substantial effort to do so. To the contrary, by law and by practice, the Mandatory has engaged in a consistent course of positive action which inhibits the well-being and prevents the social progress and the development of the larger part of the population. As the data exhibited in the foregoing paragraphs make clear, the record of the Mandatory’s behavior toward the “Native” population of the Territory has been a bleak and consistent record of negation, frustration, constraint and unfair discrimination. More particularly, as demonstrated in detail in the preceding paragraphs:

(1) The Mandatory has denied and continues to deny to the “Natives” of the Territory opportunity to take part in mining and other industries as a prospector, entrepreneur, operator, or owner.

(2) The Mandatory has denied and continues to deny to the “Native” population opportunity to take part in executive, managerial, professional or technical posts in mining and other industries.

(3) The Mandatory has unfairly prohibited and continues to prohibit “Natives” from taking part in the processes of collective bargaining and conciliation and arbitration of disputes.

¹ Wage and Industrial Conciliation Ordinance 1952 (*loc. cit.*, in fn. 2, p. 129 *supra*), p. 570, sec. 79.

² *Id.* at 528, sec. 48.

³ *Id.* at 506, sec. 33.

(4) The Mandatory has confined the participation of the "Native" population in the industrial economy, for all practical purposes, to the role of unskilled laborer.

(5) The Mandatory has shaped the circumstances and conditions of labor for the "Native" population into a pattern of constraint and compulsion that consistently subordinates the interests of the "Native" laborers to the interests of their "European" employers.

(6) The Mandatory has so drastically curtailed and circumscribed the possibilities of choice for "Native" laborers as to leave them, for all practical purposes, very little freedom of choice with respect to place of employment, type of employment, identity or character of employer, or conditions of employment.

The Mandatory has denied to "Native" laborers equal legislative protection in the form of provisions for holidays, sick pay, and compensation in the event of illness or injury caused by employment which are made available to "White" employees.

4. *Well-Being, Social Progress and Development:
Government and Citizenship*

(a) *Statement of Law*

"In accordance with these legal norms, the Mandatory's duties to safeguard and promote the 'material and moral well-being', the 'social progress' and the 'development' of the peoples of the Territory must reasonably be construed to include:

.....
(3) Political advancement of such persons through rights of suffrage, progressively increasing participation in the processes of government, development of self-government and free political institutions;¹
.....

(b) *Statement of Facts*

Background Information

78. On November 15, 1915, the Minister of Defence of the Union of South Africa, by a proclamation, established the Office of Administrator of the Protectorate of the territory theretofore known as German South West Africa, which had been seized from the Germans by the forces of the Union, in the course of World War I.² In 1919, the Union enacted the Treaty of Peace and South West Africa Mandate Act, which vested in the Governor General of the Union power to "make such appointments, establish such offices, issue such proclamations and regulations and do such things as

¹ Pp. 107-108, *supra*.

² Laws of South West Africa, 1915-22 (A. J. Waters, Windhoek, South West Africa, 1923) p. 30.

appear to him to be necessary for giving effect, so far as concerns the Union, to any of the provisions of the Mandate over South West Africa. The Governor General was also empowered to make new laws applicable to the Territory of South West Africa, to repeal or modify any laws theretofore enforced, and to "delegate his authority in this behalf to such officer in the said Territory as he may designate".¹ By Proclamation No. 1 of 1921, the Governor General delegated to the Administrator of the Territory the authority previously vested in the Governor General over South West Africa, "subject always to such instructions as may from time to time be issued for his guidance by proper authority".²

79. The Executive Committee "shall consist of five members, namely the Administrator of the Territory ... and four other persons chosen by the Assembly ... from amongst its own members".³ The Administrator "shall be chairman of the Executive Committee".³

80. The Advisory Council "shall consist of eight members, viz.: the Administrator (who shall be chairman), the other members of the Executive Committee and three members appointed by the Administrator, subject to the approval of the Governor General".⁴

81. The powers of all three of the governing organs were limited. It was provided that "The Administrator in Executive Committee shall carry on the administration of those matters in respect of which it is for the time being competent for the Assembly to make Ordinances ... Subject to the provisions of this Act ..., the powers, authorities and functions (other than legislative powers) which ... were vested in or exercised by the Administrator shall... insofar as those powers, authorities and functions relate to matters in which it is competent for the Assembly to make Ordinances, be vested in the Administrator in Executive Committee."⁵ The duties and functions of the Advisory Council "shall be to advise the Administrator in regard to ... those matters in respect of which the Assembly is not competent to make Ordinances", and also in regard to "his assent to an Ordinance passed by the Assembly."⁶ The Assembly "shall have power to make laws, to be entitled Ordinances for the Territory", subject, however, to a number of matters explicitly reserved from legislation by the Assembly, and subject also to powers of disallowance reserved to the Governor General.⁷

82. In 1926, the Governor General, acting pursuant to the authority vested in him by the South West Africa Constitution Act,

¹ *Id.* at Act No. 49 of 1919, at 10.

² *Id.* at 48.

³ The Union Statutes 1910-1947 (Butterworth & Co., Durban, South Africa), Vol. 3. Sec. 2.

⁴ *Id.* at sec. 7.

⁵ *Id.* at sec. 3.

⁶ *Id.* at sec. 8.

⁷ *Id.* at secs. 25, 26, 27, 32, 33, 34.

1925, issued a proclamation constituting the Executive Committee, the Advisory Council and the Legislative Assembly for the Territory of South West Africa.¹

83. While the South West Africa Constitution Act, 1925, was modified in minor ways from time to time, it was not until 1949 that a major change was effected. The South West Africa Affairs Amendment Act, 1949², abrogated the general legislative powers which had theretofore been retained by the Governor General of the Union with respect to South West Africa, so that "thereafter only Parliament [of the Union] shall have the power to legislate for the Territory in regard to those matters on which the Assembly is not competent to legislate."³ The Act also abolished the Advisory Council. The Assembly (Legislative Assembly of the Territory) was made fully elective, all eighteen members to be chosen by duly qualified (European) voters of the Territory.⁴ The legislative authority previously vested in the Administrator, like that previously exercised by the Governor General, was abrogated. The Administrator was specifically described as the "Chief Executive Officer of the Territory," with "all executive acts relating to the affairs of the Territory" to be "carried out therein in his name."⁵ Provision was made for direct representation of the Territory of South West Africa in the Parliament of the Union.⁶ Thenceforth, the Territory was to be represented in the "House of Assembly" of the Union Parliament "by six members to be elected in accordance with the provisions of this Act."⁷ In addition, the Territory was to be represented in the Senate of the Union Parliament by four Senators, "two of whom shall be nominated by the Governor General, and the other two elected as hereinafter provided."⁸

84. Legislative powers withdrawn from the Governor General and the Administrator in 1949 were restored by the South West Africa Affairs Amendment Act, 1951.⁹ In 1955, another and highly significant change took place in the constitutional distribution of powers affecting the Territory of South West Africa. On April 1, 1955, the South West Africa Native Affairs Administration Act, 1954¹⁰ became effective. Under its terms, the authority theretofore exercised by the Administrator with respect to "Native" affairs was curtailed, and control over the administration of "Native" affairs within the Territory of South West Africa passed from the

¹ Laws of South West Africa, 1926, p. 40 (Union Proclamation No. 57 of 1926).

² Laws of South West Africa, 1949, pp. 172ff. (Union Act No. 23 of 1949).

³ *Id.* at sec. 22.

⁴ *Id.* at sec. 8.

⁵ *Id.* at sec. 3.

⁶ *Id.* at Chap. II, pp. 182ff.

⁷ *Id.* at sec. 27.

⁸ *Id.* at sec. 30.

⁹ Union of South Africa, Statutes, 1951, p. 404 (Act No. 55 of 1951).

¹⁰ Union of South Africa, Statutes, 1954, pp. 559ff. (Act No. 56 of 1954).

Administrator to the Union Minister of Native Affairs (and the Governor General).¹

85. This shift in responsibilities and duties occurred in the following manner: powers originally held by the Administrator were passed on to the Governor General of the Union, who, in turn, retained some of those powers and delegated others both to the then Union Minister of Native Affairs (now referred to as the Minister of Bantu Administration and Development) and to the Administrator. The Minister of Bantu Administration and Development may, likewise, delegate some of his powers to the Administrator.

Suffrage

86. We have previously explained that, under the South West Africa Constitution Act, 1925, as amended, suffrage within the Territory was restricted to "European" males. By the South West Africa Affairs Amendment Act, 1949,² the right to vote within the Territory was still further confined to white persons who are also nationals of the Union. Section 34 of that Act provided: "The Electoral Consolidation Act, 1946 (Act No. 46 of 1946), as amended ... together with any regulations promulgated thereunder shall *mutatis mutandis* be enforced in the Territory". In addition, Section 8 of that Act expressly modified the pre-existing provisions relating to the election of members of the Legislative Assembly of the Territory by providing that the members of the Assembly shall be "chosen by duly registered voters of the territory voting at elections held in accordance with the provisions of the Electoral Consolidation Act, 1946 (Act No. 46 of 1946) as applied to [to the Territory] by Section 34 of the South West Africa Affairs Amendment Act, 1949". The Electoral Consolidation Act, 1946,³ provides that "Every white person who is a Union national, is of or over the age of 21 years and is not subject to [certain specified disqualifications] shall ... be entitled to be registered as a voter."⁴ The statutes have been supplemented by regulations duly issued thereunder and applied within the Territory for the registration of voters and the compilation of lists of voters. In one such regulation it is provided that "the name of any person who is not a white person, and whose residence is in ... the territory of South West Africa shall not in any circumstances be included in the voters' list for any division in ... the said territory."⁵ (By Act No. 30 of 1958 suffrage, while still limited to white persons, was granted to those 18 years and over.)

¹ *Id.* at secs. 2, 3; cited also in U.N. Doc. No. A/AC.73/L.10, at 20, para. 34.

² Laws of South West Africa, 1949, pp. 17off. (Act No. 23 of 1949).

³ Union of South Africa, Statutes, 1946, p. 388 (Act No. 46 of 1946); also printed in Laws of South West Africa, 1949, pp. 2ff.

⁴ *Id.* at sec. 3.

⁵ Union of South Africa, Government Gazette, Union Government Notice 1417 of 1957 (Union Government Gazette 5943), also cited in U.N. Doc. No. A/AC.73/L.14, at 24, para. 52 (1959).

Participation in the Territorial Government

87. As we have already pointed out, by the terms of the South West Africa Constitution Act, 1925, as amended, only persons qualified as voters may qualify as members of the Legislative Assembly of the Territory.¹ Only persons qualified to serve as members of the Legislative Assembly are qualified to serve as members of the Executive Committee.² Thus, by law in the case of the *Legislative Assembly* and the *Executive Committee*, and by uniform practice in the case of the appointment of the *Administrator*, no "Native" may serve as a member of the *Legislative Assembly*, the *Executive Committee*, or as the *Administrator* of the Territory. By virtue of the same provisions of law, no "Native" may serve in behalf of the Territory as a territorial member of the *Union Parliament*.

General Administration (Civil Service)

88. The general administration of the Territory is governed by the *Public Service and Pension Act, 1923*,³ which was applied to the Territory of South West Africa by *Proclamation No. 22 of 1923*.⁴ The public service of the Territory and that of the Union constitute a single integrated service. In the case of public officials assigned to duty within the Territory, their salaries and allowances are paid by the Territory.

89. The "public service" includes "all persons in the employment of the Government of the Union ... or of the mandated territory."⁵ The public service is organized in five main divisions: the administrative division; the clerical division; the professional and technical division, usually referred to as the professional division; the general division; and the services.

90. The Administrative Division comprises the secretary and under-secretaries of the several departments; the various clerks, secretaries, and auditors; magistrates; and "all other persons whose offices or posts the Governor General directs to be included in that division."⁶

91. The Clerical Division includes all persons whose offices or posts are directed by the Governor General to be included in that division.

92. The Professional Division consists of a higher and a lower branch and includes all persons whose offices or posts are directed by the Governor General to be included in that division.

¹ The Union Statutes, 1910-1947 (Butterworth & Co., Durban, South Africa), Vol. 3, pp. 641ff. (Act No. 42 of 1925, sec. 17).

² *Id.* at sec. 2.

³ Union of South Africa, Statutes, 1923, pp. 256ff. (Act No. 27 of 1923).

⁴ U.N. Doc. No. A/AC.73/L.3, at 287, fn. 1 (1954).

⁵ Union of South Africa, Statutes, 1923, pp. 256ff. (Act No. 27 of 1923), sec. 1.

⁶ *Id.* at sec. 1, subsec. (2).

93. The Services include the Permanent Defence Force, the Police Force and subordinate officers of the Prisons Department.¹

94. The Public Service, in the strict sense, does not include the Administrator of the Territory, persons employed in the Railway Administration, teachers serving under the Administration of the Territory, part-time or temporary employees, or any other person whose post may be excluded by the direction of the Governor General.²

95. Under Section 9, subsection (4), of the Public Service and Pension Act, 1923, no person is qualified for appointment "in a permanent capacity or on probation or in a temporary capacity to any office or post in the public service (excluding the Services) unless such person is a British subject." After the coming into effect of the South African Citizenship Act, 1949, the foregoing limitation was modified to refer to a citizen of South Africa, a citizen of a Commonwealth country, or a citizen of the Republic of Ireland.³ The three classes of citizens become eligible for admission to the public service after three years' residence in the Union or in the Territory.⁴

96. In practice, participation by "Natives" in the general administration does not appear to be excluded. With few exceptions, however, their participation appears to be confined to the lowest and least skilled categories. This practice of "job-reservation" for Natives is exemplified by allusion to the Territorial Budget, which classifies jobs as between "Europeans" and "Natives." The following, taken from the Budgets for 1946-1954, is a fair sample of such classification in the several departments, branches and divisions of the public service:

97. In the Department of Agriculture, provision was made for the participation of "Natives" solely as "messengers/cleaners".⁵

98. In Customs and Excise, provision was made for "Natives" only as "Native Messengers".⁶

99. In Works, Buildings Branch, provision was made for participation of "Natives" solely as "Native, Grade I", "Native, Grade II", and "Cleaners and Messengers".⁷

100. In the organization of the High Court and Circuit Courts for the Territory, provision was made for "Natives" only as messengers.⁸

¹ Union of South Africa, Yearbook, 1949, pp. 79-80, cited in U.N. Doc. No. A/AC.73/L.3, at 288 (1954).

² Union of South Africa, Yearbook, 1949, p. 82 as cited in U.N. Doc. No. A/AC.73/L.3, at 289 (1954).

³ See U.G. 26/1950, p. 2, and the 38th Annual Report of the Public Service Commission, 1949, as cited in U.N. Doc. No. A/AC.73/L.3, at 292-93 (1954).

⁴ Union of South Africa, Statutes, 1923, pp. 256ff. (Act No. 27 of 1923), sec. 9, subsec. (4); see also U.N. Doc. No. A/AC.73/L.3, at 293, para. 15 (1954).

⁵ U.N. Doc. No. A/AC.73/L.3, at 243.

⁶ *Id.* at 245.

⁷ *Id.* at 250.

⁸ *Id.* at 253.

101. In the Office of the Attorney General, provision was made for "Natives" only as messengers.¹

102. In the Magistrate's Courts for the Territory, provision was made for "Natives" only in the categories of "Native Assistant", "Native Interpreter—Messenger", "Temporary Native Interpreter", and "Native Messenger".²

103. In Lands, Deeds and Surveys, there was no provision made for "Native" employment.³

104. In Posts, Telegraphs and Telephones, other than Maintenance of Telegraphs and Telephones, provision was made for "Natives" only as "Native Messengers", "Native Telegraph Messengers", "Native Office Boys", "Native Drivers", "Native Watchboys" and "Native Male Runners".⁴

105. In the Maintenance of Telegraphs and Telephones Branch of Posts, Telegraphs and Telephones, provision was made for "Natives" only as "Native Line Boys". In addition, there was provision made for one "Coloured" rigger.⁵

Local Government

106. A structure of local government has been established within the Territory. The structure comprises two principal types of local governmental units: "municipalities"⁶ and "Village Management Board Areas".⁷ The municipalities are governed by "Municipal Councils".⁸ The Village Management Board Areas are governed by "Village Management Boards".⁹

107. At the close of 1959, 17 municipalities had been established, and 11 Village Management Board Areas.¹⁰

108. The composition and powers of the Municipal Councils are comprehensively defined in the Municipal Ordinance, 1949.¹¹ The members of the Municipal Councils are chosen by election. "No person who is not a 'European' ... shall be capable of being elected or of continuing as a councillor of any municipality ..." ¹² In order to be qualified as a voter, a person must be a "European", the owner or occupier of fixed property within the municipal area in which

¹ *Id.* at 253.

² *Id.* at 254.

³ *Id.* at 255-56.

⁴ *Id.* at 260-61.

⁵ *Id.* at 263.

⁶ Laws of South West Africa, 1949, pp. 79off. (Municipal Ordinance, 1949, No. 3 of 1949).

⁷ Laws of South West Africa, 1937, pp. 388ff. (Village Management Boards Ordinance, 1937, No. 16 of 1937).

⁸ *Loc. cit.*, *supra*, fn. 6 of this page, sec. 5.

⁹ *Loc. cit.*, *supra*, fn. 7 of this page, secs. 3(4), 4.

¹⁰ U.N. Doc. No. A/AC.73/L.14, at 41, para. 106 (1959).

¹¹ *Loc. cit.*, *supra*, fn. 6 of this page.

¹² *Id.* at sec. 14.

he claims the right to vote and shall have owned or occupied fixed property in the aforesaid municipal area at least six months ...”¹ In addition, “every registered company, association, society or club which is the owner of fixed property, within a municipal area, to the value of at least £1500, and was such an owner for at least 6 months ...” is eligible to vote.¹ The members of the Council elect a mayor and deputy mayor from among their number.²

109. The basic legislation defining the composition and powers of Village Management Boards is the Village Management Boards Ordinance, 1937.³ Each Board shall “consist of the Magistrate of the District *ex officio* (who shall be Chairman and Treasurer) and, in the discretion of the Administrator, not less than two and not more than four other members, appointed by the Administrator, who ... shall hold office during the pleasure of the Administrator.”⁴ The Magistrate, as a Territorial official, is always a “European”. The Administrator, in his selection of members of the Boards, follows the consistent pattern and the dominant philosophy of “*apartheid*”. Only “Europeans” are named to membership on the Boards.

110. In addition to their general powers and responsibilities, the Municipal Councils and the Village Management Boards exercise control over the administration of “Native” affairs within the municipalities and Village Management Board Areas, subject to the general authority of the Union Minister of Native Affairs (prior to April 1, 1955, the Administrator⁵). The powers and duties of the Municipal Councils and Village Management Boards in regard to “Native” affairs are defined principally in the Natives (Urban Areas) Proclamation, 1951.⁶

111. Under the Natives (Urban Areas) Proclamation, 1951, the urban local authorities (Municipal Councils or Village Management Boards, as the case may be) are authorized to define and set apart “one or more areas of land for the occupation, residence and other reasonable requirements of Natives either as extensions of any area already set apart for that purpose or in separate areas”. The urban local authorities may also define and set apart “any portion of a location ... wherein on such terms and conditions and within such limits as ... the urban local authority may ... prescribe. Natives shall be permitted to acquire the lease of lots for the erection thereon of houses or huts for their own occupation”. All such actions of the urban local authorities are subject to the approval of the

¹ *Id.* at sec. 29.

² *Id.* at sec. 147.

³ Laws of South West Africa, 1937, pp. 388ff. (Ord. No. 16 of 1937).

⁴ *Id.* at sec. 8.

⁵ See *ante*, para. 84.

⁶ Laws of South West Africa, 1951, pp. 90ff. (Proc. No. 56 of 1951).

Administrator (after April 1, 1955, the Union Minister of Native Affairs).¹

112. In the exercise of the foregoing powers, three types of separate areas for "Natives" within municipalities or Village Management Board Areas have been established by the urban local authorities—locations, "Native" villages and "Native" hostels.²

113. In the locations and "Native" villages, Native Advisory Boards have been established, consisting of at least three "Native" residents of the area, who may be elected by the other "Native" residents or otherwise selected, as may be determined by the urban local authority. The Native Advisory Board has a chairman, who may be a "European". The urban local authority is expected to obtain the advice of the Native Advisory Board concerning any regulation affecting a location, "Native" village or "Native" hostel which the local authority proposes to issue. A Native Advisory Board may also recommend to the local authority the adoption of any regulation which the Board deems desirable in the interests of the "Natives" in the particular urban area. The power of decision, however, rests firmly within the exclusive sphere of the local authority and the Administrator (after April 1, 1955, the Union Minister of Native Affairs).³

Government Within the Native Tribes and Native Reserves

114. Until the transfer of control over "Native" affairs to the Union Minister of Native Affairs, which took effect on April 1, 1955,⁴ responsibility for the management of "Native" affairs was vested in the Administrator, who in turn was responsible to the Union Government.

115. The Administrator had under him the Chief Native Commissioner, who was assisted by several Native Commissioners.

There was one such Native Commissioner at the headquarters of the Chief Native Commissioner, and there were two others in the "Native" reserves of Ovamboland and the Okavango.⁵

116. The powers of the Administrator with respect to the government of the "Natives" were plenary, subject to ultimate control by the Union Government. They were defined in the Native Administration Proclamation, 1928.⁶ The Administrator had power to "recognize or appoint any person as a chief or headman in charge of a tribe, or other location or a "Native" reserve"; to "remove any chief or headman found guilty of any political offence or for in-

¹ *Id.* at sec. 2.

² U.N. Doc. No. A/AC.73/L.10, at 55, para. 131. (1957)

³ Native (Urban Affairs) Proc., 1951, *loc. cit.*, *supra*, fn. 7. p. 109, sec. 20.

⁴ See *ante*, para. 84.

⁵ U.N. Doc. No. A/AC.73/L.3, at 319, paras. 1, 2 (1954).

⁶ Laws of South West Africa, 1928, pp. 58ff. (Proc. No. 15 of 1928.)

competency or for other just cause ... and may order his removal with his family and property to some other part of the mandated Territory; and may place him under such supervision or restraint as to him may appear to be expedient"; to "define the boundaries of the area of any tribe or of a location"; to "divide existing tribes into two or more parts or amalgamate tribes or parts of tribes into one tribe or constitute a new tribe"; he may "whenever he deems it expedient in the general public interest, order the removal of any tribe or portion thereof or any Native from any place to any other place within the mandated Territory"; and he may "generally exercise all political power and authority which according to the laws, customs and usages of Natives, are held and enjoyed by any supreme or paramount Native chief."¹

117. In the exercise of these immense powers, the Administrator was expressly declared to be above and beyond the control or restraint of any court of law. He "shall not be subject to any court of law for or by reason of any order, notice, rule or regulation ... or of any other act ... committed, ordered, permitted or done in the exercise of the powers and authority conferred by this proclamation".²

118. The Administrator was authorized to carry out his powers and duties through the Chief Native Commissioner, Native Commissioners, Assistant Native Commissioners and Magistrates.³

119. The Administrator was also empowered "whenever he deems it desirable" to "set aside areas as Native reserves for the sole use and occupation of Natives generally or of any race or tribe of Natives in particular and the inhabitants thereof shall be subject to such restrictions and to such regulations as he may prescribe".⁴

120. Inside the Police Zone, "Natives" are to be found in "Native" reserves, rural areas outside "Native" reserves, and urban areas. As has been explained, the control of "Native" administration within the urban areas is vested in the urban local authorities, subject to the powers of the Minister of Native Affairs (prior to April 1, 1955, the Administrator).⁵ Outside the urban areas, the administration of "Native" affairs is exercised through the Native Commissioners. The Magistrates of the several districts serve also as Native Commissioners for their respective districts. There are 17 such magisterial districts within the Zone.⁶

121. A Welfare Officer or a Superintendent of Reserves is in charge of each large reserve in a magisterial district in the Police

¹ *Id.* at sec. 1.

² *Id.* at sec. 2.

³ *Id.* at sec. 3.

⁴ Laws of South West Africa, 1915-22 (A. J. Waters, Windhoek, South West Africa), pp. 749ff. (Native Administration Proc. 1922, P. No. 11 of 1922).

⁵ See *ante*, para. 110.

⁶ U.N. Doc. No. A/AC.73/L.3, at 335, para. 28 (1954).

Zone. Such officer in charge reports to the Magistrate in the latter's capacity as the Native Commissioner for the district. When deemed necessary, a Native Reserve is divided into wards by the Native Commissioner (Magistrate). Each ward may be placed under the control of a "headman", who in turn is under the control of the Superintendent.¹

122. The "headman" is ordinarily a "Native". In each Native Reserve, a Native Reserve Board is established to assist and make suggestions in regard to the administration of the Native Reserves Trust Fund, and generally to assist the Superintendent in his work of developing and controlling the reserves.² A Native Reserve Board consists of the local Native Commissioner (Magistrate) or Assistant Native Commissioner, the headman and not more than six adult "Native" males who are initially elected by the adult "Native" males of the reserve, and then appointed by the Administrator, acting through the Native Commissioner (Magistrate). The Administrator (after April 1, 1955, the Union Minister of Native Affairs) may, in his discretion, dissolve any Native Reserve Board. He may also, in his discretion at any time and for any reason whatsoever, dismiss any elected member of such a Board.³

123. The "Native" headman and the "Native" members of the Native Reserve Boards represent the sole participation by "Natives" in the administration of the Native Reserves within the Police Zone. As has already been explained, the "Native" headman and the "Native" members of the Native Reserve Board are wholly under the control of the "European" officials heretofore described.

124. Outside the Police Zone, in the "Native" reserves, the "Natives" are permitted to operate under tribal law and custom, subject to guidance, supervision and control by the Governor General and by the Union Minister of Native Affairs exercised through officers stationed within these "Native" reserves. The Governor General has power to divide existing tribes into two or more parts; to amalgamate tribes or parts of tribes into one; to constitute a new tribe; to define the boundaries of the area of any tribe; to order the removal of any "Native" or groups of "Natives" from any place to any other place within the Territory; and in general to exercise all of the powers which traditionally would have been exercised by any supreme or paramount Native Chief.⁴

125. In 1958, the Union Department of Native Affairs was divided into two departments. The functions which the Depart-

¹ U.N. Doc. No. A/AC.73/L.3, at 338, paras. 37, 38 (1954).

² U.N. Doc. No. A/AC.73/L.10, at 53, para. 127 (1957).

³ *Ibid.*

⁴ U.N. Doc. No. A/AC.73/L.10 at 63-64, para. 161 (1957). These are the powers vested originally in the Administrator under the Native Administration Proclamation, 1928 (Laws of South West Africa, 1928, pp. 58ff., P. No. 15 of 1928). See *ante*, paras. 116-119 and fns. 6, p. 139, and 1-4, p. 140.

ment—and its Minister—had theretofore exercised with respect to the Territory of South West Africa were transferred to one of the two newly created departments, known as the Department of Bantu Administration and Development, and its Minister.¹

126. The Minister of Bantu Administration and Development is assisted by a Native Affairs Commission, of which the Minister or a deputy designated by him serves as chairman, and the Administrator of South West Africa serves as an *ex officio* member. There are also three to five other members. The functions of the Commission are advisory.²

127. The Minister of Bantu Administration and Development has delegated a number of his powers to the Administrator of the Territory.³ The erstwhile Chief Native Commissioner has been renamed the Chief Bantu Affairs Commissioner, and, as such, continues to operate under the Administrator as the chief operating officer of the Department of Bantu Administration and Development within the Territory.⁴

To sum up the situation with respect to suffrage and participation in government, whether territorial, local or tribal, and whether at the political or administrative level:

128. (1) The right of suffrage is completely denied to the "Native" population.

(2) At the political level of the Government of the Territory, including the Administrator, the Legislative Assembly, and the Executive Committee, the "Native" population, although it constitutes overwhelmingly the larger part of the total population of the Territory, has no participation whatever.

(3) 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.

(4) 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 U.N. Doc. No. A/AC.73/L.13 at 28, paras. 76, 77 (1959).

² The Native Affairs Act 1959, (Act No. 55 of 1959), as cited in A/AC.73/L.14 p. 42, para. 108, and fn. 76 thereto.

³ U.N. Doc. No. A/AC.73/L.14, at 43, para. 109.

⁴ *Id.* at para. 110.

(5) 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".

(6) In sum, by law and by deliberate and consistent practice, the Mandatory has failed to promote to the utmost the development of the preponderant part of the population of the Territory in regard to suffrage or participation in any aspect of government. It has not only failed to promote such development to the utmost, it has made no notable effort to do so. To the contrary, the Mandatory has pursued a systematic and active programme 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.

5. *Well-Being, Social Progress and Development: Security of the Person, Rights of Residence and Freedom of Movement*

(a) *Statement of Law*

"In accordance with these legal norms, the Mandatory's duties to safeguard and promote the 'material and moral well-being', the 'social progress' and the 'development' of the peoples of the Territory, must reasonably be construed to include.

.....

(4) Security of such persons and their protection against arbitrary mistreatment and abuse;

(5) Equal rights and opportunities for such persons in respect of home and residence, and their just and non-discriminatory treatment;

(6) Protection of basic human rights and fundamental freedoms of such persons;

.....

(8) Social development of such persons, based upon self-respect and civilized recognition of their worth and dignity as human beings."¹

¹ Pp. 107-108, *supra*.

b. *Statement of Fact*

Introduction

129. In the foregoing sections of this Memorial, which describe and analyze the situation of the "Native" population of the Territory in terms of agriculture, land tenure, industry, labor and government (territorial, local and tribal), there emerges a pattern of comprehensive, pervasive and tight control over the lives of the "Native" population of the Territory. The pattern is created by interlocking statutes, decrees, regulations, and administrative policies and practices. This section of the Memorial deals with the pattern of control as it bears upon the personal security of "Natives" within the Territory, their rights of residence and their freedom of movement.

Security of the Person

130. Reference has previously been made to the precarious situation of any "Native" under the Vagrancy Proclamation, 1920. Any "Native" "found wandering abroad and having no visible lawful means, or insufficient lawful means of support" and who "shall not give a good and satisfactory account of himself" is deemed "an idle and disorderly person". As such he may be arrested without a warrant, and upon conviction he may be imprisoned with or without hard labor and with or without solitary confinement for periods up to three months. Corresponding provisions apply to any "Native" "found without the permission of the owner ... wandering over any farm, in or loitering near any dwelling house, shop, store, stable, outhouse, garden, vineyard, kraal or other enclosed place"; or "loitering upon any road" crossing a farm, or "loitering at or near any hut, house or other building upon any farm". The power to arrest any such "Native" with or without a warrant is vested not only in any magistrate or police officer but also in any owner or occupier of land upon which the "Native" may be found. In addition, every owner of a farm "for the purpose of searching for any idle and disorderly person" may "enter without a warrant and make search in any hut, house or other building upon such farm".¹

131. Reference has previously been made to the power of any Superintendent within a "Native" reserve, under Section 20 of the Native Administration Proclamation 1922, to order "any male resident of a Reserve" who is believed by the Superintendent to have "no regular and sufficient lawful means of support" or to lead "an idle existence" to take up "employment on essential public works or services within or without the Reserve at a sufficient wage to be determined by such Superintendent."²

¹ See *ante*, para. 69.

² See *ante*, para. 70.

132. By another regulation issued under the Native Administration Proclamation 1922, any magistrate with the approval of the Administrator may order any resident of a "Native" Reserve or person within such Reserve, who shall in the opinion of such magistrate be an undesirable person, to leave such Reserve within a time specified by the order of the magistrate, provided that an opportunity shall first have been given to such person to show cause to the magistrate why he should not be ordered to leave in this manner.¹

133. Under Section 10 of the Native Administration Proclamation 1922,² any "Native" "found beyond the confines of the location, reserve, farm or place whereon he resides or where he is employed shall be bound upon the demand of any police official, duly authorized municipal official or native constable or any land owner or lessee to produce his pass ... and any native having no pass ... or neglecting or refusing to produce the same when so called upon shall be guilty of an offence and may be forthwith arrested by any such police official, municipal official, native constable, land owner or lessee without a warrant and shall be liable on conviction to" prescribed penalties.

134. Reference has previously been made to the power of any police officer, or any officer for the management or inspection of "Native" affairs in urban areas, to arrest any "Native" within a proclaimed area whenever such officer has reason to believe or suspect that the "Native" is habitually unemployed; or lacks a sufficient honest means of livelihood; or is leading an idle, dissolute or disorderly life; or has without leave or other lawful cause habitually absented himself during working hours from his employer's premises or other place proper for the performance of his work. The officer may arrest the "Native" without a warrant and cause him to be brought before a magistrate or "Native" commissioner, who shall require the "Native" to give a good and satisfactory account of himself.³ If the "Native" fails to give a good and satisfactory account of himself, he may be adjudged an "idle or disorderly person", and either removed from the area or ordered into employment.

135. In February, 1960, the Union Prisons Act (No. 8 of 1959)⁴ was made applicable to South West Africa by Proclamation.⁵ Under Section 20 of the Act, the Minister of Justice of the Union "may, by notice in the Gazette, establish prisons ... (e) of the type

¹ U.N. Doc. No. A/AC.73/L.3 Add. 1, at 123, para. 6, Reg. 27 (1954).

² (1915-22) Laws of South West Africa (A. J. Waters, Windhoek, South West Africa) pp. 749ff. (Proc. No. 11 of 1922).

³ See *ante*, para. 68 and fn. 1, p. 126; see also A/AC.73/L.3 Add. 1; pp. 147-48, para. 26 (1954).

⁴ Union of South Africa Statutes, 1959, pp. 16ff.

⁵ Union Proc. No. 271 of 1959 (Official Gazette of South West Africa 2235), as cited in U.N. Doc. No. A/AC.73/L.14, at 117-18, paras. 351, 353 (1959).

known as farm colonies to which persons declared to be idle persons may be sent to learn habits of industry and labour".

136. Under Section 1 of the Undesirables Removal Proclamation, 1920,¹ as amended by Union Proclamation 51 of 1937,² the Administrator for "Europeans" and the Minister of Native Affairs for "Natives" is empowered to expel from the Territory any person "if he is satisfied" that such person "has directly or indirectly inflicted or threatened to inflict upon any person any harm, hurt or loss, whether to his person, property, reputation or feelings, or has directly or indirectly done or threatened to do anything to the disadvantage of any person, with the object of compelling or inducing that person or any other person" to perform any act from which he might lawfully abstain or refrain from performing any act which he might lawfully do. The unbridled discretion of the Administrator in the exercise of this power is emphasized by the legislative history of the provision. When the Proclamation was originally adopted in 1920, the Administrator could exercise his power of expulsion whenever it was "shown to his satisfaction that there are reasonable grounds for believing" certain described facts concerning the alleged offender. By the amendment of 1937, the reference to "reasonable grounds for believing" was dropped in favor of a simple requirement that the Administrator be "satisfied" concerning alleged facts, apparently whether or not there might be reasonable grounds for his being satisfied.

137. The uncontrolled scope of the foregoing power of the Administrator is further emphasized by subsection (3) of said section 1 of said Proclamation as amended. Subsection (3) expressly provides that "No court shall have jurisdiction in respect of any direction issued by the Administrator" in the exercise of his powers of expulsion under said section 1.

Rights of Residence

138. Under Section 16 of the Native Administration Proclamation 1922, the Administrator (since April 1, 1955, the Minister of Native Affairs of the Union) is empowered "whenever he deems it desirable [to] set aside areas as native reserves for the sole use and occupation of natives generally or of any race or tribe of natives in particular and the inhabitants thereof shall be subject to such restrictions and to such regulations as he may prescribe."³

139. Reference has previously been made to the powers of the Administrator (after April 1, 1955, the Governor General or the Union Minister of Native Affairs), with respect to the "Natives"

¹ (1915-22) Laws of South West Africa (A. J. Waters, Windhoek, South West Africa, pp. 424-25 (Proc. No. 50 of 1920).

² (1937) Laws of South West Africa, pp. 6off., sec. 7.

³ *Loc. cit.*, *supra*, fn. 4, p. 111, sec. 16.

within any "Native" Reserve. The Administrator (Governor General) has power, *inter alia*, to "define the boundaries of the area of any tribe or of a location"; to "divide existing tribes into two or more parts or amalgamate tribes or parts of tribes into one tribe or constitute a new tribe"; to "order the removal of any tribe or portion thereof or any Native from any place to any other place within the mandated Territory" whenever "he deems it expedient in the general public interest ..." In the exercise of these immense powers, the Administrator (the Governor General) is expressly declared to be above and beyond the control or restraint of any court of law.¹

140. Reference has previously been made to the requirement that "Native" laborers recruited from the "Native" reserves outside the Police Zone for labor within the Police Zone may remain within the Police Zone only for the period of employment provided for in the contract, and in no case exceeding two-and-a-half years. Any such "Native" must carry his identification pass with him at all times within the Police Zone and produce it on the demand of any member of the South West Africa Police, or any other authorized officer or any person who employs him.²

141. Under section 25 of the Natives (Urban Areas) Proclamation, 1951, entitled "Removal of Redundant Natives from Urban Areas",³ the Governor General may "declare any urban area to be an area in respect of which, on being satisfied that the number of natives within that area is in excess of the reasonable labor requirements of that area, he may ...

"(a) require the urban local authority within a specified period to lodge with him a list of the names of the natives who, in its opinion, ought to be removed from the urban area;

"(b) determine which of the natives specified in that list shall be removed from the urban area;

"(c) make provision for the accommodation of the natives so removed who are lawfully domiciled in the Territory."

Thereafter, the urban local authority, acting under the Administrator's determination, must make arrangements for the removal of the "Natives" concerned, in accordance with the prescribed procedure.

142. Except with the written approval of the Administrator, given after consultation with the urban local authority concerned, "Natives" are forbidden to congregate upon land situated outside an urban area within five miles of the boundary thereof. To supplement this prohibition, no owner, lessee or occupier of land situated outside an urban area within five miles of the boundary thereof

¹ See *ante*, paras. 116, 117, and 124.

² See *ante*, paras. 55, 65.

³ (1951) Laws of South West Africa, pp. 90ff. (Proc. No. 56 of 1951).

"shall allow natives to congregate upon, or any native who is not *bona fide* in his employ to reside upon, or to occupy any dwelling on that land."¹

143. The Administrator, upon the request of the local authority, for any urban area, may prohibit any "Native" from entering such urban area for the purpose of seeking or taking up employment or residing therein, except in accordance with prescribed conditions.²

144. Reference has already been made to the requirement, in effect since 1955, that "Natives" who enter any one of the many proclaimed urban areas must not only register but must also pay a fee of a shilling. Upon registration, any such "Native" must remain within a reception depot until he obtains employment or is required by order to leave. Upon his employment, his employer must pay a fee of two shillings initially and each month thereafter.³

145. Reference has already been made to the power of urban local authorities to set aside separate areas of land within municipalities or Village Management Board areas for occupation by "Natives". Such separately designated areas for occupation by "Natives" are of three types—locations, "Native" villages and "Native" hostels.⁴

Freedom of Movement

146. Under Section 11 of the Native Administration Proclamation 1922, no "Native" may travel within the Police Zone except "upon a pass issued [to him] by the European owner or lessee of the farm or private property on which he resides, or by his European employer or by a magistrate, a superintendent of natives, an officer or constable in charge of a police post or any person appointed for the purpose by the Administrator."

147. Under Sections 11 and 12 of the Native Administration Proclamation 1922,⁵ no "Native" may leave the Territory of South West Africa except upon a pass which may be issued to him only by a magistrate or by the Administrator. Under Section 12, any person authorized to issue a pass has "discretion to refuse to issue a pass to any native to enter or depart from the Territory or travel therein for any reason appearing to him to be sufficient". In any case, the Administrator "shall have full authority or discretion ... to order that a pass shall be issued or refused to any native notwithstanding any prohibition or other provision contained in this Proclamation."⁶

¹ *Id.* at sec. 13.

² *Id.* at sec. 10.

³ See *ante*, para. 71.

⁴ See *ante*, paras. 111, 112.

⁵ *Loc. cit.*, *supra*, fn. 4, p. 111.

⁶ *Id.* at secs. 11, 12.

148. Under Section 4 of the Native Administration Proclamation 1922, "No person other than a European shall enter the Territory without a permit from the Administrator provided that such permit shall not be required in the case of a person entering the Territory to take up employment already offered or in the course of employment as a farm or domestic servant, Government servant, mine servant, or in such other occupation as the Administrator may from time to time ... prescribe."¹

149. Reference has previously been made to the fact that no "Native" from outside the Police Zone may enter the Police Zone or hold employment there without an identification pass issued by an authorized officer.²

150. The Administrator may declare any urban area within which a local authority has set apart areas for "Native" occupation, or any area in which "Natives" are congregated in large numbers for mining or industrial purposes, to be a "proclaimed area". The Administrator may "require every male native entering the proclaimed area ... to report his arrival within a prescribed period, to obtain a document certifying that he has or has not obtained permission to be in the proclaimed area, and to produce that document on demand to any authorized officer".³ The Administrator may refuse permission to any "Native" to be in the proclaimed area whenever there is a surplus of "Native" labor available within the proclaimed area; or if the "Native" fails to carry the pass required by the applicable laws; or if he is under the age of 18 years unless he is accompanied by his parent or guardian.³

151. The Administrator may prohibit any female "Native" from entering a proclaimed area for the purpose of residing or obtaining employment therein without a certificate of approval from an officer designated by the local authority for such proclaimed area, and a certificate from the magistrate or "Native" commissioner of the district wherein she resides. If "the necessary accommodation" is available, a certificate shall upon application be issued to any female "Native" "who produces satisfactory proof that her husband, or in the case of an unmarried female her father, has been resident and continuously employed in the said area for not less than two years." Any such certificate may be for a limited period and may be cancelled at any time after one month's notice.⁴

152. The Administrator may at the request of any urban local authority prescribe a curfew, under which no "Native" "shall be in any public place within the area controlled by such authority during such hours of the night as are specified ..."⁵

¹ *Id.* at sec. 4.

² See *ante*, para. 65.

³ Natives (Urban Areas) Proclamation, 1951, *loc. cit.*, *supra*, fn. 3, p. 118, sec. 22.

⁴ *Id.* at sec. 22(d).

⁵ *Id.* at sec. 27 (1).

153. In their cumulative effect, the multiple restraints upon the movement of "Natives" and the vulnerability of the "Natives" to arbitrary arrest press upon the individual "Native" with an almost suffocating weight. To appreciate the burden, it may be helpful to try to envisage the situation from the angle of vision of any individual "Native". If the "Native" is a resident of a "Native" Reserve, whether within or outside the Police Zone, he may at any time suddenly be ordered to leave the Reserve (*ante*, para. 132); or he may be removed to some other place within it (*ante*, para. 139). If, for any reason, he should himself want to leave a Reserve outside the Police Zone to enter the Police Zone, he may be stopped at any point and required to show a pass authorizing him to be within the Police Zone (*ante*, paras. 140, 149). Wherever he may be, whether inside or outside the Police Zone, he may be required at any time to produce a pass showing that he has a right to be within the Territory (*ante*, para. 148). Such demands upon him to show his pass may be made repeatedly. If he has a job within the Police Zone, he may be required at any time to produce a pass showing his right to hold the job; and he may also be required to prove that he has not been on the job for more than a prescribed period, not exceeding two-and-a-half years (*ante*, paras. 140, 149). If he should seek to enter any urban area, or any area in which "Natives" are congregated in large numbers for industrial or mining purposes, he must again be ready at any time to produce a document showing that he has special permission to be there (*ante*, para. 150). Even if he has such a document, he must take care lest he find himself within a public place after curfew (*ante*, para. 152). Even if he succeeds in establishing his right to reside and be employed within an urban area, he may be removed at any time as "redundant" (*ante*, para. 141). Even though lawfully employed, he must be constantly on guard during his moments of leisure. If he should simply take a walk, he may be challenged to prove that he is not "an idle and disorderly person" (*ante*, para. 130). If he should happen to be upon any road crossing a farm, or near a dwelling house or shop or store, he may be challenged as a loiterer, and arrested without a warrant by any police officer or any owner or occupier of land on which he may happen to be (*ante*, para. 130). If he leaves the confines of his place of residence or place of employment, he does so at his peril, for he may be challenged at any moment to produce a pass, and, failing his ability to do so, may be arrested without a warrant (*ante*, para. 133). In addition, he may find himself arrested without a warrant at any time within a proclaimed area by any officer who suspects that he may lack a sufficient means of livelihood or even that he has absented himself during working hours from his place of employment (*ante*, para. 134). Furthermore, any interchange with any other person may subject him to arrest and expulsion from the Territory, if the Minister of Bantu Administration and Development in his uncontrolled discretion should

choose to interpret the interchange as falling into any one of several extremely vague categories (*ante*, para. 136).

To sum up the situation with respect to security of the person, rights of residence and freedom of movement for "Natives" within the Territory of South West Africa:

154. Through interlocking statutes, regulations, decrees, orders and administrative policies and practices:

(1) In a variety of situations and under a variety of circumstances, hereinabove more particularly described, "Natives" within the Territory of South West Africa are subject to arbitrary arrest, often without any warrant.

(2) Powers to make arrests may be exercised by designated persons at their largely uncontrolled discretion.

(3) "Natives" are not allowed even a faint approximation of the degree of freedom of choice permitted to "Europeans" concerning where they may reside within the Territory. On the contrary, "Natives" are confined within sharply defined areas and places under prescribed conditions. The pattern of restrictions upon the residence of "Natives" is uniformly arbitrary and discriminatory; it is conceived and executed to give increasingly intensive effect to the dominating principle of *apartheid*.

(4) Liberty of movement has been effectively and almost completely denied to the "Native" population of the Territory in a large number and variety of ways hereinabove more particularly described. The U.N. Committee on South West Africa, in rendering its report to the Fourteenth Session of the General Assembly in 1959, summed up the situation by stressing the "intricate system by which the free movement of the 'Non-European' population and the 'Native' population in particular is restricted and controlled in the Territory of South West Africa." The Committee emphasized that there had been no indication of any relaxation in the system of control during 1959.¹ The Committee went on to express "its grave concern over the unwarranted restrictions, based on race or colour, placed on the freedom of movement of the 'Native' population of South West Africa, who form the overwhelming majority of the total population" of the Territory.²

(5) In sum, in the entire complex of provisions for the arbitrary arrest of "Natives" and tight restrictions upon their residence and movement, the Mandatory has given consideration solely to the convenience or advantage of the Mandatory government and of the "European" citizens and residents of the Territory. The Mandatory has uniformly failed to promote the material and moral well-being, the social progress and the development of overwhelm-

¹ Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 14th Sess., Supp. No. 12, p. 24, para. 162 (A/4191) (1959).

² *Id.* at 25, para. 175.

ingly the larger part of the inhabitants of the Territory of South West Africa in terms of security for their persons, their rights and opportunities of residence, and their freedom of movement. On the contrary, by law and by practice, the Mandatory has followed a systematic course of positive action which thwarts the well-being, inhibits the social progress and frustrates the development of the great majority of the population of the Territory in vital and fundamental aspects of their lives.

6. *Well-Being, Social Progress and Development: Education*

(a) *Statement of Law*

"In accordance with these legal norms, the Mandatory's duties to safeguard and promote the 'material and moral well-being', the 'social progress' and the 'development' of the people of the Territory must reasonably be construed to include:

(7) Educational advancement of such persons;

(8) Social development of such persons, based upon self-respect and civilized recognition of their worth and dignity as human beings."¹

(b) *Statement of Facts*

Background Information

155. The system of education in the Territory of South West Africa is established and controlled in accordance with the terms of the Education Proclamation, 1926,² as from time to time amended. Under the Proclamation, the "general control, supervision, and direction of education" is vested in the Administrator.³

156. The Administrator carries out his functions with respect to education in the Territory through a Department of Education. The director of the Department is appointed by and subject to the direction and control of the Administrator.⁴

157. In May, 1958, the Administrator constituted a Commission of Inquiry into non-European Education. The report of the Commission became available during 1959. The Commission reported, *inter alia*, on the "advantages of eventually transferring Native and Coloured education, respectively, to the Union of South Africa Department of Bantu Education and the Union Department of Coloured Affairs."⁵

158. The educational system of the Territory is organized in three separate divisions. Separate schools are maintained for

¹ Pp. 107-108, *supra*.

² (1926) Laws of South West Africa, pp. 132ff. (Proc. No. 16 of 1926).

³ *Id.* at sec. 3.

⁴ U.N. Doc. No. A/AC.73/L.10 at 177, paras. 512-513 (1957).

⁵ U.N. Doc. No. A/AC.73/L.14, at 124-125, paras. 369-374 (1959).

"Europeans", "Natives" and "Coloured Persons".¹ This separation reflects the specific application within the sphere of education of the generally prevailing doctrine of *apartheid*, according to which the status, rights, duties, opportunities and burdens of the population of the Territory are determined and allotted arbitrarily on the basis of race, color and tribe, without regard either to the needs or capacities of the individuals or groups affected or to the duties of the Mandatory under the Mandate.

Scope and Quality of Education Available

Elementary and High School Education

159. The minimum education required for "European" children within the Territory involves compulsory attendance until the age of sixteen and completion of "Standard VIII", meaning completion of the tenth school year. The schools for "European" children offer courses of instruction similar in scope and content to those given for children in the same age groups in the United Kingdom, the United States and the continental countries of Western Europe.²

160. By contrast, education for "Native" and "Coloured" children is not compulsory. Although segments of the "Native" and "Coloured" population have requested compulsory education, the Administration has adhered to the view that the "Native" and "Coloured" population is not ready for such a step.³

161. The schools for "Non-Europeans" fall into three groups: government schools, missionary schools accorded "recognized" status, and mission schools which do not have "recognized" status. In the case of the "recognized" mission schools, the Territorial Government pays the salaries of teachers, provides the equipment, and assists in the maintenance of school buildings and the provision of books and paper.⁴

162. The government schools and the "recognized" mission schools provide a course of instruction for "Non-European" children up to and including "Standard VI", representing the completion of an eighth school year. The instruction actually reaches "Standard VI", however, only when there are sufficient pupils to make the addition of classes and teachers appear justifiable to the Territorial Administration. Opportunity for education beyond "Standard VI" for "Native" and "Coloured" children is almost negligible.⁵

¹ U.N. Doc. No. A/AC.73/L.10, at 177, para. 514; Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 13th Sess., Supp. No. 12, p. 26, para. 154 (A/3906) (1958).

² U.N. Doc. No. A/AC.73/L.10, at 177-78, para. 515 (1957).

³ *Id.* at 178, para. 517.

⁴ *Id.* at 178-79, para. 518.

⁵ See *post*, para. 165.

163. As of 1959, out of a total estimated "European" population of 69,000, there were approximately 15,523 pupils going to school. On the other hand, the number of "Native" children attending school was estimated at 32,624 out of a total "Native" population of 464,000. In percentage terms, this represents school attendance by "European" children constituting approximately 22 per cent of the total "European" population, and school attendance by "Native" children representing a bare 7 per cent of the total "Native" population.

164. In the areas outside the Police Zone, most of the mission schools are "unrecognized". The "unrecognized" mission schools normally offer courses of study up to approximately "Standard III"—i.e. through the completion of the fifth school year only.¹ Since the larger part of the "Native" population lives outside the Police Zone,² this represents the limit of education practically available to most of the "Native" children.

165. The school system for "European" children includes not only the infant school and the elementary school, but also complete education at the high school level—i.e. through "Standard X", representing the completion of the twelfth year. For "Non-European" children, however, there are only two high schools in the entire Territory: one for "Native" children at Augustineum and another for "Coloured" children at Rehoboth.³

166. The disparity between school opportunities for "European" children and such opportunities for "Non-European" children is also manifest in the provision of residential facilities made for children while attending school. Because of the sparse distribution of the population over large areas within the Territory, it is necessary to provide school "hostels"—in effect boarding establishments—for children attending schools far from their homes. Such hostels are provided in sufficient number to accommodate all "European" children. It is reported that for the year 1959 there were 61 hostels for "European" children. The position of "Non-European" children in this respect is indicated by the following statement in the 1960 Report of the Committee on South West Africa (paragraph 380, p. 48): "For 'Native' children, the available official information indicates that there are at least three hostels within the Police Zone, one at the Augustineum teacher training school in Okahandja, and the others in the Aminuis and Waterberg East 'Native' reserves. In the urban areas of the Territory, the position was described as follows by the territorial Commission of Enquiry into Non-European Education:

¹ *Id.* at 179, para. 519.

² See *ante*, paras. 6 and 7.

³ *Id.*, at 178-79, paras. 515, 519.

'In accordance with the policy of the Department of Native Affairs which took over the administration of Native Affairs in South West Africa in April 1955, no school hostels are permitted at Native schools in locations in European areas.'

Vocational Training

167. In the entire Territory of South West Africa, there appears to be only one institution above the level of the high school. This is the Neudam Agricultural College. The College provides a two-year course, solely for "Europeans".¹

168. "Natives" may receive training as teachers at two training schools within the Territory. One, the Augustineum, is maintained by the Territorial Government at Okahandja; and the other is a Roman Catholic school at Doeбра.

169. There appear to be no facilities within the Territory for the training of "Non-European" nurses. In the 1958 report of the Territorial Commission of Enquiry into "non-European" Education, it was stated that the Administrator intended to start training programs for male and female nurses at the Government Hospital at Windhoek. In the budget speech of the Administrator for 1960, the Administrator stated that training courses for "European" nurses had definitely been introduced, and that for this purpose the State-aided hospital in Windhoek had been taken over as a state hospital. However, despite the statement in the 1958 report of the Commission of Enquiry, there is no evidence that any beginning has yet been made in the training of "Non-European" nurses within the Territory.²

170. To the extent that "Natives" or "Coloured persons" can avail themselves of the limited facilities and opportunities available to them for training as nurses in the Union, they nevertheless can enter the nursing profession only on a plane maintained and stigmatized as inferior. The scheme to confine them to a status of publicly proclaimed inferiority is revealed, and the methods carrying it out are exemplified, in such measures as the Nursing Act, 1957.³

171. The Nursing Act, 1957, a statute of the Union, is made applicable to the Territory as well as the Union by its terms.⁴ The Act vests extensive authority over the nursing profession in a South African Nursing Council,⁵ and also vests important responsibilities relating to the profession in a South African Nursing Association.⁶

¹ U.N. Doc. No. A/AC.73/L.10, at 184, paras. 541, 542 (1957).

² U.N. Doc. No. A/AC.73/L.14, at 113-14, para. 338 (1959).

³ Statutes of the Union of South Africa, 1957, pp. 1086ff. (Act No. 69 of 1957).

⁴ See, e.g., sec. 1 (xxi).

⁵ *Id.* at secs. 2, 10, 11-15, 22-29.

⁶ *Id.* at secs. 30, 21, 39, 40.

172. No person is eligible to appointment or election as a member of the South African Nursing Council "who is not a South African citizen and a white person permanently resident in the Union or the Territory".¹ The same requirement governs eligibility to serve as a member of the Board of the South African Nursing Association, which exercises control over the affairs of the Association.² Although the Act does provide that one member of the eighteen-member Board is to be elected by the "advisory committee for natives" hereinafter described, and another is to be elected by the "advisory committee for coloured persons" hereinafter described, even these members must themselves be "white".³

173. The Act provides for the establishment of an "advisory board for natives" and an "advisory board for coloured persons". Each advisory board consists of five members, elected by "Native" nurses or midwives or "Coloured" nurses or midwives, respectively. The boards may "advise that council [South African Nursing Council] on such matters relating to nurses or midwives who are coloured persons or natives, as may be referred to such a board by the council, or upon which any board may wish to report to the council."⁴

174. The Act divides the membership of the South African Nursing Association into three separate classes: "white persons", "coloured persons" and "natives". Meetings of the three classes must be held separately. A decision reached by a majority at a meeting of "members who are white persons" constitutes a decision of the Association. By contrast, a decision reached at a meeting of "native" or "coloured" members is merely a subject for consideration by the "advisory committee for natives" or the "advisory committee for coloured persons", as the case may be. Such advisory committee in turn reports the decision with its recommendation to the Board.⁵

175. Separate registers and rolls are kept "in respect of white persons, coloured persons and natives."⁶ It is made a criminal offence to cause or permit any "white person" registered or enrolled as a nurse or as a student auxiliary nurse to serve under the "control or supervision of any registered or enrolled person who is not a white person, in any hospital or similar institution or in any training school," except in an "emergency".⁷

176. The Act authorizes the South African Nursing Council to prescribe "different uniforms, badges or other distinguishing devices ... in respect of white persons, coloured persons and natives".⁸

¹ *Id.* at sec. 4 (1) (c).

² *Id.* at secs. 34, 35 (4).

³ *Id.* at sec. 35 (2) (e), 35 (2) (f), 35 (4).

⁴ *Id.* at secs. 16, 17.

⁵ *Id.* at sec. 33.

⁶ *Id.* at sec. 12 (4).

⁷ *Id.* at sec. 49.

⁸ *Id.* at secs. 11 (1) (k), 11 (4).

Higher Education

177. No facilities exist within the Territory for higher education. The administration has established a policy of extending financial assistance, in the form of bursaries, to needy and deserving students to enable them to pursue their higher education in the Union. These bursaries may be in the form of loans, or in the form of free grants. In the year 1953-54, and again in the year 1954-55, thirty-six students received such bursaries for study in the Union. The majority of the bursaries are granted for the pursuit of advanced training in teaching, agriculture, geology and civil engineering. While the evidence is not clear, there do not appear to have been any "Non-European" recipients of the bursaries.¹

178. Apart from financial assistance in the form of bursaries, students from the Territory may pursue higher education in the universities of the Union of South Africa. While this represents a significant opportunity for "European" students from the Territory, it represents primarily a reminder of opportunities denied to the "Non-European" students from the Territory. Since January 1, 1960, "Non-European" students from the Territory have become ineligible to register in any of the "European" universities in South Africa which had formerly been open to them, except with the written consent of the Union Minister of Bantu Education. To the foregoing sweeping interdiction there are only two limited exceptions: "Non-European" students from the Territory are eligible to enroll in a medical school maintained for "Non-Europeans" by the University of Natal; and "Non-European" students from the Territory may enroll in correspondence courses only (not in person) in the University of South Africa.

179. In effect, only one university of any sort may fairly be said to be open to "Natives" from the Territory. This is the University College of Fort Hare, a "Native" institution to which no students other than "Natives" may be admitted. "Coloured" students from the Territory are eligible to enroll in a separate "Coloured" university college established in the Union towards the end of 1959. It appears that "Natives" from the Territory may also be admitted to two other Bantu university colleges in the Union if they can obtain permission, which must be sought on an individual basis from the Minister of Bantu Education.²

180. A grim insight into the quality of education offered for "Natives" in the Bantu institutions, as well as the spirit in which it is offered, is given by statements of the Minister of Bantu Education. Speaking in the House of Assembly of the Union in May 1960, the Minister of Bantu Education emphasized that he did not want "frustrated people" to be turned out by the Bantu universities.

¹ U.N. Doc. No. A/AC.73/L.10, at 184-85, paras. 542-543 (1957).

² U.N. Doc. No. A/AC.73/L.14, at 125-26, paras. 375, 376 (1959).

To explain his alleged concern about "frustrated people", he referred to the undesirability of training Bantu engineers. The Minister pointed out that a Bantu engineer could not find employment in any department except the Department of Bantu Administration and Development. Even within this department, however, the Minister explained that the so-called opportunities for employment for "Native" engineers were purely theoretical, since there were no Bantu assistants for such engineers, and since it was against government policy to permit a Bantu engineer to have a "European" assistant. In consequence, he advised prospective "Native" engineering students to protect themselves against futility by avoiding training as engineers and seeking instead to be trained as assistants to "European" engineers. The Minister went on to indicate that provision would be made at the Bantu university colleges for the training of "Natives" as engineering assistants.¹

151. The foregoing statements of the Minister of Bantu Education support a complaint made in a petition to the Chairman of the U.N. Committee on South West Africa by Chief Hosea Kutako. Chief Kutako expressed a fear that the government intended to introduce the so-called Bantu Education System into the Territory, and protested that the objective of this system is "to teach the non-Europeans from childhood that they are inferior to the Europeans."²

Comparative Status of Teachers: "Native" and "European"

182. For "European" teachers in "Native" schools, up to 1955, salaries ranged from a minimum of £435 for men (£390 for women) to a maximum of £1060 for men (£870 for women) per annum. By contrast, the *maximum* salary available for "Non-European" teachers was only £230 per annum for men (£198 for women).³

183. In 1955-56, there was a general increase of £110 for all "European" teachers in "Native" schools. By contrast, there was made available for "Non-European" teachers only the possibility of an additional increment of £15 for men (£12 for women) per annum for each of three years making a maximum possible aggregate increase of £45. Unlike the increase for the "European" teachers, which was general in its application, the provision for possible increases for "Non-European" teachers was merely that individual teachers might be recommended for such increases within the limits mentioned.³

¹ *Id.* at 126, para. 377.

² Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 14th Sess., Supp. No. 12 at 50 (A/4191) (1959).

³ U.N. Doc. No. A/AC.73/L.10, at 184, paras. 539, 540 (1957).

Comparative Budgets

184. Despite the great preponderance in numbers of the "Native" population over the "European", expenditures on education have been much higher for the "European" population than for the "Native" population. In 1953-54, the total expenditure on "European" education was £678,180, whereas the total expenditure on "Native" education was merely £100,578. In 1954-55, expenditure on "European" education rose to £723,897; whereas expenditure on "Native" education was merely £108,392. In 1955-56, the expenditure on "European" education rose again to £762,346; the expenditure on "Native" education also rose, but only to £119,250.¹

185. The foregoing figures may be illuminated by some per capita calculations, taking the figures for 1954-55 as a basis. In that year, the number of "European" children attending school within the Territory was some 11,382.² The number of "Native" children attending some sort of school within the Territory, either inside the Police Zone or in the large Reserves outside the Police Zone, aggregated some 24,858.³ Thus, expenditures on education during that year for each "European" child enrolled in school amounted to some £63.5. By contrast, the expenditure for each "Native" child enrolled in school amounted to some £4.4. It should be emphasized that these calculations are on the basis of expenditures for children actually enrolled in the schools. It must be borne in mind, however, that the enrollment of "Native" children represents a far smaller fraction of the "Native" population than the enrollment of "European" children represents of the "European" population. In consequence, the expenditure per capita for the total "European" population as compared with the expenditure per capita for the total "Native" population would show an even more fantastic discrepancy.

To sum up in regard to education within the Territory:

186. The laws, policies and practices of the Territorial and Union Governments relating to education make it clear that the Mandatory plans to maintain in the future the existing burden of negation, frustration and unfair discrimination under which the adult "Native" population of the Territory suffers in the life of the Territory. This is implicit in the denial of educational opportunities to "Native" children. If the status of the "Native" population is to be improved, plainly the improvement must involve the education of the young. In fact, however, by deliberate policy and practice, the Union and Territorial Governments restrict and shape the education of the young so as to perpetuate the denial of possibilities

¹ U.N. Doc. No. A/AC.73/L.10, at 179-80, paras. 521-523 (1957).

² U.N. Doc. No. A/AC.73/L.13, at 99, para. 283 (1959).

³ *Id.* at 100, paras. 285-86.

for self-improvement and the relegation to a status of imposed inferiority to which the "Native" population is now subject. More particularly:

(1) Only a small fraction of the "Native" children within the Territory receive any schooling compared with the compulsory education for all "European" children of the Territory.

(2) To the extent that "Native" children are educated at all within the Territory, almost none receive any education beyond "Standard VI", representing the completion of the eighth school year, and the majority do not receive education beyond "Standard III", representing the completion of the fifth school year.

(3) No facilities for high school education are available for "Natives" within the Territory, apart from a high school at Augustineum.

(4) Apart from limited possibilities for training as teachers within the Territory, the "Native" population has no access to higher education or to any significant form of vocational education within the Territory.

(5) While some possibility for higher education and vocational education is theoretically available to "Natives" from the Territory in the Union, the possibilities are very meagre, and the pursuit of, even these meagre possibilities is discouraged by the Mandatory.

(6) Even in the few occupations for which "Natives" do have some access to opportunities for vocational or technical training (i.e.—as teachers, nurses, engineering assistants), the Mandatory imposes upon "Natives" who enter such occupations much lower scales of compensation than are available to "Europeans", sharply curtailed spheres of activity, and a publicly proclaimed inferiority of status.

(7) Despite the overwhelming preponderance of "Natives" within the population of the Territory, the total of expenditures for the education of "Natives" within the Territory is only a small fraction of the total of expenditures for the education of "Europeans" within the Territory.

(8) In sum, the Mandatory has failed to use the possibilities of education to promote the well-being, the social progress and the development of the overwhelming majority of the people of South West Africa. To the contrary, through deliberate and systematic control of the processes of education, the Mandatory has taken positive action which drastically restricts opportunities for education for "Native" children and "Native" young men and women, and which curtails the opportunities, restricts the rewards and depreciates the status of "Natives" who do manage to acquire some vocational education (e.g. teachers, nurses, engineering assistants). In this way, the Mandatory has removed opportunities

for any significant improvement in the well-being, social progress and development of the preponderantly "Native" population of the Territory.

C. LEGAL CONCLUSIONS

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

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

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

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

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

(i) The Mandatory has had, and continues to have, the duty to safeguard and promote "*to the utmost*" the "*material and moral well-being,*" the "*social progress*" and the development of the people of the Territory, including more particularly the *economic advancement* of the population of the Territory—and notably of the "Natives" who constitute by far the preponderant part of the total population in agriculture and industry, and the rights and opportunities of that part of such population that is employed as laborers in agriculture or industry. Nevertheless, in direct violation of such duty:

(a) The Mandatory has progressively reduced the proportion of farm land available for cultivation or pastoral use of the "Native" population, while it has progressively increased the proportion of such farm land available to "Europeans." This has been carried to the point where less than 12 per cent of the population, being "White," enjoys the use of some 45 per cent of the total land area; while over 88 per cent of the population, being "Native" or "Coloured," is confined to only 27 per cent.

(b) The Mandatory has denied the possibilities of individual ownership of land to the "Native" population, and has confined these rights to the "White" population.

(c) The Mandatory has limited the role of the "Native" population in agriculture to (a) subsistence farming within "Native" reserves and (b) employment as common laborers or domestics on "European" commercial farms. In consequence, the "Native"

population has not enjoyed any substantial participation in the expanding possibilities of the commercial agriculture of the Territory.

(d) The past and present restrictions upon the "Native" population in agriculture are not alleviated by promise or possibility of future improvement.

(e) Even in connection with emergency relief made available to the agricultural sector in time of drought, the Mandatory has used overwhelmingly the larger part of relief funds for the assistance of the small "European" proportion of the population, while the relief funds used to help the large "Native" population have been confined to a comparative pittance.

(f) The Mandatory has denied and continues to deny to the "Natives" of the Territory opportunity to take part in mining or other industries as prospector, entrepreneur, operator, or owner.

(g) The Mandatory has denied and continues to deny to the "Native" population opportunity to take part in executive, managerial, professional or technical posts in mining and other industries.

(h) The Mandatory has unfairly prohibited and continues to prohibit "Natives" from taking part in the processes of collective bargaining and the conciliation and arbitration of disputes.

(i) The Mandatory has confined the participation of the "Native" population in the industrial economy, for all practical purposes, to the role of unskilled laborer.

(j) The Mandatory has shaped the circumstances and conditions of labor for the "Native" population into a pattern of constraint and compulsion that consistently subordinates the interests of the "Native" laborers to the interests of their "European" employers.

(k) The Mandatory has so drastically curtailed and circumscribed the possibilities of choice for "Native" laborers as to leave them, for all practical purposes, very little freedom of choice with respect to place of employment, type of employment, identity or character of employer, or conditions of employment.

(l) The Mandatory has denied to "Native" laborers equal legislative protection in the form of provisions for holidays, sick pay, and compensation in the event of illness or injury caused by employment which are made available to "White" employees.

(ii) The Mandatory has had, and continues to have, the duty to safeguard and promote "to the utmost" the "material and moral well-being," the "social progress" and the development of the peoples of the Territory, including more particularly the *political advancement* of such persons through rights of suffrage, progressively increasing participation in the processes of government, develop-

ment of self-government and free political institutions. Nevertheless, in direct violation of such duty:

(a) The Mandatory has completely denied the right of suffrage to the "Native" population.

(b) The Mandatory has permitted no participation whatever to the "Native" population at the political level of the Government of the Territory, including the Administrator, the Legislative Assembly, and the Executive Committee, although it constitutes overwhelmingly the larger part of the total population of the Territory.

(c) The Mandatory has permitted only minimal participation of "Natives" at the administrative levels of the Government of the Territory. With very few exceptions, "Natives" are confined to the lowest levels of employment, involving neither skill nor responsibility.

(d) The Mandatory has almost entirely excluded the "Native" population from participation or even any semblance of participation in the government of the established local units within the Territory—the municipalities and the village management board areas. 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).

(e) The Mandatory has imposed the same pattern of discrimination, negation and frustration in the administration of the "Native" reserves. 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."

(iii) The Mandatory has had, and continues to have, the duty to safeguard and promote *"to the utmost"* the *"material and moral well-being"*, the *"social progress"* and development of the people of the Territory, including more particularly *security of such persons* and their protection against arbitrary mistreatment and abuse; *equal rights and opportunities* for such persons in respect of home and residence, and their just and non-discriminatory treatment; *protection of basic human rights* and fundamental

freedoms of such persons; and the social development of such persons, based upon self-respect and civilized recognition of their worth and dignity as human beings. Nevertheless, in direct violation of such duty:

(a) The Mandatory has established a regime in which in a variety of situations and under a variety of circumstances, hereinabove more particularly described, "Natives" within the Territory of South West Africa are subject to arbitrary arrest, often without any warrant.

(b) The Mandatory permits powers of arrest to be exercised by designated persons at their largely uncontrolled discretion.

(c) The Mandatory has not allowed to "Natives" even a faint approximation of the degree of freedom of choice permitted to "Europeans" concerning where they may reside within the Territory. On the contrary, "Natives" are confined within sharply defined areas and places under prescribed conditions. The pattern of restrictions upon the residence of "Natives" is uniformly arbitrary and discriminatory; it is conceived and executed to give increasingly intensive effect to the dominating principle of *apartheid*.

(d) The Mandatory has effectively and almost completely denied liberty of movement to the "Native" population of the Territory, in a large number and variety of ways hereinabove more particularly described. The U.N. Committee on South West Africa, in rendering its reports to the Fourteenth Session of the General Assembly in 1959, summed up the situation by stressing the "intricate system by which the free movement of the 'Non-European' population and the 'Native' population in particular is restricted and controlled in the Territory of South West Africa." The Committee emphasized that there had been no indication of any relaxation in the system of control during 1959. The Committee went on to express "its grave concern over the unwarranted restrictions, based on race or colour, placed on the freedom of movement of the 'Native' population of South West Africa, who form the overwhelming majority of the total population" of the Territory.

(e) In the entire complex of provisions for the arbitrary arrest of "Natives" and tight restrictions upon their residence and movement, the Mandatory has given consideration solely to the convenience or advantage of the Mandatory government of the "European" citizens and residents of the Territory.

(iv) The Mandatory has had, and continues to have, the duty to safeguard and promote "to the utmost" the "material and moral well-being," the "social progress" and the development of the people of the Territory, including more particularly the *educational advancement* of such persons. Nevertheless, in direct violation of such duty:

(a) The Mandatory is responsible for 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.

(b) The Mandatory is responsible for a system of education in which to the extent that "Native" children are educated at all within the Territory, almost none receive any education beyond "Standard VI," representing the completion of the eighth school year, and the majority do not receive education beyond "Standard III," representing the completion of the fifth school year.

(c) The Mandatory has failed to provide any facilities for high-school education for "Natives" within the Territory, apart from a high school at Augustineum.

(d) The Mandatory has provided for the "Native" population no access to higher education or to any significant form of vocational education within the Territory, apart from possibilities for training as teachers within the Territory.

(e) While the Mandatory has made available to "Natives" some possibility for higher education and vocational education in the Union, the possibilities are very meagre, and the pursuit of even these meagre possibilities is discouraged by the Mandatory.

(f) Even in the few occupations for which "Natives" do have some access to opportunities for vocational or technical training (i.e.—as teachers, nurses, engineering assistants), the Mandatory imposes upon "Natives" who enter such occupations lower scales of compensation than are available to "Europeans", sharply curtailed spheres of activity, and a publicly proclaimed inferiority of status.

(g) The Mandatory has established a system of education in which, despite the overwhelming preponderance of "Natives" within the population of the Territory, the total of expenditures for the education of "Natives" within the Territory is only a small fraction of the total of expenditures for the education of "Europeans" within the Territory.

FINAL CONCLUSION

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

VI

SUPPLEMENTAL MATERIAL IN REGARD TO THE
ALLEGED VIOLATION BY THE UNION OF ARTICLE 2
OF THE MANDATE

A. INTRODUCTION

Chapter V of this Memorial sets out facts establishing the Union's violation of its duty to "promote to the utmost the material and moral well-being and the social progress" of the inhabitants of the Territory. These facts have been derived principally from official sources, including laws, proclamations, and administrative decrees in force in the Territory. As stated in Chapter V, the interlocking and all pervasive nature of the above laws, proclamations and decrees establish their regular and systematic implementation in the Territory. The manner in which the daily lives of inhabitants are affected thereby is illustrated in petitions received by the United Nations Committee on South West Africa from various persons and organizations in the Territory.

The Union has failed and refused to furnish information concerning its administration of the Territory. Hence, the Committee on South West Africa and the Applicant, as well, are constrained to gather information from other sources, including petitions.

The cumulative effect and thrust of the petitions, received from so wide a variety of independent sources, reinforces, in general, the factual allegations contained in Chapter V of this Memorial. Their probable accuracy in substance is confirmed by the fact that many incidents recounted in the petitions are predictable consequences of the pattern of the Union's administration in the Territory, more fully described in Chapter V.

The following extracts from petitions received by the Committee on South West Africa are, accordingly, submitted to the Court as typical and illustrative applications of the Union's policies in the Territory.

B. ECONOMIC ASPECT

1. Extract from a communication dated 30 October, 1956, from Hosea Kutako to the Chairman of the *Ad Hoc* Committee on South West Africa, printed in the 1957 Report of the Committee on South West Africa, at page 34:¹

¹ U.N. Gen. Ass. Off. Rec. 12th Sess., Supp. No. 12 (A/3626) (1957).

"We also wish to inform you that the Chief Native Commissioner of South West Africa, Mr. H. J. Allen, held a meeting with the Herero Chief and Headmen in September, 1956, in the Aminuis Native Reserve in which he informed us that a portion of Aminuis Native Reserve was to be given to the European farmers and that a small part of the land called Kuridora to the South East of Aminuis Native Reserve was to be given to the Hereros in exchange for their land which was to be given to the Europeans.

Kuridora lies between Aminuis Native Reserve and Bechuana-land Protectorate and is uninhabited.

We said to Mr. Allen that our first Native Reserve was at Augeikas near Windhoek and the Government removed us from it in order to give the land to the Europeans. We were then given Otjimbondona from which we were removed in order to make room for European farmers. Finally we were given Aminuis Native Reserve with the assurance that it would be our permanent home.

We also reminded Mr. Allen that Dr. H. F. Verwoerd, the South African Minister of Native Affairs, had given us assurance in the presence of Mr. Allen during his South West tour in August, 1955 at Okakarara Native Reserve, that we would not be deprived of our present Native reserves.

We said that we would object to the removal and added that the previous removals caused much hardships and were responsible for the loss of much of our livestock and other property.

Mr. Allen in reply said that he would write to Dr. Verwoerd and that we would be informed about the matter in about two weeks' time.

Owing to the fact that Aminuis Native Reserve is too small for its inhabitants we had asked the Government on a previous occasion to annex Kuridora to Aminuis Native Reserve, but the request was refused. The Government replied that it would be given to the European farmers.

We concluded our meeting with the Chief Native Commissioner by saying to him that the Government should keep Kuridora for European farmers and we would keep our Reserve and would not exchange one for the other.

Mr. Eric Louw, the South Africa Minister of External Affairs who will lead the South African delegation to the United Nations, visited South West Africa in September 1956, with a view to obtain informations about the conditions in this territory but did not meet the Herero Chief and Headmen which means that he is coming to the United Nations being unconscious of our views."

2. Extract from a communication dated 10 January, 1958, from Johannes Dausab *et al* to the Secretary-General of the United Nations, printed in the 1958 Report of the Committee on South West Africa at page 36:¹

"For many years we have ask the administration to improve our water supply for the purposes of agriculture and farming.

We were given assurances that this problem will be attended to very soon. Last time when such promise was made was in 1954.

¹ U.N. Gen. Ass. Off. Rec. 13th Sess., Supp. No. 12 (A/3906) (1958).

The administration will give us tools to make dams the field for irrigation and farming. We must supply free labor, the Government will give tools and meal-meal, there will be no payment, because the system is for our own interest. All that was done to us is that the existing agricultural lands have been reduced."

3. Extract from a communication dated 31 July, 1958, from Joh. Dausab *et al* to the United Nations, printed in the 1958 Report of the Committee on South West Africa at page 45:¹

"Because the 'Nation' has strengthened his hands Dr. Verwoerd, the minister of the Union Department of Native Affairs sent his secretary Dr. Eiselen to inform the officers of the SWA's administration to effect our removal from Hoachanas. Sirs, the General Assembly adopted the resolution that no land inhabited by 'Non-Europeans' whether or not such land has been set aside as 'Native' reserve land, be alienated solely for the benefit of the 'European' settler community, and that immediate steps be initiated to ensure that the 'Non-European' majority shall not be deprived of the land necessary for their present and future needs, based on the natural growth of the population and on the principle full participation by the 'Non-European' population in the economic development of the Territory... Sirs, in defiance of this resolution of the twelfth session of the United Nations General Assembly Dr. Verwoerd is continuing with the treats against us... We have been inspecting Itzawisis and found it useless land which is just good for the purpose of grave yard."

4. Extract from a communication dated 27 November, 1957, from Hosea Kutako to the Secretary-General of the United Nations, printed in the 1958 report of the Committee on South West Africa at page 49:¹

"When we were forcibly removed from our lands to the present Native Reserves to make room for European settlement, the Government burned down our houses rendering the people homeless and cut off the water supply...

The average person in the reserve possesses 15 head of cattle and about 20 goats with which he maintains a family and is not allowed to have more than three oxen. The cultivation of crops for human consumption is practically non existent, the Government does not allow the water in the reserves to be used for irrigation purposes because it is even not enough for the live stock. The result is that the people live on milk only, but even the milk is not sufficient to maintain a family because they have to sell cream to get money with which to buy clothing.

The water is so scarce in the reserves that many people live 6 to 7 miles away from the water, which they carry on their heads in petrol tins or on donkeys to their places of residence. It is sometimes muddy and undrinkable.

¹ *Ibid.*

5. Extract from a communication dated 13 June, 1957, from Nghuwo Jepongo to the Secretary-General of the United Nations, printed in the 1958 Report of the Committee on South West Africa at page 59:¹

"Conditions of life for Ovambo Native labour in South West Africa are a scandal. There is a grave system of forced labour. The Majority of Ovambo recruits for S.W.A.N.L.A. are forced to go somewhere they do not want. Eventually, they sneak away."

6. Extract from a communication dated 3 August, 1957 from Mr. Toivo Herman Ja Toivo and eighty other Ovambo, to the Chairman of the Trusteeship Council, printed in the 1958 Report of the Committee on South West Africa at page 61:¹

"We also demand the abolition of the compulsory 'Contract System' through which our young men are employed. Contracts should only be taken voluntarily and every young man must be free to choose and serve his master as long as they understand each other. Our married women folk must be allowed to accompany their husbands to their place of work if they wish to do so; the unmarried women must be permitted to enter the Police Zone and look for work if they like to."

7. Extract from a communication dated 30 September, 1958, from J. G. A. Diergaardt *et al* to the United Nations, printed in the 1959 Report of the Committee on South West Africa at page 61:²

"Although the railway and the Administration's roads run through a large part of our territory, all the jobs on the railway and the roads are reserved for the whites.

With regard to industrial development, there has likewise been nothing at all done for us. No factories are being opened although other Governments are doing this for people in our circumstances. The Union Government, however, does not think along these lines. Our territory exists only to make the whites rich."

C. GOVERNMENT AND CITIZENSHIP

1. Extract from a communication dated 25 February, 1959, from the Rev. Markus Kooper to the United Nations, printed in the 1959 Report of the Committee on South West Africa at page 49:³

"Sirs, what is true of Hoachanas is also true of the whole of SWA as far as the non-whites are concerned. In the phenomenon of Hoachanas it has come to light that the administration of SWA or the Union Government while extending the franchise right to the 18 years old whites is basing slavish conception of allowing only the old non-white people who were adults on the German

¹ *Ibid.*

² U.N. Gen. Ass. Off. Rec. 14th Sess., Supp. No. 12 (A/4191) (1959).

³ *Ibid.*

time to have a say although of no value in the matters of the territory, and regard all those who were children at German time as non-originals, strangers and their property which they brought from the Union and refused them any voice in the country of their birth. The Union government or the administration of SWA is wanting from us the non-whites to accept this destructive principle or policy as self-evident and correct. Another fact of this unofficial policy is that it brings us back to where we was before 100 years. It also weakened our power while the voting powers of the whites are increased."

2. Extract from a communication dated 14 September, 1960, from Chief Hosea Kutako to the Secretary-General, printed in Conference Room Paper No. VII/85 of the Committee on South West Africa:

"In order to ensure that political rights remain in the hands of the European minority, all Africans and all dark-skinned people are kept voteless during their life time and they have no representatives in all the councils of the state."

3. Extract from a communication dated 2 September, 1954, from Hosea Kutako *et al* to the Secretary-General, printed in the 1955 Report of the Committee on South West Africa at page 46:¹

"As stated in our previous petitions to the United Nations, the African people of South West Africa are still not participating in the political development of the territory. The Government of the country is reserved for people of European descent. The entire indigenous population is living in a state of poverty as a result of the loss of their lands and low wages."

4. Extract from a communication dated 20 June, 1958, from Johannes Dausab *et al* to the Secretary-General, printed in the 1958 Report of the Committee on South West Africa at pages 39, 40:²

"It is thus our firm standpoint as the indigenous inhabitants of South West Africa, who, totally have no voice in the government of our country, besides which there is no country in the whole wide world which we rightfully can call to be ours, that the United Nations Organization is the onliest body dignified and competent enough with her actually practiced 'Motto' of PEACE, JUSTICE and SECURITY for all to whom we, the helpless, the voiceless, the outcasts and severely oppressed indigenour inhabitants of SWA can flight for succour..."

Sirs we have totally no representation, equal or unequal in the government of our country. The post Chief Native Commissioner, Welfare Officer, Location Superintendents serves no satisfactory purposes. These are the most deadly offices for us, and no matter what any other white may say about that, it is true. If the white man can be represented by the white people in the government of the country how is it impossible for the non-white

¹ U.N. Gen. Ass. Off. Rec. 10th Sess., Supp. No. 12 (A/2913) (1955).

² U.N. Gen. Ass. Off. Rec. 13th Sess., Supp. No. 12 (A/3906) (1958).

to represent his constituents? If a non-white cannot represent his constituents we want to know how a white man who has been sent to the governing bodies by white votes can represent non-white constituents who have not sent him there?"

5. Extract from a communication dated 16 July, 1956, from Jacobus Beukes to the Secretary of the Committee on South West Africa, printed in the 1957 Report of the Committee on South West Africa at pages 29-30:¹

"The juridical system whereby the Rehoboth Community is administered through an Advisory Board may jeopardize our future existence; at the same time it departs from our patriarchal law and fundamental principles... It is deeply to be regretted that we are now subjected by the Mandatories to laws obliging us to forfeit our hard-won rights. Under this system, we have to surrender our right of self-determination to an advisory board. Government under an advisory board means that we are totally deprived of our heritage and are forced to depart from our fundamental principles. Since we no longer enjoy the right of self-determination how could we achieve nationhood? In these circumstances how could we ensure our future existence since we could not adjust ourselves to competing in the modern world with 20 centuries of development behind it?"

6. Extract from a communication dated 30 September, 1958, from J. G. A. Diergaardt *et al* to the United Nations, printed in the 1959 Report of the Committee on South West Africa at page 61:²

"In January of this year, a leadership meeting was held at Rehoboth under the chairmanship of the Magistrate, who is also a white Captain. At this meeting we were told by the Captain that he, the Captain, was alone entitled to make decisions in matters concerning Rehoboth and that the Advisory Board was there merely for the purpose of advising him. This meeting was attended by the Board and by a full assembly of citizens."

D. CIVIL RIGHTS AND CIVIL LIBERTIES

1. Extract from a communication dated 20 June, 1958, from Johannes Dausab *et al* to the Secretary-General, printed in the 1958 Report of the Committee on South West Africa at page 40:³

"They [the white people of South West Africa] have our right of citizenship and theirs. They have our money and theirs. They have our education and theirs too, and they have our land and their land too. We, who number hundreds of thousands, the Nama, Herero and others in SWA, including our wives and children with not even a foot of land to call our own, strangers in the land of our birth, without money, without education, without aid, without a roof to cover us while we live. It is extraordinary that a race

¹ U.N. Gen. Ass. Off. Rec. 12th Sess., Supp. No. 12 (A/3626) (1957).

² U.N. Gen. Ass. Off. Rec. 14th Sess., Supp. No. 12 (A/4191) (1959).

³ U.N. Gen. Ass. Off. Rec. 13th Sess., Supp. No. 12 (A/3906) (1958).

such as the whites in South West Africa, professing education and superiority, living in a land where ringing bells call child and parent to the church of God, a land where Bibles are read and Gospel truths are spoken, and where courts of justice are presumed to exist, we say that with all these advantages on their side, they can and are making war upon us the defenceless poor blacks of South West Africa as Mr. Allen has so strictly express the word at Hoachanas 16th April 1956. 'YOUR CHILDREN SHALL LIVE AS BIRDS AND WILL HAVE NO FIXED ABODE.' The white people know we have no money, no Road Motor Services, no Railroads, no telegraphs, no advantages of any sort, and yet all manner of injustice is place upon us. They know that we the non-white people of South West Africa acknowledge them as our superiors throughout, by virtue of their education and advantages. The acknowledgement which they have abused. We have been authorized by the horrible actions of the white people to write petitions to UNO, yet the white people now seek how they will torture us more than before, so if we be killed in this campaign, we may have no opportunity any more of telling the United Nations Organization about the blackman's condition of living as it really exists in this country of ours."

2. Extract from a statement of Chief Hosea Kutako and Messrs. Chr. Tzitega, E. Kauraisa, F. Katimo, L. Muriambihu, and L. Koamba, forwarded to the Chairman of the Committee on South West Africa by the Reverend Michael Scott in a communication dated 22 July, 1958, printed in the 1958 Report of the Committee on South West Africa at page 54:¹

"The Windhoek and Okahandja locations are to be removed to another site. We have been refusing to be moved. We say we would prefer the existing locations to be improved on their present sites rather than the population removed further away from their work. Further the following are some of the regulations that have been drawn up by the Government to control all the locations in the towns of South West Africa.

One regulation says that the whole area of the location must be fenced with only one gate leading to the town. When you go out from the location to the town you must be searched by a policeman at the gate. Similarly when a man comes back from the town into the location the policeman at the gate must search through all that he has brought from the town before he is allowed to enter the location. In order to leave the location everyone must produce a permit. Also when they return they must produce permits. The police at the gate have the authority to give the permit which must specify the reasons for leaving the location or entering it from the town. When the location is finished being built any person who wishes to go and stay there must make a written application to the Superintendent. All the people who are not so well-to-do will not be allowed to enter the location to reside there. They will be obliged to return to the Reserves or else to look for work on the white man's farms. Only those people will

¹ *Ibid.*

be allowed to reside in Windhoek location who have been there continuously for three years without absence for even one day.

These locations will be built in separate sections for the Hereros, Namas, Damaras, Ovamboes. When a person wishes to go from the Ovambo to the Herero section he must apply for a permit and state the purpose of his visit. The houses that are to be built by the Administration must be paid for before the seventh of each month, the rent will be £1.18.9d. for each house. Those who fail to pay will be arrested. The house is about twenty feet square divided into four equal-sized rooms. It has only one door and has one window at the front and one at the back. There are no doors between the rooms only openings. They are dangerous in construction being made of prefabricated bricks with no cement between the bricks. There is no kitchen but permits may be given to build a kitchen alongside the house or to use an open fire. No one is allowed to go and visit the location that is being built. There are no bathrooms. The distance between one house and another is six feet. The superintendent says that communal bathrooms will be built for each section. Those who are to be allowed to stay in these houses are a man and his wife and minor children up to eighteen years. Those who are over eighteen years must be housed in compounds. There will be separate compounds for male and female in each section. These compounds will consist of long blocks in rows with one room and one door for each unmarried person.

All visitors to anyone living in a location must obtain a permit from the Superintendent of the location.

Anyone living in the location may not pay a visit out of the location for more than thirty days. If those thirty days expire before he returns his house does not belong to him any more.

Provision is being made for those wishing to build their own houses in the same location. Anyone wishing to do so must be a man over twenty-one years. He must make application to the Superintendent. He must be a man who has been resident in Windhoek for three years without residing anywhere else. When his application has been approved by the Superintendent he must bring an architectural plan of the building. He must get a health inspector and an engineer to survey the plot. When buying the materials the Superintendent will direct where these materials are to be bought. They may not be bought at the cheapest place. The house must then be built by a qualified builder and carpenter. The Superintendent will provide a Supervisor to overlook the work. This will be someone of his choice but he must be paid by the person building the house a sum equal to 5% of the total cost of the building. The value of the house must be not less than £250.

In the application the reasons must be given why you want to build this house yourself at your own expense. When it is built only the house is yours not the plot on which it stands. Except for building a kitchen if a permit is granted nothing can be done on the land outside the house. The rent of this plot of land will be decided by the value of the house constructed on it. The house will belong to the person who has built it for thirty years only.

The Government has said that the Group Areas Act is not yet put into operation in South West Africa. But the way in which this location has been planned is evidence that this policy is to be applied in South West Africa by whatever name it is described in law. We are afraid that the building of this location will bring new restrictions and oppression upon the people in the towns. For instance one of the regulations lays down that whenever more than five people are gathered together a Boardman must be fetched and asked to remain so that he may know what is being discussed."

3. Extract from the statement cited in paragraph 2 immediately above:

" 'I was working in a town. One day I got ill. My mother was in the Reserve but she cannot come to the town without special permission. This special pass must come from the Location Superintendent in the town. The Welfare Officer in the town cannot issue such a Pass. It is thus very difficult for us for there is no-one to go for this special Pass and wait at the Superintendent's office. My mother may have been told by someone that I am ill but there is nothing she can do to secure this pass from the Welfare Officer in the Reserve.' Passes for people working in Windhoek must be got from masters if the journey is for a trial or for the purpose of paying house rent etc. If your master allows you to go to a burial without giving you a written pass you will be arrested. The penalty for this is a £3. fine or more or fourteen days to one month in gaol. If you are ill and are found in the location without a permit from your master or doctor you are arrested. Pass carrying is becoming ever harder on us because special passes are required for so many different things. We are entirely against this pass system."

4. Extract from a communication dated 17 October, 1957, from Mrs. Käthe von Löbenfelder, Outjo, to the Trusteeship Council, printed in the 1958 Report of the Committee on South West Africa, at page 64:¹

"I am turning to you in desperation. I was born in South West Africa on 31 October 1901. My father was the German Protectorate Force Officer Count von Stillfried. My mother was a so-called half-caste. I have two sons both of whom I sent to Germany in 1922 to enable them to visit a better school. During the Second World War both of them were forced to become soldiers despite their anti-nazi attitude. They became officers. Both of them held good jobs after the war, but, owing to political hatred, lost them. Being ill and owning a farm I would like to bring my second son here to help me. For the past two years we have been corresponding with all kinds of officials. Sworn depositions were required in Pretoria and in Germany. At least twenty to thirty letters were exchanged with the Government in Pretoria, S.A., Windhoek, S.W.A., and Hamburg. Now my son informs me that he has

¹ *Ibid.*

received word from Pretoria to the effect that his entry permit has been denied. On inquiry for reasons for this action, reasons were denied. Getting to the bottom of this, I only heard Apartheid!!! Is there outside of South Africa another country where entry into their country of birth is denied to children who were sent abroad for a better education in view of the inadequate facilities at home..."

5. Extract from a communication dated 30 August, 1960, from Mr. S. Mifima, Chairman, South West African People's Organization, Cape Town, to the Committee on South West Africa, printed in Conference Room Paper No. VII/84, 19 September 1960, Committee on South West Africa, Seventh Session:

"Such things as banishments, deportations and refusal of permits to seek work are the order of the day.

Our people have been deported from place to place and banished from their areas to forests hundreds of miles away from their families and friends and there is no hope of seeing them any more nor is there any means of making a livelihood.

On 5th August, 1960, Mr. Louis Nelengani, vice-president of S.W.A.P.O. was deported from Windhoek to Ovamboland reserve; he has got a wife and baby of six months as well as a home in Windhoek; all is broken up.

Messrs. J. Kashikliku and Herman Ja Toivo are kept under house arrest at the chief's kraal.

The authorities in S.W.A. under the government of South Africa deal harshly with anybody who opposes apartheid and racialism.

From Ovamboland they have banished Mr. Eliezer Noah and Mr. Tuhadeleni to a lonely spot between Ovamboland and Okavango reserve known as a political prison camp; nobody is allowed to see them, not even their wives and children.

Early this year Mr. Paroly, an employee of C.D.M., Oranjemund, was banished from his fellow workers in the compound to a lonely spot four miles from his work, place and friends. He is living alone and is not allowed to talk to anyone at all until his 18 month contract has expired; he will then be deported to Ovamboland."

6. Extract from a communication dated 3 August, 1960, from South West Africa Peoples Organization, Windhoek, South West Africa, to the Committee on South West Africa, printed in Conference Room Paper No. VII/76, 30 August, 1960, Committee on South West Africa, Seventh Session:

"Today, the 3rd day of August, 1960, our Vice-President, Mr. Louis Nelengani, was given 24 hours to leave Windhoek, for Ovamboland, because he is the leader of the organisation being a opposition to the Union Government.

The reason for Mr. Louis Nelengani's deportation was, that he sent a petition to the United Nations Organisation, forwarded a copy to the Union Government, which applies to 'rule XXXI of the rules of procedure of the committee on South West Africa'!

When the Union Government received his letter, he in return notified the Native Commissioner to DEPORT Mr. Nelengani as soon as possible."

Enclosure to the Above Letter

Extract from The Windhoek Advertiser, 4 August 1960

ALL THIS AND BANNING TOO IN TROUBLED TIMES

Only One Side

"Amid all the problems which are facing South West Africa at the moment, a Native now alleges that he has been banned from the country.

Knowing that such an incident, if correct, will be exploited by the United Nations, the 'Advertiser' tried yesterday to obtain the true facts in order that the outside world might see both sides of the case. This is what happened:

The Vice-President of the Ovamboland People's Organisation, Louis Nelengani, alleged that he had been told by the Assistant Native Commissioner in Windhoek, Mr. W. S. G. Malherbe, that he had been banished to the Northern border of Ovamboland.

In an interview, Louis Nelengani said that he had been told by Mr. Malherbe that he would have to leave Windhoek by Friday, when he would be escorted to the Angola side of Ovamboland, despite the fact that he claims that he was born on the South West side of Ovamboland.

Allegation

He said that he had come to work in Windhoek in 1957, and had absolutely no connections with Angola. He alleged that when he was called in by Mr. Malherbe, he was simply told: 'You have worked against us—you have misused your rights, and for these reasons you are being banned from South West.'

No Co-operation

Yesterday a staff reporter of the 'Advertiser' called on Mr. Malherbe in his office at the Magistrate's Court, for the purpose of asking him to explain or deny the allegation.

When the reporter mentioned the name Louis Nelengani, Mr. Malherbe jumped up from his chair, threw a ruler on to his desk, and said: 'I am not prepared to discuss this matter. You can go and see the Chief Native Commissioner.'

Nothing Known

Later in the day, the reporter called on the Native Affairs Information Officer, Mr. Grobler, with the purpose of verifying his information.

All Mr. Grobler could say, was: 'I am sorry, but I know nothing about this matter.'

Busy

The 'Advertiser' tried to contact the Administrator, Mr. D. Viljoen, by telephone, but he was busy.

The 'Advertiser' believes that Native organisations have already made their own report to the United Nations."

E. EDUCATION

1. Extract from the statement cited in paragraph 2 of Section D above:

"Many children of parents who are working on European Farms do not attend schools because there are no hostels in neighbouring towns where they can be looked after. Such children cannot be educated because they have no relatives and there are no hostels in the neighbouring towns. Thus it is that many of our children get no education and so are forced to become manual labourers on contract to white employers."

2. Extract from a communication dated 22 November, 1957, from S. Shoombe and 100 other Ovambo to the Secretary-General of the United Nations, printed in the 1958 Report of the Committee on South West Africa, at page 61:¹

"There are no High schools or secondary schools in the whole of Ovamboland. The teachers are of a very poor quality because they are taught in Primary schools which give tuition up to Std. III. The chiefs and Headmen are illiterate and are appointed by the Government. They receive presents from the Government such as clothing, tobacco, sugar and liquor as a means of bribing them to allow their young men to work as unskilled labourers for the Europeans."

3. Extract from a communication dated November 1953 from Miss Margery F. Perham (Fellow of Nuffield College), The Africa Protectorates Trust, to the Chairman of the *Ad Hoc* Committee on South West Africa, printed in the 1954 Report of the Committee on South West Africa, at page 31:²

"May I draw the attention of your Committee to a case affecting a young Herero in South West Africa. As you know, the South African Government, under the terms of the Mandate, is pledged to administer the country to promote the social betterment of the inhabitants and this case would seem to indicate a violation of that pledge.

1. At the beginning of 1953 the Africa Protectorate Trust notified this young man, Berthold Himumuine, that a scholarship was being

¹ *Ibid.*

² U.N. Gen. Ass. Off. Rec. 9th Sess., Supp. No. 14 (A/2666) (1954).

provided for him to study in this country. Soon after, on 23 January 1953, Dr. Jacks, the Director of the Department of Education, Oxford University, wrote to Berthold Himumuine to say that a place had been found for him and that the necessary financial support had been ensured. He urged that Mr. Himumuine should arrive at Oxford at the end of April.

2. Mr. Himumuine then applied for a passport and despite repeated attempts to get a firm reply, was not told until 4 May that the passport had been refused. No reason was given for this refusal. A subsequent letter from Himumuine mentioned that the Secretary for South West Africa had been quoted in the local press as saying that the granting of passports rested with the Union Government, while the Minister for the Interior had also been quoted as saying that he knew nothing of the application.

3. Further representations were made from Oxford University to the South African High Commissioner in July and not until 12 November was a firm reply received which simply reaffirmed the South African Government's decision to refuse a passport to Berthold Himumuine. No reason was given.

4. The facilities for higher education in South West Africa are non-existent. An inquiry made to the South Africa Department of Education as to the number of Africans there who have passed matriculation met with the reply that it was difficult to provide the information, but I believe that only three or four Africans have in fact passed this examination in South West Africa. Berthold Himumuine was one of the few to do so, having taken a correspondence course. Himumuine then became a teacher at St. Barnabas School in Windhoek Location and in 1951 was made headmaster of the school. He taught children in the morning and adults in the evening and was also trying to obtain his Bachelor of Arts degree by correspondence course at the time when the scholarship was offered to him. The members of the Trust felt he was greatly deserving of assistance in furthering his education, and I understand his chief, Hosea Kutako, has recommended the young man.

5. I enclose a copy of a testimonial about Mr. Himumuine. This shows that he is a man of perfectly good character and, though I should not regard this as an essential qualification, he happens to be interested in teaching rather than in politics. It seems to many of us at Oxford a grave denial of human freedom and the rights of an individual of a Mandated Territory that this excellent opportunity for further education should be denied to this young man, when his people so greatly need educational leadership and members of their race who have had contact with the wider world. I hope very much that you will take this up at the United Nations when the South West Africa question is raised.

(Signed) MARGERY PERHAM

P. S. If necessary would you kindly forward this petition to the Committee that may be set up as a result of the recent debates on South West Africa.

Enclosure to the above letter:

To Whom It May Concern

Berthold Samuel Himumuine has been associated with the St. Barnabas Mission school since 1936 both as a pupil and later as a teacher; taking over the post of Headmaster in 1951.

He passed the Native Teachers Certificate also his Matriculation Examination and in 1952 wrote three subjects for his Bachelor of Arts examination.

He has at all times been courteous and diligent in all his work and concerned also with the welfare of his fellows inasmuch as he devoted his spare time to evening classes for them.

I have great pleasure in witnessing to his capabilities and am confident that he will devote his whole time and energy to whatever undertaking he may be given.

(Signed) R. W. LEWIS

Rector of St. George's Cathedral
P. O. Box 67 Windhoek,
South West Africa

13 January 1953"

VII

ALLEGED VIOLATIONS BY THE UNION OF
ARTICLE 4 OF THE MANDATE

A. STATEMENT OF LAW

Article 4 of the Mandate provides as follows:

"The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory."

Armed installations not related to police protection or internal security fall within the class of "military bases" or "fortifications" and are therefore prohibited by Article 4 of the Mandate. Facilities for police or internal security purposes are permitted, but not military bases. 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.

B. STATEMENT OF FACTS

The Union does not submit reports to the United Nations or divulge any official information on matters within the purview of Article 4 of the Mandate. The Committee on South West Africa has, however, noted increased military activity in the Territory, including the staging of aerial maneuvers, described as a large-scale exercise by the Union Department of Defence, in the Eastern Caprivi Zipfel during August 1959.¹

The Applicant has not been able to make an independent verification of the existence or nonexistence of "bases" or "fortifications" in the Territory, but on the basis of statements contained in the "Report of the Committee on South West Africa" for the years 1959² and 1960,³ it alleges upon information and belief that the Union maintains three "military bases" within the Territory.

A regiment, called the "Regiment Windhoek", is stationed at Windhoek and is part of the South African Armoured Corps of the

¹ Report of the Committee on South West Africa, Gen. Ass. Off. Rec. 15th Sess., Supp. No. 12 at 30, para. 238 (A/4464) (1960).

² Report of the Committee on South West Africa, Gen. Ass. Off. Rec. 14th Sess., Supp. No. 12 (A/4191) (1959).

³ Report of the Committee on South West Africa, Gen. Ass. Off. Rec. 15th Sess., Supp. No. 12 (A/4464) (1960).

Citizens Force, which forms an integral part of the South African Defence Force.¹ On December 1, 1959 it consisted of 16 officers and 205 other ranks.¹

The 1959 Committee Report states that the Union Department of Defence maintains a military landing ground in the Swakopmund District of South West Africa.² Access to the landing ground has been prohibited since October 3, 1958, except to persons with a permit from the Department of Defence.²

Sources cited in the 1960 Committee Report indicate the existence of at least one military facility in or near the Kaokoveld in the part of the Territory:

"From other information supplied by the Union Government to the Union House of Assembly in 1960, the former Minister of Defence made a 'visit to a military camp during reconnaissances in the Kaokoveld' in 1957. The Kaokoveld is a 'Native' reserve in the northwesternmost part of South West Africa."³

"According to a letter dated 28 June 1960 received by Mr. Sam Nujoma, a copy of which he made available to the Committee, the Union Government was stated to be carrying on military operations between the Junene river, in the north of the Kaokoveld, and Ombandja. An enclosed newspaper clipping from a local Afrikaans newspaper, otherwise unidentified, stated that employees working on the construction of a canal in Ovamboland disclosed that there was a military air base on the border. The canal is under construction in the northwestern part of Ovamboland, to extend to the Kunene river, bordering the Kaokoveld."⁴

The "military camp" referred to in the first paragraph of the above quotation immediately above may or may not be identical with the "military air base" mentioned in the second paragraph of the quotation.

C. LEGAL CONCLUSIONS

The "Regiment Windhoek" is part of an armoured corps and under the command of the South African Defence Force. Armoured corps are not normally used for police protection or internal security purposes. That the regiment is part of a conventional military organization also indicates that its purpose is not police protection or internal security. The regiment is apparently part of the conventional military forces of the Union. The supply and maintenance facilities of the regiment, together with the vehicles and material of the regiment itself would apparently constitute what is commonly known as a "military base."

¹ *Id.*, at 31, para. 241.

² Report of the Committee on South West Africa Gen. Ass. Off. Rec. 14th Sess., Supp. No. 12 at 12, para. 85 (A/4191) (1959).

³ Report of the Committee on South West Africa, Gen. Ass. Off. Rec. 15th Sess., Supp. No. 12 at 30, para. 239 (A/4464) (1960).

⁴ *Id.*, at 30, para. 240.

The Committee on South West Africa made the following statement concerning the "Regiment Windhoek":

"The Committee can understand the necessity for posting a military regiment in the Mandated Territory in December 1939, but finds itself unable to reconcile the present military measures with Article 4 of the Mandate."¹

Likewise, the military landing field at Swakopmund is apparently not intended for police or internal security use, since military airplanes are not normally used for police or internal security purposes.

The "military camp" and/or "military airbase" in the Kaokoveld are apparently not maintained for police or internal security purposes. A camp or airbase would not be situated in a remote, sparsely populated border area for police or internal security purposes. If the installation is an airbase, reasoning of the prior paragraph indicates that its nature and purpose must be purely military.

¹ *Id.*, at 31, para. 243.

VIII

ALLEGED VIOLATIONS BY THE UNION OF ITS OBLIGATIONS AS STATED IN ARTICLE 2 OF THE MANDATE AND ARTICLE 22 OF THE COVENANT OF THE LEAGUE OF NATIONS

A. STATEMENT OF LAW

As described in Chapter II herein, the cornerstone of the Mandate System is Article 22 of the Covenant of the League of Nations. In the first paragraph of Article 22, the fundamental purpose behind the Mandate System is set forth:

"To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League."

From Article 22 of the Covenant and from the fact that mandates were conferred by the League, to be exercised on behalf of the League as a "sacred trust", it is clear that mandated territories were accorded a distinct international status. One of the basic duties assumed by Mandatories is to guide less developed territories to a point at which the inhabitants thereof would become competent to determine their own future status. The Charter of the United Nations, adhered to by the Union, sets forth this objective in Article 73 and that Article, as pointed out in this Memorial (pp. 105-106), is in *pari materia* with the Mandate.

It follows that unilateral annexation or other unilateral processes of incorporation of a mandated territory by a mandatory are inconsistent with a basic legal premise of the Mandate System.

The axiomatic nature of this principle is confirmed by the fact that it has been recognized and applied by all Mandatory powers,

with the sole and single exception of the Union.¹ The principle was expressly affirmed in the 11 July, 1950 Advisory Opinion of the Court, which stated, *inter alia*:

“... two principles [in the establishment of the Mandate System] 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’.”² (Italics added.)

The Mandate itself, in Article 2, provides that the “Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory.” As shown in Chapter V of this Memorial, such a duty must be construed to include the obligation to provide for the political advancement of the inhabitants of the Territory through rights of suffrage, progressively increasing participation in the processes of government, development of self-government and free political institutions. Hence, on the bases of the language of Article 2, as well as of Article 22 of the Covenant, it follows that unilateral incorporation or annexation of the mandated territory is repugnant to the terms of the Mandate.

The foregoing considerations, *viz.*, the duty to refrain from unilateral annexation and the duty to advance the political maturity of the Territory’s inhabitants so that they may ultimately exercise self-determination, form the framework for construing the Mandate terms as to the “full power of administration and legislation over the territory . . . as an integral portion of the Union of South Africa, and [that the Union] may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.”

The phrase “integral part” gives to the Union no licence to take unilateral action regarding the Territory, if such action amounts to *de facto* annexation or incorporation. It is only subject to the limitations imposed by the basic purposes of the Mandate and by its express terms that the Territory may be governed as an “integral part” of the Union. A contrary construction would obviously nullify the Mandate and erase both the international status of the Territory and the Union’s duties as Mandatory.

Incorporation or annexation can take place through single political acts, such as a proclamation, or through gradual and erosive processes. The distinction is one of method only; the result in either case being interdicted. That the Union government is aware of the two roads to the same result is shown, for example, in the following statement by a Delegate to The Union House of Assembly:

“... I would like to make it clear that when one deals with the position of South West one really has to deal with two separate

¹ See, for example, page 43, *supra*.

² *International Status of South West Africa*, Advisory Opinion: I.C.J. Reports 1950, p. 128 at 131.

problems which should be dealt with separately. The one is the international problem, the legal position of South West vis-à-vis the world; and the other is the inter-relationship between South West and the Union ... *Consequently we make no secret of it that the question of annexation in the old fashioned sense of the word has lost all practical meaning.* Within the rights and powers the Union has always had in respect of South West, South West has in fact, *de facto*, become a partner of the four provinces, the fifth unit in the broad framework of South Africa, ..." ¹ (Italics added.)

Piece-meal incorporation amounting to *de facto* annexation is both insidious and elusive. Motive is an important indicator since it sheds light upon the significance of individual actions, which might otherwise seem ambiguous.

B. STATEMENT OF FACTS

1. *The avowed intentions of the Union.*

In Chapter II herein, the Applicant has set forth the long record of the Union's continuous assertions that the Mandate has lapsed, that the Union has no duties thereunder, and that the Union alone has a legal interest in the Territory. Because, in these respects, the record is so consistent and so clear, the statements which follow may be taken as a true and accurate picture of the Union's intent.

On May 21, 1956, when asked in the Senate by a member from the Union of South Africa whether it would not be advisable to proceed to annex the Territory and "thus bring the matter to a final end and determination", the Prime Minister replied:

"... May I say to him that the attitude of our Government and of the previous government, the Smuts Government, was that as a result of the disappearance of the old League of Nations both the Smuts Government and *the present Government have taken up the attitude that there is no other body that has anything to say in so far as South West Africa is concerned except South Africa itself and that therefore it is well within our power and fully within our power to incorporate South West Africa as part of the Union.* Up to now we have declared unto the world that legally and otherwise that is the position but that in the meantime we are prepared, although we do not for one moment recognize the rights of the United Nations organization, even should we one day incorporate South West Africa, to govern South West Africa in the spirit of the old mandate. So, whether we will proceed at a later stage to carry out and put into effect what we regard as our rights over which nobody has anything to say, that will depend on how circumstances develop in the future." ² (Italics added.)

¹ House of Assembly Debates, *Hansard*, 1956, No. 13, cols. 4107-10, cited in Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 12th Sess., Supp. No. 12 at 6 (A/3626) (1957).

² Union of South Africa, Senate Debates, *Hansard*, 1956, No. 15, col. 3628, cited in Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 12th Sess., Supp. No. 12 at 7, para. 12 (A/3626) (1957).

The Union, accordingly, has not concealed its denial of any legal restraint upon its administration of the Territory, and regards outright incorporation *in toto* as a mere question of tactics, rather than a matter of legal consequence.

In 1956, the Union's Prime Minister stated at a Parliamentary Session in a speech (more fully quoted below):

"... I just want to emphasize that South West is no longer a Mandated territory, but is ruled as an integral part of the Union".¹

This official statement admits explicitly that the Mandate, if considered to be in effect, limits the manner in which the Union may rule the Territory as an "integral part" of the Union. Furthermore, the statement reveals the Union's awareness that its actions in this respect exceed the permissible bounds of the Mandate, if the Mandate is still effective, as the Applicant contends and the Advisory Opinion of 11 July, 1950 holds.

A statement made in the Union House of Assembly by a representative from South West Africa (residents of South West Africa are elected by "Europeans" in the Territory as members of the Union Parliament) describes in detail the Union's policy of piecemeal and *de facto* incorporation. In the light of his frank concessions, and because his statement received express sanction by the Union Prime Minister, the statement is excerpted at some length:

"I would like to make it clear that *when one deals with the position of South West one really has to deal with two separate problems which should be dealt with separately. The one is the international problem, the legal position of South West vis-à-vis the world; and the other is the inter-territorial relationship, i. e., the practical relationship between South West and the Union.* When one discusses South West, one ought to be able to draw a clear distinction between the international position and the inter-territorial relationship. Such questions as whether or not the mandate still exists; with whom the sovereignty of South West rests; whether the powers of the old League of Nations in regard to mandated territories have automatically been transferred to the new UNO or not, are questions which in my opinion should fall under the international question. Those are matters on which there is a great difference of opinion in the outside world, even amongst the judges of the world court, and personally I do not think it would be of much use or bring us much further to have long debates in this House or outside on the party political platform in regard to those academic questions. What is of much greater importance to us is the practical relationship, the inter-territorial relationship between South West and the Union. No one has ever doubted and no one doubts today—even the International Court—that the Union has always had the right to govern South West as an integral portion of the Union. And South West Africa has always wanted that. And it is in regard

¹ Col. 4128, *loc. cit.*, Footnote 1, p. 186, *supra*.

to the practical application of this, how the territory should be governed as an integral portion, that the voters of South West were asked to decide in November. I have not the time to say much about the background of the matter, except this: Members of this Committee will remember that the two political parties in South West came to an agreement in 1948. That agreement was based on a standpoint which both parties formally subscribed to, namely that whatever might be the position of South West Africa in international law, as far as the public of South West was concerned, they admitted, for their own purposes, that *'the absolute sovereign power, in the interior and in the sphere of foreign affairs, over the territory of South West Africa, rests with the Union and with no one else.'* That was the first point of agreement between the two parties; it was the most important basis of that agreement. Out of this agreement between the two parties there followed an agreement between the two parties on the one hand and the then Prime Minister on the other hand, and that agreement in turn was recorded in the Act of 1949 which was approved by this Parliament. I have not the time at my disposal to go into its details, but to sum up all the happenings of 1948-49, what happened is that, between the Union and South West, inter-territorially—not internationally but only inter-territorially—the *Union on the one hand ceased to regard South West as a subordinate mandated territory, and that South West on the other hand expected to be regarded and treated as an equal partner with the other four provinces. I must say that in most respects South West's expectations were not disappointed. The term 'mandated territory' disappeared from all our statutes. We no longer talk in our statutes to-day about 'the mandated territory of South West'; we just talk about the territory of South West Africa.* As the result of the co-domination South West Africa obtained through its representation in this Parliament in the government of the whole of South Africa, in the same sense in which the provinces have it, this Parliament ceased to be the Parliament over South West and became the Parliament of South West Africa. Consequently we make no secret of it that the question of annexation in the old-fashioned sense of the word has lost all practical meaning. Within the rights and powers the Union has always had in respect of South West, *South West has in fact, de facto, become a partner of the four provinces, the fifth unit in the broad framework of South Africa,* and on a basis best fitting the political, economic and geographic circumstances of that territory. That is how we would like the Government and the public of the Union to deal with the matter.

"Now there are many people who think that because our legislative assembly has different powers from that of the provincial councils, because, e.g., it was given the power to control its own taxation, South West for that reason cannot be regarded as being a partner of the four provinces. I would like to say that this conception is based on a misunderstanding. The arrangement in connection with separate powers of taxation was made for our mutual convenience, for the convenience of South West as well as that of the Union. *I go so far as to say that even if South West had been annexed in the old-fashioned sense of the word, the form*

of local government and the form of financing our local services in South West would still have been on a different basis than that applicable to the provinces, for the simple reason that there are factors present in South West which are not applicable to any of the other provinces. Both General Smuts and Dr. Malan realized that, and it was also stated in this House that there were circumstances in South West which make it practically impossible to rule South West on the same financial basis as the provinces."¹

With reference to this statement, the Prime Minister of the Union made the following observations:

*"What the Hon. Member for Namib (Mr. Basson) said in connexion with the position in South West Africa is quite correct. I may just say that there is a very strong desire on the part of the South West administration, and representations have been made to the Union, for greater co-ordination in respect of legislation and other matters; that legislation of common interest to the Union and South West should also be applicable to South West. I just want to emphasize that South West is no longer a Mandated territory, but is ruled as an integral part of the Union."*² (Italics added.)

The Union's policy is thus frankly based upon the premise that "the question of annexation in the old-fashioned sense of the word has lost all practical meaning." Indeed, in commenting upon objections voiced by a member of the opposition, the Union Prime Minister stated:

*"... Although we adopt the standpoint which his former leader, General Smuts, adopted that the Mandate no longer exists, the Mandate itself laid down to the old League of Nations that the Union had the right to govern South West Africa as an integral part of the Union. We can, for example, make all our laws of application to it and govern it simply as a part of the Union and then the Hon. Senator ... if he so prefers can still adopt the standpoint that it is not incorporated."*³ (Italics added.)

The Union, accordingly, claims a legal right to incorporate the Territory politically, in a manner and at a time of its own choosing. Although the Union has not chosen, at least up to the present, to announce *de jure* annexation, its purpose is incorporation. The Union, in furtherance of this purpose, avowedly treats as null and void the obligations stated in Article 22 of the Covenant and the Mandate, which prohibit unilateral annexation and contemplate progress toward self-determination.

The intent of the Union, as described above, is manifest not only from official statements, but it has been given practical effect by, and explains, Union action.

2. Acts of the Union inconsistent with the international status of the Territory.

¹ See footnote 1, p. 186, *supra*.

² See footnote 1, p. 187, *supra*.

³ Union of South Africa, Senate Debates, *Hansard*, 1957, col. 5534, cited in Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 13th Sess., Supp. No. 12 at 9 (A/3906) (1958).

(a) *General conferral of Union citizenship upon inhabitants of the Territory.*

A question arose shortly after the establishment of the Mandate System, concerning the legal status of individual inhabitants of mandated territories. The question was settled by the Council of the League of Nations in a resolution of April 23, 1923:

"1. 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.*

2. The native inhabitants of a mandated territory are not invested with the nationality of the mandatory Power by reason of the protection extended to them.

3. It is not inconsistent with paragraphs 1 and 2 above that individual inhabitants of the mandated territory should *voluntarily* obtain naturalization from the mandatory Power in accordance with arrangements which it is open to such Power to make, with this object under its own law.

4. It is desirable that native inhabitants who receive the protection of the mandatory Power should in each case be designated by some form of descriptive title which will specify their status under the mandate."¹ (*Italics added.*)

In spite of the above principles regarding the status of inhabitants of a mandated territory, the Union has by processes of "general application" identified the status of inhabitants of the Territory with that of Nationals of the Union. This can be seen from the following summary history of Union Nationality Statutes.

The British Nationality in the Union and Naturalization of Aliens Act, 1926 (No. 18 of 1926) conferred British nationality in the following language:

"§ 1. *Definition of Natural-born British Subjects.* The following persons shall in the Union be natural-born British subjects, namely:

(a) Any person born within His Majesty's dominions and allegiance;

.....

§ 30. *Interpretation of Terms.* (1) In this Act, unless inconsistent with the context—

'British subject' means a person who is a natural-born British subject, or a person who is a holder of a certificate of naturalization or a person who has become a subject of His Majesty by reason of any annexation of territory, or otherwise, has under this Act become a British subject; ...

'the Union' includes also, in addition to the limits of the Union of South Africa, the Mandated Territory of South-West Africa."² (*Italics added.*)

¹ League of Nations Off. J., p. 604 (1923).

² Act No. 18 of 1926, Union Statutes 1910, 1947 (Butterworth & Co., Durban, South Africa), Vol. 1, p. 1071ff.

The Union Nationality and Flags Act, 1927 (No. 40 of 1927)¹ defined an "alien" in terms of that class of persons excluded from the class "British subject" as defined in Section 30 quoted above. The same Act conferred Union Nationality on "a person born in any part of South Africa who is not an alien or prohibited immigrant under any law relating to immigration." South West Africa was included in the Union for purposes of the Act.

Prior to the submission of the Government's report for 1928 to the League of Nations, the representative of the Union Government, on being asked by a member of the Permanent Mandates Commission whether the term "person" as used in the provision quoted above included a "Native," had informed the Commission that the "whole basis of the law was that, before a person could become a Union national, he must be a British subject. Once that point was realized, the Act became perfectly plain. A native of South-West Africa was not a British subject, and, that being so, he could not become a Union national."

In 1949, however, the Union passed the Act presently in force, the South African Citizenship Act, 1949 (No. 44 of 1949), which provides, *inter alia*, as follows:

"... § 2 (2) *Every person born in South-West Africa on or after the date of commencement of the British Nationality in the Union and Naturalization and Status of Aliens Act, 1926 (Act No. 18 of 1926), but prior to the date of commencement of this Act and who was immediately prior to the date of commencement of this Act, domiciled in the Union or South-West Africa, shall be a South African citizen.*" (Italics added.)

... § 5 (1) A person born outside the Union prior to the date of commencement of this Act, other than a person referred to in subsection (2) of Section *two*, shall be a South African citizen if his father was at the time of his birth a British subject under the law then in force in the Union, and he fulfils any one of the following conditions, that is to say, if either

(e) his father was, at the time of his birth, domiciled in the Union or South-West Africa.

... § 38. As from the date of commencement of this Act, any reference in any law to a Union National or to Union nationality shall be deemed to be a reference to a South African citizen or to South African citizenship, as the case may be, and any reference to a British subject shall be deemed to be a reference to a South African citizen, a citizen of a Commonwealth country or a citizen of the Republic of Ireland, and any reference to natural-born British subjects shall be deemed to be a reference to persons who by virtue of birth or descent are South African citizens or citizens of any Commonwealth country or of the Republic of Ireland, or who have at any time been such citizens and are not aliens."²

¹ *Ibid.*

² Act No. 44 of 1949, Statutes of the Union of South Africa (1949), p. 414ff.

The whole of Act No. 18 of 1926 and the provisions of Act No. 40 of 1927 relating to nationality were repealed by the above-quoted South African Citizenship Act, 1949 (No. 44 of 1949). It is plain on the face of Section 2 (2) of the latter Act that inhabitants of South West Africa who have been born there and are domiciled there automatically become citizens of the Union solely by virtue of their place of birth. The Union can no longer plausibly contend that a person must be a British subject before he can become a Union National or a South African citizen, since the Acts defining "British subject" have been repealed.

It is also noted that by official usage, "Native" inhabitants of the Territory are considered Union citizens. For example, in a letter dated July 5, 1960, from the Secretary for South West Africa, Office of the Administrator, to the Assistant Secretary, Ovamboland Peoples' Organisation, it is stated:

"With reference to your letter of the 22nd February last, I return herewith copy of the petition forwarded under cover thereof and at the request of the Prime Minister have to inform you that the Union Government cannot concede that the inhabitants of South West Africa have the right to address petitions to the United Nations Organisation or that there is any obligation on the Union Government to forward petitions to the organization.

The petitioners have, of course, *in common with other South African citizens*, the subject's right of petition to the highest legislative and administrative authority in the land."¹ (Italics added.)

By identifying the status of inhabitants of the Territory with that of Union nationals through processes having general application, the Union has violated its obligations as stated in Article 22 of the Covenant and Article 2 of the Mandate.

(b) *Inclusion of representatives from South West Africa in the Union Parliament.*

In 1949, the South West Africa Affairs Amendment Act² was adopted by the Union. That Act, in addition to deleting from the Union's Constitution all references to the Mandate as such, provides for representation of the Territory in the Union Parliament. Territorial representatives, in accordance with the basic discriminatory policy of the Union, are elected only by "Europeans". The representatives, in addition to participating in actions relating to the Territory, are fully authorized to speak and vote on matters regarding the Union as well.

The Committee on South West Africa concluded as follows with regard to the Union's policies in this respect:

"... The representation of the Territory in the Union Parliament, considered in the light of all the circumstances at present surrounding it, leads the Committee to believe that *this is an important*

¹ U.N. Doc. No. A/AC. 73/3 at 44 (1960).

² Act No. 23 of 1949, Statutes of the Union of South Africa (1949), p. 178.

step towards the political integration of the Territory into the Union. It draws particular attention to those statements in which spokesmen of the Union Government have associated the parliamentary representation of South West Africa with assertions of sovereignty over the Territory and of a desire to integrate it completely with the Union..."¹ (Italics added).

The policy of "political integration" violates the Union's obligations as Mandatory not only because it erodes the international status of the Territory, but, also, because it thereby impedes opportunity for self-determination by the inhabitants of the Territory. The Committee on South West Africa took particular note of this latter consequence of the Union's actions. In the Report cited immediately above, the Committee stated:

"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."

In other words, the Union's policy of including in the Union Parliament racially selected representatives from the Territory is not only part of a plan to incorporate the Territory politically, but also excludes "natives" from the processes of self-government.

(c) *Administrative Separation of the Eastern Caprivi Zipfel from the Union.*

In 1939, the Union enacted Proclamation No. 147, transferring administration of the Eastern Caprivi Zipfel from the Administrator of South West Africa to the Union directly. The Proclamation reads in part as follows:

"... 1. From and after the commencement of this proclamation the Eastern Caprivi Zipfel shall cease to be administered as a part of the Mandated Territory of South West Africa, and the Administrator of the said Mandated Territory shall cease to be the Administrator of the Eastern Caprivi Zipfel..."²

The 1955 Report of the Committee on South West Africa condemned this separation as a violation of the Mandate and rejected the avowed purpose of the action, for reasons which the Applicant fully endorses and submits to the Court:

"With regard to the administration of the Eastern Caprivi Zipfel, the Committee again questions whether the administrative separation of any section of the Territory is conducive to the attainment of the objective of the Mandate System. The Committee reiterates the opinion that such a separation is likely to prejudice consideration (b) of the 'General Conditions which must be fulfilled before the Mandates regime can be brought to an end in respect of the countries placed under that regime,' approved by the Council of the League on 4 September, 1931, namely, that 'It [the territory]

¹ Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 11th Sess., Supp. No. 12 at 8 (A/3151) (1956).

² Union Proclamation No. 147 of 1939.

must be capable of maintaining its territorial integrity and political independence.' The Committee considers that any administrative separation of any portion of the Mandated Territory would place obstacles in the way of the fulfilment of this important condition laid down by the League of Nations. In this connection, the Committee notes that the Prime Minister of the Union stated in Parliament on 1 June 1951 that the reason for the placing of the Eastern Caprivi Zipfel under direct Union Administration was the inaccessibility of the region to South West Africa. The Committee, realizing that the Eastern Caprivi Zipfel can be reached from the administrative centers of the Union only through non-Union territories, is not convinced that the direct administration of the region by the Union has, in fact, made it more accessible to the center of administration."¹

(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 Union's Minister of Bantu Administration and Development.*

The above two actions are to be regarded as elements of the plan to incorporate the Territory into the Union, in this case through direct Union control of territorial land and development and direct control of the Territory's "native" inhabitants.

Transfer of "Native" affairs to an agency external to the Territory, and vesting "Native" lands in a corporate body external to the Territory cannot be reconciled with the international status of the Territory.

The Committee on South West Africa, in its 1955 Report, sets forth relevant principles in terms which the Applicant fully endorses and submits to the Court:

"In this connection, the Committee recalls the following resolution adopted by the Permanent Mandates Commission on 7 July 1924 at its Fourth Session and endorsed by the Council of the League of Nations in 1926:

'In the Opinion of the Commission:

'The Mandatory powers do not possess, in virtue of Articles 120 and 257 (paragraph 2) of the Treaty of Versailles, any right over any part of the Territory under mandate other than that resulting from their having been entrusted with the administration of the Territory.

'If any legislative provision relating to land tenure should lead to conclusions contrary to these principles, it would be desirable that the text should be modified in order not to allow of any doubt.' ...

"It is the considered opinion of the Committee that the Mandate does not and can in no way be interpreted to confer upon the Mandatory Power the authority to divest the Mandated Territory of any portion of its assets."²

¹ Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 10th Sess., Supp. No. 12 at 10 (A/2913) (1955).

² *Id.* at 15-16.

And in its 1956 Report, the Committee stated on the same subject:

"With regard to the vesting in the South African Native Trust of all lands set apart for the sole use and occupation of 'Natives', the Committee reiterates its previous opinion that the territorial assets and integrity of South West Africa must remain intact and must be maintained until such time as the Territory has obtained the goal established for it under the Mandates System, and that its assets cannot be vested in any source other than the Mandated Territory itself..."¹

It is submitted that the actions complained of in this sub-section are elements of a plan for political integration of the Territory, and that they tend substantially to impede progress toward the objectives of the Mandate.

C. LEGAL CONCLUSIONS AND SUMMARY

The power, conferred by the Mandate, to rule the Territory "as an integral part of the Union" must be read in the light of the declared purposes of the Mandate and the Mandate's prohibition against unilateral incorporation of the Territory or any other modification of the Territory's status. The Advisory Opinion of 11 July, 1950 has affirmed these principles and the Union has never concealed its purpose to disregard them.

Under Article 2 of the Mandate, the Union has the duty to promote conditions under which the Territory's inhabitants may progress toward self-determination. This objective has been frustrated by the Union's actions in: (1) conferring, by processes of general application, Union citizenship upon the inhabitants of the Territory solely by virtue of birth and domicile in the Territory; (2) including discriminatorily selected representatives from the Territory in the Union's Parliament and giving such representatives a voice and vote in all affairs on which the Parliament is competent to legislate; (3) ceasing to administer the Eastern Caprivi Zipfel "as a part of the Mandated Territory of South West Africa"; and (4) vesting South West Africa Native Reserve Land in the Union's South African Native Trust, and transferring the administration of "Native" affairs to the Union's Minister of Bantu Administration and Development.

By the foregoing actions, read in the light of the Union's avowed intent, the Union has violated, and is violating, its international obligations stated in Article 22 of the Covenant of the League of Nations and in Article 2 of the Mandate.

¹ Report of the Committee on South West Africa, U.N. Gen. Ass. Off. Rec. 11th Sess., Supp. No. 12 at 11-12 (A/3151) (1956).

IX

ALLEGED VIOLATIONS BY THE UNION OF ARTICLE 7
OF THE MANDATE

A. STATEMENT OF LAW

Article 7 of the Mandate provides: "The consent of the League of Nations is required for any modification of the terms of the present Mandate."

The Court ruled in its Advisory Opinion of 11 July, 1950 that it is the United Nations whose consent is now required for any modification of the terms of the Mandate.

B. STATEMENT OF FACTS

It is submitted that the actions of the Union, as set forth in Chapters V, VI, VII and VIII of this Memorial, read in the light of the intent of the Union, as appears from the record herein, constitute a unilateral attempt by the Union substantially to modify the terms of the Mandate.

1. *The Union's Intent*

The Union, as amply demonstrated by its own admissions described in this Memorial, has proceeded from the assumption that the Mandate is no longer in existence, that the Union has no obligations under the Mandate, and that it has the right and the power unilaterally to incorporate the Territory by *de facto* annexation or otherwise.

2. *Acts of the Union*

In Chapters V, VI, VII and VIII the Applicant has shown violations by the Union of Articles 2, 4, 6 and 7 of the Mandate.

C. LEGAL CONCLUSIONS

The Applicant submits that the foregoing acts of the Union, read in the light of the Union's intent, constitute a unilateral attempt to modify the terms of the Mandate without the consent of the United Nations, and that such acts accordingly are, severally and in their totality, a violation of Article 7 of the Mandate.

X

SUBMISSIONS

Upon the basis of the foregoing allegations of fact, supplemented by such facts as may be adduced in further testimony before this Court, and the foregoing statements of law, supplemented by such other statements of law as may be hereinafter made, may it please the Court to adjudge and declare, whether the Government of the Union of South Africa is present or absent, that:

1. South West Africa is a territory under the Mandate conferred upon His Britannic Majesty by the Principal Allied and Associated Powers, to be exercised on his behalf by the Government of the Union of South Africa, accepted by his Britannic Majesty for and on behalf of the Government of the Union of South Africa, and confirmed by the Council of the League of Nations on 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;

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

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

5. 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;

6. the Union, by virtue of the acts described in Chapter VII herein, has established military bases within the Territory in violation of its obligations as stated in Article 4 of the Mandate and Article 22 of the Covenant; that the Union has the duty forthwith to remove all such military bases from within the Territory; and that the Union has the duty to refrain from the establishment of military bases within the Territory;

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.

The Applicant reserves the right to request the Court to declare and adjudge in respect to events which may occur subsequent to the date this Memorial is filed, including any event by which the Union's juridical and constitutional relationship to Her Britannic Majesty undergoes any substantial modification.

May it also please the Court to adjudge and declare whatever else it may deem fit and proper in regard to this Memorial, and to make all necessary awards and orders, including an award of costs, to effectuate its determinations.

The Hague, April 15, 1961

Agents for the Government of Ethiopia

(Signed) Tesfaye GEBRE-EGZY

(Signed) ERNEST A. GROSS

ANNEXES TO THE MEMORIAL OF THE GOVERNMENT OF ETHIOPIA

Annex A

COVENANT OF THE LEAGUE OF NATIONS

ARTICLE 22

1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

3. The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

4. Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

5. Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

6. There are territories, such as South West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

7. In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

8. The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

9. 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.

Annex B

MANDATE FOR GERMAN SOUTH WEST AFRICA

The Council of the League of Nations :

Whereas by Article 119 of the Treaty of Peace with Germany signed at Versailles on June 28th, 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her oversea possessions, including therein German South-West Africa; and

Whereas the Principal Allied and Associated Powers agreed that, in accordance with Article 22 Part I (Covenant of the League of Nations) of the said Treaty, a Mandate should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer the territory aforementioned, and have proposed that the Mandate should be formulated in the following terms; and

Whereas His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions; and

Whereas, by the aforementioned Article 22, paragraph 8, it is provided that the degree of authority, control or administration to be exercised by the Mandatory not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations:

Confirming the said Mandate, defines its terms as follows:—

ARTICLE I

The territory over which a Mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (hereinafter called the Mandatory) comprises the territory which formerly constituted the German Protectorate of South-West Africa.

ARTICLE 2

The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate.

ARTICLE 3

The Mandatory shall see that the slave trade is prohibited, and that no forced labour is permitted, except for essential public works and services, and then only for adequate remuneration.

The Mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the Convention relating to the control of the arms traffic, signed on September 10th, 1919, or in any convention amending the same.

The supply of intoxicating spirits and beverages to the natives shall be prohibited.

ARTICLE 4

The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory.

ARTICLE 5

Subject to the provisions of any local law for the maintenance of public order and public morals, the Mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State Member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling.

ARTICLE 6

The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5.

ARTICLE 7

The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate.

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

The present Declaration shall be deposited in the archives of the League of Nations. Certified copies shall be forwarded by the Secretary-General of the League of Nations to all Powers Signatories of the Treaty of Peace with Germany:

Made at Geneva the 17th day of December, 1920.

LIST OF THE RELEVANT DOCUMENTS

Article 22 of the Covenant of the League of Nations and the Mandate for South-West Africa are printed herein as Annex A and B respectively.

The remainder of the documents listed below were filed with the Registrar of the Court, in accordance with Article 43 of the Rules of the Court.

I. Documents of the United Nations*A. Resolutions of the General Assembly*

1. U.N. Doc. No. A/64/Add. I (1947)
2. U.N. Gen. Ass. Off. Rec. 2nd Sess. (A/519) (1948)
3. U.N. Gen. Ass. Off. Rec. 3rd Sess. (A/810) (1948)
4. U.N. Gen. Ass. Off. Rec. 4th Sess. (A/1251/Corr. 1) (1949)
5. U.N. Gen. Ass. Off. Rec. 5th Sess., Supp. No. 20 (A/1775) (1950)
6. U.N. Gen. Ass. Off. Rec. 6th Sess., Supp. No. 20 (A/2119) (1952)
7. U.N. Gen. Ass. Off. Rec. 8th Sess., Supp. No. 17 (A/2630) (1953)
8. U.N. Gen. Ass. Off. Rec. 9th Sess., Supp. No. 21 (A/2890) (1954)
9. U.N. Gen. Ass. Off. Rec. 10th Sess., Supp. No. 19 (A/3116) (1955)
10. U.N. Gen. Ass. Off. Rec. 11th Sess., Supp. No. 17 (A/3572/ and Corr. I) (1957)
11. U.N. Gen. Ass. Off. Rec. 12th Sess., Supp. No. 18 (A/3805) (1957)
12. U.N. Gen. Ass. Off. Rec. 13th Sess., Supp. No. 18 (A/4090) (1958)
13. U.N. Gen. Ass. Off. Rec. 14th Sess., Supp. No. 16 (A/4354) (1959)
14. U.N. Gen. Ass. Off. Rec. 15th Sess., Supp. No. 16 (A/4684) (1960)

B. Records of the Fourth Committee

1. U.N. Gen. Ass. Off. Rec. 3rd Sess., 1st part 4th Comm. (1948)
2. U.N. Doc. No. A/C.4/SR.132 (1949)
3. U.N. Doc. No. A/C.4/185 (1950)
4. U.N. Doc. No. A/C.4/SR.196 (1950)
5. U.N. Doc. No. A/C.4/SR.223 (1951)
6. U.N. Doc. No. A/C.4/SR.364 (1953)
7. U.N. Doc. No. A/C.4/SR.399 (1954)
8. U.N. Doc. No. A/C.4/SR.407 (1954)
9. U.N. Doc. No. A/C.4/SR.491 (1955)
10. U.N. Doc. No. A/C.4/SR.659 (1957)
11. U.N. Doc. No. A/C.4/SR.756 (1958)
12. U.N. Doc. No. A/C.4/421 (1959)
13. U.N. Doc. No. A/C.4/426 (1959)

C. *Documents of the Ad Hoc Committee*

1. U.N. Doc. No. A/AC.49/SR.21 (1952)
2. U.N. Doc. No. A/AC.49/SR.3 (1951)
3. U.N. Doc. No. A/1901 (1951)
4. U.N. Doc. No. A/2261 (1952)

D. *Documents of the Committee on South West Africa*

1. U.N. Gen. Ass. Off. Rec. 9th Sess., Supp. No. 14 (A/2666) (1954)
2. U.N. Gen. Ass. Off. Rec. 10th Sess., Supp. No. 12 (A/2913) (1955)
3. U.N. Gen. Ass. Off. Rec. 11th Sess., Supp. No. 12 (A/3151) (1956)
4. U.N. Gen. Ass. Off. Rec. 12th Sess., Supp. No. 12 (A/3626) (1957)
5. U.N. Gen. Ass. Off. Rec. 13th Sess., Supp. No. 12 (A/3906) (1958)
6. U.N. Gen. Ass. Off. Rec. 14th Sess., Supp. No. 12 (A/4191) (1959)
7. U.N. Gen. Ass. Off. Rec. 15th Sess., Supp. No. 12 (A/4464) (1960)
8. Conference Room Paper No. VII/76, 30 August 1960
9. Conference Room Paper No. VII/84, 19 September 1960
10. Conference Room Paper No. VII/85, 21 September 1960
11. Conference Room Paper No. VII/92, 30 September 1960

E. *Documents of the Good Offices Committee*

1. U.N. Doc. No. A/3900, U.N. Gen. Ass. Off. Rec. 13th Sess., Agenda item 39, Annexes (1958)
2. U.N. Doc. No. A/4224, U.N. Gen. Ass. Off. Rec. 14th Sess., Agenda item 38, Annexes (1959)

F. *Related Documents of the United Nations*

1. U.N. Doc. No. A/334 (1947)
2. U.N. Gen. Ass. Off. Rec. 3rd Sess., Supp. No. 4 (A/603) (1948)
3. U.N. Doc. No. A/929 (1949)
4. U.N. Doc. No. A/AC.73/L.3/Add. I (1954)
5. U.N. Doc. No. A/AC.73/L.3 (1954)
6. U.N. Doc. No. A/AC.73/L.7 (1955)
7. U.N. Doc. No. A/AC.73/L.10 (1957)
8. U.N. Doc. No. A/AC.73/L.14 (1959)
9. U.N. Doc. No. A/AC.73/L.13 (1959)
10. U.N. Doc. No. A/AC.73/3 (1960)
11. United Nations Charter

II. Documents of the League of Nations

A. *Minutes of the Permanent Mandates Commission*

1. PMC (Min. 2nd Sess.) (Annex 6) pp. 91-93
2. PMC (Min. 4th Sess.) pp. 59-63
3. PMC (Min. 6th Sess.) pp. 60-61
4. PMC (Min. 6th Sess.) (Annex 11) p. 178
5. PMC (Min. 9th Sess.) (Annex 9) p. 220
6. PMC (Min. 11th Sess.) (Annex 6) pp. 204-205
7. PMC (Min. 14th Sess.) (Annex 16) p. 275
8. PMC (Min. 14th Sess.) (Annex 16) pp. 274-275
9. PMC (Min. 15th Sess.) (Annex 20) p. 294
10. PMC (Min. 26th Sess.) (Annex 20) p. 207
11. PMC (Min. 27th Sess.) (Annex 36) p. 229
12. PMC (Min. 31st Sess.) (Annex 7) p. 192
13. PMC (Min. 31st Sess.) (Annex 7) p. 193

B. *League of Nations Official Journal*

1. League of Nations Off. J. 21st Ass. pp. 32-33 (plenary) (1946)
2. League of Nations Off. J. 21st Ass. p. 58 (plenary) (1946)
3. League of Nations Off. J. p. 604 (1923)

C. *Related Documents of the League of Nations*

1. Records of 9th Ass. of League of Nations, 1st Comm. p. 47 (1928)
2. L.N.C./166/M/66.1929. V, p. 97
3. Article 22 of the Covenant of the League of Nations
4. The Mandate for German South West Africa

III. Union of South Africa

A. *Legislative Acts and Proclamations*

1. Act No. 27 of 1923
2. Act No. 42 of 1925
 - Amended by Act No. 23 of 1949
 - Amended by Act No. 55 of 1951
 - Amended by Act No. 56 of 1954
 - Amended by Act No. 26 of 1955
 - Amended by Act No. 55 of 1957
3. Act No. 18 of 1926
4. Proclamation No. 57 of 1926
5. Act No. 40 of 1927
6. Act No. 18 of 1936
 - Amended by Act No. 56 of 1949
 - Amended by Act No. 18 of 1954
 - Amended by Act No. 73 of 1956
 - Amended by Act No. 79 of 1957
 - Amended by Act No. 41 of 1958
 - Amended by Act No. 46 of 1959

7. Proclamation No. 51 of 1937
8. Proclamation No. 147 of 1939
9. Act No. 46 of 1946
 - Amended by Act No. 50 of 1948
 - Amended by Act No. 55 of 1952
 - Amended by Act No. 8 of 1957
 - Amended by Act No. 30 of 1958
10. Act No. 35 of 1948
 - Amended by Act No. 8 of 1950
 - Amended by Act No. 18 of 1952
 - Amended by Act No. 11 of 1956
 - Amended by Act No. 27 of 1958
 - Amended by Act No. 35 of 1959
11. Act No. 44 of 1949
12. Act No. 55 of 1951
13. Act No. 57 of 1956
14. Act No. 69 of 1957
15. Act No. 8 of 1959
 - Amended by Act No. 33 of 1960
16. Act No. 55 of 1959

B. *Excerpts from debates in the Parliament of the Union of South Africa*

1. *Senate debates—Hansard*, Vol. 15, columns 3631-3632 (1956)
2. *House of Assembly debates—Hansard*, Vol. 13, column 4128 and columns 4107-4110 (1956)

C. *Other documents of the Union of South Africa*

1. Report of South West Africa Commission (Pretoria, 1936) p. 77
2. Report presented by the Government of the Union of South Africa to the Council of the League of Nations concerning the administration of South West Africa for the year 1936 (Pretoria, 1937) p. 4

IV. South West Africa

A. *Proclamations, Ordinances and Government Notices*

1. Proclamation No. 3 of 1917
 - Amended by Proclamation No. 6 of 1924
 - Amended by Proclamation No. 6 of 1925
 - Amended by Proclamation No. 15 of 1928 (Section 26)
 - Amended by Proclamation No. 33 of 1929 (Section 2)
 - Amended by Proclamation No. 35 of 1930
 - Amended by Proclamation No. 16 of 1935
2. Proclamation No. 25 of 1920
 - Amended by Proclamation No. 32 of 1927

3. Proclamation No. 34 of 1920
 - Amended by Proclamation No. 19 of 1923
 - Amended by Government Notice 173 of 1924 (para. 29)
 - Amended by Proclamation No. 10 of 1927
 - Amended by Proclamation No. 22 of 1938
 - Amended by Proclamation No. 7 of 1947
 - Amended by Proclamation No. 26 of 1950
 - Amended by Ordinance No. 4 of 1955
4. Proclamation No. 50 of 1920
 - Amended by Proclamation No. 30 of 1927 (Section 11)
 - Amended by Proclamation No. 15 of 1945
5. Proclamation No. 1 of 1921
6. Proclamation No. 11 of 1922
 - Amended by Proclamation No. 11 of 1927
 - Amended by Proclamation No. 15 of 1928 (Section 26)
 - Amended by Proclamation No. 43 of 1929 (Section 2)
 - Amended by Proclamation No. 17 of 1933
 - Amended by Proclamation No. 24 of 1935
 - Amended by Proclamation No. 36 of 1936
 - Amended by Proclamation No. 30 of 1938
 - Amended by Proclamation No. 38 of 1941
 - Amended by Proclamation No. 6 of 1943
 - Amended by Proclamation No. 1 of 1944
7. Proclamation No. 6 of 1925
 - Amended by Proclamation No. 33 of 1929 (Section 3)
8. Government Notice No. 26 of 1925
9. Proclamation No. 16 of 1926
 - Amended by Ordinance No. 20 of 1957
 - Amended by Ordinance No. 21 of 1957
 - Amended by Ordinance No. 9 of 1958
 - Amended by Ordinance No. 21 of 1959
 - Amended by Ordinance No. 3 of 1960
10. Proclamation No. 15 of 1928
 - Amended by Proclamation No. 25 of 1937
 - Amended by Proclamation No. 24 of 1941
 - Amended by Proclamation No. 35 of 1943
 - Amended by Ordinance No. 11 of 1954
11. Proclamation No. 33 of 1929
12. Proclamation No. 35 of 1930
13. Proclamation No. 27 of 1931
14. Proclamation No. 29 of 1935
 - Amended by Proclamation No. 29 of 1936
 - Amended by Proclamation No. 36 of 1936
 - Amended by Proclamation No. 37 of 1940
 - Amended by Proclamation No. 2 of 1946
 - Amended by Proclamation No. 22 of 1946

Amended by Proclamation No. 38 of 1949
Amended by Proclamation No. 59 of 1949
Amended by Proclamation No. 51 of 1950
Amended by Proclamation No. 33 of 1951
Amended by Ordinance No. 25 of 1953
Amended by Ordinance No. 3 of 1955

15. Ordinance No. 16 of 1937
 - Amended by Ordinance No. 10 of 1943
 - Amended by Ordinance No. 6 of 1945
 - Amended by Ordinance No. 13 of 1946
 - Amended by Ordinance No. 7 of 1952
 - Amended by Ordinance No. 10 of 1957
 - Amended by Ordinance No. 27 of 1958
16. Proclamation No. 4 of 1939
17. Proclamation No. 17 of 1939
 - Amended by Proclamation No. 25 of 1939
 - Amended by Proclamation No. 17 of 1941
 - Amended by Proclamation No. 40 of 1949
 - Amended by Ordinance No. 30 of 1955
18. Government Notice No. 64 of 1940
19. Ordinance No. 3 of 1949
 - Amended by Ordinance No. 2 of 1953
 - Amended by Ordinance No. 15 of 1954
 - Amended by Ordinance No. 34 of 1955
 - Amended by Ordinance No. 14 of 1956
 - Amended by Ordinance No. 19 of 1956
 - Amended by Ordinance No. 48 of 1957
 - Amended by Ordinance No. 29 of 1958
 - Amended by Ordinance No. 32 of 1959
 - Amended by Ordinance No. 33 of 1959
 - Amended by Ordinance No. 14 of 1960
20. Government Notice No. 3 of 1951
21. Proclamation No. 56 of 1951
 - Amended by Ordinance No. 21 of 1953
 - Amended by Ordinance No. 25 of 1954
 - Amended by Ordinance No. 4 of 1955
22. Government Notice No. 121 of 1952
23. Ordinance No. 34 of 1952
 - Amended by Ordinance No. 28 of 1957
 - Amended by Ordinance No. 29 of 1960
24. Ordinance No. 35 of 1952 (Chapter 2)
25. Ordinance No. 48 of 1952
 - Amended by Ordinance 30 of 1959
26. Government Notice No. 257 of 1953
27. Proclamation No. 28 of 1953

28. Ordinance No. 26 of 1954
 - Amended by Ordinance No. 17 of 1955
 - Amended by Ordinance No. 31 of 1957
 - Amended by Ordinance No. 23 of 1959
 - Amended by Ordinance No. 25 of 1960
29. Government Notice No. 65 of 1955
 - Amended by Government Notice No. 245 of 1956
 - Amended by Government Notice No. 99 of 1957
 - Amended by Government Notice No. 107 of 1958
 - Amended by Government Notice No. 62 of 1959
 - Amended by Government Notice No. 162 of 1960

B. *Resolutions of the South West African Legislative Assembly*

1. South West Africa Legislative Assembly Voting and Procedures (1950) p. 4

V. **Miscellaneous**

A. *Books, Periodicals, etc.*

1. Chronology of International Events, Vol. 10, No. 17, 19 August—1 September, 1954 p. 567
2. 235 South Africa, p. 511 (June 25, 1955)
3. Bentwich, *The Mandates System*, pp. 120-134 (1930)
4. Wright, *Mandates under the League of Nations*, pp. 472-476 (1930)
5. 42 *American Journal of International Law*, 630 (July, 1948)
6. 38 *California Law Review* 830 (1950)
7. Rosenne, *The International Court of Justice* (1957)
8. Smuts, *The League of Nations, A Practical Suggestion* (1918)
9. *Second Conference of Independent African States*
Addis Ababa 14-26 June, 1960, "published by the Ministry of Information of the Imperial Ethiopian Government" (1960)
10. Press Release, Delegation of the Union of South Africa to the United Nations, November 4, 1953

TABLE OF CASES CITED

A. INTERNATIONAL COURT OF JUSTICE

1. *Interpretation of Peace Treaties*, Advisory Opinion: I.C.J. Reports 1950, p. 65.
2. *International status of South-West Africa*, Advisory Opinion: I.C.J. Reports 1950, p. 128.
3. *South-West Africa—Voting Procedure*, Advisory Opinion of June 7th, 1955: I.C.J. Reports 1955, p. 67.
4. *Admissibility of hearings of petitioners by the Committee on South-West Africa*, Advisory Opinion of June 1st, 1956: I.C.J. Reports 1956, p. 23.

B. PERMANENT COURT OF INTERNATIONAL JUSTICE

1. *Eastern Carelia case*, P.C.I.J., Ser. B, No. 5 (1923).
2. *German Settlers in Poland case*, P.C.I.J., Ser. B, No. 6 (1923).
3. *Case of the Mavrommatis Palestine Concessions*, P.C.I.J., Ser. A, No. 2 (1924).
4. *Case concerning German interests in Polish Upper Silesia*, P.C.I.J., Ser. A, No. 7 (1926).
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