INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

SOUTH WEST AFRICA CASES

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

VOLUME II

1966

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRES DU SUD-OUEST AFRICAIN

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

VOLUME II

The present volume contains the first four books of the Counter-Memorial relating to the *South West Africa* cases. The proceedings in these cases, which were entered on the Court's General List on 4 November 1960 under numbers 46 and 47, were joined by an Order of the Court of 20 May 1961 (*South West Africa, Order of 20 May 1961, I.C.J. Reports 1961*, p. 13). Two Judgments have been rendered, the first on 21 December 1962 (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319), and the second on 18 July 1966 (*South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6).

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

The Hague, 1966.

Le présent volume reproduit les quatre premiers livres du contre-mémoire déposé dans les affaires du *Sud-Ouest africain*. Ces affaires ont été inscrites au rôle général de la Cour sous les nos 46 et 47 le 4 novembre 1960 et les deux instances ont été jointes par ordonnance de la Cour le 20 mai 1961 (*Sud-Ouest africain, ordonnance du 20 mai 1961, C.I.J. Recueil 1961*, p. 13). Elles ont fait l'objet de deux arrêts rendus le 21 décembre 1962 (*Sud-Ouest africain, exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 319) et le 18 juillet 1966 (*Sud-Ouest africain, deuxième phase, arrêt, C.I.J. Recueil 1966*, p. 6).

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

La Haye, 1966.

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5. COUNTER-MEMORIAL FILED BY THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

BOOK I

CHAPTER I

GENERAL INTRODUCTION

1. On 4 November 1960 the Governments of Liberia and Ethiopia (hereinafter usually referred to as "Applicants") submitted an Application to this honourable Court to institute proceedings against the Government of the Union of South Africa, now the Republic of South Africa (hereinafter usually referred to as "Respondent"). Each Applicant filed a Memorial on 15 April 1961. Thereupon the proceedings were joined by an Order of the honourable Court dated 20 May 1961. On 30 November 1961 Respondent filed Preliminary Objections relating to the jurisdiction of the Court, which Objections were dismissed by a majority Judgment dated 21 December 1962. This Counter-Memorial is submitted pursuant to Orders of the Court dated 5 February 1963 and 18 September 1963.

2. Before proceeding to a detailed discussion of the matters in issue it will be convenient to set out in broad outline the field which is covered by this Counter-Memorial.

Applicants summarize in the following terms the case presented by them:

> "The dispute between Ethiopia[1] 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[2]."

The nature of Respondent's submissions in reply to the charges thus made, may be set out as follows:

(a) Respondent firstly submits that the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations, and that Respondent is consequently no longer subject to any legal obligations

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[1] This quotation is derived from the Memorial submitted by Ethiopia. The one filed by Liberia is in identical terms in this respect, save for the substitution of the names of the Applicants.

[2] *Vide* I, p. 32.

thereunder. If this submission is accepted, it would dispose of the whole of the Applicants' case, which is based entirely on the continued existence of the Mandate.

(b) In the alternative, and even if it were to be held that the Mandate as such continued in existence after the dissolution of the League, Respondent submits that its former obligations to report and account to, and to submit to the supervision of, the Council of the League of Nations, lapsed upon dissolution of the League, and have not been replaced by any similar obligations relative to supervision by any organ of the United Nations or any other organization or body.

(c) Submissions *(a)* and *(b)* above raise mainly issues of law, and the considerations relating to them are to a large extent intertwined. They will accordingly be dealt with together in one book of this Counter-Memorial (Book II). In addition Respondent will (on the basis set out below) enter into the merits of Applicants' complaints regarding alleged violations of the substantive provisions of the Mandate (i.e., Articles 2, 4 and 7) and of its obligations as stated in Article 22 of the Covenant. Books III to IX of this Counter-Memorial will be devoted to this purpose.

Respondent wishes to emphasize that its treatment of the merits of Applicants' complaints regarding alleged violations of the Mandate must not be taken as an admission of the continued existence of the Mandate: the treatment is purely on an alternative basis, arising only if the Court were to find, contrary to Respondent's submission, that the Mandate did not lapse on dissolution of the League of Nations.

3. As will be seen, the present Counter-Memorial is an extremely lengthy document. This has been caused by various circumstances to be dealt with in the next succeeding paragraphs.

4. Applicants' charges cover a very wide field. Their allegations relate to virtually every aspect of the administration of South West Africa since 1920. At the same time their statements of facts are expressed in very terse terms without any adequate attempt to provide the background information necessary for a proper appreciation of the issues involved. This factor is of particular importance in connection with Applicants' contentions regarding alleged contraventions of Article 2 of the Mandate[1]. As will be demonstrated, Applicants' allegations in this regard amount, on analysis, to a charge that Respondent has exercised its "full power of administration and legislation" under Article 2 of the Mandate in bad faith with an intention or purpose other than one to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory"[2]. Since the issue here is one of intentions or purpose, Respondent has found it necessary not only to refute incorrect allegations contained in the Memorials, but also to fill in the picture of its administration of the Territory with all the details required for a proper evaluation of its actions, and, in particular, to endeavour to present all the material which would require consideration before any judgment could be reached as to Respondent's good or bad faith. This material consists of information regarding

[1] *Vide* I, p. 104.

[2] Art. 2 of the Mandate—see Book IV, Chap. II, paras. 17-21.

South West Africa, its background and administration, and regarding circumstances in other countries or territories which may be relevant in evaluating or explaining measures taken by Respondent, or which may be of assistance to the Court by way of comparison or illustration.

5. Respondent regrets that the bulk of its Counter-Memorial has been increased by a certain amount of repetition. In view of the vast field that was required to be covered in a relatively short time, many people have contributed to the end product. All efforts have been made to correlate and dovetail the parts produced by different people into one integrated whole, but this has necessarily been the task of a few persons and through pressure of time the aim has not been achieved in full measure.

6. In Chapter II of the Memorials, Applicants quote extensively from reports and resolutions of various organs of the United Nations, and, in particular, from the reports of the Committee on South West Africa[1]. The extracts contain demonstrably wrong conclusions, derived from wrong factual information and assumptions. Nevertheless, save where Applicants in the formulation of their specific charges rely on some statement in such a report or resolution, or associate themselves with some allegation therein[2], Respondent does not propose traversing the allegations or conclusions in question—for reasons to be indicated in the succeeding paragraphs.

7. Applicants' allegations regarding alleged breaches by Respondent of substantive provisions of the Mandate are contained in Chapters V to IX of their Memorials. In these Chapters Applicants formulate their charges, and, where so advised, they quote United Nations reports as sources for their allegations, or they associate themselves expressly with comments or criticisms emanating from United Nations organs. Respondent does not understand the quotations from reports of organs of the United Nations in Chapter II of the Memorials to constitute in effect further complaints made by Applicants. This is particularly so since Chapter II purports to contain no more than the "history and background of the dispute"[3]. The purpose in referring extensively to the said reports in Chapter II was therefore, presumably, to seek to establish the existence of a dispute between the parties, and no more.

8. The said reports and resolutions contain political findings and recommendations made by political bodies or organs. As such the findings and recommendations, it is submitted, are of no relevance whatsoever to this Court's judicial function, which is to be exercised on the basis of the facts, evidence and other material properly placed before it.

In so far as such reports and resolutions contain purported statements or conclusions of fact, they might conceivably have been of some assistance to the Court and the parties if it had been possible to place reliance on them for reasonable accuracy. The very opposite is true, however, as has been stated and as may be demonstrated by one example. General Assembly resolution 1702 (XVI) passed on 19 December 1961, contained the following:

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[1] *Vide* I, pp. 64-65, 69, 70-71, 73-74, 76-77, 79, 83-84.
[2] As, e.g., at I, pp. 192-195.
[3] *Vide* heading, I, p. 33.

"Noting with increased disquiet the progressive deterioration of the situation in South West Africa as the result of the ruthless intensification of the policy of apartheid, the deep emotional resentments of all African peoples, accompanied by the rapid expansion of South Africa's military forces, and the fact that Europeans, both soldiers and civilians, are being armed and militarily reinforced for the purpose of oppressing the indigenous people, all of which create an increasingly explosive situation which, if allowed to continue, will endanger international peace and security[1]."

This resolution proceeded to provide for the appointment of a special committee on South West Africa, and charged it, *inter alia*, to attempt to secure "Evacuation of all military forces of the Republic of South Africa from the Territory" [2].

During May 1962, the Chairman and Vice-Chairman of the Committee on South West Africa visited the Territory as guests of Respondent. They were invited to stay as long as they wished, to visit any part of the Territory, and to speak to any person. At the conclusion of their visit, they stated in a joint communiqué:

". . . that in the places visited they had found no evidence and heard no allegations that there was a threat to international peace and security within South West Africa, that there were signs of militarisation in the territory, or that the indigenous population was being exterminated [3]".

It is apparent therefore that the factual assumptions on which the said resolution of the General Assembly was based, were entirely fallacious and were shown to be such as a result of the visit of the Chairman and Vice-Chairman of the said Committee.

It is further apparent that no probative value can attach to purported statements or conclusions of fact in the reports and resolutions, and that to canvass them fully would be a lengthy process which could serve no purpose in these proceedings. If the Court should, however, consider that it could be assisted by such a canvassing, Respondent would gladly co-operate in that regard at the oral stages of the proceedings. Meanwhile, for the reasons given, the reports and resolutions will not be dealt with to a greater extent than has been indicated.

9. It will be noted that in many instances Respondent does not quote any published work or authority in support of statements made in the succeeding volumes. In such cases, apart from facts which are so generally and well known as to require no citation, the information is mostly derived from Respondent's own official sources. If any doubt is cast on the accuracy of such information, or if the Court wishes it to be amplified or explained, Respondent would willingly make the necessary evidence available during the oral proceedings.

10. It may be convenient to give a brief account of the general scheme of the Counter-Memorial. The present Book (Book I) contains, apart from this introduction, various matters of general importance, such as

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[1] *G.A. Resolution* 1702 (XVI), 19 Dec. 1961, in *G.A., O.R., Sixteenth Sess., Sup.* No. 17 (A/5100), pp. 39-40.

[2] *Ibid.*, para. 2 *(b)*, p. 40.

[3] *U.N. Press Release GA/2501*, 26 May 1962, *Joint Statement on Pretoria talks following visit of U.N. Representatives to South West Africa.*

maps of Africa [1] and of the Territory [2] and Respondent's Submissions [3]. Book II consists of Respondent's legal argument (with necessary supporting facts) relating to the issues set out in paragraph 2 *(a)* and *(b)* above. Book III contains background information relating to the geography, history and peoples of the Territory. Applicants' allegations regarding breaches of Article 2 of the Mandate [4] are dealt with in Books IV, V, VI and VII.

Book VIII contains Respondent's replies to Chapters VI, VII, VIII and IX of the Memorials.

11. As indicated above, the present Book also contains Respondent's Submissions on the charges made by Applicants. Save in regard to Respondent's reply to Chapter V of the Memorials, Submissions are also set out at the end of the various self-contained portions of the Counter-Memorial. In view, however, of the fact that Respondent's reply to Applicants' Chapter V is spread over four books, no separate Submission relevant to the said Chapter is contained elsewhere in this Counter-Memorial.

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[1] Not reproduced.
[2] *Vide* pocket in back cover.
[3] *Vide* para. 11, *infra*.
[4] *Vide* I, pp. 104 ff.

CHAPTER II

SUBMISSIONS

Upon the basis of the statements of fact and law as set forth in the several books of this Counter-Memorial, may it please the Court to adjudge and declare that the Submissions of the Governments of Ethiopia and Liberia as recorded at pages 197 to 198 of their Memorials are unfounded and that no declaration be made as claimed by them.

In particular Respondent submits:

1. That the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations, and that Respondent is, in consequence thereof, no longer subject to any legal obligations thereunder.

2. *In the alternative to (1) above, and in the event of it being held that the Mandate as such continued in existence despite the dissolution of the League of Nations:*

(a) *Relative to Applicants' Submissions Nos. 2, 7 and 8:*
that Respondent's former obligations under the Mandate to report and account to, and to submit to the supervision of, the Council of the League of Nations, lapsed upon the dissolution of the League, and have not been replaced by any similar obligations relative to supervision by any organ of the United Nations or any other organization or body. Respondent is therefore under no obligation to submit reports concerning its administration of South West Africa, or to transmit petitions from the inhabitants of that Territory, to the United Nations or any other body;

(b) *Relative to Applicants' Submissions Nos. 3, 4, 5, 6 and 9:*
that Respondent has not, in any of the respects alleged, violated its obligations as stated in the Mandate or in Article 22 of the Covenant of the League of Nations.

(Sgd.) R. McGREGOR

(Sgd.) J. P. VERLOREN VAN THEMAAT

Agents of the Government of the
Republic of South Africa

BOOK II

CHAPTER I

INTRODUCTION TO BOOK II

1. This book contains Respondent's reply to Applicants' Submissions 1, 2, 7 and 8, in which they request the Court to declare the following in 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;
>
> 2. the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted;
>
> .....
>
> 7. the Union has failed to render to the General Assembly of the United Nations annual reports containing information with regard to the Territory and indicating the measures it has taken to carry out its obligations under the Mandate; that such failure is a violation of its obligations as stated in Article 6 of the Mandate; and that the Union has the duty forthwith to render such annual reports to the General Assembly;
>
> 8. the Union has failed to transmit to the General Assembly of the United Nations petitions from the Territory's inhabitants addressed to the General Assembly; that such failure is a violation of its obligations as Mandatory; and that the Union has the duty to transmit such petitions to the General Assembly;[1]"

2. Respondent does not dispute that it has in fact refused to render to the General Assembly of the United Nations annual reports such as it was obliged to render to the Council of the League of Nations. Respondent equally does not dispute that it has refused to transmit to the General Assembly petitions from the Territory's inhabitants addressed to the General Assembly. Respondent denies, however, that it was in law obliged to render such annual reports, or to transmit such petitions, to the General Assembly. Applicants' Submissions 1, 2, 7 and 8 therefore raise questions of law only, namely whether the Mandate still exists, and, if so, whether the supervisory functions of the Council

[1] *Vide* I, pp. 95, 197-198.

of the League of Nations have passed to the United Nations. Respondent contends that both these questions are to be answered in the negative —and, indeed, that acceptance of this contention would dispose of the whole of Applicants' case, which is based on the continued existence of the Mandate [1].

3. The major part of this Book consists of legal argument in support of Respondent's aforesaid contention. It has been found desirable, however, also to set out the historical events, which are, in Respondent's submission, relevant to a proper appreciation of its legal submissions. This topic forms the subject-matter of the next Chapter.

4. In view of the overlapping of the issues now raised with those dealt with in the Preliminary Objections, there is to some extent a repetition in this Book of material which was contained in Respondent's written Objections or its Oral Statement relative thereto. Consideration was given to the possibility of incorporating such material into the present argument merely by reference to its original source, and thus to reduce the bulk of the Pleadings. It was decided, however, that the advantages attendant upon following that course would be outweighed by the inconvenience caused to members of the Court in having to gather Respondent's argument in unco-ordinated bits and pieces from a number of different sources. Consequently, although the measure of repetition is regretted, this Book presents in one self-contained unit Respondent's reply to Applicants' Submissions 1, 2, 7 and 8.

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[1] *Vide* Chapter V, Part A, para. 17 *(c)*, *infra*.

CHAPTER II

HISTORICAL BACKGROUND

Introductory

1. This Chapter contains an account of the historical background to the present proceedings, but only to the extent relevant to the legal issues raised under Submissions Nos. 1, 2, 7 and 8 at pages 168 and 169 of the Applicants' Memorials[1]. The historical facts which are relevant only to the issues raised under Submissions 3, 4, 5, 6 and 9 in the Applicants' Memorials—namely whether in its administration of South West Africa Respondent has violated provisions of the Mandate [17]—are dealt with elsewhere in the Counter-Memorial[2]. For the sake of convenience, particularly as regards replying to certain of the allegations by the Applicants in Chapter II of their Memorials, the subdivisions of that Chapter are broadly adhered to in this historical account. In view, however, of the division of historical matter into the two parts aforestated, Respondent will in this Chapter not deal with, or furnish full replies to, those allegations and citations from reports which relate to charges that Respondent has violated substantive obligations concerning the administration of South West Africa. These matters are, in so far as is necessary, dealt with elsewhere in the Counter-Memorial[3].

Origin and Nature of the Mandate System

2. Although the term "mandate" had been used before in regard to certain international relationships[4], it first acquired a special meaning in international law when the mandate system of the League of Nations was instituted. This system originated, together with the League, from the peace settlements effected after the First World War. As Quincy Wright remarked:

> "This system, like most other political innovations, was not a product of disinterested juristic thought nor of detached scientific investigation but was a compromise invented by the Versailles statesmen to meet an immediate political dilemma[5]."

3. The dilemma which required resolution by compromise involved,

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[1] *Vide* Chap. I, *supra*.

[2] *Vide* Book III *et seq.* of the Counter-Memorial.

[3] *Vide* Book III *et seq.*

[4] In this respect *vide* Hall, H. D., *Mandates, Dependencies and Trusteeship* (1948), pp. 17 ff. and "The Trusteeship System", *B.Y.B.I.L.*, Vol. XXIV (1947), pp. 44-46; Wright, Q., *Mandates under the League of Nations* (1930), pp. 15-23; Schneider, W., *Das Völkerrechtliche Mandat* (1926), pp. 14 ff.; Mohr, E. G., *Die Frage der Souveränität in den Mandatsgebieten* (1928), p. 4; Temperley, H. W. V., *A History of the Peace Conference of Paris* (1920-1924), Vol. VI, p. 502; Kennedy, W. P. M. and Schlosberg, H. J., *The Law and Custom of the South African Constitution* (1935), pp. 514-515; Rolin, H., "Le Système des Mandats Coloniaux", *R.D.I.*, Vol. XLVII (1920), pp. 356-357.

[5] Wright, *op. cit.*, p. 3.

briefly, a clash of views and aspirations within the ranks of the Allied and Associated Powers relative to the future of territories and colonies conquered from enemy powers during the war.

4. Among such territories was German South West Africa, which had been surrendered to South African military forces in July 1915, as a result of which Respondent remained in military occupation for the remainder of the war and thereafter pending the peace settlements. Similar situations obtained in respect of other territories conquered and occupied by other Allied and Associated Powers. These included, *inter alia*, the former German colony in New Guinea, which was occupied by Australia; that in Samoa, by New Zealand; the German islands in the Pacific Ocean north of the Equator, by Japan; and various German territories elsewhere in Africa, by Great Britain, Belgium and France. Further north, various portions of the Ottoman Empire were in Allied occupation.

5. During the war, secret treaties and agreements were made between some of the Allies whereby their respective claims to various occupied territories were to be recognized in the event of an Allied victory. And the British Imperial War Cabinet decided in March 1917, that the three Dominions, Australia, New Zealand and South Africa should be allowed to annex the above-mentioned occupied territories, adjacent to their own, namely German New Guinea, German Samoa and German South West Africa respectively [1].

On the other hand, certain proposals for international control of conquered colonies, some of them even relating to all colonies [2], were also made during the war years.

In 1918, G. L. Beer, historian, and adviser to President Wilson of the United States of America, connected such proposals with others then current for the establishment of the League of Nations. He proposed a mandate system for Mesopotamia and certain of the German colonies, urging that the administration of these areas should be entrusted to "different States acting as mandatories of the League of Nations" [3]. Beer considered, however, that the mandate system could not be applied to South West Africa, and recommended that this region be incorporated in the Union of South Africa [4].

Like Beer, General Smuts, in the publication referred to by the Applicants [5], linked a proposed mandate system with a proposed League of Nations. He limited his proposal to "territories formerly belonging to Russia, Austria-Hungary and Turkey", and expressly excluded the

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[1] *Vide* Lloyd George, D., *The Truth about the Peace Treaties* (1938), Vol. I, pp. 114-123 and Vol. II, p. 766; Spiegel, M., *Das Völkerrechtliche Mandat und seine Anwendung auf Palästina* (1928), pp. 8-9; Temperley, *op. cit.*, Vol. I, p. 195; Logan, R. W., *The African Mandates in World Politics* (1948), pp. 1-2; Townsend, M. E., *The Rise and Fall of Germany's Colonial Empire* (1930), pp. 363-369, 377-378.

[2] *Vide* Hobson, J. A., *Towards International Government* (1915). *Vide* also the discussion by Potter, P. B., in "Origin of the System of Mandates under the League of Nations", *A.P.S.R.*, Vol. XVI, No. 4 (Nov. 1922), pp. 563-583.

[3] Beer, G. L., *African Questions at the Paris Peace Conference*, ed. by L. H. Gray (1923), p. 431.

[4] *Ibid.*, p. 443.

[5] Smuts, J. C., *The League of Nations: A Practical Suggestion* (1918), p. 15 and I, p. 34.

"German colonies in the Pacific and Africa", since in these cases "it would be impracticable to apply any ideas of political self-determination in the European sense" [1].

The United States of America was not a party to the secret treaties and agreements mentioned above; she entered the war after most of them had been concluded. At the termination of the war President Wilson strongly advocated a policy of "no annexations"; and he went to the Paris Peace Conference determined to secure application of the proposed mandate system, in an extreme form, to *all* ex-enemy colonies and possessions. His proposals, as contained in his drafts of the Covenant, included that the League would be vested with complete authority and control, that it would be entitled (not obliged) at its discretion to delegate to a State or "organized agency" powers to act "as its agent or mandatory", and also that by reason of an appeal from the people of the territory the League could substitute some other State or agency as mandatory [2]. In keeping with this conception, his Third Draft proposed that the expenses of Mandatory Government would, if necessary, be borne by all the Members of the League [3].

6. From the above, the makings of conflict at the Paris Peace Conference will be manifest. The future of the German Colonies was discussed as from 24 January 1919 in the "Council of Ten", which consisted of the heads of government and foreign ministers of the United States of America, the United Kingdom, France, Italy and Japan. Representatives of Australia, New Zealand and South Africa were allowed to be present and to express their views at the discussions concerning the future of the former German colonies in New Guinea, Samoa and South West Africa.

There was fairly general agreement that a mandate system was to be established. The controversy concerned the contents of such a system, and particularly the peoples and territories to which it was to be applied, especially inasmuch as there was general recognition of the wide differences between the various peoples and territories concerned, ranging from, on the one hand, developed societies to, on the other, peoples still living in the Stone Age [4]. The representatives of the three Dominions strongly pressed their cases for incorporation of the respective territories, and were supported by the British Prime Minister, Mr. Lloyd George. After representatives of Japan and France had also spoken in favour of annexation in their cases, President Wilson's reaction was so strong as to threaten "a break-up of the conference" [5].

The Conference reached a state of apparent deadlock on 27 January 1919. There followed negotiations behind closed doors for two days, during which Lloyd George secured the agreement of the repre-

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[1] Smuts, *op. cit.*, pp. 12 and 15.

[2] *Vide* particularly paras. I, II and III of his Second Draft, as amended by his Third Draft: Baker, R. S., *Woodrow Wilson and World Settlement* (1922-1923), Vol. III, pp. 108-110, 126-129.

[3] *Ibid.*, p. 127.

[4] *Vide For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, p. 786 According to an article in the *United Nations Review* of September 1954 (Vol. I, No. 3, p. 31), the people in some parts of New Guinea still live "in Stone Age conditions of primitive savagery". *Vide* also Vol. 2, No. 3 (Sep. 1955), p. 34.

[5] Lloyd George, *op. cit.*, Vol. I, p. 530

sentatives of the Dominions to a document which he handed in as a proposal to the Conference on 30 January, announcing that it—

> "did not represent the real views of the Colonies [Dominions]; but it had been accepted by them as an attempt at a compromise . . . because they fully realized that there could be no greater catastrophe than for the delegates to separate without having come to a definite decision"[1].

He also stated that ". . . it was only with the greatest difficulty that the representatives of the Dominions had been prevailed upon to accept the draft submitted, even provisionally"; and later ". . . they had accepted his proposals, but only as a compromise"[2]. The document contained provisions which, with unimportant alterations and one important addition[3], eventually became Article 22 of the Covenant[4]. Its essential feature, as Lloyd George explained, was the division of mandates into three classes in recognition of the wide range of differences between the various communities and territories. He described the third of these classes (the eventual C Mandates) as:

> "Mandates applicable to countries which formed almost a part of the organization of an adjoining power, *who would have to be* appointed the mandatory[5]." (Italics added.)

It was in this category that German New Guinea, German Samoa and German South West Africa were to be put.

President Wilson indicated that the document "made a long stride towards the composition of their differences", but at the same time suggested deferment of a decision. A somewhat heated discussion ensued in which the Prime Minister of Australia rendered clear that Australia really desired "direct control" and that for his country and New Zealand the document "represented the maximum of their concession"[6]. A speech, generally described by commentators as "conciliatory", was then made by the South African Prime Minister, General Botha, in which he stated, *inter alia*:

> "He appreciated the ideals of President Wilson. . . . They must remember that their various peoples did not understand everything from the same point. . . . Personally he felt very strongly about the question of German South West Africa. He thought that it differed entirely from any question they had to decide in this conference, but he would be prepared to say that he was a supporter of the document handed in that morning [by Lloyd George], *because he knew that, if the idea fructified, the League of Nations would consist mostly of the same people who were present there that day, who understood the position and who would not make it impossible for any mandatory to govern the country.* That was why he said he would accept it[7]." (Italics added.)

After further discussion, President Wilson agreed to accept the pro-

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[1] *For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, p. 785.
[2] *Ibid.*, p. 790.
[3] Para. 9 of Art. 22, concerning the Permanent Mandates Commission.
[4] For text *vide For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, pp. 795-796.
[5] *Ibid.*, p. 786.
[6] *For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, p. 800.
[7] *Ibid.*, pp. 801-802.

posal, which was then adopted, with very minor amendments[1]. In its eventual form, as Article 22 of the Covenant[2], it became part of the Treaty of Versailles, which was signed on 28 June 1919, and came into force on 10 January 1920.

7. The main elements of the compromise embodied in Article 22 of the Covenant are rendered clear by the above historical background. As was commented generally by M. Rappard, Secretary and subsequently member of the Permanent Mandates Commission: "The terms of the compromise were obvious: President Wilson succeeded in preventing annexation; the conquerors in retaining their conquests[3]."

More particularly, in return for the concession that all the German Colonial possessions were brought into the mandate system, President Wilson had to abandon certain of the extreme aspects of his proposals concerning League supremacy and control and the consequent payment of expenses of mandate administration by League Members. All Mandatories were to be States, not "organized agencies". The mandates were to be allocated by the Principal Allied and Associated Powers (not the League), and at any rate in the case of the C Mandates the allocation *"would have to be"* to the adjacent claimant States[4]. The relationship between the League and Mandatories was in each case regulated by a mandate instrument, the terms of which were assented to by the Mandatory and would normally require its consent for alteration[5]. All this was very far removed from the envisaged free League discretion to appoint and change Mandatories. Again in the case of C Mandates, the Mandatories were to have powers to administer the territories "as integral portions" of their own. And there would be no objection to eventual amalgamation that could naturally result from such administration, if agreed to by the inhabitants. At the Peace Conference President Wilson stressed that—

> "It was up to the Union of South Africa to make it so attractive that South West Africa would come into the Union of their own free will. . . . If successful administration by a mandatory should lead to union with the mandatory, he would be the last to object. . . ."[6];

and later he said that "if South Africa managed South West Africa as well as she had managed her own country, then she would be married to South West Africa"[7].

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[1] Miller, D. H., *The Drafting of the Covenant* (1928), Vol. II, pp. 213-228.

[2] A draft clause on mandates was introduced by Smuts at the Sixth Meeting of the League of Nations Commission on 8 February 1919. As to amendments to this draft made in the League Commission, *vide* Miller, *op. cit.*, Vol. II, pp. 283, 285, 306, 314-315, 323, 333-334, 362, 384-385 and 679-680. At the Sixth Meeting, an attempt was made to insert the word "if" between the words "as" and "integral" in the provision relating to C Mandates, which read, "South West Africa and certain of the islands in the South Pacific . . . can be best administered under the laws of the Mandatory State as integral portions thereof". After discussion, the word "if" was not inserted. *Vide* Miller, *op. cit.*, Vol. I, pp. 186 and 190 and Vol. II, pp. 273, 275 and 286.

[3] Rappard, W. E., "The Mandates and the International Trusteeship System", *Varia Politica* (1953), p. 182.

[4] *Vide* Lloyd George's statement on 30 January 1919, para. 6, *supra*.

[5] *Vide* Art. 7 of the Mandate for German South-West Africa.

[6] *For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, pp. 741-742.

[7] *Ibid.*, p. 788.

Finally, the "open door" principle of equal trade opportunities for Members of the League, although originally envisaged for all Mandates, was excluded in the case of C Mandates[1]. This exclusion was subsequently referred to by Lord Milner, Chairman of the Commission appointed to frame draft Mandates[2], as "a compromise actually accepted by the Powers"[3].

8. In view of the above features, commentators quite naturally referred to C Mandates as being in their practical effect not far removed from annexation.

Thus, during the First Session of the Permanent Mandates Commission, Mr. Ormsby-Gore, the United Kingdom member, stated: ". . . this case of South West Africa was, indeed, a typical example of the complete political incorporation of a mandated territory in the territory of the mandatory Power"[4].

Margalith wrote:

> "It has been found necessary, also, to devise three types of administration, and to give in the case of C Mandates, powers that amount nearly to annexation. Otherwise the British Dominions could not have been won over to the acceptance of the mandates principle at all[5]."

When introducing the Peace Treaty in the British House of Commons on 3 July 1919, Lloyd George stated:

> ". . . South West Africa, running as it does side by side with Cape Colony, was felt to be so much a part, geographically, of that area that it would be quite *impossible to treat it in the same way as you would a colony* 2,000 or 3,000 miles away from a centre of administration. *There is no doubt at all that South West Africa will become an integral part* of the Federation of South Africa. It will be colonized by people from South Africa. You could not have done anything else. You could not have set customs barriers and have a different system of administration[6]." (Italics added.)

And Temperley wrote:

> "Clearly the development of this territory must in the main come from the adjoining Union of South Africa, *and its progress would be seriously handicapped if it were administered as a distinct entity with separate native, fiscal, and railroad policies. As, however, it was feared that an exception made in one case—no matter how valid it might be —might open the door to others, a general application of the system was insisted upon.* This had some unfortunate consequences since, mainly in order to meet the special circumstances in South Africa, a broad formula had to be adopted which was not completely satisfactory as far as other areas were concerned[7]." (Italics added.)

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[1] *Vide* final words of Art. 22 (6).

[2] *Vide* para. 11, *infra*.

[3] *Conférence de la Paix 1919-1920, Recueil des Actes de la Conférence*, Partie VI, *Traités avec les Puissances Ennemies mis en vigueur*, A, *Préparation de la mise en vigueur*, 1er Fasc., p. 353.

[4] *P.M.C., Min.*, I, p. 17.

[5] Margalith, A. M., *The International Mandates* (1930), pp. 33-34.

[6] Temperley, *op. cit.*, Vol. III, p. 95.

[7] *Ibid.*, Vol. II, pp. 233-234.

9. It will be observed from the aforegoing that considerable over-simplification, tending towards a wrong impression, is involved in the Applicants' statement in their Memorials that:

> "The Mandate System, as ultimately given expression in Article 22 of the Covenant of the League of Nations and in the several Mandate Agreements, represented a victory for the opponents of the principle of annexation[1]."

A compromise can hardly be regarded as a victory for either side. By itself, the Applicants' over-simplification may be unimportant. But certain other statements by them demonstrate that negation of the significance of the compromise could lead to erroneous conclusions.

So, for example, it is unsafe to assume that the mandates system as finally agreed upon, and particularly as regards C Mandates, could be interpreted in terms of quotations from General Smuts' publication. The quotations set out by Applicants at **I**, p. 33, relate to a proposed system which the author considered to be totally inappropriate for those territories which eventually became C Mandates[2] and which could only be accommodated in a specially adapted system, agreed to by way of compromise.

Similarly there is no justification for Applicants' expression "so striking a reversal of concept"[3], as applied to a 1920 speech by General Smuts in which he, in common with the commentators mentioned in paragraph 8 above, spoke of the relationship between the Union and South West Africa as being, in effect, close to annexation.

These and other attempts in the Memorials to disparage policies directed towards closer assimilation between South Africa and the Territory as being somehow in conflict with duties undertaken by Respondent, will be dealt with in another part of this Counter-Memorial. Here Respondent merely wishes to stress that they do not accord with the expressed intentions of the statesmen who created the mandate system. Respondent accepted the obligations which the Mandate for South West Africa involved for it; and it has always regarded compliance with those obligations as being a matter of importance—according to their letter and spirit during the lifetime of the League, and according to their spirit thereafter. But it resents and resists attempts at the unilateral imposition upon it of suggested duties which were excluded from those undertaken, and which would amount to a repudiation of the compromise whereby Respondent was induced to agree to the mandate system being rendered applicable at all to the case of South West Africa.

The Framing of the Mandate for South West Africa

10. In terms of Articles 118, 119 and 257 of the Treaty of Versailles, Germany renounced all rights in or over her colonial possessions in favour of the Principal Allied and Associated Powers.

On 7 May 1919, thus even before the Treaty of Versailles was signed[4] the Council of Three, represented by M. Clemenceau, President Wilson

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[1] *Vide* **I**, p. 33.
[2] *Vide* para. 5, *supra*.
[3] *Vide* **I**, p. 38.
[4] The Treaty was signed on 28 June 1919 and came into force on 10 Jan. 1920.

and Mr. Lloyd George, announced that they had decided on 6 May as to the disposition of the former German Colonies, *inter alia*, as follows: "German South West Africa: The Mandate shall be held by the Union of South Africa[1]."

11. Before the end of the Paris Peace Conference of 1919, a Mandates Commission was established and was instructed by the Supreme Council, *inter alia*: "To give attention to the editing of draft mandates[2]." (Translation.)

The Commission, under the chairmanship of Lord Milner, met for the first time on 28 June 1919, when a draft C Mandate was submitted for discussion by Lord Milner[3]. At its next meeting on 8 July 1919 the Commission had for discussion, in addition to the draft C Mandate, also two draft B Mandates submitted respectively by France[4] and the United States of America[5]. On the next day, 9 July 1919, the Commission, after discussion and consideration of the two B drafts, approved terms as a pattern for B Mandates. On 10 July 1919, the Commission resumed consideration of the C draft, which had meanwhile been altered in certain respects, and approved terms as a pattern for C Mandates.

On the basis of the Commission's decisions and recommendations, draft mandate instruments were eventually prepared by the legal experts of the Drafting Committee of the Peace Conference. These drafts were first cast in the form of conventions[6] and the intention had originally been that such conventions should form annexes to the Peace Treaty[7]. By the time they were submitted to the Council, as to be recounted below, they had, however, been recast in the form of Council resolutions.

12. It was in the deliberations of the above-mentioned Mandates Commission that a proposal for a compromissory clause in the mandate first came to be discussed. In view of certain questions to be considered in argument regarding the scope and purpose of the compromissory clause in the Mandate for South West Africa, it may be convenient to indicate briefly the relevant history of the clause in the Mandates Commission.

Neither Lord Milner's original C draft nor the French B draft contained any compromissory clause. The United States B draft, however, provided in considerable detail for commercial and other rights for State Members of the League of Nations and their nationals, such as:

(a) the open door policy in trade and commerce for the benefit of subjects of member States (Art. 5);
(b) freedom of religion and rights of missionaries who were nationals of member States (Art. 6);
(c) equal opportunity in commerce and navigation for member States, and prohibition of discrimination between the subjects of member States (Art. 7);
(d) concessions in respect of railways, post offices, telegraphs, radio

[1] *For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. V, p. 508.
[2] *Conférence de la Paix 1919-1920*, Partie VI, A, 1er Fasc., p. 327.
[3] *Ibid.*, pp. 329-330.
[4] *Ibid.*, pp. 343-345.
[5] *Ibid.*, pp. 339-342.
[6] *Ibid.*, pp. 399-416 (Annexes II to VIII).
[7] *Vide* Report by M. Hymans to the Council of the League of Nations, *L. of N., O.J.*, 1920, No. 6, pp. 335, 338.

stations and other public works or services, without distinction between subjects of member States (Art. 7*a*);

(e) a clause in the nature of a most-favoured-nation provision to operate in favour of member States and their subjects (Art. 7*b*).

And it proceeded to provide for adjudication in the following terms:

> "If any dispute should arise between the Members of the League of Nations regarding the interpretation or application of the present convention and the dispute cannot be settled by negotiation, it will be referred to the Permanent Court of International Justice which is to be established by the League of Nations.
>
> The subjects or citizens of States Members of the League of Nations may likewise bring claims concerning infractions of the rights conferred on them by Articles 5, 6, 7, 7*a* and 7*b* of this Mandate before the said Court for decision. The judgment rendered by this Court will be without appeal in both the preceding cases and will have the same effect as an arbitral decision rendered according to Article 13 of the Covenant." (Art. 15.) (Translation.)

In its consideration of the B drafts on 9 July 1919, the Commission took as a basis for discussion the French draft, clause by clause. But inasmuch as the provisions in the French draft for rights to be conferred upon member States and their nationals were cast in broad terms only, the question arose whether more detailed stipulation such as contained in the United States draft was not to be preferred. In this regard Lord Robert Cecil, a representative of the British Empire, is reported to have stated as follows:

> "[He] thought that that question was linked with the right of recourse to the International Court. If the right of recourse were to be granted, it would be preferable merely to lay down the principle of equality and leave it to the Court to apply the principle to particular cases. . . . *If, on the other hand, no right of recourse to the Court was to be given, it would be necessary to elaborate stipulations in detail*[1]." (Translation.) (Italics added.)

Thereupon consideration was given to the adjudication clause in the United States draft. Both the representative of France and the Chairman of the Commission, Lord Milner, were opposed to the idea of rendering the proposed recourse to an international court available to individuals, Lord Milner stating, *inter alia*:

> "He [Lord Milner] thought that there would certainly be advantage in transferring *the settlement of questions such as those relating to rights of property* from the political to the legal sphere, but he requested that the Government which was to decide whether a claim should be submitted to the Court should undertake responsibility therefor[2]." (Translation.) (Italics added.)

Lord Robert Cecil then suggested that the second paragraph of the compromissory clause should read:

> "The Members of the League of Nations will also be entitled on behalf of their subjects or citizens to refer claims for breaches of their rights . . .[3]"

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[1] *Conférence de la Paix 1919-1920*, Partie VI, A, 1er Fasc., p. 348.
[2] *Ibid.*, p. 349.
[3] *Ibid.*, p. 350.

This suggested alteration met with the approval of the representative of the United States, and was adopted. The Commission then reverted to the French draft, and tentatively approved, with some amendments, its provisions for rights of member States and their nationals. Thus the reference to "Articles 5, 6, 7, 7*a* and 7*b*" in the adjudication clause was omitted.

When the Commission thereafter considered the draft for C Mandates, that draft had been amended, *inter alia*, by providing for the first time for freedom of entry and residence on the part of missionaries who were nationals of Members of the League, and, also for the first time, for a compromissory clause in terms of the first paragraph of the United States draft clause for B Mandates[1].

In the process of further drafting the second paragraph as approved by the Commission for B Mandates was also omitted from all B Mandate instruments save that for Tanganyika. The reason for such elimination seems evident: once it was decided that only States should have recourse to the International Court, the second paragraph in the adjudication clause became redundant, its provisions being in effect embraced in the first paragraph. The reason for the retention of the second paragraph in the mandate instrument for Tanganyika, cannot be established with certainty[2].

As indicated above, all discussion in the Commission regarding the compromissory clause was concerned with its operation relative to prospective provisions for rights and privileges to be accorded to member States and their nationals: the record reveals no discussion indicating contemplation of possible operation of the compromissory clause in any other respect or for any other purpose.

The wording of the clause as it appeared in all the draft mandate instruments eventually submitted to the Council of the League for its approval (except in the case of the Mandate for Tanganyika) was as follows:

> "... if any dispute whatever should arise between the Members of the League of Nations relating to the interpretation or the application of these provisions which cannot be settled by negotiation, this shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations[3]".

13. Transmission of the draft mandates to the Council of the League was delayed because of a difference of opinion among the Members of the Commission regarding the question whether the open-door principle was to be applicable in the case of the C Mandates[4].

On 5 August 1920 the Council of the League of Nations considered and adopted a very full report by M. Hymans concerning the mandate

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[1] Quoted *supra*. *Vide Conférence de la Paix 1919-1920*, Partie VI, A, 1er Fasc., p. 342.

[2] *Vide* in this regard the explanation suggested by Judges Sir Percy Spender and Sir Gerald Fitzmaurice in *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 559-560.

[3] E.g., Art. 7 of the Mandate for German South-West Africa.

[4] *Vide* Wright, *op. cit.*, pp. 47-48, 50; Temperley, *op. cit.*, Vol. II, pp. 237, 239; Hall, *op. cit.*, p. 136; House, E. M. and Seymour, C. (eds.), *What Really Happened at Paris* (1921), pp. 227, 440.

system[1]. After giving a summary of the main aspects of the system, the report dealt with measures to be taken to apply it, measures already taken by the Principal Allied and Associated Powers and the Mandates Commission, and measures which the Council should take. It pointed out that the right to allocate mandates belonged to the Principal Powers. Since, however, the Mandatory would govern in the name of the League of Nations, the allocation should be confirmed by the League.

The next issue was the determination of the terms of the mandates. M. Hymans pointed out that this question was only partially solved by Article 22 (8) of the Covenant, since most of the mandates would contain many provisions other than those relating to the degree of authority. As regards Article 22 (8) he concluded:

> "It seems to me that the real explanation of paragraph 8 of Article 22 is as follows. When this Article was drafted in January 1919, its authors supposed that the conventions dealing with the Mandates could certainly be included in the Treaty itself, or form annexures to it. It was also thought at that time that only the Allied and Associated Powers would be considered as Original Members of the League of Nations. In other words, that on the day of its foundation they would be its only Members. It was, therefore, intended in using the words 'the Members of the League' to refer to all the signatories except Germany of the Treaty of Versailles[2]."

The report proceeded:

> "How is paragraph 8 to be applied to the present moment? It is in practice almost impossible to apply literally the procedure which we have just defined. How could the assent of all those signatories of the Treaty of Versailles who are Members of the League be obtained?
>
> Has not the Council now the right to take cognizance of the absence of any Convention such as is referred to by the Covenant and itself to regulate the degree of authority or administration of the Mandatory Power?
>
> This right appears theoretically incontestable, but one which would not be opportune to exercise. We must bear in mind, indeed, that in the 'A' Mandates the degree of authority must vary according to the population of the mandated territories and according to who is the Mandatory Power. In these circumstances and as far as these Mandates are concerned, the Council should in any case wait until the Powers have arrived at a decision with regard to the appointment of the Mandatory Power and the delimitation of the territories.
>
> Moreover, the examination of the degree of authority to be conferred presupposes somewhat specialized knowledge; with regard to 'B' and 'C' Mandates, the Council would probably consider that it could not make a pronouncement until it should have taken the opinion of experts, appointed by it. Would it not be more reasonable to take advantage of the work which has already been accomplished by the experts of the Principal Powers. I propose, *therefore*, to ask these Powers at the same time as they acquaint us with their

[1] *L. of N., O.J.*, 1920 (No. 6), p. 334.
[2] *Ibid.*, p. 338.

decision as to the Mandatory Power, to inform us of their proposals with regard to the terms of the Mandate to be exercised[1]." (Italics added.)

The resolution proposed by M. Hymans was also unanimously adopted by the Council (on 5 August 1920). It read as follows (in so far as is relevant):

"(i) The Council decides to request the principal Powers to be so good as to *(a)* name the Powers to whom they have decided to allocate the Mandates provided for in Article 22; *(b)* to inform it as to the frontiers of the territories to come under these Mandates; *(c)* to communicate to it the terms and the conditions of the Mandates that they propose should be adopted by the Council from following the prescriptions of Article 22.

(ii) The Council will take cognizance of the Mandatory Powers appointed, and will examine the draft Mandates communicated to it, in order to ascertain that they conform to the prescriptions of Article 22 of the Covenant.

(iii) The Council will notify to each Power appointed that it is invested with the Mandate, and will, at the same time, communicate to it the terms and conditions[2]."

14. According to the Minutes of the Council of 14 December 1920, Mr. Balfour, the United Kingdom representative, on that date, handed in draft mandates proposed by the British Government for a certain number of territories, including South West Africa[3]. The Council referred these drafts to the Secretariat of the League: ". . . to consider the Mandates and to consult other legal experts on any points which they considered necessary"[4].

15. On 17 December 1920 the Council considered a memorandum prepared by the Secretariat and containing suggestions for amendment in certain respects of the draft mandates handed in by Mr. Balfour[5].

The Council accepted the suggested amendments, confirmed, *inter alia*, the Mandate for South West Africa, and defined its terms.

Those portions of the text of the Balfour draft mandate for South West Africa which were amended are here quoted in juxtaposition to the text thereof as amended and adopted by the Council resolution of 17 December 1920.

The Balfour draft mandate for German South West Africa submitted for approval	*Text as amended and finally adopted*
	Insertion of a fourth paragraph to the preamble.
	"*Whereas*, by the aforementioned Article 22, paragraph 8, it

[1] *L. of N., O.J.*, 1920 (No. 6), pp. 338-339.

[2] *Ibid.*, pp. 340-341. *Vide* also Wright, *op. cit.*, pp. 109-112; Hall, *op. cit.*, p. 146.

[3] *L. of N., O.J.*, 1921 (No. 1), p. 11. A photostat copy of the mandate instrument handed in by Mr. Balfour was transmitted by the Agent of the Government of the Republic of South Africa to the Registrar of the Court under cover of a letter dated 24 Oct. 1962.

[4] *L. of N., O.J.*, 1921 (No. 1), p. 12.

[5] *Ibid.*, Hall, *op. cit.*, p. 153.

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:

"The Council of the League of Nations . . .

Hereby approves of the terms of the Mandate as follows:—

[The Council of the League of Nations . . .]

Confirming the said Mandate, defines its terms as follows:

ARTICLE 7

The consent of the Council of the League of Nations is required for any modification of the terms of the present mandate, provided that in the case of any modification proposed by the Mandatory, such consent may be given by a majority.

ARTICLE 7

The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate.

If any dispute whatever should arise between the Members of the League of Nations relating to the interpretation or the application of these provisions which cannot be settled by negotiation, this dispute shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations."

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."

16. The reasons for the insertion of the fourth paragraph of the preamble and for the amendment of the text of Article 7 are explained in a report to the Council of the League by Viscount Ishii on 20 February 1922 [1].

According to the Ishii report, the fourth paragraph of the preamble was inserted—

> ". . . to define clearly the relations which, under the terms of the Covenant, should exist between the League of Nations and the Council on the one hand, and the mandatory Power on the other . . . [2]"

The proviso to the first paragraph of Article 7 was deleted—

> ". . . because it [the Council] did not think it advisable to consider

[1] *L. of N., O.J.*, 1922 (No. 8, Part II), pp. 849 ff.
[2] *Ibid.*, p. 850.

> the possibility of altering the terms of a mandate by a decision taken on a majority vote[1]".

And the amendment of the compromissory clause in Article 7—

> ". . . was inspired by the consideration that Members of the League other than the Mandatory could not be forced against their will to submit their differences to the Permanent Court of International Justice[1]".

The League of Nations Period

17. The functions of the League of Nations in respect of mandates were exercised by the Council, the Assembly and the Permanent Mandates Commission.

18. The *Council* was the body to which every Mandatory was ultimately accountable. It was to the Council that the Mandatories had to render annual reports[2], to its "satisfaction"[3].

The Council alone had the power to take decisions and address recommendations to the Mandatories[4].

Article 4 of the Covenant entitled any Member of the League not represented on the Council "to send a Representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member". This provision enabled a Mandatory to be represented when the Council considered matters relating to its own mandate and to mandates in general.

In terms of Article 5 of the Covenant, decisions of the Council required "the agreement of *all* the Members of the League represented at the meeting". (Italics added.) Whether a Mandatory could exercise its vote in the Council in such a way as to frustrate the unanimous view of all the other Members on a matter affecting its own mandate, was never raised. In fact no occasion on which there was such a division of votes ever arose; all Council decisions concerning mandates were taken unanimously[5]. In this connection Jennings states that the "invariably careful and even elaborate avoidance of an adverse vote from the Mandatory" in the Council is "difficult to understand unless one may assume at any rate the possibility of a veto in the Mandatory State"[6].

19. The *Assembly* derived its powers in respect of mandates from Article 3 of the Covenant in terms of which it could "deal at its meetings with any matter within the sphere of action of the League . . .".

At the First Assembly a "working basis" was, however, decided on according to which—

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[1] *L. of N., O.J.*, 1922 (Part II) p. 854.

[2] Art. 22 (7).

[3] E.g., Art. 6 of the Mandate for South West Africa.

[4] *Vide The Mandates System—Origin—Principles—Application* (1945), p. 35: Hall, *op. cit.*, p. 174; *P.M.C., Min.*, I, p. 5.

[5] *Vide Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, pp. 100-101. (Judge Lauterpacht's separate opinion)

[6] Jennings, R. Y., "The International Court's Advisory Opinion on the Voting Procedure on Questions concerning South-West Africa", in *Grotius Soc.*, Vol. 42 (1956), p. 92.

"Neither body [i.e., the Assembly or the Council has jurisdiction to render a decision in a matter which by the Treaties or the Covenant has been expressly committed to the other organ of the League. Either body may discuss and examine any matter which is within the competence of the League[1]."

Thus, in respect of mandates, the Assembly's role was confined to:

"... the exercise of a certain moral and very general influence in this domain. Its function may be said to be to maintain touch between public opinion and the Council[2]".

20. The *Permanent Mandates Commission* was instituted by the Council on 29 November 1920, pursuant to the provisions of Article 22, paragraph 9, of the Covenant, in terms of which its functions were "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".

Article 22 of the Covenant did not make provision for petitions from inhabitants of mandated territories, nor did the mandate instruments do so. Petitions were, however, sent to the Permanent Mandates Commission, and as a result the Council, at its 23rd session in 1923, framed rules relating to the procedure to be adopted with regard thereto. In terms of these rules, petitions from "communities or sections of the populations of mandated areas" were to be submitted only through the Mandatory concerned, which would be entitled to attach "such comments as it might think desirable". Petitions "regarding the inhabitants of mandated territories received ... from any source other than that of the inhabitants themselves", were to be addressed to the Chairman of the Commission who had to decide whether they should be regarded as "claiming attention". If so, the Mandatory concerned was then to be asked for its comments thereon[3].

The question whether the Permanent Mandates Commission was entitled to grant oral hearings to petitioners was raised on several occasions in the organs of the League, especially during the years 1926-1927, when a proposal for such hearings "in certain cases" met with considerable opposition. When the views of the mandatories were sought in regard thereto, they unanimously expressed their opposition, with the result that the Council on 27 March 1927 decided that—"there is no occasion to modify the procedure which has hitherto been followed by the Commission in regard to this question"[4].

In constituting the Permanent Mandates Commission, the Council decided, *inter alia*, that it was to consist of nine members[5], the majority to be nationals of non-Mandatory States. It further provided that—

"All the Members of the Commission shall be appointed by the Council and selected *for their personal merits and competence. They shall not hold any office which puts them in a position of direct*

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[1] *L. of N., Assembly, Rec.*, I, p. 320.
[2] *The Mandates System—Origin—Principles—Application*, p. 35.
[3] *L. of N., O.J.*, 1923 (No. 3), p. 300.
[4] *Ibid.*, 1927 (No. 4), p. 348.
[5] Later increased to ten and then to eleven.

dependence on their Governments while members of the Commission[1]." (Italics added.)

The Permanent Mandates Commission was described as—

> "essentially an advisory body—a body whose duty it is to examine and report—designed to assist the Council in carrying out its task. Its work is preliminary in character. Constitutionally, it has no power to take decisions binding on the mandatory Powers or to address direct recommendations to them. Its conclusions are not final until they have been approved by the Council[2]."

The Commission itself realized and stated that, having adopted the rule of "absolute independence and impartiality", its Members should exercise their authority "less as judges from whom critical pronouncements are expected, than as collaborators who are resolved to devote their experience and their energies to a joint endeavour"[3].

Although its powers were purely advisory, the Commission developed into an effective institution. In this connection M. Rappard—at first Secretary and later for a long time a Member of the Commission—stated:

> "As the Commission, thanks to the personal competence and generally recognized independence of its members, came to enjoy a real respect and, indeed, quite some prestige, an international or rather a supernational moral authority sprang up. . . . In its capacity as a purely advisory body . . . the Permanent Mandates Commission had no powers of coercion whatever. As a universally esteemed group of impartial and independent experts, however, its powers of persuasion were indisputably very effective. No Mandatory government . . . could afford to disregard its advice for fear of no other sanctions but those of public and parliamentary opinion.
>
> The net result was a willing co-operation between the League and the Mandatory governments, and the enhancement of the standards of administration in the mandated territories and even, by a natural repercussion, in colonial administration everywhere[4]."

21. There was at all times cordial co-operation between Respondent and the Permanent Mandates Commission. On occasion differences of opinion arose—as was the case also with regard to other mandated territories—but this was inevitable in view mainly of uncertainties and obscurities in a new system, operating under the somewhat vague terms of the compromise embodied in Article 22 of the Covenant. And with both Respondent and the Commission approaching their task in the spirit of that compromise, the problems which arose were always satisfactorily solved.

Applicants' Memorials, on the other hand, contain statements and allegations suggesting strife between Respondent and the Commission, and even a "hostile" attitude towards the Commission on Respondent's

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[1] *L. of N., O.J.*, 1920 (No. 8), p. 87.

[2] *The Mandates System—Origin—Principles—Application*, p. 35. *Vide* also van Asbeck, F. M., "International Law and Colonial Administration", in *Grotius Soc.*, Vol. 39 (1953), p. 14.

[3] *L. of N., O.J.*, 1921 (Nos. 10-12), pp. 1124-1125.

[4] Rappard, *Varia Politica*, p. 184.

part. These allegations and suggestions are unfounded, as will appear from closer scrutiny of the facts to which they relate.

22. At **I**, page 37, Applicants state as follows:

> "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." (Italics added.)

Respondent finds it difficult to appreciate why such language should be used, when the true facts are that Respondent regularly submitted annual reports until 1940, after the outbreak of the Second World War, which brought about a cessation of all reporting by Mandatories and of meetings of the Commission.

23. The Applicants state at **I**, page 37, that "the Union was not at first overtly hostile towards the Permanent Mandates Commission".

Respondent denies the implication that it was at some time hostile, overtly or otherwise, towards the Commission. On the contrary, there is abundant evidence to show that despite occasional divergencies of view regarding specific matters, Respondent's attitude throughout was one of friendly co-operation.

So, for instance, Respondent was the first of all the Mandatories to be represented at the discussions of the Permanent Mandates Commission by the officer "personally responsible for the administration" of the mandated territory, namely the Administrator of South West Africa —which action the Council particularly appreciated and commended to other Mandatories[1].

At Respondent's invitation, the Chairman of the Commission visited South West Africa in 1935 and made an extensive tour of the Territory. As far as is known, this was the only occasion on which a Member of the Commission was invited by a Mandatory to visit a mandated territory. Respondent had extended this invitation also to the Secretary-General of the League and the Director of the Mandates Section of the League, but neither could avail himself thereof[2].

On many occasions appreciation was expressed, on both sides, of the relationship and co-operation between Respondent and the Commission. As examples may be mentioned the following:

(a) In a letter by General Smuts, dated 16 May 1923, to the Chairman of the Commission, there occurred, *inter alia*:

> "I also wish to express my appreciation of the valuable work which you are doing as Chairman of the Permanent Mandates Commission; and I wish especially to thank you and the other members of the Commission for the way in which you have assisted the Council of the League in order to meet my wishes about the naturalization of the white German inhabitants of South West Africa. You have shown great fairness and wisdom in realizing the special and exceptional character of the problem in that territory, and I thank you for finally agreeing to the solution which I have put forward[3]."

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[1] *L. of N., O.J.*, 1924 (No. 10), p. 1287.
[2] *P.M.C., Min.*, XXVII, p. 153.
[3] *Ibid.*, III, p. 215.

(b) On 6 June 1936 the Chairman of the Commission thanked the South African representative—

"for his co-operation and expressed the Commission's appreciation of the cordiality, sincerity and loyalty shown by the accredited representative of the Mandatory power. It was a matter for satisfaction that there was such close co-operation between the Commission and the Union[1]".

(c) In his address of 9 April 1946, to the Assembly of the League in its final session, the South African representative stated:

"it is generally recognised that the League discharged its supervisory functions in respect of mandates with high seriousness, skill and success. For twenty years, as one of the mandatory Powers, South Africa worked in close co-operation with the Permanent Mandates Commission, and we are proud of the fact that our relations with that body have always been both happy and cordial[2]."

Again the reason for the language in the Memorials, as above cited, is difficult to appreciate.

24. The Applicants state at **I**, page 37, that, "Officials of the Union Government from the outset: viewed the mandate as tantamount to annexation".

They then quote, at the same page, two extracts from a newspaper report of a speech made by General Smuts at Windhoek in September 1920, the first being that he "emphasized that the League of Nations had nothing to do with the giving of the Mandates", and the second: "In effect, the relations between the South West Protectorate and the Union amount to annexation in all but name."

This the Applicants then describe as "so striking a reversal of concept towards the Mandate System".

In regard to the first of the above extracts, General Smuts was speaking of the *allocation* of mandated territories by the Principal Allied and Associated Powers[3]. His address was delivered some months prior to the execution of the mandate instrument[4]. In regard to the second extract, Respondent has already pointed out[5] that General Smuts' description accorded with that of other commentators, and that when regard is had to the nature of the compromise arrived at in respect of C Mandates, no "reversal of concept", "striking" or otherwise, was involved. That General Smuts, in the passage in question, was concerned only with the *practical effect* of the C Mandate, and was in no way seeking to evade the significance of the safeguards envisaged in the interests of the native population, or of League supervision in respect thereof, appears from the context of the whole address as reported, as well as from a letter written by him on the subject to M. Rappard on 4 July 1922. In the report of the speech there occurs, *inter alia*, the following:

". . . the mandate was a new idea in International Law, and therefore it was only right that a full explanation should be given at

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[1] *P.M.C., Min.*, XXIX, p. 137.
[2] *L. of N., O.J., Spec. Sup.* No. 194, p. 32.
[3] *Vide* para. 10, *supra*.
[4] 17 Dec. 1920—*vide* para. 15, *supra*.
[5] Para. 9, *supra* read with para. 8, *supra*.

this stage. He emphasized that the League of Nations had nothing to do with the giving of mandates, *which were already settled as a fact by the Peace Treaty*, quite apart from the League of Nations.

Under the Peace Treaty Germany had renounced her colonies not to the League of Nations, but to the Great Powers. Article 119 of the Treaty made that clear. *The Great Powers passed a resolution in Paris in May 1919, conferring various mandates and in the case of South West Africa the mandate was given to the Union.* This mandate was accepted by the Union Parliament. The League of Nations was only concerned in one way, namely to define the scope of the mandate in any particular area . . . The Prime Minister then quoted the relevant portion of the Peace Treaty providing for the government under the laws of the Mandatory. *Subject to safeguards*, the Union Government had complete authority over South West Africa, not as a separate territory, but as an integral portion of the Union, as though it were Union territory, *with safeguards for the natives against slavery, traffic in arms, liquor and military training—the control of these safeguards lying with the League of Nations.* The Union Government could extend to South West Africa its legal, judicial, administrative and financial systems, its Civil Service, its police, and its Railway Administration, and it could declare South West Africa a Province of the Union and could give Parliamentary representation, the only limit being in regard to natives.

In effect, the relations between the South West Protectorate and the Union amount to annexation in all but name. Without annexation the Union could under the Peace Treaty do whatever it could have done *in annexed territory, save the reservation of the natives* [1]." (Italics added.)

In his letter to M. Rappard, General Smuts pointed out that he had addressed the German section of the population and had explained to them "the futility of looking to the Fatherland and the necessity of throwing their lot in with the people of the Union". He added:

"I have explained to them that the Union has full power of legislation and administration over South West Africa as an integral portion of the Union, and that the effect is very much the same as if they were incorporated into the Union subject of course, to the full safeguards in the interests of the native population. In all this, I have confined myself to the strict letter of Article 22. . . .

Do not for a moment think that in my ideas or proposals I depart from the system of mandates, which I consider one of the most beneficent advances in international law. *We must only recognize the fact that C mandates are in effect not far removed from annexation.* The case is, of course, quite different with the other two far more important types of mandates [2]." (Italics added.)

In the light of these facts, apparent in full from the Minutes of the Permanent Mandates Commission as referred to by Applicants themselves at **I**, page 37, there can again be no justification for the Applicants' language in question.

25. Applicants state at **I**, page 38, that the Permanent Mandates

[1] *P.M.C., Min.*, II, p. 92.
[2] *Ibid.*, p. 91.

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". Applicants then proceed to allege in this regard that—

> ". . . 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'". (Italics added.)

As *a fact* Respondent in the preamble did not assert "full" sovereignty: the word "full" was not used and the word "sovereignty" was qualified by the words "*subject to the terms of the said Mandate*". The relevant part of the preamble read:

> "*And Whereas* under a mandate issued by the Council of the League of Nations in pursuance of Article 22 of the Treaty of Versailles, the Government of the Union of South Africa, *subject to the terms of the said mandate, possesses sovereignty* over the Territory of South West Africa (hereinafter referred to as the Territory) lately under the sovereignty of Germany[1]." (Italics added.)

A lengthy controversy did arise, with reference to this preamble, as to the meaning to be assigned to the word "sovereignty". There followed discussions and correspondence, which as a result of misunderstandings were protracted. Part only of these is quoted by the Applicants. A full account, as recorded in the official records of the League—but which would needlessly lengthen this statement—shows that the difficulty related mainly to the meaning to be assigned to the word "sovereignty" in the context of mandates. This was a question dealt with at great length by many authorities, who arrived at a variety of conclusions. Wright mentions at least ten theories[2].

As far as the League was concerned, M. Hymans had in 1920, in a report adopted by the Council on 5 August 1920 stated as follows:

> "The degree of authority, control or administration is, so far as 'B' or 'C' Mandates are concerned, a question of only secondary importance.
>
> In the former case, as in the latter, the Mandatory Power will enjoy, *in my judgment, a full exercise of sovereignty*, in so far as such exercise is consistent with the carrying out of the obligations imposed by paragraphs 5 and 6[3]." (Italics added.)

There was, however, no attempt in the League to define where sovereignty, in the traditional sense of absolute power, was lodged in regard to Mandates. In this regard, the above report by M. Hymans had stated:

> "I shall not enter into a controversy—though this would certainly be very interesting—as to where the sovereignty actually resides. We are face to face with a new institution. Legal erudition will decide as to what extent it can apply to this institution the older juridical notions[4]."

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[1] *L. of N., O.J.*, 1926 (No. 11), p. 1533.
[2] *Op. cit.*, pp. 319-339.
[3] *L. of N., Council, Min.*, VIII, p. 183.
[4] *Ibid.*, p. 185.

Similar sentiments on this aspect of the matter were expressed by M. Beelaerts van Blokland in a report adopted by the Council on 8 September 1927[1], and also in a further report by M. Procopé adopted on 6 September 1929[2]. The different senses in which the word "sovereignty" could be used, contributed to the misunderstandings involved in the lengthy discussions and exchange of communications between the Commission and Respondent.

What is, however, of importance, is that all such misunderstanding was resolved through the acceptance by Respondent, in a letter of 16 April 1930, of the above reports of M. Beelaerts van Blokland and M. Procopé, which were to the effect, *inter alia*, that "sovereignty in the traditional sense of the word does not reside in the Mandatory Power"[3].

In the light of this outcome of the exchange of communications between the Commission and Respondent concerning the question of sovereignty, Respondent finds it difficult to understand why Applicants' Memorials, at **I**, page 39, leave this matter on the note of "no clear reply to the question", "regrettable misunderstanding" and "its [Respondent's] assertion of the possession of sovereignty over the mandated territory".

26. With regard to the reference at **I**, page 39, to an "intention to incorporate" the Territory, Respondent's view has consistently been that closer association between South West Africa and South Africa was in accordance with the compromise arrangement regarding C Mandates as contained in Article 22 and given effect to in the mandate instrument for South West Africa[4].

In September 1920, General Smuts saw the constitutional development of South West Africa as follows:

> "The policy of the Government would be to carry out the mandate. South West Africa would always be a separate unit as a large country, but it was impossible to run it as a province at the present time, though later, no doubt, it would become one, with a Provincial Council and members in the House of Assembly, but first other stages would have to be passed through. The first would probably be an Advisory Council to be appointed to advise the Administrator. Not long after that, the Council would become an elected council, and in due course there would be a full Parliamentary system[5]."

Although Respondent during the existence of the League never made any formal proposals, either for the incorporation of South West Africa as a fifth province or otherwise, incorporation was from time to time strongly urged by sections of the inhabitants of the Territory. This pressure from within the Territory arose mainly as a counter to events in the 1930s—the claims of Germany under Hitler to the restoration of the former German colonies and the insistence on the part of the German section of the population in South West Africa that this would sooner or later be achieved. M. Rappard in 1934 called this agitation for incorporation "a very natural reaction"[6].

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[1] *L. of N., O.J.*, 1927 (No. 10), p. 1120.
[2] *Ibid.*, 1929 (No. 11), p. 1467.
[3] *Ibid.*, 1930 (No. 7), pp. 838-839.
[4] *Vide* para. 7, *supra*.
[5] *P.M.C., Min.*, II, p. 92.
[6] *Ibid.*, XXVI, p. 50.

The statement of M. Rappard referred to at **I**, page 39, was made in 1925. It did not relate to any concrete proposal or intention and, in fact, constituted speculation on a purely hypothetical basis. Consequently Sir Frederick Lugard considered that in the absence of a concrete proposal, this discussion was beyond the Commission's competence [1].

In the circumstances the phrase "the proposal" at **I**, page 39, is not understood, nor does Respondent understand the allegation that such a proposal *(sic)* "frequently drew the Commission's attention".

27. The purport of the quotation given by the Applicants at **I**, pages 39 to 40, will be better understood when that quotation is read in the context of the full paragraph in which it appeared. That paragraph read:

> "The Commission was informed by the mandatory Power that the latter has appointed a special Committee to study certain constitutional problems raised by a motion of the Legislative Assembly of the territory aiming at its incorporation as a 'fifth province of the Union'. It noted, in particular, that this committee is to take account, *inter alia*, 'of the character of the territory as a mandated territory and the rules of international law governing the mandate'.
>
> The *Commission noted with satisfaction* the statement by the accredited representative that the mandatory Power will not take any action in this respect until it has first communicated its intentions to the League of Nations.
>
> 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.
>
> The Commission wishes, on this occasion, to draw attention to the mandatory Powers' fundamental obligation to give effect, not only to the provisions of the mandate, but also to those of Article 22 of the Covenant [2]." (Italics added.)

M. Rappard indicated the attitude of Members of the Commission when he said:

> ". . . he deeply appreciated the statements made by the accredited representatives. The attitude of the Union Government in this matter had now been fully and completely defined. Last year, there had been some misunderstanding on the subject, because the previous accredited representative had apparently not felt authorized to make definite statements. There had been no lack of goodwill on his part, and this observation implied no criticism of his attitude.
>
> It was however, a matter of congratulation that so full a statement had now been made. This statement went a long way to create that mutual confidence between the Mandates Commission and the mandatory Power which was so necessary for the success of their mutual efforts [3]."

Thus as regards the Mandatory's attitude, the Commission expressed, not "misgivings" [4], but "satisfaction".

Applicants state at **I**, page 40, "in the meantime the Union had

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[1] *P.M.C., Min.*, VI, p. 60.
[2] *Ibid.*, XXVII, p. 229.
[3] *Ibid.*, p. 161.
[4] As is alleged by Applicants at I, p. 39.

established 'a South West Africa Commission' . . . to deal further with the matter of incorporation". In fact this Commission was the body referred to in the observations of the Permanent Mandates Commission, quoted above, as a "Committee to study certain constitutional problems". Its appointment had been notified to the Commission by Respondent, and the observations of the Commission arose from the discussion of that very notification.

The Commission's subsequent observations referred to by the Applicants at **I**, page 40, read in full:

> "The Commission noted the statement in the annual report (page 4) that the mandatory Power 'is of opinion that to administer the mandated territory as a fifth province of the Union subject to the terms of the mandate would not be in conflict with the terms of the mandate itself'. It also noted that the mandatory 'feels that sufficient grounds have not been adduced for taking such a step'.
>
> The Commission does not express any opinion as to a method of administration the scope of which it has had no opportunity of judging and the adoption of which, according to the statement of the mandatory Power, is not contemplated; it confines itself to making all legal reservations on the question[1]."

In the absence of any specific proposal, the Permanent Mandates Commission could hardly be expected to take any other course than to reserve its position, as it did. The significance which the Applicants attach to this reservation is therefore not understood.

Respondent has never made a secret of its conviction that closer association between South Africa and South West Africa would best serve the interests of the inhabitants of South West Africa. It held that view before Versailles and reassessment in the light of subsequent events has not led to any other conclusion. Respondent sees nothing wrong, sinister or strange in seeking that closer association.

There is, however, no justification for Applicants' statement at **I**, page 40, that—

> "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".

As appears from the facts aforestated, there was no "area of disagreement persisting" as regards "the legal status of the Territory"; and Respondent is not aware of any "area of disagreement", "serious" or otherwise, "persisting" in regard to any other matter.

28. Applicants allege at **I**, page 40, that the Permanent Mandates Commission "repeatedly deemed it necessary to criticize other phases of the Union's administration of the Territory"—and they then list five aspects of administration, giving references. For reasons stated in paragraph 1 above, Respondent does not deal here with the substance of the allegations, other than to state that neither the references cited by Applicants nor the other records of the League support the allegation that the Commission had "repeatedly criticized" aspects of its administration of South West Africa. It was the duty of the Commission to express its views on the administration, and complete agreement at all times between the Mandatory and individual Members or even the

[1] *P.M.C., Min.*, XXXI, p. 192.

Commission as a whole could not possibly be expected. Yet, individual differences which did arise from time to time, were remarkably few and they were invariably settled to the satisfaction of the Commission, the Council and the Mandatory.

The Period of Transition 1945-1946

Establishment of the United Nations

29. The establishment of the United Nations Organization resulted largely from inter-Allied co-operation during the Second World War. The name "United Nations" had been adopted by the Allies in the later stages of the war and used in declarations, such as that of 1 January 1942, at Washington, pledging war-time co-operation. The prospect of establishing a new international organization for the preservation of international peace was mentioned in a declaration signed on 30 October 1943, at Moscow, by the representatives of four of the major Allied Powers, viz., the Union of Soviet Socialist Republics, the United States of America, the United Kingdom and China. The first blueprint of the organization was prepared during discussions in the period August to October 1944, at Dumbarton Oaks, Washington, in which the said four Powers participated. Following on these discussions there was published the proposal, *inter alia*, that the key body in the contemplated organization was to be a Security Council on which the "Big Five" Powers (being the above four and France) were to be permanently represented. During the Yalta Conference of February 1945, between President Roosevelt of the United States of America, Prime Minister Churchill of the United Kingdom and Premier Stalin of the Soviet Union, came an announcement that the question of voting procedure in such a Security Council had been settled and that "a conference of United Nations" should be called to meet at San Francisco to prepare a charter for "a general international organization to maintain peace and security . . . along the lines proposed in the informal conversations of Dumbarton Oaks".

A conference of delegates of 50 nations was held at San Francisco between 25 April and 26 June 1945, at which the Charter of the United Nations was drafted, unanimously agreed upon and signed by all the representatives. It came into force on 24 October 1945, when, as required by Article 110 thereof, the five Powers that were to be Permanent Members of the Security Council and a majority of the other signatory States had filed their ratifications[1].

30. During the aforesaid events the League of Nations was still in existence; and it continued to exist side by side with the new organization until April 1946.

There was no suggestion that the United Nations was to be the League under a new name, or an automatic successor in law to League assets, obligations, functions or activities. Indeed, two of the major Powers which played a leading role in the establishment of the United Nations, and were to be Permanent Members of the Security Council, were known to be strongly averse to any notion of automatic succes-

[1] *Everyman's United Nations* (6th ed.), pp. 4-5. *Vide* also Goodrich, L. M. and Hambro, E., *Charter of the United Nations* (2nd ed.), pp. 3-18.

sion. They were the Soviet Union, which had been expelled from the League in December 1939, and the United States of America, which had never been a Member of the League.

In terms of Article 3 of the Charter, the original Members of the United Nations were the States which, having participated in the San Francisco Conference or having signed the Declaration by the United Nations of 1 January 1942, also signed the Charter and ratified it in accordance with Article 110. There were 51 such original Members of the United Nations, of which 17 were not at that time (1945-1946) Members of the League. They were: Byelorussian Soviet Socialist Republic, Chile, Costa Rica, El Salvador, Guatemala, Haiti, Honduras, Lebanon, Nicaragua, Paraguay, Peru, Philippines, Saudi Arabia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United States of America, Venezuela.

Of those 17, six had never been Members of the League. They were: Byelorussian Soviet Socialist Republic, Lebanon, Philippines, Saudi Arabia, Ukrainian Soviet Socialist Republic and United States of America.

All the others (except the Soviet Union) had many years before withdrawn from the League on notice [1].

Further, of the 42 Members of the League of Nations at that time, 11 were not original Members of the United Nations. They were: Afghanistan, Bulgaria, Estonia, Finland, Ireland, Latvia, Lithuania, Portugal, Siam (Thailand), Sweden and Switzerland.

Four of these, viz., Switzerland, Lithuania, Latvia and Estonia, never became Members of the United Nations. The others were admitted to membership at various times, in some cases years after the establishment of the United Nations [2].

As a result of the admission of new Members, United Nations membership grew to 99 as at the end of 1960 and to 110 as at the end of 1962. Although 14 of these new Members had at some stage or another been Members of the League, the others had never been.

31. At the San Francisco Conference, during the discussions concerning the provisions of the Charter relative to a proposed trusteeship system [3], the South African representative made the following statement:

> "I wish to point out that there are territories already under Mandate where the Mandatory principle cannot be achieved.
>
> As an illustration, I would refer to the former German territory of South West Africa held by South Africa under a 'C' Mandate.
>
> The facts with regard to this territory are set out in a memorandum filed with the Secretariat, which I now read:
>
> When the disposal of enemy territory under the Treaty of Versailles was under consideration, doubt was expressed as to the suitability of the Mandatory form of administration for the territory which formerly constituted the German Protectorate of South West Africa.
>
> Nevertheless, on 17 December 1920, by agreement between the Principal Allied and Associated Powers and in accordance with Article 22 Part I (Covenant of the League of Nations) of the Treaty,

[1] For dates *vide* Walters, F. P., *A History of the League of Nations* (1952), Vol. I, pp. 64-65.

[2] *Vide* dates in *Everyman's United Nations* (6th ed.), p. 6.

[3] In Committee II/4 on 11 May 1945.

a Mandate (commonly referred to as a C Mandate) was conferred upon the Government of the Union of South Africa to administer the said territory.

Under the Mandate the Union of South Africa was granted full power of administration and legislation over the territory as an integral portion of the Union of South Africa, with authority to apply the laws of the Union to it.

For 25 years, the Union of South Africa has governed and administered the territory as an integral part of its own territory and has promoted to the utmost the material and moral well-being and the social progress of the inhabitants.

It has applied many of its laws to the territory and has faithfully performed its obligations under the Mandate.

The territory is in a unique position when compared with other territories under the same form of Mandate.

It is geographically and strategically a part of the Union of South Africa, and in World War No. 1 a rebellion in the Union was fomented from it, and an attack launched against the Union.

It is in large measure economically dependent upon the Union, whose railways serve it and from which it draws the great bulk of its supplies.

Its dependent native peoples spring from the same ethnological stem as the great mass of the native peoples of the Union.

Two-thirds of the European population are of Union origin and are Union Nationals, and the remaining one-third are Enemy Nationals.

The territory has its own Legislative Assembly granted to it by the Union Parliament, and this Assembly has submitted a request for incorporation of the territory as part of the Union.

The Union has introduced a progressive policy of Native Administration, including a system of local government through Native Councils giving the Natives a voice in the management of their own affairs; and under Union Administration Native Reserves have reached a high state of economic development.

In view of contiguity and similarity in composition of the native peoples in South West Africa the native policy followed in South West Africa must always be aligned with that of the Union, three-fifths of the population of which is native.

There is no prospect of the territory ever existing as a separate state, and the ultimate objective of the Mandatory principle is therefore impossible of achievement.

The Delegation of the Union of South Africa therefore claims that the Mandate should be terminated and that the territory should be incorporated as part of the Union of South Africa.

As territorial questions are however reserved for handling at the later Peace Conference where the Union of South Africa intends to raise this matter, it is here only mentioned for the information of the Conference in connection with the Mandates question[1]."

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[1] The official records of the San Francisco Conference contain only a brief summary of this statement (*U.N.C.I.O. Docs.*, Vol. 10, p. 434). The text quoted here is taken from the original typewritten document from which the South African representative, Dr. D. L. Smit, read the statement in the Committee on Trusteeship on 11 May 1945, which accords with an unofficial verbatim record in the custody

32. The significance of the above statement appears further from an extract from a later statement by Field-Marshal Smuts, which can conveniently—although out of historical sequence—be cited here. Addressing the Fourth Committee of the General Assembly of the United Nations at its Fourteenth Meeting on 4 November 1946, Field-Marshal Smuts stated, *inter alia*:

> "It was . . . incumbent on the Union Government as trustee of the interests of the people of South West Africa to ensure that, when the proper time arrived for consideration of any change in the status of the Territory, such consideration should not be prejudiced by any prior commitment on the part of the Union Government by virtue of its membership of any organization which might replace the League of Nations; Accordingly, in May 1945, when questions relating to trusteeship were under consideration by the San Francisco Conference, the Union Government entered a reservation designed to ensure that the future status of South West Africa and the desirability of its incorporation in the Union should not be prejudiced by any proposals adopted by the Conference in regard to the future of mandated Territories. The text of this reservation is given in Paragraph 1 of Document A/123. In the event, however, the Charter of the United Nations by the use of the term 'may' instead of 'shall' in Article 77 excluded any obligation to place Mandated Territories under trusteeship and made the application of the trusteeship system to such territories a matter of voluntary agreement. This no doubt accounts for the fact that in addition to South West Africa three other Mandates—Transjordan, Palestine and the Japanese Pacific Islands—have so far been excluded from the Trusteeship System[1]."

33. Towards the conclusion of the San Francisco Conference, on 25 June 1945, there was established a Preparatory Commission of the United Nations, consisting of one representative of each signatory State[2]. The functions entrusted to it were to convoke the General Assembly in its first session, to prepare the provisional agenda, documents and recommendations for the first sessions of the principal organs of the Organization, and to do certain other defined preparatory work pending establishment of the Secretariat[3]. One of these items of preparatory work was to:

> "Formulate recommendations concerning the possible transfer of certain functions, activities and assets of the League of Nations

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of the United Nations Secretariat. The original document read by the South African representative contains also the following paragraph which is, however, not reflected in the unofficial verbatim record:

> "As stated in the Memorandum, this is not a matter that can be decided here, but I am directed to mention it for the information of the Conference so that South Africa may not afterwards be held to have acquiesced in the continuance of the Mandate or the inclusion of the territory in any form of trusteeship under the new International Organization."

Dr. Smit, who died during 1962, affirmed by letter to Respondent before his death, that he made the whole statement as it appears in Respondent's records.

[1] *G.A., O.R., First Sess., Second Part, Fourth Comm.*, Part I, p. 239.

[2] *U.N.C.I.O. Docs.*, Vol. 5, pp. 300, 315 and Vol. I, p. 630.

[3] *Ibid.*, Vol. 5, pp. 300, 316.

which it may be considered desirable for the new Organization to take over on terms to be arranged[1]."

The Commission first met on 27 June 1945, at San Francisco. And when its Second Session opened on 24 November 1945, in London, it had before it a report by its Executive Committee[2], which was composed of representatives of the governments of 14 States. This report served as a basis for the work of the full Commission, which rendered its own report on 23 December 1945[3], setting out therein, *inter alia*, recommendations concerning the agenda and proposed resolutions for the First Part of the First Session of the General Assembly, which was held in London from 10 January to 14 February 1946.

34. The Commission's task in regard to the possible transfer of certain functions, assets and activities of the League to the United Nations, was carried out in the following stages:

(a) A subcommittee of the Executive Committee made certain recommendations, cited in section 3 of Chapter IX of the latter's report. The subcommittee recommended, with certain exceptions and qualifications, the transfer of the functions, activities and assets of the League. Among the exceptions were the political functions of the League; and the subcommittee also indicated that:

"Since the questions arising from the winding up of the mandate system are dealt with in Part III, Chapter IV, no recommendation on this subject is included here[4]."

In regard to functions arising from Treaties, the subcommittee recommended the adoption of a resolution by which the United Nations should express their willingness to exercise functions and powers previously entrusted to the League, reserving, however, the right to decide which functions and powers they were prepared to take over and to determine which organ of the United Nations, or specialized agency associated with it, would exercise the functions or powers taken over[5]. Added to this recommendation was the following:

"The transfer to the United Nations of functions or powers entrusted to the League of Nations by treaties, conventions, agreements or instruments having a political character, would if the parties to these instruments desire, be separately considered in each case[6]."

As regards possible transfer of functions and activities as well as of assets, the subcommittee suggested the appointment by the Preparatory Commission of a small committee to negotiate with the Supervisory Commission of the League of Nations regarding "the parallel measures that should be adopted by the League of Nations and the United Nations"[7].

(b) The Executive Committee's recommendations, as set out in sections 1 and 2 of Chapter IX of its report, reveal acceptance in substance

[1] *U.N.C.I.O. Docs.*, Vol. 5, p. 316, item *(c)*.
[2] *Doc.* PC/EX/113/Rev. 1, 12 Nov. 1945.
[3] *Doc.* PC/20, 23 Dec. 1945.
[4] *Doc.* PC/EX/113/Rev. 1, Chap. IX, sec. 3, paras. 1, 2 and 5, p. 110.
[5] *Ibid.*, para. 8, p. 111.
[6] *Ibid.*, para. 10, p. 111.
[7] *Ibid.*, paras. 32 and 33, p. 114.

of the subcommittee's recommendations. Recommendation No. 1 of the Executive Committee read as follows:

"1. that the functions, activities and assets of the League of Nations be transferred to the United Nations with such exceptions and qualifications as are made in the report referred to above, and without prejudice to such action as the United Nations may subsequently take with the understanding that the contemplated transfer does not include the political functions of the League, which have in fact already ceased, but solely the technical and non-political functions;" [1]

A footnote relative to exceptions and qualifications read in part:

"The Committee recommends that no political questions should be included in the transfer. *It makes no recommendation to transfer the activities concerning* refugees, *mandates* or international bureaux [1]." (Italics added.)

Section 2 of this Chapter of the Executive Committee's report contained a draft resolution for the General Assembly, concerning the assumption by the United Nations of functions of the League under international agreements. It distinguished between:

"A. Secretarial Functions";

"B. Functions and Powers of a Technical and Non-Political Character"; and

"C. Treaties and International Conventions, Agreements and other Instruments having a Political Character."

In regard to A and B it suggested an expression of willingness, subject to the reservations mentioned by the subcommittee, to ensure continued exercise of functions and powers. In regard to C it suggested the following:

"The General Assembly of the United Nations decides that it will itself examine or will submit to the appropriate organ of the United Nations any request from the parties that the United Nations should take over the exercise of functions or powers entrusted to the League of Nations by treaties and international conventions, agreements or other instruments having a political character [2]."

The subcommittee's recommendation that a small Committee be appointed to negotiate with the League Supervisory Commission regarding parallel measures, was endorsed [3].

(c) Discussions in the Preparatory Commission itself revealed that two delegates in the Executive Committee had voted against acceptance of Chapter IX of its report [4], and also that there was concern amongst some delegates about the possibility that the word "transfer", as used in the recommendations concerning functions and activities of the League, could "imply a legal continuity which would not in fact exist", resulting in a suggestion that the phrase "the assumption of responsibility for certain functions and

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[1] *Doc.* PC/EX/113/Rev. 1, Chap. IX, sec. 3, p. 108.
[2] *Ibid.*, p. 110.
[3] *Ibid.*, p. 109 (last para. of sec. 1).
[4] *U.N.P.C., Committee 7, Summary Records*, para. 1, p. 2.

activities" might be adopted [1]. This was eventually done [2], with the further substitution of "powers" for "activities". The recommendations of the Commission, relative to functions and powers, in the form as finally adopted by the General Assembly in its resolution XIV (1) of 12 February 1946 read as follows:

"TRANSFER OF CERTAIN FUNCTIONS, ACTIVITIES AND ASSETS OF THE LEAGUE OF NATIONS

I

FUNCTIONS AND POWERS BELONGING TO THE LEAGUE OF NATIONS UNDER INTERNATIONAL AGREEMENTS

Under various treaties and international conventions, agreements and other instruments, the League of Nations and its organs exercise, or may be requested to exercise, numerous functions or powers for the continuance of which, after the dissolution of the League, it is, or may be, desirable that the United Nations should provide.

Certain Members of the United Nations, which are parties to some of these instruments and are Members of the League of Nations, have informed the General Assembly that, at the forthcoming session of the Assembly of the League, they intend to move a resolution whereby the Members of the League would, so far as this is necessary, assent and give effect to the steps contemplated below.

Therefore:

1. *The General Assembly* reserves the right to decide, after due examination, not to assume any particular function or power, and to determine which organ of the United Nations or which specialized agency brought into relationship with the United Nations should exercise each particular function or power assumed.

2. *The General Assembly* records that those Members of the United Nations which are parties to the instruments referred to above assent by this resolution to the steps contemplated below and express their resolve to use their good offices to secure the co-operation of the other parties to the instruments so far as this may be necessary.

3. *The General Assembly* declares that the United Nations is willing in principle, and subject to the provisions of this resolution and of the Charter of the United Nations, to assume the exercise of certain functions and powers previously entrusted to the League of Nations, and adopts the following decisions, set forth in A, B, and C below.

A. *Functions pertaining to a Secretariat*

. . . . . .

[1] *U.N.P.C., op. cit.*, para. 3, pp. 2-3.
[2] *Ibid.*, pp. 10-11.

B. *Functions and Powers of a Technical and Non-Political Character*

Among the instruments referred to at the beginning of this resolution are some of a technical and non-political character which contain provisions, relating to the substance of the instruments, whose due execution is dependent on the exercise, by the League of Nations or particular organs of the League, of functions or powers conferred by the instruments. Certain of these instruments are intimately connected with activities which the United Nations will or may continue.

It is necessary, however, to examine carefully which of the organs of the United Nations or which of the specialized agencies brought into relationship with the United Nations should, in the future, exercise the functions and powers in question, in so far as they are maintained.

Therefore:

The General Assembly is willing, subject to these reservations, to take the necessary measures to ensure the continued exercise of these functions and powers, and refers the matter to the Economic and Social Council.

C. *Functions and Powers under Treaties, International Conventions, Agreements and Other Instruments Having a Political Character*

The General Assembly will itself examine, or will submit to the appropriate organ of the United Nations, any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character. . . .[1]"

Regarding transfer of assets, the Preparatory Commission on 18 December 1945 set up a committee—

> "to enter, on its behalf, into discussion with the League of Nations Supervisory Commission, which has been duly authorized by the members of the League of Nations, for the purpose of establishing a common plan for the transfer of the assets of the League to the United Nations on such terms as are considered just and convenient. This Plan will be subject, so far as the United Nations is concerned, to approval by the General Assembly[2]".

It will be observed that the task of this negotiating committee was confined to assets, the earlier recommendations of the Executive Committee and its Subcommittee (subparas. *(a)* and *(b)* above) not being followed in so far as they related to functions and activities—ostensibly inasmuch as the conception of a "transfer" of certain functions and activities had been abandoned in favour of one of "assumption" of certain functions and powers.

The Commission's recommendation regarding assets was merely that the plan to be developed as a result of the discussions should be submitted for approval to the General Assembly[2]. This was done at the

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[1] *G.A. Resolution* XIV (1), 12 Feb. 1946, in *U.N. Doc.* A/64, pp. 35-36.
[2] *Doc.* PC/20, p. 118.

First Part of the First Session, the General Assembly approving of the common plan in Part III of resolution XIV of 12 February 1946 *(supra)*.

35. *(a)* It will be recalled that the Subcommittee of the Executive Committee stated in its recommendations that "questions arising from the winding-up of the mandate system are dealt with in Part III, Chapter IV" of the Executive Committee's report [1].

(b) Reference to Chapter IV of its report reveals that the Executive Committee, in view of possible delay in constituting the Trusteeship Council in terms of Article 86 of the Charter, recommended that the General Assembly create a Temporary Trusteeship Committee "to carry out certain of the functions assigned in the Charter to the Trusteeship Council, pending its establishment" [2].

One of the functions proposed for such a Committee was to—

"advise the General Assembly on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the mandates system [3]".

And in section 3, paragraph 9, there was included in the proposed provisional agenda for the Temporary Trusteeship Committee: "Problems arising from the transfer of functions in respect of existing mandates from the League of Nations to the United Nations."

This is probably what the Subcommittee of the Executive Committee had in mind in speaking of "Part III, Chapter IV" of the Executive Committee's report.

(c) The recommendations regarding a Temporary Trusteeship Committee were, however, not accepted by the Preparatory Commission. They were replaced by a recommendation that the General Assembly should adopt a resolution calling on States administering territories under League of Nations Mandate to undertake practical steps for submitting trusteeship agreements in respect of them "preferably not later than during the Second Part of the First Session of the General Assembly" [4]. The recommendation proceeded:

"Those trusteeship matters which will be taken up by the General Assembly at the First Part of its First Session for the purpose of expediting the establishment of the trusteeship system, will be considered by the Trusteeship Committee of the General Assembly, using the methods which the General Assembly considers most appropriate for the further consideration of these matters [4]."

(d) In the discussion preceding this recommendation, in the 4th Committee of the Preparatory Commission on 20 December 1945, the representative of Australia made certain reservations concerning aspects of the proposed preamble, stating, *inter alia*:

"There was an implication that Article 80 imposed an obligation on States administering the territories mentioned in Article 77 to place those territories under trusteeship. *The terms of Articles 75 and 77 made it clear that the placing of a territory under trusteeship would be a voluntary act.*

Thirdly, the phrase 'calls on', since it had a special connotation in

[1] *Vide* para. 34 *(a)*, *supra*.
[2] *Doc.* PC/EX/113/Rev. 1, Chap. IV, sec. 2, para. 3, p. 55.
[3] *Ibid.*, para. 4 (iv), p. 56.
[4] *Doc.* PC/20, Chap. IV, sec. 1, p. 49.

the Charter (e.g., Arts. 33 and 41), was unfortunate in this context.

His Delegation cordially associated itself with the language of the resolution, but had to insist that the language of the preamble was not within the letter and spirit of the Charter; *the action of a mandatory would be as voluntary as that of any State putting any kind of dependent territory under trusteeship* [1]." (Italics added.)

Respondent's representative on the same occasion—

"reserved the position of his Delegation until the meeting of the General Assembly, because his country found itself in an unusual position. The mandated territory of South-West Africa was already a selfgoverning country, and last year its legislature had passed a resolution asking for admission into the Union. His Government had replied that acceptance of this proposal was impossible owing to their obligations under the mandate.

The position remained open, and his Delegation could not record its vote on the present occasion if by so doing it would imply that South-West Africa was not free to determine its own destiny. His Government would however, do everything in its power to implement the Charter [2]."

In the discussion on the same subject in the Preparatory Commission meeting on 23 December 1945, Respondent's representative stated:

"the South African Delegation associated itself wholly with the desire of Committee 4 to apply the principles laid down in the Charter and that its efforts had been directed towards that end. In view, however, of the special position of the Union of South Africa, which held a mandate over South-West Africa, it reserved its position with regard to the document at present under review, and especially because South Africa considered that it had fully discharged the obligations laid upon it by the Allies, under the Covenant of the League of Nations, on the advancement towards self-government of territories under mandate, and that the time had now come for the position to be examined as a whole. For that reason, the South African delegation reserved its attitude until the Assembly met [3]."

(e) The Preparatory Commission's report was considered at the First Part of the First Session of the General Assembly in January-February 1946. Addressing a Plenary Meeting on 17 January 1946 the South African representative stated his Government's position on the South West Africa Mandate in the following terms:

"Under these circumstances, the Union Government considers that it is incumbent upon it, as indeed upon all other mandatory Powers, to consult the people of the mandated territory regarding the form which their own future government should take, since they are the people chiefly concerned. Arrangements are now in train for such consultations to take place and, until they have been concluded, the South African Government must reserve its position concerning the future of the mandate, together with its right of

[1] *U.N.P.C., Committee 4, Summary Recoras*, p. 39.
[2] *Ibid.*, p. 40.
[3] *U.N.P.C., Journal*, p. 131.

full liberty of action, as provided for in paragraph 1 of article 80 of the Charter.

From what I have said I hope it will be clear that South West Africa occupies a special position in relation to the Union which differentiates that territory from any other under a C mandate. This special position should be given full consideration in determining the future status of the territory. South Africa is, nevertheless, properly conscious of her obligations under the Charter. I can give every assurance that any decision taken in regard to the future of the mandate will be characterized by a full sense of our responsibility, as a signatory of the Charter, to implement its provisions, in consultation with and with the approval of the local inhabitants, in the manner best suited to the promotion of their material and moral well-being[1]."

On 22 January 1946, in the Fourth Committee, he added:

"Referring to the text of Article 77, he said that under the Charter the transfer of the mandates regime to the trusteeship system was not obligatory. According to paragraph 1 of Article 80, no rights would be altered until individual trusteeship agreements were concluded. It was wrong to assume that paragraph 2 of this Article invalidated paragraph 1. The position of the Union of South Africa was in conformity with this legal interpretation.

He explained the special relationship between the Union and the territory under its mandate, referring to the advanced stage of selfgovernment enjoyed by South-West Africa, and commenting on the resolution of the Legislature of South-West Africa calling for amalgamation with the Union. There would be no attempt to draw up an agreement until the freely expressed will of both the European and native populations had been ascertained. When that had been done, the decision of the Union would be submitted to the General Assembly for judgment[2]."

(f) Of the other Mandatories the representative of the United Kingdom stated (on 17 January 1946):

"We have decided to enter forthwith into negotiations for placing Tanganyika, the Cameroons and Togoland under the trusteeship system. Preliminary negotiations have already started. I must make it clear that our willingness to place these territories under the trusteeship system naturally depends upon our being able to negotiate terms which in our view are generally satisfactory, and which achieve the objectives of the Charter and are in the best interests of the inhabitants of the territories concerned. . . .

Regarding Palestine, the Assembly is aware that an Anglo-American Committee of Enquiry, is at this very moment, examining the question of European Jewry, which is one of the most tragic episodes in the whole of history, and also the Palestine problem. We think it necessary to await the Committee's report before putting forward any proposals relating to the future of Palestine.

Regarding the future of Transjordan, it is the intention of His

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[1] *G.A., O.R., First Sess., First Part*, 12th Plenary Meeting, 17 Jan. 1946, pp. 185-186.

[2] *Ibid., Fourth Comm.*, 3rd Meeting, 22 Jan. 1946, p. 10.

Majesty's Government in the United Kingdom to take steps in the near future for establishing this territory as a sovereign independent State and for recognizing its status as such. In these circumstances, the question of Transjordan going under trusteeship does not arise [1]."

The representative of France stated (on 19 January 1946):

"The French Government intends to carry on with the work entrusted to it by the League of Nations. Believing further that it is in the spirit of the Charter that this work should henceforward be carried on under the trusteeship system, it is prepared to study the terms of the agreements by which this regime could be defined in the case of Togo and the Cameroons, on the understanding, however, that this shall not entail, for the populations concerned, any diminution in the rights which they already enjoy by reason of their integration into the French community, and further that these agreements will be submitted for approval to the representative organs of these populations [2]."

Other Mandatory Powers, New Zealand, Australia and Belgium, stated intentions to negotiate trusteeship agreements in respect of the Mandated territories administered by them [3].

(g) In its resolution XI of 9 February 1946, the General Assembly (in the preamble), *inter alia*, expressed regret at the fact that the Trusteeship Council could not be brought into being at that Session, because trusteeship agreements had first to be concluded, and referred to the above-mentioned recommendation of the Preparatory Commission as regards expediting the conclusion of such agreements. The resolution proceeded to state, *inter alia*, that—

"*with respect to Chapters XII and XIII of the Charter, the General Assembly:*

Welcomes the declarations, made by certain States administering territories now held under mandate, of an intention to negotiate trusteeship agreements in respect of some of those territories and, in respect of Transjordan, to establish its independence.

Invites the States administering territories now held under mandate to undertake practical steps, in concert with the other States directly concerned, for the implementation of Article 79 of the Charter (which provides for the conclusion of agreements on the terms of trusteeship for each territory to be placed under the trusteeship system), in order to submit these agreements for approval, preferably not later than during the second part of the first session of the General Assembly [4]."

Dissolution of the League of Nations

36. The situation as far as the League of Nations was concerned, after establishment of the United Nations, was described in a League publication as follows:

[1] *G.A., O.R., First Sess., Fourth Comm.*, 11th Plenary Meeting, 17 Jan. 1946, pp. 166-167.

[2] *Ibid.*, 16th Plenary Meeting, 19 Jan. 1946, p. 251.

[3] *Ibid.*, 14th and 15th Plenary Meetings, 18 Jan. 1946, pp. 227, 233 and 238.

[4] *U.N. Doc.* A/64, p. 13.

"The adoption of the Charter of the United Nations by a Conference at which the great majority of the States Members of the League were represented made the latter's ultimate disappearance a foregone conclusion and from that time onwards the chief concern of those responsible for its destinies was to see that its activities were terminated in a manner worthy of the part it has played in world affairs during the last quarter of a century [1]."

37. The Secretary-General of the League, in a communication dated 20 September 1945, drew the attention of League Members to the task entrusted at San Francisco to the United Nations Preparatory Commission relative to "the possible transfer of certain functions, activities and assets of the League which it may be considered desirable for the new Organization to take over on terms to be arranged" [2]. The communication contained a proposal that the Supervisory Commission of the League be empowered to negotiate with representatives of the United Nations in this regard and to draw up provisional terms of transfer "subject to the final decision of the League Assembly" [1]. The proposal was accepted by the Members of the League, and negotiations were entered into with the United Nations negotiating committee established by its Preparatory Commission on 18 December 1945 [3]. By reason of the limited terms of reference of the United Nations committee [3], the negotiations concerned *assets* only. The joint deliberations were successful and resulted in the "common plan", which was approved by the General Assembly of the United Nations in Part III of its Resolution XIV of 12 February 1946 [3]. It still required the assent of the League Assembly to become effective.

After referring to the United Nations resolutions relative to possible assumption of League functions and powers [4], the authors of *The League Hands Over* stated:

"Thus by the time the Assembly met in its twenty-first session it was in possession of the United Nations' plans for taking over the League's material assets and for carrying on, either directly or through one of its related agencies, all the League's most important functions and activities of a non-political character. Its main business, therefore, was 'to make provision for bringing the League of Nations to an end in orderly fashion, so that as much as possible of its surviving work can be continued without interruption and as much as possible of its property can be used to promote those high purposes of international peace and co-operation for which the League itself was founded' [5]."

38. The League Assembly met in its 21st, and last Session from 8 to 18 April 1946.

Its final resolution, adopted on 18 April 1946, provided at the commencement of its operative part as follows:

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[1] *The League Hands Over* (1946), p. 61.

[2] *Vide* para. 33, *supra.*

[3] *Vide* para. 34 *(c), supra.*

[4] *Vide* para. 34, *supra.*

[5] At p. 63. The quotation was taken from the *Report of the First Committee to the Assembly* in *L. of N., O.J., Spec. Sup.* No. 194, p. 250.

"*Dissolution of the League of Nations*

1. (1) With effect from the day following the close of the present session of the Assembly, the League of Nations shall cease to exist except for the sole purpose of the liquidation of its affairs as provided in the present resolution [1]."

The rest of the resolution related to practical arrangements concerning liquidation. Thus in paragraph 2 provision was made for the appointment of certain persons to form a "Board of Liquidation" which was to "represent the League for the purpose of effecting its liquidation".

In the same paragraph the powers of the Board were circumscribed as follows:

"Subject to the provisions of this resolution and other relevant decisions taken by the Assembly at the present session, the Board shall have full power to give such directions, make such agreements and take all such measures as in its discretion it considers appropriate for this purpose."

Paragraph 5 of the resolution approved of the "Common Plan" for transfer of *assets* to the United Nations.

The final paragraph of the resolution provided as follows:

"On the completion of its task, the Board shall make and publish a report to the Governments of the Members of the League giving a full account of the measures which it has taken, and shall declare itself to be dissolved. On the dissolution of the Board, the liquidation shall be deemed to be complete and no further claims against the League shall be recognized."

The resolution contained no provisions with regard to Mandates or functions in connection with Mandates.

39. "*The Assumption by the United Nations of Functions and Powers hitherto exercised by the League under International Agreements*" was the heading of a separate resolution adopted earlier on 18 April 1946. It read, in so far as is relevant, as follows:

"The Assembly of the League of Nations,

Having considered the resolution on the assumption by the United Nations of functions and powers hitherto exercised by the League of Nations under international agreements, which was adopted by the General Assembly of the United Nations on February 16th, 1946 [2].

Adopts the following resolutions:

1. *Custody of the Original Texts of International Agreements.*

. . . . . .

2. *Functions and Powers arising out of International Agreements of a Technical and Non-political Character.*

The Assembly recommends the Governments of the Members of the League to facilitate in every way the assumption without interruption by the United Nations, or by specialized agencies brought into relationship with that organization, of functions and

[1] *L. of N., O.J., Spec. Sup.* No. 194, p. 281.

[2] *G.A. Resolution* XIV (1), 12 Feb. 1946, in *U.N. Doc.* A/64, p. 35.

powers which have been entrusted to the League of Nations, under international agreements of a technical and non-political character, and which the United Nations is willing to maintain[1]."

40. *"The Assumption by the United Nations of Activities hitherto performed by the League"* was the heading of a further separate resolution of 18 April 1946, reading as follows:

"The Assembly directs the Secretary-General of the League of Nations to afford every facility for the assumption by the United Nations of such non-political activities, hitherto performed by the League, as the United Nations may decide to assume[1]."

41. Finally, "Mandates" was the heading of another important separate resolution of 18 April 1946. Before setting out its terms, regard is to be had to certain events which preceded its adoption.

(a) The session was scheduled to last less than two weeks, and delegates knew that it would not be possible to discuss the future of the mandate system at any length in an appropriate Committee. Informal discussions were consequently initiated between those Members of the League most directly concerned, with a view to securing the greatest possible measure of agreement before the matter was officially considered in the Committee.

In pursuance of the said discussions, the representatives of Mandatory Powers, in addressing the Plenary Meeting of the Assembly, made statements indicating the intentions of their governments regarding their respective mandates. In the resolution ultimately adopted the Assembly "took note" of these statements.

(b) The following are relevant extracts from these statements of intention by the various Mandatories:

(i) *By the representative of the United Kingdom* (on 9 April 1946):

"The mandates administered by the United Kingdom were originally those for Iraq, Palestine, Transjordan, Tanganyika, part of the Cameroons and part of Togoland. Two of these territories have already become independent sovereign States, Iraq in 1923, and Transjordan just the other day in 1946. As for Tanganyika and Togoland under their mandate, and the Cameroons under their mandate, His Majesty's Government in the United Kingdom have already announced their intention of placing them under the trusteeship system of the United Nations, subject to negotiations on satisfactory terms of trusteeship.

The future of Palestine cannot be decided until the Anglo-American Committee of Enquiry have rendered their report, but until the three African territories have actually been placed under trusteeship and until fresh arrangements have been reached in regard to Palestine—whatever those arrangements may be—it is the intention of His Majesty's Government in the United Kingdom to continue to administer these territories in accordance with the general principles of the existing mandates[2]."

(ii) *By the representative of South Africa* (on 9 April 1946):

"Since the last League meeting, new circumstances have arisen

[1] *L. of N., O.J., Spec. Sup.* No. 194, p. 278.
[2] *Ibid.*, p. 28.

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 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 according South-West Africa a status under which it would be internationally recognized as an integral part of the Union. As the Assembly will know, it is already administered under the terms of the mandate as an integral part of the Union. 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]."

(iii) *By the representative of France* (on 10 April 1946):

"The French Government intends to pursue the execution of the mission entrusted to it by the League of Nations. It considers that it is in accordance with the spirit of the Charter that this mission should henceforth be carried out under the regime of trusteeship and it is ready to examine the terms of an agreement to define this regime in the case of Togoland and the Cameroons[2]."

(iv) *By the representative of New Zealand* (on 11 April 1946):

"New Zealand has always strongly supported the establishment of the International Trusteeship System, and has already declared its willingness to place the mandated territory of Western Samoa under trusteeship. . . . New Zealand does not consider that the dissolution of the League of Nations and, as a consequence, of the Permanent Mandates Commission will have the effect of diminishing her obligations to the inhabitants of Western Samoa, or of increasing her rights in the territory. Until the conclusion of our Trusteeship Agreement for Western Samoa, therefore, the territory will continue to be administered by New Zealand, in accordance with the terms of

[1] *L. of N., O.J., Spec. Sup.* No. 194, pp. 32-33.
[2] *Ibid.*, p. 34.

the Mandate, for the promotion of the well-being and advancement of the inhabitants [1]."

(v) *By the Belgian representative* (on 11 April 1946):

"At the meeting of the General Assembly of the United Nations in London on January 20th last, she declared her intention of entering into negotiations with a view to placing the Territory of Ruanda-Urundi under the new regime. In pursuance of this intention, the Belgian Government has prepared a draft agreement setting out the conditions under which it will administer the territory in question.

In the course of the same declaration of January 20th, we expressed our confidence that the Trusteeship Council would soon come to occupy in the United Nations Organization the important place which it deserves. We can only repeat that hope here and give an assurance that, pending its realization, Belgium will remain fully alive to all the obligations devolving on members of the United Nations under article 80 of the Charter [1]."

(vi) *By the Australian representative* (on 11 April 1946):

"The trusteeship system, strictly so called, will apply only to such territories as are voluntarily brought within its scope by individual trusteeship agreements. . . . After the dissolution of the League of Nations and the consequent liquidation of the Permanent Mandates Commission, it will be impossible to continue the mandates system in its entirety.

Notwithstanding this, the Government of Australia does not regard the dissolution of the League as lessening the obligations imposed upon it for the protection and advancement of the inhabitants of the mandated territories, which it regards as having still full force and effect. Accordingly, until the coming into force of appropriate trusteeship agreements under Chapter XII of the Charter, the Government of Australia will continue to administer the present mandated territories, in accordance with the provision of the Mandates, for the protection and advancement of the inhabitants. In making plans for the dissolution of the League, the Assembly will very properly wish to be assured as to the future of the mandated territories, for the welfare of the peoples of which this League has been responsible. So far as the Australian territories are concerned, there is full assurance. In due course these territories will be brought under the trusteeship system of the United Nations; until then, the ground is covered not only by the pledge which the Government of Australia has given to this Assembly to-day but also by the explicit international obligations laid down in Chapter XI of the Charter, to which I have referred. There will be no gap, no interregnum, to be provided for [2]."

In the earlier reference to Chapter XI of the Charter the Australian representative had said:

"Amongst other things, each administering authority under that chapter undertakes to supply to the United Nations information

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[1] *L. of N., O.J., Spec. Sup. No. 194*, p. 43.
[2] *Ibid.*, p. 47.

concerning economic, social and educational conditions in its dependent territories [1]."

(vii) No statement was made concerning the future of the Pacific Islands in respect of which a mandate had been granted to Japan.

(c) After the above statements by the representatives of the United Kingdom and of Respondent had been made (on the morning of 9 April 1946), but before the others could be delivered, and while the informal discussions were still proceeding regarding the drafting of a resolution, the representative of China, Dr. Liang, raised the question of the future of Mandates in the First Committee on the afternoon of 9 April 1946.

The Committee was at the time considering the draft resolution concerning assumption by the United Nations of League functions and powers arising out of international agreements of a technical and non-political character (*vide* para. 33 above). Dr. Liang wished to propose for discussion the following draft resolution, which he read out:

"The Assembly,

Considering that the Trusteeship Council has not yet been constituted and that all mandated territories under the League have not been transferred into territories under trusteeship;

Considering that the League's function of supervising mandated territories should be *transferred* to the United Nations, *in order to avoid a period of interregnum in the supervision of the mandatory regime* in these territories. (Italics added.)

Recommends that the mandatory powers as well as those administering ex-enemy mandated territories shall continue to submit annual reports to the United Nations and to submit to inspection by the same until the Trusteeship Council shall have been constituted [2]."

The Chairman, however, ruled that the proposal was not relevant to the item then under consideration by the Committee. What transpired is set forth as follows in the Summary Records of the League:

"Dr. Lone Liang (China) referred to the position of territories under mandate and to the position which would arise on the dissolution of the League, in view of the fact that the trusteeship council of the United Nations has not yet been appointed and was not likely to be set up for some time. The Chinese delegation wished to submit a resolution recommending that the mandatory powers should continue to submit annual reports on the mandated territories to the United Nations and that they should agree to inspection by the latter, pending the constitution of the trusteeship council.

The Chairman thought that the question raised by the Chinese delegate could be discussed later, but for the moment they must confine themselves to examining the resolutions of the United Nations in the order in which they appeared in document A/13.1946. The General Assembly of the United Nations had certainly not had

[1] *L. of N., O.J., Spec. Sup.* No. 194, p. 47.

[2] *Vide L. of N.*, 21st Assembly, 1st Comm., 2nd Meeting, provisional record. An extract from this document was sent to the Registrar of the Court by Respondent's Agent under cover of a letter dated 16 October 1962.

the question of the system of trusteeship in mind when it drafted its resolution on functions and powers under international agreements of a technical and non-political character.

Dr. Lone Liang (China) accepted the Chairman's explanation [1]."

(d) Following this incident, the informal discussions mentioned above were renewed, the Chinese delegation also participating therein. The final outcome was that when the question of mandates was reached in the First Committee, on 12 April 1946, the Chinese delegate, Dr. Liang, himself introduced a new draft of which Sir Hartley Shawcross of the United Kingdom said, when seconding the proposal, that it—

"had been settled in consultation and agreement by all countries interested in mandates, and he thought it could, therefore, be passed without discussion and with complete unanimity [2]".

In proposing the new draft resolution Dr. Liang—

"recalled that he had already drawn the attention of the Committee to the complicated problems arising in regard to mandates from the transfer of functions from the League to the United Nations. The United Nations Charter in Chapters XII and XIII established a system of trusteeship based largely upon the principles of the mandates system, but the functions of the League in that respect *were not transferred automatically* to the United Nations. The Assembly should therefore take steps to secure the continued application of the principles of the mandates system. As Professor Bailey had pointed out to the Assembly on the previous day, the League *would wish to be assured* as to the future of mandated territories. The matter had also been referred to by Lord Cecil and other delegates.

It was *gratifying* to the Chinese delegation, as representing a country which had always stood for the principle of trusteeship, that all the Mandatory Powers *had announced their intention* to administer the territories under their control in accordance with their obligations under the mandates system *until other arrangements were agreed upon. It was to be hoped* that the *future* arrangements *to be made* with regard to these territories *would* apply, in full, the *principle of trusteeship* underlying the mandates system.

The Chinese delegation had pleasure in presenting the draft resolution now before the Committee, so that the question could be discussed by the Assembly in a concrete form and the position of the League clarified [3]." (Italics added.)

The resolution was supported by the French and Australian representatives. The French representative, speaking in support,

". . . wished to stress once more the fact that all territories under the mandate of his Government would continue to be *administered* in the *spirit* of the Covenant and of the Charter [2]". (Italics added.)

The Australian representative:

". . . welcomed the initiative of the Chinese delegation in moving the

[1] *L. of N., O.J., Spec. Sup.* No. 194, p. 76.
[2] *Ibid.*, p. 79.
[3] *Ibid.*, pp. 78-79.

resolution, which he supported. The Australian delegation had made its position clear in the Assembly—namely that Australia did not regard the dissolution of the League as weakening the obligations of countries administering mandates. They regarded the obligations as still in force and would continue to *administer* their mandated territories in accordance with the provisions of the mandates for the *well-being of the inhabitants*. Over and above that, Australia recognized obligations under the Charter which she had already assumed as a Member of the United Nations and others which she would assume in bringing the Territories under the international trusteeship system [1]." (Italics added.)

The Egyptian delegate "made all reservations on behalf of his Government with regard to Palestine"[1].

The draft resolution was put to the vote and adopted unanimously subject to drafting, the Egyptian delegate abstaining [1].

(e) The new draft contained what eventually became the Assembly's resolution concerning mandates. The adoption of that resolution by the Assembly on 18 April 1946, was without discussion, save that the Egyptian delegate indicated that he would abstain from voting by reason of a reservation of his Government in regard to the mandate for Palestine. The essence of the reservation appears from the following extracts from his statement:

"The opinion of my Government is that Palestine has intellectually, economically, and politically reached a stage where it should no longer continue under mandate or trusteeship or whatever other arrangements may be considered. . . . It is the view of my Government *that mandates have terminated with the dissolution of the League of Nations*, and that, in so far as Palestine is concerned, there should be no question of putting that country under trusteeship [2]." (Italics added.)

(f) Thereupon the resolution was adopted (Egypt abstaining) as follows:

"The Assembly:

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

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 Mandates Commission;

2. Recalls the role of the League in assisting Iraq to progress from its status under an 'A' mandate to a condition of complete independence, welcomes the termination of the mandated status of Syria, the Lebanon and Transjordan, which have, since the last session of the Assembly, become independent members of the world community;

3. Recognizes that, on the termination of the League's existence, its functions with respect to the mandated territories will come to

[1] *L. of N., O.J., Spec. Sup.* No. 194, p. 79.
[2] *Ibid.*, pp. 58-59.

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 the United Nations and the respective mandatory powers[1]."

DISSOLUTION OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

42. In pursuance of a resolution of the Preparatory Commission of the United Nations regarding the dissolution of the Permanent Court, the Assembly of the League of Nations on 18 April 1946, adopted a resolution, the operative part of which read as follows:

"Resolves:

That the Permanent Court of International Justice is for all purposes to be regarded as dissolved with effect from the day following the close of the present session of the Assembly, but without prejudice to such subsequent measures of liquidation as may be necessary[2]."

The Period 1946-1949

43. Over the years of the Mandate's existence a growing desire had developed amongst the inhabitants of South West Africa for closer association with South Africa and for termination of the Mandate. This desire found concrete expression in resolutions passed by the South West Africa Legislative Assembly as far back as 1934. On 14 May 1943 the Legislative Assembly again asked for termination of the Mandate and incorporation of the Territory in the Union of South Africa. A similar resolution was passed on 8 May 1946.

Since these resolutions emanated from a body wherein the non-White sections of the population were not directly represented, Respondent felt that they should be fully and directly consulted as to their wishes.

Respondent had made known on a number of occasions during 1945 and 1946, its intentions as to the future of South West Africa. This was done first at the San Francisco Conference in May 1945[3]. In January 1946, at the First Part of its First Session, the United Nations General Assembly was informed[4], and in April of that year also the League of Nations Assembly at its final Session[5], of Respondent's intention to consult the inhabitants of South West Africa regarding the future of the Territory.

The consultations which were thereupon conducted, resulted in an

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[1] *L. of N., O.J., Spec. Sup.* No. 194, pp. 58, 278-279.

[2] *Ibid.*, pp. 55-56, 256-257. All the surviving members of the Court had already on 31 January 1946, submitted their resignations to the Secretary-General of the League of Nations. (*Vide* Rosenne, S., *The International Court of Justice* (1957), p. 27.)

[3] *Vide* para. 31, *supra.*

[4] *Vide* para. 35, *supra.*

[5] *Vide* para. 41 *(b)* (ii), *supra.*

overwhelming majority of the non-White inhabitants of South West Africa expressing themselves in favour of "our country [becoming] part of the Union of South Africa"; 208,850 were in favour, 33,520 were against; and 56,790 could not be consulted because of practical difficulties.

The results and the manner of consultation, as well as a reasoned statement on the question of incorporation, were fully set out in a "Memorandum on the administration of South West Africa and on the wishes of its peoples as to the future status of the Territory", submitted to the Secretary-General of the United Nations by Respondent in October 1946 [1].

44. In November 1946 the South African representative (Field-Marshal Smuts) further elaborated on the question of incorporation in an address to the Fourth Committee of the United Nations General Assembly.

He dealt, *inter alia*, with the fundamental concepts of the mandate system and stressed the importance of the wishes of the inhabitants of mandated territories as to their ultimate destiny. In emphasizing that South West Africa was "uniquely different" from other mandated territories, he referred to the statement by President Wilson at Versailles [2] as to South West Africa's future association with South Africa.

He advanced many reasons why incorporation would facilitate the administration of the Territory and would also be in the best interests of South West Africa and beneficial to its inhabitants. He referred to the reservation made by Respondent at the San Francisco Conference in May 1945, as to the future of the Territory [3], and concluded by saying he was confident that the United Nations would recognize that, to give effect to the wishes of the population of South West Africa, would be "the logical application of the democratic principles of political self-determination" and would also be—

> "the inevitable fulfilment of a historical evolution which is in itself designed to promote the best interests of the territory and confer upon it the benefits of the membership of a larger community without loss of those individual rights and responsibilities which the territory enjoyed under the Mandate [4]".

Some days later Field-Marshal Smuts also informed the Fourth Committee that:

> "It would not be possible for the Union Government as a former mandatory to submit a trusteeship agreement in conflict with the clearly expressed wishes of the inhabitants. The Assembly should recognize that the implementation of the wishes of the population was the course prescribed by the Charter and dictated by the interests of the inhabitants themselves. If, however, the Assembly did not agree that the clear wishes of the inhabitants should be implemented, the Union Government could take no other course than

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[1] *U.N. Doc.* A/123, in *G.A., O.R., First Sess., Second Part, Fourth Comm.*, Part I, pp. 199-235.

[2] Quoted para. 7, *supra*.

[3] *Vide* para. 31, *supra*.

[4] *U.N. Doc.* A/C.4/41, in *G.A., O.R., First Sess., Second Part, Fourth Comm.*, Part I, p. 244.

to abide by the declaration it had made to the last Assembly of the League of Nations to the effect that it would continue to administer the territory as heretofore as an integral part of the Union, and to do so in the spirit of the principles laid down in the mandate.

In particular the Union would, in accordance with Article 73, paragraph *(e)*, of the Charter, transmit regularly to the Secretary-General of the United Nations 'for information purposes, subject to such limitations as security and constitutional regulations might require, statistical and other information of a technical nature relating to economic, social and educational conditions' in South West Africa. There was nothing in the relevant clauses of the Charter, nor was it in the minds of those who drafted these clauses, to support the contention that the Union Government could be compelled to enter into a trusteeship agreement even against its own view or those of the people concerned[1]."

45. Apart from the expressed wishes of the inhabitants, the numerous other considerations relied on for incorporation, as set out in the Memorandum[2] and elaborated on by Field-Marshal Smuts in his addresses, included the following (briefly stated):

(a) Experience had shown that the circumstances of South West Africa did not permit of entirely satisfactory administration under the mandate system—or any analogous system.

(b) The geographical features and location of South West Africa, its vast semi-desert areas, its climate and low rainfall, and its sparse population rendered it incapable of a separate economic existence.

(c) Experience in two world wars had shown that for strategic and security reasons South Africa and South West Africa should constitute a single unit.

(d) The various peoples of South West Africa had a close ethnological and national affinity with those of South Africa—a substantial number in fact being of South African origin and South African citizens.

(e) A large measure of integration of the administration of South West Africa with that of South Africa—as sanctioned by Article 22 of the Covenant and the Mandate—had already taken place, and further integration was essential if the Territory were to share fully in the advanced technical and administrative services South Africa could provide.

(f) South West Africa was economically dependent on South Africa, not only for financial assistance and the subsidization of its economic life, but also as a free market for its agricultural produce.

(g) The uncertainty as to the political future of the Territory inevitably militated against racial tranquility and the optimum development of the Territory.

46. In view of the above considerations Respondent considered that the General Assembly ought to endorse the proposal for incorporation. The General Assembly, however, rejected (in resolution 65 (I)) the proposal on the ground "that the African inhabitants of South West

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[1] *G.A., O.R., First Sess., Second Part, Fourth Comm.*, Part I, 19th Meeting, 13 Nov. 1946, p. 102.

[2] *U.N. Doc.* A/123.

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", and recommended that South West Africa be placed under the international trusteeship system of the United Nations [1].

In rejecting the proposal for incorporation on this ground the General Assembly reflected on only one aspect of the factors favouring incorporation, namely the expressed wishes of the population, and remained silent on all the others.

In Respondent's view the other factors, especially those relating to the interests of the inhabitants, were of importance and should have been given weight in the General Assembly's consideration of the proposal, particularly if there were doubts as to the ability of the population to express themselves.

From the fact that the General Assembly did not, in its resolution 65 (I), reflect on these factors at all, coupled with the nature of the discussions in the Fourth Committee, Respondent felt justified in inferring that there were other reasons which had motivated the approach of at least some Members of the United Nations to the proposal for incorporation.

The tone of the statements made in the Fourth Committee and the General Assembly by some delegations was regarded by Respondent as an indication that political motivations, unrelated and even detrimental to the interests of the inhabitants of South West Africa, would be an inherent element in any supervisory system under the United Nations. This, in Respondent's view, would greatly hamper its task in administering the Territory; and as Respondent had assumed a "sacred trust" in respect of the inhabitants, it had in any event to be mindful of their expressed wishes and their interests.

47. In response to the General Assembly's invitation to Respondent "to propose for the consideration of the General Assembly a trusteeship agreement" [1], Respondent consequently replied by letter (of 23 July 1947) to the Secretary-General, *inter alia*, as follows:

> "the Union Government desire to reiterate their view that it is implicit in the mandate system and in the mandate for South West Africa that due regard shall be had to the wishes of the inhabitants in the administration of the Territory. The wish clearly expressed by the overwhelming majority of all the native races in South West Africa and by unanimous vote on the part of the European representatives of the Territory that South West Africa be incorporated in the Union therefore debars the Union Government from acting in accordance with the resolution of the General Assembly, and thereby flouting the wishes of those who under the Mandate have been committed to their charge. In the circumstances the Union Government have no alternative but to maintain the *status quo* and to continue to administer the territory in the spirit of the existing Mandate [2]."

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[1] *G.A. Resolution* 65 (I), 14 Dec. 1946, in *U.N. Doc.* A/64/Add. 1, p. 123. (Quoted *in extenso* in I, pp. 43-44.)

[2] *U.N. Doc.* A/334, in *G.A., O.R., Second Sess., Fourth Comm.*, p. 135.

In the same letter Respondent referred to a resolution adopted by the House of Assembly of the Union Parliament, on 11 April 1947, reading as follows:

> "Whereas in terms of the Treaty of Versailles full power of legislation and administration was conferred on the Union of South Africa in respect of the Territory of South West Africa, subject only to the rendering of reports to the League of Nations; and
>
> Whereas the League of Nations has since ceased to exist and was not empowered by the provisions of the Treaty of Versailles or of the Covenant to transfer its rights and powers in regard to South West Africa to the United Nations Organization, or to any other international organization or body, and did not in fact do so; and
>
> Whereas the Union of South Africa has not by international agreement consented to surrender the rights and powers so acquired, and has not surrendered these by signing the Charter of the United Nations Organization and remains in full possession and exercise thereof; and
>
> Whereas the overwhelming majority of both the European and non-European inhabitants of South West Africa have expressed themselves in favour of the incorporation of South West Africa with the Union of South Africa;
>
> Therefore this House is of opinion that the Territory should be represented in the Parliament of the Union as an integral portion thereof, and requests the Government to introduce legislation, after consultation with the inhabitants of the Territory, providing for its representation in the Union Parliament, and that the Government should continue to render reports to the United Nations Organization as it has done heretofore under the Mandate[1]."

The letter also referred to the fact that "the Union Government have already undertaken to submit reports on their administration for the information of the United Nations" [2].

48. In compliance with an undertaking given by Respondent at the First Session of the General Assembly in 1946, meetings were held throughout South West Africa during 1947 to acquaint the non-White inhabitants with the General Assembly's resolution 65 (I). These meetings showed that the overwhelming majority were still in favour of incorporation. Likewise, the South West Africa Legislative Assembly on 7 May 1947, unanimously adopted a further resolution urging incorporation.

The wishes of the people of South West Africa were again communicated to the United Nations in a special report[3], and were further elaborated on by the South African representative in the Fourth Committee on 25 September 1947. He intimated that Respondent:

Would not proceed with the incorporation of South West Africa;

Would consider itself under no legal obligation to propose a Trusteeship agreement for the Territory;

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[1] *U.N. Doc.* A/334, *op. cit.*, p. 134.

[2] *Vide* para. 44, *supra.*

[3] *U.N. Doc.* A/334/Add. 1, in *G.A., O.R., Second Sess., Fourth Comm.*, pp. 136-138.

Could not further ignore the wishes of the great majority of the inhabitants of South West Africa who favoured incorporation, by placing the Territory under the trusteeship system; and

Would continue to maintain the *status quo*, to administer the Territory in the spirit of the Mandate, and to transmit to the United Nations for its information an annual report on the administration of the Territory of South West Africa.

At the thirty-third meeting of the Committee on 27 September 1947, in response to a request by the representative of Denmark for amplification of Respondent's proposal regarding maintenance of the *status quo*, the representative of the Union of South Africa explained that:

> "the annual report which his Government would submit on South West Africa would contain the same type of information on the Territory as is required for Non-Self-Governing Territories under Article 73 *(e)* of the Charter. It was the assumption of his Government, he said, that the report would not be considered by the Trusteeship Council and would not be dealt with as if a trusteeship agreement had in fact been concluded. He further explained that, since the League of Nations had ceased to exist, the right to submit petitions could no longer be exercised, since that right presupposes a jurisdiction which would only exist where there is a right of control or supervision, and in the view of the Union of South Africa no such jurisdiction is vested in the United Nations with regard to South West Africa [1]."

49. In November 1947 the South African representative dealt in the General Assembly with the question of an alleged moral obligation to submit a trusteeship agreement—a contention based, firstly, on the fact that all other mandated territories had been placed under the trusteeship system or had been offered independence, and secondly, on resolutions of the General Assembly of 9 February [2] and 14 December [3] 1946. He again stressed the many and material respects in which South West Africa differed from other Mandated territories, and emphasized that Respondent would be acting in defiance of the wishes of the vast majority of the inhabitants if a trusteeship agreement were concluded. He added that, whereas the resolution of 9 February 1946 conveyed an *invitation*, and that of 14 December 1946 a *recommendation*, that a trusteeship agreement be submitted in respect of South West Africa, his Government had "conscientiously performed" its duty in giving "most anxious consideration" to the recommendation, but could not accede thereto [4].

At the same time he informed the General Assembly that—

> "the Union of South Africa has expressed its readiness to submit annual reports for the information of the United Nations. That undertaking stands. Although these reports, if accepted, will be rendered on the basis that the United Nations has no supervisory jurisdiction in respect of this territory they will serve to keep the United Nations informed in much the same way as they will be

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[1] *U.N. Doc.* A/422, in *G.A., O.R., Second Sess., Plenary Meetings*, Vol. II, p. 1538.
[2] *G.A. Resolution* XI (1), in *U.N. Doc.* A/64, p. 13.
[3] *G.A. Resolution* 65 (I).
[4] *G.A., O.R., Second Sess.*, Vol. I, 105th Plenary Meeting, 1 Nov. 1947, pp. 632 ff.

kept informed in relation to Non-Self-Governing Territories under Article 73 *(e)* of the Charter[1]."

50. Despite the above, the General Assembly adopted a resolution maintaining its previous recommendation that South West Africa be placed under the trusteeship system and urging Respondent to propose for the consideration of the General Assembly a trusteeship agreement for the Territory, motivating its resolution in the following terms:

> "Whereas 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[2]."

At the Third Session of the General Assembly in 1948 the South African representative formally reiterated—

> "that the Union Government, after full consideration of all the aspects of the matter, had once again come to the conclusion that it would be in the interests neither of the Territory of South West Africa and its people, nor of the Union and its people, to place the Territory under the authority of the Trusteeship Council of the United Nations, and that, in the circumstances, the Government regretted not being able to comply with the request of the United Nations Assembly to submit, voluntarily, a trusteeship agreement[3]."

51. In compliance with its earlier voluntary undertaking, Respondent submitted in September 1947 a report on South West Africa for the year 1946.

This report was submitted on the basis clearly stated in the said undertaking, namely:

(a) that it would be for information purposes only, containing the same type of information on the Territory as required for Non-Self-Governing Territories under Article 73 *(e)* of the Charter; and

(b) that Respondent did not recognize the United Nations as a supervisory authority in respect of the Territory—the reports not being intended for use by the United Nations as if the latter were the supervisory authority or as if a trusteeship agreement had in fact been entered into.

After receipt of this report, the General Assembly authorized—

> "the Trusteeship Council in the meantime to examine the report on South West Africa . . . and to submit its observations thereon to the General Assembly[4]".

Respondent declined an invitation by the Trusteeship Council to send a representative to attend its examination of the report since such action would not have been consistent with its view that the Council was not vested with supervisory functions in respect of South West Africa.

Respondent, however, offered to transmit further information in writing if requested to do so. In response to such a request, further

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[1] *G.A., O.R., Second Sess., op. cit.*, p. 632.

[2] *G.A. Resolution* 141 (II), 1 Nov. 1947, in *U.N. Doc.* A/519, p. 47.

[3] *G A., O.R., Third Sess., Part I, Fourth Comm.*, 76th Meeting, 9 Nov. 1948, p. 292.

[4] *G.A. Resolution* 141 (II).

information *was* submitted; and in a covering letter of 31 May Respondent, *inter alia*:

> "re-iterate(d) that the transmission to the United Nations of information on South West Africa, in the form of an annual report or any other form, is on a voluntary basis and is for purposes of information only. They have on several occasions made it clear that they recognize no obligation to transmit this information to the United Nations, but in view of the wide-spread interest in the administration of the Territory, and in accordance with normal democratic practice, they are willing and anxious to make available to the world such facts and figures as are readily at their disposal. . . . The Union Government desire to recall that in offering to submit a report on South West Africa for the information of the United Nations, they did so on the basis of the provisions of Article 73 *(e)* of the Charter. This Article calls for 'statistical and other information of a technical nature' and makes no reference to information on questions of policy.
>
> In these circumstances the Union Government do not consider that information on matters of policy, particularly future policy, should be included in a report (or in any supplement to the report) which is intended to be a factual and statistical account of the administration of the Territory over the period of a calendar year. Nevertheless, the Union Government are anxious to be as helpful and as co-operative as possible and have, therefore, on this occasion replied in full to the questions dealing with various aspects of policy. The Union Government do not, however, regard this as creating a precedent. Furthermore, the rendering of replies on policy should not be construed as a commitment as to future policy or as implying any measure of accountability to the United Nations on the part of the Union Government. In this connexion the Union Government have noted that their declared intention to administer the Territory in the spirit of the mandate has been construed in some quarters as implying a measure of international accountability. This construction the Union Government cannot accept and they would again recall that the League of Nations at its final session in April 1946, explicitly refrained from transferring its functions in respect of mandates to the United Nations [1]."

When the Trusteeship Council's observations on the report on South West Africa [2] came before the Fourth Committee in 1948, the South African representative referred to Respondent's earlier reservations, and stated that, in view thereof:

> "the Union could not admit the right of the Trusteeship Council to use the report for purposes for which it had not been intended: still less could the Trusteeship Council assume for itself the power claimed in its resolution i.e. 'to determine whether the Union of South Africa is adequately discharging its responsibilities under the terms of the mandate. . . .' Furthermore, that power was claimed in respect of a territory which was not a trust territory and in respect of which no trusteeship agreement existed. The South African

[1] *U.N. Doc.* T/175, 3 June 1948, pp. ii-iii.
[2] *G.A., O.R., Third Sess., Sup.* No. 4 (A/603), pp. 42-45.

delegation considered that in so doing the Council had exceeded its powers [1]."

The South African representative also observed that the Trusteeship Council, in dealing with the report, apparently considered that it had a supervisory function in respect of South West Africa and that Respondent was accountable to it for the administration of the Territory—which was not in accordance with the basis of the undertaking with regard to reports [2].

52. Respondent does not deal here with the substance of the Trusteeship Council's comments on the report [3]. What is relevant, however, is that those comments and the subsequent discussions thereon did not observe the reservations under which the report had been submitted.

Moreover, many of the conclusions contained in the Trusteeship Council's observations were apparently based on misconceptions as to conditions in the Territory, and the discussions in the Fourth Committee made it clear to the South African delegation that similar misconceptions existed also amongst some of the Members of that Committee. The South African representative consequently dealt at length with conditions in the Territory [4] in order to acquaint the Committee with the true facts. It was found, however, that a majority of Members did not pay regard to the information given, and some continued with prepared speeches based on the Trusteeship Council's observations and the misconceptions involved therein—a fact to which the South African representative drew attention [5].

Representatives of certain States also used the occasion for attacking Respondent's domestic policies in the Union. The South African representative had occasion to point out that such attacks, based on unfounded allegations, were unrelated to the welfare of the peoples of South West Africa.

In a statement to the General Assembly on 26 November 1948, after explaining once more the reasons why South Africa could not enter into a Trusteeship agreement, the South African representative in conclusion recalled:

> "that the League of Nations, at the last session of its Assembly, had not referred to Trusteeship Agreements and had simply stated that territories should be administered as heretofore until other arrangements could be made. The Union was anxious to make arrangements which would be satisfactory to all concerned. All he asked the General Assembly was that it should not make his Government's task more difficult and should believe in his country's good faith as the previous Mandates Commission had done. The Union was not likely to do anything in connexion with the territory of South West Africa which might earn the ill-will of other nations.

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[1] *G.A., O.R., Third Sess., Part I, Fourth Comm.*, 76th Meeting, 9 Nov. 1948, p. 288.

[2] *Ibid.*, 77th Meeting, 10 Nov. 1948, p. 297.

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

[4] *G.A., O.R., Third Sess., Part I, Fourth Comm.*, 78th Meeting, 11 Nov. 1948, pp. 308 ff.

[5] *Ibid.*, 81st Meeting, 16 Nov. 1948, pp. 343-344.

He asked the Assembly to keep the door open for other arrangements [1]."

The majority in the General Assembly nevertheless supported a resolution maintaining its previous requests that South West Africa be placed under the United Nations trusteeship system and expressing regret that Respondent had not yet done so. This resolution (227 (III)) also contained the following recommendation:

"... Without prejudice to its resolutions of 14 December 1946, and 1 November 1947, that the Union of South Africa, until agreement is reached with the United Nations regarding the future of South West Africa, continue to supply annually information on its administration of the Territory [2]."

53. In a letter of 11 July 1949 to the Secretary-General, Respondent referred to the previous explanations for its inability to place South West Africa under the United Nations trusteeship system and, in referring to resolution 227 (III), stated, *inter alia*,

"The recommendation of the General Assembly that the Union should continue to supply information on its administration of South West Africa has been given most careful consideration.

It will be recalled, however, that the Union Government have at no time recognized any legal obligations on their part to supply information on South West Africa to the United Nations, but in a spirit of goodwill, co-operation and helpfulness offered to provide the United Nations with reports on the administration of South West Africa, with the clear stipulation that this would be done on a voluntary basis, for purposes of information only and on the distinct understanding that the United Nations has no supervisory jurisdiction in South West Africa. In this spirit a report was submitted in 1947, and in 1948 detailed replies were furnished to a subsequent questionnaire, formulated by the Trusteeship Council. It was emphasized at the time that the forwarding of information on policy should not be regarded as creating a precedent, or construed as a commitment for the future or as implying any measure of accountability to the United Nations on the part of the Union Government. The Union Government also expressed their confidence that the Trusteeship Council would approach its task in an entirely objective manner and examine the report in the same spirit of goodwill, co-operation and helpfulness as had motivated the Union in making the information available.

These hopes have not been realized. Instead the submission of information has provided an opportunity to utilize the Trusteeship Council and the Trusteeship Committee as a forum for unjustified criticism and censure of the Union Government's administration not only in South West Africa but in the Union as well. Inferences and deductions have been drawn from the information submitted which are quite inconsistent with facts and realities. The misunderstandings and accusations to which the United Nations discussions

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[1] *G.A., O.R., Third Sess., Part I, Fourth Comm.*, 164th Plenary Meeting, 26 Nov. 1948, pp. 589-590.

[2] *G.A. Resolution* 227 (III), 26 Nov. 1948, in *U.N. Doc.* A/810, pp. 89-91.

of this subject have given rise have had repercussions both in the Union and in South West Africa, with deleterious effects on the maintenance of the harmonious relations which have hitherto existed and are so essential to successful administration. Furthermore, the very act of submitting a report has created in the minds of a number of Members of the United Nations an impression that the Trusteeship Council is competent to make recommendations on matters of internal administration of South West Africa and has fostered other misconceptions regarding the status of this Territory.

In these circumstances the Union Government can no longer see that any real benefit is to be derived from the submission of special reports on South West Africa to the United Nations, and have regretfully come to the conclusion that in the interests of efficient administration no further reports should be forwarded. In coming to this decision the Union Government are in no way motivated by a desire to withhold from the world factual and other information regarding South West Africa published in accordance with the customary practice of democratic nations, and information of this nature previously embodied in annual reports to the League of Nations or the United Nations will continue to be made available to the general public in the form of statistics, departmental reports by the Administrator to the South West African Legislature, blue books, and other governmental publications [1]."

At the Fourth Session of the General Assembly in September 1949 the South African representative (with reference to the aforesaid letter) dealt fully with Respondent's decision to discontinue the submission of reports [2].

54. In the premises aforestated the following statements by the Applicants regarding the events over the years 1946 to 1949 are unfounded:

(a) "The Union's announcement [that submission of reports would be discontinued] signalled its repudiation of previous explicit commitments [3]."

There was neither an explicit commitment nor a repudiation.

From the outset Respondent had made it clear that reports would be submitted voluntarily, for information purposes only and not in recognition of any supervisory functions vested in the United Nations.

This was Respondent's attitude throughout and was explicitly repeated in statements to, and correspondence with, the United Nations over the years under consideration. When therefore, the General Assembly failed to observe the reservations attached to Respondent's undertaking, withdrawal thereof did not involve a repudiation of a commitment [4].

(b) "By November, 1948, the Union Government was openly denying

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[1] *U.N. Doc.* A/929, in *G.A., O.R., Fourth Sess., Fourth Comm., Annex*, p. 7.

[2] *G.A., O.R., Fourth Sess., Fourth Comm.*, 128th Meeting, 18 Nov. 1949, p. 200.

[3] *Vide* I, p. 47.

[4] The General Assembly itself in this regard recorded that Respondent had "withdrawn its previous undertaking" (*G.A. Res.* 337 (IV)) in preference to earlier proposed wording objected to by Respondent to the effect that it had "repudiated its previous assurance". *Vide G.A., O.R., Fourth Sess.*, 269th Plenary Meeting, 6 Dec. 1949, p. 535.

its obligations under the Mandate and insisting—in contradiction to its statements of a year earlier—that the Mandate had expired [1]."

In support of this contention Applicants refer to a statement by Mr. Eric Louw, the representative of South Africa, in November 1948, in which he referred to the "previous Mandate, since expired".

From the outset, and throughout the years under consideration, Respondent had repeatedly stated its intention to observe the "sacred trust" which it had assumed, and to administer the Territory "in the spirit of the Mandate".

In fact, the very statement of Mr. Louw, referred to above, contained also the following:

> "It is the firm intention of the South African Government to administer the territory in the spirit of the mandate which was originally conferred upon the Union, and that it will at all times promote to the best of its ability the wellbeing of all sections of the population.
>
> In making this statement, I am obliged to add that the words 'the spirit of the mandate' should not be interpreted as including obligations other than that stated in the preceding sentence. It is unfortunately necessary for me to state this proviso because of the fact that the same phrase, when used by the previous government, was later interpreted in a manner which was not in accordance with the intentions of the then government [2]."

This attitude was repeated in the following statement of the South African representative to the General Assembly on 6 December 1949:

> "My Government is fully conscious of that trust, and whatever our critics may say, it has never deviated from the path along which it is endeavouring to lead the peoples of South West Africa to the achievement of that degree of development which is their right and which it is my Government's duty to ensure to them [3]."

On the other hand, Respondent had from the dissolution of the League taken up the attitude that the Mandate in its original form, and with the obligations imposed therein, particularly that of accountability to the League of Nations, had not survived the League [4].

Respondent, therefore, while denying that the United Nations was vested with supervisory functions over South West Africa (an attitude maintained throughout) at the same time intimated that it would observe the "sacred trust" assumed under the Mandate and would administer the Territory in the spirit of the Mandate (also an attitude maintained throughout).

(c) "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

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[1] *Vide* I, p. 47.

[2] Verbatim text. A summary appears in *G.A., O.R., Third Sess., Fourth Comm.*, 76th Meeting, 9 Nov. 1948, pp. 292-293.

[3] Verbatim text. A summary appears in *G.A., O.R., Fourth Sess.*, 269th Plenary Meeting, 6 Dec. 1949, para. 9, p. 524.

[4] *Vide*, e.g., statement by Field-Marshal Smuts of November 1946, quoted in para. 44, *supra*, and extract from letter of 23 July 1947, cited in para. 47, *supra*.

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', insisting that the administration of the Territory was a matter solely of internal concern, and refusing to render reports to the United Nations [1]."

Respondent's policy underwent no marked change over the period 1946-1949, particularly in that:

(i) At no time after the dissolution of the League did Respondent concede the existence of the Mandate in its original form and as still encompassing its original obligations.

(ii) Respondent throughout denied that the United Nations was vested with any supervisory functions in respect of South West Africa and throughout denied that it was obliged to render reports to the United Nations.

(iii) Respondent throughout maintained its expressed intention to observe the "sacred trust" which it had assumed and to administer the Territory in the spirit of the Mandate.

55. The statement by the representative of Liberia quoted at **I,** page 47, to the effect that Respondent wished to have the annexation of South West Africa accepted as a *"fait accompli"*, was unfounded and was, at the time, specifically denied by the South African representative who said, *inter alia*, the following:

> "I endeavoured to prove to the Committee that not only was the closer association between the Union and the territory, . . . within the authority conferred upon my Government by the mandate, but also that it was not 'annexation'—the territory having retained its separate identity . . .
>
> Yet my Government was accused of having unilaterally annexed the territory and of having placed this organization before an accomplished fact. This criticism was maintained throughout our debates—and that despite the facts of the case to which my delegation repeatedly drew attention. Surely, argument however frank and honest, cannot prevail under such circumstances [2]."

The General Assembly, in resolution 227 (III) of 26 November 1948, took note of Respondent's assurance that its contemplated legislation for closer association "does not mean incorporation".

Respondent had previously made it clear that it did not intend proceeding with its proposal to incorporate South West Africa in the face of the United Nations rejection of that proposal [3].

56. The General Assembly in 1949 decided to ask the Court for an Advisory Opinion. But it is somewhat misleading to suggest, as the Applicants do, that this happened because—

> "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 . . . [4] ".

Indeed there was major disagreement between other United Nations Members themselves as to certain aspects of the legal situation which

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[1] *Vide* **I**, p. 48.

[2] Verbatim text. A summary appears in *G.A., O.R., Fourth Sess.*, 269th Plenary Meeting, 6 Dec. 1949, paras. 13 and 14, p. 524.

[3] *Vide*, e.g., paras. 44 and 47, *supra*.

[4] *Vide* **I**, p. 48.

had arisen, particularly with regard to the question whether Respondent was obliged to submit a trusteeship agreement for South West Africa [1].

On the other hand, in view of Applicants' Submissions 2, 7 and 8 in these proceedings, concerning supervisory functions, reports and petitions, it is of particular importance to note that there was substantial agreement between Respondent and the other United Nations Members to the effect that the supervisory powers of the League had not been transferred to the United Nations in respect of Mandates not converted into trusteeships.

In order to facilitate an accurate review of the attitudes of United Nations Members in this last-mentioned respect, Respondent attaches an Annex, marked "A", the *First Part* of which comprises an *index* to statements made by the representatives of *all* the States which participated in debates on South West Africa over the years 1947, 1948 and 1949, and the *Second Part* of which contains *extracts* from statements made by representatives of *certain* States over the said years [2].

In the following paragraphs, Respondent indicates briefly what it submits to be significant aspects emerging from the contents of Annex A.

57. *(a)* As reflected in the First Part of Annex A, the representatives of 41 Member States addressed the various organs of the United Nations —the Fourth Committee, the Trusteeship Council and the General Assembly—during the year 1947 on the question of South West Africa [3].

(b) The statements made by the South African representatives conveyed Respondent's attitude clearly and unambiguously, namely that Respondent was not obliged to conclude a trusteeship agreement for South West Africa, and was not prepared to do so [4], and that, in the absence of a trusteeship agreement, the United Nations had no supervisory jurisdiction over South West Africa [5]. In this attitude Respondent remained consistent throughout.

(c) With regard to the other 40 States which participated in the debates during 1947, one finds that they differed in their attitudes regarding various aspects of the situation.

Some contended that Respondent was legally obliged to enter into a trusteeship agreement concerning South West Africa; others denied such an obligation [6].

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[1] *Vide* summary of attitudes of Members as given in the Written Statement of the United States of America in *International Status of South-West Africa, Pleadings, Oral Arguments, Documents*, pp. 122-123, from which it appears that States which took part in debates on this particular question were more or less equally divided.

[2] Respondent's proposal regarding incorporation of South West Africa was rejected by the resolution of the General Assembly on 14 December 1946. Debates regarding Respondent's obligations under the Mandate, as a result of the rejection of the incorporation proposal, started in 1947.

[3] In 1947 the Members of the United Nations totalled 57, of whom 51 were original Members. Of the 51, 34 had been original Members of the League of Nations and 32 had been Members of the League at the time of its dissolution.

[4] *G.A., O.R., First Sess., Second Part, Fourth Comm.*, Part I, 19th Meeting, 13 Nov. 1946, pp. 101-102, and *G.A., O.R., Second Sess., Fourth Comm.*, 31st Meeting, 25 Sep. 1947, pp. 3-9.

[5] *G.A., O.R., Second Sess., Fourth Comm.*, 33rd Meeting, 27 Sep. 1947, pp. 13-18, and *G.A., O.R., Second Sess.*, 105th Plenary Meeting, 1 Nov. 1947, pp. 626-638. *Vide* paras. 48 to 51, *supra*.

[6] *Vide* footnote 1, above.

Some States contended for an obligation on the part of Respondent to submit to the Secretary-General in terms of Article 73 *(e)* of the Charter, statistical and other information of a technical nature—a different and very much lesser obligation than that of reporting and accounting under the Mandate.

Other States again expressed the view that Respondent, in undertaking to submit annual reports for the information of the United Nations, had committed itself to the United Nations. This view could only rest on a misconception of the nature and extent of Respondent's voluntary undertaking, which was later withdrawn [1].

There were also States that contended that the Mandate had lapsed altogether, and others that contended not for legal obligations on the part of Respondent, but for obligations which they termed "political" or "moral".

But, whatever these differences, one thing is clear, and that is that not a single State, in response to Respondent's attitude, either alleged or suggested that there was at any time an agreement, express or implied, or any understanding, whereby the League's supervisory powers over the Mandate became vested in the United Nations, or whereby Respondent became obliged to report and account to the United Nations regarding compliance with substantive mandate obligations.

(d) At least 14 of the 41 States which took part in the debates acknowledged, either expressly or by clear implication, that in the absence of a trusteeship agreement the United Nations would have no supervisory powers in respect of South West Africa. These States were Australia, China, Colombia, Cuba, France, India, Iraq, the Netherlands, New Zealand, Pakistan, the Philippine Republic, the Soviet Union, the United States of America and Uruguay. Extracts from the statements made by representatives of these 14 States are quoted at pages 275 to 282 of the Second Part of Annex A.

It is not necessary to recite all such extracts. The following are indicative of the tenor of the statements made:

Mr. Gerig, representative of the United States of America, in the Trusteeship Council on 12 December 1947:

"*It was said here* earlier this afternoon, and *I did not hear any member object*, that while we all hope—my delegation as much as any delegation feels that way—that there will be a trusteeship agreement for this territory [South West Africa], *we do not, in the absence of a trusteeship agreement, have supervisory functions over this territory*. Therefore, I do not think we ought to imply that we do have supervisory functions to ensure that the Union Government discharges its duties under the present mandate, admitting that it exists." (Italics added.)

Mr. Kerncamp, representative of the Netherlands in the General Assembly on 1 November 1947:

"The mandate system now does not operate. As there is no longer a supervising authority, there is no longer a mandate system. The voluntary transmission of information, merely for the sake of information, by the Union of South Africa to the Trusteeship Council

[1] A matter dealt with in paras. 44 and 48 to 53, *supra*.

does not give the Council the same jurisdiction as the Permanent Commission on Mandates had.

. . . we consider that the present situation constitutes a step backward, in so far as *a territory once under international supervision is now under no superintendence . . .*" (Italics added.)

Draft resolution proposed by the representative of India in the General Assembly on 1 October 1947 (para. 5):

"*Whereas* the territory of South West Africa, though not self-governing, *is at present outside the control and supervision of the United Nations.*" (Italics added.)

The statements on behalf of Pakistan and China were equally explicit, and those on behalf of Australia also very clear on the point. In other cases the attitude emerged by necessary implication. Thus the representatives of Colombia, Iraq, the Soviet Union and Uruguay, considered that the Mandate had lapsed altogether—from which would follow that there could be no duty of reporting and accounting with regard to Mandate obligations. And in the cases of France, New Zealand, Cuba and the Philippine Republic the statements were to the effect that the information in fact submitted by South Africa could be examined for information purposes only, or not at all.

58. During the years 1948 and 1949, in debates on South West Africa, similar views were expressed also on behalf of at least four other States. They were Canada [1], Costa Rica [2], Greece [3], and the United Kingdom [3].

With a view to curtailment of the record, the extract from the statement made by the representative of the lastmentioned State only is recited here.

Sir Terence Shone, in the Fourth Committee on 24 November 1949:

"It could not be said that the Government of the Union of South Africa had repudiated its previous assurance [concerning rendering of reports] since *it had complete liberty to decide whether or not to transmit information.*" (Italics added.)

59. Also in respect of other mandated territories, similar views were expressed from time to time up to 1948 by representatives of Member States.

(a) In a debate concerning a draft Trusteeship Agreement for Western Samoa in a sub-committee of the Fourth Committee on 22 November 1946, the representative of New Zealand stated as follows:

"New Zealand, although it would be most co-operative, could not be forced to amend its draft agreement. The result of disapproval of the draft agreement by the General Assembly would be that New Zealand would carry on, as in the past, its sacred trust to lead the people of Samoa in their orderly progress towards self-government. *In this eventuality, New Zealand would have to carry on without the privilege of the supervision by the United Nations which it desired* [4]." (Italics added.)

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[1] *Vide* Annex A, Second Part, p. 285, *infra*.

[2] *Ibid.*, p. 282.

[3] *Ibid.*, p. 286.

[4] *G.A., O.R., First Sess., Second Part, Fourth Comm.*, Part II, 5th Meeting, 22 Nov. 1946, p. 28.

(b) On 2 April 1947, during the 124th Meeting of the Security Council, there was a discussion of a draft trusteeship agreement for the former Japanese Mandated Islands, more particularly with reference to a Polish amendment to insert in the preamble the words: "*Whereas Japan has violated the terms of the above mandate of the League of Nations and has thus forfeited her mandate. . . .* [1]"

Mr. Gromyko's statement, on behalf of the Soviet Union, contained, *inter alia*, the following:

"It seems to me that there is no need for such an amendment. *There is no continuity, either legal or otherwise, between the mandatory system of the League of Nations and the Trusteeship System laid down in the United Nations Charter.* There is therefore nothing which might entitle the Security Council to discuss this question, let alone take any decisions on it. The mandatory system of the League of Nations is distinct from the Trusteeship System which the United Nations is now trying to establish." (Italics added.)

After referring to "a difference in the fundamental principles" of the two systems, he proceeded:

"It seems to me, moreover, that in this connexion we should not lose sight of the fact that, since there is no continuity such as would permit and justify the discussion of this question by the Security Council, the latter cannot investigate the substance of the matter. For the reasons which I have just stated, *the Security Council is not competent to decide to what extent Japan may have violated the conditions of the mandate system and the duties involved in the administration of mandated territories* [2]." (Italics added.)

(c) The case of Palestine was investigated and reported upon by a United Nations Special Committee, consisting of representatives of the following 11 Members of the United Nations: Australia, Canada, Czechoslovakia, Guatemala, India, Iran, the Netherlands, Peru, Sweden, Uruguay and Yugoslavia.

The following are extracts from the Committee's report dated 3 September 1947, all from portions *unanimously* agreed to by the Committee.

"Following the Second World War, the establishment of the United Nations in 1945 and the dissolution of the League of Nations the following year opened a new phase in the history of the mandatory régime. The mandatory Power, in the absence of the League and its Permanent Mandates Commission, had *no international authority to which it might submit reports and generally account* for the exercise of its responsibilities in accordance with the terms of the Mandate. *Having this in mind*, at the final session of the League Assembly *the United Kingdom representative declared* that Palestine would be administered *'in accordance with the general principles'* of the existing Mandate until 'fresh arrangements had been reached' [3]." (Italics added.)

After recommending unanimously that: "The Mandate for Palestine

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[1] *S.C., O.R., Second Year*, No. 31, 124th Meeting, 2 Apr. 1947, pp. 643-644.
[2] *Ibid.*, p. 648.
[3] *G.A., O.R., Second Sess., Sup.* No. 11, Vol. I (A/364), pp. 26-27.

shall be terminated at the earliest practicable date[1]", the Committee commented as follows:

"*(d)* It may be seriously questioned whether, in any event, the Mandate would now be possible of execution. The essential feature of the mandates system was that it gave an international status to the mandated territories. This involved a positive element of international responsibility for the mandated territories and *an international accountability to the Council of the League of Nations* on the part of each mandatory for the well-being and development of the peoples of those territories. The Permanent Mandates Commission was created for the specific purpose of assisting the Council of the League in this function. But the League of Nations and the Mandates Commission have been dissolved, *and there is now no means of discharging fully the international obligation with regard to a mandated territory other than by placing the territory under the International Trusteeship System of the United Nations.*

(e) The International Trusteeship System, however, *has not automatically taken over* the functions of the mandates system with regard to mandated territories. Territories can be placed under Trusteeship only by means of individual Trusteeship Agreements approved by a two-thirds majority of the General Assembly.

(f) The most the mandatory could now do, therefore, in the event of the continuation of the Mandate, would be to carry out its administration, in the spirit of the Mandate, without being able to discharge its international obligations in accordance with the intent of the mandates system. At the time of the termination of the Permanent Mandates Commission in April 1946, the mandatory Power did, in fact, declare its intention to carry on the administration of Palestine, pending a new arrangement, in accordance with the general principles of the Mandate. The mandatory Power has itself now referred the matter to the United Nations[2]." (Italics added.)

The report also contained a special note by Sir Abdur Rahman, representative of India, in which note the following passage occurred:

"Moreover, the international machinery in the form of the Permanent Mandates Commission, which had been created for the purpose of scrutinizing the actions of the Mandatory Powers, and to which they were bound to submit annual reports, has, along with the League of Nations, ceased to exist. *There are no means by which the international obligations in regard to mandates can be discharged by the United Nations.*

The Mandate has in any case become infructuous, and must, in my opinion, go. Whether it could be superseded by any other system within the present Charter is a different matter, and will be dealt with when I consider the solution of the present problem[3]." (Italics added.)

(d) In a debate regarding Palestine in the Security Council on 19 March 1948, the representative of the United States of America stated:

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[1] *G.A., O.R., Second Sess., Sup.* No. 11, Vol. I (A/364), p. 42.
[2] *Ibid.*, p. 43.
[3] *Ibid.*, Vol. II (A/364/Add. 1), p. 38.

> "The United Nations does not automatically fall heir to the responsibilities either of the League of Nations or of the Mandatory Power in respect of the Palestine Mandate. The record seems to us entirely clear that *the United Nations did not take over the League of Nations Mandate system* [1]." (Italics added.)

60. It was only as from the end of 1948 that certain States voiced any contradiction at all to Respondent's above contention regarding supervisory jurisdiction in the absence of trusteeship. This contradiction came from five States: Belgium, Brazil, Cuba, India and Uruguay.

The view expressed by the representative of Belgium was that Article 80 of the Charter preserved the benefits of international supervision for the people of South West Africa [2].

The representative of Brazil took up the attitude that, inasmuch as South West Africa had been placed under the mandate system of the League of Nations, it was "under the supervision of the community of Nations, namely the General Assembly" [3].

On behalf of Cuba, the view was put in 1949 that "the rights and duties of the United Nations were the same as those of the League of Nations for both organizations represented the international community" [4].

The representative of India contended in 1948 that:

> "The provisions of Article 80 of the Charter, safeguarding the existing rights of the people of South West Africa until a Trusteeship Agreement had been concluded, had to be recognized. One of these rights, under the mandate system, had been the examination, by the Permanent Mandates Commission, of annual reports ... That right could not be extinguished merely because the Permanent Mandates Commission had ceased to exist [5]."

The argument advanced by the representative of Uruguay in 1948 was that Article 80 of the Charter "safeguarded the rights of indigenous populations and imposed on the administering authorities the duty of reporting progress and of communicating to the international community how they were fulfilling their obligations". The argument then proceeded on the line that the United Nations had taken the place of the League of Nations as the "co-ordinating centre" of the "civilized and organized international collectivity" with the result that it was "through the organization [United Nations] that the Union of South Africa should fulfil its obligations towards the international community and give an account of its administration" [6].

In the cases of the lastmentioned three States, Cuba, India and Uruguay, these contentions were in conflict with the statements made, or attitudes adopted, by them in 1947.

For the earlier statement by the representative of Cuba, see Annex A, Second Part, page 276, *infra*.

In the case of India, reference is made to paragraph 57 *(d)*, *supra*. Attention is also drawn to the report on Palestine, paragraph 59 *(c)*,

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[1] *S.C., O.R., Third Year*, Nos. 36-51, 271st Meeting, 19 Mar. 1948, p. 164.
[2] Annex A, Second Part, p. 282, *infra*.
[3] *Ibid.*, p. 285.
[4] *Ibid.*, pp. 285-286.
[5] *Ibid.*, p. 283.
[6] *Ibid.*, pp. 284-285.

supra, and to the written statement submitted by India in the 1950 Advisory Proceedings, which contained the following:

> "It is respectfully submitted that the only respect in which the position has changed [as a result of the dissolution of the League] is that Article 6 of the Mandate and the first portion of Article 7 of the Mandate have become incapable of being complied with. In other respects, the rights and obligations of the mandatory are exactly the same as they were before. The result is that the mandatory is not obliged to submit an annual report under Article 6 and that it cannot modify the terms of the Mandate at all because the procedure by which it could have modified the terms of the Mandate has ceased to be applicable [1]."

And, in the case of Uruguay, the statement made by its representative in 1948 runs counter to the contention advanced on its behalf in 1947 [2] and to its attitude concerning the Mandate for Palestine [3].

The Period 1950-1960

INTRODUCTION

61. A portion of Applicants' Memorials with the same heading as the above [4] contains a brief summary of events over the period 1950-1960. The broad outlines of fact as presented therein are substantially correct; but certain statements require comment with a view to proper perspective.

(a) The importance of the "restrictive nature" of the *Ad Hoc* Committee's terms of reference [5] will be dealt with below in the year-by-year chronology of events. There was, however, a further important reason, also reverted to below, for the failure of the negotiations between Respondent and this Committee. This was the insistence by the majority of Members in the General Assembly that Respondent should place South West Africa under United Nations trusteeship—despite Respondent's objections and the Court's Opinion that it was not obliged to do so.

(b) While the reports of the Committee on South West Africa have in fact "annually criticized the Union sharply for the manner in which the Union administers the territory" [6], the question whether the criticism was justified is not canvassed in this part of the Counter-Memorial [7]. Respondent on many occasions protested that the Committee's findings were based on unreliable information and were unjustified.

(c) The statement that "the Union has refused to co-operate with the Committee" [6] (on South West Africa) is an over-simplification, possibly derived from the Committee's own interpretation of the

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[1] *International Status of South-West Africa, Pleadings, Oral Arguments, Documents*, p. 148.
[2] As to which *vide* Annex A, Second Part, pp. 281-282, *infra*.
[3] As to which *vide* para. 59 *(c)*, *supra*
[4] *Vide* I, pp. 48-51.
[5] *Ibid.*, p. 49.
[6] *Vide* I, p. 50.
[7] *Vide* para. 1, *supra*.

situation. The statement is correct in so far as it signifies that Respondent was not prepared to accept supervision by the Committee of the administration of South West Africa. Failure of negotiations, however, was again due mainly to the restrictive terms of reference on which the Committee was to negotiate, as will be dealt with later.

(d) The account of negotiations between Respondent and the Good Offices Committee [1] makes no mention of the fact that there *was*, as between Respondent and that Committee, agreement as to the possibility of an approach which merited investigation, but that the Committee's recommendation in that regard was rejected by the majority in the General Assembly—a matter more fully dealt with later. Moreover, the words "existing rights of the United Nations to supervise the administration of the Mandate" [1] beg the question in respect of one of the vital issues requiring negotiation. For reasons to be dealt with later, Respondent was unable to accept the 1950 Advisory Opinion of the majority of the honourable Court with regard to supervision, on which Opinion the reference to "existing rights" is apparently based.

(e) The statement that "repeated debates and resolutions have failed to bring about the Union's compliance with the Mandate" [2] also involves an assumption consistently disputed by Respondent. Respondent maintains that it faithfully honours the spirit of the Mandate in the administration of the Territory (a matter not canvassed herein [3]) and that it owes no accountability to the United Nations in respect thereof, a matter fully dealt with later.

Summary of the Court's Advisory Opinions

62. Applicants' summary of the Court's three Advisory Opinions as set out in the Memorials [4] does not require comment save that with regard to the Advisory Opinion of 11 July 1950, Respondent desires to draw attention to the following:

(a) The following quotation from the Opinion of the majority, namely that Respondent'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 fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon",

was clearly intended to apply only to the obligations relating to the administration of the Territory, and not to the obligations relating to the machinery for implementation, i.e., the obligations to accept international supervision and to submit reports [5]. The last-

[1] *Vide* I, p. 50.
[2] *Vide* I, p. 51.
[3] *Vide* para. 1, *supra*.
[4] *Vide* I, pp. 51-54.
[5] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 133.

mentioned obligations were stated by the majority of the Judges to be "an important part of the mandates system" [1].

(b) Applicants' statement that—

"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 [2]",

reflects the majority opinion only. Two Judges (McNair and Read) dissented, expressing the view that the supervisory powers of the League had not passed to the United Nations, and that Respondent was not obliged to submit reports and transmit petitions to the United Nations.

Respondent will not deal here with the reasons advanced by the Court for its conclusions, but will do so in stating Respondent's legal contentions in Chapters III to V below.

YEAR-BY-YEAR CHRONOLOGY OF RELEVANT EVENTS: 1950-1960

1950

63. When the Fourth Committee considered the Court's Advisory Opinion of 11 July 1950 the South African representative stated at the outset that Respondent's attitude to the Opinion was "a matter in which his Government would have to define its position at a later moment" in the light of the debate in, and any resolution which might eventually emanate from, the General Assembly. He assured the Fourth Committee that Respondent did not wish to close the door to a friendly solution of a question which had been in dispute for so long and hoped that the United Nations would not do so either. He pointed out that while the Court's Opinion was entitled to the greatest respect, it was not automatically binding on the parties concerned, as would be a judgment.

Furthermore, since the Court had given its Opinion, important facts had come to light bearing directly on the reasoning and conclusions of the Court with regard to certain material points. He contended that if these facts had been placed before the Court it would probably not have come to the conclusion reached (in the majority opinion) with regard to transfer to the United Nations of the League's supervisory functions.

As to the additional facts which had come to light he dealt at length with the circumstances surrounding, and the developments leading up to, the adoption by the League of its resolution of 18 April 1946, with special reference to the first Chinese draft resolution [3].

He stated that the additional information had to be carefully weighed and considered by his Government together with:

(a) the fact that several widely varying interpretations of the Court's Opinion had been put forward in the Fourth Committee; and

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[1] *International Status of South-West Africa, op. cit.*, p. 136.

[2] *Vide* I, p. 52.

[3] *Vide* para. 41, *supra*.

(b) the attitude of the United Nations in regard to the international position of South West Africa as expressed in any resolution by the General Assembly.

He concluded his statement as follows:

> "It would be premature to expect me to say or do anything which could possibly be interpreted as binding my Government in any way until it has had every opportunity of considering fully and carefully the whole problem in all its aspects [1]."

With regard to this explanation by Respondent's representative to the Fourth Committee, Applicants at I, page 55, quote from a statement made in response by the representative of China (Mr. Liu) who said, *inter alia*,

> "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 [2]."

The relevance of the fact that transfer was not forbidden in an enquiry whether in fact there was a transfer, is not understood. In any event this statement by the representative of China in 1950 strikes a significant contrast with his attitude in 1948 when he contended as follows in the Fourth Committee:

> "It was true that, as no trusteeship agreement had been concluded for South West Africa, the United Nations could not intervene or exercise its power of supervision in regard to that Territory [3]."

64. While it was evident that the majority of Members of the United Nations were prepared to accept the Advisory Opinion, there was a difference of view in regard to the manner in which the Opinion was to be implemented. Some Members favoured an immediate decision to set up an *ad hoc* body to deal with annual reports and petitions, while others felt that a hasty decision would prove ineffective, that the Fourth Committee acting unilaterally had no right to set up and impose supervisory machinery and that Respondent's co-operation was essential. This resulted in the eventual adoption of a compromise resolution (449 A (V)) accepting the Court's Advisory Opinion and, *inter alia*, establishing an *Ad Hoc* Committee,

(a) to confer with Respondent on the "procedural measures necessary for the implementation of the Advisory Opinion"; and

(b) to examine reports and petitions [4].

65. Respondent could not support the adoption of this resolution, and explained to the General Assembly that, in its view, the resolution, *inter alia*,

(a) took no account of the additional facts referred to in paragraph 63 above;

(b) established unilaterally, despite Respondent's protests, machinery for the examination of reports and petitions;

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[1] Verbatim text. A summary appears in *G.A., O.R., Fifth Sess., Fourth Comm.*, 196th Meeting, 4 Dec. 1950, para. 52, p. 364. (*Vide* also paras. 41-51, pp. 362-364.)

[2] *Vide* I, p. 432.

[3] Annex A, Second Part, p. 282, *infra*.

[4] *G.A. Resolution* 449 A (V), 13 Dec. 1950, in *G.A., O.R., Fifth Sess., Sup.* No. 20 (A/1775), pp. 55-56.

(c) assigned these supervisory functions to the very body created for the purpose of conferring with Respondent on the implementation of the Court's Opinion; and

(d) restricted the terms of reference in a way which held out little hope of fruitful discussions [1].

66. Although resolution 449 A (V) created machinery for negotiation, the General Assembly on the very same date adopted resolution 449 B (V), again urging Respondent to place South West Africa under the United Nations trusteeship system.

The inconsistency of on the one hand offering "negotiations" with a view to amicable settlement of a dispute, while on the other hand making what in effect amounted to an extreme demand relative to that dispute, namely United Nations trusteeship for South West Africa, was to become a regularly recurring feature in the history of this matter.

67. Applicants' statements that *"The Union, however, made it clear very early that it would not act in accord with the Advisory Opinion . . ."* [2], and *"The Union's rejection of the Court's rulings in its Advisory Opinion was made manifest from the outset* [3]," are incorrect, particularly in so far as the context appears to suggest that such an attitude was displayed in the 1950 debates of the General Assembly. Indeed, Respondent made it clear at the outset that it would be able to define its position with regard to the Court's Opinion only after careful consideration had been given to the debates and to any resolutions which might be adopted. (*Vide* para. 63 above.)

1951

68. Respondent, despite its opposition to resolution 449 A (V) and its expressed views regarding the profitability of the proffered negotiations, agreed to confer with the *Ad Hoc* Committee on South West Africa in an effort to arrive at a definite settlement of the South West Africa question [4].

69. In the course of the discussions which ensued, the South African representative emphasized that the Court's Opinion was advisory and thus not binding either upon the United Nations or upon Respondent. He explained fully the reasons why Respondent could not accept the Court's Opinion relating to accountability to the United Nations as a supervisory authority in succession to the League. Nevertheless, his Government realized that negotiation would be impossible if it were to maintain its standpoint rigidly [5].

70. Respondent accordingly expressed its preparedness, in deference to the wishes of the General Assembly, to negotiate a new international instrument embodying those obligations of the Mandate which, in the view of the Court, related directly to the "sacred trust" (Art. 2 to 5 of the Mandate), and, if considered necessary, also an obligation, similar to that of Article 7 of the Mandate, to submit to the jurisdiction of the International Court of Justice. Thereby the difference of view as to

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[1] *G.A., O.R., Fifth Sess.*, Vol. I, 322nd Plenary Meeting, 13 Dec. 1950, p. 629.
[2] *Vide* I, p. 55.
[3] *Ibid.*, p. 56.
[4] *Vide U.N. Doc.* A/AC.49/SR.2, pp. 2-4.
[5] *Vide U.N. Docs.* A/AC.49/SR.3 and 7.

whether the Mandate had lapsed or not would be rendered a matter of no further practical importance.

The new international instrument would be concluded with the three remaining Principal Allied and Associated Powers of the First World War (France, the United Kingdom and the United States of America) as principals and not as agents of the United Nations. These three Powers were historically associated with the Mandate, were Permanent Members of the Security Council of the United Nations and had a recognized position in international affairs [1].

71. The Committee felt that Respondent's proposals "did not give the United Nations a sufficient role" [2]. The South African representative accordingly indicated that, after further consideration, his Government was prepared to accept a compromise whereby the idea of a fresh agreement with the three Powers should be sanctioned by the United Nations prior to the negotiation of such an agreement.

This still did not satisfy the Committee, and after further consideration Respondent intimated its willingness to have the actual agreement submitted to the United Nations for confirmation.

The South African representative further indicated that if the Committee considered Respondent's proposal as falling outside its terms of reference, he would be glad to submit to his Government any suggestion from the Committee indicating how the proposal could be brought within the Committee's competence [3].

72. Despite the concessions offered by Respondent, the Committee found the proposal unacceptable "because it did not allow for a full implementation of the advisory opinion" and "could not therefore be considered as within [its] terms of reference" [4].

The Committee in turn proposed a draft agreement embodying the terms of the Mandate in a modified form, and providing, *inter alia*, for new supervisory machinery under the United Nations [5].

73. Respondent's representative explained to the Committee the reasons why Respondent could not accept the principle of accountability to the United Nations embodied in the Committee's proposal.

He emphasized that it would be virtually impossible to come to any arrangement involving such accountability without extending the obligations which Respondent had assumed under the Mandate. This was evident from the broader membership, and the fundamentally different structure, of the United Nations as compared with the League of Nations. The most important difference in structure was that relating to voting procedure, in that the League rule of unanimity did not apply in the United Nations. This was of particular significance in view of the basic ideological differences existing within the United Nations [6].

74. In a letter to the *Ad Hoc* Committee on 20 September 1951 Respondent reiterated the basic elements of the concessions which

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[1] *U.N. Doc.* A/1901, in *G.A., O.R., Sixth Sess., Annexes* (Agenda item 38), pp. 2-11.
[2] *Ibid.*, para. 25 *(d)*, p. 5.
[3] *Ibid.*, para. 25.
[4] *Ibid.*, paras. 26 and 27, pp. 5-6.
[5] *Ibid.*, para. 27, pp. 5-6.
[6] *U.N. Doc.* A/AC.49/SR.11, p. 7.

it was prepared to make in an effort to achieve a settlement which would "satisfy the major desires" of the United Nations and of Respondent, and expressed regret that the Committee had felt that the proposal would not be acceptable to the General Assembly. On the other hand, the Committee's proposal did not provide for certain requirements considered by Respondent to be basically essential. If these were recognized, Respondent would not be unwilling to concede certain basic requirements of the United Nations, such as the principle of international accountability and provision for United Nations approval for any change in the international status of the Territory.

Respondent also reiterated the difficulties experienced in the submission of reports to the United Nations, and pointed out that, while it was not prepared to submit reports, information on the Territory from official sources was "always available" [1].

75. The *Ad Hoc* Committee, however, intimated that Respondent's proposal was "not within its terms of reference", and expressed its willingness to continue negotiations on the basis of its own counter-proposal [2].

76. Respondent remained desirous to seek a mutually satisfactory solution. Before negotiations could, however, be resumed, the Fourth Committee on 16 November 1951, at the Sixth Session of the General Assembly, granted oral hearings to petitioners on South West Africa [3].

This decision was taken despite Respondent's repeated intimations that it did not accept accountability to the United Nations, and in spite of the fact that implementation of the Court's Advisory Opinion, including the question of petitions, was a matter on which negotiations were still in progress; this seriously hampered negotiations [4].

1952

77. The Sixth Session of the General Assembly on 19 January 1952 adopted resolution 570 A (VI) reconstituting the *Ad Hoc* Committee for the purpose of "conferring" with South Africa "concerning means of implementing the Advisory Opinion". At the same time, however, and despite Respondent's protests, the Committee was authorized to examine reports and petitions with regard to South West Africa.

The Assembly also reiterated its previous resolutions pressing for South West Africa to be placed under United Nations Trusteeship [5].

78. Respondent had doubts as to the likelihood of fruitful results flowing from further negotiations with the *Ad Hoc* Committee. These doubts were founded upon the following considerations, pointed out to the United Nations on various occasions:

(a) The divergence in the views held by Respondent and the majority in the United Nations. Respondent, while carrying out the spirit of the "sacred trust" which it had assumed under the Mandate, did

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[1] *U.N. Doc.* A/1901, para. 32, pp. 7-8.

[2] *Ibid.*, para. 33, p. 8.

[3] *U.N. Doc.* A/C.4/190, in *G.A., O.R., Sixth Sess., Annexes* (Agenda item 38), p. 17.

[4] *Vide G.A., O.R., Sixth Sess., Fourth Comm.*, 204th Meeting, 16 Nov. 1951, pp. 17-19.

[5] *G.A. Resolution* 570 B (VI), 19 Jan. 1952, in *G.A., O.R., Sixth Sess., Sup.* No. 20 (A/2119), p. 64.

not recognize accountability to the United Nations in respect of its administration of South West Africa, whereas the majority in the General Assembly held the view that Respondent was obliged to account to the United Nations and in fact continued to press for a trusteeship agreement for the Territory.

(b) The manner in which the South West Africa issue had been dealt with in the United Nations, particularly the acrimony displayed by some Members in the debates, marred objective consideration and jeopardized negotiations.

(c) The restrictive nature of the Committee's terms of reference, which left little hope for a compromise inasmuch as it required Respondent to accept accountability (in accordance with the majority opinion of 1950) as the only basis for negotiation.

Respondent was, however, desirous of arriving at an amicable arrangement and was therefore prepared to explore all avenues. On being assured by the *Ad Hoc* Committee in 1952 that its "terms of reference were such as to allow it to discuss any reasonable proposal", negotiations were resumed in September 1952 [1].

79. In the circumstances Respondent hoped that its proposal of 1951 [2] would be reconsidered on its merits. In re-submitting that proposal the South African representative contended that agreement had been reached in principle with regard to the revival of the clauses of the Mandate dealing with the "sacred trust". Moreover, Respondent had agreed on the fundamental principles which the Committee regarded as essential, the only exception being the handling of annual reports and petitions. In this last respect his Government, depending on satisfactory progress of the negotiations, would be prepared to go somewhat further; it would make available information on its administration to those with whom a new instrument would be concluded.

While the new instrument would be negotiated with the three Principal Allied and Associated Powers as principals, its general principles would have to be approved by the United Nations, and if found acceptable, the United Nations would ascertain whether the three Powers were prepared to act as the second party [3]. Before the new instrument could come into force the United Nations would have to approve it, thus having a double opportunity of examining the instrument [4].

80. The Committee enquired whether Respondent would make available annual reports as complete as those furnished to the League. The South African representative replied that under its proposal, his Government would supply annually to the three Powers information on South West Africa as complete as that furnished to the League of Nations on the basis of the Permanent Mandates Commission questionnaire.

Upon a further enquiry from the Committee, whether Respondent would recognize the principle of international supervision under a pro-

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[1] *U.N. Doc.* A/2261, para. 7, in *G.A., O.R., Eighth Sess., Annexes* (Agenda item 36), p. 2.

[2] *Vide* para. 70 *et seq., supra.*

[3] The representative of the United States of America—the only one of the three Powers represented on the *Ad Hoc* Committee—had indicated his Government's willingness in principle to act as a member of the second party if the United Nations agreed. *Vide U.N. Doc.* A/AC.49/SR.4, p. 3.

[4] *Vide U.N. Doc.* A/2261, paras. 11-13, pp. 2-3.

cedure as nearly as possible analogous to that under the League, the representative stated that Respondent's attitude would depend on the progress of the negotiations on all the other points.

He therefore again pressed the Committee for its views on the merits of Respondent's proposal, stating that to facilitate agreement, Respondent had made considerable concessions and had indicated its readiness, under certain conditions, to make further proposals [1].

81. While the Committee expressed its appreciation of the efforts made by Respondent and noted that Respondent had extended its 1951 proposal, the Committee insisted on accountability to and supervision by *the United Nations* because it felt that its terms of reference so required [2].

82. Despite the fact that the negotiations were not conclusive, by the end of 1952 the Committee was able to record that there was agreement in principle on the following points:

(a) That a new instrument, replacing the former Mandate for South West Africa, should be concluded;

(b) That the new instrument should revive the "sacred trust" contained in Articles 2 to 5 of the Mandate, with minor modifications which would not affect in any way the principle of the "sacred trust";

(c) That, under certain conditions, Respondent would make available information on its administration of South West Africa;

(d) That such information would be as full as that once supplied under the mandates system; and

(e) That there should be some form of supervision of the administration of South West Africa [3].

83. The points of difference, as also recorded by the Committee, were to the following effect:

(a) How supervision of the administration of South West Africa should be carried out:

The Committee insisted on United Nations supervision, "even though it should not exceed that which applied under the mandates system". On the other hand Respondent had come to the conclusion that any obligation which would carry with it supervision by the United Nations, would be more onerous and would go beyond the obligations undertaken under the mandates system.

(b) The second party to the proposed instrument:

Respondent could not contemplate concluding an agreement directly with the United Nations, although the agreement which it was prepared to negotiate and conclude, would have to be approved by the United Nations. On the other hand the Committee considered that the agreement should be concluded with the United Nations or with an agency appointed by it [4].

84. From the above it is clear that, far from Respondent frustrating the *Ad Hoc* Committee's efforts at negotiation—as is alleged at **I**, page 58—the substantial measure of agreement which had by the end of 1952 actually been reached between Respondent and the Committee

[1] *U.N. Doc.* A/2261, paras. 15 and 16, pp. 3-4.
[2] *Ibid.*, para. 20, p. 4.
[3] *Ibid.*, para. 23, p. 5.
[4] *U.N. Doc.* A/2261, para. 24, p. 5.

was due to the fact that Respondent was prepared to make proposals and concessions in regard thereto. Whatever frustration there was, resulted, in fact, from the Committee's restrictive terms of reference.

1953

85. The inconclusive negotiations of 1952 were resumed in June 1953 when the South African representative again requested that the Committee, as a whole, state its views with regard to the essential elements of Respondent's proposal.

The Committee intimated, that inasmuch as Respondent wished the three Powers to act as principals and not as agents of the United Nations, the proposal did not provide means for implementing the Advisory Opinion, and that the Committee was therefore unable to accept the proposal as a basis for detailed discussion.

86. The South African representative referred again to Respondent's view that it would be well-nigh impossible to devise any arrangement whereby Respondent would be accountable to the United Nations for its administration of South West Africa without extending the degree of supervision and, therefore, Respondent's obligations. And he enquired how the Committee proposed to cope with the difficulties in this regard, especially the absence of the unanimity rule in the United Nations voting procedure.

The Committee was, however, not prepared to enter into that enquiry until Respondent had accepted the principle of United Nations supervision. This Respondent could not do without the assurance that its obligations would not be extended. Respondent reiterated its willingness to consider proposals which would not involve such extension. The Committee, however, did not attempt to show how United Nations supervision could be devised without extending Respondent's obligations [1].

The negotiations consequently did not lead to positive results.

87. At its Eighth Session the General Assembly, on 28 November 1953, rejected Respondent's proposal to the *Ad Hoc* Committee and established the Committee on South West Africa with functions as set out in resolution 749 A (VIII) [2].

These functions in essence amounted to—

(a) exercising supervision over the administration of the Territory, and,
(b) negotiating with Respondent for the full implementation of the Advisory Opinion.

The South African representative explained to the Fourth Committee that Respondent could not support this resolution, as it required Respondent to submit to United Nations supervision as a basis for co-operation with the Committee, left the Committee no scope for negotiation beyond that basis, and combined a supervisory function with that of so-called "negotiations" [3].

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[1] *U.N. Doc.* A/2475, paras. 8-15, in *G.A., O.R., Eighth Sess., Annexes* (Agenda item 36), pp. 33-34.

[2] *G.A. Resolution* 749 A (VIII), 28 Nov. 1953, in *G.A., O.R., Eighth Sess., Sup.* No. 17 (A/2630), pp. 26-27. (*Vide* also **I**, pp. 59-61.)

[3] *G.A., O.R., Eighth Sess., Fourth Comm.*, 363rd Meeting, 12 Nov. 1953, para. 32, p. 306.

In the circumstances, those who supported the adoption of resolution 749 A (VIII) were aware that no co-operation with such a committee could be expected from Respondent; and they must, therefore, have realized that the Committee's supervision would be one-sided and thus defective.

88. Furthermore, the proffered "negotiations" were again coupled with a resolution urging the conclusion of a United Nations trusteeship agreement [1].

1954

89. When the Committee on South West Africa invited Respondent to confer with it, Respondent replied that it was—

> "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".

This reply was communicated to the Chairman of the Committee in a letter dated 25 March 1954, wherein Respondent's reasons for its view were set forth in full [2]. The letter is quoted at **I**, pages 62 to 64.

The Committee confirmed Respondent's doubts by replying that it could not "enter into discussion of proposals which are not designed to implement fully the Advisory Opinion" [3].

Inasmuch as this reply signified that negotiations could only take place on the basis of acceptance by Respondent of United Nations supervision, Respondent had no alternative but to decline the Committee's invitation.

90. As regards the supervisory functions contemplated for the Committee on South West Africa, resolution 749 A (VIII) directed that the practices and procedures which had applied to supervision of Mandates by the organs of the League of Nations should be observed as far as possible [4].

It was, however, inevitable that supervision in pursuance of the said resolution would differ substantially from that which had applied under the League of Nations, particularly in the following respects:

(a) Unlike the Permanent Mandates Commission, which was "a commission of experts . . . of high standing and independent of Governments" [5], the Committee on South West Africa was composed of political representatives of member States, the selection of individuals being left to the discretion of the States elected to serve on the Committee. The Members of the Committee, in exercising their supervisory functions, thus did not stand apart from the political views of their governments.

(b) In the League the ultimate supervisory body was the Council, the voting procedure of which was subject to the unanimity rule. The corresponding supervisory organ in the United Nations, as

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[1] *G.A. Resolution* 749 B (VIII), 28 Nov. 1953, in *U.N. Doc.* A/2630, pp 27-28.

[2] *G.A., O.R., Ninth Sess., Sup.* No. 14 (A/2666), Annex I *(c)*, pp. 6-8.

[3] *Ibid.*, Annex I *(d)*, pp. 7-8.

[4] *Vide* sub-paras. *(a)*, *(b)*, *(c)* and *(d)* of para. 12 of *G.A. Resolution* 749 A (VIII).

[5] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Afrika, Advisory Opinion, I.C.J. Reports 1955*, p. 95. *Vide* also para. 20, *supra*.

contemplated by resolution 749 A (VIII), was the General Assembly, in the voting procedure of which the unanimity rule did not apply—Article 18 of the Charter providing only for decisions by a majority, or in the case of certain matters, by a two-thirds majority.

The combined effect of the differences mentioned in *(a)* and *(b)* above would inevitably render supervision in pursuance of resolution 749 A (VIII) more onerous for Respondent than that which had applied under the League.

91. When the Committee on South West Africa requested Respondent to submit reports [1], this request was declined for reasons fully stated in Respondent's letter of 25 March 1954 [2], which is quoted at **I,** pages 62 to 64. Respondent's position in this regard was further explained to the General Assembly at its Ninth Session, where the South African representative pointed out that the Committee had been established despite Respondent's objections and that Respondent was then invited to co-operate on a basis unilaterally determined by a majority in the General Assembly. His Government could obviously not accept an arrangement which had been decided on against its wishes and which failed to take into account its essential requirements. It was, therefore, unable to recognize the Committee or the legitimacy of the report which the Committee had drawn up [3].

With regard to petitions, Respondent's attitude was also clearly stated in the letter of 25 March 1954; and, in fact, Respondent declined to participate in any United Nations proceedings concerning petitions.

92. In the absence of reports from Respondent, the Committee compiled its own report, relying on information from various official and unofficial sources. This report contained many inaccuracies and omissions of a serious nature, as well as erroneous conclusions.

The allegations contained in the extracts from the report, quoted in Applicants' Memorials [4], will not be dealt with here [5].

Respondent did reply, in the Fourth Committee, to certain allegations in order to indicate that some of the information on which the report was based was unreliable and that the report reflected serious misconceptions as to conditions in South West Africa [6].

93. In 1954 the General Assembly once more adopted a resolution urging Respondent to place South West Africa under United Nations Trusteeship [7].

94. The statement in the Memorials [8] alleged to have been made by Dr. Malan (then South African Prime Minister) on 24 August 1954 was in fact issued by a political party in South West Africa—the National Party for South West Africa. It was not made by the Prime Minister, although, as National Leader of the said party, he had ap-

[1] *Vide U.N. Doc.* A/2666, Annex I *(a)*, p. 6.

[2] *Ibid.*, Annex I *(c)*, pp. 6-7.

[3] *G.A., O.R., Ninth Sess., Fourth Comm.*, 407th Meeting, 15 Oct. 1954, para. 36, p. 66.

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

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

[6] *Vide* e.g., *G.A., O.R., Ninth Sess., Fourth Comm.*, 407th Meeting, pp. 67-70.

[7] *G.A. Resolution* 852 (IX), 23 Nov. 1954, in *G.A., O.R., Ninth Sess., Sup.* No. 21 (A/2890), p. 29.

[8] Quoted at **I,** p. 66.

proved thereof. The statement answered a claim of an opposition party to the effect that the Territory had acquired a status independent of South Africa.

95. The General Assembly in 1954 also adopted resolution 904 (IX), in which it asked the International Court of Justice for an advisory opinion as to whether Special Rule F was a correct interpretation of the Court's 1950 Advisory Opinion [1]. This rule concerned voting procedure in the General Assembly on questions relating to reports and petitions regarding South West Africa. Respondent did not support this request for an advisory opinion for the reason that it had not accepted the 1950 Opinion, especially with regard to supervisory functions on the part of the United Nations. As Respondent had throughout denied that the General Assembly had any supervisory powers or functions in respect of the administration of South West Africa, Respondent was not concerned with the voting procedure adopted by the General Assembly in the exercise of the supervisory powers it had assumed in respect of the Territory and, consequently, Respondent did not participate in the proceedings before the Court in 1955 [2].

As the correctness or otherwise of the 1955 Advisory Opinion does not arise for decision in the present proceedings, Respondent refrains from commenting on the reasoning of the Court or its conclusions in that Opinion.

1955

96. In 1955 the Committee on South West Africa again invited Respondent—

(a) to confer with it on the implementation of the Court's 1950 Opinion; and

(b) to assist the Committee in its supervisory task; in particular to send a report [3].

In response, Respondent referred to its letter of 25 March 1954 [4] and stated that as there had been no material change in the position outlined therein, Respondent could not see that negotiations on the basis of the Committee's restrictive terms of reference would lead to positive results [5].

The Committee, in its reply of 10 June 1955, stated that it could only conclude that Respondent "is unwilling even to enter into negotiations in order to implement fully the Advisory Opinion [6]".

While this was a correct conclusion, so far as it went, Respondent was not unwilling to negotiate with the United Nations on a basis which did not as a prerequisite place impossible demands on Respondent—an attitude fully explained to the Fourth Committee by Respondent on 31 October 1955 [7].

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[1] *G.A. Resolution* 904 (IX), 23 Nov. 1954, in *U.N. Doc.* A/2890, pp. 55-56.

[2] *Vide G.A., O.R., Tenth Sess., Fourth Comm.*, 491st Meeting, 31 Oct. 1955, para. 9, p. 130.

[3] *G.A., O.R., Tenth Sess., Sup.* No. 12 (A/2913), Annex I *(a)*, p. 6.

[4] *Vide* para. 89, *supra*.

[5] *U.N. Doc.* A/2913, Annex I *(c)*, p. 7.

[6] *Ibid.*, Annex I *(d)*, p. 7.

[7] *Vide G.A., O.R., Tenth Sess., Fourth Comm.*, 491st Meeting, pp. 134-136.

97. The 1955 report of the Committee (referred to at **I**, page 69), suffered from the same defects and short-comings as that of 1954. The South African representative, however, did not—

> "attempt to explain where the Committee had erred in its conclusions, since the experience of the previous year had shown that to do so would produce no fruitful result. Nor would he comment on the inaccuracies and even untruths contained in the petitions considered by the South West Africa Committee. [The previous year,] without prejudice to his Government's standpoint on petitions, he had endeavoured to arouse the Fourth Committee to the serious implications involved in the adoption of the resolutions on petitions suggested by the South West Africa Committee. His statement, however, had not been discussed at all; the draft resolutions had simply been voted on without any examination of their contents and referred to the General Assembly [1]."

The allegations contained in the extract from the report, quoted at **I**, page 69, are not dealt with here [2].

98. In regard to the admission of oral hearings to petitioners on South West Africa, Respondent's views were stated as follows:

> "In the first place, the Union of South Africa did not recognize the competence of the United Nations to consider petitions, whether written or oral. In the second place, the system established by the Charter made no provision for oral petitions except in the case of Trust Territories. Lastly, there had undoubtedly been no provision for hearings in the procedure applied by the League of Nations, and the Permanent Mandates Commission in particular had not granted any hearings properly so-called [3]."

There was, in the initial stages of the discussions at the Ninth Session of the General Assembly, a fairly general view in the Fourth Committee that to grant oral hearings to petitioners would not be in accordance with the procedure of the former mandate system and therefore not admissible in the Committee on South West Africa.

A draft resolution to this effect was, however, withdrawn and, instead, the Court was requested for an advisory opinion as to whether it would be consistent with the Court's 1950 Opinion for the Committee on South West Africa to grant oral hearings to petitioners [4].

In view of Respondent's attitude regarding the 1950 Advisory Opinion, and as to accountability to the United Nations, Respondent did not support the request for an advisory opinion on the admissibility of oral hearings, inasmuch as the request was confined to an interpretation of the 1950 Opinion.

99. During the Tenth Session of the General Assembly, a further resolution was adopted urging Respondent to place South West Africa under United Nations Trusteeship [5].

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[1] *G.A., O.R., Tenth Sess., op. cit.*, para. 48, p. 135.

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

[3] *G.A., O.R., Tenth Sess., Fourth Comm.*, 500th Meeting, 8 Nov. 1955, para. 42, p. 182.

[4] *G.A. Resolution* 942 (X), 3 Dec. 1955, in *G.A., O.R., Tenth Sess., Sup.* No. 19 (A/3116), p. 24.

[5] *G.A. Resolution* 940 (X), 3 Dec. 1955, in *U.N. Doc.* A/3116, p. 23.

1956

100. In reply to a further invitation to Respondent by the Committee on South West Africa, to negotiate and to submit reports, Respondent again referred to its earlier replies in 1954 and 1955 (*vide* paras. 89 and 96, *supra*) and stated, *inter alia*, "as there has in the meantime been no material change in the position outlined in my previous communications the attitude of the Union Government remains unchanged" [1].

101. Applicants quote extensively, at **I**, pages 60-61, from the report of the Committee on South West Africa for the year 1956. While denying that it failed in any way to observe the spirit of the Mandate, Respondent will not deal here with the allegations contained in the report [2]. The same applies to the extracts from petitions contained in Chapter VI of the Memorials and referred to at the top of **I**, page 73 thereof.

102. For a proper understanding of the extract from the statement of the South African Prime Minister which is quoted at **I**, page 72, it should be read in the fuller context given hereafter, namely:

> "The hon. Senator Cowley suggested that in order to avoid troubles in future in so far as South West Africa is concerned, we should forthwith proceed to annex South West Africa . . .
>
> 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 [3]."

This matter is again raised at **I**, page 186, and is dealt with fully elsewhere in the Counter-Memorial.

103. With regard to the extracts from the 1956 Advisory Opinion, which are quoted at **I**, page 72, Respondent refers to paragraph 98 above and will not deal with the reasons advanced by the Court for its conclusion.

1957

104. At the 11th Session of the General Assembly an attempt was made by some delegations in the Fourth Committee to find a new basis

[1] *G.A., O.R., Eleventh Sess., Sup.* No. 12 (A/3151), Annex I *(b)* p. 4.
[2] *Vide* para. 1, *supra*.
[3] *U. of S.A., Parl. Deb., Senate*, Vol. III (1956), Cols. 3631-3632.

for negotiations; but as this attempt did not result in a concrete proposal, resolution 1059 (XI) was adopted, requesting the Secretary-General "to explore ways and means of solving satisfactorily the question of South West Africa" [1].

At the same time, the Liberian representative introduced the usual resolution urging the placing of South West Africa under United Nations trusteeship—eventually adopted by the General Assembly as resolution 1055 (XI) [2].

105. Also at that session a further step was taken in an attempt to compel Respondent to submit to the wishes of the majority in the Assembly, namely the adoption of resolution 1060 (XI) in terms whereof the Committee on South West Africa was requested to study the following question:

> "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 fulfils the obligations assumed by it under the Mandate, pending the placing of the Territory of South West Africa under the International Trusteeship System? [3]"

In Respondent's view this task could hardly be consonant with the functions of negotiation and supervision already entrusted to the Committee.

106. At the 12th Session of the General Assembly, in October 1957, a number of delegations appealed for a new approach on the South West Africa question aimed at the resumption of negotiations between South Africa and the United Nations. This culminated in the establishment of the Good Offices Committee (United States, United Kingdom and Brazil) 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" (resolution 1143 (XII)) [4].

107. The wider terms of reference of this Committee extended the possibility of fruitful negotiations. The prospective negotiations were, however, greatly jeopardized by the concurrent adoption of other resolutions sponsored, *inter alia*, by the Applicants. These included a further resolution calling for United Nations trusteeship for South West Africa [5], and a resolution calling for further study of legal action on the South West Africa question [6].

The inherent conflict between the act of "good offices" and the adoption of these and other resolutions were pointed out by a number of delegations, but attempts to suspend action on them failed.

The attitude of Liberia is illustrated by the fact that, although supporting the establishment of the Good Offices Committee, the Liberian

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[1] *G.A. Resolution* 1059 (XI), 26 Feb. 1957, in *G.A., O.R., Eleventh Sess., Sup.* No. 17 (A/3572), p. 30.

[2] Of 26 Feb. 1957, in *U.N. Doc.* A/3572, pp. 28-29.

[3] *G.A. Resolution* 1060 (XI), para. 1, 26 Feb. 1957, in *U.N. Doc.* A/3572, p. 30.

[4] *G.A. Resolution* 1143 (XII), 25 Oct. 1957, in *G.A., O.R., Twelfth Sess., Sup.* No. 18 (A/3805), pp. 25-26.

[5] *G.A. Resolution* 1141 (XII), 25 Oct. 1957, in *U.N. Doc.* A/3805, pp. 24-25

[6] *G.A. Resolution* 1142 (XII), 25 Oct. 1957, in *U.N. Doc.* A/3805, p. 25.

representative nevertheless "urged the members of the Committee to consider the possibility of compulsory jurisdiction of the Court" [1].

The Ethiopian representative sponsored the resolution on legal action and did not support the resolution establishing the Good Offices Committee.

108. Respondent nevertheless, in pursuance of its desire to arrive at an amicable arrangement, accepted the invitation of the Good Offices Committee to participate in discussions with it. The negotiations with the Good Offices Committee took place in 1958 and will be dealt with below under that year.

109. Regarding the contents of the report of the Committee on South West Africa, referred to at **I,** pages 73 and 74, and the statement of the representative of Liberia quoted at page 75, Respondent, while denying any violation on its part of the spirit of the Mandate, will for the reasons previously stated not here deal with the factual questions involved therein [2].

1958

110. In March 1958, the Good Offices Committee invited Respondent to enter into discussions with it in terms of resolution 1143 (XII). Respondent indicated that, while it could not reconcile the 1957 resolutions relating to legal action and urging a trusteeship agreement [3] with the act of "good offices", it was nevertheless impressed by the presence of a more conciliatory spirit, and invited the Good Offices Committee to come to South Africa for discussions. This the Committee did, and at the conclusion of the discussions in South Africa, the Members of the Committee were invited by Respondent to visit South West Africa in their private capacities—which two of the Members did. In the record of the discussions the Good Offices Committee paid tribute to the "spirit of frankness, friendliness and desire to find a mutually acceptable basis for agreement which animated the [South African] Government's participation in the discussions" [4].

111. In the discussions Respondent expressed its preparedness to enter into an agreement concerning South West Africa which would specify that the Territory possessed an "international character", and that this character could be modified only with the consent of both parties to the agreement—the agreement to contain provisions along the lines of Articles 2 to 5 of the Mandate, as well as the obligation to provide information on the administration of the Territory.

Respondent was, however, for the reasons already stated, not prepared to accept the United Nations as the second party to such an agreement. The Good Offices Committee, on the other hand, felt itself precluded from considering any party other than the United Nations as the second party to an agreement [5].

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[1] *G.A., O.R., Twelfth Sess., Fourth Comm.*, 659th Meeting, 2 Oct. 1957, para. 14, p. 36.

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

[3] *G.A. Resolutions* 1141 (XII) and 1142 (XII).

[4] *U.N. Doc.* A/3900, in *G.A., O.R., Thirteenth Sess., Annexes* (Agenda item 39), para. 10, p. 3.

[5] *U.N. Doc.* A/3900.

112. After discussing other possibilities the Good Offices Committee mentioned, *inter alia*, "a suggestion that the partitioning of the Territory might provide the basis for a solution" [1]. Respondent intimated that it would be prepared to investigate the practicability of partitioning as envisaged and, if found feasible, Respondent would submit proposals to the United Nations.

In its report to the General Assembly, the Good Offices Committee expressed:

> "the opinion that some form of partition under which a part of the Territory would be placed under a trusteeship agreement with the United Nations and the remainder would be annexed to the Union, might provide a basis for an agreement";

and

> "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].

Respondent stressed, to the Good Offices Committee and the General Assembly at its 13th Session, that the envisaged investigation would have to be directed, *inter alia*, at ascertaining the view of all the inhabitants [3]. And Respondent explained that its willingness to contemplate, in this context, the United Nations as the second party to an agreement was due to Respondent's desire to find a compromise, and the fact that it was inherent in the suggestion that the area which would be placed under United Nations Trusteeship, would probably contain Bantu peoples only, thus eliminating the major difficulties which had prevented Respondent in the past from accepting United Nations accountability [4].

113. When the report of the Good Offices Committee came before the Fourth Committee at the 13th Session of the General Assembly, Respondent appealed for discussion thereof separately from the other aspects such as suggested legal action and the report of the Committee on South West Africa, so as to avoid acrimonious debate which would not be conducive to constructive negotiation. The majority in the Fourth Committee, including both Applicants, however opposed a separate discussion, and moreover acceded to a request from petitioners for oral hearings specifically on the subject of the negotiations, despite the protests of Respondent and others.

It was in such circumstances that the South African representative stated:

> "Even before the vote it had been apparent from the procedural debate that a number of delegations had come to the Assembly determined to wreck the work of the Good Offices Committee. That course of events confirmed his Government's contention that the

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[1] *U.N. Doc.* A/3900, para. 47, p. 8.
[2] *Ibid.*, para. 52 (6) and (7), p. 10.
[3] *G.A., O.R., Thirteenth Sess., Fourth Comm.*, 745th Meeting, 29 Sep. 1958, paras. 20-23, p. 15.
[4] *U.N. Doc.* A/3900, para. 50, p. 8.

forum of the United Nations was being used for the purpose of waging propaganda and ideological warfare against a member State. The Union Government had not expected those developments when it had agreed to enter into discussions with the Good Offices Committee; on the contrary it had expected that its proposals would be considered seriously and without prejudice [1]."

114. A resolution was adopted (resolution 1243 (XIII)) rejecting the Good Offices Committee's suggestion that the partition idea be investigated and requesting it to renew discussions with Respondent to find a basis for an agreement which would continue to accord to "South West Africa *as a whole* an international status and which would be in conformity with the purposes and principles of the United Nations", bearing "in mind the discussions at the 13th Session of the General Assembly" [2]. (Italics added.)

115. Again respondent refrains from dealing here with the extracts from the report of the Committee on South West Africa referred to at **I**, pages 65 and 66 [3].

116. At the same Session, the General Assembly adopted a resolution, which had by now become standard, calling for South West Africa to be placed under United Nations Trusteeship [4].

1959

117. In its reply to an invitation by the Good Offices Committee to renew discussions, Respondent referred to the unfortunate developments at the 13th Session of the General Assembly which, in Respondent's view, showed that the essential elements of conciliation and goodwill on the part of the majority of Members in the General Assembly were absent. Respondent was nevertheless still prepared to act in accordance with the spirit which animated the resolution establishing the Good Offices Committee, and to collaborate with the Committee on the basis of the terms of reference contained in that resolution. It was difficult to see, however, what useful purpose could be served by renewing, under the Committee's new and more restricted terms of reference, the discussions which had been initiated in the previous year in such completely different circumstances [5].

When, however, the Good Offices Committee [6] replied that its terms of reference were "not essentially different from those under the 1957 resolution"[7], Respondent indicated that, while it did not agree with this interpretation, it would meet with the Committee [8].

118. The ensuing discussions showed, however, that the Good Offices Committee felt itself bound to consider only proposals which would

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[1] *G.A., O.R., Thirteenth Sess., Fourth Comm.*, 747th Meeting, 30 Sep. 1958, para. 27, p. 25.

[2] *G.A. Resolution* 1243 (XIII), 30 Oct. 1958, in *G.A., O.R., Thirteenth Sess., Sup.* No. 18 (A/4090), p. 30.

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

[4] *G.A. Resolution* 1246 (XIII), 30 Oct. 1958, in *U.N. Doc.* A/4090, p. 31.

[5] *Vide U.N. Doc.* A/4224, Annex II, in *G.A., O.R., Fourteenth Sess., Annexes* (Agenda item 38), pp. 4-5.

[6] In its letter of 19 June 1959.

[7] *U.N. Doc.* A/4224, Annex III, p. 5.

[8] *Ibid.*, Annex IV, p. 5.

involve acceptance by Respondent of accountability to the United Nations in respect of the Territory *as a whole*, and it proposed a formula in the following terms:

> "It is agreed that further talks might be concentrated on the negotiation of some form of agreement to which the United Nations must be a party for the supervision of the administration of South West Africa in a manner which would not impose greater responsibilities on the Union Government or impair the rights enjoyed by it under the Mandate [1]."

Respondent could not accept this formula because of its conviction that it would be impossible to devise, within the framework of accountability to the United Nations, a procedure which would not impose on Respondent obligations greater than those which had existed under the League.

In an effort to meet the view of the Good Offices Committee, Respondent in turn proposed the following formula as a basis for further discussion:

> "It is agreed that further talks with the Union Government should be concentrated on negotiation with the United Nations, through its Good Offices Committee, of some form of settlement regarding South West Africa, which would not impose greater (or more onerous) responsibilities on the Union Government or impair any of the rights conferred upon it by the Mandate in 1920, it being understood that such discussions will be without prejudice to the juridical position taken up by the Union in the past [2]."

The Good Offices Committee felt that this proposal did not improve the position, and reported to the General Assembly that "it has not succeeded *in finding a basis for an agreement under its terms of reference*" [3]. (Italics added.)

Thus negotiations were once more frustrated by the restrictive terms of reference of the negotiating agency.

119. When the report of the Good Offices Committee [4] was discussed at the 14th Session of the General Assembly, the South African representative expressed his Government's "real regret" that it had not been possible to find a basis for agreement, and informed the Fourth Committee that:

> *(a)* The South African delegation would at the next session, as it had done at the 14th Session, again participate in the discussion of the report of the Committee on South West Africa.
>
> *(b)* The South African Government would *make available to the United Nations* blue books (official reports) and other reports issued by the South West Africa Administration, Hansards (Parliamentary Proceedings) of both the South African Parliament and the Legislative Assembly of South West Africa; and other documents concerning the administration of the Territory which are required to be laid before the South African Parliament and the Legislative Assembly.

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[1] *U.N. Doc.* A/4224, Annex IV, para. 10, p. 3.
[2] *Ibid.*, Annex III, para. 14, p. 3.
[3] *Ibid.*, para. 16, p. 4.
[4] *U.N. Doc.* A/4224.

(c) The South African Government *remained ready to enter into discussions* with an appropriate United Nations *ad hoc* body that might be appointed after prior consultation with the South African Government and which would have a full opportunity to approach its task constructively, providing for fullest discussion of *all possibilities* [1].

In giving these undertakings the South African representative emphasized that Respondent could only carry them out within a framework of co-operation and he expressed the hope that further developments would not force Respondent to re-assess its attitude [1].

120. The atmosphere was unfortunately marred by subsequent developments including the following:

(a) Resolution 1360 (XIV) [2] (sponsored, *inter alia*, by Ethiopia) was adopted which, although apparently designed to create machinery for negotiation, contained paragraphs condemnatory of Respondent. On the "negotiation" aspect Respondent was invited to—

"... enter into negotiations with the United Nations through the Committee on South West Africa, which is authorized under its terms of reference to continue negotiations with the Union, or through any other committee which the General Assembly may appoint, with a view to placing the Mandated Territory under the International Trusteeship System";

and requested to—

"... formulate for the consideration of the General Assembly, at its fifteenth session, proposals which will enable the Mandated Territory of South West Africa to be administered in accordance with the principles and purposes of the Mandate, the supervisory functions being exercised by the United Nations according to the terms and intent of the Charter [3]".

The South African representative pointed out to the Committee that Respondent could hardly be expected to enter into negotiations when the resolution also contained paragraphs censuring the South African Government. Furthermore the terms of reference laid down for the negotiations implied only trusteeship. He continued,

"... the Committee was well aware of the Union's attitude towards a possible trusteeship agreement; even the Court's opinion, adopted by the General Assembly, indicated that the Union was not obliged to enter into a trusteeship agreement. There was therefore, no question of the Union considering a trusteeship agreement. As operative paragraph 3 envisaged supervision according to the terms and principles of the Charter, it also aimed at supervision by the Trusteeship Council. Moreover, the terms of reference of the United Nations body which was to be entrusted with those negotiations

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[1] *G.A., O.R., Fourteenth Sess., Fourth Comm.*, 924th Meeting, 26 Oct. 1959, para. 2, p. 221.

[2] *G.A. Resolution* 1360 (XIV), 17 Nov. 1959, in *G.A., O.R., Fourteenth Sess., Sup.* No. 16 (A/4354), pp. 28-29.

[3] *Ibid.*, paras. 2 and 3, p. 29.

seemed much too restrictive, more restrictive in fact than the present terms of reference of the Good Offices Committee. The South African delegation would therefore ... vote against the draft resolution as a whole [1]."

(b) Together with others, both Applicants also sponsored a resolution designed to encourage Member States to institute legal action against Respondent. This resolution, *inter alia*, drew—

"... *the attention* of Member States to the conclusions of the special report of the Committee on South West Africa covering the legal action open to Member States to refer any dispute with the Union of South Africa concerning the interpretation or application of the Mandate for South West Africa to the International Court of Justice for adjudication in accordance with Article 7 of the Mandate read in conjunction with Article 37 of the Statute of the Court [2]".

The South African delegation had pointed out in vain that this resolution was not consonant with a conciliatory spirit necessary for successful negotiation [3]. Other delegations also feared that this resolution would have a deleterious effect and a formal proposal was made to postpone consideration thereof until the 15th Session; but after an appeal to the sponsors by the representative of Liberia, the proposal to postpone consideration was withdrawn [4].

121. The General Assembly also adopted the annual resolution (sponsored, *inter alia*, by Liberia) calling for the Territory to be placed under United Nations trusteeship [5]. Of particular significance in this respect is the attitude adopted by the representative of Ethiopia. Speaking as a Member of the Committee on South West Africa in the Fourth Committee on 19 October 1959, he said, *inter alia*:

"... The General Assembly had been entirely right to oppose, at its thirteenth session, both the Territory's partition and any solution which offered less than the full trusteeship regime as it was applied in all the other Territories administered by Member States of the United Nations."

And later:

"... the Ethiopian delegation was obliged to state that the only legally acceptable status for the Territory would be trusteeship status. Nothing less would be in accordance with the Charter and the advisory opinion of the International Court of Justice [6]".

122. With regard to the extracts from the report of the Committee on South West Africa referred to at **I**, page 79, it is desired merely to record here that, without prejudice to its juridical position, Respondent did at the 14th Session of the General Assembly deal with certain allegations and information contained in the report. This was done to draw attention to the misstatements and the unjustified conclusions in the report, as well as to show that Respondent's refusal to supply

[1] *G.A., O.R., Fourteenth Sess., Fourth Comm.*, 931st Meeting, 29 Oct. 1959, para. 48, p. 254.
[2] *G.A. Resolution* 1361 (XIV), 17 Nov. 1959, in *U.N. Doc.* A/4354, p. 29.
[3] *G.A., O.R., Fourteenth Sess., Fourth Comm.*, 931st Meeting, para. 50, p. 254.
[4] *Ibid.*, 932nd Meeting, 30 Oct. 1959, para. 1, p. 259.
[5] *G.A. Resolution* 1359 (XIV), 17 Nov. 1959, in *U.N. Doc.* A/4354, p. 28.
[6] *G.A., O.R., Fourteenth Sess., Fourth Comm.*, 914th Meeting, 19 Oct. 1959, p. 164.

information was due to its inability to accept United Nations accountability and not to a desire to hide the facts [1].

The Applicants allege at I, page 81, that the South African representative "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". Respondent did not intend or attempt to deal fully with the various allegations and conclusions in the report of the Committee on South West Africa, inasmuch as Respondent did not recognize supervisory authority as vested in the United Nations, and was not accounting to the United Nations in that sense.

Respondent will not deal here with the allegations in the said report [2].

1960

123. When the Committee on South West Africa invited Respondent to negotiate with it in terms of resolution 1360 (XIV)[3] Respondent on 29 July 1960, replied:

> "The Union Government have repeatedly expressed their desire to find a solution which would be acceptable to all the parties concerned. To this end the Union Government have, over a period of years, made concrete proposals and expressed their willingness to examine others. The Union Government continue to desire that this matter be settled and in addition to making certain helpful offers to the Fourth Committee last year, recorded once more the Union's readiness to enter into discussions with an appropriate United Nations *ad hoc* body that may be appointed after prior consultation with the Union Government, and with terms of reference which would allow the fullest discussion and exploration of *all possibilities*.
>
> This offer did not, however, find a positive response and the Assembly instead adopted resolution 1360 (XIV) which laid down terms of reference for negotiation with the Union which were most restrictive. The Union's representative pointed out, before the adoption of the resolution, that the terms of reference were far more restrictive than those of the Good Offices Committee and he voted against the adoption of the resolution. You will therefore understand that the Union Government could not see any possibility of fruitful results flowing from negotiations which required the Union to place 'South West Africa under the International Trusteeship System'—terms of reference which prescribed the end result in advance.
>
> The Union Government still believe that negotiations on the basis proposed would not lead to any positive results.
>
> The Union Government would, however, wish to reiterate their readiness to enter into discussion 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

[1] *G.A., O.R., Fourteenth Sess., op. cit.*, 883rd, 914th, 915th, 916th and 918th Meetings.

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

[3] *Vide* para. 120 *(a)*, *supra*.

held stand on the judicial [juridical] aspect of the issue[1]." (Italics added.)

124. Respondent had intended reiterating the above offer at the 15th Session of the General Assembly which was to meet some weeks later. A request by Respondent for early consideration of the South West Africa question was, however, not acceded to by the Fourth Committee and by the time it did come up for discussion, Applicants had instituted these proceedings.

In the light of this event the South African representative informed the Fourth Committee that, since the Committee's discussion on South West Africa was likely to traverse the same field as that covered by the proceedings instituted by Applicants, the matter was, in Respondent's view, *sub judice* and should, therefore, not be discussed by the Committee. The South African representative argued his contention at some length, pointing out that discussion, and adoption of resolutions, might have a prejudicial effect on the judicial proceedings and could be construed as an attempt to usurp the functions of the Court. The Committee rejected Respondent's proposal for an adjournment of the debate pending the conclusion of the judicial proceedings—the Applicants voting against the proposal for adjournment

The South African representative then informed the Committee that his delegation could not be a party to discussion of a matter which was the subject of a judicial action pending in the Court, since in doing so it would itself be violating the *sub judice* rule [2].

In view of these events it was not possible for Respondent to deal further with its offer to explore "all possibilities".

125. At **I**, page 82, Applicants give an account of certain events at the "Second Conference of Independent African States" at Addis Ababa in June 1960. The relevance of these events to the proceedings before the Court is not apparent, save that the Liberian representative's reference to the determination of his Government "on behalf of all African States to pursue further action to get this territory placed under the trusteeship provisions of the Charter", appears to confirm that in the so-called negotiations with Respondent over the years, there had been but one objective on the part of Applicants, namely United Nations trusteeship for South West Africa.

126. Applicants also refer at **I**, page 84, to General Assembly resolution 1565 (XV) [3]. This resolution was adopted after the filing with the Court of the Applications in these proceedings. Respondent therefore does not intend dealing with the contents thereoff, save to state its strongest objection to the reliance which Applicants, in referring to this resolution, apparently place on the conclusion of the majority in the General Assembly 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".

127. Respondent refrains from dealing in this part of the Counter-

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[1] *G.A., O.R., Fifteenth Sess., Sup.* No. 12 (A/4464), Annex II C, p. 58.
[2] *Ibid., Fourth Comm.*, 1049th Meeting, 14 Nov. 1960, paras. 39-66, pp. 296-299.
[3] Of 18 Dec. 1960, in *G.A., O.R., Fifteenth Sess., Sup.* No. 16 (A/4684), pp. 31-32.

Memorial with the extracts from the report of the Committee on South West Africa as quoted at **I**, pages 83 and 84 [1].

Summary

128. Respondent's submissions with regard to the facts dealt with in this Chapter are stated in Chapters III to V below, in each case to the extent relevant to the matter considered in such Chapter.

There remains, however, to be dealt with the following statements by the Applicants in a summary at the end of Chapter II of their Memorials:

> (a) *"Upon the dissolution of the League of Nations the Union did not conceal its desire to annex the Territory* [2]*."*

In paragraphs 1 to 9 above, Respondent indicated that the Mandate for South West Africa gave effect to a compromise arrangement which involved, *inter alia*, that C Mandates were, in their practical effect, not far removed from annexation. Respondent has further shown in this Chapter that it considered closer association between South Africa and the Territory to be a natural development and that it never made a secret of its conviction that the interests of the inhabitants would best be served thereby. At the time of establishment of the United Nations and even before the dissolution of the League, Respondent clearly announced its view that the Mandate should be terminated and the Territory incorporated in the Union. Respondent's proposal to that effect, supported by the wishes of the inhabitants, was however rejected by the United Nations in 1946.

> (b) *"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* [3]*."*

Respondent's contention was in conformity with a general understanding to that effect amongst Members of the League and of the United Nations, and given expression to *before and after* dissolution of the League [4].

> (c) *"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* [3]*."*

Respondent did not "denounce" the Opinion, nor did it "proclaim" an "intention not to comply" therewith.

Respondent advanced reasons why it could not accept *certain of* the conclusions in the Opinion, the most important reason being that certain vital information was not before the Court when the Opinion was given. Although Respondent could not accept the Opinion *in toto*, it nevertheless made concrete proposals and considered counterproposals in an endeavour to find an acceptable arrangement.

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[1] *Vide* para. 1, *supra*.
[2] *Vide* **I**, p. 85.
[3] *Ibid.*, p. 86.
[4] As will be further dealt with in Chap. IV, paras. 38-42, *infra*.

(d) *"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* [1]."

and,

"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. . . . [2]"

As regards the implication contained in the lastmentioned statement, to the effect that there has not been compliance with the Mandate on the part of Respondent, reference is made to subparagraph *(e)* below.

The allegations concerning "unavailing efforts" and "fruitless efforts", and the conclusion that there is a dispute which cannot be settled by negotiation were dealt with fully in Chapters V and VI of Respondent's Preliminary Objections. Inasmuch as the issues now before the Court do not require a decision as to whether there is a "dispute" which "cannot be settled by negotiation" the submissions made in the Preliminary Objections in that regard are, save as dealt with where relevant in Chapters III to V below, not repeated in the Counter-Memorial.

(e) *"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", and other allegations at page 57* [1] *concerning alleged violations of the Mandate.*

Respondent denies that its administration of the Territory has not been in conformity with the provisions of the Mandate. For the reasons stated in paragraph 1 above, Respondent refrains from dealing in this part of the Counter-Memorial with the substance of the Applicants' allegations in this regard.

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[1] *Vide* I, p. 86.
[2] *Ibid.*, p. 87.

CHAPTER III

FOUNDATIONS OF RESPONDENT'S LEGAL ARGUMENT

A. General Outline

1. The legal argument presented in this and succeeding Chapters constitutes a reply to the issues raised by Applicants' Submissions 1, 2, 7 and 8, viz., whether the Mandate for South West Africa *still exists*, and, if so, whether the supervisory functions of the League of Nations have passed to the United Nations[1].

2. It may be convenient at this stage briefly to summarize the argument which Respondent proposes to submit to the Court. It may be stated in the following propositions:

(a) The provisions for supervision of Mandatory administration by organs of the League were dependent for their operation on the existence of the League of Nations.

(b) Upon the dissolution of the League of Nations, the aforementioned provisions were not modified into or replaced by others serving the same or similar purposes, and consequently lapsed.

(c) Whether the Mandate continues in force at all, thus depends on whether it is, in accordance with the intentions of its founders, capable of existence without the said provisions.

(d) On the basis of the criterion stated in *(c)*, Respondent submits that the Mandate as a whole has lapsed.

(e) *In the alternative to* (d), if the Mandate continues in force, Respondent, for the reasons stated in *(a)* and *(b)*, submits that it does so only in respect of aspects which were not by their own terms dependent upon the League of Nations, and thus, in particular, without any obligation on Respondent's part to submit to supervision by any international organization or body.

As appears from the above, Respondent's argument will fall into two main parts, dealing *firstly* with the disappearance of the provisions relating to the supervision of the League in respect of mandates (i.e., Art. 6 of the mandate instrument and attendant provisions in the mandate system) and *secondly* with the lapse of the Mandate as a whole. The first part is dealt with in Chapter IV below and the second in Chapte V. In regard to the latter part, questions of a subsidiary nature may arise regarding the compromissory clause in Article 7 of the Mandate: these are considered in Chapter V, more particularly in Part B and the concluding portion of Part A thereof.

3. In the present Chapter, Respondent will consider a number of topics of a general or introductory nature.

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[1] *Vide* Chap. I, para. 1, *supra*, for the text of the Submissions.

B. Effect of the Previous Advisory Opinion

4. In making their Submissions Nos. 1 and 2[1], Applicants in their Memorials rely solely on the Advisory Opinion of this Court of 11 July 1950, on the International Status of South West Africa, and ask that that Opinion be reaffirmed[2]. Inasmuch as certain submissions advanced by Respondent in these proceedings are not in accord with conclusions arrived at, or views expressed, by the Court or some of its members in the Advisory Opinion of 1950, a question arises regarding the approach of the Court to a previous advisory opinion where the same issues arise in subsequent contentious proceedings. This question is dealt with in the next succeeding paragraphs.

5. Respondent submits that two general principles govern the approach in contentious proceedings towards a previous advisory opinion which dealt with the same subject-matter.

Firstly, although an advisory opinion will always command great respect and *prima facie* authoritative weight as an expression of the views of an eminent tribunal, the Court will never refuse to *reconsider* conclusions reached in a previous advisory opinion, save perhaps where a request for such reconsideration is frivolous or vexatious.

Manley O. Hudson states this principle as follows:

> "Nor is the Court itself bound to adhere to conclusions reached in an advisory opinion. If the question upon which an opinion is given is later submitted to the Court for judgment, the matter is not *res judicata*; and though an opinion may be cited as a precedent, the Court is not bound to abide by the conclusions stated in the opinion[3]."

In the *Peace Treaties* case, Judge Winiarski said:

> "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[4]."

6. Respondent's second proposition follows logically from the first. It is that where sound reasons are established, the Court will depart from a previous advisory opinion. This proposition is supported by implication in the Judgment in the *Upper Silesia* case[5], referred to by Applicants, where the Court affirmed a view previously expressed in an advisory opinion because—"Nothing has been advanced in the course of the present proceedings calculated to alter the Court's opinion on this point[6]." Clearly, the Court did not intend to formulate any general rule of practice, such as suggested by Applicants in their Memorials, where they use the words—

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[1] Quoted in Chap. I, para. 1, *supra*.

[2] *Vide* I, pp. 95-103—particularly p. 103.

[3] Hudson, M. O., *The Permanent Court of International Justice 1920-1942* (1943), p. 512.

[4] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 65, at p. 91.

[5] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A*, No. 7.

[6] *Ibid.*, p. 31.

> "... 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 [1]".

The Court, in Respondent's submission, merely stated its finding and its decision in that particular case. The statement implies that, where good reasons are established, the Court will depart from a previous advisory opinion.

It is submitted that the Court in its Judgment on the Preliminary Objections in the present matter, adopted the same approach when it stated the following:

> "The unanimous holding of the Court in 1950 on the survival and continuing effect of Article 7 of the Mandate, *continues to reflect the Court's opinion today*. Nothing has since occurred which would warrant the Court reconsidering it. All important facts were stated or referred to in the proceedings before the Court in 1950 [2]." (Italics added.)

In Respondent's submission the italicized words express the essence of the Court's attitude, and imply that, had the Court's opinion changed, it would not have hesitated to give effect to such change in its Judgment.

7. Respondent does not wish to suggest any general and comprehensive rules as to when the Court will consider that there are sound reasons justifying a departure from a previous advisory opinion. This is essentially a matter that would depend on the particular circumstances of each case. The presentation of new or additional facts, deemed by the Court to be important, or the happening of subsequent events having an influence on the issues raised in the proceedings, are obvious examples of factors which may induce a Court to depart from a previous advisory opinion, and were by implication recognized as such in the passage quoted above from the Judgment on the Preliminary Objections. But even in the absence of such factors the Court will, in Respondent's submission, depart from a previous advisory opinion if satisfied that justice requires it.

8. Applicants in their Memorials suggest the existence of a so-called "principle" or "doctrine of Eastern Carelia", namely "that an advisory opinion as to a dispute is 'substantially equivalent to deciding the dispute' " [3].

In Respondent's submission, no such general principle or doctrine was laid down in the *Status of Eastern Carelia* [4]. In that case the Council of the League of Nations requested an advisory opinion from the Court as to whether a treaty entered into between Russia and Finland and a Declaration made by Russia at the same time, constituted engagements of an international character which placed Russia under an obligation to Finland. Finland contended that the Declaration was part of the agreement with Russia. Russia maintained that the Declaration did

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[1] *Vide* I, p. 103.

[2] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319, at p. 334.

[3] *Vide* I, p. 98.

[4] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B*, No. 5.

not amount to a contract, but was only declaratory of an existing situation and made merely for information.

The Court found that an advisory opinion on the question asked by the Council of the League of Nations would have to embody a finding on facts which were in dispute between Finland and Russia [1]. Russia, which was not a Member of the League of Nations at the time, refused to take part in the advisory proceedings [2].

In the circumstances, the Court declared that it would be at a very great disadvantage at an enquiry into the disputed facts. The Court said:

> "It appears now to be very doubtful whether there would be available to the Court materials sufficient to enable it to arrive at any *judicial conclusion upon the question of fact*: What did the parties agree to? The Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some enquiry as to facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are.
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> 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 considerations. *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 the 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* [3]." (Italics added.)

The Opinion as a whole indicates that the passage "Answering the question would be substantially equivalent to deciding the dispute" was intended to refer to the particular case and was not intended to lay down any general rule, or to formulate a general principle or doctrine. Furthermore, it related purely to the Court's "activity" as a judicial tribunal in investigating the matter with a view to coming to a "judicial conclusion upon the question of fact". Nothing was said or implied regarding the weight to be attached to such conclusions in possible later contentious proceedings.

In any event it is not clear what effect Applicants intend should be given in the present proceedings to the expression "substantially equivalent to deciding the dispute". In stating their appreciation of the effect of the so-called doctrine laid down in *Certain German Interests in Upper Silesia*, Applicants, *inter alia*, propound the following proposition:

> "... 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

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[1] *Status of Eastern Carelia, op. cit.*, p. 28

[2] *Ibid.*, pp. 27-28.

[3] *Ibid.*, pp. 28-29.

hearing of the disputants' submissions is 'substantially equivalent to deciding the dispute;'" [1].

Do Applicants hereby suggest that in the circumstances postulated, the Court would never depart from a previous advisory opinion, even if completely satisfied that it was wrong? If so, such a suggestion is clearly untenable. Or do they merely suggest that in the circumstances postulated, the advisory opinion will command great respect and *prima facie* authoritative weight? If no more than the latter is meant, the contents of the so-called doctrine accords with Respondent's submission.

9. In the Memorials Applicants also state that in the *Peace Treaties* case:

> "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' [2]."

In Respondent's submission, there is no justification for this statement.

Although some of the minority judges in the *Peace Treaties* case may have held the view that some general rule was formulated in the *Status of Eastern Carelia* to the effect of or weight to be attached to advisory opinions in subsequent contentious proceedings, that was not the view of the majority.

The majority opinion in the *Peace Treaties* case merely distinguished the two cases, holding that *Status of Eastern Carelia* was profoundly different for two reasons—*firstly* because the question put to the Court in that case—

> ". . . 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 *secondly*, because—

> ". . . at the same time it raised a question of fact which could not be elucidated without hearing both parties [3]".

There is nothing in the Opinion of the majority in the *Peace Treaties* case which justifies a conclusion that the majority judges interpreted the *Status of Eastern Carelia* case as laying down any general rule, principle or doctrine regarding the effect or weight of advisory opinions, or which justifies a conclusion that they gave recognition to any such general rule, principle or doctrine. In effect, the majority opinion in the *Peace Treaties* case refutes the very existence of any such general rule, principle or doctrine. That is why writers who interpret the *Status of Eastern Carelia* case as laying down such a rule, principle or doctrine, consider that case to have been overruled by the *Peace Treaties* case. In this respect, reference may be made to Lauterpacht, *The Development of International Law by the International Court*, where the learned author states that the Advisory Opinion in the *Status of Eastern Carelia*

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[1] *Vide* I, p. 97.

[2] *Ibid.*, p. 98.

[3] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 72.

case "... can no longer be regarded as a precedent of authority" [1], and that the case "... was not followed, in fact, in the Advisory Opinion on the *Interpretation of Peace Treaties*" [2].

C. Effect of the Judgment and Opinions on the Preliminary Objections

10. Respondent will at a later stage deal with some of the findings of the members of the Court in the Judgment and Opinions on the Preliminary Objections in this matter. In some instances Respondent's argument derives a measure of support from such findings. Thus, as far as the question of the survival or otherwise of the provisions regarding League supervision of Mandates is concerned, four members of the Court held that such provisions had lapsed on the dissolution of the League, and although the other 11 members left the question open, seven adopted reasoning which was to a greater or lesser extent inconsistent with the survival of these provisions [3].

On the other hand, as will appear hereafter, certain findings were made which are contrary to submissions which Respondent will advance regarding the question whether the Mandate as a whole has lapsed [4].

It is necessary therefore to consider the correct approach which should, in Respondent's submission, be adopted at the merits stage to such findings.

11. The basic consideration is that a preliminary objection is not meant to, and is not able to, give rise to a judgment that is binding in regard to the issues on the merits of the dispute between the parties. This consideration was recognized by the Permanent Court of International Justice. Thus, in the *Mavrommatis* case the Permanent Court emphasized that a decision on the preliminary objections was given "... without, however, in so doing, in any way prejudging the final outcome of such argument ..." [5] (i.e., the argument on the merits).

12. Even where a decision on the preliminary objections has involved a consideration of certain arguments relating also to the merits of the dispute, this does not give rise to any principle of *res judicata*. This issue was considered by the Permanent Court in the *Polish Upper Silesia* case, where the matter was formulated as follows:

> "... the Court cannot in its decision on this objection in any way prejudge its future decision on the merits. On the other hand, however, the Court cannot on this ground alone declare itself incompetent; for, were it to do so, it would become possible for a Party to make an objection to the jurisdiction—which could not be dealt with without recourse to arguments taken from the merits—have the effect of precluding further proceedings simply by raising it in *limine litis*; this would be quite inadmissible.
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> The Court, therefore, ... considers that it must proceed to the enquiry above referred to, even if this enquiry involves touching

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[1] Lauterpacht, H., *The Development of International Law by the International Court* (1958), p. 248.

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

[3] *Vide* Chap. IV, para. 55, *infra*.

[4] *Vide* in particular Chap. V, Part B, hereafter.

[5] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 10.

upon subjects belonging to the merits of the case; it is, however, to be clearly understood that *nothing which the Court says in the present judgment can be regarded as restricting its entire freedom to estimate the value of any arguments advanced by either side on the same subjects during the proceedings on the merits*[1]." (Italics added.)

Findings made in a judgment on preliminary objections would naturally carry great weight where the subject-matter of the findings is in issue on the merits. Nevertheless the Court would always entertain arguments directed towards persuading it to depart from its previous judgment, and would come to a different conclusion where sound reasons exist therefor.

D. Origin and Contents of the Mandate

13. By Article 22 of the Covenant of the League of Nations, the signatory Powers agreed that what came to be known as the "mandate system" was to be applied to certain colonies and possessions, including South West Africa.

As was indicated above[2], the agreement as eventually set forth in Article 22 was a compromise arrived at after much travail at the Paris Peace Conference of 1919. The history of the Article explains also why its provisions were in certain respects vague and lacking in legal precision. Nevertheless the broad trends of what was intended, as distinct from certain questions of detail, seem reasonably clear.

The Article commenced with setting out the signatories' agreement that to the colonies and territories in question "... there should be applied the principle that the well-being and development of ... [the inhabitants] form a sacred trust of civilization ...". It further recorded their agreement that "securities for the performance of this trust" should be embodied in the Covenant.

The second paragraph of the Article stated that "the best method of giving practical effect to this principle" would be to "entrust" the "tutelage" of the "peoples" concerned to suitable "advanced nations", willing to accept it, who would "exercise" it "as Mandatories on behalf of the League".

The wording of the Article as a whole, as well as its historical background, suggest strongly that the references to "trust", "tutelage" and "Mandatories" were not intended to bear technical legal meanings, by exact or close analogy to municipal law institutions of *trust, tutelage* and *mandatum*. So, for instance, the English word "trust", which is capable of a technical legal meaning as well as of a more general ordinary meaning, depending on context, was rendered in the French version by the word *mission*, meaning in this context "task" or "undertaking", and thus confirming that a non-technical connotation of "trust" was intended. The conception, also, of the "tutelage" of a backward people or community by an "advanced nation" could at most have been intended in a broad, metaphorical sense. It is significant that in the actual mandate instruments which came into existence subsequently, the words "trust" and "tutelage" did not appear at all. Even in the case of the

[1] *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A*, No. 6, p. 15.

[2] Chap. II, paras. 2-9.

words "Mandatory" and "Mandate", which were retained in the mandate instruments themselves, the analogy, if any, with a private law *mandatum* was probably intended to be of the broadest and most general nature only. The more detailed and technical aspects of the private law institution could hardly have been known to the Peace Conference as a whole—as distinct possibly from certain of its members—and cannot therefore fairly be presumed to have been intended to be incorporated in its covenants. It was probably by reason of considerations such as these that the majority of the Court in the 1950 Advisory Opinion expressed the view that it was ". . . not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law" [1].

It seems then, that what was said in the opening paragraphs of Article 22 concerning a "sacred trust" and "tutelage", must be regarded as being descriptive of the idealistic or humanitarian objectives involved in the mandate system, and that the reference to "Mandatories on behalf of the League" is to be understood as affording a broad indication of the method whereby those objectives would be sought to be attained. It is, therefore, to the more detailed provision in Article 22 for "securities for the performance of this trust" that regard must be had in order to determine the juridical content of the mandate system as envisaged by the signatories to the Covenant.

14. On analysis the following "securities" are found embodied in the further provisions of Article 22:

(a) Although the Mandatories were to have authority and control in respect of the territories concerned (Art. 22 (8)), in other words (at any rate in the case of B and C Mandates) title or power of government and administration (Art. 22 (5) and (6)), this would vary according to circumstances (Art. 22 (3) and (8)) and would be subject to conditions (Art. 22 (5) and (6)).

(b) The said conditions would be directed towards a two-fold purpose, namely,

(i) to provide certain "safeguards in the interests of the indigenous population", and

(ii) to secure certain interests or benefits for Members of the League and their nationals (Art. 22 (5) and (6)).

(c) More particularly, the conditions mentioned in regard to B and C Mandates as directed towards safeguarding the interests of the indigenous population were:

". . . 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 . . .".

(Art. 22 (5) read with (6)).

(d) Specifically directed towards the interests or benefit of Members of the League and their nationals, would be conditions to "secure

[1] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128, at p 132.

equal opportunities for the trade and commerce of other Members of the League" (Art. 22 (5)). This so-called "open door" clause would not, however, apply in regard to C Mandates. (*Vide* limitative words at the end of Art. 22 (6).) It is further evident that certain of the conditions mentioned in *(c)* above as directed towards indigenous interests, could in addition serve the interests of League Members (e.g., the restrictions upon traffic in arms and ammunition and upon fortification and armament).

(e) The Mandatory was to be under an obligation to render to the Council of the League "an annual report in reference to the territory committed to its charge" (Art. 22 (7)). A Permanent Mandates Commission would receive and examine the reports and advise the Council "on all matters relating to the observance of the mandates" (Art. 22 (9)).

(f) The "degree of authority, control, or administration" to be exercised by the Mandatory was to be "explicitly defined" in each case—by agreement between Members of the League or by the Council (Art. 22 (8)).

15. It will be observed that Article 22 did not itself purport to put the mandate system into operation. It set forth the agreed idealistic objectives of the system, agreed methods whereby it would be put into operation and agreed features which would be incorporated therein. The provisions of Article 22 clearly envisaged that concrete steps would have to be taken for the complete constitution of the system, namely towards entrusting the "tutelage" of the inhabitants of particular territories to particular "advanced nations . . . willing to accept it" (Art. 22 (2)), constituting those "nations" as "Mandatories on behalf of the League" (Art. 22 (2)), and explicitly defining the degree of authority, control or administration to be exercised by them (Art. 22 (8)); and those provisions prescribed conditions which were in this process to be imposed as obligations upon the Mandatories, *substantively* in the interests of the mandated peoples and Members of the League (*vide* Art. 22 (5) and (6) and para. 14, *supra*), and *procedurally* with a view to international supervision of the "observance of the mandates", i.e., of the exercise of the substantive powers and compliance with the substantive obligations (Art. 22 (7) and (9)).

In other words, Article 22 was an agreement between Members of the League as such, regarding a mandate system *to be constituted* in pursuance thereof. The system itself, however, would begin to operate only upon the *conferment* on the respective Mandatories as such (not necessarily Members of the League) of *specific Mandates* in respect of particular territories, and upon the *specific definition* of the Mandatories' *rights and obligations* in connection therewith.

16. The concrete steps envisaged by Article 22 were duly taken, in the following order:

(a) The Principal Allied and Associated Powers (in whose favour Germany was to renounce her overseas possessions by Arts. 118 and 119 of the Treaty) allocated the various territories to different Mandatories, and, *inter alia*, decided on 7 May 1919 that the Mandate for South West Africa should be held by Respondent.

(b) Draft mandate instruments were considered by the Principal Allied and Associated Powers and, after agreement amongst them-

selves and with the designated Mandatories as to the terms thereof submitted to the Council of the League. In the case of South West Africa the Mandatory's agreement appears from the second and third paragraphs of the preamble of the draft submitted to the Council and of the instrument as finally approved [1].

(c) The Council of the League confirmed the Mandates [2], thereby constituting the designated Mandatories as "Mandatories on behalf of the League".

(d) The Council further, in pursuance of Article 22 (8), defined the terms of the Mandates in the manner set out in the instruments of Mandate [3]. This was generally in accordance with the drafts submitted, subject to certain alterations [4].

17. The provisions of the Mandate for German South West Africa, as defined by the Council on 17 December 1920, were typical of C Mandates. They can, for convenience, be grouped as follows:

(a) *Mandatory's Title*: The Preamble set out that there was conferred and confirmed, in accordance with Article 22 of the Covenant "a Mandate . . . to administer the territory aforementioned", which the Mandatory had undertaken "to exercise . . . on behalf of the League" [5]. Article 2 provided that "the Mandatory shall have full power of administration and legislation over the Territory . . . 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".

(b) *Mandatory's Substantive Obligations*: These were set out in Articles 2 to 5. Article 2 imposed the general obligation to "promote to the utmost the material and moral well-being and the social progress of the inhabitants". Articles 3, 4 and 5 imposed conditions as contemplated in the portion of Article 22 (5) of the Covenant cited in paragraph 14 *(c)* above—those in Article 3 relating to the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic; those in Article 4, to the prevention of fortifications and military training of natives other than for police and defence purposes; and those in Article 5, to freedom of conscience and religion. Article 5 was worded with reference not only to freedom of conscience and worship on the part of the inhabitants, but also to allowing all missionaries who were "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. While all the obligations imposed by Articles 2 to 5 were "safeguards . . . in the interests of the indigenous population", certain of the provisions (e.g., those of Article 5 relating to missionaries) appear to have been intended to secure and serve in addition the interests of Members of the League and their nationals.

(c) *Mandatory's Procedural Obligations*: Article 6 imposed the obliga-

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[1] *L. of N., O.J.*, 1921 (No. 1), p. 89. *Vide* also Preambles to other C Mandates at pp. 84-94 and Chap. II, para. 15, *supra*.

[2] End of Preamble of Mandate for South West Africa and also of other C Mandates.

[3] *Vide* end of Preamble.

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

[5] Paras. 2 and 3 of Preamble.

tion to render to the Council of the League, to its satisfaction, an annual report "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".

(d) *Amendment of Mandate Provisions*: Article 7 provided that the consent of the Council of the League was required for any modification of the terms of the Mandate.

(e) *Compulsory Jurisdiction for Adjudication of Disputes*: Article 7 also set out the Mandatory's agreement to the submission to the Permanent Court of International Justice of disputes between itself and another Member of the League of Nations, in so far as they related to the interpretation or application of the provisions of the Mandate and could not be settled by negotiation [1].

18. With reference to the origin and content of the Mandate, Respondent wishes to emphasize two points:

(a) *The Mandate required, and arose out of, the consent of a number of parties, including the Mandatory.*

During the hearing of the Preliminary Objections, Respondent submitted that the Mandate never was a "treaty or convention in force" within the meaning of Article 37 of the Statute of the Court [2]. For the purposes of this submission, it was necessary to consider not merely whether the Mandate gave rise to international obligations, but the character of the act or instrument that gave these obligations their legal force.

The majority of the Court held that the Mandate derived its legal force from international agreement to which the Mandatory was a party [3]. On the basis of this finding, it is obvious that the existence and terms of the Mandate required the consent of the Mandatory.

But the same result follows from the contrary view, expressed, *inter alia*, by Judge Basdevant [4] and by Judges Spender and Fitzmaurice [5]. They held that the Mandate had derived its legal force from a quasi-legislative exercise by the Council of the League of its powers in terms of Article 22 (8) of the Covenant to define the degree of authority, control or administration to be exercised by the Mandatory. However, this conclusion would also not derogate from the fact that the Mandatory's consent to the conferment and terms of the Mandate was required and obtained. Thus the basic terms of the C Mandates were laid down in the Covenant, which incorporated the compromise agreement to which Respondent had consented. When the Covenant was drafted, it was clear that the Mandate for South West Africa would be granted to Respondent. In fact the conferment of the Mandate pre-dated the signature and coming into force of the Treaty of Versailles, of which the

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[1] *Vide* Chap. II, paras. 11-16, *supra*, for the history of this clause.

[2] *South West Africa, Preliminary Objections, Oral Proceedings* (2 to 22 Oct. 1962), p. 365.

[3] *Vide South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 331; the separate opinion of Judge Bustamante, pp. 358-361; the separate opinion of Judge Jessup, pp. 398-401; and the separate opinion of Judge Sir Louis Mbanefo, pp. 440-442.

[4] *Ibid.*, pp. 460-462.

[5] *Ibid.*, pp. 474-494; *vide* also Judge Spiropoulos at pp. 347-348 and Judge van Wyk at p. 598.

Covenant formed a part [1]. The mandate instrument could not depart from the lines laid down by Article 22 of the Covenant without the express consent of the Mandatory [2]. In fact, save for the addition of a compromissory clause, the mandate instrument for South West Africa clearly adhered to the principles which had been agreed to by the authors of Article 22. Of particular importance for present purposes is the fact that the provisions regarding League supervision contained in Article 6 of the Mandate consisted basically of a repetition of the contents of Article 22 (7) of the Covenant. And the compromissory clause, which added a new element not provided for in Article 22, recorded that the Mandatory's consent thereto had been obtained ("The Mandatory agrees . . .").

Whether or not the Mandate ever was a "treaty or convention" does not therefore affect the basic consideration that the Mandate required for its creation and validity the consent of a number of parties, including the Mandatory.

(b) *Regard being had to the contents of Article 22 of the Covenant and of the Mandate instrument, the terms of the Mandate could not be applied fully in the absence of the League of Nations.*

As has been noted above, Article 22 of the Covenant and the Mandate instrument contained various references to the League of Nations and to its Members.

Thus Article 22 (7) of the Covenant and Article 6 of the Mandate both provided for the rendering of annual reports to the Council of the League, and Article 22 (9) of the Covenant provided for the creation of a Permanent Mandates Commission to receive and examine these reports and to advise the Council thereon.

Although of lesser importance for present purposes, the provisions of Articles 5 and 7 of the Mandate contained similar features. Article 7 required the consent of the Council for modification of the terms of the Mandate, and provided for compulsory jurisdiction solely with reference to disputes between the Mandatory and another Member of the League of Nations. Article 5 required special facilities for missionaries who were nationals or any State Member of the League of Nations.

At present Respondent wishes to emphasize only that these various provisions can no longer be applied in accordance with their express terms. For purposes of Respondent's argument [3] this is of particular importance as regards the provisions concerning administrative supervision [4]. During the lifetime of the League of Nations there was no difficulty about submitting annual reports to the Permanent Mandates Commission and the Council of the League of Nations exactly in accordance with the provisions of the Mandate and the Covenant [4]. The dissolution of the League brought about a radical change in this respect. As pointed out by Judge Read in his minority opinion in the 1950 Advisory Proceedings, the dissolution of the League gave rise to a

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[1] *Vide* Chap. II, para. 10, *supra*.

[2] *Vide* report of M. Hymans, adopted on 5 Aug. 1920, in *L. of N., O.J.*, 1920 (No. 6), p. 337.

[3] *Vide* broad exposition in para. 2, *supra*.

[4] Article 22 (7) and (9) of the Covenant and Article 6 of the Mandate.

situation wherein "it was no longer possible for the Union to send reports to a non-existent Council, or to be accountable to, or supervised by, a non-existent Permanent Mandates Commission" [1].

E. General Principles Applicable in Determining Whether Particular Provisions of the Mandate Still Exist

I. General

19. The situation indicated at the conclusion of the previous paragraph necessarily raises questions regarding the continued existence or otherwise of the provisions in question, and particularly those concerned with administrative supervision. Inasmuch as they can no longer be applied in accordance with their express terms—assuming, of course, that those terms are to be understood as bearing their apparently obvious meaning—it follows *prima facie* that these provisions lapsed on dissolution of the League. If they did not lapse, they can today be applied only in a manner different from that laid down by their express terms (understood as aforesaid) and from that applied in practice during the lifetime of the League of Nations. The question is therefore how such a situation could possibly have arisen. Excluding possibilities that are wholly far-fetched, it seems that it could have arisen on one or more of four broad bases only, viz.:

(a) If the express terms of the provisions in question are as a matter of interpretation to be understood in a sense which, contrary to their apparently obvious meaning, would enable the provisions to operate despite dissolution of the League.

(b) If the Mandate was *ab initio* subject to an implied provision providing for its adaptation in the event of the dissolution of the League.

(c) If an agreement, express or implied, making such provision, was entered into during the period of the foundation of the United Nations Organization and the dissolution of the League, or thereafter.

(d) If some legal principle, operating independently of the intent of those concerned, effected some change in the Mandate enabling the provisions in question to operate after the dissolution of the League [2].

These four potential bases involve three separate legal concepts, viz.:

(i) Interpretation of the express terms of an instrument.

(ii) The implication of a term or agreement not expressed in the instrument.

(iii) Legal rules affecting relationships between States and operating independently of their consent, express or implied.

It will be convenient at this stage to set out briefly the legal principles which are, in Respondent's submission, applicable to these three concepts. For convenience (ii) will be considered in conjunction with (i).

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[1] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 166.

[2] If it were to become necessary to consider the survival or otherwise of the compromissory clause in Article 7 of the Mandate, the same bases would be applicable.

II. Principles of Interpretation and Implication

20. The major questions of interpretation which will be dealt with at this stage of the proceedings relate to the provisions of Article 22 of the Covenant and of the mandate instrument. The Covenant was of course a convention among Members of the League, and as such the ordinary principles of treaty interpretation would apply to it. And the mandate instrument, whether or not it was a treaty in the ordinary sense of the word, in any event embodied the concord of wills of a number of parties, including the Mandatory [1]. In principle and logic the same rules of interpretation would therefore be applied to the mandate instrument—whatever its true juridical nature may have been—as to a document embodying an international agreement.

For convenience Respondent will, in the following exposition, employ terminology which is appropriate specifically to international agreements. It must be borne in mind, however, that, for the reasons stated, the principles set out therein are equally applicable to the Mandate instrument, whether or not it could be regarded as ever having been a "treaty or convention".

21. Certain principles applicable to the interpretation of international agreements are set out in detail, with reference to authority, in the Oral Proceedings relating to the Preliminary Objections [2]. Respondent does not propose reviewing the authorities in full again, but will merely refer to the major principles which are, in its submission, relevant to these proceedings.

22. *Common Intent* [2].

Treaties and conventions, being international agreements, owe their effect in law to the joint or common consent of the parties thereto. Consequently all questions concerning either the existence or the measure or meaning of a treaty obligation are to be answered basically with reference to the common intent of the parties.

The basic aim of treaty interpretation, as of interpretation of contracts in municipal law, is therefore to arrive at and give effect to the common intent of the parties, as that common intent existed at the time when the agreement was reached. To this aim all the rules and principles of interpretation must be subservient—they are intended merely to be of assistance for the purpose of arriving at the common intent of the parties.

23. *Actuality, Natural Meaning and Contemporaneity* [2].

In seeking to ascertain the common intent of the parties, a tribunal will in the first instance have regard to the principles of actuality, natural meaning and contemporaneity. This means that *prima facie*:

(a) the text of the treaty as it stands should be regarded as fully and accurately expressing the common intent of the parties (principle of actuality) [2];

(b) the language of the text is to be given its normal, natural and unstrained meaning in its context (principle of natural meaning) [2];

(c) the text should be appraised in the light of concepts and linguistic

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[1] *Vide* para. 18 *(a)*, *supra*.

[2] Oral Proceedings, 3 Oct. 1962 (morning).

usage current at the time of its execution (principle of contemporaneity) [1].

In applying these principles, it is, of course, necessary to look at and consider the instrument as a whole before any conclusion is reached about the meaning or effect of any part thereof [2].

Where the application of these principles gives rise to a clear, unambiguous and coherent result, it is only in exceptional circumstances that a Court would depart therefrom, to find, e.g.—

(i) that the text must be regarded as being amplified by something not expressed therein; or
(ii) that the text is to be understood in some sense other than the ordinary and natural one [1].

Implication of Tacit Agreement [1]

24. The principle of actuality referred to above involves that the parties must *prima facie* be considered to have expressed their full agreement in the written text. Exceptionally, however, a conclusion may be warranted that something "goes without saying", i.e., that the parties were in fact agreed upon something additional to the text without giving expression to such agreement.

Courts in all legal systems guard themselves against assenting to such a proposed implication on any but the most cogent grounds, realizing that implication on a basis of speculation, or of what the parties ought reasonably to have done, would amount to the making of a new bargain or compact for the parties, as distinct from the Court's true function of giving effect to the bargain or compact actually agreed to by the parties themselves. Consequently the requirement is stressed that an implication of such tacit *consensus* must arise *necessarily* or *inevitably* from the relevant facts, in the sense that all other reasonable inferences are excluded.

25. Two further corollaries arise from the principles stated above:

(a) The term sought to be implied must be capable of formulation in substantially one way only. If the content of the term sought to be implied is doubtful, then one cannot conclude that the parties tacitly agreed on anything at all [3].
(b) Where the written document makes express provision for any eventuality, there is increased difficulty about finding that there must in addition be an implied term covering substantially the same ground as such express provision [3].

26. *Travaux Préparatoires, Contemporanea Expositio and Subsecuta Observatio* [3].

Travaux Préparatoires, Contemporanea Expositio and *Subsecuta Observatio* are all recognized as legitimate aids to interpretation where required. But their degree of usefulness must necessarily vary with circumstances. Thus:

(a) Where the purpose of recourse to such aids is to assign a meaning to the text of an instrument, their potential utility would decrease

[1] Oral Proceedings, 3 Oct. 1962 (morning).
[2] Oral Proceedings, 3 Oct. 1962.
[3] Oral Proceedings, 3 Oct. 1962 (afternoon).

or increase in accordance with the extent to which the text in the particular respect is itself clear, on the one hand, or obscure or ambiguous on the other.

(b) Where the purpose is to ascertain whether the parties were tacitly agreed upon something not expressed in the instrument, the question of textual clarity does not arise, but such extraneous facts, in so far as they are relevant, could form an important part of the data for the drawing of inferences concerning *consensus* or the absence thereof in the particular respect.

Effectiveness (Ut res magis valeat quam pereat) [1]

27. This principle takes account of the objects and purposes of the instrument to be interpreted, and presumes that the parties intended for particular provisions the maximum effectiveness, consistent with the text, towards achievement of such objects and purposes.

The degree to which this principle could assist interpretation also depends on circumstances. Thus it could be a factor—

(a) in choosing between alternative possible meanings of an ambiguous or obscure text, or

(b) in deciding whether an inference of tacit agreement does or does not arise necessarily in a particular respect [1].

28. To some extent different considerations arise in the operation of the principle of effectiveness in these two different applications thereof. There are, however, certain basic propositions that are common to both, viz.:

(a) The principle of effectiveness is only an aid towards arriving at the intention of the parties. It cannot operate to give a higher degree of efficacy to the instrument than the parties intended. It also cannot act as a substitute for a non-existent common intention [1].

(b) The objects and purposes, to which effect is sought to be given, must themselves be ascertained by interpretation. The principle of effectiveness cannot operate to ascribe to the parties a loftier purpose than the one they actually had in mind [1].

29. In its application as an aid to textual interpretation, the principle of effectiveness cannot override the clear meaning of the text. It can at most assist the Court in deciding which of two or more possible meanings of an expression is, in case of doubt, to be preferred. It cannot justify a "meaning" which the language cannot bear [1].

30. In its operation relative to implied terms, the principle of effectiveness also has a relatively limited application. Basically it only means that, for the purpose of deciding whether a term is to be implied or not, regard is to be had to the probability that the parties would have intended a result which is in consonance with the general object or purpose which they had in mind. To put it in a different way, the fact that the parties had a certain object or purpose in mind may in certain circumstances give rise to grounds for inferring an implied term. In all cases the ordinary rules relating to implied terms would still apply. Thus it would not be sufficient to have regard merely to the purpose or object of the parties. The purpose or object would be only one of the circumstances to be considered, although in some cases it might

[1] Oral Proceedings, 3 Oct. 1962 (afternoon).

be a very important one. It would, however, always be necessary to examine *all* the relevant facts and circumstances, giving due weight to each one[1]. Furthermore, the ordinary rule applies that an implied term cannot override the express terms of the instrument, or operate to regulate some aspect for which express provision is made in the instrument. Thus a finding that the parties had a certain purpose or object in mind, would not justify a radical amendment of the instrument in order to give effect to such purpose or object. In this regard, particular reference may be made to the following passage from *The Law of Treaties*, by Lord McNair:

> "The rule of effectiveness must mean something more than the duty of a tribunal to give *effect* to a treaty; that is the obvious and constant duty of a tribunal; that is what it is there to do. The rule must surely mean, in the mind of the party invoking it: 'If you (the tribunal) do not construe the treaty in the way that I submit to you to be correct, this treaty will fail in its object.' But that is a *petitio principii*, because, as has been submitted in the previous chapter, it is the duty of a tribunal to ascertain and give effect to the *intention of the parties as expressed in the words used by them in the light of the surrounding circumstances.* Many treaties fail—and rightly fail—in their object by reason of the words used, and tribunals are properly reluctant to step in and modify or supplement the language of the treaty[2]."

III. Legal Rules affecting Relationships between States and operating Independently of their Consent, Express or Implied

31. Article 38 (1) of the Statute of the Court provides as follows:

> "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> *(a)* international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> *(b)* international custom, as evidence of a general practice accepted as law;
> *(c)* the general principles of law recognized by civilized nations;
> *(d)* subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Subparagraph *(d)* clearly is not a source of law which is to be recognized by the Court, but merely a method which the Court may adopt in ascertaining what the legal principles are. Rosenne puts it as follows:

> "Heads *(a)*, *(b)* and *(c)* [of Article 38 (1)] describe the various types of rules, from the point of view of legal theory, of which together international law is composed. Head *(d)* refers to an entirely different aspect, namely subsidiary means for the determination of rules of law, i.e., of the rules falling into one or other of heads *(a)*, *(b)* and *(c)*[3]."

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[1] Oral Proceedings, 3 Oct. 1962 (afternoon).
[2] McNair, A. D., *The Law of Treaties* (1961), p. 383.
[3] Rosenne, S., *The International Court of Justice* (1957), p. 424.

Apart, therefore, from treaty, rules of law affecting the relationships between the parties in the present case can arise only from international custom or the general principles of law recognized by civilized nations.

CHAPTER IV

THE MANDATORY'S PROCEDURAL OBLIGATIONS

A. Introductory

1. The main aspect of the Mandate to be examined, is that concerning the Mandatory's procedural obligations, in other words, those obligations relating to administrative supervision of Mandatory administration by organs of the League of Nations. The purpose of the enquiry is to ascertain—

(a) whether on a correct interpretation of the express provisions of the Mandate instrument and the Covenant, this aspect was capable of surviving the dissolution of the League of Nations; and, if not,

(b) whether an implied term in the Mandate itself provided the necessary adaptation to an existence after dissolution of the League of Nations; and, if not,

(c) whether an agreement, express or implied, making such provision, was entered into during the period of the foundation of the United Nations Organization and the dissolution of the League, or thereafter; and, if not,

(d) whether some objective legal principle effected some change in the Mandate enabling this aspect to operate after the dissolution of the League.

B. History, Nature and Meaning of Mandatory's Procedural Obligations

2. Although, as submitted above [1], the authors of the Covenant did not intend any close or technical analogy with municipal law institutions of trust, tutelage and *mandatum*, the mandate system did provide certain features of broad resemblance to those institutions. The resemblance to trust and tutelage lay in the vesting in the Mandatories of title and powers of administration, subject to conditions which involved obligations to utilize the powers for the benefit and progress of underdeveloped peoples. The resemblance to *mandatum* was supplied by the notion that the Mandatories would, in the exercise of these civilizing functions, act "as Mandatories on behalf of the League", and more specifically by the provision requiring them to report to the Council of the League relative to observance of their obligations in that regard.

3. In the history of the government and development of backward countries and their inhabitants, this element of League supervision provided for in the mandate system was an innovation generally recognized to be of great importance.

The application of the "sacred trust" and "tutelage" concepts in this sphere was nothing new. Following on views expressed by earlier writers [2], the colonial policies of western powers were, as from the 18th

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[1] *Vide* Chap. III, para. 13.

[2] *Vide* Chowdhuri, R. N., *International Mandates and Trusteeship Systems* (1955), pp. 16-18.

century, described by various statesmen as civilizing missions involving duties of trusteeship and guardianship towards the colonies and their inhabitants [1].

These declarations were generally recognized to be of a moral character and as involving no consequences in international law. P. T. Furukaki expressed the position thus:

> "Heretofore certain powerful states of superior civilization have attributed to themselves a civilizing mission among backward peoples. France, for example, admits and practices the theory of the colonization-tutelage. But this is a purely moral duty, voluntarily accepted by the colonizing state as a politic means of justifying in the name of civilization the conquest and the administration of colonial territories difficult to justify from the democratic point of view. This duty has been envisaged as the consequence of the suzerainty over the colony. It allows sovereignty in its full integrity to remain in the colonizing government which has to render account to no one for its action [2]."

4. Towards the end of the 19th century, during the period of the so-called "scramble for Africa" on the part of colonial powers, various international conventions were entered into between them in relation to, *inter alia*, the welfare of native peoples. The General Act of the Berlin African Conference of 1885 provided in Article 9 thereof that the slave trade was "forbidden" by "the principles of international law as recognized by the signatory Powers" [3]; and in regard to the area known as the Conventional Basin of the Congo the powers undertook towards each other not only to apply the "open door" principle but also—

> ". . . to watch over the preservation of the native tribes and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery, and especially the slave trade [4]".

Later international conferences, mainly at Berlin and Brussels, in the years 1890, 1899, 1900, 1906, 1907 and 1912, resulted in the recognition as between the signatory powers of principles and rules relating to abolition of slavery and the slave trade and to regulation of the importation of arms and trade spirits into Africa [5].

Although it is in a sense correct to say that by these conventions the welfare of backward peoples was rendered "a matter of international concern" [6], there were as yet no sanctions to the conventions. As Bentwich puts it:

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[1] Chowdhuri, *op. cit.*, pp. 18-22. *Vide* also Toussaint, C. E., *The Trusteeship System of the United Nations* (1956), pp. 5-8; Hall, H. D., *Mandates, Dependencies and Trusteeship* (1948), pp. 97-100; Bentwich, N., *The Mandates System* (1930), p. 4.

[2] Furukaki, P. T., "Nature juridique des mandats internationaux de la Société des Nations", *Bib. Un.* (July-Dec. 1926), p. 385, as cited by Wright, *op. cit.*, pp. 536-537.

[3] Hall, *op. cit.*, p. 104.

[4] Article 6, General Act of the Berlin African Conference. Referred to in Hall, *op. cit.*, p. 104.

[5] *Vide* Hall, *op. cit.*, pp. 102-104; Toussaint, *op. cit.*, pp. 8-9; Chowdhuri, *op. cit.*, pp. 20-22; Bentwich, *op. cit.*, p. 5.

[6] Toussaint, *op. cit.*, p. 9.

"The signatory Powers had no defined means of intervening if things were done contrary to the convention; and, in fact, they did not interfere[1]."

According to commentators this weakness led to evasion and inadequate observance of the conventions[2]. Moreover, it gave rise to uncertainty as to the exact manner in which certain aspects of the conventions were to be viewed—more particularly whether, in providing for native welfare in covenants as between civilized States, the conventions were to be regarded as giving rise to legal obligations in international law or whether they resorted in the sphere of morality only.

5. The mandate system, whilst also containing provisions in accordance with the "sacred trust" and "tutelage" ideals, sought to overcome this weakness and uncertainty by the introduction, in accordance with the *mandatum* concept, of international accountability in the form of League supervision. And thus it was that Wright commented:

"The distinctive feature of the system is undoubtedly the League's supervision. The principles of trusteeship and tutelage have often been avowed before and sometimes practised but only as self-limitations[3]."

And commentators generally are agreed that it was through the provision for League supervision that the Mandatories' obligations in respect of the welfare of the mandated communities became "juristically sanctioned"[4].

6. Although commentators frequently employ the broad descriptive terms "League supervision" and "supervisory functions of the League", such phraseology did not occur in the relevant provisions of Article 22 of the Covenant or of the Mandate instruments. These provisions were as follows:

(a) *Article 22 (7) of the Covenant:*

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

(b) *Article 22 (9) of the Covenant:*

"A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates."

(c) *Article 6 of the Mandate for South West Africa* (and corresponding provisions in other Mandate instruments):

"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."

These specific provisions are further to be read in the light of:

(i) the provision in Article 22 (2) that the "tutelage" should be exer-

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[1] Bentwich, *op. cit.*, p. 5.
[2] *Vide* Hall, *op. cit.*, pp. 104-105.
[3] Wright, *op. cit.*, p. 64.
[4] *Vide* e.g., Furukaki, as cited by Wright, *op. cit.*, p. 537; Bentwich, *op. cit.*, p. 5.

cised by advanced nations "as Mandatories on behalf of the League", and

(ii) the Mandatories' undertakings (as recorded in the preamble of the Mandate instruments) to exercise their Mandates "on behalf of the League of Nations".

7. The "supervisory functions of the League" spoken of by commentators was a concept in essence derived from the *obligation*, imposed upon the Mandatories by the above provisions, *to report* with reference to the respective territories and to the measures taken to carry out the substantive obligations. The reports would (by implication) regularly be considered by the Permanent Mandates Commission and the Council of the League with a view to achieving and maintaining observance of the Mandates, if necessary by Council resolutions directed to that end.

Moreover the Council, without express provision to that effect in the Covenant or the mandate instruments, accepted that the consideration of petitions regarding alleged grievances about observance of the Mandates by the Mandatories would form part of its functions as the supervisory organ. And it laid down in that regard the rules of procedure already referred to above [1]. Briefly these involved that petitions from inhabitants were to be forwarded through the respective Mandatories, who could then at the same time furnish their comments, and that petitions from other sources were to be addressed to the Chairman of the Permanent Mandates Commission, who was to decide whether they merited attention and, if so, to forward them to the Mandatory concerned for comment.

Thus the regular consideration of reports and of petitions and the Mandatories' comments thereon, with a view to securing observance of the Mandates, constituted League supervision correlative to the Mandatories' obligation to report and account to the Council. Without the imposition of this obligation on the Mandatories, there would be no justification for an inference that the League Council was intended to exercise a "supervisory function", or for speaking of any obligation to submit to such supervision.

So, by contrast, Article 23 *(b)* of the Covenant of the League imposed upon League Members the obligation "to secure just treatment of the native inhabitants of territories under their control". But, in the absence of any additional provisions requiring the Members affected by Article 23 *(b)* to act in this respect as Mandatories on behalf of the League, and to render reports to the League indicating the measures taken to comply with the obligation undertaken in that sub-article, nobody has ever suggested that the League was given a supervisory function with reference to that obligation or that the Members in question were obliged to submit to any such supervision.

It is evident, therefore, that the essence of *League supervision* or *the supervisory functions of the League* was the Mandatories' *obligation to report and account* to the Council of the League in respect of compliance with the substantive obligations pertaining to administration of the territories and protection and development of the inhabitants. The further obligation or function of the Mandatories relative to supervision, viz., the forwarding of petitions, was purely subsidiary and de-

[1] *Vide* Chap. II, para. 20, *supra*.

pendent on the fact that the Council was the supervisory organ—which fact in turn depended on the obligation to report and account.

8. By its *content* the obligation required the Mandatories to report and account to a *specific supervisory body*, constituted and functioning under the provisions of a particular international convention. It was *not* an obligation to submit *generally* to "international supervision" or to supervision by the "international community" or "the Family of Nations", or "the civilized nations of the world" or the like. It was an obligation to report and account to a *specific* organ of a *specific* organization of *certain* of the nations of the world, viz., the Council of the League of Nations.

The implications of this feature are of major importance. The League was constituted by a Covenant, the provisions of which were known to the Mandatories, and to which all Mandatories were, initially, signatories. The Constitution of the Council and the manner in which it was to function were laid down in the Covenant. As has been noted above [1], the provisions of the Covenant in that regard required, *inter alia*, unanimity, as a general rule, for Council decisions (Art. 5), and an invitation to any Member of the League not represented on the Council to be represented at any meeting during the consideration of matters specially affecting the interests of that Member (Art. 4). The Council would in regard to Mandates be assisted and advised by a permanent Commission (Art. 22 (9)). It was to supervision through machinery governed, *inter alia*, by these provisions of the Covenant, and to no other, that the Mandatories consented to submit.

9. The practical importance of the fact that the obligation related to specific supervisory machinery, is illustrated by certain statements made by delegates at the Paris Peace Conference. It will be recalled [2] that on 30 January 1919, when the compromise arrangement regarding the mandate system was arrived at, the South African Prime Minister, General Louis Botha, stated that:

> "Personally he felt very strongly about the question of German South-West Africa. He thought that it differed entirely from any question that they had to decide in this conference, but he would be prepared to say that he was a supporter of the document handed in that morning, *because he knew that, if the idea fructified, the League of Nations would consist mostly of the same people who were present there that day, who understood the position and who would not make it impossible for any mandatory to govern the country.* That was why he said he would accept it [3]." (Italics added.)

To this explanation by General Botha, added significance is lent by earlier statements of the British Prime Minister, Mr. Lloyd George, and President Wilson of the United States of America, in the Council of Ten on 28 January 1919, as follows:

> "Mr. Lloyd George said that he agreed with M. Clemenceau that if the League of Nations were made an executive for purposes of governing, and charged with functions which it would be unable to

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[1] *Vide* Chap. II, para. 18.
[2] *Ibid.*, para. 6.
[3] *For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, pp. 801-802.

perform, it would be destroyed from the beginning. But he had not so interpreted the mandatory principle when he had accepted it.

President Wilson said he too had not so interpreted it.

Mr. Lloyd George, continuing, said that he regarded the system merely as a general trusteeship upon defined conditions. Only when those conditions were scandalously abused would the League of Nations have the right to interfere and to call on the mandatory for an explanation. For instance, should a mandatory allow foul liquor to swamp the territories entrusted to it, the League of Nations would have the right to insist on a remedy of the abuse[1]."

10. The above contemplation of a conservative approach to the possibility of League interference with Mandatory government, became a reality upon the establishment of the League. The report by M. Hymans, unanimously adopted by the Council of the League on 5 August 1920[2], included the following passage:

> "The Annual Report stipulated for in Article 7 should certainly include a statement as to the whole moral and material situation of the peoples under the Mandate. It is clear, therefore, that the Council also should examine the question of the whole administration. *In this matter the Council will obviously have to display extreme prudence so that the exercise of its right of control should not provoke any justifiable complaints, and thus increase the difficulties of the task undertaken by the Mandatory Power* [3]." (Italics added.)

The Permanent Mandates Commission was constituted with a view specially to securing an impartial and non-political approach to the exercise of the supervisory functions. Reference has been made above to the independence and the individual merit of the members of the Commission, and to their expressed endeavour to exercise their authority,

> ". . . less as judges from whom critical pronouncements are expected, than as collaborators who are resolved to devote their experience and their energies to a joint endeavour [4]".

The dual function of supervision and co-operation was again stressed in later reports[5], and observed in practice[6].

The Council of the League seldom took any action in regard to Mandates supervision save on the basis of the Commission's advice, and usually accepted it when given; resolutions were tactfully worded as suggestions or invitations to Mandatories[7]; and due to the considerable representation of Mandatory Powers on the Council, it was generally sympathetic to the Mandatories' point of view[8].

Thus the agreed supervisory machinery was in fact very carefully checked and balanced so as to render unlikely any injurious, biased or unfair interference with Mandatory government, and, indeed, as was then apparently considered to be in the best interests of the inhabitants

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[1] *For. Rel. U.S., op. cit.*, pp. 769-770.
[2] *Vide* Chap. II, para. 13, *supra*.
[3] *L. of N., O.J.*, 1920 (No. 6), p. 340.
[4] *Ibid.*, 1921 (Nos. 10-12), p. 1125. *Vide* Chap. II, para. 20, *supra*.
[5] *Vide P.M.C. Min., VIII*, p. 200; Wright, *op. cit.*, pp. 196-197.
[6] *Vide* Wright, *op. cit.*, pp. 199-200; Hall, *op. cit.*, p. 209.
[7] Wright, *op. cit.*, p. 128.
[8] *Ibid.*, pp. 87-90.

of mandated territories, so as to contain the minimum of political element and a maximum of independent expert approach.

11. In the above circumstances, the wording of the obligation to report and account as relating to a specific supervisory authority and no other, was quite evidently not a matter of mere form or technicality, but one of basic practical importance. As a matter of interpretation there can therefore be no doubt that the parties never intended or contemplated any other supervisory authority than the Council of the League, assisted by the Permanent Mandates Commission.

Since the principle of contemporaneity would have to be applied in interpreting the provisions of the Mandate[1], the question may be posed whether any interpretation could reasonably be given to the Mandate which would have entailed any obligation on the Mandatory to submit *during the lifetime of the League* to supervision by any other international organization or any other organ of the League as regards performance of its functions under the Mandate. It seems self-evident that the answer must be in the negative. If, for example, a group of Nations which did not join the League had formed an organization of their own, with objectives similar to those of the League and with organs capable of exercising a supervisory function in regard to the government of mandated territories, it could surely not have been contended that the Mandatories, having agreed to submit to "international supervision" by League organs, must for that reason be regarded as obliged to submit to "international supervision" by some organ of the parallel organization. Such a contention would seek to attribute to the Mandatories an obligation to which they had never agreed; and its untenability would become the more manifest if the other form of supervision should be lacking in the very qualities which had made the specific League supervision acceptable to the Mandatories and had probably induced them to agree thereto[2].

Similarly it could not have been contended that the Mandatories would, without fresh consent on their part, be obliged to submit to "international supervision" by some other international organization in fact established and having for its members largely the same States as the League of Nations—such as, for instance, the International Labour Organisation. Again such a contention would seek to attribute to the Mandatories an obligation substantially different from that agreed to by them in Article 22 of the Covenant and the mandate instruments.

12. Even within the League of Nations organization, an alteration in the supervisory machinery provided for in the Covenant could not be imposed upon the Mandatories without their consent—e.g., an alteration transferring the supervision from the Council to the Assembly, or providing that the Council could in matters of Mandate supervision arrive at valid decisions by a simple majority or by a two-thirds vote. For again such an alteration would seek to impose upon the Mandatories an obligation of a content different from that agreed to by them in the Covenant and the mandate instruments. Article 26 of the Covenant did provide for amendments to the Covenant, through ratification

[1] *Vide* Chap. III, para. 23, *supra*.

[2] This argument is therefore not merely a technical one. In logic and fairness, similar considerations apply *a fortiori* to those which in municipal law prevent a master from ceding a service contract without the servant's consent.

by the Members whose representatives composed the Council and a majority of the Members whose representatives composed the Assembly: but it proceeded to provide that no such amendment would bind a Member signifying dissent therefrom, although the dissentient would then cease to be a Member of the League. At worst, therefore, a Mandatory refusing to agree to an alteration in supervisory machinery could lose its membership in the League, but the alteration could not be rendered binding upon it as a Mandatory without its consent—given either expressly, or tacitly through acquiescence without dissent in a Covenant amendment in terms of Article 26.

13. As a matter of interpretation, it is therefore submitted that there cannot possibly be any warrant for reading Respondent's duty to submit to supervision by the Council of the League as meaning supervision by any other international organization.

C. Whether an Implied Term Can Be Read into the Mandate Instrument

14. The further question then arises as to whether there can be read into the mandate instrument an implied term which could have had the effect of preventing the lapse of the Mandatory's procedural obligations on the dissolution of the League of Nations.

Respondent is loath to devote extensive consideration to this aspect since it appears somewhat academic. The Court in the 1950 Advisory Opinion apparently did not rely on any such implied term, as will be pointed out hereunder[1]. Nor did Applicants in their Memorials. They did indeed attempt some such basis in their Observations on the Preliminary Objections, referring to an "automatic succession"[2] or "doctrine of succession"[3] whereby the United Nations allegedly succeeded to the supervisory functions of the League of Nations. Although Applicants did not specifically indicate the legal origin of this alleged succession, it did appear from the development of their argument at I, pages 442 to 443 and pages 443 to 446[4], that they probably had in mind some term to be implied in the Mandate itself. This appears, *inter alia*, from their reliance[5] on the so-called principle of effectiveness, which was said to be applicable in view of the alleged essentiality of international supervision as an element of the Mandate. As pointed out earlier[6], effectiveness may be used either to assign a meaning to an ambiguous phrase (which hardly arises in the present case) or as one of the factors from which a term may be implied. However, after this "automatic succession" argument had been analysed and dealt with by Respondent in its Oral Statement[7], Applicants refrained from attempting to support it, or even from raising it at all, in the Oral Proceedings, and no member of the Court applied it. Judge van Wyk dealt with it only to reject it[8].

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[1] *Vide* paras. 43-48, *infra*.
[2] *Vide* I, p. 429.
[3] *Ibid.*, p. 443.
[4] *Vide* also p. 481.
[5] *Ibid.*, pp. 443-446.
[6] *Vide* Chap. III, para. 27, *supra*.
[7] Oral Proceedings, 5 Oct. 1962 (morning).
[8] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 605 ff.

Nevertheless, since the possibility of an implied term arises also in respect of other aspects of the Mandate, Respondent proposes dealing with it.

15. Any implication of such a term in the Mandate presupposes that the parties in 1920 intended that the supervisory functions of the League would not necessarily have to be exercised by the League itself, but could, in the event of its dissolution, be exercised by some other appropriate body. And the so-called essentiality of international supervision[1], could likewise have been relevant in this regard only if the authors of the Mandate contemplated the possibility that the organs of supervision actually provided by them, would not endure. It seems clear, however, that in 1920 nobody did in fact contemplate the possibility of the future dissolution of the League, or the creation of any other international body to take its place. This seems to be generally accepted.

Thus, Judge Bustamante states in his separate opinion on the Preliminary Objections:

> "Obviously the provisions of the Covenant which had instituted the international Mandates System did not envisage the possibility of the dissolution of the League of Nations and did not foresee its possible effects on the Mandate agreements in force[2]."

Judge Jessup refers in his separate opinion to the League system as "a system which it was fondly hoped in 1919 would become universal"[3]. In their joint dissenting opinion, Judges Spender and Fitzmaurice express the view that it is "evident that those concerned did *not* foresee, and would have refused to contemplate, a possible break-up of the League" [4].

Judge van Wyk states in his dissenting opinion as follows:

> "The truth is that the possibility of the dissolution of the League was not contemplated when the Covenant was agreed to or when the Mandate Declaration was made . . . [5]"

And Applicants themselves make the following statement in their Observations on the Preliminary Objections:

> "It was, of course, hoped and expected that the organs created after World War I to represent the international community would endure [6]."

16. Even if one were to assume, contrary to the generally accepted facts, that the authors of the Mandate did contemplate the possibility of a future dissolution of the League, it is still clear that no tacit intent can be imputed to them which would have the effect of the substitution of a new supervisory organ, however essential they may have considered international supervision to be. It has been pointed out above[7] that certain of the Mandatories could only with great difficulty be prevailed upon to accept the mandate system at all in substitution for contem-

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[1] *Vide* Applicants' contention in their Observations, as referred to in para. 14, *supra*.

[2] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 362.

[3] *Ibid.*, p. 412.

[4] *Ibid.*, p. 514.

[5] *Ibid.*, p. 601.

[6] *Vide* I, p. 443.

[7] *Vide* Chap. II, paras. 2-9, *supra*.

plated annexation, that a special compromise formula had to be devised in order to meet their difficulties, and that their acceptance thereof, with reluctance, was strongly influenced by the composition and nature of the supervisory organs. It is therefore almost inconceivable that they would have agreed in advance in 1920 to submit to supervision at some unknown date in the future by a body, the composition, procedure and attitude of which were *ex hypothesi* unknown to them. This becomes the more apparent if one adds the considerations that the circumstances whereunder the League would be dissolved would in the nature of things be unknown and unpredictable in 1920, and that the authors of the Mandate made express provision in Article 7 thereof for its future amendment. Surely had the matter been raised, the reaction of at least some of the prospective Mandatories would have been that the matter was to be left for further agreement in pursuance of the amendment provisions, in the light of the as yet unknown circumstances that might apply at the time of postulated dissolution of the League.

17. It seems clear, therefore, that no such implied agreement could possibly have been concluded. Further confirmation for this conclusion is found in the fact that no State has ever alleged the existence of such an implied agreement. During the discussions concerning the future of the mandates by the founders of the United Nations in 1945-1946 and by the Members of the League at its final session in April 1946, there was ample opportunity and every incentive for representatives to refer to such an agreement, if one existed. No such reference was made. Again in the discussions during the years 1946-1949 in the various organs of the United Nations, concerning the continued existence of the Mandate[1], no suggestion was made of any implied agreement concluded at the time of the creation of the Mandate, providing for future succession of supervisory organs [2].

18. Respondent submits therefore that, likewise as regards interpretation of its express provisions[3], there was nothing in the Mandate or its surrounding circumstances which would, by way of an implied term, provide a warrant for rejecting the *prima facie* conclusion that the Mandatory's obligation to report and account, together with the subsidiary function of forwarding petitions, lapsed on dissolution of the League.

D. Whether an Agreement, Express or Implied, Was Entered into during the Years 1945-1946 or thereafter

I. General

19. The above conclusion leaves the further questions, namely whether the procedural obligations under consideration were adapted either by agreement during the years 1945-1946 or thereafter, or by the operation of some objective Rule of Law, to the change of circumstances resulting from the dissolution of the League of Nations.

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[1] *Vide* Chap. II, paras. 56-60. *Vide* also paras. 38-42, *infra*.

[2] See generally in regard to this topic, the dissenting opinion of Judge van Wyk in *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 607-610.

[3] *Vide* para. 13, *supra*.

In their Memorials, Applicants in effect contend that the obligations "continue" in force in modified form, viz., as obligations to report and account and forward petitions to the General Assembly of the United Nations, which must for the purposes of the said obligations be regarded as the new supervisory authority [1].

Applicants rest their case in this regard entirely on the majority Advisory Opinion of 1950, and ask for reaffirmation thereof [2].

Since, in Respondent's submission, the Court in its 1950 Advisory Opinion reached its conclusion on the basis of the events during 1945-1946, Respondent will, while dealing with the question whether any express or implied agreement was reached during that period, at the same time consider the correctness of the 1950 Advisory Opinion in the respect under discussion.

20. Respondent contends respectfully that the general considerations which normally operate in favour of affirmation of a previous advisory opinion, are in this case outweighed by certain special considerations to the contrary.

The first and foremost of these is that vital factual information was not placed before the Court for the purposes of its Advisory Opinion in 1950. The information in question casts clear light on the real intent involved in the final resolution by the Assembly of the League of Nations on 18 April 1946, regarding Mandates, and also on the corresponding general intent and understanding on the part of the Members of the United Nations at the time of its formation and during the early years of its existence. Knowledge on the Court's part of the facts in question would, in Respondent's submission, almost certainly have led to a conclusion contrary to that arrived at in the majority opinion. The information and its significance will be dealt with below [3].

Respondent must also point out, with respect, that there were in any event two minority opinions on this question. In the critical comment of writers on international law—which may also have been based on fuller information regarding the relevant facts than the Court had at its disposal in 1950—the weight of opinion appears to favour the reasoning and the conclusions arrived at in this regard in the minority opinions.

Furthermore, in the Judgment and opinions on the Preliminary Objections, four members of the Court held that Respondent's procedural obligations had lapsed on the dissolution of the League, and although the other 11 members left the question open, seven adopted reasoning which was to a greater or lesser extent inconsistent with the survival of these obligations [4].

In all the circumstances a *de novo* and thorough consideration of the whole question seems essential.

21. It will be recalled that the United Nations Charter was drafted at San Francisco during the period 25 April to 25 June 1945, and came into force on 24 October 1945—i.e., some six months before the League of Nations was dissolved [5]. As was indicated above, the United Nations

[1] *Vide* Applicants' Submission No. 2 (I, p. 197), read with I, pp. 52, 53, 95-103.
[2] *Vide* Memorials, Chap. IV.
[3] *Vide* paras. 48-51, *infra*, and earlier passages there referred to.
[4] *Vide* paras. 55-69, *infra*.
[5] *Vide* Chap. II, para. 29, *supra*.

was a new international organization which had for its Members some, but not all, of the Members of the League of Nations at that time, plus some States that were not then, and a large number that had never been, Members of the League [1]. Although in many respects it adopted principles and objectives identical or similar to those of the League of Nations, it was not a successor in law to the League; indeed two of its major founder Members were known to be strongly averse to succession in law [1]. After the Charter and the new organization had commenced to function, and upon dissolution of the League, certain League assets were taken over by the United Nations and certain League activities were "assumed" and continued by it; but this was effected by special agreement and arrangements pertaining to those assets and activities, and again in language which intentionally avoided any impression of succession in law [2].

In providing for the establishment of a trusteeship system which would, in a broad sense, correspond to the mandate system of the League of Nations, the United Nations Charter created supervisory machinery which differed very materially from that which had operated under the Covenant in respect of Mandates. In the trusteeship system the supervision of first instance would not be by a commission of independent experts, but by a Trusteeship Council consisting of governmental representatives of member States [3]. And the ultimate supervisory authority would not be a Council in which Mandatory Powers exercised strong influence and in which a unanimity rule prevailed, but either the General Assembly of the United Nations [4], which could arrive at decisions by a bare majority, or, on important questions, by a two-thirds majority [5], or the Security Council in the case of trusteeship over "strategic areas" [6], in which event decisions could be taken by seven affirmative votes including those of the five permanent members [7] out of a total of 11 [8].

From the reasoning set out in paragraphs 2 to 13 above, it follows that no Mandatory could, by reason only of its agreement in 1920 to report and account to, and thus to submit to the supervision of, the Council of the League of Nations, now be held obliged to report and account to, and submit to the supervision of, the United Nations or any of its organs. The *content* of the latter obligation would be *materially different, in substance as well as in form,* from that agreed to in 1920 by the Mandatories; and for this reason alone it follows that a Mandatory could only have become bound to such an obligation by *fresh agreement and consent* thereto.

22. The question, therefore, whether Respondent is obliged to report and account to, and submit to the supervision of, the General Assembly of the United Nations, in essence resolves itself into an enquiry whether Respondent by any binding juristic act has consented to such an obligation.

[1] *Vide* Chap. II, para. 30.
[2] *Ibid.*, paras. 33-34, 37, 39-40.
[3] Art. 86 of the Charter.
[4] Arts. 85, 87-89 of the Charter.
[5] *Ibid.*, Art. 18.
[6] *Ibid.*, Art. 83.
[7] *Ibid.*, Art. 27 (3).
[8] *Ibid.*, Art. 23.

Although the enquiry as thus posed essentially concerns Respondent's consent to an obligation as postulated, it must of necessity also have reference to another aspect, viz., with whom Respondent agreed to submit to such an obligation (if any). (The majority advisory opinion of 1950 does not expressly refer to this aspect of the question.)

The mandate instrument derived its legal effect either from international agreement, or from a League resolution in terms of Article 22 (8) of the Covenant[1]. Whichever of these alternatives should be correct, it seems evident that the international persons, other than the Mandatory, who were intended to derive rights or legal interests from the mandates were the League of Nations and/or the Members of the League—at any rate primarily[2]. One would therefore *prima facie* expect the League and/or its Members to be parties to an agreement, if any, rendering a Mandatory obliged to report and account to a new supervisory authority. And if that new supervisory authority were to be an organ of the United Nations, it seems that the United Nations and/or its Members would *necessarily* have had to be parties to such an agreement.

For all practical purposes the enquiry is therefore directed towards ascertaining whether Respondent at any time bound itself by agreement, either with the Members of the League at the time of its dissolution (directly or *via* the League as representing them), or with the United Nations and/or its Members, or with both these groups, to an obligation as postulated. Such an agreement could conceivably have been either part and parcel of *general* multipartite conventions concerning the formation of the United Nations and/or the dissolution of the League, or *special* as between Respondent and the others who could conceivably have been parties thereto as aforestated.

II. The United Nations Charter

23. There could be no warrant for any suggestion that the provisions of the Charter of the United Nations by themselves rendered Respondent obliged to the United Nations or the other Members thereof to report and account to, or to be subject to the supervision of, any organ of the United Nations with regard to performance of its functions under the Mandate for South West Africa. In this respect there appears to have been general agreement in the Advisory Opinion of 1950. The majority opinion particularly emphasized that:

> "... the Charter has contemplated and regulated only a single system, the International Trusteeship System. It did not contemplate or regulate a co-existing Mandates System[3]."

The whole of the portion of the Opinion in which this statement occurred (answer to question *(b)*) was concurred in by Judge McNair and Judge Read[4]; and the particular statement was agreed to by Judge

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[1] *Vide* Chap. III, para. 18 *(a)*, *supra*, and Chap. V, Part B, paras. 33-47, *infra*.

[2] *Vide* Chap. V, Part B, paras. 48-67, *infra*, where Respondent submits that these were the *only* international persons who could have derived such rights or interests: for present purposes, however, the point is immaterial.

[3] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 140.

[4] *Ibid.*, pp. 146 and 164 respectively.

de Visscher[1], Judge Krylov[2], and apparently also Judges Zoričić and Badawi Pasha (who concurred in the dissenting opinion of Judge de Visscher)[3]. It is borne out entirely on reference to the Charter. The provisions of the Charter make no mention of anything pertaining to supervision in regard to Mandates. They do make provision for supervision of administration under the trusteeship system, but render it clear that this would apply only to cases in respect of which trusteeship agreements are entered into[4]. Clearly they impose no obligation upon any Mandatory to enter into a trusteeship agreement, as was (with respect, correctly) held by the majority of Judges in the Advisory Opinion in 1950. In any event Respondent had at the San Francisco Conference, when the Charter was being drafted, rendered clear and explicit that it did not intend to place South West Africa under United Nations Trusteeship or to be a party to any other arrangement involving commitment to the United Nations[5].

In the circumstances, it is manifest that, by agreement to the Charter, Respondent did not agree to any United Nations supervision of the performance of its functions under the Mandate. Furthermore, inasmuch as the Charter provided for supervisory machinery only in respect of trusteeship agreements voluntarily entered into, there would have had to be some further appropriate arrangement, in amplification or possibly even amendment of the Charter, if United Nations supervision was to be brought about regarding any Mandate or Mandates not converted into trusteeship.

24. Notwithstanding the above, Applicants attempted in their Oral Statement on Respondent's Preliminary Objections to base an argument on Article 80, paragraph 1, of the Charter, as, in their contention, it had been interpreted and applied by the Court in the 1950 Advisory Opinion. Article 80, paragraph 1, reads as follows:

> "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."

Applicants' submissions regarding this Article appear in the Oral Proceedings of 16 and 17 October 1962. The effect of their submissions is that the Court in the 1950 Advisory Opinion interpreted this Article as having been "designed to conserve all rights of peoples of Mandated territories to international supervision and judicial protection"[6].

In Respondent's submission, the Court in 1950 gave no such interpretation to Article 80[7].

The Court, in its Judgment on the Preliminary Objections, did not accept Applicant's argument relating to Article 80 and it is conse-

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[1] *International Status of South-West Africa, op. cit.*, p. 186.
[2] *Ibid.*, p. 191.
[3] *Ibid.*, p. 145.
[4] Arts. 76, 77 and 79 of the Charter.
[5] *Vide* Chap. II, paras. 31-32.
[6] Oral Proceedings, 17 Oct. 1962 (morning).
[7] *Vide* para. 46, *infra*.

quently not necessary to deal with it in detail. In Respondent's respectful submission, the untenability of this argument appears clearly from the following footnote to the joint dissenting opinion of Judges Spender and Fitzmaurice, the reasoning of which, although it deals more particularly with the suggested effect of Article 80 (1) on Article 7 of the Mandate, applies also to its effect on Article 6:

> "It has however been sought to call it [i.e., Article 80 (1)] in aid as follows: the Article, it is said, 'conserved' the rights of States: one of these rights was that stated in Article 7 of the Mandate instrument; therefore the right survived the League dissolution until the mandated territory was brought under trusteeship.
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> The argument is not only inherently unsound, it ignores the words of Article 80 (1). This Article is clearly an interpretation clause, commonly called a saving clause, of a type frequently to be found in legislative or treaty instruments, designed to prevent Statute or Treaty provisions being *interpreted* so as to operate beyond their intendment.
>
> Such a clause does not, except in a loose and quite indefinite sense, 'conserve' any rights. It prevents the operation of the Statute or Treaty from affecting them (whatever they are and whatever their content) except as provided by the Statute or Treaty. Article 80 (1) does not maintain or stabilize rights as they existed at the date of the Charter coming into operation, nor does it insure the continuance of those rights or increase or diminish them. It leaves them unaffected by Chapter XII of the Charter.
>
> What Article 80 (1) does not say is as important as what it does say. It does not say that rights shall continue. It does not provide that these rights shall not thereafter, until trusteeship agreements have been concluded, be subject to the operation of law, or that they shall not terminate or be extinguished by effluxion of time, failure of purpose, impossibility of performance or for any other reason. It does not say these rights shall not be altered or be subject to alteration even by normal legal processes.
>
> It is evident that the purpose of Article 80 (1) was quite different to what has been contended and does not lend itself by any rational method of interpretation to support the contention advanced. The sole purpose of the Article was to prevent any provision of Chapter XII of the Charter being construed so as to alter existing rights prior to a certain event [1]."

III. United Nations Resolutions of January-February 1946 pertaining to Assumption of Certain League Functions and Establishment of the Trusteeship System

25. These resolutions and their history, as dealt with above [2], in the first place clearly demonstrate that the United Nations did not consider itself to be an automatic successor in law to any League functions, and consequently that in its contemplation the assumption and continuation

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 516, footnote 1. *Vide* also dissenting opinion of Judge van Wyk at pp. 615 ff. and para. 53 *(b)*, *(c)* and *(d)*, *infra*.

[2] *Vide* Chap. II, paras. 33-35, *supra*.

of any League function by it would have to be a matter of active arrangement. Indeed, in contrast with assets, which were to be "transferred" in terms of the mutually adopted "common plan" [1] the earlier idea of a "transfer" of certain functions and activities was abandoned in favour of one of "assumption" by United Nations organs of certain functions and powers [1].

26. The second feature of importance is that in resolution XIV as finally adopted by the General Assembly on 12 February 1946 [2], the statement of *general willingness* to ensure the continued exercise of League functions was carefully limited to *functions of a non-political character* [3]. This would obviously not include the function of supervision regarding Mandates. The only portion of the resolution under which such function could possibly fall would be Part I, 3, C which read as follows:

> "C. *Functions and Powers under Treaties, International Conventions, Agreements and Other Instruments Having a Political Character*
>
> *The General Assembly* will itself examine, or will submit to the appropriate organ of the United Nations, any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character [4]."

In other words, for the assumption of a supervisory function regarding mandates, the procedure envisaged by the resolution would involve a "request from the parties" to, or legally interested in, the respective Mandates, and a *decision acceding to the request* by the General Assembly or other United Nations organ considered to be the appropriate one.

27. However, even in so far as the said Part I, 3, C of resolution XIV supplied a method whereby it might have been *possible*, at the initiative of the parties to the Mandates themselves, to effect an assumption of supervisory functions in respect of Mandates by some United Nations organ, it is apparent from its history that it was not designed for this purpose at all—at any rate as far as its proposers were concerned. For it will be recalled that the resolution was based on a recommendation of the United Nations Preparatory Commission, which in turn had considered a prior report from its Executive Committee [5]. The relevant portion of the Executive Committee's report, had stated, *inter alia*, that—

> "Since the questions arising from the winding up of the Mandate system are dealt with in Part III, Chapter IV, no recommendation on this subject is included here [6]."

"Part III, Chapter IV" as there referred to formed part of the history leading eventually to resolution XI, adopted at the same Session of

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[1] *Vide* Chap. II, para. 34.

[2] *G.A. Resolution* XIV (1), 12 Feb. 1946, in *U.N. Doc.* A/64, pp. 35-36; *vide* Chap. II, para. 34 *(c)*, *supra*.

[3] Part I, para. 3, A and B of the resolution.

[4] *U.N. Doc.* A/64, p. 35; *vide* Chap. II, para. 34 *(c)*, *supra*.

[5] *Vide* Chap. II, para. 34, *supra*.

[6] *Doc.* PC/EX/113/Rev. 1, 12 Nov. 1945, p. 110.

the General Assembly, on 9 February 1946. The said "Part III, Chapter IV" of the Executive Committee's report dealt with the establishment of the trusteeship system. It will be recalled that a recommendation was made therein for the establishment of a Temporary Trusteeship Committee, one of whose functions would be to—

> "advise the General Assembly on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the Mandates System[1]".

The recommendation regarding establishment of the Temporary Trusteeship Committee was, however, rejected by the Preparatory Commission[2]; and no other proposal regarding investigation of, or machinery for, the possible "transfer to" or "assumption by" the United Nations "of any functions and responsibilities hitherto exercised under the Mandates System", was substituted for the rejected proposal. Resolution XI as adopted in effect merely urged expedition in the submission of proposed trusteeship agreements by "the States administering territories now held under Mandate[3]".

28. In adopting resolution XI the Assembly knew beforehand that such proposed agreements would not be submitted in respect of all mandated territories. Express reservations had been made by the South African representative indicating an intention on the part of his Government to refrain from placing South West Africa under United Nations trusteeship and to seek recognition for incorporation thereof in the Union[4]. From reservations made by the representative of the United Kingdom, the future of the Palestine Mandate was known to be uncertain[5]. Furthermore, the Pacific Islands under Japanese Mandate were occupied by the United States and no decision had been come to as to their future.

In addition, the representatives of the United Kingdom and France had indicated that their Governments' willingness to place certain mandated territories under United Nations trusteeship depended upon their being able to obtain satisfactory terms[5].

That the Assembly was in fact aware that a number of States administering Mandates had no present intention of submitting trusteeship agreements, appears indeed from the text of resolution XI, especially the following:

> "... *with respect to Chapters XII and XIII of the Charter, the General Assembly:*
>
> 3. *Welcomes* the declarations, made by *certain States* administering territories now held under mandate, of an intention to negotiate trusteeship agreements in respect of *some of those territories* and, in respect of Transjordan, to establish its independence.
>
> 4. *Invites the States* administering territories now held under mandate to undertake practical steps ... for the implementation of Article 79 of the Charter[6]." (Italics added save for the heading and the words "Welcomes" and "Invites".)

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[1] *Doc.* PC/EX/113/Rev. 1, 12 Nov. 1945, p. 56.
[2] *Vide* Chap. II, para. 35 *(c)*, *supra*.
[3] *Ibid.*, para. 35 *(g)*.
[4] *Ibid.*, para. 35 *(d)* and *(e)*.
[5] *Ibid.*, para. 35 *(f)*.
[6] *U.N. Doc.* A/64, p. 13. *Vide* also Chap. II, para. 35 *(g)*, *supra*.

The references to *"certain States"* and *"some of those territories"* in the first part of the resolution may partially have been inspired by the absence of Japan (which was not a Member of the United Nations, and not present at the Assembly) and the case of Transjordan, to which reference is made later in the resolution. Nevertheless in view of the express reservations, *inter alia*, by South Africa, the resolution must have been intended to refer thereto as well. In addition, the invitation extended, in the second part of the resolution, to *"the States* administering" mandates, to submit trusteeship agreements, suggests that the General Assembly realized full well that there was a class of Mandatories which did not fall under the "certain States" which had made declarations, but which the General Assembly nevertheless hoped would submit agreements[1].

29. In all the circumstances, the silence on the part of the United Nations in regard to supervision of Mandatory government is significant. Its Members were aware that time would elapse before the coming into effect of the trusteeship system, and that there was no certainty that all mandated territories would end up as trust territories (para. 28, *supra*). Yet no attempt was made to arrive at a general arrangement either for *interim* supervision (after dissolution of the League) regarding mandated territories until they should become trust territories, or for any supervision at all in respect of mandated territories which might not become trust territories. The United Nations made elaborate provision for the "assumption" of certain League functions and powers, and for transfer to it of League assets, knowing, however, that its resolution XIV in this regard was not designed for supervisory functions in respect of Mandates (para. 27, *supra*). A specific proposal envisaging investigation and recommendation concerning possible "transfer" of "functions . . . under the mandates system" was rejected and nothing substituted for it (para. 27, *supra*). The inference seems inescapable that the omissions were deliberate. It is highly unlikely that it would have been possible to achieve a *general* arrangement applicable to all mandated territories, in view of the widely varying circumstances pertaining to them and the differing intentions of the Mandatory Powers in regard to their future—with the result that the matter perforce had to be left to *special* arrangement, if any, to be arrived at in each particular case.

However that might be, the contents and history of resolutions XI and XIV clearly show that, at the time of their adoption, being shortly prior to dissolution of the League of Nations:

(a) there had been no agreement express or implied between Respondent and the United Nations and/or its Members whereby Respondent consented to United Nations supervision regarding the performance of its functions under the Mandate;

(b) the only provision made on the part of the United Nations whereby such agreement could possibly come about, if at all, was that contained in Part I, 3, C of resolution XIV, envisaging a request therefor by the interested parties and agreement thereto by a United Nations organ; and

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[1] *Vide South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 537-538.

(c) in view of the repeated reservations made by Respondent, the Members of the United Nations must have realized that the prospects of Respondent being a party to such a special request were remote.

IV. Relevant League of Nations Resolutions during Last Session of Its Assembly, 8 to 18 April 1946

30. The texts of the relevant resolutions that were adopted by the League Assembly on 18 April 1946 are set out above [1].

As will appear from the Preamble of the resolution relating to assumption by the United Nations of League functions and powers arising out of international agreements [2], the Assembly of the League had "considered" the United Nations General Assembly resolution XIV of 12 February 1946 on the same subject [3]. The League resolution in question, as did the one following upon it and set out above [4], specifically confined itself to functions, powers and activities of a *non-political character*, and contained provisions designed to facilitate assumption of such functions, powers and activities by the United Nations in terms of its resolution XIV; it remained silent in regard to functions and powers arising out of international agreements of a *political* character, as dealt with in Part I, 3, C of the United Nations resolution XIV. The inference seems clear that the League Assembly considered that that was a matter in regard to which it had no role to play, and which was to be left to the *ad hoc* treatment envisaged by Part I, 3, C of United Nations resolution XIV. In other words, the League Assembly clearly knew that the United Nations wished each case involving political functions to be dealt with separately, by way of a request by the interested parties to the United Nations and consideration thereof by the United Nations General Assembly or other appropriate organ; and if it contemplated or intended transfer of such functions to the United Nations in any other manner, it could be expected to have said so.

31. This was exactly what had been contemplated in the *first* draft proposal by China concerning mandates [5]. The second paragraph of the draft invited the League Assembly to express the view that "the League's function of supervising mandated territories should be *transferred to* the United Nations in order to avoid a period of *interregnum* in the supervision of the Mandatory regime". The third paragraph invited it to recommend *submission of annual reports by the Mandatories to the United Nations* until the Trusteeship Council should be constituted. Here, then, was a proposal involving a course of action differing from that contemplated in Part I, 3, C of the United Nations General Assembly resolution XIV: instead of *separate* consideration by United Nations organs of *separate* requests from parties interested in *particular Mandates*, the proposal envisaged *transfer to* the United Nations of supervisory functions in respect of *all Mandated territories* and submission to the United Nations of reports by *all Mandatories*.

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[1] *Vide* Chap. II, paras. 38-41.
[2] *Ibid.*, para. 39.
[3] The League resolution erroneously refers to the date as 16 Feb. 1946.
[4] *Vide* Chap. II, para. 40.
[5] *Vide* Chap. II, para. 41 *(c)*.

It seems quite clear that such a proposal could not have obtained the unanimous support required for a League Assembly resolution. By reason of the reservation stated by South Africa in regard to South West Africa—being, in effect, that neither a mandate system nor a trusteeship system should in future apply to the Territory—the Union could not support the original Chinese proposal [1]. Nor does it seem that that proposal could have received the support of the United Kingdom, which, in terms of the statement by its representative, reserved its future intentions in regard to Palestine [2]. Furthermore, the reservation by the representative of Egypt was to the effect that Mandates would, in his Government's view, terminate with the dissolution of the League, and that Palestine must in any event be considered to have outgrown the need for being governed under mandate or trusteeship [3]: thus it also seems most unlikely that Egypt could have supported the original Chinese proposal.

32. In the light of the above considerations, the significance of the fact that the original Chinese draft was dropped after informal discussions and replaced by an agreed draft, which was then unanimously adopted, is self-evident. It will be observed that in paragraph 3 of the resolution, as adopted [4], the Assembly *"recognizes"* that on dissolution of the League its functions with respect to mandated territories will come to an end, and it "notes" the existence in the Charter of the United Nations of principles "corresponding to" those of Article 22 of the League Covenant: but it says nothing in regard to transfer to the United Nations of the League's functions with respect to Mandates, or of assumption or continuation of such functions by the United Nations. In paragraph 4 it expresses a contemplation of "other arrangements" that may be "agreed between the United Nations and the respective mandatory powers"; and as regards the *interim* period, pending such agreement upon "other arrangements", it *"takes note"* of the *"expressed intentions"* of those powers to continue—

> ". . . to *administer* [the territories] for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates . . ." [5]. (Italics added.)

In all the circumstances, the only inference that can be drawn is that the omissions in the adopted resolution, as compared with the original Chinese draft, were intentional. The author of that draft had also envisaged an *interim* period, described by Dr. Liang on 9 April 1946, as follows: ". . . in view of the fact that the trusteeship council of the United Nations has not yet been appointed and was not likely to be set up for some time" [6], and described in the last paragraph of the draft itself as "until the Trusteeship Council shall have been constituted" [7]. It was specifically in respect of this *interim* period that the author of the original draft wished "to avoid a period of *interregnum* in the super-

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[1] *Vide* text of statement at Chap. II, para. 41 *(b)* (ii), *supra*.
[2] *Vide* Chap. II, para. 41 *(b)* (i), *supra*.
[3] *Ibid.*, para. 41 *(e)*, *supra*.
[4] *Vide* text at Chap. II, para. 41 *(f)*, *supra*.
[5] *L. of N., O.J., Spec. Sup.* No. 194, p. 58; Chap. II, para. 41 *(c)*, *supra*.
[6] *Ibid.*, p. 76; Chap. II, para. 41 *(c)*, *supra*.
[7] L. of N., 21st Assembly, 1st Comm., 2nd Meeting, provisional record; Chap. II, para. 41 *(c)*, *supra*.

vision of the Mandatory regime" [1], and consequently invited the Assembly (i) to express the view "that the League's functions of supervising mandated territories should be transferred to the United Nations" [1], and (ii) to recommend "that the mandatory powers . . . shall continue to submit annual reports to the United Nations" [1].

Instead, as indicated above, the adopted resolution in respect of such *interim* period confined itself to stating that the Assembly *"takes note"* of *"expressed intentions"* *"to administer the territories"* in a certain manner. (Italics added.)

33. That the representative of China was himself fully aware of the significance of the contrast, appears from what he said upon introducing the eventual agreed draft, on 12 April 1946 [2], as compared with his earlier speech on 9 April 1946 [3]. He emphasized (on 12 April) that the functions of the League in respect of Mandates "were not transferred automatically" to the United Nations and that the Assembly "should therefore take steps to secure the continued application of the principles of the mandates system". But instead of moving from this foundation to the earlier proposal "recommending that the mandatory powers should continue to submit annual reports . . . to the United Nations", he then stated that, as the Australian representative had pointed out the previous day, the League "would wish *to be assured"* as to the future of mandated territories. He referred to statements by representatives of other Mandatory Powers, and described as "gratifying" the fact that all had "announced their intention to administer the territories under their control in accordance with their obligations under the mandate system until other arrangements were agreed upon". His comment on the substance of the matter concluded that "it was to be *hoped"* that "the principles of trusteeship underlying the mandate system" *"would"* be applied to the territories *"in full"* by "the *future* arrangements *to be made"*.

Clearly then, the conclusion is inescapable that there was in the final result a deliberate refrainment from attempting to secure a general transfer to the United Nations of League supervisory functions in respect of mandates not converted into trusteeship, and even from attempting to secure a recommendation that reports should in respect of such mandates be rendered to the United Nations.

34. In sum: The subject of possible United Nations supervision regarding mandates not converted into trusteeship had not been treated as something generally understood so as to "go without saying", but an express resolution to bring about such supervision had been sought, by a proposer who later stressed that the League functions concerning mandates "were not transferred automatically to the United Nations". The obvious failure of the proposal to secure the necessary support for an Assembly resolution thus rules out all possible basis of inferring general tacit intent to bring about such United Nations supervision. The known absence of such intent is confirmed by the text of, and omissions in, the resolution actually adopted, and by the speech of its proposer.

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[1] L. of N., 21st Assembly, 1st Comm., 2nd Meeting, provisional record; Chap. II, para. 41 *(c)*, *supra*.

[2] Chap. II, para. 41 *(d)*, *supra*.

[3] *Ibid.*, para. 41 *(c)*.

The intention must have been to leave to such "other arrangements", if any, as may be "agreed" in each case, the possibility of the assumption by the United Nations of supervisory powers in respect of mandates not converted into trusteeship—in other words, to the *ad hoc* method which was the only possibility provided for by the United Nations General Assembly in Part I, 3, C of its resolution XIV of 12 February 1946.

35. The above conclusions are further confirmed by the fact that none of the "expressed intentions" of Mandatory States referred to in paragraph 4 of the resolution, included an intention to report under their mandates to the United Nations pending such "other arrangements"; they were confined to administration of the territories in accordance with obligations regarding protection and promotion of the well-being and development of the inhabitants, and certain of the statements clearly suggested that there would be no such reporting pending the "other arrangements". Thus:

(a) the statement of the South African representative pointedly referred to the "disappearance of those organs of the League concerned with the *supervision* of mandates, primarily the Mandates Commission and the League Council [1], as something which would "necessarily preclude complete compliance with the letter of the Mandate" [1]; and immediately before, he had stated an intention of continued administration by the Union 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" [1] (and when reports were in fact not rendered).

(b) The Australian representative also stated, *inter alia*, that—

"After the dissolution of the League of Nations and the consequent *liquidation of the Permanent Mandates Commission*, it will be *impossible to continue the mandates system in its entirety* [2]." (Italics added.)

He further intimated that for the *interim*, pending trusteeship, he regarded Chapter XI of the Charter as being applicable, including the limited obligation thereunder (i.e.) Art. 73 *(e)*) to supply to the United Nations, for information purposes, certain statistical and other information of a technical nature [2]. This necessarily excluded contemplation of the more onerous obligation of reporting and accounting as regards compliance with substantive Mandate obligations and thus submitting to supervision [3].

(c) The United Kingdom's intention was expressed as being ". . . to continue to administer these territories in accordance with *the general principles* of the existing mandates" [4]. (Italics added.)

An interesting light is cast on the meaning intended to be conveyed by the italicized words in the above quotation, by the Report of the Special Committee on Palestine, extracts from which are quoted above [5]. One passage reads as follows:

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[1] *L. of N., O.J., Spec. Sup.* No. 194, p. 33; Chap. II, para. 41 *(b)* (ii), *supra.*
[2] *Ibid.*, p. 47; Chap. II, para. 41 *(b)* (ii), *supra.*
[3] *Vide* para. 37 *(b)*, *infra.*
[4] *L. of N., O.J., Spec. Sup.* No. 194, p. 28; Chap. II, para. 41 *(b)*, *supra.*
[5] *Vide* Chap. II, para. 59 *(c)*, *supra.*

"Following the Second World War, the establishment of the United Nations in 1945 and the dissolution of the League of Nations the following year opened a new phase in the history of the mandatory regime. The mandatory Power, in the absence of the League and its Permanent Mandates Commission, had *no international authority to which it might submit reports and generally account* for the exercise of its responsibilities in accordance with the terms of the Mandate. Having this in mind, at the final session of the League Assembly, *the United Kingdom representative declared* that Palestine would be administered 'in accordance with the *general principles*' of the existing Mandate until 'fresh arrangements had been reached' [1]." (Italics added.)

This was a report by an 11-nation committee, not by the United Kingdom itself, but it seems most unlikely that this explanation could have been given for the United Kingdom's statement had it not been obtained at the statement's very source.

36. In view of the above, the conclusion is clear that the relevant resolutions of the Assembly of the League of Nations at its last session did not embody any agreement, either express or implied, between Respondent and the League and/or its Members, whereby Respondent was rendered obliged to report or account to, or to submit to the supervision of, any organ of the United Nations relative to performance of its functions under the Mandate. On the contrary, the indications point to a mutual understanding that, pending "other arrangements" which may be "agreed" upon between the United Nations and Respondent, there would be no such reporting or accounting or supervisory authority. Such "other arrangements" could potentially, as far as the League resolution was concerned, cover a variety of possibilities, such as,

(a) recognition of a new status for the Territory, e.g., as was being proposed by Respondent, or independence, or partition as in the case of Palestine; or

(b) a Trusteeship agreement; or

(c) the "assumption" by the United Nations, in terms of Part I, 3, C of its Assembly's resolution XIV of 12 February 1946, of supervision regarding continued Mandatory administration of the Territory in pursuance of a request to that end.

V. Negotiations Subsequent to Dissolution of the League

37. The evidence shows that subsequent events never led to any agreement whereby Respondent was rendered obliged to submit to the supervision of any United Nations organ.

(a) "Other arrangements", as contemplated by the resolution of the last League Assembly, were never "agreed" upon between the United Nations and Respondent. The United Nations was not prepared to agree to an arrangement whereby recognition would be given to incorporation of South West Africa in the Union, nor to other proposals subsequently made [2]. On the other hand, Respondent,

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[1] *G.A., O.R., Second Sess., Sup.* No. 11, Vol. I (A/364), pp. 26-27.

[2] *Vide* Chap. II, paras. 43-46, 61 ff.

for the reasons explained above, was not prepared to agree to trusteeship for the Territory [1]. And there never was, in terms of Part I, 3, C of the United Nations General Assembly's resolution XIV of 12 February 1946, any "request from the parties", or agreement thereto by any United Nations organ, as to "assumption" by the United Nations of supervisory functions regarding continued Mandatory administration of the Territory.

(b) Chapter II above [2], deals with the history of Respondent's undertaking, later withdrawn, to submit statistical and other information such as mentioned in Article 73, paragraph *(e)*, of the Charter. Article 73 *(e)*, where it applies as a matter of law, does not involve an obligation to submit to "supervision". The whole of Article 73 comprises a counterpart in amplified form of Article 23 *(b)* of the League Covenant, in respect of which, as indicated above, no obligation concerning supervision applied [3]. The same situation was intended to apply in Article 73 of the Charter; and it is to this end that paragraph *(e)* thereof emphasizes that the transmission is to be "for information purposes" [4].

In the present case, there was a purely *voluntary* undertaking to furnish information "in accordance with" or "on the basis of" Article 73 *(e)* [5] coupled with an express denial of liability to submit to United Nations supervision, and with an understanding that the information was not to be dealt with as if a trusteeship agreement had, in fact, been concluded [6]. Inasmuch as the United Nations neither accepted nor observed the conditions attached to the undertaking, in which circumstances the undertaking was withdrawn, there was never any *consensus ad idem* or agreement, express or implied, even as regards the furnishing of information in accordance with Article 73 *(e)*, much less as regards Respondent being obliged to submit to supervision on the part of the United Nations.

VI. Practice of States

38. During the years immediately after establishment of the United Nations and the dissolution of the League, the practice of States showed a general understanding that the League supervisory powers in respect of Mandates had not been transferred to, or assumed by, the United Nations.

As appears above [7], Respondent expressed its attitude very clearly both before the Fourth Committee and before the General Assembly during the period September to November 1947, to the effect that Respondent was not obliged to conclude a trusteeship agreement for South West Africa, and was not prepared to do so, and that in the absence of a trusteeship agreement, the United Nations had no "right

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[1] *Vide* Chap. II, paras. 43-53.
[2] *Ibid.*, paras. 44-54.
[3] Para. 7, *supra*.
[4] *Vide* Hall, *op. cit.*, pp. 285-286, 288-289.
[5] *Vide* Chap. II, paras. 44, 48-49, 51, *supra*.
[6] *Ibid.*, paras. 48-49, 51.
[7] *Vide* Chap. II, paras. 48-49. *Vide* also para. 50.

of control or supervision" [1] or "supervisory jurisdiction" [2] in respect of South West Africa. At that time the United Nations consisted of 57 Members, of which 51 had been original Members. Of the 51, 31 had been Members of the League at the time of its dissolution and 34 had been original Members of the League. Had these States or any of them disagreed with Respondent's contention that the supervisory functions of the League had not been transferred to the United Nations, one would have expected them to have contested it, particularly if they had been parties to an agreement, express or implied, concluded the previous year and providing for such a transfer.

39. In fact, representatives of 41 States addressed the various organs of the United Nations on the question of South West Africa during 1947, *but at no stage did any of them aver the existence of any such agreement or suggest that the supervisory functions of the League had passed to the United Nations on any other basis* [3]. On the contrary, at least 14 of the 41 States who took part in the debates, acknowledged either expressly or by clear implication that, in the absence of a trusteeship agreement, the United Nations would have no supervisory powers in respect of South West Africa. These were Australia, China, Colombia, Cuba, France, India, Iraq, the Netherlands, New Zealand, Pakistan, the Philippine Republic, the Soviet Union, the United States of America and Uruguay [4].

During 1948 and 1949, four additional States associated themselves with this view, viz., Canada, Costa Rica, Greece and the United Kingdom [5].

Up to 1949 18 States therefore expressed the view that in the absence of a trusteeship agreement, the United Nations would have no supervisory powers with regard to South West Africa. If South Africa is added, the number is increased to 19.

Whereas there had been no contradiction in 1947, five States adopted a contrary attitude in 1948 and 1949 [6]. They were Belgium, Brazil, Cuba, India and Uruguay. Cuba, India and Uruguay had previously taken up a different attitude as indicated above; and India did so again, in its written statement to this Court in the 1950 proceedings relating to the status of South West Africa [7].

As will be seen from the extracts quoted above [8], none of these States relied on any agreement (other than Art. 80 (1) of the Charter) having been concluded during the transitional period of 1945-1946.

40. Also in respect of other mandated territories, the practice of States up to 1948 shows a clear understanding that the United Nations would have no supervisory powers over the administration of a mandated territory not placed under trusteeship. This understanding appears from the following:

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[1] *Vide* Chap. II, para. 48.
[2] *Ibid.*, para. 49.
[3] *Ibid.*, para. 57 *(a)*, *(b)* and *(c)*.
[4] *Ibid.*, para. 57 *(d)*.
[5] *Vide* Chap. II, para. 58.
[6] *Ibid.*, para. 60.
[7] *Vide International Status of South-West Africa, Pleadings, Oral Arguments, Documents*, p. 148. *Vide* also Chap. II, para. 60, *supra*.
[8] Chap. II, para. 60, *supra*.

(a) The trusteeship agreement for the mandated territory of Nauru was entered into as late as November 1947, i.e., more than two years after the Charter had come into force[1]; and the United Kingdom withdrew from the administration of Palestine only as from 15 May 1948[2]. Nevertheless no reports were in the interim period submitted to the United Nations in respect of either Territory. As far as the United Nations records show, and as far as Respondent is aware, no State ever suggested that such reports should be submitted—either in respect of these Territories or in respect of any other mandated territories during the period after dissolution of the League and prior to "new arrangements" being "agreed" upon in regard to them.

(b) (i) The case of Palestine is of particular significance inasmuch as it was investigated and reported upon by a United Nations Special Committee, consisting of representatives of 11 Members of the United Nations. Relevant extracts from the report, dated 3 September 1947, are set out above[3]. It is important to note that this committee unanimously expressed the clear understanding that the United Nations did not take over the supervisory functions of the League of Nations with respect to Mandates which were not converted into trusteeship territories. Five of these 11 Members (Australia, Canada, India, the Netherlands and Uruguay) at various times during the relevant period expressed the same view regarding the Mandate for South West Africa, as has been noted above. The further six were Czechoslovakia, Guatemala, Iran, Peru, Sweden and Yugoslavia.

(ii) Also in debates on the Palestine question the same view was expressed. On 19 March 1948, before the Security Council, the representative of the United States of America stated: "the record seems to us entirely clear that the United Nations did not take over the League of Nations Mandate system[4]."

(c) On 22 November 1946 the representative of New Zealand clearly expressed a similar understanding in relation to the Mandate for the Territory of Western Samoa[5].

(d) On 2 April 1947 a similar understanding emerged from statements made by the representative of the Union of Soviet Socialist Republics in relation to the former Japanese Mandated Islands[6].

41. In the result therefore:

(a) Up to the year 1947, no Member of the United Nations voiced any contradiction to Respondent's contention that in law the United Nations was not vested with supervisory powers over the Mandate for South West Africa, although 41 took part in debates

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[1] *Vide G.A., O.R., Second Sess., Sup.* No. 10 (A/402/Rev. 1).

[2] The Mandate terminated on 15 May 1948. The last British troops left from Haifa on 30 June 1948. *Vide Keesing's Contemporary Archives*, Vol. VII (1948-1950), p. 9354.

[3] *Vide* Chap. II, para. 59 *(c)*, *supra*.

[4] *S.C., O.R., Third Year*, Nos. 36-51, 271st Meeting, 19 Mar. 1948, p. 164. *Vide* Chap. II, para. 59 *(d)*, *supra*.

[5] *Vide* Chap. II, para. 59 *(a)*, *supra*.

[6] *Ibid.*, para. 59 *(b)*.

on South West Africa in that year and New Zealand had adopted a similar view in relation to Western Samoa.

(b) Over the years 1947 to 1949, at least 24 States Members of the United Nations (other than Respondent) in participating in debates in the organs of the United Nations, or in expressing views in its agencies, whether relative to the Mandate for South West Africa or to other Mandates, such as Palestine and the Japanese Mandated Islands, either expressly or by clear implication acknowledged that, in the absence of a trusteeship agreement, the United Nations would have no supervisory powers over a mandated territory. These States were: Australia, Canada, China, Colombia, Costa Rica, Cuba, Czechoslovakia, France, Greece, Guatemala, India, Iran, Iraq, the Netherlands, New Zealand, Pakistan, Peru, the Philippine Republic, the Soviet Union, Sweden, the United Kingdom, the United States of America, Uruguay, Yugoslavia [1].

(c) Up to 1949 only five States voiced any contradiction to the proposition aforestated. These States were Belgium, Brazil, Cuba, India and Uruguay. In the case of the lastmentioned three States, the attitude adopted by them in 1948 and 1949 was in conflict with their earlier contentions, and in the case of India also with its contentions before this Court in 1950. And in no case was the contradiction based on a suggested agreement or understanding (other than Art. 80 (1) of the Charter) arrived at during the period 1945-1946.

(d) At no time up to 1949 was any such contradiction voiced by any one of the two Applicant States, Liberia or Ethiopia.

42. The understanding which emerges from the above circumstances, and in particular the written and oral statements made on behalf of a large number of States, Members of the United Nations, in a variety of circumstances and situations, and within a relatively short time after the establishment of the United Nations and the dissolution of the League, when the events were still reasonably fresh in memory, in Respondent's submission effectively refutes any suggestion of agreement, express or implied, as between Members of the United Nations or other interested parties to the effect that Mandatories would be subject to United Nations supervision in respect of Mandates not converted into trusteeship [2].

VII. The Advisory Opinion of 1950

43. The majority of the members of the Court in 1950 came to the conclusion—

> "... that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised

[1] *Vide* paras. 39 and 40, *supra*. In the years 1947, 1948 and 1949, the Members of the United Nations totalled, respectively, 57, 58 and 59.

[2] Similarly, in Respondent's submission, these discussions clearly refute any suggestion that such an obligation arose out of a term to be implied in the Mandate instrument (para. 17, *supra*). In this regard it must be noted that 18 of the 24 States who expressed the view during 1947 to 1949 that the United Nations did not succeed to the supervisory functions of the League in respect of Mandates, had been founder Members of the League of Nations, and 17 had been Members at the time of its dissolution.

by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it [1]".

At the next page of the Opinion followed a consequential conclusion regarding petitions, viz.:

"In view of the result at which the Court has arrived with respect to the exercise of the supervisory functions by the United Nations and the obligation of the Union Government to submit to such supervision, and having regard to the fact that the dispatch and examination of petitions form a part of that supervision, the Court is of the opinion that petitions are to be transmitted by that Government to the General Assembly of the United Nations, which is legally qualified to deal with them [2]."

The Court's reasoning in support of its above main conclusion, is set out at pages 136 to 137 of the report. It commences with a recognition of—

"... the fact that the supervisory functions of the League with regard to mandated territories not placed under the new Trusteeship System were neither expressly transferred to the United Nations nor expressly assumed by that organization [3]".

Then follow what in the Court's words "nevertheless, ... seem to be decisive reasons" for its conclusion. These can briefly be summarized as follows:

(i) The obligation to accept "international supervision" and to submit reports is an *important part* of the mandate system—considered by the authors of the Covenant to be *required for effective performance* of the sacred trust, and similarly regarded by the authors of the Charter relative to the international trusteeship system. The *"necessity for supervision"* cannot be admitted to have 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.

(ii) "These general considerations" are confirmed by Article 80 (1) of the Charter, which cannot "effectively safeguard" the rights of the peoples of mandated territories without international supervision or a duty to render reports to a supervisory organ.

(iii) In its resolution of 18 April 1946, concerning mandates, the Assembly of the League of Nations gave expression to a *"corresponding view"*. In the Court's view *"this resolution presupposes that the supervisory functions exercised by the League would be taken over by the United Nations"* [1]. (Italics added.)

(iv) The General Assembly of the United Nations is rendered competent to exercise such supervision and to receive and examine such reports by Article 10 of the Charter.

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[1] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 137.

[2] *Ibid.*, p. 138.

[3] *Ibid.*, p. 136.

It seems evident that the Court could not have meant that each of the above four "reasons", or stages in the reasoning, was to be regarded as in itself affording full justification for the conclusion arrived at.

So, for instance, stage (iv) is concerned merely with the determination *within the United Nations* of an organ which would be competent to undertake the supervision: but this would have no relevance in the enquiry unless there should be an obligation to submit to United Nations supervision. Stage (iv) clearly proceeds on the basis that such an obligation has been affirmatively established by the first three stages.

44. The first stage in the reasoning is described in the Opinion itself as embodying "general considerations". As noted above, they relate to "effective performance" of the "sacred trust of civilization". At the outset the learned judges state in effect that the authors of the Covenant considered that international supervision of Mandatory administration was necessary for such effective performance; that the authors of the Charter had in mind the same necessity relative to the trusteeship system; and that such necessity continues to exist despite disappearance of the supervisory organ under the mandate system. These statements are clear, and were apparently meant to supply a basis for possible application of the principle of effectiveness, in the sense that there can be said to be a presumption or general likelihood that the interested parties would have intended to keep alive, after dissolution of the League, an obligation on the part of Mandatories to submit to international supervision regarding Mandatory administration. In other words, the consideration of effectiveness was invoked as a factor in reasoning towards a possible implication of tacit agreement [1].

The next general consideration is the existence within the United Nations of an organ performing supervisory functions—for which reason it cannot be "admitted" that the obligation to submit to supervision has disappeared merely because the League supervisory organs have ceased to exist. The suggestion seems to be that, in the light of the consideration of effectiveness already stated, the interested parties might well (or would probably) have intended that supervision of mandates should be continued by this new organ. Again this is reasoning by inference relative to tacit intent.

45. Clearly the "general considerations" were not considered conclusive. If they should be read as purporting to be full justification, by themselves, for the Court's conclusion in question, they would have to be interpreted as meaning in effect that because international supervision is desirable, therefore the Court holds that it must exist; and, that because the United Nations has an organ performing supervisory functions under a trusteeship system, which are similar to, though not identical with the supervision previously exercised by the League organs in respect of mandates, therefore the Court holds that a Mandatory previously obliged to submit to League supervision must now be obliged to submit, in respect of its Mandate, to supervision of the United Nations organ (despite the fact that the Mandatory is not obliged and may not be willing to submit to the trusteeship system). If this were what the Court intended to signify, it would mean that the Court in effect forsook its function of deciding in accordance with law and

[1] *Vide* Chap. III, paras. 27-30, *supra*.

assumed the role of a legislator. Clearly such an interpretation of the Court's reasoning cannot be justified. The Court could hardly have ignored the universal principle of law and logic that a party which consents to an obligation of a certain content, cannot, merely for that reason, and without fresh consent or agreement on its part, be held liable to an obligation of a substantially different content[1].

Nor does it seem that the Court could have intended to apply the principle that an obligation is not extinguished by impossibility of performance when the impossibility affects only one of two or more equivalent methods of compliance therewith. That principle clearly cannot find application in the present case, for the very reason that the obligation was not one to submit to "international supervision" but to the specific supervision of particular League organs. Submission to United Nations supervision would thus be a different obligation in substance as well as in form, and not a mere equivalent method of complying with the same obligation. That there were certain inherent and unavoidable differences, appears to have been acknowledged by the majority of the Court in the 1955 Advisory Opinion, particularly in the following passage:

> "The voting system is related to the composition and functions of the organ. It forms one of the characteristics of the constitution of the organ. Taking decisions by a two-thirds majority vote or by a simple majority vote is one of the distinguishing features of the General Assembly, while the unanimity rule was one of the distinguishing features of the Council of the League of Nations. These two systems are characteristic of different organs, and one system cannot be substituted for the other without constitutional amendment. To transplant upon the General Assembly the unanimity rule of the Council of the League would not be simply the introduction of a procedure, but would amount to a disregard of one of the characteristics of the General Assembly. Consequently the question of conformity of the voting system of the General Assembly with that of the Council of the League of Nations presents insurmountable difficulties of a juridical nature[2]."

In the result it seems evident that the first stage in the reasoning should be interpreted as not having been intended to be conclusive in itself but merely as affording indications of probability which, together with other relevant factors, could justify an inference of tacit agreement rendering Mandatories obliged to submit to United Nations supervision.

46. The second stage in the reasoning refers to Article 80 (1) of the Charter, and holds that the general considerations are "confirmed" by this clause "as ... interpreted above". These last words relate to an earlier passage which distinguishes the actual content of the clause from something "presupposed" by it, namely that the rights of States and peoples regarding mandates would not lapse automatically on dissolu-

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[1] *Vide* para. 21, *supra*, as to the material difference in form and substance between an obligation to submit to League supervision in respect of Mandates and one to submit to United Nations supervision.

[2] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, p. 75.

tion of the League [1]; the earlier passage proceeds that "it *obviously* was the *intention* to safeguard the rights of States and peoples under all circumstances and in all respects, until each territory should be placed under the trusteeship system [2]". (Italics added.) The reasoning regarding supervision [3] then proceeds by stating that the "*purpose must have been* to provide a real protection for those rights; but no such rights of the peoples could be *effectively safeguarded* without international supervision and a duty to render reports to a supervisory organ" [4]. (Italics added.) Again, therefore, the *presupposition*, the *obvious intent* and the *purpose* referred to unexpressed, i.e., tacit intent, and the *effective safeguarding* was employed as a factor of probability in reasoning towards an implication regarding such intent.

Applicants contended in their argument on the Preliminary Objections, that the Court's reasoning in the 1950 Opinion should be read as holding that Article 80 (1) by itself resulted in a transfer of the League's supervisory functions to the United Nations [5]. It is clear, however, that Article 80 (1) cannot be interpreted to achieve such a result [5]. Consequently, Applicants' contentions in this respect did violence both to the language of Article 80 (1) and to the reasoning of the Court in the 1950 Opinion.

47. The third stage in the reasoning concerns the last League Assembly resolution regarding Mandates [6]. After giving the contents of its third and fourth paragraphs, the Opinion states the conclusion: "This resolution *presupposes* that the supervisory functions exercised by the League would be taken over by the United Nations [7]." (Italics added.) Once more the reference is clearly to an inferred, tacit intent: the word "presupposes" renders this clear, as also the fact that the resolution itself made no mention of any transfer or taking over of supervisory functions.

48. To sum up, the Court was arguing from what it considered to be probabilities inherent in objective features referred to by it in the first two stages of its reasoning, and seeking to draw from these probabilities an inference of tacit agreement between the parties to the Charter of the United Nations to the effect that Mandatories would be obliged to submit to the United Nations supervision, pending trusteeship or other agreement with the United Nations. And, in the third stage of its reasoning, it sought to draw a similar inference of a corresponding tacit agreement on the part of the Members of the League of Nations at the time of its dissolution. Respondent contends that neither of these inferences could have been justified or would have been drawn, had the Court been fully informed of all the relevant facts.

In his judgment in the case of *Rex* v. *Blom*, Judge Watermeyer, a

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[1] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, pp. 133-134.
[2] *Ibid.*, p. 134.
[3] *Ibid.*, p. 136.
[4] *Ibid.*, pp. 136-137.
[5] *Vide* para. 24, *supra*.
[6] For its text, *vide* Chap. II, para. 41 *(f)*, *supra*.
[7] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 137.

South African Judge of Appeal and later Chief Justice of the Union, stated as follows:

> "In reasoning by inference there are two cardinal rules of logic which cannot be ignored:
>
> (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
>
> (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct [1]."

These rules of logic are clearly of general application. In particular they are applied by Courts of civilized States to the question whether a tacit agreement, or a tacit term in an express agreement, can justifiably be inferred or implied in a given case.

As pointed out above, a term may be inferred or implied only where it arises *necessarily or inevitably* from the relevant facts, in the sense that all other reasonable inferences are excluded [2]. From this it follows that the term sought to be implied must be capable of formulation in substantially one way only [3]. If the content of the term sought to be implied is doubtful, then one cannot conclude that the parties tacitly agreed on anything at all.

When regard is had to these principles and logical considerations, it is self-evident that in the absence of knowledge of certain relevant facts, a conclusion arrived at in reasoning by inference may be vitally different from what it would be if all the facts were known and considered. Three sets of facts which were not before the Court in 1950 and are of particular importance in this regard, are dealt with in the next succeeding paragraphs.

49. The majority conclusion as to the *presupposition* involved in the last League resolution on Mandates [4], was an integral part, if not the crux, of its reasoning in concluding that the League's supervisory functions had by tacit agreement been transferred to or assumed by the United Nations. But the introduction of the *facts concerning the original Chinese proposal* [5], which were not before the Court in 1950, puts a completely different complexion on the tacit intentions of the League Members at the last Session. It shows that what the Court considered to be a presupposition or tacit understanding, had been sought to be achieved by express resolution, but that the proposal to that end could not be proceeded with because it became plain that certain of the parties would not agree thereto [6].

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[1] *Rex* v. *Blom*, 1939 A.D. 188, at pp. 202-203.

[2] *Vide* Chap. III, para. 24, *supra*.

[3] *Ibid.*, para. 25 *(a)*.

[4] *Vide* para. 47, *supra*.

[5] *Vide* Chap. II, para. 41 *(c)* and para. 31, *supra*.

[6] It is instructive to note the close similarity between the wording of the presup position or tacit understanding found by the Court, and the express terms of the first Chinese draft proposal. The 1950 majority opinion stated that the resolution presupposed that:

"... *the supervisory functions exercised by the League would be taken over by the*

This not only destroys all possibility of finding in favour of such presupposition: it also throws such light on other aspects of the final League proceedings [1] as to render clear a contrary understanding on the part of the League Members, viz., that there would be no reporting, accounting or supervision pending "agreement" upon "other arrangements" as between each Mandatory and the United Nations. In turn, this contrary understanding in itself effectively rebuts the presumptions or probabilities regarding effectiveness, as relied on in the majority's reasoning concerning the "general considerations" and the "purpose" of Article 80 (1) of the Charter [2]. For the majority of the League Members, including all Mandatories except Japan, had been involved in the establishment of the United Nations and the agreement upon its Charter. Consequently their understanding at that time could hardly have been the opposite from what it was shortly afterwards at the dissolution of the League.

50. The last-mentioned factor, bearing on the tacit intent of the founders of the United Nations, is enhanced by the second set of facts not known to the Court in 1950, i.e., that there was an *express proposal that the suggested Temporary Trusteeship Committee was to be empowered to "advise the General Assembly on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the mandates system* [3]" (italics added)—which proposal lapsed upon the rejection of the suggestion of a Temporary Trusteeship Committee, without the substitution of anything regarding possible transfer to, or assumption by, the United Nations of any "functions under the mandate system" [4].

51. Finally, as regards the tacit intent of the United Nations founders as well as of League Members at its dissolution, regard must be had to the third set of facts not before the Court in 1950, i.e., *the practice of States during the years 1946 to 1949* and reflected, *inter alia*, in written and oral statements made on behalf of a large number of States in a variety of circumstances and situations, and within a relatively short time after the establishment of the United Nations and the dissolution

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United Nations". (Italics added.) (*International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 137.)
The Chinese draft proposal had considered:
"... *that the League's function of supervising mandated territories should be transferred to the United Nations* ..." (Italics added.) (*Vide* Chap. II, para. 41 (*c*), *supra*.)

[1] As dealt with in Chap. II, para. 41, *supra*, and in this Chapter, paras. 30-36, *supra*.

[2] *Vide* para. 46, *supra*.

[3] *Doc.* PC/EX/113/Rev. 1, p. 56.

[4] *Vide* Chap. II, para. 35 *(a)*, *(b)* and *(c)*, *supra*, and para. 27, *supra*. The text of the powers regarding Mandates proposed to be exercised by the Temporary Trusteeship Committee, was not before the Court in 1950, nor was any reference to these proposed powers made in the written or oral proceedings. That there was a suggestion to have a Temporary Trusteeship Committee, which was later abandoned, does appear from the statement made by Dr. Ivan S. Kerno, the legal officer of the United Nations, which appears in *International Status of South-West Africa, Pleadings, Oral Arguments, Documents*, at p. 161, but, as already stated, without any reference to the powers regarding Mandates proposed to be exercised by such Committee.

of the League of Nations, when the events were still reasonably fresh in memory [1]. These statements show unmistakably a general understanding amongst Members of the United Nations that no supervisory functions regarding mandates (not converted into trusteeships) had been taken over, and thus refute any suggestion of a general tacit intention to the contrary.

Had the above facts been known to the Court in 1950, it seems inconceivable that it could have arrived at its conclusion regarding an obligation on Respondent's part to submit to United Nations supervision.

VIII. Dissent from the 1950 Opinion concerning Supervision

52. *Minority Opinions.*

Even on the basis of the facts before the Court in 1950, two of its members, Sir Arnold McNair and Judge Read, were not prepared to subscribe to the finding that Respondent is obliged to submit to a supervisory power on the part of the United Nations, and they gave full reasons for their dissent [2]. As far as Respondent is aware, these reasons and the conclusions drawn from them have invited no adverse criticism from writers on international law. On the contrary, they find considerable support in the critical comments of such writers—as will appear from paragraph 53 below. Furthermore, the additional factual information now brought into consideration [3] confirms the correctness of the result arrived at in these minority opinions.

53. *Opinions of Writers.*

(a) Even before the 1950 Advisory Opinion, Hall, in dealing with the effect of the dissolution of the League upon Mandates, stated, *inter alia*:

> ". . . the supervisory functions of the League had come to an end before the supervisory functions of the United Nations could begin to operate, especially since the plan for a temporary trusteeship committee had been rejected in the Preparatory Commission of the United Nations [4]".
>
> In referring to the original draft resolution raised by the Chinese delegate at the last session of the League Assembly, which was not proceeded with, he quoted the Chinese delegate as saying that the Charter "made no provision for assumption by the United Nations of the League's functions" under the mandate system [5].
>
> And he commented finally in regard to the League Assembly resolution of 18 April 1946:
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> "The significance of this resolution of the League Assembly becomes clearer when it is realized that for many months the most elaborate discussions had been taking place between the governments as to the exact procedure to be adopted in making the transition between the League and the United Nations. It was the

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[1] *Vide* paras. 38-42, *supra.*

[2] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950,* pp. 159-162, 166-173.

[3] *Vide* paras. 49-51, *supra,* and earlier paragraphs there referred to.

[4] Hall, *op. cit.,* p. 272.

[5] *Ibid.,* pp. 272-273.

function of the Preparatory Commission and the committees succeeding it to make recommendations on the transfer of functions, activities, and assets of the League. All the assets of the League had been carefully tabulated. All its rights and obligations that could be bequeathed to the United Nations and which the latter desired to take over were provided for in the agreements that were made. But in the case of mandates, the League died without a testament[1]."

(b) In January 1951, very shortly after the 1950 Advisory Opinion, Manley O. Hudson wrote as follows:

"To support its additional conclusion that the Union of South Africa is obliged to submit to the supervision of, and to render annual reports to, the United Nations, the Court relied upon a resolution adopted by the final Assembly of the League of Nations on April 18, 1946, which was said to presuppose that the 'supervisory functions exercised by the League would be taken over by the United Nations'. This is hardly borne out by the text of the resolution, however. Nor is the succession of the General Assembly a necessary consequence of its competence under Article 10 of the Charter to which the Court refers[2]."

and,

"The Court seems to have placed emphasis on the competence of the General Assembly to exercise supervision and to receive and examine reports. Such competence can hardly be doubted. Yet it does not follow from the conclusion that the General Assembly 'is legally qualified to exercise the supervisory functions previously exercised by the League of Nations', that the Union of South Africa is under an obligation to submit to supervision and control by the General Assembly, or that it is obligated to render annual reports to the General Assembly[3]."

Regarding the applicability and effect of Article 80 (1) of the Charter he remarked:

"Article 80 (1) of the Charter seems to be the principal basis of the Court's conclusion that the Union of South Africa must report to the General Assembly. This article provided that, until the conclusion of Trusteeship Agreements, nothing in Chapter XII of the Charter should 'be construed *in or of itself* to *alter in any manner the rights whatsoever of any states or any peoples* or the terms of existing international instruments' (italics supplied). The text clearly shows an intention that Chapter XII should not effect any alteration of rights or terms. This intention was 'entirely negative in character'. The provision served an obvious purpose when Chapter XII of the Charter was drawn up: the Mandate was still in force at that time: as the League of Nations had not then been dissolved, any alteration of the existing situation was a matter for its consideration. Article 80 (1) was a precautionary provision designed to negative the accomplishment of any change in the existing

[1] Hall, *op. cit.*, p. 273.

[2] Hudson, M. O., "The Twenty-ninth Year of the World Court", *A.J.I.L.*, Vol. 45 (Jan. 1951), pp. 1-36, at p. 13.

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

situation by reason of Chapter XII 'in or of itself'. It is not surprising that Judge McNair found it 'difficult to see the relevance of this article'.

Yet the Court gave an affirmative effect to Article 80 (1), turning it into a positive 'safeguard' for maintaining the rights of states and the rights of peoples of the mandated territory. This is the more notable because at a later stage the Court stressed the 'entirely negative' character of Article 80 (2), declining to say that the latter imposed a positive obligation on the Mandatory even to negotiate with a view to the conclusion of a Trusteeship Agreement.

No attention was paid by the Court to the fact that certain States, which as Members of the former League of Nations may have 'rights' under Article 22 of the Covenant and under the Mandate itself, had no responsibility for the Charter and have never become Members of the United Nations. For example, Finland, Ireland and Portugal, which were represented at the final session of the Assembly of the League of Nations in 1946, are in this category. If their rights are 'maintained' by Article 80 (1) of the Charter, they have no voice in the supervision to be exercised by the General Assembly [1]."

(c) In August 1951, followed an article by Joseph Nisot [2]. The learned author stated, *inter alia*:

"Now, what, in actuality, were the rights derived by peoples from the Mandate and from Article 22 of the Covenant? They were not rights to the benefit of abstract supervision and control. They consisted of the right to have the administration supervised and controlled by the *Council of the League of Nations*, and, in particular, the right to ensure that annual reports were rendered by the mandatory Power to the *Council of the League of Nations*, as it was, and the right to send petitions to the *Secretariat of the League of Nations*. What has become of these rights? They have necessarily disappeared as a result of the disappearance of the organs of the League (Council, Permanent Mandates Commission, Secretariat).

The Court could not correctly conclude that such rights had been maintained by Article 80, except by contending at the same time that for the purposes of the Mandate for South West Africa, the said organs had survived the dissolution of the League.

. . . Being unable, and for good reasons, so to contend, the Court creates *new* rights. To the Court, the right of peoples 'maintained' by Article 80 is linked to the *United Nations Organisation* . . .

According to its thesis, it is because Article 80 'maintains' the rights of peoples that these, though linked to the League, must now be deemed linked to the United Nations! To infer this from a text worded as is Article 80 amounts to assuming that, with respect to the mandates system, the United Nations stands as the legal successor of the League, an assumption inconsistent with the dis-

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[1] Hudson, *op. cit.*, pp. 14-15.

[2] Nisot, J., "The Advisory Opinion of the International Court of Justice on the International Status of South West Africa", *S.A.L.J.*, Vol. 68, Part 3 (Aug. 1951), pp. 274-285.

cussions of San Francisco and with the very fact that the Charter provides for the conclusion of trusteeship agreements[1]."

Regarding the resolution of 18 April 1946, of the League Assembly, he continued:

"... one fails to see how this statement can provide any support for a suggestion that it was the Assembly's opinion that a mandatory Power, though not bound by a trusteeship agreement, was under an obligation to submit to supervision and control by the United Nations.

This was no more the opinion of the Assembly of the League of Nations than that of the General Assembly of the United Nations, which, by its resolution of 9th February, 1946, urged the conclusion of trusteeship agreements, implying that no implementation of the principles of the trusteeship system—therefore, no supervision or control—was possible in the absence of such agreements[2]."

In the final portion of this part of the article, Nisot referred to the failure of the authors of the Charter:

"to provide for international supervision with respect to the obligations incumbent on a mandatory State, should it elect not to conclude such an agreement." (i.e., Trusteeship Agreement.)

He concluded:

"This lack of foresight has resulted in the present situation, which the Court attempts itself to redress, stepping out of its role as interpreter of the law to assume that of legislator[3]."

(d) Georg Schwarzenberger commented, *inter alia*, as follows:

"... the World Court was faced with the issue of whether the United Nations had become responsible for the discharge of the supervisory function which the League had formerly exercised in relation to the only still surviving mandate. In support of a positive answer, the Court could neither rely on any general principle of succession between international persons nor any relevant transaction between the two collective systems.... The still missing link with the United Nations was provided by the Court's interpretation of Article 80 of the Charter of the United Nations. It was admitted in the majority Opinion that 'this provision only says that nothing in Chapter XII shall be construed to alter the rights of States or peoples or the terms of existing international instruments'. Still, with the assistance of a somewhat debatable presupposition and 'obvious' intentions, the last gap was bridged. It is not surprising that Judge McNair should have found it 'difficult to see the relevance of this Article'.

Having filled the legal void which separated the supervisory functions of the League of Nations from those of the United Nations, the Court proceeded with its self-imposed task of 'judicial legislation'[4]."

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[1] Nisot, *op. cit.*, p. 279.
[2] *Ibid.*, p. 280.
[3] *Ibid.*, p. 281.
[4] Schwarzenberger, G., *International Law* (3rd ed.), Vol. I, pp. 101-102.

Again the criticism of the majority opinion was possibly in a large measure derived from the fact that certain material facts may well have been known to some of these writers whereas the Court was unaware thereof in 1950.

IX. Advisory Opinions of 1955 and 1956

54. On 7 June 1955 and 1 June 1956 this Court gave Advisory Opinions interpreting the 1950 Opinion. The 1955 Opinion concerned voting procedures on questions relating to reports and petitions regarding the territory of South West Africa[1]. The 1956 Opinion related to the admissibility of hearings of petitioners by the Committee on South West Africa[2].

In both cases this Court was asked only for an interpretation of the 1950 Opinion, and consequently its correctness was not considered. The later Opinions are, however, significant in one respect. The difficulty experienced by the Court, particularly in 1956, in determining exactly what had been decided in 1950 regarding supervision and what the ratio of such decision was, indicates, in Respondent's respectful submission, that the Court in 1950 was not able, on the information before it, to formulate with precision the implied agreement considered to have been entered into during the years 1945-1946. In the result, doubt must attach to the correctness of the implication even on the information then before the Court[3]. The further information now presented, however, in Respondent's submission, establishes clearly that no such implication is warranted.

X. Judgment and Opinions on the Preliminary Objections

55. Although the question whether Respondent's obligation to report and account to the Council of the League survived the League's dissolution, was not *per se* an issue to be determined for the purpose of the Preliminary Objections, it was extensively argued by both Parties. This was done primarily because of the nature of the main argument advanced by Applicants on the issue whether there were still in existence any States competent to invoke the compromissory clause. That argument was to the effect that on dissolution of the League a succession was effected of the functions and rights of the League and its Members in favour of the United Nations and its Members, and that the right to invoke the compromissory clause was thus kept alive in favour of Members of the United Nations[4].

However, although eight Members of the Court held that the right of Members of the League to invoke the compromissory clause was not terminated by the dissolution of the League, it is significant that not one of them was prepared to accept Applicants' argument relating to a succession by the United Nations and its Members.

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[1] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, p. 67.

[2] *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23.

[3] *Vide* Chap. III, para. 25 *(a)*, *supra*.

[4] *Vide* Oral Proceedings, 2-3 Oct. 1962.

The reasoning of the Judgment and various opinions will be discussed below. As will appear from this discussion, a number of Members of the Court found it unnecessary to deal with the issue relating to Article 6 of the Mandate. However, four members of the Court (Judges Bustamante, Spender, Fitzmaurice and van Wyk) expressed a clear view that Article 6 had lapsed on dissolution of the League. The other 11 judges did not deal expressly with this point; but the findings or reasoning of seven of them are to a greater or lesser extent inconsistent with any survival of the Mandatory's procedural obligations. They are Judges Alfaro, Badawi, Moreno Quintana, Wellington Koo, Koretsky, Jessup and Mbanefo. In respect of the remaining four Judges (i.e., President Winiarski and Judges Basdevant, Spiropoulos and Morelli) no indications are in this regard afforded by their opinions.

For convenience, the Judgment and opinions will be dealt with in more or less the order indicated above.

56. *Separate Opinion of Judge Bustamante.*

Although Judge Bustamante held that the compromissory clause had survived the dissolution of the League, he made it quite clear that he did not thereby intend to convey that in his view any succession to the United Nations had taken place. In fact he explicitly stated:

> "The above findings do not in any way imply an intention to establish or to regard as established the principle of automatic or *ex officio* succession of the United Nations to the League of Nations. It has been sufficiently clearly shown, in the course of the written and oral proceedings in this case, that the theory of automatic succession is inconsistent with the historical background of the discussions and resolutions of the two great bodies during the transitional period in 1945-1946 [1]."

Dealing specifically with the Mandatory's procedural obligations, he stated that "the tutelary organization's right of supervision over the exercise of the Mandate is an institutional rule in the mandates system", which is not just an adjectival or procedural formality, but an "essential element"[2]. The survival of this essential element was in his view provided for in the Charter, which imposed on the Mandatory the obligation to put into force a trusteeship agreement [3].

One of the grounds on which he based this conclusion was the very fact that in the absence of a trusteeship agreement there would be no international supervision in respect of mandates. This appears very clearly from the following passage:

> "In my opinion, this wording of paragraph 2, [i.e., Article 80 (2)] which is connected with that of Articles 77 (para. 1 *(a)*) and 81 clearly defines the obligation—the urgent obligation it might be said—of Mandatory States without delay to put into force a new Mandate agreement. *This interpretation is fully warranted by a logical reasoning since the intention of the authors of the Charter cannot have been to leave the mandated territories indefinitely to the unfettered discretion of the Mandatory alone.* To have done so would have been to distort the character of this legal system as well as

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 364.
[2] *Ibid.*, p. 358.
[3] *Ibid.*, p. 365.

> the intentions of its founders. It would have amounted to what has been called the 'freezing' of the Mandate, which would practically be equivalent to annexation [1]." (Italics added.)

Respondent does not propose dealing with Judge Bustamante's conclusion regarding an obligation to conclude a trusteeship agreement. This conclusion is contrary to the finding of the Court in the 1950 Advisory Opinion, and Applicants do not rely on any such obligation, nor have they contended that the Court was wrong in this regard.

Respondent does, however, wish to emphasize that Judge Bustamante's reasoning is based, *inter alia*, on the absence of supervision if no trusteeship agreement is concluded.

57. *Dissenting Opinion of Judges Spender and Fitzmaurice.*

In their joint dissenting opinion, Sir Percy Spender and Sir Gerald Fitzmaurice clearly reveal that in their view the 1950 Opinion was wrong in finding that the League's supervisory functions in respect of mandates were, on the dissolution of the League, transferred to the United Nations. This first appears very explicitly from two footnotes. In the first of these they state:

> ". . . we think that the view expressed by the Court in its 1950 Opinion, to the effect that the supervisory functions of the former League Council passed to the Assembly of the United Nations which was entitled to exercise them, was definitely wrong [2]."

The second footnote, referring to the original Chinese draft resolution raised at the final session of the League of Nations and later not proceeded with [3], reads as follows:

> "The contrast between the original Chinese draft and the one eventually adopted constitutes an additional reason why we find it impossible to accept the view taken by the Court in 1950, that the functions of the League Council in respect of Mandates had passed to the United Nations; for this was the very thing which the original Chinese draft proposed but which was not adopted [4]."

This view is again expressed in the following words after a thorough survey of events concerning the foundation of, and early proceedings in, the United Nations and the dissolution of the League:

> "They [i.e., both the United Nations and the League Assemblies] refrained equally from any attempt to adapt the Mandates to the situation arising from the termination of the League and of League membership.
>
> They not only 'refrained', but at least twice (proposal of the Executive Committee of the Preparatory Commission of the United Nations . . . and original Chinese resolution at Geneva) they *rejected* proposals for a transfer of League functions respecting Mandates to the United Nations. Acceptance of either of these proposals would naturally not, of itself, have got over the difficulty about cessation

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 365.

[2] *Ibid.*, p. 532, footnote 2.

[3] *Vide* paras. 31-33 and 49, *supra*.

[4] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 535, footnote 1.

of League membership. It would probably have brought that question into the open, but this is not the point. Our concern here is simply to show that the two Assemblies were (except for Article 73 of the Charter) unwilling to provide in *any* specific way for the consequences of the termination of the League and its membership, or for a possible eventual failure to bring a mandated territory into trusteeship. In this lies the key to the whole matter.

It is the key to the whole matter because it is strikingly evident that the two Assemblies (and the Applicant States were Members of both) relied, and *preferred to rely*, on the hope or expectation that the mandated territories would eventually be brought into trusteeship. Whether this was a reasonable assumption in the case of South West Africa, considering the declarations that were made on behalf of the Union Government, is another matter. The fact remains that it *was* relied upon, in the full knowledge of facts from which it was manifest that the expectation might not be realized, and of the fact that the Mandatory was under no legal obligation in the matter.

It seems to us fairly clear as a matter of reasonable inference, that an important part of the reason for this attitude was the desire to avoid even the suggestion that any mandated territory might not be brought into trusteeship; or, by providing for the situation that might arise if that was not done (and if the League had in the meantime been dissolved) to appear to be countenancing such a situation by providing for it, or to be giving grounds on the basis of which any Mandatory could contend that, express provision having been made for continuing the Mandates *as* Mandates, no further action was required.

In short, given the view that they took of the whole matter, those concerned thought it unnecessary to provide for this situation and better policy not to. This course having been chosen, and the possible consequences it entailed accepted, there is no legal principle which would enable a Court of law to put the clock back and, by judicial action, make provision for a case which those concerned elected not to deal with for reasons which appeared to them good and sufficient at the time [1]."

Apart from the value of this finding as support for Respondent's submission, the manner in which it is reached is also of significance. In the passage quoted above, after a thorough and comprehensive review of the facts, the learned judges again emphasize two facts previously considered by them. These facts are:

(a) the content of the proposal of the Executive Committee of the Preparatory Commission of the United Nations, which proposal was rejected; and,

(b) the inability of the Chinese representative to secure acceptance of his original draft resolution.

These two facts are thus singled out for special emphasis in reaching a conclusion which is at variance with that reached by the Court in 1950. It is significant therefore that these are both facts which were

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 539-540.

not before the Court in 1950[1]. Their importance further appears from the treatment given to them in other parts of the opinion. Thus the history of the proposal of the Executive Committee of the Preparatory Commission is dealt with at page 536. The Chinese draft resolution is dealt with at page 535, where the second footnote quoted above appears. Thereafter it is again considered at page 538 in the following terms:

> "The contrast between the original draft Chinese resolution, presented by the representative of China but not proceeded with, and the eventual resolution of the League Assembly is so glaring and revealing, that we set out both resolutions verbatim in a footnote."

58. *Dissenting Opinion of Judge van Wyk.*

After a full and systematic treatment of the question whether Article 6 survived the dissolution of the League, Judge van Wyk reached the following conclusion:

> "The above considerations compel me to conclude that those provisions of the Mandates which depended for their fulfilment on the existence of the League of Nations were not impliedly amended in any respect, and accordingly ceased to apply on the demise of the League[2]."

He thereafter proceeded to deal with the 1950 Advisory Opinion and discussed fully the respects in which he disagreed with the findings of the majority regarding the succession of the United Nations to the supervisory functions of the League[3].

59. *The Judgment of the Court.*

The Judgment of the Court does not deal expressly with the question whether the League's supervisory functions regarding mandates passed to the United Nations on the dissolution of the League. A detailed analysis of its reasoning also does not provide any clear conclusion as to the probable view of its authors in this regard. A consideration of the Court's findings and reasoning in regard to the survival of Article 7 of the Mandate indeed appears to provide strong support for a conclusion that the Court must have considered that Article 6 had lapsed on dissolution of the League; but doubt is again cast thereon by the actual treatment of Article 6. These two aspects will be dealt with in turn below.

60. *The Court's Findings regarding the Survival of Article 7.*

As has been pointed out above[4], Applicants relied in their Observations on the Preliminary Objections on a so-called "doctrine of succession". This suggested "doctrine" entailed that all rights and functions in respect of mandates would have passed from the League and its Members to the United Nations and its Members, which would have meant, *inter alia*, that the supervisory functions of the League would have been transferred to the United Nations, and that the competence to invoke the compromissory clause would have passed from Members of the League of Nations to Members of the United Nations.

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[1] *Vide* paras. 49 and 50, *supra*.
[2] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 640.
[3] *Ibid.*, pp. 640-653.
[4] *Vide* para. 14, *supra*.

The Court did not accept this argument in its application to the compromissory clause but, on the contrary, held that on dissolution of the League the competence to invoke the compromissory clause remained vested in those States that were Members of the League at its dissolution. Thus the Court not only declined to accept the "succession" argument raised by the Applicants, but its conclusion seems entirely inconsistent with any transfer of League supervisory functions to the United Nations. As stated above [1], the supervisory functions could conceivably have passed to the United Nations as a result of implied agreement concluded in 1920; or by agreement (express or implied) in 1945-1946 or thereafter; or by some rule of objective law. It seems inconceivable that any agreement, whether express or implied, and whether concluded in 1920 or in 1945-1946 or thereafter, would have separated the obligations to report to the Council of the League from the obligations owed to Members of the League—in the sense that the former would relate to a new international organization and the latter to ex-Members of a different and defunct organization. If the interested parties intended to replace the Council of the League by the General Assembly of the United Nations for purposes of administrative supervision, the logical course would have been to replace the Members of the League by Members of the United Nations for compulsory jurisdiction purposes. Otherwise anomalous complications may arise from the difference in composition between the two groups of States, i.e., those entitled to participate in the "administrative supervision" and those entitled to invoke the compromissory clause. Thus, for instance, if, as the Court found, the provisions of the compromissory clause were inserted in the Mandate largely to enable the will of the authority exercising administrative authority to be imposed on the Mandatory [2], it would be anomalous to provide that only some members of the body exercising administrative supervision (and indeed, on the present Membership of the United Nations Organization, only a relatively small proportion of its Members) would be able to invoke the Court's jurisdiction. And, it would be equally or even more anomalous to confer the competence to implement the "judicial supervision" on States that need not be members of the organization exercising administrative supervision, and which may even have been expelled from such organization. Such anomalies could never have been intended at any stage.

Similarly, if the concept of devolution through an objective rule of international law should be applicable at all to the circumstances of this case (which Respondent disputes), one cannot conceive of the existence of a rule which would have the effect of separating in the sense aforestated *the devolution of these two obligations, particularly on the* Court's finding that they were designed towards achievement of one and the same purpose, viz., enforcement of the Mandatory's "sacred trust" obligations.

61. *The Court's Reasoning regarding the Survival of Article 7.*

Not only is the Court's *finding* in regard to Article 7 inconsistent with a substitution of supervisory organs, as demonstrated above, but

[1] *Vide* Chap. III, para. 19, *supra.*

[2] *Vide South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* pp. 336 ff.

its *reasoning* in reaching this finding equally tends to negative the possibility of such a succession.

Thus the Court relies largely, if not solely, on an agreement among Members of the League of Nations in April 1946. This portion of the Judgment points out that the Members of the League had full knowledge in April 1946 of the contents of the Charter of the United Nations, as also of the fact that the United Nations had already begun to operate. The purpose of the agreement that was concluded was, therefore, in the words of the Court:

> ". . . to provide for the continuation of the Mandates and the Mandate System 'until other arrangements have been agreed between the United Nations and the respective Mandatory Powers'[1]".

When defining the ambit of the agreement held to have been entered into in April 1946 for the purpose set out above, the Court, in Respondent's submission, renders it clear that such agreement did not comprehend any obligation to report and account to the United Nations. Thus the following language is used:

> ". . . obviously an agreement was reached among all the Members of the League at the Assembly session in April 1946 to continue the different Mandates *as far as it was practically feasible or operable* with reference to the obligations of the Mandatory Powers and therefore to *maintain the rights of the Members of the League* notwithstanding the dissolution of the League itself[1]". (Italics added.)

The Judgment proceeds to state that discussions were held "to find ways and means of meeting the difficulties and *making up for the imperfections as far as was practicable*[2]". (Italics added.) Later the agreement is said "to maintain the *status quo as far as possible* in regard to the Mandates[3]". (Italics added, save in regard to the words *status quo*.)

At page 341, the agreement is stated to be as follows:

> "It is clear from the foregoing account that there was a unanimous agreement among all the Member States present at the Assembly meeting that the Mandates should be continued to be exercised in accordance with the obligations therein defined *although the dissolution of the League, in the words of the representative of South Africa at the meeting, 'will necessarily preclude complete compliance with the letter of the Mandate'*, i.e., *notwithstanding the fact that some organs of the League like the Council and the Permanent Mandates Commission would be missing*. In other words the common understanding of the Member States in the Assembly—including the Mandatory Powers—in passing the said resolution, was to continue the Mandates, *however imperfect the whole system would be* after the League's dissolution, and *as much as it would be operable*, until other arrangements were agreed upon by the Mandatory Powers with the United Nations concerning their respective Mandates." (Italics added.)

From the above discussion of the contents of the agreement, two points emerge clearly:

(a) The interim arrangement comprised in the agreement would en-

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 338.
[2] *Ibid.*, p. 339.
[3] *Ibid.*, p. 342.

able the Mandate to operate only in an "imperfect" manner, meaning thereby, *inter alia*, incomplete ("as much as it would be operable"). In the last-quoted passage such imperfection is related directly to the disappearance of the organs exercising administrative supervision. If this supervision had been transferred to the United Nations, the imperfection would naturally have been cured. It is, therefore, difficult to imagine that the Court could have considered that there had been such a transfer to the United Nations—either by the agreement under discussion or by any other agreement between Members of the League of Nations at its final Session in April 1946, or any agreement at the previously held conference resulting in the foundation of the United Nations. Indeed, even disregarding the specific reference to the League's supervisory organs, it would, in view of the Court's finding that the compromissory clause survived the dissolution of the League, be difficult to imagine in what respect the operation of the Mandate could at all be said to be "imperfect" in the above sense unless the administrative supervision fell away.

(b) The purpose of the agreement was, in the Court's view, not to create new rights, but merely to "maintain the *status quo*" or "maintain the rights of Members of the League". Whereas an agreement with this content could conceivably serve to perpetuate in favour of States, in their individual capacities, the competence to invoke the compromissory clause which had previously vested in them in their capacities as Members of the League, it obviously could not have the effect of providing a new body to exercise administrative supervision. By analogy, the highest effect it could possibly have had, would have been to continue in favour of the States which constituted the Council at the dissolution of the League the rights of supervision which had previously vested in the Council. But obviously individual Members could never exercise the functions of a body which had been dissolved, quite apart from the practical difficulties created by the disappearance of the Permanent Mandates Commission and the Secretariat.

62. To sum up, both the conclusion and the reasoning of the Court regarding the survival of Article 7, provide strong indication that Article 6 must, in the Court's view, have lapsed.

63. *The Court's Actual Treatment of Article 6.*

There is, to the contrary, a passage in the Judgment which may possibly be read as signifying that in the Court's view the obligation to report and account, as imposed on Respondent by Article 6, has in some form or another survived the dissolution of the League [1]. The meaning of the passage is, however, far from clear, and Respondent must respectfully confess to being wholly uncertain as to what the Court intended to convey thereby regarding possible survival or otherwise of Article 6. The uncertainty arises not only from the fact that the expressions "international supervision" and "the obligations connected with the Mandate", as used by the Court [2] are for the purposes

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 333-334.
[2] *Ibid.*, p. 334.

under consideration imprecise and somewhat obscure, but also and particularly from the context and manner of treatment of the subject in the Judgment. Thus:

(a) It is striking that the Court at no stage deals specifically with the problems arising from the disappearance of the League's supervisory organs, and that no reference is made at any stage to the suggestion that supervisory functions were, after April 1946, to be exercised by the United Nations. In fact, the impression is created that any such reference is intentionally avoided. This appears particularly from the passage quoted from the 1950 Opinion at pages 333 and 334 of the Judgment, where every reference to the United Nations has been deleted [1].

(b) The passage under discussion concludes with the following words:

"That the League of Nations in ending its own existence did not terminate the Mandates but that it definitely intended to continue them by its resolution of 18 April 1946 will be seen later when the Court states its views as to the true effect of the League's final act of dissolution on the Mandates [2]."

In the later discussion referred to in this quotation, the Court holds that the intention of the Members of the League at its final Session was merely to continue the mandates in so far as they would be operable after the dissolution of the League. In view of the Court's finding that the compromissory clause survived the dissolution of the League, the only respect in which there could in its view have been inoperability after such dissolution, was, as has been demonstrated above [3], in that the provisions relating to administrative supervision fell away. The reference in the above quotation to the intention of the League of Nations in April 1946 would therefore appear to indicate that the Court did not in the passage under discussion [4] mean to express the view that the provisions relating to administrative supervision somehow survived the dissolution of the League.

64. In the result, in view of the above-mentioned uncertainties, no

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[1] The complete text of the passage is given below. The parts deleted in the quotation are italicized:

"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 authors of the Charter had in mind the same necessity when they organized an International Trusteeship System. The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System.* 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.*" (*International Status of South-West Africa. Advisory Opinion, I.C.J. Reports 1950*, p. 136.)

[2] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 334.

[3] *Vide* para. 61, supra.

[4] *South West Africa, Preliminary Objections, Judgement, I.C.J. Reports 1962*, pp. 333-334.

clear inference can be drawn as to the Court's view on the question whether the League's supervisory functions regarding mandates have been taken over by the United Nations—although Respondent submits, for the reasons advanced, that on balance the reasoning is inconsistent with such succession.

65. *Separate Opinion of Judge Jessup.*

Judge Jessup does not deal expressly with the survival or otherwise of Article 6. He finds in regard to Article 7 that the competence conferred upon Members of the League remained available to ex-Members of the dissolved League. Respondent's argument set out above [1], relating to the logical inconsistency between such a finding, and a finding that the United Nations Organization has succeeded to the supervisory functions of the League, would therefore also apply to this Opinion.

The reasoning whereby the learned Judge reached his conclusion regarding Article 7 (irrespective of its soundness, with which Respondent is not at the present stage concerned) is either inapplicable to the question whether Article 6 likewise survived the dissolution of the League, or tends positively to contradict any possibility of a succession by the United Nations to the supervisory functions previously performed by the Council of the League. The survival of Article 7 is firstly based by Judge Jessup on an interpretation of Article 7, and in particular, of the expression "another Member of the League of Nations". In effect he follows Sir Arnold McNair (in his dissenting opinion in 1950) in holding that these words did not impose a condition, but were merely descriptive of individual States, which acquired rights in their individual capacities. It will be observed that this reasoning seeks to find, by a process of interpretation of the expression "another Member of the League of Nations", an entity capable of surviving the dissolution of the League. Such entity (or entities) existed during the lifetime of the League in the individual States concerned in their individual capacities. By no process of interpretation, however, can the expression "Council of the League of Nations" in Article 6 be interpreted in a sense which could have referred during the existence of the League, to any other entity than the Council itself; and thus the learned Judge's line of reasoning with regard to Article 7 cannot be applied to Article 6.

66. Secondly, Judge Jessup relies on a statement made on behalf of Respondent on 9 April 1946, relative to the continuation of its obligations under the Mandate. This statement contained the following sentence:

> "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 [2]."

Judge Jessup holds that this reservation did not affect Article 7, in that:

(a) The Permanent Court had by express agreement been replaced by the new Court prior to this reservation, and therefore its disappearance did not preclude complete compliance with Article 7;

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[1] *Vide* para. 60, *supra.*

[2] *L. of N., O.J., Spec. Sup.* No. 194, p. 33; Chap. II, para. 41 *(b)* **(ii)**, *supra.*

(b) the reference to "another Member of the League" in Article 7 was not affected by this reservation, because the Members of the League were not "organs of the League" [1].

For present purposes it suffices to say in this regard:

As to (a) *above*—

That the Council of the League had not, by agreement or otherwise, been replaced, prior to the reservation, by any other body; and

As to (b) *above*—

That the Council was one of the "Organs of the League" and was expressly mentioned as such in the reservation contained in Respondent's statement of 9 April 1946.

It follows, therefore, that the statement could not have played any role in effecting a substitution of the supervisory organs mentioned in Article 6. On the contrary, it showed a clear contemplation of the absence of such a substitution.

In certain portions of his opinion the learned Judge seems to accept that there is a distinction between the frustration caused by the dissolution of the League in regard to, on the one hand, Article 7 (where the new Court was already in existence) as against Article 6 (where there had been no substitution of supervisory organs) [2].

67. *Separate Opinion of Sir Louis Mbanefo.*

Sir Louis Mbanefo equally does not deal with the effect of the dissolution of the League on the procedural obligations of the Mandatory. As in the case of the other majority judges, his conclusion that ex-Members of the League would continue to be entitled to invoke the compromissory clause is, as pointed out above, inherently inconsistent with the concept of succession by the United Nations to the functions of the League. And his reasoning seems to emphasize the inconsistency. Thus he says:

> "Although the League was dissolved, the Mandate still continues and the rights and obligations embodied in it became, as it were, maintained at the level at which they were on the dissolution of the League. It is on this ground that the Respondent can justify its right to continue to administer the territory and those States who were Members of the League at the time of its dissolution the right to continue to invoke the compromissory clause of Article 7. The right to invoke Article 7 remained vested in those States who were Members of the League at the time of its dissolution, and continues notwithstanding the termination of the League's functions [3]."

Irrespective of the cogency of this argument nobody would be able to say that the rights and obligations regarding supervision "became, as it were, maintained at the level at which they were on the dissolution of the League". As a result of the dissolution of the League the said obligations could not be "maintained": there could be further supervision only pursuant to a new obligation, relating to a new supervisory organ. In particular, any suggestion that in respect of such obligations the

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 418-419.

[2] *Ibid.*, especially pp. 413-414.

[3] *Ibid.*, p. 445.

organs of the United Nations replaced those of the League would involve, not maintenance of existing obligations, but creation of new obligations—and in fact different obligations in view of the difference in composition, procedure and approach as between the organs of the League and those of the United Nations [1].

68. *Dissenting Opinions of President Winiarski, Judges Basdevant and Morelli and Declaration of Judge Spiropoulos.*

None of the above-mentioned Judges dealt specifically with the question relating to the survival of Article 6, and no inference can be drawn from their opinions as to their views in that regard.

69. Taking the Judgment and opinions on the Preliminary Objections as a whole, therefore, it is submitted that they tend to support Respondent's contention that there was no succession by any organ of the United Nations to the functions formerly exercised by the Permanent Mandates Commission and the Council of the League of Nations in regard to mandates not converted into trusteeships.

XI. Conclusion regarding Agreement in 1945-1946 or Thereafter

70. For the aforegoing reasons, it is submitted that there is no warrant for finding that any agreement, express or implied, was entered into at any stage, and particularly during the years 1945-1946, whereby the supervisory functions of the League of Nations with regard to mandates not converted into trusteeships were transferred to the United Nations Organization. This leaves, as a final topic in this Chapter, the question whether an objective rule of law could have brought about such a transfer.

E. Succession by Virtue of Some Objective Principle of International Law

71. Neither in the 1950 Advisory Opinion, nor in the Judgment and opinions on the Preliminary Objections, has any Member of the Court suggested the existence of any principle of succession which, operating independently of the intention of the parties, could automatically effect a substitution of the United Nations, its organs and/or Membership, for the League of Nations, its organs and/or Membership. The only real discussion of this topic is found in the dissenting opinion of Judge van Wyk on the Preliminary Objections [2], where he finds that no such principle exists, citing, *inter alia*, Judge Levi Carneiro in the *Ambatielos* case, as follows:

> "Even when the organ which was formerly competent has been abolished, its powers cannot be regarded as automatically transferred to the new organ which replaces it [3]."

And Judge Bustamante, in a passage of his opinion already quoted above [4], also in passing rejects all possibility of either "automatic" or "*ex-officio*" succession of the United Nations to the League of Nations.

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[1] *Vide* para. 21, *supra*.

[2] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 603-604.

[3] *Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 54.

[4] *Vide* para. 56, *supra*.

72. It will be recalled [1] that Applicants relied in their Observations on the Preliminary Objections, on a "doctrine of succession", without indicating the exact legal origin of such "doctrine". During the oral proceedings regarding the Preliminary Objections, Respondent's Counsel submitted that Applicants probably had in mind some term to be implied in the Mandate itself. But he proceeded to deal also with the alternative possibility that they meant to rely on some principle of international law operating independently of the parties' intentions, and he argued fully that no such principle existed [2]. Thereafter, Applicants did not again revert to any such suggestion in the Oral Proceedings.

73. In view, therefore, of the largely academic nature of the suggestion of automatic succession, Respondent will confine itself to submitting that no such principle exists, either in customary international law or in the general principles of law recognized by civilized nations.

F. Conclusions regarding the Procedural Obligations

74. Respondent contends that the Court will in this case, for the reasons advanced above, conclude that Respondent's obligations to report and account to, and submit to the supervision of, the Council of the League of Nations, lapsed upon dissolution of the League and have not been replaced by obligations to submit to the supervision of any organ of the United Nations or any other organization or body.

The acceptance of this contention would by itself provide a complete answer to the Applicants' Submissions 7 and 8 [3] and that part of Submission 2 [4] relating to the supervisory function alleged to be exercisable by the United Nations.

In addition, however, the lapse of the League's supervisory functions raises the further question whether the Mandate was capable of further existence to any extent whatever once such functions became impossible of performance. This question is dealt with in the next Chapter, in which it is submitted that the Mandate as a whole lapsed on the falling away of League supervision.

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[1] *Vide* para. 14, *supra*.
[2] *Vide* Oral Proceedings, 5 Oct. 1962, morning.
[3] *Vide* I, p. 198.
[4] *Ibid.*, pp. 95, 197.

CHAPTER V

THE LAPSE OF THE MANDATE AS A WHOLE

Part A

1. Whether the Mandate was capable of further existence to any extent after the falling away of the provisions regarding administrative supervision by organs of the League of Nations, is a question depending in the ultimate analysis on the intentions of the authors of the Mandate.

2. It seems to be a generally accepted proposition that there is nothing notionally impossible in the idea of severability (or separability) of treaties or institutions. In this regard Judge Jessup said in his separate opinion on the Preliminary Objections in this matter:

> "The principle of separability is now accepted in the law of treaties, especially with reference to multipartite treaties, although the older classical writers tended to reject it. It is a doctrine which exists in municipal contract law (sometimes under the label of 'divisibility') and in the law governing the construction of statutes [1]."

Judges Spender and Fitzmaurice, in their joint dissenting opinion, stated the following:

> ". . . there is in fact no principle of international law which requires that because an instrument or institution survives or continues in existence, it must necessarily do so with respect to *all* its parts on a completely non-severable basis. The position is quite the contrary: international law postulates no incompatibility between the survival, or continued existence of an international agreement, organ or institution, and a termination or cessation, on one ground or another, of some particular part of it, or of particular functions, rights or obligations provided for by it. This situation is indeed rather a common one, and it quite often occurs that, for instance, an instrument remains in force, but that some particular provision of it ceases or has ceased any longer to be operative, because its terms have become inapplicable, or because it is now impossible of performance, or for some other reason.
>
> If an inspection of a particular clause shows that, although an instrument or institution survives as such, the clause concerned is no longer possible of performance, or can no longer be applied according to its terms (as is the case with Articles 6 and 7 of the Mandate) then the *prima facie* conclusion must be that although the instrument or institution otherwise remains intact, that particular clause is at an end.
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> The only circumstances in which it might be possible to maintain the contrary, would be where the provision concerned was of so

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 408.

> fundamental and essential a character that the instrument or institution could not function without it [1]."

Although the learned judges used the objective term "could not function", it is submitted that they clearly did not intend to lay down a purely mechanical test. An institution may, after dismemberment of some of its parts, still be capable of performing some of its erstwhile functions, although such performance may be entirely ineffective to advance the purposes for which the institution was created. In such a case, it cannot be said that the institution, as an institution—i.e., as intended by its founders—was still capable of functioning.

In order to determine whether any particular provision is of so fundamental and essential a character that the instrument or institution could not function without it, one must consequently have regard to the type of institution which its authors intended to create. As it was put by Viscount Haldane in *Attorney-General for Manitoba* v. *Attorney-General for Canada and Others*, referring to legislation which had been held partially *ultra vires*:

> "Their Lordships agree with Duff J. in his view that if the Act is inoperative as regards brokers, agents, and others, it is not possible for any Court to presume *that the Legislature intended to pass it in what may prove to be a highly truncated form* [2]." (Italics added.)

3. The question then is whether this Court can hold that the Mandate as a mandate can, having regard to the purposes intended for it by its founders, still function in the "highly truncated form" which resulted from the disappearance of the Mandatory's procedural obligations to report and account to supervisory organs of the League.

In the Preliminary Objections proceedings Respondent did not pursue this question, and indeed made no submissions in regard thereto, inasmuch as the success of the Objections as presented did not depend thereon. For purposes of its argument on the Objections, Respondent was thus prepared to assume, without conceding, that the 1950 Advisory Opinion was correct in holding that the Mandate, *as an institution*, survived the dissolution of the League [3]. Inasmuch, however, as Respondent also submitted then, as now, that there had been a complete lapse of the procedural provisions for administrative supervision, the assumption of continued existence of the Mandate necessarily carried with it a further assumption, viz., that of complete severability between the Mandatory's duty of report and accountability on the one hand and other aspects of the mandate institution on the other [4]. This further assumption also accorded with Respondent's interpretation of the 1950 Advisory Opinion [5]. In the written Preliminary Objections Respondent had stressed what might be termed the physical or mechanical severability of the procedural obligations from the substantive

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 517-518.

[2] 1925 A.C. 561 (P.C.), at p. 568.

[3] *Vide* I, pp. 299, 359; Oral Proceedings, 2, 3 and 19 Oct. 1962. If the Judgment on the Preliminary Objections is to be understood as suggesting (at p. 332) that Respondent contended positively that some aspects of the Mandate still exist, such suggestion would be erroneous.

[4] Oral Proceedings, 3 and 19 Oct. 1962.

[5] Oral Proceedings, 3 Oct. 1962.

obligations involved in the "sacred trust" and "tutelage" [1]; and in the Oral Proceedings Respondent rendered clear that the question of ultimate severability, as related to the intentions of the founders of the mandate system and institution, was left open, and that each of the alternative answers to that question would equally suit Respondent's case in support of the Preliminary Objections [2]. The question now, however, arises pertinently for decision.

4. The administrative supervisory aspect of the mandate system has always been considered of great importance. In this regard reference has been made above [3] to commentators who emphasized that the provision for League supervision was the factor differentiating mandates from certain colonial regimes and from certain earlier international conventions concerning the well-being and development of under-developed peoples. As it was put by Wright:

> "The distinctive feature of the system is undoubtedly the League's supervision. The principles of trusteeship and tutelage have often been avowed before and sometimes practised but only as self-limitations [4]."

And in the 1950 Advisory Opinion the Court expressed itself as follows:

> "The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the Mandatory Powers required that the administration of mandated territories should be subject to international supervision [5]."

5. Expressions of opinion by various States further show the importance that has in practice been attached to these provisions. Thus, e.g., the following statement was made by the delegate of the Netherlands before the General Assembly of the United Nations on 1 November 1947: "The mandate system now does not operate. As there is no longer a supervisory authority, there is no longer a mandate system [6]."

Of special significance also is the report of the United Nations Special Committee on Palestine, referred to above [7], which contains the following passages:

> "It may be seriously questioned whether, in any event, the Mandate would now be possible of execution. The essential feature of the mandates system was that it gave an international status to the mandated territories. This involved a positive element of international responsibility for the mandated territories and an *international accountability to the Council of the League of Nations* on the part of each mandatory for the well-being and development

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[1] *Vide* I, p. 317.
[2] Oral Proceedings, 19 Oct. 1962.
[3] *Vide* Chap. IV, paras. 3-5.
[4] Wright, *op. cit.*, p. 64.
[5] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 136.
[6] *G.A., O.R., Second Sess.*, Vol. I, 105th Plenary Meeting, 1 Nov. 1947, p. 605.
[7] *Vide* Chap. II, para. 59 *(c)*.

> of the peoples of those territories. The Permanent Mandates Commission was created for the specific purpose of assisting the Council of the League in this function. But the League of Nations and the Mandates Commission have been dissolved, *and there is now no means of discharging fully the international obligation with regard to a mandated territory other than by placing the territory under the International Trusteeship System of the United Nations* [1]." (Italics added.)

and—

> "The most the mandatory could now do, therefore, in the event of the continuation of the Mandate, would be *to carry out its administration, in the spirit of the Mandate,* without being able to discharge its international obligations in accordance with the intent of the mandates system [1]." (Italics added.)

It will be recalled that 11 States concurred in this report—Australia, Canada, Czechoslovakia, Guatemala, India, Iran, the Netherlands, Peru, Sweden, Uruguay and Yugoslavia. They had all been original Members of the League, and would presumably have known what importance was attached to the supervisory aspect by the founders of the mandate system.

6. Various references were made to this matter in the Judgment and Opinions on the Preliminary Objections. Thus the authors of the Judgment, apparently referring to the provisions of Article 6 of the Mandate [2], said:

> "The findings of the Court [i.e., in the 1950 Advisory Opinion] on the obligation of the Union Government to submit to international supervision are thus crystal clear. Indeed, to exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate [3]."

And Judge Bustamante said:

> "The tutelary organisation's right of supervision over the exercise of the Mandate is *an institutional rule in the Mandates System,* expressly provided for by Article 22 of the Covenant (paragraphs 7, 8 and 9). This right is not just an adjectival or procedural formality, but *an essential element on which adherence to the purposes of the system and the efficiency of its application depend.* It should not be forgotten that in the Mandate agreements one of the parties, the beneficiary under tutelage, has no possibility of entering into discussion with the other party, the Mandatory, on an equal footing, having regard to its lack of legal capacity. Thus, the only way of safeguarding the rights of the people under Mandate is to entrust the supervision of the Mandatory's acts to the Mandator or tutelary organisation which, on the one hand, represents the ward and, on the other, personifies the interest of the States of the world assembled in an association. Absence of a supervisory organ would be tantamount to unilateral and arbitrary exercise of the Mandate and would inevitably lead to annexation. *A Mandate so mutilated would*

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[1] *G.A., O.R., Second Sess., Sup.* No. 11, Vol. I (A/364), p. 43.
[2] *Vide* Chap. IV, para. 63, *supra.*
[3] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 334.

be of an essentially different nature from that provided for in Article 22 of the Covenant [1]." (Italics added.)

7. Analysis of the history and wording of Article 22 of the Covenant fully bears out, in Respondent's submission, that the feature of report and accountability to the League was intended to be an integral portion of the madate system, as will appear from the succeeding paragraphs.

8. As regards history, it seems clear that the various proposals which preceded the mandate system as actually agreed upon, all proceeded from the basic principle of "*no annexations*", to which effect was to be given by some form or another of *internationalization* of the government or administration of the colonies and territories in question. When proposals came to be made for the establishment of a League of Nations, the League was seen as the medium through which such internationalization could be carried into effect, the various proposers differing, however, as to the exact nature and degree of the authority to be accorded to the League in this respect. The proposals in the various drafts apparently ranged from, on the one hand, virtually complete and direct powers of control for the League, to, on the other hand, a supervisory function of a relatively indirect nature [2].

In the ultimate event, the supporters of the latter idea won the day [3]; but nevertheless the supervisory function remained an integral portion of the whole scheme, as is evident also from the wording of Article 22 itself.

9. *(a)* The first paragraph of Article 22 sets out two things:

(i) the basic principle to which effect was to be given in the system devised for the colonies and territories in question, viz., that the well-being and development of their peoples form a sacred trust *of civilization; and*

(ii) that securities for the performance of this trust should be embodied in the Covenant.

The paragraph can therefore be said to be an introductory statement of a *basic principle or objective*, together with an intimation that the ensuing provisions would be directed towards the attainment thereof.

(b) The second paragraph sets out "*the best method of giving practical effect to this principle*". Here, then, we find the authors announcing, in broad outline, their conception of the *basic practical elements* of the system they wished to create. These were twofold, viz.:

(i) that the "tutelage" of the peoples concerned should be entrusted to certain advanced nations, and

(ii) "that this tutelage should be exercised by them as Mandatories on behalf of the League".

The notion of "Mandatories on behalf of the League" was therefore integrally combined with the notion of "tutelage", as part and parcel of the "best method" of giving practical effect to the basic

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 358.

[2] In regard to these aspects of the various proposals, *vide* Chap. II, paras. 5 and 6, *supra*, and the authorities there referred to.

[3] *Vide*, e.g., the comment by Mr. Lloyd George in the Council of Ten on 28 Jan. 1919, and by M. Hymans in his report of 5 Aug. 1920, in both instances as cited in Chap. IV, paras. 9 and 10, *supra*.

principle of the sacred trust. The conclusion seems inescapable that both notions were seen by the authors as essential elements of the system they were devising.

(c) In the further provisions of Article 22, and in the mandate instruments themselves, the "tutelage" notion was put into effect by vesting in the Mandatories title and powers of administration, subject to conditions obliging them to utilize the powers in the interest and for the advancement of the underdeveloped peoples, as noted above [1].

The *only* provisions whereby practical effect was sought to be given to the notion of "Mandatories on behalf of the League", were those requiring report and accountability to, and thus submission to supervision by, the Council of the League, acting with the advice and assistance of the Permanent Mandates Commission [2].

(d) In the result, the dissolution of the League brought about not only a cessation of the notion of "Mandatories on behalf of the League", but also of all provisions whereby practical effect was sought to be given to that notion, thus destroying completely an element which the authors had intended to be an essential part of the mandate system they were devising.

10. For the above reasons Respondent submits that the lapse of the Mandatory's obligations to report and account to, and be supervised by, organs of the League, has resulted in a situation which renders it impossible for a Court to presume that the authors of the Mandate would have intended it to continue in existence in such a "highly truncated form".

11. In the 1950 Advisory Proceedings Sir Arnold McNair and Judge Read, in their separate opinions, both found that the Mandatory's obligations to report and account to organs of the League had lapsed, without replacement relative to administrative supervision by organs of the United Nations or any other organization or body [3]. Nevertheless they both concluded that the Mandate remained in existence in other respects [4].

The last-mentioned conclusion of the learned judges appears, however, to have been influenced, at least to some extent, by views taken by them regarding the ambit and continued existence of the compromissory clause in Article 7 of the Mandate. Thus Sir Arnold McNair stated as follows:

> "Although there is no longer any League to supervise the exercise of the Mandate, it would be an error to think that there is no control over the Mandatory. 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. The Mandate provides two kinds of machinery for its supervision—*judicial*, by means of the right of any Member of the League under Article 7 to bring the Mandatory compulsorily before the Permanent Court, and *admin-*

[1] *Vide* Chap. III, paras. 13-16.

[2] Paras. 7 and 9 of Article 22, Article 6 of the Mandate for South West Africa and corresponding articles in other mandates.

[3] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports* 1950, pp. 159-162 (Judge McNair), pp. 169-173 (Judge Read).

[4] *Ibid.*, pp. 146, 158, 164-166, 169.

istrative, by means of annual reports and their examination by the Permanent Mandates Commission of the League.

The *Judicial supervision* has been expressly preserved by means of Article 37 of the Statute of the International Court of Justice. . . . [1]"

And Judge Read stated:

"With regard to the other factors which may have affected the continuance of the international obligations of the Union, there is one which cannot be overlooked. A territory, held under Mandate by a Member of the United Nations, is not left to the uncontrolled administration of the Mandatory Power. In the present instance, the Union, in the case of disputes relating to the interpretation or the application of the provisions of the Mandate, is subject to the compulsory jurisdiction of this Court—under the provisions of Article 7 of the Mandate Agreement and Article 37 of the Statute, reinforced by Article 94 of the Charter. The importance of these provisions cannot be measured by the frequency of their exercise. The very existence of a judicial tribunal, clothed with compulsory jurisdiction, is enough to ensure respect for legal obligations [2]."

12. In Respondent's respectful submission, however, the compromissory clause cannot be relied upon in support of a contention or view that the Mandate remained in existence despite lapse of the administrative supervision. Before any finding could be made that the compromissory clause filled the void caused by the lapse of Article 6, and thus kept the Mandate alive, each of the following questions would first have to be answered in the affirmative, viz.:

(a) Whether the clause was intended to provide for any supervisory functions in respect of Mandates, and, if so,

(b) whether such supervisory functions were of sufficient efficacy so as to act as a substitute for those provided for in Article 6, and thus to have prevented the lapse of the Mandate,

(c) whether the clause itself survived—

(i) the disappearance, on the dissolution of the Permanent Court of International Justice, of the tribunal provided for in the clause for the adjudication of disputes; and

(ii) the disappearance, on the dissolution of the League, of membership in the League, mentioned in the clause as a requisite for invoking it.

Upon any one of these questions being answered in the negative, the compromissory clause could have had no effect in preventing the lapse of the Mandate. In Respondent's submission not only one, but all the questions are to be answered in the negative.

13. Since the majority members of the Court in the Preliminary Objections proceedings held that the compromissory clause did provide for some form of judicial supervision, it will be convenient first to consider question *(b)* above with reference to the type of supervision found by the majority to have vested in the Court by virtue of Article 7 of the Mandate. If Respondent's submission in this regard is accepted, i.e., that such supervision was not of sufficient efficacy to prevent the

[1] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950,* p. 158.

[2] *Ibid.,* p. 169.

lapse of the Mandate on the falling away of administrative supervision, it will be unnecessary to consider questions *(a)* and *(c)*, both of which involve a re-appraisal of issues that have been dealt with in the Judgment and opinions on the Preliminary Objections. These questions are, however, for convenience and in so far as reconsideration may be necessary, dealt with in alternative submissions contained in Part B of this Chapter.

14. It is clear, in Respondent's submission, that in the view of the majority members regarding the scope and purpose of the compromissory clause, it could not have been a satisfactory substitute for the provisions of Article 6 of the Mandate. Thus, although the Court in its Judgment emphasized [1] that the purpose of administrative supervision in terms of Article 6 and judicial protection in terms of Article 7 was the same, i.e., to protect the inhabitants of mandated territories against possible abuse or breaches of the Mandate [2], it is clear that it regarded the two provisions as providing *distinct and complementary* machinery for achieving this purpose. For the *raison d'être* of the compromissory clause was, in the Court's view, *not* to serve as *a substitute* for the provisions regarding administrative supervision, but, on the contrary, to provide a method of imposing on the Mandatory the view of the organs exercising such supervision.

The Court's reasoning in this regard was to the effect that the Council of the League—which was, in terms of Article 6 of the Mandate, vested with the powers of exercising administrative supervision—required unanimity for the passing of resolutions, and could therefore, by reason of the Mandatory's right in terms of Article 4, paragraph 5, of the Covenant to attend and vote at its meetings, not come to a decision adverse to the Mandatory without its consent [3]. The main purpose of the compromissory clause was, therefore, in the Court's view, to provide machinery to overcome this defect in the provisions relating to administrative supervision, by enabling contentious proceedings to be instituted against the Mandatory.

On this line of reasoning, it follows that the compromissory clause was *not* intended to provide for the functioning of any *independent* supervisory organ, but merely to *supplement* the provisions regarding administrative supervision. Its function in this regard would necessarily have fallen away on the dissolution of the League (which entailed the disappearance of the League Council with all its incidents) and it could therefore not have served to act as a substitute for administrative supervision.

15. However, on the Court's finding, Members of the League would have been *able* to invoke the compromissory clause for the protection of the rights of the inhabitants even in cases where no impasse existed between the Council and the Mandatory. It seems evident that any jurisdiction to determine such an issue would not render the Court an effective substitute for the organs which had previously exercised administrative supervision. The obstacles in the way of regarding the

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 344.
[2] *Ibid.*, pp. 336, 343.
[3] *Ibid.*, pp. 336-337.

Court in this light are, it is respectfully submitted, clearly demonstrated by Judge Bustamante in the following passage:

> "... it cannot be said that the Court is a supervisory organ with regard to the exercise of the Mandates, because its function is strictly legal and not administrative or political, and because a Court cannot on its own initiative institute supervisory measures, its functions being exercised only at the request of the parties, which virtually negatives the effectiveness of the supervision [1]."

A legal decision on a concrete dispute which comes before the Court only when a particular State wishes to institute action, can never be a substitute for a continuous system of reporting and of supervisory proceedings in administrative bodies. This applies *a fortiori* when it is appreciated that the Court can, by virtue of its judicial functions, only decide whether there has been a violation of the Mandate or not. It can never even approximately perform the role played by the Council of the League and the Permanent Mandates Commission—organizations with expert members, meeting regularly and capable of giving advice and assistance on all aspects of Mandatory administration, independently of any dispute or suggestion of violation of duty on the part of the Mandatory. Thus the Commission itself considered that its attitude towards the Mandatories should be that of "collaborators who are resolved to devote their experience and their energies to a joint endeavour". [2].

The Court, on the other hand, is—

> "... unable to give any practical advice upon the various courses which might be followed once it had defined the legal relations between the parties with regard to the matter referred to it, since by doing so it would depart from its judicial function [3]".

16. In Respondent's submission it is therefore clear that the possibility of proceedings under the compromissory clause, even on the widest suggested interpretation of the Court's powers thereunder, could not have provided a substitute for *reporting and accountability* and administrative supervision, as contemplated by the authors of the mandate system in providing that the tutelage should be exercised by the advanced nations "as Mandatories on behalf of the League".

17. *Conclusion.*

(a) For the aforegoing reasons Respondent submits that the Mandate as a whole must be held to have lapsed consequent upon the lapse of the Mandatory's obligations of report and accountability to the Council of the League.

(b) A contention that the Mandate as a whole has lapsed has, on occasions in the past, resulted in the raising of the further questions whether, in such event, Respondent would have to rely on a basis other than the Mandate as such for a right or title to administer the Territory of South West Africa [4] and if so, what that basis would be.

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 361.

[2] *Vide* Chap. II, para. 20, *supra.*

[3] Rosenne, S., *The International Court of Justice* (1957), pp. 63-64.

[4] *Vide* the statement of the Court in the 1950 Opinion that "To retain the rights derived from the Mandate and to deny the obligations thereunder could not be

Such questions do not, however, fall to be considered for the purposes of the present case. Respondent only wishes to point out that, given the premise that the procedural obligations were an essential part of the Mandate, the mere fact of continued administration of the territory by Respondent does not mean that the Mandate must still be in existence, or, *a fortiori*, that the procedural obligations must still exist despite inoperability in accordance with their terms and the absence of any adaptation to some new manner of operation. On the contrary, the inoperability must, on the said premise of essentiality, lead to the conclusion that the Mandate as a whole has lapsed. And the *de facto* continued administration of the Territory by Respondent must in law be an irrelevant consideration as far as this conclusion is concerned, particularly where Respondent does not claim, but on the contrary expressly disclaims, that its right of administration is based on continued existence of the Mandate.

(c) Finally, whatever the situation might be as regards Respondent's right or otherwise to administer the territory, a conclusion that the Mandate as a whole has lapsed must in itself result in the dismissal of the whole of the Applicant's case in the present proceedings, inasmuch as that case is in law based entirely on averments that the Mandate still exists and that provisions thereof have been violated by Respondent.

18. In the event of the Court considering that the supervisory functions held by the majority members on the Preliminary Objections to have been exercisable by the Court, were of sufficient efficacy to have been capable of preventing the lapse of the Mandate on the falling away of the provisions regarding administrative supervision, Respondent submits that the compromissory clause was, contrary to the view of the majority, not intended to provide for any supervisory functions over mandates, and has, in any event, itself lapsed [1].

These submissions involve a reconsideration of issues dealt with in the Preliminary Objections proceedings, and Respondent's argument in this regard is contained in Part B of this Chapter.

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justified". (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 133.)

[1] *Vide* para. 12, *supra*.

Part B

A. Introductory

1. For the reasons of possible relevancy indicated in the concluding paragraph of Part A of this Chapter [1], Respondent in this Part sets out its submissions with reference to the following matters:

(a) The scope and purpose of the compromissory clause.
(b) The effect of the dissolution of the Permanent Court of International Justice on the compromissory clause.
(c) The effect of the dissolution of the League of Nations on the compromissory clause.

B. The Scope and Purpose of the Compromissory Clause

2. The purpose of the present enquiry is to ascertain whether the compromissory clause was intended to introduce any form of "judicial supervision" at all. As pointed out above, the supervision held by the majority of the Court in the Preliminary Objections proceedings to have been exercisable in terms of the compromissory clause, was of a very limited and imperfect nature [2]. Whether the Court was vested with even such a restricted type of supervisory function, would depend on the nature of the conflicts or disputes which States were entitled to submit to it for adjudication.

3. As a matter of logic, conflicts between parties are generally justiciable only when their rights or legal interests are involved. Courts of law are not concerned with conflicts, differences of opinion or opposite views unconnected with the rights or legal interests of the litigants. It is submitted that the position is the same in international law. International Courts exist for the adjudication and settlement of claims arising from legal rights or legal interests, and are not there for judicial expression on differences of opinion or on conflicts of views between States, unrelated to their legal rights or interests.

The Court, of course, has a discretion to respond to a request for an advisory opinion on any legal question, even though the question may not involve legal rights of the organization or body which asks for the opinion; but that is so by virtue of specific provisions in the Charter of the United Nations [3] and the Statute of the Court [4]. Advisory opinions are an exceptional form of process and the right to request such an opinion is limited to the General Assembly, the Security Council and other organs of the United Nations, and specialized agencies which may be authorized by the General Assembly to make such a request. States have no such right. In this respect, the position with regard to advisory opinions was the same in the Permanent Court of International

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[1] No. 18.
[2] *Vide* Part A, para. 15, *supra*.
[3] Art. 96.
[4] Art. 65.

Justice, also by virtue of express provision in the Covenant of the League of Nations [1] and the relevant Rules of Court [2].

4. There is no indication in Article 7 of the mandate instrument, or in any other part thereof, that the word "dispute" in the context of the compromissory clause was intended to convey a notion other than the generally accepted legal meaning, namely a disagreement or conflict between the Mandatory and another Member of the League concerning the legal rights or legal interests of the latter in the provisions of the Mandate [3].

The words "any" and "whatever" flanking the word "dispute" in the Article, cannot give to the latter word a meaning wider than its ordinary connotation in law.

5. Applicants rely heavily on the formulation of the meaning of the word "dispute" in the *Mavrommatis* case [4]. It is submitted, however, that the decision in that case supports Respondent's contention in this regard.

In the *Mavrommatis* case the Permanent Court of International Justice, in dealing with Article 26 of the Mandate for Palestine (which clause was identical to Article 7 of the Mandate for South West Africa), defined the word "dispute" as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" [5].

The Court was, however, careful in demonstrating that the Applicant had itself a right or legal interest in the subject-matter of the dispute then before the Court. Thus the majority of the Court said:

> "It is an elementary principle of international law that a State is entitled to protect its subjects, *when injured* by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a *State is in reality asserting its own rights*—its right to ensure in the person of its subjects, respect for the rules of international law [6]." (Italics added.)

In each of the five dissenting opinions in the said case, although there is no direct statement to that effect, the reasoning of the individual judges indicates a contemplation of a legal right or interest as a requirement for *locus standi* of the Applicant, and consequently for jurisdiction of the Court [7].

6. The question for determination therefore is what rights or legal

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[1] Art. 14.

[2] Rosenne, *op. cit.*, pp. 441-443.

[3] *Vide* in this regard *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 455-456 (President Winiarski); p. 567 (Judge Morelli); pp. 550-551 (Judges Spender and Fitzmaurice); p. 659 (Judge van Wyk).

[4] *Vide* I, p. 89.

[5] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.

[6] *Ibid.*, p. 12.

[7] *Ibid.*, pp. 42-43 (Lord Finlay); p. 61 (Judge Moore); pp. 77-81 (Judge de Bustamante); p. 86 (Judge Oda); p. 88 (Judge Pessôa). These various passages are quoted at I, pp. 378-379.

interests vested in the Members of the League individually so as to have been capable of giving rise to a "dispute" in terms of the compromissory clause, and, after fruitless negotiation, to invocation of the compulsory jurisdiction of the Court. This question must be answered primarily on a construction of Article 22 of the Covenant and the mandate instruments.

Reference to these instruments discloses one obvious class of such rights or legal interests. Each of the mandate instruments contained provisions apparently intended specifically for the benefit of member States and their nationals [1]. These were, for example, the open door provisions in all the A and B Mandates, and provisions in the C Mandates relative to the freedom of entry, movement and residence of missionaries who were nationals of League Members. Then there were also contained in the mandate instruments other provisions, primarily intended for the benefit of the inhabitants, the non-observance of which could, however, affect also the material interests of individual League Members. Examples would be the provisions with regard to the slave trade, and provisions with regard to traffic in liquor which, if violated by a Mandatory, could possibly affect neighbouring or even other States which, being Members of the League, would then have a legal right to object. In respect of these provisions, individual League Members would have been vested with rights or legal interests either because the instruments clearly indicated an intention that such rights should vest in Members individually, or because the impact of a violation of the terms of the Mandate on the material interests of individual Members suggests that it was intended that such Members would be entitled as of right to resist such a violation.

7. It has, however, been submitted by Applicants that Members of the League possessed "a legal interest in seeing to it through judicial process that the sacred trust of civilization created by the Mandate is not violated" [2]. The majority of the Court in the Preliminary Objections proceedings adopted a similar view [3].

This submission, if accepted, would involve that the Permanent Court possessed, subject to the limitations pointed out above [4], some form of supervisory functions, and its correctness or otherwise is accordingly of vital importance for present purposes. A consideration of its validity requires an analysis of the nature and extent of the rights, interests and functions of Members of the League in relation to those provisions of the Mandates which concerned the benefit of the inhabitants of the mandated territories, in circumstances where observance or non-observance did not affect the material interests of individual League Members, either directly or through their nationals. This again depends on the correct construction of Article 22 of the Covenant and the mandate instruments.

8. The basic scheme of the mandate system was that the Mandatory would be answerable for its administration of the mandated territory

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[1] Although in addition in the interests of the inhabitants of the mandated territories.

[2] I, pp. 91-92.

[3] *Vide South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 336-337, 343-344; pp. 360-362, 374, 379-381 (Judge Bustamante); p. 432 (Judge Jessup); pp. 447-448 (Sir Louis Mbanefo).

[4] *Vide* Part A, para. 15, *supra*.

to the League, i.e., either to a body having legal personality apart from its Members, or to an association of States acting collectively in accordance with a constitution (the Covenant) which regulated not only the rights and obligations of Members *inter se* but also the procedures whereby the organization could express its collective views or perform its collective acts. Although the League Members would thus be entitled, by virtue of their membership, to participate in the League's supervision of the observance by a Mandatory of its obligations regarding the administration of the mandated territory, such participation would merely constitute the method whereby the League (whether as a separate *persona*, or as an unincorporated association) performed its functions. If this incident of membership could be considered a right or legal interest vesting in the Member, the content of this right or legal interest would not enable a Member to exercise it independently from other Members of the League, or otherwise than by taking part in the League's activities in accordance with the Covenant.

9. Applicants' submission, however, involves an assertion that League Members possessed additional rights or legal interests entitling each of them, individually, if it considered that the Mandatory was not observing its obligations towards the inhabitants, not only to raise the matter in the League for its consideration and attention, but also to take it up directly with the Mandatory, and, failing satisfaction, to institute contentious proceedings against the Mandatory with regard thereto—even in cases which did not affect the material interests of such Member at all, either directly or through its nationals.

In Respondent's submission, the contents of Article 22 of the Covenant and the mandate instrument seem to exclude the possibility that such additional rights were intended to vest severally in each Member of the League. The following indications appear particularly cogent, namely:

(a) The Mandate was to be exercised on behalf of the League only, and not on behalf of the League *and* its Members [1].

(b) The consent of the Council of the League was required for modification of the terms of the Mandate, and not also the consent of the Members of the League [2].

(c) Article 22 (1) of the Covenant provided that the securities for the performance of the sacred trust of civilization were to be embodied in the Covenant itself. The only securities mentioned in the Covenant relating to accounting by the Mandatory, or to supervision of its activities, were those prescribed in paragraphs 7 and 9 of Article 22, which read as follows:

> "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."
>
> "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 Covenant did not provide, or contemplate, any accounting by a Mandatory for its administration of the Mandate to individual League Members, the only provisions being paragraphs 7 and 9 providing for

[1] Art. 22 (2) of the Covenant and Preamble to the Mandate.
[2] Art. 7 of the Mandate.

accounting to the League itself. Moreover, the Mandatory's annual report had to be to the satisfaction of the Council. Individual League Members had no say with regard to the nature and scope of the contents of such a report.

Similarly there was no mention in any part of the Covenant of any form of judicial protection of any right of supervision over Mandates vesting in the Members of the League individually and enforceable by them directly against the Mandatory. In the absence of any provision to that effect in the Covenant, it is unlikely that Article 7 of the Mandate was intended to establish a form of "judicial supervision", or a form of judicial protection of such individual rights of supervision. If it were so intended, one would have expected such intention to be expressed in very clear terms.

The Court held in the Judgment on the Preliminary Objections, that—

> ". . . Article 7, paragraph 2, is clearly in the nature of implementing one of the 'securities for the performance of this trust', mentioned in Article 22, paragraph 1 [1]".

The Court did not, however, meet the difficulty that Article 22 (1) provided that such securities "should be embodied in this Covenant".

Judge Bustamante, also did not meet this difficulty when he stated:

> "The texts of the 'Declarations' or 'Mandate agreements' which were issued immediately after the establishment of the League of Nations contain a clause which does not appear in the text of Article 22 of the Covenant, *although it must in the spirit of the Covenant be regarded as a necessary security for the system.* This is the 'compromissory clause' . . . [2]" (Italics added.)

If the authors of the mandate system regarded "judicial supervision" as a necessary security for the system, it is difficult to understand why they left it to the "spirit of the Covenant" instead of inserting it in the letter thereof as they did in regard to the other securities.

In the light of the factors set out in subparagraphs *(a)* to *(c)* above, it would indeed be strange if, in the mandate instruments, it was intended to confer on individual League Members a legal interest in the observance by the Mandatory of its obligations, enforceable in the last instance by recourse to the Court, in so far as such obligations affected only the inhabitants of mandated territories. If that were the intention, one would have expected it to have been stated in explicit terms.

10. The conclusion reached in the preceding paragraphs upon analysis of the actual provisions of the Covenant and the mandate instrument, is also supported by the probabilities.

Supervisory functions with regard to the Mandates were, in express terms, reserved not for the Assembly of the League but for the Council —a particular organ of the League with limited membership—acting with the assistance of another particular body, the Permanent Mandates Commission. It could hardly have been the intention that in addition to the supervisory functions of the Council each and every Member of the League would, by virtue of an individual legal interest, stand in the position of a custodian of the rights of the inhabitants of the Mandated territories.

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 344.
[2] *Ibid.*, p. 360.

One cannot conceive of the League intending, and the respective Mandatories agreeing, that despite the express reservation of supervisory functions to the Council, individual League Members would be entitled to assert legal rights with regard to the Mandatories' legislative acts and administrative measures concerning the inhabitants of mandated territories and, if necessary, to enforce such rights by judicial process.

The position of a Mandatory would have been extremely invidious under such circumstances. In accounting for its administration to the Council of the League, it may have satisfied that body on all matters affecting the inhabitants, but still an individual League Member, disagreeing with the Mandatory and with the unanimous view of the Members of the Council, and perhaps even with all other Members of the League, could, by virtue of its legal rights, seek to impose on the Mandatory its own particular views as to the proper administration of the Mandate.

The Council's position in such circumstances would have been equally invidious. The very conferment on individual League Members of powers equal to, and concurrent with, those of the Council relative to mandate administration would have tended to undermine the Council's authority in that field.

11. A League of Nations publication makes it clear that the right to take decisions in regard to Mandate questions belonged solely to the Council of the League. It states as follows:

> "During the discussion upon the Secretary-General's annual report on the work of the League, it is permissible for any delegation to draw the attention of the Assembly to some point in the chapter concerning mandates and even to move that this chapter be referred to one of the Assembly Committees where an exhaustive discussion may ensue. . . . The discussion in the *Assembly* usually leads to the adoption of a resolution laying stress on some particular aspect of the discharge of the mandates, formulating *some wish* addressed to the Council, the Mandates Commission or the mandatory Powers, etc.
>
> Thus, the rôle of the Assembly consists in the exercise of a certain moral and very general influence in this domain. Its function may be said to be to maintain touch between public opinion and the Council.
>
> *The right to take decisions in regard to mandate questions belongs, however, to the Council.* It exercises its supervision with the aid of the *Permanent Mandates Commission*, instituted by the Covenant itself.
>
> The Covenant provides that this *Commission* is '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'. It is therefore essentially an advisory body—a body whose duty it is to examine and report—designed to assist the Council in carrying out its task. Its work is preliminary in character. Constitutionally, *it has no power to take decisions binding on the mandatory Powers or to address direct recommendations to them. Its conclusions are not* final until they have been approved by the Council [1]." (Italics added.)

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[1] *The Mandates System—Origin—Principles—Application* (1945), p. 35.

It is clear from this passage that the Permanent Mandates Commission, a body of experts provided for in the Covenant as an important cog in the system of mandate supervision, was not entitled to address a recommendation to a Mandatory, and even the Assembly composed of all the member States, could take no decisions in regard to mandate questions. It could surely then not have been intended that an individual League Member would have the right to decide for itself what measures *should or should not* be adopted by a Mandatory, and then to assert a right against the Mandatory in that regard—or, even more, to attempt to dictate to a Mandatory the adoption of a particular policy. Applicants' contention involves the possibility of such action by a League Member, including ultimate judicial recourse, even where the measures or policy advocated by such Member may have been considered unwise by the Mandates Commission, outvoted by the Assembly and even rejected by the Council of the League.

Furthermore, the Mandatory could stand in the midst of conflicting demands upon it by different Members who do not see eye to eye with the Mandatory and with each other as to policies to be applied in mandate administration. One Member could favour a particular policy, and another Member an entirely different policy, and each of them would, on Applicants' contention, be entitled to invoke the Court's jurisdiction.

12. The anomalous position that could arise if a Mandatory were subject to supervision both by the Council of the League and by individual League Members exercising individual rights enforceable by legal process, was dealt with as follows by Judges Spender and Fitzmaurice in their joint dissenting opinion on the Preliminary Objections:

> "We find it impossible to reconcile the view that Article 7 relates to disputes about the general conduct of the Mandate, with the supervisory functions given to the Council of the League under Article 6 of the Mandate. The conjunction would mean that although the League Council might have been perfectly satisfied with the Mandatory's conduct of the Mandate, or might even have made suggestions to the Mandatory about that, which the latter was complying with and carrying out, any Member of the League not satisfied with the Mandatory's conduct, or not agreeing with the Council's views, could have brought proceedings before the Permanent Court under Article 7.
>
> There would have been an even more extraordinary possibility. A Member of the League might, on some point relative to the conduct of the Mandate, have obtained from the Permanent Court a decision which was not in fact in the best interests of the peoples of the mandated territory—due, say, to lack of sufficient technical data before the Court. Yet under Article 59 of the Statute, the Mandatory would have been bound by the decision, and obliged to apply it vis-à-vis the inhabitants, although the Council of the League might have been wholly opposed to it and itself not bound by it.
>
> We cannot believe it was ever intended that it should be possible for such situations to arise, and in estimating this, one must, for reasons we have given earlier in this Opinion, place oneself at the point in time when these provisions, Articles 6 and 7, were being drafted as designed portions of a coherent and integrated whole,

which the Mandate certainly would not have been if Article 7 had had the meaning attributed to it by the Court [1]."

13. A counter-argument advanced by the Court in its Judgment on the Preliminary Objections, was that the purpose of Article 7 was to make provision for a failure of the Council's supervision and thus to add to the effectiveness of the Mandate. The argument was that in the political activities of the Council, under Article 6 of the Mandate, unanimity was required, and the Mandatory was entitled to participate in the proceedings. The Mandatory could therefore block any action by the Council. The Council could, however, not bring contentious proceedings, and was limited to advisory opinions which did not bind the Mandatory. Therefore, it was held, the right to bring contentious proceedings was granted to individual Members of the League to enable the will of the Council to be imposed on the Mandatory [2].

This argument was characterized by Judges Spender and Fitzmaurice in their joint dissenting opinion as the one having "the least substance" of "all the arguments advanced in this case", i.e., the Preliminary Objections proceedings [3]. It is, in Respondent's respectful submission, unsound for the reasons advanced in the succeeding paragraphs.

14. Firstly it is by no means settled law (as the authors of the Judgment appear to suggest) that the Mandatory's vote could prevent any resolution of the Council. Respondent draws attention to the difference in the views expressed in this regard by Judge Klaestad and Judge Lauterpacht in their separate opinions in the Voting Procedure Advisory Opinion [4].

If a Mandatory could not block a Council resolution in the manner suggested, the basis for the argument falls away. But the same result follows also on the opposite assumption. For if a Mandatory could block a Council resolution, that would indicate that the whole purpose of the authors of the Mandate was that the Council should *not* be able to impose its will on the Mandatory. As expressed by Judges Spender and Fitzmaurice in their joint dissenting opinion:

> "The very fact of the unanimity rule coupled with the further fact that under paragraph 5 of Article 4 of the League Covenant, the Mandatory had to participate in the vote, shows that the system was one which was intended to be worked by a process of discussion, negotiation, and common understanding [3]."

15. Moreover, if it had been the intention that the Council's will should be able to be imposed on the Mandatory, one can hardly imagine a more inept way of making provision therefor. If that had been the intention, it would have been much easier and more direct to provide explicitly that a Council resolution would be effective even if the Mandatory voted against it. This would then have the desired effect, i.e., to enable the Council to pass a resolution without the consent of the Mandatory.

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 553.

[2] *Ibid.*, pp. 336-337. *Vide* also the separate opinion of Judge Bustamante at p. 374.

[3] *Ibid.*, p. 520.

[4] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, pp. 85-86, 98-106.

The compromissory clause, on the other hand, is not suited at all to a purpose of enforcing the Council's will. The Council is not empowered to invoke it, but on the contrary the suggested imposition of the *Council's will*, is left to the chance possibility of action *by an individual Member of the League*. If judicial process had been contemplated at all as a method whereby the Council could impose its will on the Mandatory, the obvious course would have been to grant powers to the *Council* (excluding the Mandatory) enabling it to obtain a judgment binding on the Mandatory [1].

Alternatively, one would at least have expected some provision designed to effect co-ordination between the action of an individual Member and the will of the Council, for example, express provision that individual Members would have the right to obtain a judgment enforcing a Council resolution, or a resolution which would have been passed but for the Mandatory's dissentient vote. In fact, however, the right of a Member of the League is defined without reference to anything occurring before the Council at all. It seems illogical to enable Members to approach the Court without the Council ever having considered a matter, if the purpose of the procedure was to enforce the Council's will.

16. Another consideration tending to refute Applicants' submission regarding the scope of the compromissory clause, is that, in exercising any "judicial supervision", the Court could be called upon to give a judgment on technical, political and administrative matters without the assistance of the Permanent Mandates Commission and the other technical assistants available for consultation by the Council or individual Members thereof. In its decision, the Court could be called upon to apply, *inter alia*, the wide and general provisions of Article 2 requiring the Mandatory to "promote to the utmost the material and moral well-being, and social progress of the inhabitants of the territory". As put in their joint dissenting opinion on the Preliminary Objections by Judges Spender and Fitzmaurice:

> "There is hardly a word in this sentence which has not now become loaded with a variety of overtones and associations. There is hardly a term which would not require prior objective definition, or redefinition, before it could justifiably be applied to the determination of a concrete legal issue. There is hardly a term which could not be applied in widely different ways to the same situation or set of facts, according to different subjective views as to what it meant, or ought to mean in the context; and it is a foregone conclusion that, in the absence of objective criteria, a large element of subjectivity must enter into any attempt to apply these terms to the facts of a given case. They involve questions of appreciation rather than of objective determination. As at present advised we have serious misgivings as to the legal basis on which the necessary objective criteria can be founded.
>
> The proper forum for the appreciation and application of a provision of this kind is unquestionably a technical or political one, such as (formerly) the Permanent Mandates Commission, or the Council of the League of Nations—or to-day (as regards

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 520.

Trusteeships), the Trusteeship Council and the Assembly of the United Nations. But the fact that, in present circumstances, such technical or political control cannot in practice be exercised in respect of the Mandate for South West Africa, is not a ground for asking a Court of law to discharge a task which, in the final analysis, hardly appears to be a judicial one [1]."

The functions of courts of law do not normally extend to the realm of politics; and where a legislature or an administrative body acts within the scope of powers conferred upon it, it is not the function of courts of law to enquire into the policy or soundness of its acts.

This general principle was recognized in the case of *Jerusalem-Jaffa District Governor and another* v. *Murra and others*, as being applicable also in regard to the administration of the Mandated Territory of Palestine under that Mandate. In regard to certain measures of expropriation applied by the Mandatory, the Privy Council stated:

"Their Lordships agree that in such a case, and in the absence of exceptional circumstances, justice requires that fair provision shall be made for compensation. But this depends not upon any civil right, but (as the Chief Justice said) upon principles of sound legislation; and it cannot be the duty of the Court to examine (at the instance of any litigant) the legislative and administrative acts of the Administration, and to consider in every case whether they are in accordance with the view held by the Court as to the requirements of natural justice [2]."

With regard to the functions of international courts, Rosenne states, with reference to decisions both of the Permanent Court of International Justice and of the present Court:

"In the first place, it cannot too often be emphasized that the Court is a court of justice and not of ethics or morals or of political expediency. Its function is to 'declare the law'. Its pronouncements are solely concerned with the law as it is, and 'it is not for the Court to pronounce on the political or moral duties' which its conclusions on the law may involve [3]."

Respondent is mindful of the fact that legal questions are often encompassed or intertwined with political issues, and that the jurisdiction of the Court, if otherwise established, would not for that reason be ousted. It is, however, foreign to the essential nature and purpose of the Court to entertain matters of a purely political character, and it is unlikely that the authors of the Mandate intended that the Court should perform such a function in the mandate system—if they intended that the Court should, one would have expected very explicit language to that effect [4].

17. In his separate opinion on the Preliminary Objections Judge Jessup refers to certain cases decided in the Supreme Court of the

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 466-467.

[2] *Jerusalem-Jaffa District Governor* v. *Suleiman Murra and others*, 1926 A.C. 321, at p. 328.

[3] Rosenne, *op. cit.*, pp. 62-63.

[4] Compare the wording of the compromissory clauses in the Minorities Treaties, para. 21, *infra*.

United States of America as support for the propositition that courts are sometimes called upon to determine whether particular laws or actions comply with general broad criteria such as "due process", "equal protection" and "religious freedom" [1].

Admittedly courts are sometimes called upon to apply vague formulae. It must, however, always be a matter of construction to determine whether the formula concerned was intended to be applied by a court or some other body. Where formulations are not only broad in the extreme, but their application would require technical knowledge, then formidable difficulties must always exist in coming to a conclusion that a court was intended to have jurisdiction as an alternative to, or concurrently with, an existing technical body specifically designed for and charged with the application or administration of the provision in question.

18. A further important factor in ascertaining the scope of rights of League Members for the protection of which the compromissory clause was designed, arises from the phrase "if it [the dispute] cannot be settled by negotiation" [2]. This is a clear indication that the type of rights which were meant to be protected by Article 7, were such as would be capable of settlement by negotiation between the Mandatory and the other Member of the League concerned. In the words of Judges Spender and Fitzmaurice:

> "... a requirement that a dispute must be such as 'cannot' be settled by negotiation, necessarily implies that it be of a type *capable* of being so settled, and of being so settled by negotiation between parties competent for that purpose. If a dispute *could not* be settled (i.e., is inherently incapable of settlement) by any kind of negotiation at all between the parties before the Court, then clearly a requirement that the dispute be one that 'cannot' be settled by negotiation would be meaningless.
>
> By 'settlement', we understand final settlement, and a final settlement to us means a settlement negotiated between parties having competence to settle the particular dispute in a final manner. The question therefore arises, could the Applicant and Respondent States, by negotiation *inter se*, settle in any way whatever a dispute not relating to their own State or national rights or interests, but belonging to the 'conduct of the Mandate' type—the sacred trust—could any settlement negotiated between single States, such as the Applicant States and the Mandatory, settle any question relating to the general conduct of the Mandate itself? Could any such settlement, arrived at between the Applicants and the Respondent alone, bind any other State conceiving itself to have an interest in the conduct of the Mandate—or bind the United Nations Assembly? Obviously not—such a settlement might be wholly inacceptable to these other entities [3]."

Settlement with one or some States would not prevent others from raising complaints relative to the matter settled.

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 428.

[2] Art. 7 of the Mandate.

[3] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 551. *Vide* also the dissenting opinion of President Winiarski at p. 457.

19. Similarly, if proceedings were brought and the Mandatory were to be successful, such judgment would be *res judicata* only for the Applicant States [1]. It would not bind any other States, who would be able immediately to institute fresh proceedings on exactly the same grounds. From the Mandatory's point of view there would thus be no finality. On the other hand, a decision against the Mandatory would be final and conclusive—at any rate, as far as the Mandatory itself was concerned.

Such an anomaly could never have been intended by the authors of the Mandate, and it suggests very strongly that the only disputes cognizable by the Court under Article 7 were disputes relating to a State's material interests, which it could freely settle by negotiation—as against, on the other hand, disputes pertaining to "the obligations of the Mandatory in relation to the 'sacred trust'" which were, in Respondent's respectful submission, correctly held by Judges Spender and Fitzmaurice to have been "of their nature not negotiable as between the Mandatory and another State Member of the League" [2].

It is significant that the typical compromissory clause in the Minorities Treaties [3] contains no provision regarding previous attempts at settlement by negotiation [4].

The argument that disputes regarding the "sacred trust" provisions were of their nature not capable of settlement by negotiation, was not dealt with in the Judgment or opinions of the majority of the Court in the Preliminary Objections proceedings.

20. When dealing with the ambit of the rights granted by the Covenant and the mandate instrument to Members of the League individually, Judge Jessup stated as follows:

> "International law has long recognized that States may have legal interests in matters which do not affect their financial, economic, or other 'material', or, say, 'physical' or 'tangible' interests [5]."

And:

> "The question is not, therefore, whether one can conceive of a treaty being concluded in such a spirit and with such results but whether the Mandate was of this character [6]."

Though Respondent is in respectful agreement with these statements, it must be pointed out that in the treaties of the kind referred to by the learned Judge, and in particular those concluded more or less contemporaneously with the Mandate, very clear language was used to achieve the unusual result of conferring legal rights or interests of the kind in question on individual States.

As examples of such treaties, more or less contemporaneous with the Mandate and containing compromissory clauses, Judge Jessup referred particularly to the Minorities Treaties concluded after the First World

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[1] Art. 59 of the Statute.
[2] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 552.
[3] *Ibid.*, pp. 425-426 (quoted by Judge Jessup).
[4] *Vide* para. 21, *infra*.
[5] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 425.
[6] *Ibid.*, p. 426.

War, and to the Constitution of the International Labour Organisation [1].

21. Dealing first with the Minorities Treaties, Article 11 of the Treaty of Saint-Germain-en-Laye of 10 September 1919 (quoted at pp. 425-426 of Judge Jessup's separate opinion and which is typical of Minorities provisions), read as follows:

> "... any difference of opinion as to questions of law or fact arising out of these Articles between the Serb-Croat-Slovene State and any one of the Principal Allied and Associated Powers or any other Power, a member of the Council of the League of Nations, *shall be held to be a dispute of an international character* under Article 14 of the Covenant of the League of Nations. The Serb-Croat-Slovene State hereby consents that any such dispute shall, if the other party thereto demands, be referred to the Permanent Court of International Justice [2]." (Italics added.)

It is significant that the States to whom legal interests were granted, together with the concomitant right of invoking the Court's jurisdiction, were limited to the Principal Allied and Associated Powers, and to other Members of the *Council of the League*. There was no general grant to *all* Members of the League of Nations, as, it is argued, the position was with respect to Mandates. This limitation in the grant of legal interests is all the more marked when one realizes that the Minorities Treaties were imposed on the conquered nations and new States by the conquerors, whereas the Mandates were substantially conferred upon the conquerors by themselves [3].

Is it then likely that the Great Powers would in these circumstances voluntarily have granted in respect of Mandates, legal interests and competence to invoke jurisdiction to a wider number of States than in respect of the Minorities Treaties?

Moreover, the Minorities Treaties differ from the Mandates also in another significant respect. The language employed in the Minorities Treaties in order to make provision for the exercise of legal interests by other States is entirely clear and unambiguous. It is difficult to imagine that the authors of the Mandates would have used much less explicit language to achieve a more far-reaching result. It is also important to note that the compromissory clause in the Minorities Treaties did not contain a provision regarding previous attempts to settle the dispute by negotiation between the parties.

22. In another context Judge Jessup made further use of provisions of certain Minorities Treaties as follows:

> "It has been urged that those who concluded the Mandate agreements could not have intended the meaning of Article 7 (2) which has just been stated, because they would have wished to avoid the

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 425-432; particularly pp. 429-430.

[2] *Vide* also Hudson, M.O., *International Legislation* (1931), Vol. I, p. 319.

[3] *Vide South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 452-453 (dissenting opinion of President Winiarski); and also Jessup, P. C., *A Modern Law of Nations* (1959), p. 89, where the learned author states as follows:

> "But the minorities treaties were obnoxious largely because they carried the stigma of imposition upon small states by the great powers, who were unwilling to accept like obligations in their own territories."

> confusion and conflict which it might have entailed between the respective roles of the Council of the League and the Permanent Mandates Commission on the one hand, and the Permanent Court of International Justice on the other hand. The Permanent Court disposed of a comparable objection in connection with the Minorities treaties which contained provisions both for invoking action by the Council and for submitting a case to the adjudication of the Court. (*Settlers of German Origin*, Series B, No. 6 (1923), pp. 21-23; *Upper Silesia (Minority Schools)*, Series A, No. 15 (1928), pp. 19-25.) And to the same general effect, although with certain differences of treaty terms, *Statute of the Memel Territory*, Series A/B, No. 47 (1932), pp. 248-249 [1]."

The *Settlers of German Origin* case does not in Respondent's respectful submission, appear relevant. In that case the Court was dealing with the possible conflict between the right of the Council to refer the matter to the Court for an advisory opinion, and the right of certain Powers to institute contentious proceedings. In other words the Court was dealing with two different ways of bringing the same question before the same tribunal, and not with different ways of bringing the same question before two different tribunals.

The two other cases referred to by Judge Jessup are comparable, but the dissimilarities between the Minorities Treaties dealt with in them and the Mandate are so striking that they tend rather to support Respondent than otherwise. Like the Treaty of Saint-Germain-en-Laye, referred to above, the language of these treaties was entirely clear, and their interpretation could hardly have been affected by any anomalies that might have arisen on their application. And in fact there was hardly any scope for the type of conflict between the functions of the Council of the League and the Permanent Court as would arise in the case of mandates if Applicants' interpretation of Article 7 were to be correct. Contentious proceedings could in terms of both these Treaties also be instituted only by Members of the Council of the League [2].

In view of the fact that Council decisions could be arrived at only by a unanimous vote, the possibility of conflict between the will of the Council and that of the State instituting judicial proceedings was thus virtually excluded.

23. The second example, referred to by the learned judge, of a treaty granting to States legal rights enforceable by judicial process in matters in which their material interests were not concerned, derives from the constitution and operation of the International Labour Organisation. From his discussion of this topic, he concluded:

> "... that a State may have a legal interest in the observance, in the territories of another State, of general welfare treaty provisions and that it may assert such interest without alleging any impact upon its own nationals or its direct so-called tangible or material interests. The operation of the International Labour Organisation further

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 432.

[2] *Vide* Art. 72 (3) of the German-Polish Convention of 15 May 1922, quoted in *Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 80, and Art. 17 of the Convention of 8 May 1924, quoted in *Interpretation of the Statute of the Memel Territory, Preliminary Objection, Judgment, 1932, P.C.I.J., Series A/B, No. 47*, p. 247.

indicates that disagreements over the observance of general welfare provisions may be the subject of judicial investigation and of ultimate resort to this Court [1]."

Respondent is, however, not prepared to concede that the International Labour Organisation, and the conventions which it has brought into effect, were motivated solely by a humanitarian "interest which all States have in 'humane conditions of labour' in all other States" [2].

Thus States have always considered international regulation of labour conditions a necessary prerequisite to an improvement at the national level, since unilateral raising of standards by any State would raise costs of production and consequently put such a State at a disadvantage in international competition [3]. That this attitude played a vital role in the formation of the International Labour Organisation, can be seen from statements made more or less contemporaneously with its foundation by leaders from various countries. Thus, for example, a memorandum prepared in January 1919 by members of the British delegation to the Paris Peace Conference contained the following passage:

"One of the fundamental objects of conventions as to labour conditions is to eliminate unfair competition based on oppressive conditions or working. Any State, therefore, which does not carry out a convention designed to prevent oppressive conditions, is guilty of manufacturing under conditions which create a state of unfair competition in the international market [4]."

This same economic consideration was expressed in the preamble to the Constitution of the International Labour Organisation, which contains the following paragraph:

"Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries [5]."

It is therefore not surprising that the Constitution provided means whereby a State could enforce compliance with conventions to which both it and an allegedly non-complying Member were parties [6]. Such non-compliance would clearly benefit the non-complying State in its competition with complying States—a situation affecting the material interests of the States concerned and/or their nationals. In this regard there is no comparison with the position said to exist under the mandates, where it is contended that a right of compulsory jurisdiction was granted to States also in respect of matters in which neither their own interests nor those of their nationals were involved at all.

24. For the reasons aforestated, it is submitted that a comparison between the provisions of the Mandate and those of the Minorities Treaties and the Constitution of the International Labour Organisation

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 428.

[2] *Ibid.*, p. 429.

[3] *Vide* Shotwell, J. T. (ed.), *The Origins of the International Labor Organization* (1934), Vol. I, p. 4; *The International Labour Organisation:* The First Decade (1931), pp. 29-31.

[4] *Vide* Shotwell, *op. cit.*, Vol. II, p. 125; *vide* also Vol. I, p. 118. Similar statements may be found in various other parts of this work, such as, e.g., Vol. I, p. 86, as well as in Périgord, P., *The International Labor Organization* (1926).

[5] *The International Labour Organisation:* The First Decade, p. 367.

[6] *Vide* Art. 411 (of the Treaty of Versailles), later renumbered 26.

strengthens the conclusion that the Mandate was never intended to grant rights or legal interests in respect of the "sacred trust" obligations to individual Members of the League, save in so far as their material interests could be affected by a breach of these provisions by the Mandatory.

25. The conclusion reached above with reference to the provisions of the Covenant and the mandate instruments as well as the probabilities, is further supported by the history relating to the framing of the mandates.

It will be recalled that the compromissory clause originated in a draft for the B Mandates submitted to the drafting Mandates Commission by the representative of the United States of America, which draft made elaborate and detailed provision for commercial and other rights to be conferred on, and for the benefit of, State Members of the League of Nations and their nationals. In its original form it rendered not only the Mandatory but all State Members of the League subject to the jurisdiction of the Court in disputes concerning the interpretation or application of the Mandate provisions. This feature persisted throughout the later drafts of the Commission, and indeed also in the draft submitted by the Principal Powers to the Council of the League [1].

The only reason for the amendment thereupon brought about by the Council of the League whereby the Mandatory, and only the Mandatory, would be obliged to accept the jurisdiction of the Court, was the consideration that other League Members could not, without their consent, be subject to the jurisdiction of the Court [2]. If the purpose of the compromissory clause was to effect some form of judicial supervision, there does not seem to be any reason why it should initially have been drafted in a form which permitted the *Mandatory* to institute proceedings against other Members of the League, and which permitted one Member of the League to institute proceedings against another Member, even where neither was the Mandatory in respect of the particular mandate concerned.

Furthermore, if the Powers represented on the Council were so scrupulous of the right of member States not to be bound without their express consent, it is difficult to believe that they would, on their own and without an explicit statement to that effect, have changed what was intended to be an ordinary compromissory clause into a clause providing for a form of judicial supervision over mandate administration [3].

The historical survey also shows that discussion in the Mandates Commission of the draft provisions of the adjudication clause was confined to the operation thereof relative to the rights which were to be conferred on, and for the benefit of, member States and their nationals [4]. Originally it was intended that the rights granted to nationals of member States would be justiciable also at the instance of individuals. This was changed to render these rights justiciable only at the instance of States—this change being given effect to by having (except in the case

[1] *Vide* Chap. II, paras. 12 and 15, *supra*.

[2] *Ibid.*, para. 16, *supra*.

[3] *Vide South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 453 (President Winiarski).

[4] *Vide* Chap. II, para. 12, *supra*.

of Tanganyika) a clause consisting of only one paragraph as finally drafted and approved of by the Council of the League [1]. Throughout the discussions, there was a significant absence of any mention or even suggestion that the clause was intended to constitute a form of judicial supervision for the benefit of the inhabitants of mandated territories.

26. The anomalous so-called Tanganyika-clause has been used in argument, *inter alios*, by Judge Jessup against the contentions advanced by Respondent [2].

The Tanganyika-clause alone contains, in addition to a first paragraph identical to the whole compromissory clause in Article 7 of the South West Africa Mandate (and in all other Mandates), the following paragraph:

> "States Members of the League of Nations may likewise bring any claims on behalf of their nationals for infractions of their rights under this mandate before the said Court for decision."

It is *not* argued by Judge Jessup that the explicit provision for claims on behalf of nationals in the Tanganyika-clause, indicates that the compromissory clauses in other Mandates do not cover such claims. Indeed this point is left open by him. In the *Mavrommatis* case it was clearly held that the compromissory clauses in other Mandates did cover such claims [3].

Judge Jessup's point is, however, that the compromissory clauses in other Mandates:

> ". . . *must* include something other than or in addition to the claims of nationals or else the East African Mandate would have omitted paragraph 1 because paragraph 2 would have covered the field [4]".

This conclusion does not, in Respondent's respectful submission, take the matter any further. It has never been suggested that the compromissory clause in Article 7 of the Mandate applied *only* to claims by States *acting on behalf of their nationals*. In addition it clearly covered claims *involving the rights of States themselves*.

Judge Jessup continues, however, as follows:

> "The language of paragraph 2 of Article 7 of the South West Africa Mandate is very broad indeed and there is no evidence *that it is limited to matters in which other States might have a 'public' concern*, as for example the interest of a neighbouring State in the control of the traffic in slaves, arms, or liquors [5]." (Italics added.)

This logic is, with respect, difficult to follow. Judge Jessup himself has not positively disputed that paragraph 2 of Article 7 may include claims on behalf of nationals. Nobody has therefore suggested that it should be limited to matters of public concern—the question is whether, in addition to claims on behalf of nationals, it would cover matters of public concern only, or whether it would have a still wider import. If

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[1] *Vide* Chap. II, para. 12, supra. *Vide* also generally the dissenting opinion of Judges Spender and Fitzmaurice in *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 554-559.

[2] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 431.

[3] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2.*

[4] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 431.

[5] *Ibid.*, pp. 431-432.

the learned Judge intended to suggest that the language is so broad that it must extend beyond both "claims on behalf of nationals" and "matters of public concern", the relevance of the Tanganyika-clause is not readily apparent [1].

27. A further significant fact in favour of the construction of Article 7 advanced by Respondent, is that prior to the present Applications no State has ever attempted to bring any application to the Court on behalf of the inhabitants of any mandated territory, and this so despite the fact that in the League of Nations period 14 mandates were in force for over 25 years. The only case arising from the mandates, i.e., the *Mavrommatis* case [2], dealt with the situation where a Member of the League espoused the cause of one of its nationals.

In League circles generally there never seems to have been any contemplation of any judicial supervision. In the words of President Winiarski:

> "The Applicants rely on the views of certain jurists in favour of a general supervision to which any Member of the League could subject any Mandatory by bringing it before the Permanent Court of International Justice.
>
> And yet Mr. van Rees, one of the most active members, and Vice-Chairman of the Permanent Mandates Commission, says nothing in his book *Les Mandats internationaux*, Vol. I, *Le contrôle international de l'administration mandataire* (Paris, 1927), about this judicial supervision by the Permanent Court of International Justice claimed to be able to be brought into operation by any Member of the League. Even more significant, the official publication *The Mandates System—Origin—Principles—Application* which the League put out in 1945 with a preface by the Acting Secretary-General, Mr. Sean Lester, is also silent on the subject of this alleged role of the Court, although it contains a passing reference to the jurisdictional clause; yet such a role, if provided for, could not have escaped the attention of the authors. If in League quarters such as the Council, Secretariat and Permanent Mandates Commission judicial supervision was contemplated even only as a possibility provided for in extreme cases by the international agreements, the fact that we find no mention of it in these two books is inexplicable. If in the time of the League, when the framers of the Covenant and the Mandates, and their associates, were still alive, judicial supervision such as the Applicants put forward found no authoritative proponent, it may be taken as evidence that matters were not seen in this light [3]."

28. The authorities, scholarly and judicial, relied upon by Applicants were dealt with by Respondent in its Preliminary Objections [4], and in

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[1] *Vide*, in regard to the Tanganyika-clause, also the dissenting opinion of President Winiarski (at pp. 453-454), and the joint dissenting opinion of Judges Spender and Fitzmaurice (at pp. 559-560).

[2] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2.*

[3] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 451-452.

[4] Vide I, pp. 389-394.

the Oral Proceedings [1], and it is not necessary to repeat the discussion here. None of these authorities were of particular cogency. The most pertinent and weighty scholarly authority on the subject which has up to the present been quoted in these proceedings is, in Respondent's submission, the opinion expressed by Professor Feinberg at The Hague Academy of International Law in 1937, as follows:

> "Like most of the writers who have, in their works, expressed a view on the question, I consider that the judicial settlement clause does not confer on Members of the League of Nations the right unilaterally to bring a Mandatory Power before the Court except in cases where they can allege the violation of some right of their own or some injury to the interests of their nationals. This interpretation would seem to me to be entirely correct and in conformity with the general scheme of the Mandates System. It is indeed difficult to imagine that, by the inclusion of the judicial settlement clause in the text of the Mandates, it was intended to give each Member of the League of Nations a power so extensive that it would enable it to set itself up as a censor of the Mandatory's administration. The aim pursued was certainly a more limited one; it was desired to secure compulsory reference to the Court of all conflicts which might arise as a result of the non-performance of obligations assumed by the Mandatory, under the Mandate, in relation to other Members of the League of Nations [2]."

29. For the reasons aforestated, it is submitted that the Permanent Court did not possess any function of judicial supervision in respect of Mandates, since its competence was limited to deciding disputes relating to the rights or legal interests of Members of the League in the Mandate, and Members did not individually possess any right or legal interest in the observance by the Mandatory of the conditions imposed in the Mandate for the benefit of the inhabitants of the territory except in cases where the breach of these obligations affected the material interests of individual League Members, either directly or through their nationals.

For this reason alone, therefore, it follows that the compromissory clause could not have played any role in preventing, or assisting to prevent, the lapse of the Mandate on the falling away of the supervisory functions of the League Council.

C. The Effect of the Dissolution of the Permanent Court of International Justice on the Compromissory Clause

I. Introductory

30. If Respondent's submissions in section B of this Chapter as to the scope of the compromissory clause are not accepted, the further contention is advanced that in any event the compromissory clause has itself lapsed, and for that reason also cannot serve to keep, or assist in keeping, the Mandate in existence. Two reasons will be advanced why the compromissory clause has lapsed, viz., *firstly* that on the dissolu-

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[1] Oral Proceedings, 10 Oct. 1962.

[2] Quoted by President Winiarski in *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 455.

tion of the Permanent Court there was no judicial body vested with jurisdiction to hear disputes arising from the provisions of the Mandate, and, *secondly*, that on the dissolution of the League of Nations no States possessed the qualification (i.e., membership of the League) required for invocation of the Court's jurisdiction in terms of Article 7. The former basis will be dealt with in this section, and the latter in the next succeeding section.

31. Article 7 of the Mandate made express provision for submission of disputes to "the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations". No suggestion has ever been made that any process of interpretation of the Mandate, or the implication of terms in it, could have produced a result whereby any other organ was or could be substituted for the Permanent Court. Reference has been made to the dissolution of the Permanent Court [1]. The effect of this dissolution would clearly be to render the provisions of Article 7 inoperable, unless some new provision was made for the substitution of another judicial organ for the defunct Permanent Court.

Applicants rely on Article 37 of the Statute of this Court as making such new provision [2].

Article 37 reads as follows:

> "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." (Italics added.)

Article 37 therefore provides for a substitution of Courts only for the purposes of compromissory clauses *contained in treaties or conventions in force*. Other instruments are not affected by the terms of this Article.

Respondent's submission in this section will be that Article 37 is inapplicable to the circumstances of this case in that the Mandate never was, or at any rate, on dissolution of the League ceased to be, a "treaty or convention in force".

II. Definition of Treaty or Convention

32. In his separate opinion on the Preliminary Objections, Judge Jessup states the following:

> "The notion that there is a clear and ordinary meaning of the word 'treaty' is a mirage. The fundamental question is whether a State has given a promise or undertaking from which flow international legal rights and duties [3]."

For the purposes of this argument Respondent is prepared to assume the correctness of this proposition (despite strong authority in favour of a more limited meaning) [4] provided one point is kept in mind, namely

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[1] *Vide* Chap. II, para. 42, *supra*.
[2] *Vide* I, p. 88.
[3] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 402.
[4] *Ibid.*, pp. 475-476 (dissenting opinion of Judges Spender and Fitzmaurice).

that the concept of a promise or undertaking involves at least two parties, i.e., a promisor and a promisee. Thus the promise or undertaking will not give rise to an international treaty relationship unless accepted (or deemed to be accepted) by the promisee. *Consensus* between the parties is always required. It is submitted that this proposition appears clearly or implicitly from the authorities quoted by the learned Judge.

Thus the learned Judge discusses the formalities required for treaties, and concludes that oral *agreements* would suffice.

He proceeds to state:

> "It is also generally recognized that there may be unilateral agreements, meaning agreements arising out of unilateral acts in which only one party is promisor and may well be the only party bound [1]."

The expression "unilateral act" may give rise to some confusion. An *agreement* can, in the strict sense, never be constituted by a unilateral act alone. Although only one party may be the promisor, the acceptance express or implied of the promisee is required. Thus, for instance, in the *Free Zones* case [2] the "unilateral manifesto" issued by a domestic Sardinian organ was treated as follows by the Court:

> "This Manifesto, moreover, which was issued in pursuance of royal orders, following upon the favourable reception by H.M. the King of Sardinia of the request of the Canton of Valais based on Article 3 of the said Treaty of Turin, terminated an international dispute and settled, with binding effect as regards the Kingdom of Sardinia, what was henceforward to be the law between the Parties. *The concord of wills thus represented by the Manifesto* confers on the delimitation of the Zone of Saint-Gingolph the character of a treaty stipulation which France must respect as Sardinia's successor in the sovereignty over the territory in question [3]." (Italics added.)

It appears clearly therefore that this "unilateral manifesto" was treated as having the character of a treaty stipulation *because it represented the concord of wills of the parties*.

Respondent does not propose discussing the various authorities in detail, because it is prepared to accept for the purposes of its argument the following conclusion reached by Judge Jessup:

> "If the fact of *agreement* is established, the identification of a document or instrument embodying the agreement is not required by any rule of international law. International law contains no rule comparable to a Statute of Frauds in some municipal legal systems. The well-known Ihlen Declaration dealt with by the Permanent Court in the case of *Eastern Greenland* became an engagement when it was uttered; the minute in which it was subsequently recorded was an instrument which proved the fact and the content of the engagement but these might have been proved by other

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 402.

[2] Referred to by Judge Jessup at p. 403.

[3] *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 145.

evidence. As Judge Anzilotti said in his Dissenting Opinion (*Series A/B, No. 53*, p. 91):

> 'There does not seem to be any rule of international law requiring that agreements of this kind must necessarily be in writing, in order to be valid.'
>
> Nothing in the form—or formlessness—or novelty of the Mandate, militates against its being considered a 'treaty' [1]." (Italics added.)

The last proposition in the quotation from Judge Jessup's opinion is probably somewhat too wide—the form or formlessness of the Mandate may well be a pointer to its true nature, although not necessarily a conclusive one.

III. Did the Rights and Obligations Incorporated in the Mandate Derive their Force from International Agreement?

33. It must be emphasized at this stage that the question is not whether the mandate instrument was preceded by certain agreements, or even whether as a fact the Mandate would have been promulgated in the absence of such antecedent agreements. The question is whether the legal act which gave it its legal effect, was an international agreement or not. In this respect, one might quote legislation in municipal law as an example. Where a law is passed unanimously because all interested parties had previously agreed on its terms, it nevertheless derives its effect from the will of the legislature, and not from the consent of the individuals, although such consent may have been *de jure* or *de facto* a necessary prerequisite to the passing of the legislation [2].

In the present case, the mandate instrument did not take the form of an agreement, but of a council resolution. Naturally the form is not necessarily conclusive as to the nature of the act, and it will be necessary to consider carefully the history and surrounding circumstances in order to determine whether, despite its form, the Mandate can be considered an international agreement. On the other hand, as pointed out above, the mere fact that it followed on certain agreements would not *per se* result in its force being contractual. Basically the question must resolve itself into an examination of the intention of the parties responsible for bringing the Mandate into existence.

34. The history relating to the framing of the Mandate has been dealt with above [3]. Respondent wishes to refer to certain aspects thereof in the next succeeding paragraphs.

35. The draft Mandates were first put into the form of treaties. At some stage the drafts were changed to take the form of League resolutions [4]. This is a strong indication that the parties did not consider the final documents as recording international agreements at all, otherwise there would have been no necessity for effecting any change [5].

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 405. *Vide* also pp. 474-475 (Judges Spender and Fitzmaurice).

[2] *Ibid.*, pp. 460-461 (Judge Basdevant); p. 491 (Judges Spender and Fitzmaurice).

[3] *Vide* Chap. II, paras. 10-16, *supra*.

[4] *Ibid.*, para. 11.

[5] *Vide* joint dissenting opinion of Judges Spender and Fitzmaurice in *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 483-484.

36. It will be recalled that on 5 August 1920 the Council unanimously approved a report and draft resolution submitted by M. Hymans regarding the implementation of the mandate system [1]. In it, M. Hymans, *inter alia*, pointed out:

(a) That the allocation of the mandates was the prerogative of the Principal Powers, but that it required confirmation by the Council.

(b) That it would not be practical to secure agreement between Members of the League in terms of Article 22 (8) of the Covenant as to the degree of authority or administration to be exercised by the Mandatory Powers.

(c) That the Council was therefore itself entitled to define the degree of authority or administration, but that it would be reasonable in view of the technical nature of this task, to make use of the drafts already prepared by the Principal Powers.

In the result, the draft resolution clearly distinguished between the roles of the Council in confirming the allocation of the mandates (the granting of which was the prerogative of the Principal Powers) and in defining the terms of the mandates (which was the prerogative of the Council, but which it would exercise by making use of the work already accomplished by the experts of the Principal Powers).

Thus in paragraph (i) the resolution requested the Principal Powers to "*name* the Powers to whom they have *decided to allocate*" the mandates and to "*inform*" the Council of the frontiers of the mandated territories.

On the other hand, it requested the Principal Powers to *communicate* to the Council the terms and conditions of the mandates "that they *propose* should be *adopted* by the Council".

Paragraph (ii) provided that the Council would "*take cognisance* of the Mandatory Powers *appointed*" but would "*examine* the draft mandates *communicated* to it".

Paragraph (iii) provided that the Council would *notify* each Mandatory that it was invested with the mandate, and would *communicate* to it the terms and conditions.

It is therefore clear both from the terms of the resolution and from the contents of the report on which it was based that, at least as from the date of this resolution, the Council considered that it was within its competence to formulate the terms of the Mandates (agreement between Members of the League being impractical) and that it took the initiative in giving effect to the provisions of Article 22 of the Covenant [2].

37. When the draft mandates were handed in, the Council referred them to the Secretariat ". . . to consider the Mandates and to consult other legal experts on any points which they considered necessary" [3].

It is quite clear once again that the Council did not consider itself a mere rubber stamp whose only function was to approve the drafts submitted to it.

38. The same point arises from the following aspect, i.e., the changes actually brought about by the Council. These are set out in Chapter II,

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[1] *Vide* Chap. II, para. 13, *supra*.

[2] *Vide South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 486 (Judges Spender and Fitzmaurice).

[3] *L. of N., O.J.*, 1921 (No. 1), p. 12. *Vide* Chap. II, para. 14, *supra*.

paragraph 15, *supra*. Of particular significance is the insertion of a fourth paragraph in the preamble. In its natural meaning this paragraph clearly indicates that the degree of authority, control or administration was being defined by the Council, *because* there had been no previous agreement by the Members of the League. In fact one knows that there had been no previous agreement by Members of the League, and that Members of the League were not even made aware of the terms of the draft Mandates [1].

In his separate opinion, Judge Jessup suggests that the expression "Members of the League" should, in the context of Article 22 (8) of the Covenant and paragraph 4 of the preamble to the Mandate instrument, be read as referring to the Principal Allied and Associated Powers, or the Principal Allied Powers [2]. As a matter of construction, this would be entirely untenable. The authors of the Covenant and the Mandate would hardly have used the expression "Members of the League" in different senses in different parts of these instruments. As far as the mandate instrument is concerned, the expression "Principal Allied and Associated Powers" is used repeatedly (see paragraphs 1 and 2 of the preamble) and the expression "Member [or Members] of the League" is equally used repeatedly (see fourth paragraph of the preamble, Article 5, Article 7). There is no suggestion that in one instance the two concepts are synonymous [3].

Furthermore, the references given by Judge Jessup do not bear out his suggestion that the expression "Members of the League" was given any consistent interpretation by the Council and its Members to produce a result departing from the natural meaning of the words. Thus M. Hymans, in his report adopted on 5 August 1920, considered this expression to signify "all the signatories except Germany of the Treaty of Versailles" or "those signatories of the Treaty of Versailles who are Members of the League of Nations" [4]. He, and since the Council unanimously adopted the report, presumably also the other Members of the Council, clearly therefore did not consider the expression to refer only to the *Principal* Allied and Associated Powers, or the *Principal* Allied Powers.

Respondent does not propose dealing in detail with the further passages referred to by the learned Judge. In part they merely emphasize the obvious fact that the consent of the Principal Powers to the terms of the Mandate was necessary in that they were Members of the Council, which required unanimity for its resolutions [5]; and in part they may well have been motivated only by the consideration, expressed in M. Hymans' report of 5 August 1920 [6], that agreement between the Principal Powers was a desirable (though not essential) preliminary to action by the Council. However that may be, there is no warrant for finding that there ever was any general agreement that the expression

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[1] *Vide South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 500-501 (Judges Spender and Fitzmaurice).

[2] *Ibid.*, p. 395.

[3] *Ibid.*, p. 500 (Judges Spender and Fitzmaurice).

[4] *L. of N., O.J.*, 1920 (No. 6), p. 338.

[5] *Vide*, e.g., the statement of the British Prime Minister referred to in *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 392.

[6] *Vide* Chap. II, para. 13, *supra*.

"Members of the League" was to be regarded as bearing any other *meaning* than the words suggest.

39. The alteration in the last paragraph of the preamble to the mandate instrument is also instructive. The draft read: "The Council of the League of Nations . . . Hereby *approves* of the terms of the Mandate as follows . . ." (Italics added.) This was altered to read: "*Confirming* the said Mandate, *defines* its terms as follows . . ." (Italics added.) This clearly expresses the Council's view of its function. It confirmed the Mandate (the granting of which was the prerogative of the Principal Allied and Associated Powers) but it defined its terms, since the definition of the terms of the Mandate, in the absence of agreement amongst the Members of the League, was the function of the Council. It also shows that the Council did not consider that it was merely "approving" the terms of the Mandate [1].

40. According to Article 7, the terms of the Mandate could only be altered with the consent of the Council of the League. This is a further indication that the Members of the Council (which included the Principal Powers) considered the Mandate as an act of the Council, not of any other entity or entities. One can hardly imagine an agreement concluded between individual States which can nevertheless be altered by the Council without reference to or consultation with such States [2].

41. The Mandate for South West Africa, in common with all the other B and C Mandates, was not registered as a "treaty or international engagement" under Article 18 of the Covenant. Furthermore, none of the Mandates—with the exception only of the Mandate for Iraq, the terms of which were, for special reasons, recorded in the form of a treaty—ever appeared in the *Treaty Series* published by the League. This indicates that its authors did not regard the Mandate as a treaty or international engagement [3].

The Judgment of the Court on the Preliminary Objections holds that the explanation for the non-registration may be found, *inter alia*, in the consideration that Article 18—

> ". . . provided for registration of 'Every treaty or international engagement entered into *hereafter* by any Member of the League' and the word 'hereafter' meant after 10 January 1920 when the Covenant took effect . . ." [4]

This may explain why the conferment of the Mandate by the Principal Allied and Associated Powers (7-9 May 1919) and the provisional agreement on its terms in August 1919 had not been registered. It hardly affords an explanation why the Mandate instrument, dated 17 December 1920, was not registered as a treaty, if it was considered one.

42. The Judgment of the Court on the Preliminary Objections and the separate concurring opinions suggest various possible agreements out of which the Mandate may be said to have arisen. Thus the Judgment holds:

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[1] *Vide South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 489 (Judges Spender and Fitzmaurice).

[2] *Ibid.*, p. 493.

[3] *Ibid.*, p. 494.

[4] *Ibid.*, p. 332.

"For its confirmation, the Mandate for South West Africa took the form of a resolution of the Council of the League but obviously it was of a different character. It cannot be correctly regarded as embodying only an executive action in pursuance of the Covenant. The Mandate, in fact and in law, is an international agreement having the character of a treaty or convention. The Preamble of the Mandate itself shows this character. The agreement referred to therein was effected by a decision of the Principal Allied and Associated Powers including Great Britain taken on 7 May 1919 to confer a Mandate for the Territory on His Britannic Majesty and by the confirmation of its acceptance on 9 May 1919 by the Union of South Africa. The second and third paragraphs of the Preamble record these facts. It is further stated therein that 'His Britannic Majesty, for and on behalf of the Government of the Union of South Africa . . . has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions'. These 'provisions' were formulated 'in the following terms'.

The draft Mandate containing the explicit terms was presented to the Council of the League in December 1920 and, with a few changes, was confirmed on 17 December 1920. The fourth and final paragraph of the Preamble recites the provisions of Article 22, paragraph 8, of the Covenant, and then 'confirming the said Mandate, defines its terms as follows: . . .'

Thus it can be seen from what has been stated above that this Mandate, like practically all other similar Mandates, is a special type of instrument composite in nature and instituting a novel international regime. It incorporates a *definite agreement* consisting in the conferment and acceptance of a Mandate for South West Africa, a *provisional or tentative agreement* on the terms of this Mandate between the Principal Allied and Associated Powers to be proposed to the Council of the League of Nations and a *formal confirmation agreement* on the terms therein explicitly defined by the Council and agreed to between the Mandatory and the Council representing the League and its Members. It is an instrument having the character of a treaty or convention and embodying international engagements for the Mandatory as defined by the Council and accepted by the Mandatory [1]." (Italics added.)

Now the "definite agreement" consisting of the conferment and acceptance of the Mandate was not incorporated in the mandate instrument—the preamble merely states that this agreement had taken place previously. It seems clear that this "agreement" was merely a preliminary act. The Mandate could not operate as such before its terms had been settled in one of the two ways provided for in Article 22 (8). The "provisional or tentative agreement" among the Principal Powers *inter se* clearly did not establish the Mandatory's rights and obligations. The vital stage in the Judgment of the Court is to be found in the last portion of the above quotation commencing with the words "and a formal confirmation agreement". No reasons are advanced for the Court's conclusion that this act of the Council's amounted to an agreement, or that the Council therein represented the League and its Members.

[1] *Vide South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* pp. 330-331.

43. Judge Bustamante, in dealing with this matter [1], recognizes that the "'pre-agreement' by which one or more Powers allocated the Mandate for a particular territory to another State" was "a matter outside the League of Nations" [2]. The actual mandate instrument is, however, in his view, an agreement, and acceptance by the Mandatory was at least implied ". . . above all, because in fact the very exercise of the Mandate was objective evidence of the agreement of the Mandatory" [3].

This reasoning presupposes—

(a) that the Council, in defining the terms of the Mandate, intended to enter into an agreement, and not to pass a resolution; and

(b) that, in exercising the Mandate, the Mandatory was doing more than merely recognizing the right of the Council to pass the resolution in question, and was in fact accepting an offer proposed by the Council in its resolution.

Neither of these presuppositions is established by the learned Judge, or is, in Respondent's respectful submission valid.

In regard to non-registration of the mandate instrument under Article 18 of the Covenant, Judge Bustamante emphasizes that the form of registration of, and publicity for, declaratory instruments of the Council are similar to, and equally effective as, registration in terms of Article 18. He also emphasizes that a mandate is in many respects different from an ordinary treaty [4].

In this respect, it must however, be pointed out that Respondent is not, for the purpose of the present argument, submitting that the Mandate was *invalid* because it was not a treaty or was not registered as such, but that its non-registration suggests that it was *not considered a treaty*. From this point of view, the differences between Mandates and ordinary treaties, and the difference between the manner of securing publicity for the two types of instrument, both point to the conclusion that they were regarded as basically dissimilar instruments.

44. Judge Jessup, in his separate opinion, refers to the following agreements:

(a) The first agreement was the decision of the Council of Four on 7 May 1919 to confer the Mandate on Respondent [5].

(b) The second agreement was the agreement by the Principal Powers on the terms to be proposed to the Council of the League [6].

(c) The third agreement was the acceptance by the Mandatory of the Mandate as allocated in the first agreement between the Principal Allied and Associated Powers; and the acceptance of the second agreement between the Principal Powers by which the terms of the Mandate were formulated [7].

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* pp. 358-360, 371-374.
[2] *Ibid.*, p. 358.
[3] *Ibid.*, p. 359.
[4] *Ibid.*, pp. 359-360, 371-373.
[5] *Ibid.*, p. 399.
[6] *Ibid.*, pp. 399-400.
[7] *Ibid.*, p. 400.

(d) The fourth agreement was "the entire body of the Council's resolution" in defining the final terms of the Mandate [1].

(e) The fifth agreement was the compromissory clause as distinct from the rest of the Mandate [2].

It is submitted that the first three "pre-agreements" (to use Judge Bustamante's description) did not establish the Mandatory's rights and obligations under the Mandate. Before such rights and obligations could be created, Article 22 (8) of the Covenant had to be complied with. This was effected by the Council's resolution of 17 December 1920. With regard to the "fourth agreement", it is submitted that it is artificial to treat the Council's act as an agreement merely because it represented the unanimous decision of the Council of which Britain, being also the representative of the Mandatory, was a Member. In terms of Article 22 (8) of the Covenant, the degree of authority, control or administration to be exercised by the Mandatory could be established by agreement only if such agreement was reached by the Members of the League—agreement among Members of the Council would not have been sufficient. No other provision gave the Members of the Council any power to define the terms of Mandates by means of *agreement* with the Mandatory. Such agreement could not bind the League (as an entity) or its Members. The "fifth agreement" considers the compromissory clause in isolation from the rest of the Mandate. In this regard Respondent respectfully associates itself with the following passage from the joint dissenting opinion of Judges Spender and Fitzmaurice.

> "We recognize in this connection that it may be tempting to regard an instrument containing an adjudication clause (particularly one worded like Article 7—'the Mandatory agrees . . .', etc.) as being *protanto* of a conventional character. We do not however think it possible or legitimate to detach and isolate one provision of an instrument, ascribe a treaty character to it and then, on that basis, deem a similar character to be thereby imparted to the whole instrument. Article 7, standing on its own, could not be a 'treaty or convention' for the purposes of Article 37 of the Statute, for an adjudication clause, standing on its own, and apart from the context in which it occurs, is meaningless and can have no real existence. It could not be interpreted, and certainly could not be applied in isolation. The fact that it is in the instrument may indeed be a pointer to the character of the latter, may afford some evidence as to the nature of the instrument: but that is all. Moreover, it would seem that if one did detach Article 7 from the rest of the Mandate, it would then assume the character of a unilateral declaration involving a unilateral assumption of obligation, since the Mandatory alone gave the undertaking. Unilateral declarations may contain undertakings, and can certainly create valid international obligations; but, as noted above, they do not come within the category of treaties, conventions or other forms of international agreements, since they have no bilateral character [3]."

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 400.
[2] *Ibid.*, p. 401.
[3] *Ibid.*, p. 478.

45. Judge Mbanefo's arguments with regard to this issue may be summed up as follows [1]:

(a) After posing the question: "If the Mandate Declaration was never a treaty, by what right then did the Respondent assume the administration of the territory?", the learned Judges states:

"For upwards of 40 years it has administered the territory because it regarded the Declaration as a treaty or convention empowering it to do so on the terms therein set out. If the law of estoppel has any meaning or application in international law the Respondent would be precluded from raising such an issue on the face of its own conduct during the past 40 years [2]."

The reasoning seems to be based on a presupposition that the Mandate could not have had any validity unless it was a treaty and that therefore the recognition by the Mandatory of its validity necessarily involved a recognition of its character as a treaty or other international agreement. This argument falls away if it is appreciated that Respondent does not assert that the Mandate was invalid *ab initio*; it merely contends that its validity did not arise from international agreement. It accepts that the Mandate was valid as a Council resolution in terms of Article 22 (8) of the Covenant.

(b) As authority for the view that the Mandate was an international agreement, the learned Judge refers to the 1950 Advisory Opinion and the *Mavrommatis* case [2]. In neither case, however, was there any dispute as to whether the Mandate's legal effect derived from international agreement or not.

(c) Finally, Judge Mbanefo holds that the Mandate is a treaty because it was "an annex to the Covenant" or "part of Article 22 of the Covenant" in that the Council's power to define the terms of the Mandate derived from Article 22 (8) of the Covenant [3].

It is respectfully submitted that this finding is untenable. The Mandate does not purport to be an annex to the Covenant, and in fact was concluded long after the Covenant came into force. A document recording the exercise of a power granted by an enabling instrument clearly does not become part of such instrument. For instance, a statute passed by virtue of some power in a Constitution, does not become part of the Constitution. If Judge Mbanefo's reasoning is correct, every statute passed, e.g., by the legislature of the United States of America must be considered a part of, or an annex to, its Constitution [4].

46. To sum up, a number of agreements have been suggested as being the international agreement which gave the Mandate its binding force. Respondent concedes that a number of agreements were concluded prior to the promulgation of the Mandate, but denies that they, whether considered singly or together, can be regarded as the constitutive source of the rights and obligations recorded in the mandate instrument.

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 439-440.

[2] *Ibid.*, p. 440.

[3] *Ibid.*, p. 441. *Vide* also p. 442.

[4] *Vide* also the further examples set out in *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 491 (Judges Spender and Fitzmaurice); and pp. 599-600 (Judge van Wyk).

On the contrary, Respondent submits that the Mandate was created by the act of the League Council on 17 December 1920, and recorded in the instrument of the same date. This decisive act can in no sense be described as an international agreement, since it is, for the reasons stated above, both in form and substance a Council resolution and no more or less [1].

47. The conclusion that the Mandate did not derive its legal effect from international agreement, is strengthened when one considers who could conceivably have been parties to any mandate agreement. This topic will be dealt with in the next succeeding paragraphs.

IV. Who Could Have Been the Parties to any Mandate Agreement?

48. An analysis of the above question shows that there exists considerable doubt whether any international person other than the Mandatory could have been a contractual party to the Mandate. Since an agreement cannot exist unless there are at least two parties, it would follow that, if this doubt were justified, the lack of parties would be a further reason why the Mandate could not be considered as ever having been an international agreement.

But an examination of who could have been parties to a mandate agreement is important also for the purposes of Respondent's alternative argument in the event of the Court finding that the Mandate was initially a treaty or convention. Respondent's basic submissions in this regard may be rendered as follows:

(a) For a treaty or convention to have effective existence, there must of necessity be at least two parties possessed of international personality, who enter into an agreement and between whom the intended rights and obligations can operate as provisions thereof.

(b) Likewise, for its continued operation as such, a treaty or convention requires the continuation in being of at least two parties possessed of international personality, who can *inter se* and by reason of the contractual *nexus* between them, claim observance of the agreed rights or performance of the agreed obligations.

(c) When by extinction of parties to a treaty or convention their number is reduced to one, its continued contractual operation between parties becomes impossible in fact, and the continued existence of contractual rights and obligations as between international persons, by reason of that treaty or convention, is rendered impossible in law.

(d) Such extinction of parties could occur in various ways, e.g., their extinction as States, or their ceasing to be parties although remaining in existence as States. And there may be various reasons for ceasing to be a party, e.g., release by agreement, or loss of an agreed qualification for being a party.

(e) Upon dissolution of the League there was such an extinction of all parties (other than the Mandatory) between whom the Mandate could previously have had contractual operation.

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[1] *Vide, in this regard, also the declaration of* Judge Spiropoulos at pp. 347-348, and the dissenting opinions of Judge Basdevant at pp. 460-462 and Judge van Wyk at p. 598.

(*l*) Even if the Mandate is regarded as having *ab initio* been a "treaty or convention", there thus ceased to be in operation a mandate *agreement*, i.e., a "treaty or convention in force"—and that so quite irrespective of the question whether certain vested consequences of the agreement remained in existence for a reason independent of the continued contractual operation thereof.

Respondent will therefore consider in turn the various entities that have been, or may be, suggested as being, apart from the mandatory, parties to a mandate agreement.

49. *The Principal Allied and Associated Powers.*

Although the group of States known at the time as the Principal Allied and Associated Powers participated, under that name, in the establishment of the mandate system, in the manner and to the extent indicated above [1], the terms of the respective mandate instruments did not, either by themselves or as read against the background of Article 22 of the Covenant, provide for any function to be fulfilled by the Principal Powers as such in the operation of the system. In other words, the instruments did not confer rights or impose obligations upon the Principal Powers as a body or group, or as individual States because of their membership of that body or group. It is significant that the original idea of casting the Mandates into the form of treaties between the respective Mandatories and the Principal Powers was abandoned [2]. Their role as Principal Powers was apparently intended to be transitional only, namely to exercise their power of disposal over the ex-enemy territories in such a way as to get the mandate system established in respect of such territories. Their co-operation was particularly necessary with a view to the establishment of the respective Mandatories' title to the territories. Having done what was necessary from their side to achieve that purpose, their function as Principal Powers in this respect was fulfilled. In the operation of the system itself the role contemplated for them would be that of individual Mandatories, or of Members of the League [3], or of both.

50. The absence of any contractual *nexus* as far as the Principal Powers were concerned, is further evidenced by the fact that, although the United States of America had participated in the allocation of the Mandates and in the earlier drafting of the B and C Mandates, it was not present at the Council Meetings of December 1920 (since it was not a Member of the League) and was unaware of what had been submitted to the Council in the form of draft mandates, or of what action the Council had taken thereanent, until after the event. Moreover, in the separate treaty which the United States concluded with Germany in Berlin in 1921, it reserved for itself all rights and advantages set out in the Treaty of Versailles for the Principal Allied and Associated Powers, including those concerning the former German colonies, and stipulated that it should not be bound by any action taken by the League of Nations unless the United States should expressly give assent to such action. Whether the United States ever did expressly give its

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[1] *Vide* Chap. II, paras. 5-9, *supra*.

[2] *Ibid.*, para. 11.

[3] Article 4 of the Covenant provided that they would also be permanent Members of the Council of the League.

consent to the terms of the Mandate for South West Africa, does not appear [1].

51. It is also significant that the Powers have never claimed any rights as a separate party to the mandate instruments, or any interest in any mandate otherwise than as Mandatories or Members of the Council. This is particularly significant when one considers the events at the last session of the League Assembly in April 1946. No suggestion was then made that in respect of Mandates the Principal Powers [2] possessed rights which would survive the dissolution of the League, or that the consent of the Principal Powers would be required for any future variation of the Mandates. In this regard Judges Spender and Fitzmaurice drew attention to the League resolution of 18 April 1946, which referred to the Mandatories' intentions to continue to discharge their obligations under the Mandates "until other arrangements have been agreed to between the United Nations *and the respective Mandatory Powers*" (italics added by Judges Spender and Fitzmaurice) [3]. If the Principal Powers considered that they had any rights, this would have been the stage to assert them, particularly since their position was not as firmly entrenched in the United Nations Organization as it had been in the League of Nations.

On the contrary, however, at least one of the Principal Powers, namely Great Britain, in relation to the Mandate for Iraq, had previously recognized the sole competence of the Council to agree to the terms of the Mandate. The details are set out in the joint dissenting opinion of Judges Spender and Fitzmaurice [4] and it is not necessary to repeat them here.

52. Finally, the provisions of paragraph 1 of Article 7 of the Mandate seem to exclude any possibility of the Principal Powers being parties to a mandate agreement. This paragraph read as follows: "The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate."

It is difficult to conceive of the Principal Powers being parties to an instrument, but leaving the power to modify it in other hands [5].

53. Judge Jessup holds that:

> "... the Mandate agreement was, in 1945, and was on 4 November 1960, a 'treaty in force' between the Mandatory and the four Principal Allied Powers. The contractual arrangement between the Mandatory and the four Principal Powers was not terminated by the dissolution of the League and therefore the rights and obligations of the four Powers at any rate were not affected by the dissolution of the League, and the rights vested in third States beneficiaries, which category includes the Applicants, persist as long as this treaty is in force. The only theory on which it can be said

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[1] *Vide South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 496-497 (Judges Spender and Fitzmaurice).

[2] Three of whom were not represented at the Session, viz., the United States of America, Japan and Italy.

[3] *Vide South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 499.

[4] *Ibid.*, p. 498, footnote 1.

[5] *Ibid.*, pp. 497-498.

that this treaty is no longer in force would be one posited on the total elimination of the Mandate in every respect [1]."

The "contractual arrangement" referred to in this passage, is the "pre-agreement" relating to the provisional formulation of the terms of the Mandate [2]. It does not refer to the conferment of the Mandate, which happened by agreement with the Principal Allied and Associated Powers (including the United States of America), not only the Principal Allied Powers (i.e., Great Britain, France, Italy and Japan) [3].

The last two sentences of this quotation are, it is submitted, unsound for the reasons set out above [4]. This "contractual arrangement" clearly did not establish the rights and obligations of the Mandatory. The intention at all times was that it should be superseded either by a formal convention, or by a resolution of the Council in terms of Article 22 (8) of the Covenant. In fact the latter method was employed.

Judge Jessup does not deal with the various arguments advanced above which tend to show that there never was any intention that the Principal Powers should be contractual parties to the Mandate.

54. *The League of Nations.*

In determining whether the League was a party to, and derived contractual rights from, the Mandates, the first question of importance is whether the League could be regarded as a legal *persona* and a subject of international law.

There is considerable authority in favour of the proposition that the League was a legal *persona.*

Thus Quincy Wright stated:

> "There remains the possibility that the League is itself a personality capable of contracting obligations and acquiring rights, apart from its members. This is the most generally accepted theory . . . [5]"

And Oppenheim stated:

> "The question of the legal nature of the League was a matter of considerable controversy. The predominant opinion was that the League, while being a juristic person *sui generis*, was a subject of international law and an International Person side by side with the several States [6]."

55. If, in consonance with these authorities, the view is accepted

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 416.

[2] *Ibid.*, pp. 399-400 (Judge Jessup). *Vide* also para. 44, *supra.*

[3] *Ibid.*, pp. 390, 399.

[4] *Vide* paras. 44, 49-52, *supra.*

[5] Wright, *op. cit.*, p. 366. *Vide* the various authorities quoted in footnote 52 *(a)* on that page. *Vide* also Starke, J. G., *An Introduction to International Law* (3rd ed.), p. 57; Verdross, A., *Die Verfassung der Völkerrechtsgemeinschaft* (1926), p. 51; Williams, J. F., "The Status of the League of Nations in International Law", *I.L.A., Rep.* XXXIV (1926), pp. 688-689.

[6] Oppenheim, L., *International Law* (8th ed.), Vol. I, p. 384. *Vide* the authorities quoted in footnote 2. *Vide* also Schwarzenberger, G., *International Law* (3rd ed.), Vol. I, p. 138 (quoted at I, p. 308); *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 179 (quoted at I, p. 309); and *Communications from the Swiss Federal Council concerning the Diplomatic Immunities to Be Accorded to the Staff of the League of Nations and of the International Labour Office* in *L. of N., O.J.*, 1926 (No. 10), pp. 1407, 1422, of which Article 1 is quoted at I, p. 309.

that the League was an international legal *persona* (and still on the assumption that the Mandates were in fact agreements) it must follow that the League itself was a party to the mandate agreements and derived contractual rights therefrom correlative to the obligations imposed upon the respective Mandatories. Article 22 (2) of the Covenant rendered clear that the respective Mandatories would fulfil their functions "as Mandatories on behalf of *the League*". (Italics added.) Consequently, on the premise of "the League" being a legal *persona*, the Council's role in entering into the mandate agreements with the respective Mandatories would be of the nature of an agency performed on behalf of the League, whereby the latter would be constituted a party to the mandate agreements. In fact, each of the mandate instruments records in its preamble the Mandatory's undertaking to exercise its Mandate "on behalf of the League of Nations"; and it was such a Mandate that was in each case *confirmed* by the Council as "the said Mandate", and the terms of which were *defined* by the Council in pursuance of Article 22 (8) of the Covenant.

56. In the above regard some views on the part of Members of the Court were revealed in the Judgment and opinions on the Preliminary Objections in this matter. The Court held that the Mandate was an agreement "between the Mandatory and the Council *representing the League and its Members*" [1], and said:

> "The Mandate for South West Africa, like all the other Mandates, is an international instrument of an institutional character, *to which the League of Nations, represented by the Council, was itself a Party.* It is the implementation of an institution in which all the Member States are interested as such [2]." (Italics added.)

The Court, therefore, accepted both that the League was a legal *persona*, and that it (and its Members) were represented by the Council [3].

Judges Spender and Fitzmaurice, on the other hand, were inclined to doubt whether the League had legal personality [4].

As will appear hereunder [5], it is in the ultimate analysis of no consequence to Respondent which of these views is correct since, in Respondent's submission, on either basis all entities which could have been parties to a mandate agreement fell away on dissolution of the League.

57. *The Members of The League.*

There are a number of formidable difficulties in the way of finding that the Members of the League were parties to any mandate agreement. Firstly, the expression "Mandatories on behalf of the League" in Article 22 of the Covenant and in the mandate instrument would be inapt if Members of the League were to be regarded as parties to the Mandate. It should then have read, "Mandatories on behalf of Members of the League". Secondly, it is clear that the Members did not participate directly in the conclusion of any mandate agreement. They could

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 331.
[2] *Ibid.*, p. 332.
[3] As far as the Members of the League are concerned, *vide* para. 57, *infra*.
[4] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 475 (footnote 1), 502.
[5] *Vide* para. 61, *infra*.

therefore be parties only if the Council (or possibly the Principal Powers) were authorized to act on their behalf. No such authority can be found in the Covenant or in the mandate instrument, or anywhere else.

Perhaps, the strongest indication that the Members of the League were not considered to be parties to the Mandate derives from the amendment effected by the Council to the compromissory clause as worded in the draft Mandate submitted to it. It will be recalled that the draft provided for compulsory jurisdiction in the event of disputes "between the Members of the League of Nations". This was altered by the Council to relate only to disputes "between the Mandatory and another Member of the League of Nations". This change "was inspired by the consideration that Members of the League other than the Mandatory could not be forced against their will to submit their differences to the Permanent Court of International Justice" [1].

Had the Council been authorized to act on behalf of Members, or had the Members been parties to the Mandate on any other basis, this consideration could not arise, since they would have consented to jurisdiction by becoming such parties [2].

These difficulties were not dealt with by the Court in its Judgment on the Preliminary Objections when it held that the Mandate was an agreement between the Mandatory and the Council "representing the League and its Members" [3].

Respondent submits, for the reason aforestated, that the Members of the League were not parties to a mandate agreement. Upon the acceptance of this submission, it would follow that the Mandate could have been an international agreement *ab initio* only if the League were a legal *persona*. For if the League did not possess legal personality and if the Members of the League were not parties to a mandate agreement, then, since Respondent contends that no other persons could have been parties, the Mandate could not have been an international agreement [4].

58. If despite the strong indications to the contrary dealt with above, it should be held that Members of the League (with or without the League as a co-party), became parties to a mandate agreement—whether through the agency of some other international person or persons, or by way of contract for the benefit of member States as third parties—they could, as Respondent will submit elsewhere [5], by reason of the qualification upon which those contractual rights (if any) were dependent, remain parties only as long as they were Members of the League. Consequently they could, in Respondent's submission, not have remained parties after dissolution of the League.

59. *The Inhabitants of the Mandated Territory.*

In his separate opinion on the Preliminary Objections Judge Bustamante expressed the view that the populations of the mandated territories were, in the mandate system, "recognized as having the capacity

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[1] *Vide* Chap. II, para. 16, *supra.*

[2] *Vide* generally *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 499-502 (Judges Spender and Fitzmaurice).

[3] *Ibid.*, p. 331.

[4] *Vide* para. 48, *supra.*

[5] *Vide* paras. 69-84, *infra.*

of legal persons" [1] and that they "are in fact parties to the mandate agreements and represented by the League of Nations" [2].

Judges Spender and Fitzmaurice, in their joint dissenting opinion, referred to the proposition that the inhabitants of the mandate territory were "directly or indirectly parties" to the Mandates as "obviously untenable", and they consequently refrained from even examining this proposition [3].

60. It is submitted that whatever might have been the position of the peoples inhabiting A Mandated areas [4], the inhabitants of a C Mandated area could not on ordinary principles of international customary law be regarded collectively as an international person or separately as international persons.

The possibility exists that individuals, though not ordinary or full subjects of international law, can by agreement between States become the bearers of rights in international law in a sense and to an extent intended by the parties to such agreement. Whether such intent exists in a particular case, is always a matter for interpretation of the agreement in question [5]. The general trend of opinion appears to be that rights in international law cannot be considered to have been conferred upon individuals unless there is covenanted for them procedural capacity to pursue their interests in an international political and/or judicial *forum* [5].

In the case of the C Mandates, although obligations imposed upon the Mandatories were undoubtedly intended for the benefit of the inhabitants of the territories, there is nothing to indicate that rights in international law *vis-à-vis* the Mandatories were intended to be conferred upon them. In this regard it will be recalled that there was a proposal during the drafting of the Mandates to grant rights to individuals to move the Permanent Court [6]. It is significant however that this right was proposed to be granted to "subjects or citizens of States Members of the League of Nations" and not to the inhabitants of mandated territories, and that it did not relate to the exercise by the Mandatory of the "sacred trust" provisions of the Mandate, but purely to the provisions inserted for the benefit of citizens of League Members. This shows that the States responsible for the drafting of the mandate provisions never contemplated a right of access to the Court for the inhabitants of the territory—and, in the final event, even the right proposed for citizens of League Members was not agreed to.

Certain writers suggest that the inhabitants were, in a sense, accorded rights in international law *vis-à-vis* the Mandatories in that they were permitted the facility of petitioning the League [7]. It is to be recalled, however [8], that there was no provision for such petitions either in the mandate instruments or in the Covenant of the League; and the Man-

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 354. *Vide* also pp. 356, 362-363, 369.

[2] *Ibid.*, p. 355.

[3] *Ibid.*, p. 496.

[4] As to which *vide* Wright, *op. cit.*, p. 460.

[5] *Vide* François, J. P. A., *Grondlijnen van het Volkenrecht* (2nd ed.), pp. 227-231; Korowicz, M. St., "The Problem of the International Personality of Individuals", *A.J.I.L.*, Vol. 50 (1956), pp. 536, 561.

[6] *Vide* Chap. II, para. 12, *supra*.

[7] *Vide*, e.g., Wright, *op. cit.*, p. 457.

[8] *Vide* Chap. II, para. 20, *supra*.

datories did not by international agreement undertake any obligations relative to petitions by inhabitants. In so far as the rules of procedure, as laid down by the Council, required petitions from inhabitants to be forwarded through the respective Mandatories, this was in reality directed towards affording the Mandatories an opportunity of commenting on the contents of the petitions. If there could be said to have been an obligation upon the Mandatories to forward the petitions to the League, the obligation was of a procedural nature only, concerning the Mandatories' relationship with the League; and it was not of the nature of an obligation towards the inhabitants undertaken by treaty or convention. Moreover, although inhabitants could *submit* petitions, they had no capacity of *pursuing* such petitions in the proceedings of the League itself; even consideration of the petitions depended entirely upon the will of the Members and organs of the League. In all these circumstances it seems erroneous to suggest that the facility for submitting petitions was to be regarded as a right in international law, vested in the inhabitants *vis-à-vis* the Mandatories.

However, even if such a suggestion could be countenanced, the "right" involved therein would have been dependent entirely on the existence of the supervisory body. Upon the dissolution of the League and the consequent lapse of the Mandatories' obligation to report and account to the Council as supervisory organ, the very basis of the suggested "right" on the part of the inhabitants also fell away.

In the result no possibility exists of the inhabitants having rights which involve any procedural capacity for them in an international *forum*, whether political or legal. If they could possibly be said to have rights in international law in any other sense, such a proposition would have to be founded on some basis other than regarding them as contractual parties to the Mandate.

61. For the reasons aforestated, Respondent submits that:

(a) Neither the Principal Allied and Associated Powers, nor the inhabitants of the mandated territory, could have been parties to any mandate agreement.

(b) The only possible parties, apart from the Mandatory, could have been the League and/or its Members in their capacities as such, and even that is doubtful.

(c) The circle of possible parties (apart from the Mandatory) is therefore no wider than the League and/or its Members in their capacities as such, and on dissolution of the League both fell away—the League was then no longer in existence, and no States could thereafter retain their capacities as Members of the League. Consequently, on dissolution of the League, the Mandate ceased being a "treaty or convention in force" if it had ever been one [1].

62. It will be convenient at this stage to advert briefly to the attitude of the majority members of the Court to this aspect in the Judgment and opinions on the Preliminary Objections.

63. *The Judgment of the Court.*

It will be recalled [2] that the Court held that the parties to the Mandate

[1] *Vide South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 347-348 (Judge Spiropoulos); p. 503 (Judges Spender and Fitzmaurice); p. 598 (Judge van Wyk). The other minority Judges did not deal with this point.

[2] *Vide* para. 56, *supra*.

were, apart from the Mandatory, the League of Nations and its Members. The Court based its conclusion that the Mandate continued as a "treaty or convention" even after the dissolution of the League, on two grounds. Firstly [1], it relied on the 1950 Advisory Opinion. The 1950 Opinion did not, however, deal with the question whether the Mandate continued in force *as a treaty or convention* or who the parties thereto could have been. In the words of Judges Spender and Fitzmaurice:

> "The issue arising on Article 37 of the Statute is whether the Mandate is in force *as a treaty or convention*. For this purpose it is not sufficient to rely on the Court's 1950 Opinion as establishing that the Mandate is, in any case, in force on an *institutional* basis [2]."

The Court also relied on the alleged agreement of April 1946 [3]. An agreement in 1946 could conceivably have kept the Mandate alive in an amended or truncated form between new parties. For the reasons stated below [4] Respondent submits, however, that this did not happen.

64. *Judge Bustamante.*

Judge Bustamante, it will be recalled, conceived of the Mandate as an agreement between the Mandatory and the population under Mandate. These parties both survived the dissolution of the League [5].

Whether the population of the mandated territory could be regarded as a party to the Mandate, has been considered above, where it is submitted that the answer must be in the negative [6].

In addition Judge Bustamante considered that the League resolution of 18 April 1946 "recognized" the survival of the Mandates as "international conventions in force" [7]. The effect of this resolution is discussed below [4].

65. *Judge Jessup.*

Judge Jessup relied on a contractual arrangement between Respondent and the Principal Powers [8]. It has been submitted above that the four Principal Powers could not be regarded as parties to any Mandate agreement [9].

In addition his reasoning regarding an undertaking by the Mandatory on 9 April 1946 [10], was advanced as further support for his conclusion that there can still be said to be a treaty or convention in force. This is dealt with below [4], where it is submitted that this undertaking did not give rise to any legal rights.

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* pp. 333-334.
[2] *Ibid.*, p. 495. *Vide* also p. 472.
[3] *Ibid.*, p. 334 read with p. 338.
[4] *Vide* paras. 114-135, *infra.*
[5] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 369.
[6] *Vide* paras. 59-60, *supra.*
[7] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 370.
[8] *Ibid.*, p. 416.
[9] *Vide* paras. 49-53, *supra.*
[10] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* pp. 417 ff.

66. *Judge Mbanefo.*

It seems that Judge Mbanefo's reasoning [1] may be summarized as follows:

(a) The Court in the 1950 Advisory Opinion held that the Mandate still existed.

(b) No distinction can be drawn between the Mandate as an agreement and the Mandate as an objective institution.

(c) Therefore the Mandate as an agreement still exists.

Judge Mbanefo did not advert to the question who the parties to the Mandate could be at present. In fact his reasoning [2] merely leads him to the conclusion that the rights and obligations in terms of the Mandate still exist "in so far as they are still capable of being exercised and enforced . . ." [3]. This is, in his view, sufficient to dispose of the matter, since if the rights and obligations still exist, the instrument creating them must still be in force.

The crucial aspect of Judge Mbanefo's reasoning is therefore that the Mandate can exist only as an international agreement. Although he purports to follow the 1950 Advisory Opinion, he thus reaches a conclusion which in Respondent's submission, is the opposite to that reached by the Court in 1950. The Court then dealt mainly with an argument that the Mandate as a whole had lapsed when, on the dissolution of the League, there were no longer contractual parties to it. This argument was rejected by the Court on the basis that the Mandate was capable of existence independently of any continuing contractual aspect [4]. The Court was thus in 1950 able to decide that the Mandate continued irrespective of whether there were still contractual parties to it. Judge Mbanefo now uses this continued existence as a basis for finding that there are still contractual parties to the Mandate.

If Judge Mbanefo were correct that the Mandate cannot exist otherwise than as a treaty or convention, it would in Respondent's submission follow that the Mandate as a whole must now have lapsed, solely by reason of there being no longer any contractual parties thereto.

V. Conclusion regarding the Dissolution of the Permanent Court

67. For the reasons aforestated, Respondent submits that the Mandate never was, or at any rate, since the dissolution of the League of Nations, no longer is, a "treaty or convention in force".

The effect of this submission is that Article 37 of the Statute of this Court, could not (in any event as from the date of dissolution of the League) operate so as to effect a substitution of this Court for the Permanent Court in respect of disputes falling under Article 7 of the Mandate. Consequently there is, at any rate since the dissolution of the League, no tribunal vested with jurisdiction to determine disputes falling under Article 7 of the Mandate.

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* pp. 442 ff.

[2] *Ibid.*, pp. 444-445.

[3] *Ibid.*, p. 445.

[4] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950,* p. 132.

The above in itself would provide a complete answer to any suggestion that the provisions of the compromissory clause could have played any role in keeping the Mandate alive.

In the next section of this Chapter, Respondent will deal with the further reason why, in its submission, the compromissory clause has lapsed, namely that since dissolution of the League no States possess the qualification, i.e., Membership of the League, which was required for invocation of the compromissory clause.

D. The Effect of the Dissolution of the League on the Parties Entitled to Invoke the Compromissory Clause

I. Introductory

68. The compromissory clause provided for the adjudication of disputes "between the Mandatory and another Member of the League of Nations". Since the dissolution of the League no State can claim to be "another Member of the League of Nations", unless this expression must be interpreted in a sense different from that conveyed by the ordinary meaning of the words. In the absence of such an interpretation, the compromissory clause could today be applied only if the competence to invoke it now vests in States not falling within the category of Members of the League. Such a change could, in the circumstances of this case, conceivably have been brought about only by a term to be implied in the Mandate itself, or by an agreement, express or implied, concluded during the years 1945-1946, or by the operation of some objective rule of international law [1]. These various possibilities will be considered in turn.

II. Interpretation of the Phrase "Another Member of the League of Nations"

69. As in all cases of interpretation, the object must be to ascertain the intention of the parties as expressed in the written document, read as a whole, in the light of the circumstances existing at the time of its execution.

In the present case, the phrase which is in essence to be interpreted, viz., "another Member of the League of Nations", occurs in the context of a compromissory clause in which the Mandatory consented to the jurisdiction of an international tribunal in respect of certain types of disputes. The consent is qualified, *inter alia*, with reference to the other party to such dispute. And the reference is not to another State or States by name, but to another State or States to which the expression "Member of the League of Nations" applies.

The immediate linguistic context is:

> ". . . if any dispute whatever should *arise* between the Mandatory and another Member of the League of Nations . . . *such dispute . . . shall be submitted* . . .". (Italics added.)

In this context, not only the literal but also the natural and ordinary

[1] The approach is consequently the same as that adopted in seeking to ascertain whether Article 6 of the Mandate survived the dissolution of the League. *Vide* Chap. III, para. 19, *supra*.

meaning of the language is that the expression "Member of the League of Nations" must apply to the other party at the time when the dispute *arises*, i.e., at the time of *operation* or *incidence* of the clause, as envisaged therein—otherwise the case will not be covered by the consent.

The effect of this natural construction may be expressed in two ways, each of the same practical import, namely:

(a) that the *expression* "another Member of the League . . ." is descriptive, with reference to the *time of envisaged application* of the clause, *or*

(b) that the *right* of the other State is *conditional* upon its complying with a *qualification* at the *time of envisaged application* of the clause.

This natural and ordinary meaning of the phrase derives support from the probabilities and surrounding circumstances, which will be considered hereafter.

70. An analysis of the Covenant, in pursuance of which the mandate instrument was framed, clearly shows that the expression "Member of the League", wherever it occurred in the Covenant, carried the same requirement as above, namely that of *membership at the time of envisaged application* of the provision in question—i.e., when such provision would be sought to be invoked for the exercise of a right or for enforcement of an obligation due by another. This entails that such provision could not have been invoked by or against any State which had either never joined the League, or had ceased to be a Member prior to such purported invocation.

71. The Covenant provided, *inter alia*, as follows with regard to membership in the League:

(a) "The original Members of the League of Nations shall be those of the Signatories which are named in the Annex to this Covenant and also such of those other States named in the Annex as shall accede without reservation to this Covenant." (Art. 1 (1).)

(b) "Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided . . ." (Art. 1 (2).)

(c) "Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided . . ." (Art. 1 (3).)

(d) "Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon." (Art. 16 (4).)

(e) "No such amendment [to the Covenant] shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League." (Art. 26 (2).)

72. In all except four of the Articles of the Covenant (the exceptions being Arts. 2, 9, 21 and 24) the expression "Member(s) of the League" is employed; and that so in dealing both with rights and benefits conferred on member States and with obligations and duties imposed on them. As examples the following are mentioned:

Article 3: Assembly consists of Representatives of "the Members of the League". "Each Member of the League" has one vote.

Article 4: Representation in the Council for the Principal Powers and "four other Members of the League" to be elected by the Assembly.

Article 6: Obligation imposed upon "the Members of the League" to contribute to expenses of Secretariat in accordance with apportionment.

Article 7: Diplomatic privileges and immunities of Representatives of "Members of the League".

Article 8: Obligation upon "the Members of the League" to interchange information as to armaments, etc.

Article 12: Obligation upon "the Members of the League" to submit disputes between themselves to arbitration.

Article 15: Obligation upon "Members of the League" to submit disputes between themselves to the Council of the League.

Article 22: Equal opportunities for trade and commerce of "other Members of the League".

These provisions may be used to demonstrate the absurd results that would ensue if the construction suggested above were not followed, i.e., if the construction were to be that States which had never been, or had ceased to be, Members of the League, would nevertheless be entitled to the rights and subject to the obligations embodied in the Covenant. The following illustrations should suffice:

The non-Member would have a seat and a vote in the Assembly (Art. 3) and could be elected a Member of the Council (Art. 4); it could be held liable for a contribution to the expenses of the Secretariat (Art. 6); and despite the fact that it had been refused membership or expelled (in pursuance of Art. 16) by reason of acts of war perpetrated by it, Members would nevertheless be obliged to submit information to it in regard to their armaments, military, naval and air programmes (Art. 8).

That only Members of the League were subject to any obligations under the Covenant, is illustrated also by the proviso in the last paragraph of Article 1, to the effect that a Member was allowed to withdraw voluntarily, on the two years' notice there prescribed, only if "all its obligations under this covenant shall have been fulfilled at the time of its withdrawal".

73. Certain provisions of the Covenant were such that non-Members of the League could benefit from them, in an indirect manner or by the grace of the League or its Members. Thus promotion of the League's general object "to achieve international peace and security" [1] would certainly benefit all nations, whether Members of the League or not. But this factor would not, by itself, enable such non-member States to claim that they were parties to the Covenant or that its provisions conferred any rights or legal interests upon them, as little as they would have been prepared to accept a suggestion that the provisions of the Covenant imposed any legal obligations upon them. Throughout the Covenant the intention was clear that in so far as its provisions conferred rights or legal interests or imposed legal obligations upon States, they

[1] Preamble of the Covenant.

did so with reference only to Members of the League. There were no provisions, capable of being interpreted as stipulations for the benefit of non-member States, resulting in "legal interests" being vested in such States, and capable of being turned into rights by acceptance or exercise on their part. The *basic purpose* of the authors of the Covenant in that regard was obvious, viz., to *reserve rights and legal interests for such States as were,* inter alia, *willing to accept also the obligations of membership.*

74. Significant illustration of the aforegoing was afforded by the provisions of Articles 16 and 17 of the Covenant. Article 16 provided that a Member resorting to war "in disregard of its covenants under Articles 12, 13 or 15", would be deemed, *ipso facto,* to have committed an act of war against all other Members of the League; the latter would then be obliged to take certain action against the "covenant-breaking State" and to support one another in that regard. Articles 12, 13 and 15 related to methods of peaceful settlement of disputes, but only disputes *between Members of the League*: hence Article 16 applied only where a Member had failed to resort to those methods relative to such disputes. Article 17 proceeded to deal with disputes between a Member and a non-member State or between non-member States *inter se,* in order to make, for such cases, provision corresponding to that contained in Article 16. But as a prerequisite it prescribed that non-Members involved in such a dispute should be "invited to accept the obligations of Membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just". Upon acceptance of the invitation the provisions of Articles 12 to 16 would apply, with such modifications as the Council might deem necessary: in other words, the non-member State(s) would *then* have the *benefit* of those provisions, on the same basis as League Members, *but only after acceptance of corresponding Members' obligations.* In the event of a non-Member's refusal to accept the obligations of membership for the purposes of a dispute, and resorting to war against a League Member, the provisions of Article 16 would apply *"as against"* it: in other words the non-Member could *then* experience the *detriment* envisaged by Article 16 (for protection of a League Member), but could *not* invoke the *benefit* thereof upon being attacked by another State.

75. In terms of Article 22 of the Covenant the "tutelage" entrusted to Mandatories over mandated territories would be exercised *"on behalf of the League"*. The Mandatories were, therefore, in terms of Article 22, to be responsible to the League—in other words, either to a distinct international entity existing apart from its Members, or to a collection of States which together formed an association. On either supposition non-Members would again be excluded from the circle of international persons intended to acquire or hold rights against the Mandatory.

76. Likewise an analysis of the mandate instruments made in pursuance of the Covenant shows that in so far as legal rights or interests were incorporated for States other than the Mandatory, whether for their own benefit or for that of the inhabitants of mandated territories, such rights or interests were intended to be enjoyed by a State only while it was a Member—thus again a requirement of *membership at the time of envisaged application,* i.e., of exercise of such rights or enjoyment of such interests.

77. The preambles state that the Mandatories undertook to exercise their Mandates "on behalf of the League". This was merely a projection of the language used in Article 22 (2) of the Covenant, and expressed the same concept, namely that the Mandatories were to be responsible to the League, either as a distinct international entity, or as an association of States. On either supposition, non-Members would again be excluded from the circle of international persons intended to exercise rights against the Mandatories.

78. The provisions of the mandate instruments in terms of which rights and privileges were granted to States other than the Mandatory, render it clear that such rights and privileges were not intended to be available to States other than Members of the League.

The expression "Member of the League of Nations" was used in all the B and C Mandates where provision was made for rights of entry, movement and residence to be enjoyed by missionaries who were nationals of "any State Members of the League of Nations" [1].

Pursuant to paragraph 5 of Article 22 of the Covenant, all the B Mandates provided for equal opportunities for the trade and commerce of other "Members of the League of Nations" in the said Mandated territories [2].

Somewhat similar provisions in favour of "Members of the League of Nations" were contained in some of the A Mandates [3].

In all the aforesaid provisions, the expression "Member of the League of Nations" could have been used in one sense only, namely Members at the time when the intended privilege was sought to be enjoyed, and not as including States which had never been, or had ceased to be, Members of the League.

79. Strange anomalies, similar to those discussed in paragraph 72 above, would be involved in a suggestion that the above rights or legal interests would be available to States which had never been Members of the League, or had ceased being Members. Such States may have been refused admission as Members of the League, or may have been expelled, because of belligerency, but would nevertheless be entitled to call the Mandatory to task concerning fortification of the Territory or military training of the Natives, or, in the case of A and B Mandates, insist on "open door" privileges for all their nationals.

80. The practice of States and of the League itself bears out that non-Members were not intended to possess rights or legal interests deriving from the Covenant or the mandate instruments. Thus:

(a) The United States of America, which did not join the League, entered into separate treaties with certain Mandatories in order to secure the same rights in the territories as Members of the League [4].

(b) When Germany, in 1925, prior to becoming a Member of the League,

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[1] *Vide*, e.g., British Mandate for Tanganyika (Art. 8); Belgian Mandate for Ruanda-Urundi (Art. 8); Mandate for German Samoa (Art. 5); Mandate for South West Africa (Art. 5) in *U.N. Doc.* A/70.

[2] *Vide*, e.g., British Mandate for Togoland (Art. 6); British Mandate for Tanganyika (Art. 7); Belgian Mandate for Ruanda-Urundi (Art. 7) in *U.N. Doc.* A/70.

[3] *Vide*, e.g., Mandate for Syria and the Lebanon (Art. 11); Mandate for Palestine (Art. 18) in *U.N. Doc.* A/70.

[4] *Vide* McNair, A. D., "Mandates", *C.L.J.*, Vol. III, No. 2 (1928), p. 157; Wright, *op. cit.*, p. 55; Hall, H. D., *Mandates, Dependencies and Trusteeship* (1948), p. 140.

raised a complaint about Mandatory administration by Belgium in Ruanda-Urundi, the Council of the League declined to reply thereto, and the Belgian Government rejected the complaint, *inter alia*, on the express grounds that the Covenant "confers rights only upon States which are Members of the League of Nations" and that so long as Germany is not a Member of the League she has no right or title to intervene . . . [1]

(c) Wright refers also to an Allied exchange of notes with Germany before the signing of the Covenant as clearly suggesting that Members only would be entitled to the benefits of the Covenant. One of the notes stated, *inter alia*, that "as soon as Germany is admitted to the League, she would enjoy the benefit of these provisions" (i.e., of Art. 23) [2].

81. It is precisely for the reasons aforestated that the compulsory jurisdiction clauses in the mandate instruments were so worded as to make the provisions thereof available to Members of the League only.

It could never have been the intention of the Council of the League that a State which had ceased to be a Member of the League, should be entitled to implead before the Court a Mandatory of the League with regard to the administration of a mandated territory—a matter in which such State, by reason of termination of its membership, had no further legal interest. Any contrary view must permit of the strange result that such a State, though having no longer a seat in the League of Nations and being unable to raise in the League for its consideration a matter concerning the interpretation or application of the provisions of the Mandate, could nevertheless raise the very same matter in contentious proceedings before the Court, possibly even in conflict with an attitude unanimously resolved upon by the Council.

Nor can it be conceived that the respective Mandatories, in agreeing to the terms of the compulsory jurisdiction clause, intended to accept compulsory jurisdiction at the instance of a State which, though at one time a Member of the League, had ceased to be such.

82. The above observations would be all the more forcible if it should be held (contrary to Respondent's submission above) [3] that the compulsory jurisdiction clause entitled a State to refer to the Court also matters which did not affect itself or its subjects, but solely concerned the interests of the inhabitants of the mandated territory. The Mandatory, even though it may have been exercising its Mandate in complete accordance with the views of the League, may nevertheless then still have been obliged to entertain negotiations with, and be subject to judicial proceedings instituted by, a State which was no longer a League Member and which held a view with regard to aspects of Mandate administration in conflict with that of the Mandatory and the League itself.

This could not have been the intention of the authors of, or parties to, the mandate instruments.

83. That the League itself regarded membership as a qualification for

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[1] *Vide L. of N., O.J.*, 1927 (No. 3), pp. 316-317. *Vide* also Wright, *op. cit.*, pp. 493-494.

[2] Wright, *op. cit.*, pp. 494-495.

[3] *Vide* paras. 2-29, *supra*.

the questioning by another State of the administration of mandated territories, is evidenced by the League's refusal to answer the complaints of Germany, made when the latter was not a Member of the League, with regard to the administration by Belgium of the mandated territory of Ruanda-Urundi [1].

It is submitted that the League would have adopted the same attitude if this question had arisen after termination of Germany's membership of the League, and that Germany would not then, upon the League's refusal to entertain its complaint, have been entitled to raise the same complaint in contentious proceedings before the Court.

84. For the foregoing reasons, Respondent submits that the natural meaning of the phrase "another Member of the League of Nations" is confirmed by reference to context and relevant extraneous circumstances.

85. *Judge McNair's Descriptive Meaning.*

In his separate opinion in 1950 Sir Arnold McNair suggested a meaning different from that contended for by Respondent. He said:

> "... I have endeavoured to show that the agreement between the Mandatory and other Members of the League embodied in the Mandate is still 'in force'. *The expression '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'* [2]." (Italics added.)

By "descriptive ... not conditional" the learned Judge apparently meant that the expression "Member of the League" was employed to identify States which were intended to have the competence provided for in Article 7, without prescribing a condition or qualification to be complied with by such States for retaining such competence. Respondent has respectfully to point out, however, that to speak of descriptive" in this sense solves nothing, save upon reference to a point or period of time at or during which the identification by description is intended to apply. Respondent has shown that upon the natural interpretation contended for by it, the meaning assigned to the expression "another Member of the League" is also "descriptive", but only with reference to the time *of intended application* of the clause—which in effect renders the competence conditional.

86. If the "descriptive" meaning is tested with reference to membership at other conceivable points or periods of time, the following implications emerge:

(a) The time of entering into the Mandate. This would:

(i) exclude States which might later become Members—a most improbable contemplation; and

(ii) preserve the competence to invoke Article 7 for a State which resigns or is expelled from the League during its lifetime—again most improbable and anomalous.

(b) Any time: The same as in *(a)* (ii).

(c) The time of dissolution of the League: This would have rendered

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[1] A matter dealt with in para. 80 *(b)*, *supra*.

[2] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, pp. 158-159.

the clause completely unworkable during the lifetime of the League, since the States entitled to invoke it would *ex hypothesi* still have been unascertained.

(c) The time of dissolution of the League: This would have rendered the clause completely unworkable during the lifetime of the League, since the States entitled to invoke it would *ex hypothesi* still have been unascertained.

(d) A combination of two periods or points of time, whereby, during the lifetime of the League, regard was to be had to the time of intended application of the provision in question, and after dissolution of the League, to the time of dissolution. This would:

(i) involve the logical absurdity that the meaning of the expression "another Member of the League" may be different at different points of time;

(ii) distinguish between States losing membership before dissolution, and States losing membership at dissolution—a distinction for which there is no justification in the wording of Article 7 or of any other provision of the Mandate;

(iii) attribute to the parties to the Mandate, at the time of its creation, an intention to regulate consequences of a possible future dissolution of the League, in circumstances incapable of being exactly foreseen—an improbability, for which the language of Article 7 and of the Mandate as a whole again affords no justification;

(iv) more specifically attribute to the parties in 1920 an intention to preserve, after possible future dissolution of the League, competence for ex-Members to obtain adjudication by a Court the effective existence of which was known to be dependent on the League—again a most improbable intent, unless coupled with the equally improbable contemplation of special arrangements to keep such Court alive after the League's demise.

When regard is further had to the fact that each of the above alternatives would involve giving an unnatural and strained meaning to the language of a compulsory jurisdiction clause, it becomes evident that none of them can weigh up against the natural meaning supported by the considerations dealt with above.

87. Since Applicants at one stage seemed to rely on Judge McNair's formulation [1], Respondent in the Preliminary Objections dealt with its applicability [2]. Thereafter Applicants addressed no argument to the Court on this aspect, although Respondent again dealt fully with the matter in the Oral Proceedings on the Preliminary Objections [3].

88. *The Judgment and Opinions on the Preliminary Objections.*

In the Judgment and opinions on the Preliminary Objections, only Judges Bustamante and Jessup appear to have adopted reasoning which purported to assign a different meaning to the expression "another Member of the League" than the one contended for by Respondent. Their opinions will be considered hereunder. Although the Judgment also stated its approach to this question as one of interpretation, the context makes it clear, in Respondent's submission, that the word "in-

[1] *Vide* I, pp. 90, 439.
[2] I, pp. 371-372.
[3] Oral Proceedings, 8 Oct. 1962, afternoon.

terpretation" was not used in the sense of assigning a meaning to a word or expression. This will also be considered hereafter.

On the other hand, Judges Spiropoulos, Spender, Fitzmaurice, Mbanefo and van Wyk expressed views expressly or impliedly contrary to that of Judge McNair [1]. Thus Judges Spender and Fitzmaurice said:

> "It is, naturally, with diffidence that we feel bound, for reasons which will appear, to differ from this distinguished Judge. Lord McNair's opinion was indeed an attempt, the only one which has ever been made, to reconcile such a claim as that of the present Applicants with the actual language of Article 7. But it appears to us to have overlooked the fact that Article 7 was never intended to apply to any particular States as *States*. Nobody knew in 1920 what the exact membership of the League would be, or what it would remain. This membership might, and did, vary periodically a good deal. It was a shifting membership. At one time it might comprise States A, B and C; at another A and B might have dropped out, and D and E have come in. This kind of thing occurred from time to time. Article 7 was not intended to apply to any of these States, A, B, C, D *or* E, *as such*. It was intended to apply to any State which, at any given moment was—and only if and so long as it was—a Member of the League. It was not intended to apply otherwise. Therefore, if Article 7 conferred a right on Ethiopia and Liberia, the present Applicants, it was solely as a consequence of the fact that they happened to fulfil the criterion specified, namely membership of the League. Otherwise they would not have had this right [2]."

89. *Separate Opinion of Judge Jessup.*

In his separate opinion on Respondent's Preliminary Objections, Judge Jessup purports to follow Lord McNair's reasoning. It is therefore necessary to examine Judge Jessup's opinion in some detail.

90. At the commencement of this aspect of his opinion, Judge Jessup states the particular question as being concerned with the operability or inoperability, after dissolution of the League, of the compromissory clause in its reference to "another member of the League of Nations" [3].

He then proceeds to point out that, for the purpose of answering this question, it is not necessary to assert that the Members of the League were "parties" to the Mandate. They were, however, in his view, third-party beneficiaries [4].

Respondent respectfully agrees that the operability or otherwise of the rights in question depends on the identity or capacity of the States to whom it was intended to be granted, and not on a question of a classification of the grant itself into one or other legal category. Respondent also agrees that valid rights were granted by the Mandate, the only question being whether there still exist States to whom the description relative to such rights applies, or who have the necessary qualification for the exercise of these rights.

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 347-348 (Judge Spiropoulos); pp. 507-508 (Judges Spender and Fitzmaurice); p. 445 (Judge Mbanefo); pp. 655-657 (Judge van Wyk).

[2] *Ibid.*, p. 508.

[3] *Ibid.*, p. 408.

[4] *Ibid.*, p. 409.

91. Judge Jessup thereafter remarks that—

> "the situation in regard to the rights of Members of the League as *third States beneficiaries* may be more clearly seen in its basic elements . . . [1]", (Italics added.)

by referring to one of the B Mandates, such as that of Belgium in respect of Ruanda-Urundi, which contained an open-door provision, *inter alia*, forbidding Belgium to discriminate against the nationals of other "Members of the League" in the granting of concessions. He then continues:

> "It is not apparent why it would be reasonable to say that while it would have been a violation of Belgium's contractual obligation so to discriminate against a French citizen in the matter of a concession on 18 April 1946, the day before the dissolution of the League, Belgium would have been free so to discriminate on 20 April 1946. On the contrary, if Belgium had so discriminated on 20 April, France could properly (if diplomatic negotiations failed to result in a settlement) have seized the Court of this dispute concerning the interpretation or application of the Mandate, relying on Article 13 of the Mandate for Ruanda-Urundi (which contains a compromissory clause identical with that in Article 7 of the Mandate for South West Africa), and on Article 37 of the Statute to which both Belgium and France are parties [1]."

Respondent, with respect, finds this reasoning difficult to understand. Firstly, the reference to the rights of Members of the League "as third State beneficiaries" seems entirely pointless. As pointed out above, the enquiry relates to the identity or capacity of the beneficiaries, not to the classification of the legal act whereby they became beneficiaries. Whether they were direct parties to a contract, or third State beneficiaries, cannot provide any answer to the question whether the rights were intended to vest in them only in their capacities as Members of the League, or in their individual capacities [2].

Secondly, the conclusion reached in the last sentence of the quoted passage, is not supported by any reasoning at all, save that it would not be "reasonable" to assert the contrary. By this the learned member of the Court is presumably not to be understood as suggesting that the question under consideration could be judicially resolved on the basis of what a Judge regards as "reasonable" in the circumstances. It seems that he rather had in mind the principle of interpretation which, in its application to the question under discussion, would be to the effect that the authors of the Mandate are not to be presumed to have intended to achieve an unreasonable or anomalous result. But a mere statement of this principle refutes its applicability in the manner apparently contemplated by Judge Jessup. As the learned Judge himself points out: ". . . the Mandates were drawn up as part of the whole League system, a system which it was fondly hoped in 1919 would become universal" [3].

During the existence of the "League system" there was nothing un-

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 411.
[2] *Ibid.*, pp. 509-560 (Judges Spender and Fitzmaurice).
[3] *Ibid.*, p. 412.

reasonable or anomalous involved in the contemplation that loss of League membership would result in loss of benefits stipulated for Members of the League: this is also conceded by Judge Jessup later in his opinion [1]. Thus, if France had resigned from the League say on 19 April of a particular year, the position in Ruanda-Urundi would indeed have been that:

> ". . . while it would have been a violation of Belgium's contractual obligation so to discriminate against a French citizen . . . on 18 April . . . Belgium would have been free so to discriminate on 20 April . . ."[2]

It is not clear why the same result, flowing from termination of membership by dissolution of the League, becomes unreasonable or anomalous or otherwise inconsistent with the probable intent of the authors of the Mandate—particularly when it is borne in mind that *the authors did not purport to provide at all for such dissolution or its* consequences, but did provide in the Mandate for machinery for amendment which could be utilized upon unforeseen changes of circumstances [3]. Indeed, if the result under discussion could be regarded as unreasonable or anomalous at all, that would be because of failure on the part of the parties concerned to make provision for adaptation at the stage of dissolution, and not because of unreasonable intentions on the part of the authors of the Mandate.

92. Judge Jessup continues to apply the same "reasonableness" argument to the missionary clause in the South West Africa Mandate [4]. He states that there is no justification "as a matter of common sense and reasonable construction" for a conclusion that the provision in Article 5 of the Mandate requiring the free admission of missionaries who were nationals of a "Member of the League" lapsed on dissolution of the League.

Respondent is unable to follow this reasoning. As in the previous example Judge Jessup, notwithstanding the clear language of the instrument, rejects as contrary to "common sense and reasonable construction" a result which seems to flow inevitably from the language used and from the practical design of an instrument "drawn up as part of the whole League system".

93. Having thus already concluded on the basis of the "reasonableness" argument that these provisions in favour of "Members of the League of Nations" survived the dissolution of the League of Nations in favour of States as yet unspecified, Judge Jessup addresses himself to the question whether the expression "Member of the League of Nations" does not provide some obstacle in this regard.

The argument calling for an answer is put by him as follows:

> "But, it is argued, the right of the French missionary to enter into or reside in South West Africa depended, according to the terms of Article 5 of the Mandate, upon the missionary being a national of a 'Member of the League'; after the dissolution of the League there

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 416.
[2] *Ibid.*, p. 411.
[3] Art. 7 (1) of the Mandate.
[4] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 411-412.

were no Members and hence no nationals of Members. Accordingly, it would be said, the French missionary did lose his right to enter or reside at the moment when the League was dissolved [1]."

The reply follows immediately:

"Such an argument assumes that the reference to 'another Member of the League' was not, as Lord McNair concluded in his Separate Opinion in 1950 (at pp. 158-159), descriptive of a class or category, but that it posed an imperative condition. The most *reasonable interpretation* is that the specification of beneficiaries of various provisions in all the Mandates in terms of 'Members of the League' was the natural result of the fact that the Mandates were drawn up as part of the whole League system, a system which it was fondly hoped in 1919 would become universal. In drawing up agreements within the framework of this system, it was natural to refer to other Members of the League. Article 22 of the Covenant, in accordance with which the Mandates were established, was part of the Treaties of Peace ending a great war with Germany and her allies. *It is reasonable to suppose that the drafters may have had in mind a specification which would, immediately after the War, deny privileges in the mandated areas to Germans or other ex-enemies.* This *interpretation* is borne out by the incident of the rejection of the complaint in 1925 by Germany before becoming a Member of the League. (Permanent Mandates Commission, *Minutes*, 7th Session (1925), p. 54.) But the quality of League Membership as compared subsequently to the quality of a friendly former co-belligerent such as the United States, was not, and was not intended to be, an *essential* quality or a perpetually imperative condition [1]". (Italics added, save for the words "Minutes" and "essential".)

Since one is in the realm of interpretation, one must ascertain what the parties meant in 1920 by the expression "Members of the League". From the above passage, one must deduce that in the learned Judge's view the parties meant "all States save Germany or other ex-enemies". This, however, does not give full effect to his words "immediately after the war" and "not ... a *perpetually* imperative condition". Judge Jessup apparently considered the denial to Germany or other ex-enemies to have been intended to be of limited duration only. The correct interpretation would, therefore, have to be "all States save, in respect of the period immediately after the war, Germany or other ex-enemies". No other "class or category" of States is suggested of which the expression "Members of the League of Nations" could be "descriptive". This analysis in Respondent's respectful submission exposes the basic fallacy in the reasoning, namely the confusion of the concepts of motive and intention. The framers of the mandate instruments in using the above expression, may possibly have been motivated by, *inter alia*, the various factors mentioned by the learned Judge, i.e., the creation of the League system, the hope that it would become universal, and the desire to exclude for the time being benefits for ex-enemies. This motive was, however, given effect to by the method of limiting such benefits to Members of the League, and the intention of the parties was that it should be so limited. The idea that the limitation on ex-enemies was to be of temporary

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 412.

duration only, was given effect to by later according them the opportunity of joining the League.

Before leaving this point it must be emphasized that the reasons given by Judge Jessup why rights in terms of the Mandates were limited to Members of the League, do not include the most important one, namely that the whole League system involved a reciprocity of rights and obligations between Members. Rights in the Mandate were consequently limited to States which were, by virtue of their membership, also bound by obligations towards the Mandatory. That this was the vital motive or reason underlying the use of the expression "Member [or Members] of the League" when granting rights in respect of the mandated territories to States other than the Mandatories, appears indeed to be accepted by the learned Judge later in his opinion[1].

94. That the learned Judge was dealing with motive and not intention, appears also from the next passage which reads as follows:

> "The loss by the French missionary in 1946 of the quality of being a national of a 'Member of the League' did not introduce any element of frustration which would impede the performance of the Mandatory's obligation to permit his entry and residence. Granted the reasons which have been suggested why there should have been granted special rights to the Members in 1919, such reasons would not be applicable in 1946; *cessante ratione legis, cessat ipsa lex.* If the Mandatory claimed the right to limit the privileges to missionaries who were nationals of States which were Members of the League when the League came to an end, the claim would be reasonable and it would avoid any charge that there was imposed on the Mandatory an obligation more onerous than that which it had originally assumed[2]."

Analysis reveals a number of different concepts in this passage.

(a) *The maxim cessante ratione legis, cessat ipsa lex.*

The meaning of this maxim is that when the reasons (or motive) giving rise to a law or some other provision fall away, the law or provision itself must lapse. Whatever the scope of this principle may be in international law generally, it is clearly inapplicable to the circumstances of the present case. Judge Jessup does not argue that the Mandate as a whole, or some self-contained provision thereof, lapsed when the reasons giving rise thereto fell away, but on the contrary seeks to invoke this maxim for the purpose of removing a qualification which had previously limited the extent of an obligation. There can be no rule of law having the effect of increasing or altering the scope of a State's treaty obligations (or at any rate, obligations voluntarily assumed by the State concerned) without further consent of the State bound thereby, and possibly against its will, merely because the reasons which had prompted the parties in limiting the obligations and correlative rights had, in the meanwhile, fallen away. The practical effect of the application by analogy of the maxim *cessante ratione legis* in the present case, would be that on cessation of the *ratio* or reasons for limiting rights to Members of the League, this limitation would fall away *altogether* and the rights be available to *all States*, irrespec-

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 416-417.

[2] *Ibid.*, p. 412.

tive of membership or past membership of the League. That this would be the logical result seems to be appreciated by Judge Jessup, and consideration will be given below to the method whereby he seeks to remove this anomaly by introducing a new limitation, i.e., a limitation, to States which were Members of the League at its dissolution [1].

But in any event, the invocation of this maxim falls down on its basic premise, i.e., that the reasons for limiting rights to Members of the League had fallen away prior to April 1946. At least the reason of reciprocity, which recognized that it was unreasonable to expect a Mandatory to be obligated to other States which had no reciprocal obligations to it, at all times retained its validity.

(b) *The "Element of Frustration".*

Judge Jessup refers at various stages of his opinion to the "frustration" of certain of the Mandatory's obligations [2]. The argument is that because there are States who are physically capable of exercising a certain right, therefore the Mandatory's obligation in that regard is not frustrated, and therefore continues. This is, however, an irrelevant consideration and indeed a question-begging argument. If the right in question could, in accordance with the intention of the parties, be exercised only by Members of the League, and no such Members exist any more, the provision conferring such right would be frustrated and it could be no answer to say that there are in existence States which are physically able to exercise the right. The frustration arises not from the absence of States who are physically able to exercise the right, but from the absence of States who possess the prescribed qualification to exercise the right.

In concentrating on a suggested lack of frustration of the Mandatory's *obligations*, Judge Jessup appears to lose sight of the fact that a Mandatory had certain *rights* as well. One of the important rights was not to be accountable or obligated to any State who was not a Member of the League, in the familiar and organized context of the League organization.

(c) *If the Mandatory claimed to limit privileges to States which were Members of the League at its dissolution, "the claim would be reasonable".*

As submitted above, the logical result of applying the *"cessante ratione"* principle by suggested analogy, as Judge Jessup seeks to do, is that the missionary rights clause would thereupon become available to all States without limitation. In order to avoid such a result, the learned Judge provides a new limitation, i.e., a restriction to States which were Members of the League at the time of its dissolution. In so doing, he in truth abandons the proposition that the term "another Member of the League of Nations" was descriptive and not conditional: by no method or principle of *interpretation* can the words "another Member of the League of Nations" be read to mean "another Member of the League of Nations, or, after its dissolution, any State which was such a Member as at the date of dissolution". He also derives no support in this regard from the *"cessante ratione"* principle—for even on his application thereof, this principle cannot serve to provide a new limitation to replace one

[1] *Vide* sub-para. *(c), infra.*

[2] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* pp. 412, 413, 414, 417.

that has fallen away. The only manner in which that could have been achieved, would have been by new consent on the part of the Mandatory. And, on analysis, Judge Jessup's own formulation is indeed, in substance, based on the hypothesis of a new act by the Mandatory in order to provide the new limitation. Thus he postulates that the Mandatory would *claim* a right to limit the privileges to States which were Members of the League when it came to an end, that such a claim would be *reasonable*, and that it would avoid a charge that there was *imposed* on the Mandatory an obligation more onerous than that which it had originally assumed.

In drawing attention to this facet of the reasoning, Respondent is not concerned with a mere matter of wording. Whatever wording might be employed, the substance of the reasoning must necessarily, in order to produce the result arrived at by Judge Jessup, amount to something which is not interpretation of an actual legal transaction, but evaluation of what *would have been* a *reasonable* attitude for interested parties to adopt *if they should have negotiated* for an *amendment* of their transaction in order to adapt it to the changed circumstances brought about by the dissolution of the League. In other words, the substance of the reasoning accords with its form; which is a revision of the compromissory clause and not an interpretation thereof.

95. A further argument is raised by Judge Jessup in the following words:

> "If it be said that only such elements of the Mandates survived as related to the welfare, etc., of the inhabitants, then the rights of missionaries would be included in that group of provisions. The rights of missionaries in the South West African Mandate are set out in Article 5, which deals in general with freedom of conscience and worship. Surely the Mandatory should not be privileged to interfere with the religious life of the inhabitants by expelling missionaries on April 20, 1946, on the technical ground that they no longer qualified as nationals of a Member of the League. If this *stipulation pour autrui* survived the dissolution of the League despite the reference to a descriptive qualification which was no longer applicable, other such stipulations could also have survived [1]."

The first two sentences of this passage are based on an assumed argument which has not been used by Respondent, and which it does not accept as correct. In the last two sentences Judge Jessup appears to do no more than reiterate his previous argument that it would be anomalous if the rights of missionaries were to fall away on the dissolution of the League. He seeks however to strengthen his reasoning by using the phrase "privileged to interfere with the religious life of the inhabitants by expelling missionaries". If the expulsion of missionaries amounted to an interference with the religious life of the inhabitants, it may have amounted to a contravention of the general provisions of Article 5. If this were the correct position it would entail that, even during the lifetime of the League, the Mandatory may possibly not have been entitled to expel particular missionaries even although they were not nationals of League Members. If the contrary view is held, i.e., that during the lifetime of the League all missionaries who were not nationals of League

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 413.

Members were liable to arbitrary expulsion irrespective of the effect thereof on the religious needs of the inhabitants, there does not appear to be any anomaly in applying the same principle after dissolution of the League.

96. Judge Jessup next considers whether the disappearance of the capacity of "Members of the League" caused a frustration of the Mandatory's obligations, and comes to the conclusion that it did not [1]. This is put as follows:

> "It has been shown that the disappearance of the quality of Member did not make Article 5 inoperable and the case is even *stronger here since under Article 7 the Mandatory is not the actor*, is not the operator, so to speak [2]."

The aspect of frustration has been discussed above [3]. Respondent does not appreciate why the case is stronger under Article 7, where the whole provision was explicitly rendered dependent upon a matter of League membership, as against Article 5, where the same did not apply to the overriding general provision for "freedom of conscience and the free exercise of all forms of worship".

97. Judge Jessup continues:

> "For the successful operation of the Mandate during the life of the League, the quality of being a Member of the League was not necessary to the operation of Article 7; as already shown there were quite other reasons for referring to the Members [2]."

Once again, in Respondent's submission, a confusion between *reasons* for referring to Members, and the *intended meaning* of the expression "Member of the League". Even if it be admitted that the founders of the League could have achieved the object involved in their reasons by other means (which is not readily apparent) the fact is that they sought to achieve it by limiting rights to Members of the League.

Then follows:

> "After all, these 'Members of the League' were not just concepts, 'ghosts seen in the law, elusive to the grasp'. They were actual States or self-governing entities whose names could be recited. The names of the original Members were listed in the annex to the Covenant, but it was not a fixed group; it fluctuated as new Members were admitted or as old Members terminated their memberships. Yet at any given moment—as for example the moment of the dissolution of the League —the Mandatory would always have been able to draw up, by names, a list of the States included in the descriptive term 'Member of the League' [2]."

Respondent must confess with respect that it finds the meaning which Judge Jessup seeks to assign to the expression "Members of the League" to be "elusive to the grasp". Although he purports to deal with the interpretation of the expression "Members of the League", Judge Jessup at no stage indicates how *by a process of interpretation* a result is reached different from the one contended for by Respondent. In the passage

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 413-414.

[2] *Ibid.*, p. 414.

[3] *Vide* para. 94 *(b), supra.*

quoted above he emphasizes the fluctuation of the group. At what point of time then must a State have been included in the group in order to acquire a right which would thereafter not be surrendered by loss of membership of the group? And where does Judge Jessup find anything in the mandate instrument laying down the point of time?

Judge Jessup says that at any given moment the Mandatory would always have been able to draw up, by names, a list of the States included in the descriptive term "Member of the League". This statement is correct, as far as it goes. Such a list would presumably not include States which were no longer Members, otherwise the emphasis on the fluctuation and the given moment would not be intelligible. And thus, if the Mandatory were at any given moment after the dissolution of the League to have drawn up a list of Members at the moment, it would have contained no names whatsoever. The learned Judge gives no reason why a list drawn up at any time after the dissolution of the League should reflect the names of States no longer Members of the League but which were such immediately before dissolution.

98. In his further reasoning, Judge Jessup considers the change of Courts effected by Article 37 of the Statute of the Court. This aspect is not of importance in the particular enquiry dealt with here; Article 37 merely provides for a substitution of Courts, not of parties entitled to invoke compromissory clauses, and Respondent does not understand Judge Jessup to give a wider effect thereto. He then correlates the results of his enquiry as to the meaning of the phrase "Members of the League of Nations" and of the effect of Article 37, to reach the conclusion that Applicants have competence to invoke jurisdiction in the present case [1].

99. Thereafter Judge Jessup considers the question of States who during the lifetime of the League gave up their League membership. He deals with it as follows:

> "Are the conclusions which have up to this point been arrived at, vitiated by a consideration of the case of a State such as Brazil which gave up its League membership during the active life of the League? I think not. *While the League was operating*, it was natural for the Members to intend that membership, which entailed some very definite obligations—actual in the matter of financial contributions and potential in the matter of political responsibilities such as might arise under Article 16 of the Covenant—should entail also some corresponding advantages. Obviously the territorial guarantees under Article 10 of the Covenant were reciprocal and Brazil—to continue the example—lost its right to invoke that guarantee. Similarly in regard to economic rights in the mandated areas, a Mandatory might well have said: 'My freedom is limited, I am restricted by the obligations which I have assumed in the Mandate and I shall continue to bear these burdens in respect of the large numbers of States which are Members of the League. But since you have chosen to leave the League, I am not obliged to continue to subject myself to an additional burden on your behalf.' The view set out above, following Sir Arnold McNair, that the term 'Members of the League'

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 415-416.

was descriptive and not conditional, does not mean that upon assuming the Mandate for South West Africa the Union of South Africa was obligated to grant certain privileges to missionaries, nationals of Germany. Nor does it mean that after the resignation of Brazil, the Union was bound to grant those privileges to nationals of Brazil. But the situation was very different when by common consent in 1946 the Mandatory joined with the other States which were then Members of the League in dissolving the League because the United Nations had been established in its place. To assert that this dissolution immediately freed the Mandatory of the obligations in the Mandate such as those relating to missionaries, in regard to which the disappearance of the League introduced no iota of frustration or impossibility of performance, but that at the same time the Mandatory retained rights of authority, control and administration, cannot, in the language of the Court's 1950 Opinion 'be justified'. What is said concerning the 'missionary' clause applies with equal force to the provisions in the compromissory clause of Article 7 which provided that disputes concerning these surviving rights might be submitted to the Court. If the Mandate survived as an institution, the Mandatory was still subject to certain obligations and those obligations were owed to the States which were Members of the League at the moment when by common consent the League was dissolved [1]."

Respondent must confess to being perplexed by this passage. Judge Jessup apparently concedes that the parties in 1920 intended that while the League was operating, the expression "Members of the League" was to be given its natural meaning, and indeed for the very reason set out above by Respondent [2]. In other words, in 1920 the parties intended rights to be accorded only to States which were Members of the League, and only while they were Members of the League. What then is meant by saying the expression "Members of the League" was "descriptive and not conditional"? Does the learned Judge suggest that the expression bore a different *meaning* in 1946 from that which it had in 1920? Does the learned Judge attempt to imply a term in the Mandate? If so, on what grounds, and how does Judge McNair's formulation become relevant to such an attempt; and how can this passage be reconciled with the "*cessante ratione*" principle?

Judge Jessup does not answer these questions. He proceeds to refer again to lack of frustration (which has been dealt with above) [3]; to a conclusion which he, without reasoning, considers not "justified"; to the "common consent" of the parties in 1946 (this phrase is repeated twice—is any significance sought to be attached to it?) to come to the conclusion reached before, i.e., that the compromissory clause can still be invoked by States which were Members of the League at its dissolution.

One is left with the conclusion that the learned Judge gave wide and exhaustive consideration to possible bases for distinguishing between States which lost their membership of the League prior to its

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 416-417.
[2] *Vide* paras. 72-79, 93, *supra*.
[3] *Ibid.*, para. 94 *(b)*.

dissolution and those which lost their membership at the dissolution, but that none of the various bases thus considered can on analysis be regarded as sound in law.

100. To sum up, although Judge Jessup purports to rely on Judge McNair's separate opinion in the 1950 Advisory Proceedings, his reasoning in fact makes it clear that he does not assign a different *meaning* to the expression "another Member of the League of Nations" than the one suggested by Respondent.

His whole discussion of this aspect is devoted to an attempt to give effect, not to the meaning of the words concerned, or to the intention which the authors of the Mandate wished to express in using these words, but to the reasons or motives which he considers gave rise to such intended meaning, in so far as these reasons or motives in his view still retain their validity. His approach is apparently that since the methods employed by the authors of the Mandate in giving effect to their motives have become inoperable, new methods must be created to apply to the changed circumstances the motives which still retain their validity.

It needs no argument to establish that this approach bears no relation to the principle enunciated by Judge McNair in 1950 or indeed to any principle of interpretation, but amounts to the imposition of a new obligation on the Mandatory. In addition, as respectfully demonstrated above, several of the separate stages of Judge Jessup's reasoning are either untenable or mutually inconsistent.

101. *The Judgment of the Court.*

In its Judgment on the Preliminary Objections, the Court commenced its consideration of the problem raised by the words "another Member of the League of Nations", by referring to Respondent's argument that the natural and ordinary meaning of the words should be applied [1]. In that regard it stated:

> "But this rule of interpretation is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it [1]."

Although the Court thus stated its approach to this problem on the basis of the application of rules of interpretation entitling it to depart from the natural and ordinary meaning of the Article, Respondent submits that the Judgment as a whole makes it clear that the Court's crucial finding on the problem did not rest on interpretation in the strict sense. Interpretation of Article 7 would involve an ascertainment of the meaning of the Article in the context of 1920. At no stage in the Judgment did the Court indicate that the *meaning* of the expression was, in its view, different from that suggested by Respondent. The Court itself never used the expression "Member (or Members) of the League" in any sense which would suggest that a different meaning was attached to it than the words seem to indicate. Reference may be made for example, to the following passages:

> "The only effective recourse for protection of the sacred trust would be for a *Member or Members of the League to invoke Article*

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 336.

7 . . . [1]" ". . . the right to implead the Mandatory Power before the Permanent Court was specially and expressly conferred on the *Members of the League* . . .[1]"

"For the manifest scope and purport of the provisions of this Article [i.e., Art. 7] indicate that the *Members of the League* were understood to have a legal right or interest in the observance by the Mandatory of its obligations. . . .[2]"

"*The right to take legal action conferred by Article 7 on Member States of the League of Nations* is an essential part of the Mandate itself. . . .[3]"

". . . by vesting the right of invoking the compulsory jurisdiction against the Mandatory for the same purpose *in each of the other Members of the League* [3]." (Italics added.)

In fact, some passages indicate strongly that the Court assigned the natural meaning to the expression. See in this regard:

". . . an agreement was reached . . . *to maintain* the rights of the *Members of the League* [4]".

". . . the literal objections derived from the words 'another Member of the League of Nations' are not meaningful, *since the resolution of 18 April 1946 was adopted precisely with a view to averting them* . . .[5]" (Italics added.)

The meaning attached to the word "interpretation" in the Judgment appears also from the following passage:

"In conclusion, any interpretation of Article 7 or more particularly the term therein 'another Member of the League of Nations' must take into consideration all of the relevant facts and circumstances relating to the act of dissolution of the League, in order to ascertain the true intent and purpose of the Members of the Assembly *in adopting the final resolution of 18 April 1946* [5]." (Italics added.)

To sum up, a fair reading of the Judgment suggests that its authors accepted that the expression "another Member of the League of Nations" in its original context bore its natural and ordinary meaning as contended for by Respondent, but that in their view special features brought about an adaptation to the circumstances arising on the dissolution of the League. What these features are, will be considered at a later stage.

102. *Separate Opinion of Judge Bustamante.*

Judge Bustamante deals with the interpretation of Article 7 at two stages of his opinion. Firstly, he states as follows:

"This is the explanation of the participation of the States Members, alongside the League, in the compromissory clause of the Mandate agreements. Each of these States acquires a right of legal intervention to protect the interests of the mandated population; and this right—which is at the same time a responsibility—extends to *the whole duration of the Mandate.* From the entry into force of the agreement with the Mandatory, this right of intervention of other

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 337.
[2] *Ibid.*, p. 343.
[3] *Ibid.*, p. 344.
[4] *Ibid.*, p. 338
[5] *Ibid.*, p. 341.

States Members becomes *part of the legal heritage of each one of them*, not for the duration of the League of Nations, *but for the duration of the Mandate itself*. Possession of this right by the States which acquired it thus extends beyond the life of the League of Nations, even if the League is dissolved before the expiry of the Mandate [1]."

This is later amplified as follows:

"When the text of Article 7 refers to the States enjoying the benefit of the compromissory clause, the reference to the status of States Members of the League of Nations must be interpreted *as a means for the individual identification of those States* and not as *a permanent condition required for the role of applicant in legal proceedings*. In other words, Article 7 means, in my opinion: 'States belonging to the League of Nations and identified with the purposes of the League shall individually have the right to require before the Permanent Court the faithful execution of the Mandate during its entire duration' [2]."

The basic difficulty in advancing any suggested interpretation of this sort is that it fails to provide for the case of States which, during the lifetime of the League, lost their membership by resignation or as the result of a disciplinary measure. This in turn leads to the further difficulty that there is nothing in the Article upon which such cases can be distinguished, as a matter of interpretation, from loss of membership due to dissolution of the League—with the result that the distinction, if any, must needs be sought in something which is in substance not interpretation at all, e.g., revision, new agreement or the like.

Judge Bustamante's opinion provides no exception in this regard. He considers that States lost their rights when leaving the League, by resignation or expulsion [3], but that the same result did not flow from loss of membership occasioned by the dissolution of the League, since he regards such loss of membership not to have been voluntary [4].

103. Even on the wide interpretation of Article 7 suggested by the learned Judge, this distinction between, on the one hand, a voluntary or disciplinary loss of membership, and an involuntary loss on the other, does not follow from the wording of, or indeed, from anything contained or suggested in, Article 7. To justify it, something like the following interpretation of the expression "another Member of the League of Nations" would be required:

"Any State which at any stage was a Member of the League of Nations, save however any State which either voluntarily renounced its Membership, or was expelled from Membership . . ."

Judge Bustamante does not say how he reaches this conclusion as a matter of interpretation, save in so far as the following may have to be regarded as directed to that end:

"It is only in this way that the purposes of the institution can be served.

If this interpretation were not accepted, and since the League of Nations as such has been dissolved, the legally unacceptable conclu-

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 378.
[2] *Ibid.*, p. 382.
[3] *Ibid.*, pp. 382-383.
[4] *Ibid.*, p. 383.

> sion would be reached that the mandated populations would not have had the possibility of recourse to international judicial authority in respect of possible abuses or deviations by the Mandatory. And it must be recalled that the right of defence before the law is expressly mentioned in the Declaration of Human Rights [1]."

And he states further:

> "But the intention of the Article was not to say that: 'The States Members of the League, so long as it continues to exist, shall individually have the rights . . .[1]', etc. That latter interpretation would render ineffective the judicial security in the Mandate in the event of the disappearance of the League of Nations; and that cannot have been the intention of the authors of the agreement because the effect would be to prejudice the peoples under tutelage [2]."

Since the reference to the Declaration of Human Rights in the second-last passage does not appear to have been intended as independent justification for the learned Judge's conclusion, the whole basis of the reasoning seems to be that any other interpretation would, by reason of facts which have supervened and which were unforseen in 1920, give rise to a result which the learned Judge considers undesirable. Clearly such reasoning amounts to revision, and not interpretation. As was so aptly stated by Judges Spender and Fitzmaurice:

> "But it is not a legitimate process of interpretation to read a provision on the basis of presumed intentions deduced in the light of nothing but after-knowledge. One can only deduce intentions in the light of what the parties might reasonably have been expected to foresee at the time, and not on what those intentions might have been had the parties had an actual foreknowledge of the future, which they could never in fact have had [3]."

104. For the reasons advanced above, Respondent submits that there is no justification for assigning to the expression "another Member of the League of Nations" any but the natural meaning.

III. Can a Term Be Implied in the Mandate to Provide the Necessary Adaptation to the Existence of the Provisions of Article 7 of the Mandate after the Dissolution of the League of Nations?

105. In the light of the attitudes adopted by Applicants [4], this question must be considered with a view to two possibilities. Firstly, is there scope for an implied term to the effect that on dissolution of the League the rights of Members would be exercised by Members of the new organization, i.e., the United Nations?

It has already been submitted that there is no possible warrant for finding that the Mandate contained an implied term providing generally for transfer of the League's supervisory functions to the United Nations [5]. It is inconceivable that there could, by a process of general tacit intent, have been a transfer of the rights of Members to invoke the compro-

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 379.
[2] *Ibid.*, p. 382.
[3] *Ibid.*, p. 515.
[4] I, pp. 440-449.
[5] *Vide* Chap. IV, paras. 14-18, *supra*.

missory clause without there being a transfer of supervisory functions—and Applicants indeed submitted that transfer in the two respects went hand in hand [1]. Inasmuch as the object of the compromissory clause was to protect the rights of League Members, transfer of competence to invoke the clause must necessarily presuppose that also the League Members' substantive rights have devolved on Members of the United Nations. The same considerations which conclusively establish that there could have been no implied term providing for succession of the United Nations to the functions of the League [2], also establish that there could be no implied term providing for succession of the Members of the United Nations to the rights formerly held by the Members of the League of Nations.

As has been pointed out [3], no Member of the Court accepted Applicants' submissions in regard to such succession.

106. In the second instance, the question is whether the Mandate carried an implication that all States which were Members of the League at its dissolution, would continue to have legal rights in the Mandate, including the right to bring contentious proceedings against the Mandatory.

This would presuppose that the authors of the Mandate contemplated the possibility of dissolution of the League, and meant to guard against the disadvantages attendant thereon. As submitted above there is no warrant whatsoever for such a presupposition [4].

In addition, this suggestion would have to involve that the authors of the Mandate foresaw that on dissolution of the League, there would nevertheless still be a Court which could exercise the functions allotted to the Permanent Court. This would attribute an unwarranted degree of prescience to the authors of the Mandate.

107. *The "Essentiality" of the Compromissory Clause.*

At this stage it is desirable to refer to an argument used by the Court in its Judgment on the Preliminary Objections [5]. The argument is that the compromissory clause played a vital role in the machinery of the League relative to mandates, in that, as the Council was bound by the unanimity rule, a Mandatory could at will block any Council resolution, and that for that reason the right to bring contentious proceedings was vested in League Members to enable them to impose the will of the Council on the Mandatory.

Respondent has dealt with the question whether this argument is inherently valid, and has submitted that it is not [6]. At this stage Respondent wishes to consider what relevant consequences would flow from an assumption that the compromissory clause was intended to play the vital role in the mandate system, as described by the Court.

It is not clear what use the Court made of this suggested "essentiality". As pointed out above, the principle of essentiality or maximum effect may be used either for purposes of interpretation, i.e., to assign a mean-

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[1] I, pp. 429, 445-446.
[2] *Vide* Chap. IV, paras. 14-18, *supra*.
[3] *Ibid.*, para. 14, *supra*.
[4] *Ibid.*, para. 15.
[5] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 336 ff.
[6] *Vide* paras. 13-15, *supra*.

ing to a doubtful text, or as one of the factors from which an implied term could be inferred [1]. It has also been indicated that although the Judgment is cast in the mould of an interpretation of Article 7, it in fact accepts the ordinary meaning of the words but holds that such meaning was extended as a result of the operation of certain features, of which "essentiality" in the sense above described, was one [2]. The only basis upon which "essentiality" could therefore be relevant in the instant case is as one of the factors that might be relied upon in an attempt to establish an implied agreement. For the present, the question is whether such an implication arises from the Mandate itself.

Dealing therefore with "essentiality" in the sense described in the Judgment, i.e., that the compromissory clause was designed to impose the Council's will on the Mandatory, one must, in determining whether an implied term can be read into the Mandate, consider the intentions or presumed intentions of the authors of the Mandate. If they had at all contemplated the possible future dissolution of the League, they would have realized that the Council itself, with all its incidents, would disappear with the League. It follows that once the Council went, there would be no point in retaining an institution, the *raison d'être* of which was to impose the Council's will on the Mandatory. Had there been the essentiality in the sense relied upon by the Court, it follows therefore that it would not have served as any inducement to the parties to retain the compulsory jurisdiction in the event of a future dissolution of the League.

108. Another feature relied upon by the Court was the so-called *reliability of judicial supervision*. This is expressed in the following way:

> "In the second place, besides the essentiality of judicial protection for the sacred trust and for the rights of Member States under the Mandates, and the lack of capacity on the part of the League or the Council to invoke such protection, the right to implead the Mandatory Power before the Permanent Court was specially and expressly conferred on the Members of the League, evidently also because it was the most reliable procedure of ensuring protection by the Court, whatever might happen to or arise from the machinery of administrative supervision [3]."

This passage may be interpreted in two ways. It may mean that the right to implead the Mandatory was conferred on the *Members of the League* (in preference to conferring it on any other entity or body) because Members could be relied upon to exercise this right properly. On this interpretation, the Court was considering only the relative merits of various possible entities as initiators of legal proceedings. If this is the correct reading of the Judgment, it is difficult to see the relevance of this consideration to the question of survival or otherwise of the compromissory clause after dissolution of the League.

On the other hand, it may be interpreted as meaning that the *right to implead the Mandatory* was more reliable than any other procedure, e.g., than administrative supervision, because the machinery of adminis-

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[1] *Vide* Chap. III, para. 27, *supra*.

[2] *Vide* para. 101, *supra*.

[3] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 337-338.

trative supervision was more liable to cease functioning than the Court. If this is the correct interpretation, then it might be a factor tending to the implication of a term in the Mandate. But it would involve that the parties in 1920 foresaw the possibility of a break-up of the League, *realized that this would or might entail the complete lapse of administrative supervision*, and therefore provided for judicial supervision which could function even when administrative supervision had fallen away.

Again, however, it is quite clear that the parties in 1920 did not foresee the possibility of a break-up of the League. And it seems completely artificial to suggest that they would in 1920 have considered the Permanent Court to be a more durable institution than the League of Nations, to the extent that they thought it would survive the dissolution of the League.

109. For the reasons set out above, Respondent submits that no term can be implied in the Mandate to provide for the existence of the provisions of Article 7 after the dissolution of the League of Nations.

IV. Was any Agreement, Express or Implied, Entered into during the Period 1945-1946 providing for the Adaptation of the Compromissory Clause to an Existence after the Dissolution of the League of Nations?

110. *The Charter of the United Nations Organization.*

In the 1950 Advisory Opinion, the majority of the Court held as follows:

> "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 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]."

This passage is relied upon by the Applicants in their Memorials [2]. It is therefore necessary to consider to what extent Article 37 of the Statute of the Court and Article 80 (1) of the Charter may be said to provide, or assist in providing, for an adaptation of Article 7 of the Mandate to an existence in the absence of the League of Nations.

111. *Article 37 of the Statute of the Court.*

This Article is cited verbatim above [3]. It goes no further than to substitute the International Court of Justice for the Permanent Court of International Justice in treaties or conventions containing a reference to the latter.

Its effect could at most [4] be to read Article 7 of the Mandate as if it provided as follows:

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[1] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 138.

[2] I, pp. 88-89.

[3] *Vide* para. 31, *supra*.

[4] That is if, contrary to Respondent's submission in section C, *supra*, the Mandate should be regarded as a "treaty or convention in force".

"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 International Court of Justice."

When Article 37 of the Statute of the Court was accepted by the Signatories to the Charter of the United Nations in the year 1945, the League of Nations was still in existence and it continued in existence until April 1946. Article 37 of the Statute does not in terms, and was not intended to, amend treaties or conventions by altering qualifications upon which the right to refer a dispute to a tribunal or the Court was dependent—it merely substituted a new forum for the adjudication of disputes [1].

The effect of Article 37 was discussed or referred to by various Members of the Court in the Judgment and opinions on the Preliminary Objections [2].

Respondent does not read the Judgment or any of the opinions as giving a different interpretation to Article 37 than the one suggested above.

112. *Article 80, Paragraph 1, of the Charter.*

Not only was this Article as noted above [3] referred to by the Court in the 1950 Advisory Opinion, and relied upon by the Applicants in their Memorials [4] but Applicants placed particular emphasis on it in the Oral Proceedings on the Preliminary Objections [5]. However, the Court in its Judgment on the Preliminary Objections did not base its finding on this Article, and indeed made no mention thereof in its reasoning.

In his dissenting opinion Judge Basdevant referred to:

". . . the silence preserved in the reasoning of the Judgment with regard to the Applicants' reference to Article 80, paragraph 1, of the Charter [6]".

In view of this silence, which was found also in the findings in the separate opinions, Respondent wishes to refer only to the consideration already given to the effect of Article 80 (1) above [5], where it was demonstrated that this Article was not intended to, and could not, preserve the rights of the League or its Members from lapsing as a result of the dissolution of the League of Nations.

113. *(a)* It is submitted therefore that the Charter of the United Nations did not make any provision for the adaptation of the

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[1] *Vide Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 39. *Vide* also Hudson, M. O., "The Twenty-ninth Year of the World Court", *A.J.I.L.*, Vol. 45 (1951), p. 15; Rosenne, *op. cit.*, p. 282.

[2] *Vide*, e.g., *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 334-335; pp. 367-368, 376-377, 384 (Judge Bustamante); pp. 414-415 (Judge Jessup); pp. 472-473, 505 (Judges Spender and Fitzmaurice); pp. 613-615 (Judge van Wyk).

[3] *Vide* para. 110, *supra*.

[4] I, p. 88.

[5] *Vide* Chap. IV, para. 24, *supra*.

[6] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 459.

compromissory clause to an existence after dissolution of the League of Nations.

(b) The further question then arises whether any other agreement was concluded during the years 1945-1946 as a result whereof the rights or interests [1] previously possessed by Members of the League, would in future be possessed by States not having the qualification of such membership.

114. *Was an Agreement Concluded outside the Charter of the United Nations during the Years 1945-1946?*

Here again, the same two alternatives are to be borne in mind as in the case of possible implication in the Mandate itself [2]. Thus, in the first instance, Respondent could conceivably have agreed with the United Nations Organization (and/or its Members) with or without the consent of the League of Nations and/or its Members, that the rights of Members of the League were to be transferred to Members of the United Nations. Although, as pointed out above [3], Applicants did in fact contend (albeit apparently not on the basis of an agreement in 1945-1946) for a general succession of the United Nations and its Members to the rights of the League of Nations and its Members regarding Mandates, this contention was not accepted by any Member of the Court, and is manifestly unsound for the reasons there set out [4].

The second possibility is an agreement between the Mandatory and the Members of the League of Nations whereby the rights previously vested in States in their capacities as Members of the League would remain vested in them despite loss of membership. Since the Court in its Judgment on the Preliminary Objections relied on such an agreement, it may be convenient to consider this topic with reference to the Court's Judgment as will be done in the next succeeding paragraphs.

115. *The Judgment of the Court on the Preliminary Objections.*

It has already been pointed out that the Court in its consideration of the question whether, after dissolution of the League, there were still States qualified to invoke the compromissory clause, stated its approach to be one of "interpretation", but that in fact its decision rested not on the meaning of the words of Article 7, but on various features which were said to have extended the meaning [5].

In paragraphs 107 and 108 above, Respondent considered the first two features relied upon by the Court in concluding that there are still States entitled to invoke Article 7 of the Mandate. These features are the "essentiality" and the "reliability" of "judicial supervision". Since "essentiality" and "reliability" of "judicial supervision" cannot by themselves provide for the continuation of such "supervision" in an amended form, they can at most supply motives or reasons which might have prompted the parties to provide for its continuation. As such they may be factors in implying an agreement. It is not stated in the Judgment what inference is drawn from these features. They were dealt with above

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[1] That is, the competence to invoke the compromissory clause, as well as the substantive rights and interests to which the clause was intended to relate.

[2] *Vide* paras. 105-106, *supra*.

[3] *Vide* Chap. IV, para. 14, *supra*.

[4] *Ibid. Vide* also paras. 15-17, following thereon.

[5] *Vide* para. 101, *supra*.

from the point of view of a possible implied term arising from the Mandate itself [1]. Respondent will next consider what value they have as supporting material for the Court's conclusion that an agreement was concluded in April 1946 whereby rights of States which were Members of the League were maintained after dissolution of the League.

116. The *"essentiality" of "judicial supervision"* as will be recalled, is said to arise from the consideration that in the last resort the Council of the League was powerless to impose its will on the Mandatory in view of the unanimity rule, and the fact that the Council was not empowered to institute contentious proceedings.

The merits of this argument have been considered above, where it was submitted that it is unsound [2]. Here also [3] Respondent wishes to consider the implication of essentiality in this sense on the assumption, for purposes of argument, that it did in fact exist during the lifetime of the League. For present purposes, the question then is, what effect was this consideration likely to have had in the minds of the Members of the League at its dissolution? The circumstances during April 1946 were as follows:

(a) The League of Nations was being dissolved and the Council could of course not survive the League itself. Since the Council would no longer exist, there was no point in providing for the continuation of a provision the *raison d'être* of which was *ex hypothesi* to provide for the enforcement of the Council's will.

(b) The United Nations Charter had come into force on 24 October 1945. The Members of the League were well aware of the provisions of the Charter. In particular, they were well aware that the Mandatory as a Member of the United Nations did not have the power to block resolutions of the General Assembly, or of any other organ of the United Nations, inasmuch as the unanimity rule does not operate in that organization. If it was envisaged that supervisory functions would be taken over by the United Nations, the "essentiality" of the compromissory clause in the framework of the League of Nations could not have been a consideration for retention of the provisions of the clause in the framework of the United Nations, in which organization it could not have served the purpose of enabling the will of the supervisory authority to be imposed on the Mandatory. The logic of the proposition just stated is accepted by the Court in another context. When dealing with the fact that some Trusteeship agreements do not contain compromissory clauses, it states:

> "To deny the existence of the agreement it has been said that Article 7 was not an essential provision of the Mandate instrument for the protection of the sacred trust of civilisation. If therefore Article 7 were not an essential tool in the sense indicated, the claim of jurisdiction would fall to the ground. In support of this argument attention has been called to the fact that three of the four 'C' Mandates, when brought under the trusteeship provisions of the Charter of the United Nations, did not contain in the res-

[1] *Vide* paras. 107-108.
[2] *Vide* paras. 13-15.
[3] *Vide* para. 107, *supra*.

pective Trusteeship Agreements any comparable clause and that these three were the Trusteeship Agreements for the territories previously held under Mandate by Japan, Australia and New Zealand. The point is drawn that what was essential the moment before was no longer essential the moment after, and yet the principles under the Mandates system corresponded to those under the Trusteeship system. *This argument apparently overlooks one important difference in the structure and working of the two systems and loses its whole point when it is noted that under Article 18 of the Charter of the United Nations, 'Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting', whereas the unanimity rule prevailed in the Council and the Assembly of the League of Nations under the Covenant.* Thus legally valid decisions can be taken by the General Assembly of the United Nations and the Trusteeship Council under Chapter XIII of the Charter without the concurrence of the trustee State, and *the necessity for invoking the Permanent Court for judicial protection which prevailed under the Mandates system is dispensed with under the Charter* [1]." (Italics added.)

It follows, therefore, that the "essentiality" relied upon by the Court could have been of importance only in the context of the League of Nations. Once it was decided to dissolve the League, any reason for keeping the compromissory clause alive on the ground of such "essentiality" fell away.

117. *The "reliability" of "judicial supervision"* has been dealt with above relative to a possible implication of a term in the Mandate itself [2]. There it was pointed out that it is not clear what was meant by reliability in this context. Respondent will assume however that the Court intended to convey that "judicial supervision" was regarded as more reliable than "administrative supervision" since the latter was more liable to cease functioning than the former.

Respondent has already pointed out that there is nothing to support such a finding. In any event, however, the factor of reliability in this particular sense could hardly have been relevant at all at the time of dissolution of the League, when the administrative supervision of the mandate system in fact came to an end without provision for any substitute. There could then no longer be a question of weighing up the relative reliability of administrative and judicial supervision: the only question could be whether the latter—if thought of at all at that stage—was worth the trouble of special measures to keep it alive. This is dealt with below, relative to the agreement found by the Court to have been concluded in this regard.

118. It is submitted, therefore, that neither the "essentiality" nor the "reliability" of the "judicial supervision" could have played any role in the minds of the Members of the League resulting in inducement to enter into an agreement in April 1946, as found by the Court.

119. With regard to the alleged *Agreement of April 1946*, it is neces-

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 342.
[2] *Vide* para. 108, *supra*.

sary to examine the actual facts from which the Court seeks to deduce it. This topic is first raised in the Judgment as follows:

> "The third reason for concluding that Article 7 with particular reference to the term 'another Member of the League of Nations' continues to be applicable is that obviously an agreement was reached among all the Members of the League at the Assembly session in April 1946 to continue the different Mandates as far as it was practically feasible or operable with reference to the obligations of the Mandatory Powers and *therefore to maintain the rights* of the Members of the League, notwithstanding the dissolution of the League itself. This agreement is evidenced not only by the *contents of the dissolution resolution* of 18 April 1946, but also by the *discussions relating to the question of Mandates* in the First Committee of the Assembly and the *whole set of surrounding circumstances* which preceded, and prevailed at, the session [1]." (Italics added.)

The agreement is accordingly, in the Court's view, evidenced by:

(a) the contents of the League resolution of 18 April 1946;
(b) the discussions relating to the question of Mandates in the First Committee of the Assembly; and
(c) the whole set of surrounding circumstances which preceded, and prevailed at, the Session.

These various features are discussed by the Court at pages 338 ff.

Judge Jessup, in his separate opinion, relies on a statement made by the representative of Respondent in the Meeting of the League Assembly on 9 April 1946 as one of the bases for his finding that the compromissory clause survived the dissolution of the League [2]. Since this basis of his finding overlaps with that employed by the Court, Respondent will deal with them simultaneously.

120. Inasmuch as the compromissory clause imposed an obligation on Respondent to submit to jurisdiction at the instance of "another Member of the League of Nations", this obligation could only *by the consent of the Respondent* be altered or extended in favour of individual States *not* possessing the qualification of League membership. What has to be established therefore, is an act of consent by Respondent to jurisdiction in favour of specified States, which act was accepted by or on behalf of the States concerned [3].

121. The question therefore is whether South Africa undertook in April 1946 to submit to jurisdiction at the instance of States who were at that stage Members of the League. It is clear that there was no express submission. However, as the Permanent Court said in the *Minority Schools* case:

> ". . . there seems to be no doubt that the consent of a State to the submission of a dispute to the Court may not only result from an express declaration, but may also be inferred from acts *conclusively establishing* it [4]". (Italics added.)

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 338.
[2] *Ibid.*, pp. 417 ff.
[3] *Ibid.*, p. 526 (Judges Spender and Fitzmaurice).
[4] *Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 24.

Later the Court repeated:

"... there is no rule laying down that consent must take the form of an express declaration rather than that of acts *conclusively* establishing it [1]". (Italics added.)

122. The relevant facts must therefore be considered with a view to determining whether they conclusively establish consent to jurisdiction on Respondent's part. As regards the events leading up to and at the last Session of the League Assembly, the following are of importance:

(a) At the San Francisco Conference during the discussions concerning the provisions of the Charter relative to a proposed trusteeship system (in Committee II/4 on 11 May 1945), the South African representative made a long and explicit statement, the full text of which is set out in Chapter II, paragraph 31, *supra*.

At this stage Respondent wishes to emphasize only the concluding portion, which reads as follows:

> "The Delegation of the Union of South Africa therefore claims that the Mandate should be terminated and that the territory should be incorporated as part of the Union of South Africa.
>
> As territorial questions are however reserved for handling at the later Peace Conference where the Union of South Africa intends to raise this matter, it is here only mentioned for the information of the Conference in connection with the Mandates question.
>
> As stated in the Memorandum, this is not a matter that can be decided here, but I am directed to mention it for the information of the Conference so that South Africa may not afterwards be held to have acquiesced in the continuance of the Mandate or the inclusion of the territory in any form of trusteeship under the new International Organisation."

(b) The history of the resolutions whereby the United Nations made provision for "assumption" of certain League functions and powers was dealt with in Chapter II, paragraphs 33-35, *supra*. As pointed out there, a specific proposal envisaging investigation and recommendation concerning possible "transfer" of "functions ... under the mandate system" was rejected and nothing substituted for it. Although the proposal related primarily to "administrative supervision" it would also have resulted in at least a consideration of any "judicial supervision" which may have existed as a part of the mandate system. The inference seems inescapable that the omissions were deliberate, particularly since Respondent and certain other Mandatories had made it clear that trusteeship agreements would not be concluded as a matter of course. The South African reservations were particularly explicit [2].

(c) When the Members of the League of Nations met in April 1946 the position, which must have been known to the Members, was as follows:

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[1] *Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 25. *Vide* also *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 419-420 (Judge Jessup).

[2] *Vide* Chap. II, para. 35, *supra*.

(i) The Charter of the United Nations made provision for the voluntary placing of mandated territories under trusteeship.
(ii) Some States had made it quite clear that they would not, or might not, conclude trusteeship agreements. South Africa, in particular, was clearly on record as contemplating the incorporation of South West Africa.
(iii) There had been a deliberate omission to provide for the continuation or adaptation of the Mandates by the United Nations [1].

123. It is in these circumstances that Respondent's representative made the statement to which Judge Jessup attributes such decisive importance. It will be recalled that the statement made on behalf of South Africa was one of a series made on behalf of the various Mandatory Powers (excluding Japan) pursuant to informal discussions between them [2].

For convenience, the South African statement is here repeated in full. It read:

> "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 these consultations, and having 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 according South-West Africa a status under which it would be internationally recognised 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 [3]."

It will be noted that this statement, in common with all the other statements by Mandatories, did not refer in terms to "judicial supervision" of any kind or to any continuation of the compulsory jurisdiction

[1] *Vide* Chap. IV, para. 29, *supra*.
[2] *Vide* Chap. II, para. 41, *supra*.
[3] *L. of N., O.J., Spec. Sup.* No. 194, pp. 32-33; Chap. II, para. 41 *(b)* (ii), *supra*.

of the Court. The expressed intention of the South African Government was "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 . . . Clearly this did not comprehend any intention to submit to supervision, "judicial" or otherwise. Submission to jurisdiction can hardly be said to be a part of administration of a territory.

But the statement went further to point out that "complete compliance with the letter of the Mandate" would no longer be possible by reason of the "disappearance of those organs of the League concerned with the supervision of Mandates, primarily the Mandates Commission and the League Council". Thereafter followed the sentence upon which Judge Jessup apparently places main reliance:

> "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 . . ." (Italics added.)

It must be noted that the word "discharge" (like the word "administer" used previously) connotes the active performance of an act, and not the mere passive acquiescence in or submission to an act performed or a right exercised by another, such as would be involved in submitting to jurisdiction.

Reading the statement as a whole, it is quite clear that the South African representative had in mind the two basic types of obligations in terms of the Mandate. Firstly, there were the obligations to administer the territory for the well-being of the inhabitants. These obligations were to be continued. And secondly there were the obligations regarding supervision. These could not be complied with any more and accordingly fell away. It seems clear, in Respondent's submission, that no attention was specifically directed towards the compromissory clause by any person at any stage of the discussions, most likely because it was considered of no importance.

124. The two aspects of the statement which are of particular importance for present purposes, are:

(a) It was clearly *an expression of intention only*, and cannot be regarded as a promise or undertaking intended to create rights or obligations *vis-à-vis* other States [1]. It was much too imprecise for that purpose, and there was no indication of the States in whose favour any promise, if such was intended, would operate.

(b) The expression of intention was confined to the *obligations regarding administration* of the territory for the benefit of the inhabitants.

Judge Jessup does not suggest that the South African statement alone contained a consent to jurisdiction—in fact he refers to the South African statement and those made during the same Session on behalf of other Mandatories as "this and similar declarations" [2]. An examination of the other statements shows that one or other or both of the aspects em-

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[1] *Vide* in this regard McNair, A. D., *The Law of Treaties* (1961), pp. 14-15, quoted in *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 405 (Judge Jessup).

[2] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 418.

phasized in subparagraphs *(a)* and *(b)* above, were also present in each of them. Thus, the British statement contained the following:

> "... it is the *intention* of His Majesty's Government in the United Kingdom to continue to *administer these territories* in accordance with the *general principles* of the existing mandates [1]". (Italics added.)

The French statement:

> "The French Government *intends* to pursue the *execution of the mission* entrusted to it by the League of Nations. It *considers* that it is in accordance with the *spirit* of the Charter ... [2]" (Italics added.)

The New Zealand statement:

> "New Zealand does not consider that the dissolution of the League of Nations ... will have the effect of diminishing her *obligations to the inhabitants* of Western Samoa, or of increasing her *rights in the territory*. Until the conclusion of our Trusteeship Agreement for Western Samoa, therefore, the territory will continue to be *administered* by New Zealand, in accordance with the terms of the Mandate, *for the promotion of the well-being and advancement of the inhabitants* [3]." (Italics added.)

The Belgian statement:

> "Belgium will *remain fully alive* to all the obligations devolving on members of the United Nations under Article 80 of the Charter [4]." (Italics added.)

The Australian statement:

> "After the dissolution of the League of Nations ... it will be impossible to continue the mandates system in its entirety.
>
> Notwithstanding this, the Government of Australia does not regard the dissolution of the League as lessening the obligations imposed upon it for the *protection and advancement of the inhabitants* of the mandated territories, which it regards as having still full force and effect ... Australia will continue to *administer* the present mandated territories, in accordance with the provision of the Mandates, for the *protection and advancement of the inhabitants*. In making plans for the dissolution of the League, the Assembly will very properly *wish to be assured* as to the future of the mandated territories, for the welfare of the peoples of which this League has been responsible [5]." (Italics added.)

Apparently, in Judge Jessup's view, all these Mandatories must be taken conclusively to have submitted themselves to the jurisdiction of the new Court by making the statements from which the above passages have been extracted.

The Court was, however, not mentioned—not in any of the statements, nor in any of the discussions. On the contrary, the language of all the statements was entirely inconsistent with an intention to assume a legal obligation to renew a jurisdiction which in terms was about to lapse. And the statements

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[1] *L. of N., O.J., Spec. Sup.* No. 194, p. 28; Chap. II, para. 41 *(b)* (i), *supra.*
[2] *Ibid.*, p. 34; Chap. II, para. 41 *(b)* (iii), *supra.*
[3] *Ibid.*, p. 43; Chap. II, para. 41 *(b)* (iv), *supra.*
[4] *Ibid.*, p. 43; Chap. II, para. 41 *(b)* (v), *supra.*
[5] *Ibid.*, p. 47; Chap. II, para. 41 *(b)* (vi), *supra.*

did not even touch upon the most vital aspect of any jurisdiction clause, viz., the identity of the parties who would be entitled to invoke it.

If *all* the Mandatories did not intend to bind themselves in this way, one would have the strange position of South Africa, who was openly and avowedly pressing for incorporation of South West Africa, going out of its way to consent to jurisdiction, while other Mandatories were not prepared to do so. It is hardly imaginable that any of the persons present could have derived such an impression from the South African statement.

125. Reference has been made above to the Chinese draft resolution which sought to provide expressly for transfer of the League's supervisory functions in respect of Mandates to the United Nations, but which resolution was not proceeded with [1].

This draft resolution was raised *after* the declarations made on behalf of the United Kingdom and Respondent, but *before* the declarations on behalf of other States [2].

It is highly significant that Dr. Lone Liang who raised the proposed resolution, dealt only with so-called administrative supervision. He, in common with everybody else at the final session of the League, seems to have been entirely unaware of, or indifferent to, any so-called "judicial supervision".

When the final League resolution of 18 April 1946 was moved by Dr. Liang, it once more appeared clearly:

(a) that the Assembly was not concerned with any problem arising from the imminent lapse of "judicial supervision" but, on the contrary,

(b) that the Assembly was only considering the future administration of the mandated territories, particularly with reference to the disappearance of the supervisory organs of the League, and

(c) that the statements by the Mandatories comprised only expressions of intention, and not undertakings or promises intended to create rights and obligations *vis-à-vis* other States. Thus Dr. Liang said, *inter alia*, as follows:

> "It was gratifying to the Chinese delegation, as representing a country which had always stood for the principle of trusteeship, that all the Mandatory Powers *had announced their intention* to *administer the territories* under their control in accordance with their obligations under the mandates system *until other arrangements were agreed upon* [3]." (Italics added.)

And the same aspects appear also in the supporting addresses of the French and Australian delegates [4].

126. It is against this background that the League resolution of 18 April 1946 must be read. For convenience, it is here set out in full:

> "The Assembly:
>
> Recalling that Article 22 of the Covenant applies to certain territories placed under mandate the principle that the well-being and

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[1] *Vide* Chap. II, para. 41 *(c)* and *(d)*, *supra*.

[2] *Ibid.*, para. 41 *(c)*.

[3] *L. of N., O.J., Spec. Sup.* No. 194, p. 79; Chap. II, para. 41 *(d)*, *supra*.

[4] Referred to in *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 340-341, and quoted in Chap. II, para. 41 *(d)*, *supra*.

development of peoples not yet able to stand alone in the strenuous conditions of the modern world form a sacred trust of civilisation:

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 Mandates Commission;

2. Recalls the role of the League in assisting Iraq to progress from its status under an 'A' mandate to a condition of complete independence, welcomes the termination of the mandated status of Syria, the Lebanon and Transjordan, which have, since the last session of the Assembly, become independent members of the world community;

3. Recognises 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 the United Nations and the respective mandatory powers [1]."

It will be observed that although the resolution makes specific reference to functions under the Mandates, none of these could remotely relate to judicial supervision.

Paragraph 1 expresses satisfaction with the manner in which organs of the League performed their functions with respect to the mandate system. This cannot refer to the Permanent Court which was not an organ of the League, but, and this is of even greater importance, at no time during the subsistence of the League in fact performed any function pertaining to "judicial supervision".

Paragraph 2 makes no express or implied reference to any function of the Court.

Paragraph 3 refers only to the functions of the League (not of the Permanent Court) and only to such functions as are mentioned in Article 22 of the Covenant of the League and Chapters XI, XII and XIII of the Charter of the United Nations. "Judicial supervision" is not expressly or by implication mentioned in Article 22 of the Covenant, or in Chapters XI, XII and XIII of the Charter.

Paragraph 4 *"takes note"* of the *"expressed intentions"* of Mandatories to continue to *"administer* them for the *well-being and development of the peoples concerned"*. (Italics added.) Paragraph 4 thus clearly does not refer to judicial supervision either. It relates only to the *administration of Mandated territories* for the well-being of the inhabitants. Furthermore, its wording clearly bears out what has been said about the declarations made by the Mandatories, i.e., that they merely consisted of expressions of intention. Clearly they were understood by the League in that sense. Finally, paragraph 4 obviously does not purport to embody any agreement between the States present at that meeting. The expression "takes note of the expressed intentions" can never amount to "records the binding undertakings" or words of similar import.

[1] *L. of N., O.J., Spec. Sup.* No. 194, pp. 278-279; Chap. II, para. 41 *(f), supra.*

127. Turning now again to the Judgment of the Court and the separate opinion of Judge Jessup, the latter will for convenience be dealt with first.

128. *Judge Jessup* states that:

> ". . . one of the 'obligations' under the Mandate which the Union of South Africa thus [i.e., by its statement of 9 April 1946] newly agreed to respect after the dissolution of the League, was the obligation under Article 7 to submit to the jurisdiction of the Court . . . [1]"

His reasoning is to the effect that the statement of 9 April 1946 pointed out that the disappearance of "*certain organs of the League*" would prevent full compliance with the letter of the Mandate, but did not "indicate that with regard to the obligation under Article 7 it [Respondent] intended to rely on the fact that in some ten days [i.e., after the dissolution of the League] there would be no State which could call itself a 'Member of the League of Nations' " since "it could hardly be claimed that 'Members' of the League were 'organs' of the League, which disappeared". This reasoning leads the learned Judge to the conclusion that the obligation to submit to the jurisdiction of the Court was not excluded from Respondent's "pledge in sweeping terms, 'to regard the dissolution of the League as in no way diminishing its obligations under the Mandate' " [2].

The fallacy in this reasoning lies, in Respondent's respectful submission, in the assumption that the obligations under the compromissory clause were *included* in Respondent's "undertaking" because they were not *excluded*. In truth, as demonstrated above, the wording of the operative part of the statement read against the background of the surrounding circumstances, including statements on behalf of other Mandatories, renders it clear that no consent to jurisdiction was contemplated at all, and thus that the compromissory clause was *in no way included* in the statement.

129. The Court, as pointed out in paragraph 114 above, relies on an agreement concluded amongst Members of the League of Nations in April 1946. Respondent has set out above why it contends that no agreement at all was concluded—i.e., because the respective Mandatories were merely giving utterance to expressions of their intention relating to mandated territories without any intention of creating legal rights thereby. This aspect need not be repeated at this stage.

Regarding the content of the alleged agreement, however, the Court repeatedly stresses that it was in effect "to continue the different Mandates *as far as it was* practically feasible or operable . . ." [3]. (Italics added.)

One must therefore ascertain in what manner the Court reaches its finding that the compromissory clause was "practically feasible or operable" after the dissolution of the League of Nations.

130. The Court in this regard refers to the coming into force of the United Nations Charter, and in particular the provisions relating to Trusteeship, as well as to the fact that the United Nations had begun to operate in January 1946. It then continues:

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 418.
[2] *Ibid.*, p. 419.
[3] *Ibid.*, p. 338.

"When the Assembly of the League actually met subsequently in April of the same year, it had full knowledge of these events. Therefore before it finally passed the dissolution resolution, it took special steps to provide for the continuation of the Mandates and the Mandate System 'until other arrangements have been agreed between the United Nations and the respective mandatory Powers'. It was fully realised by all the representatives attending the Assembly session that the operation of the Mandates during the transitional period was bound to be handicapped by legal technicalities and formalities. *Accordingly they took special steps to meet them* [1]." (Italics added.)

The Judgment proceeds:

"To provide for the situation certain to arise from the act of dissolution, and to continue the Mandates on the basis of a sacred trust, *prolonged discussions* were held both in the Assembly and in its First Committee to find ways and means of meeting the difficulties and making up for the imperfections as far as was practicable [2]." (Italics added.)

Nevertheless, as has been mentioned above, despite these "prolonged discussions", nobody at any stage uttered one single word relating to the future of the alleged "judicial supervision". In the circumstances, the only conclusion can be that nobody considered that there was any "judicial supervision" at all, or, if there was any, that it was worth retaining. This reticence about "judicial supervision", is in marked contrast to the attitude of Members of the League in relation to "administrative supervision", which was repeatedly mentioned and discussed.

131. Later, the Court expresses its conclusion as follows:

"It is clear from the foregoing account that there was a unanimous agreement among all the Member States present at the Assembly meeting that the Mandates should be continued to be exercised in accordance with the obligations therein defined although the dissolution of the League, in the words of the representative of South Africa at the meeting, 'will necessarily preclude complete compliance with the letter of the Mandate', i.e., notwithstanding the fact that some organs of the League like the Council and the Permanent Mandates Commission would be missing. In other words the common understanding of the Member States in the Assembly—including the Mandatory Powers—in passing the said resolution, was to continue the Mandates, *however imperfect the whole system would be after the League's dissolution, and as much as it would be operable*, until other arrangements were agreed upon by the Mandatory Powers with the United Nations concerning their respective Mandates [3]." (Italics added.)

Quite apart from the fact that, in Respondent's submission, there is no warrant for finding that any agreement was concluded at all, it seems abundantly clear that nobody could have understood the Mandatories' attitude to be of a content higher than as set out in this passage; and thus, if there had been any agreement, its content could not have been any higher. None of the Mandatories' statements indicated any

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 338.
[2] *Ibid.*, p. 339.
[3] *Ibid.*, p. 341.

undertaking, intent or contemplation of adaptation of any of the provisions of the Mandate to the new situation supervening after the dissolution of the League. On the contrary, these statements as well as the resolution of the League, indicated acceptance as unavoidable that some aspects of the Mandate would become inoperable, and contained no suggestion of any attempt to adapt them or to provide substitutes for them. Thus the declarations (of which the resolution took note) related only to the continuation of such aspects of the Mandate as were inherently capable of continued operation in accordance with their terms despite the dissolution of the League: and this is, in the above passage, indicated as the content of the "agreement" found by the Court.

132. Notwithstanding this absence of design to adapt the Mandate in any way, the Court nevertheless held that the agreement found by it *did* provide for adaptation. Thus it says:

> "Manifestly, this continuance of obligations under the Mandate could not begin to operate until the day after the dissolution of the League of Nations and hence the literal objections derived from the words 'another Member of the League of Nations' are not meaningful, since the resolution of 18 April 1946 was adopted precisely with a view to averting them and continuing the Mandate as a treaty between the Mandatory and the Members of the League of Nations [1]." (Italics added.)

The Court does not, however, indicate on what basis it finds that there was such an intent ("view") to avert the "literal objections". Manifestly it cannot be derived from the content of the "agreement" as found, since, as pointed out above, the avowed content of the "agreement" directly contradicts this view. It does not derive from the preparatory discussions, because there was never any discussion of the compromissory clause or of the effect which the imminent dissolution of the League would have on the expression "another Member of the League of Nations" as it occurred in that clause or in any of the other clauses of the various mandate instruments. And the wording of the resolution itself indicates no such intent, being on the contrary, in its pertinent paragraph 4, limited to taking note of expressed intentions regarding *administration* of the mandated territories for the well-being and development of the peoples concerned. One can only, with respect, conclude with Judge van Wyk that this finding of the Court "has no factual basis" [2]. The Judgment reveals none—and Respondent is not aware of any.

133. Finally, the Court states in support of its finding of an agreement as under discussion (to maintain the *status quo* as far as possible) that the interval between the dissolution of the League and the coming into force of other arrangements was expected to be of short duration [3].

Respondent, with respect, does not appreciate the cogency of this consideration. Had the parties considered that it was necessary to make provision for a short while only, they would hardly have gone to the trouble of entering into a special agreement regarding "judicial supervision" which had never been invoked during the 25 years of the League's existence.

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 341.
[2] *Ibid.*, p. 633.
[3] *Ibid.*, p. 342.

134. As a last consideration regarding the alleged agreement in 1946, Respondent wishes to refer to Article 102 of the Charter of the United Nations, which provides as follows:

"1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations."

In the present case, the "agreement" was allegedly entered into after the Charter came into force, but no such agreement has been registered. Consequently, if such agreement existed, the result might well be that it could not be invoked before this Court, which is an organ of the United Nations.

What is more important, however, is that the non-registration indicates forcibly that the participants in the resolution of 18 April 1946 did not consider that any treaty or international agreement had been created thereby or in regard thereto [1].

135. For the reasons aforestated, Respondent submits that no agreement express or implied was entered into in April 1946 involving consent on the Mandatory's part to be bound to submit to the jurisdiction of the International Court of Justice at the instance of States which were Members of the League of Nations at its dissolution.

V. The Application of Some Principle of International Law, not Arising from Agreement, Express or Implied

136. Respondent has dealt with the interpretation of the mandate instrument, and with the questions whether the survival and adaptation of the compromissory clause might have been effected by agreement, express or implied, entered into either at the time of the creation of the Mandate, or during the years 1945-1946. The only remaining question is whether such survival and adaptation might have arisen from the operation of some objective principle of international law.

The concept of a compromissory clause being amended without the consent of the party bound thereunder by the substitution of different parties for the ones who were entitled to invoke it according to its terms, is necessarily contrary to the basic principles of international law. No authority need be quoted for the proposition that jurisdiction in international law can rest only on the consent of the party impleaded. It would be completely contrary to this principle to find that a compromissory clause could be amended in the manner set out above, without the consent of the State bound thereby. Nevertheless various arguments suggesting such amendment have been propounded. Respondent will deal with each of them separately, but in every case it must be kept in mind that the whole concept of jurisdiction being conferred by an objective rule of law is hostile to the basic principles of interna-

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 635 (Judge van Wyk).

tional law. This is a fundamental objection common to all of them, and Respondent does not propose repeating it every time.

137. In so far as Applicants have relied on a principle of "succession" in accordance with which the rights of the League and its Members would automatically devolve upon the United Nations and its Members, Respondent has already dealt with this issue [1]. It is consequently not necessary to consider it again.

138. Applicants also advanced a principle of "carry-over", by which Members of the League at the date of its dissolution were said to have retained the rights which they had previously possessed in their capacity as Members.

In their Observations they stated that there was at least a *de facto* carry-over of the League's responsibilities to the extent that an important function of the League continued beyond the League's formal existence [2]. They sought to justify this suggestion as follows:

> "The concept of the limited *de facto* survival of an entity which has been formally dissolved is a concept familiar to civilised legal systems. Thus, in many States of the United States of America, a dissolved corporation remains *de facto* in existence until it winds up its corporate affairs. Other States of the United States enable persons who were corporate directors at the time of a corporate dissolution to sue as trustees on any claim of the corporation. This is but another way of recognising the continuing vitality of the rights and obligations created by the corporation prior to its dissolution. The 'carry-over' principle of dissolved corporations is implicit in the rule that suit may be brought on behalf of the defunct corporation only by former directors. Civil law countries have similar legislation, which keep alive and carry-over the legal existence of rights and duties of dissolved entities [3]."

This contention was dealt with by Respondent in its argument in chief in the Oral Proceedings on the Preliminary Objections [4] and was not thereafter raised by Applicants again. Respondent does not propose dealing with it again except to submit that it is without substance. None of the Judges relied on it, and it was dealt with only by Judge van Wyk, who rejected it [5].

139. Some of the members of the Court also employed arguments involving principles which do not appear to arise from agreement, express or implied. They are dealt with in the next succeeding paragraphs.

140. In its Judgment, the Court states:

> "Those States who were Members of the League at the time of its dissolution continue to have the right to invoke the compulsory jurisdiction of the Court, as they had the right to do before the dissolution of the League. *That right continues to exist for as long as the Respondent holds on to the right to administer the territory under the Mandate* [6]." (Italics added.)

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[1] *Vide* Chap. IV, paras. 14-17 and 71-73, *supra*.
[2] I, pp. 446-448.
[3] I, p. 447.
[4] Oral Proceedings, 9 Oct. 1962, afternoon.
[5] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 605.
[6] *Ibid.*, p. 338.

It is, with respect, not appreciated how the fact that Respondent "holds on to the right to administer the Territory" can by itself serve to keep alive the compromissory clause in Article 7 *in an amended form*. If this clause lapsed on dissolution of the League, then that would be in circumstances in which either the substantive provisions of the Mandate also lapsed or in which the substantive provisions still remained in existence. In the latter case, there would be no anomaly in Respondent retaining administration of the Mandate without a provision for compulsory jurisdiction.

In the former case, i.e., if the Mandate as a whole lapsed on dissolution of the League, the fact that Respondent "holds on" to the right to administer the territory, whether legitimately or not, cannot by any rule of law result in the amendment and adaptation of the compromissory clause so as to impose on Respondent a compulsory jurisdiction to which it had not consented.

141. Sir Louis Mbanefo, rested his judgment on a somewhat similar ground. He stated as follows:

> "The purpose of the Mandate, however, is the well-being and development of the peoples of the territories as a sacred trust of civilisation. That purpose has not yet been achieved, and no one has suggested that it has been abandoned or rendered invalid with the dissolution of the League.
>
> Although the League was dissolved, the Mandate still continues and the rights and obligations embodied in it became as it were, maintained at the level at which they were on the dissolution of the League. It is on this ground that the Respondent can justify its right to continue to administer the territory and those States who were Members of the League at the time of its dissolution the right to continue to invoke the compromissory clause of Article 7. The right to invoke Article 7 remained vested in those States who were Members of the League at the time of its dissolution, and continues notwithstanding the termination of the League's functions [1]."

Sir Louis Mbanefo does not appear to use the "purpose of the Mandate" as a factor from which, together with other factors, an implied term relative to the continued existence of the compromissory clause is deduced. If that nevertheless were to be the basis of his reasoning, Respondent refers to its submissions regarding the implication of terms [2].

However, the learned Judge appears to suggest that there is some rule of law to the effect that an institution such as the Mandate cannot lapse before its purpose has been achieved. This, with respect, is clearly not so. Reference need only be made to the passage quoted from *The Law of Treaties* by Lord McNair as authority against the existence of any such rule [3].

Secondly, if some such rule existed, it could hardly go further than to provide that the institution should survive according to its terms. Survival cannot "somehow operate to add stature to the institution, so to

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 445.
[2] *Vide* paras. 105-109, *supra*.
[3] *Vide* Chap. III, para. 30, *supra*.

speak, giving it an added effect" [1]. Such a principle could not operate to amend the terms of the institution so as to render them operable where otherwise they would not be. In this respect, Sir Louis Mbanefo's reference to rights being maintained "at the level at which they were on the dissolution of the League", is, it is respectfully submitted, fallacious. As has been pointed out above [2], there is a vast difference in substance as well as in form between an obligation to be brought to Court by a Member of the League as a functioning organization, and, on the other hand, one operating in favour of an immutable number of States quite divorced from the control and activities of the League.

It is submitted therefore that no principle of law operates to produce the effect set out in the separate opinion of Sir Louis Mbanefo.

VI. Conclusion regarding the Effect of the Dissolution of the League

142. For the reasons set out above, Respondent submits that the compromissory clause lapsed, also on the ground that after dissolution of the League there were no States entitled to invoke the Clause.

E. General Conclusion on Part B of Chapter V

143. The purpose of the above consideration of the compromissory clause was to determine whether, on the lapse of the provisions of Article 6 of the Mandate, it could have served to keep the Mandate alive. It is submitted that, in addition to the reasons advanced in Part A above [3], this question must be answered in the negative also on the grounds that—

(a) the compromissory clause was not intended to provide for any supervisory functions in respect of Mandates, and, in any event,

(b) it has itself lapsed as a result of—

(i) the disappearance, on the dissolution of the Permanent Court of International Justice, of the tribunal provided for in the clause for the adjudication of disputes, and

(ii) the disappearance, on the dissolution of the League, of membership in the League mentioned in the clause as a requisite for invoking it.

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 517 (Judges Spender and Fitzmaurice).

[2] *Vide* paras. 72-79 and 93, *supra*.

[3] Part A, paras. 12-16, *supra*.

CHAPTER VI

SUBMISSIONS

For the reasons hereinbefore advanced, supplemented as may be necessary in later stages of these Proceedings, Respondent, as far as this portion of its Counter-Memorial is concerned, prays and requests:

(a) that all of Applicants' Submissions 1 to 9 [1] be dismissed, on the ground that the Mandate for South West Africa lapsed *in toto* upon dissolution of the League of Nations;

(b) alternatively, and in the event of the honourable Court finding that the Mandate for South West Africa is still in existence: that Applicants' Submissions Nos. 7 and 8 be dismissed, as well as their Submission No. 2 in so far as it relates to petitions, annual reports and supervisory functions, on the ground that Respondent's former obligations to report and account to, and to submit to the supervision of, the Council and the League of Nations, lapsed upon dissolution of the League and have not been replaced by any similar obligations relative to supervision by any organ of the United Nations or any other organization or body.

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[1] I, pp. 197-198.

Annexes to Book II of the Counter-Memorial filed by the Government of the Republic of South Africa

Annex A

PARTICIPATION BY MEMBERS OF THE UNITED NATIONS IN DEBATES IN THAT ORGANIZATION DURING THE YEARS 1947, 1948 AND 1949 CONCERNING THE "QUESTION OF SOUTH WEST AFRICA"

FIRST PART

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1947

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1947

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URUGUAY

1947

Fourth Committee

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Plenary

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1948

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Plenary

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1949

Fourth Committee

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VENEZUELA

1947

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1949

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YUGOSLAVIA

1947

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1948

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1949

Fourth Committee

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SECOND PART

Extracts from Statements by Representatives of Certain States

1947

AUSTRALIA

Fourth Committee

Mr. Evatt: "Although the General Assembly was entitled to recommend that a trusteeship agreement be submitted, the countries represented at San Francisco had never intended it to be a legal obligation to place any territory under trusteeship. The obligation to submit information under Chapter XI for territories not under trusteeship ran parallel to the provisions of Chapter XII." (*G.A., O.R., Second Sess., Fourth Comm.*, 39th Meeting, 8 Oct. 1947, p. 58.)

Plenary

Mr. Evatt: "Therefore, there is no gap in the Charter of the United Nations. If the Union of South Africa does not bring its Territory under the Trusteeship System, it is still, in my view, a Non-Self-Governing Territory. The Union Government will have to give, voluntarily, reports for the information of the Secretary-General. The Secretary-General can do as he chooses with this information." (*G.A., O.R., Second Sess.*, Vol. I, 104th Plenary Meeting, 1 Nov. 1947, p. 588.)

Trusteeship Council

Mr. Forsyth: "The reports on Trust Territories are submitted not merely to inform the Trusteeship Council but to enable the Trusteeship Council to exercise its main function, the supervision of administration. In the case of South West Africa, which is not a Trust Territory, the Trusteeship Council does not have the function of supervising administration. The administration of South West Africa has been reserved by the Government of the Union of South Africa as its own concern, and that Government, not having placed the territory under trusteeship, does not recognize the power of the Trusteeship Council to supervise its administration. There is, therefore, a fundamental difference between the purpose for which the report on South West Africa is submitted and the purpose for which reports on Trust Territories are submitted." (*T.C., O.R., Second Sess., First Part*, 15th Meeting, 12 Dec. 1947, p. 477.)

CHINA

Fourth Committee

Mr. Liu Chieh: "The only choice lay between trusteeship and the grant of independence. Article 80, paragraph 2, of the Charter further proved the obligatory character of the [trusteeship] system. . . . If the Union of South Africa placed South West Africa under trusteeship, it would not be deprived of the administration of the territory; and the only change would be the placing of that administration under international supervision." (*G.A., O.R., Second Sess., Fourth Comm.*, 31st Meeting, 25 Sep. 1947, p. 6.)

Plenary

Mr. Chieh: "We are told that the Union of South Africa would administer the Territory of South West Africa in the spirit of the Mandate of the League of Nations. I do not doubt the sincerity of this statement on the part of the Union of South Africa, but we all know that the mandate system has ceased to exist and that the Trusteeship System has been established. Would it not be more desirable, to administer the Territory in question under a living system than under the shadow of a ghost system?" (*G.A., O.R., Second Sess.*, Vol. I, 105th Plenary Meeting, 1 Nov. 1947, p. 601.)

COLOMBIA

Fourth Committee

Mr. Yepes: "If the Mandate were to be continued, on whose behalf would it be exercised? The League of Nations was defunct. In international as well as in civil law, the Mandatory Power could not continue to hold a mandate after the institution to which it was responsible had ceased to exist." (*G.A., O.R., Second Sess., Fourth Comm.*, 33rd Meeting, 27 Sep. 1947, p. 14.)

Plenary

Mr. Yepes: ". . . on whose behalf would the mandate of the old League of Nations be exercised?

It could certainly not be the League of Nations, for it has ceased to exist, and the mandate could not be exercised on behalf of a dead institution. In civil law, as we all know, power of attorney ceases upon the death of the principal. The same idea extends, by analogy, to international law. We can conclude that, since the League of Nations is dead, mandates exercised under its authority have also lapsed, and the territories concerned must fall under the Trusteeship System established by Article 77 of the Charter." (*G.A., O.R., Second Sess.*, Vol. I, 105th Plenary Meeting, 1 Nov. 1947, p. 602.)

CUBA

Fourth Committee

(i) *Mr. Meyer:* ". . . the information submitted by the Government of the Union of South Africa with regard to South West Africa could not be examined since South West Africa was neither a Trust Territory nor a Non-Self-Governing Territory." (*G.A., O.R., Second Sess., Fourth Comm.*, 32nd Meeting, 26 Sep. 1947, p. 10.)

(ii) *Mr. Meyer:* ". . . disputed the contention of the Government of the Union of South Africa that it had no alternative to retaining the *status quo*, nor did he recognize that South West Africa constituted a category *sui generis*. The Charter was very clear in recognizing only three categories: Trust Territories, the Non-Self-Governing Territories and independent States." (*G.A., O.R., Second Sess., Fourth Comm.*, 39th Meeting, 8 Oct. 1947, p. 55.)

FRANCE

Trusteeship Council

Mr. Garreau: "That text [of the General Assembly Resolution]

was very carefully drafted after lengthy discussion because the Assembly, in referring the report of the Government of the Union of South Africa to the Trusteeship Council, wanted above all to take the first step in the direction of international supervision over the former mandated Territory of South West Africa, *pending reconsideration of the Assembly resolution by* the Government of the Union of South Africa and a decision of that Government in that connection . . .

Indeed, in the absence of a trusteeship agreement, the Council—and the same would have been true of the Fourth Committee—could examine the report of the South African Government only for information." (*T.C., O.R., Second Sess., First Part*, 15th Meeting, 12 Dec. 1947, p. 480.)

INDIA

Fourth Committee

India submitted a draft resolution which in paragraph 5 therof contained the following statement:

"*Whereas* the territory of South West Africa, though not self-governing, is at present outside the control and supervision of the United Nations."

(*G.A., O.R., Second Sess., Fourth Comm.*, Annex 3h, p. 197.)

IRAQ

Fourth Committee

Mr. Khalidy: ". . . pointed out that the trusteeship system of the United Nations had replaced the mandate system. . . .

The mandate system had ceased to function. The Union of South Africa had not accepted the trusteeship system, to which there was no alternative. The trusteeship system offered the only legal right to administer a territory formerly under mandate." (*G.A., O.R., Second Sess., Fourth Comm.*, 32nd Meeting, 26 Sep. 1947, p. 10.)

Plenary

Mr. Jamali: "Now the League of Nations is dead, but the principles underlying the mandate are not dead. Chapter XII of the Charter certainly replaces Article 22 of the Covenant. . . .

There is no obligation [to place a Mandated territory under the trusteeship system], but these members of the General Assembly who worked on the trusteeship Chapter of the Charter at San Francisco will remember that, although there was no obligation on the mandatory power to put a territory under the Trusteeship System, it was implied that the mandatory Power would either put such a territory under trusteeship in due course, or declare its independence. . . .

There is no further alternative. . . .

I believe that the retention of the Territory of South West Africa, neither under the Trusteeship System nor as an independent territory, is a retrograde step. It is contrary to the spirit of the Charter, and it is a denial of the right of the United Nations to supervise the welfare and freedom of all peoples all over the world." (*G.A., O.R., Second Sess.*, Vol. I, 105th Plenary Meeting, 1 Nov. 1947, pp. 621-622.)

Trusteeship Council

Mr. Khalidy: "I had occasion to say at the time [in the Fourth Committee] that South West Africa is neither a colony, a mandated territory nor a Trust Territory. It is not a mandated territory, I said, and I still say so because the League of Nations from which the mandate derived legally, is dead." (*T.C., O.R., Second Sess., First Part,* 15th Meeting, 12 Dec. 1947, p. 482.)

NETHERLANDS

Fourth Committee

Mr. Kernkamp: "He felt that the refusal of South Africa to place the territory under the international trusteeship system was regrettable because since independence had not been granted to the territory its withdrawal from any system of international supervision was a retrogressive step." (*G.A., O.R., Second Sess., Fourth Comm.,* 38th Meeting, 7 Oct. 1947, p. 52.)

Plenary

Mr. Kernkamp: "The mandate system now does not operate. As there is no longer a supervising authority, there is no longer a mandate system. The voluntary transmission of information, merely for the sake of information, by the Union of South Africa to the Trusteeship Council does not give the Council the same jurisdiction as the Permanent Commission on Mandates had. . . . . we consider that the present situation constitutes a step backward, in so far as a territory once under international supervision is now under no superintendence . . ." (*G.A., O.R., Second Sess.,* Vol. I, 105th Plenary Meeting, 1 Nov. 1947, p. 605.)

NEW ZEALAND

Fourth Committee

Sir Carl Berendsen: "Speaking as the representative of New Zealand, he favoured the international supervision of all backward peoples, but maintained that there was no legal obligation on any Mandatory Power to place a mandate under the trusteeship system. The Committee could not therefore accuse the Union of South Africa of failing in its duty." (*G.A., O.R., Second Sess., Fourth Comm.,* 33rd Meeting, 27 Sep. 1947, p. 17.)

Trusteeship Council

Sir Carl Berendsen: "This [South West Africa] is not a Trust Territory. We derive no powers from the Charter. Our only powers are derived from the resolution of the General Assembly, and our powers are limited by that resolution. . . . But we are not entitled—and I regret it very much indeed—we are clearly not entitled to send a visiting mission. We are clearly not entitled to accept petitions. We are clearly not entitled to hear oral representation." (*T.C., O.R., Second Sess., First Part,* 15th Meeting, 12 Dec. 1947, pp. 478-479.)

PAKISTAN

Plenary

Mr. Pirzada: "A simple comparison of the relevant Articles in Chapters XI and XII of the Charter will show clearly the advantage of one system over the other. The first advantage

that I would stress is that, under the present mandate system, only one country is responsible for the proper administration and the development of political and other institutions within the Territory. It is the conscience of one State which will be guiding it all the time to follow the provisions laid down in Chapter XI of the Charter. On the other hand, if it comes under the International Trusteeship System, it will be the conscience of all the United Nations, as represented in the Trusteeship Council, which will be guiding the administration of the Territory and which, therefore, has a greater chance of being directed in the interests of the people of that Territory.

The second advantage which the Trusteeship System has over the ordinary administration under Chapter XI is that international supervision is provided under the International Trusteeship System, according to Article 75 of the Charter. As against that, under Chapter XI of the Charter, which relates to the administration of Non-Self-Governing Territories—to which class this Territory of South West Africa will have to belong if it is not brought under the Trusteeship System—there is no provision for international supervision, and the only supervision that exists takes the form of supplying information on non-political matters for the consideration of the United Nations: in other words, economic, social, and other matters. . . .

There are two systems under the Charter of the United Nations, namely the administration of Non-Self-Governing Territories, and the administration of territories under the Trusteeship System. This would be a third system—administering in the spirit of the mandate—which the Charter does not recognize and which the Charter seems to abolish altogether. . . .

Therefore, by refusing to place this Territory under the Trusteeship System, the Union of South Africa is going back on both principles recognized by the Covenant of the League of Nations: first, trusteeship of an international body; second, supervisory control of an international body." (*G.A., O.R., Second Sess.*, Vol. I, 105th Plenary Meeting, 1 Nov. 1947, pp. 618-619.)

PHILIPPINE REPUBLIC

Fourth Committee

(i) *General Romulo:* "The Union of South Africa had contended that it had obtained its powers from the League of Nations, but it had forgotten the new obligations it had assumed under the Charter. Chapter XI of the Charter contained a declaration which applied to all the Non-Self-Governing Territories, whether mandated or not. That declaration embodied obligations which far exceeded those of the mandate system. The resolution of the Union Parliament implied that these obligations would be fulfilled by the submission of information." (*G.A., O.R., Second Sess., Fourth Comm.*, 31st Meeting, 25 Sep. 1947, p. 7.)

(ii) *General Romulo:* "While supporting the draft resolution submitted by the representative of India, [he] could not

subscribe to the fifth paragraph of that proposal, to the effect that South West Africa was 'at present outside the control and supervision of the United Nations'. Chapter XI of the Charter applied to all the Non-Self-Governing Territories. . . .

According to Article 103 of the Charter, obligations under the present Charter superseded other international obligations, and that meant in effect that the Union of South Africa was bound to fulfil its obligations under Chapter XI as long as South West Africa remained outside the trusteeship system." (*G.A., O.R., Second Sess., Fourth Comm.*, 39th Meeting, 8 Oct. 1947, p. 57.)

UNION OF SOUTH AFRICA

Fourth Committee

(i) *Mr. Lawrence:* "In respect of its administration of South West Africa, that Government [of the Union of South Africa] would maintain the *status quo* in the spirit of the Mandate. It would not submit a trusteeship agreement, but would transmit information annually. Information relating to 1946 was now in the hands of the Secretary-General." (*G.A., O.R., Second Sess., Fourth Comm.*, 31st Meeting, 25 Sep. 1947, p. 4.)

(ii) *Mr. Lawrence:* "In reply to the request made by the Danish representative at the thirty-first meeting regarding clarification of document A/334, Mr. Lawrence stated that the Mandate gave certain powers and imposed certain obligations. The Government of the Union of South Africa had full powers of administration over South West Africa, and it proposed to continue to exercise them, just as it would continue to fulfil its obligations under the Mandate to promote the moral and material well-being of the population and to advance social progress. The Union of South Africa did not claim that South West Africa was a colony, but it was willing to submit annual reports like those required for the Non-Self-Governing Territories under Article 73 c [sic].

The right to petition had ceased to exist with the disappearance of the League of Nations, the authority to which petitions could be addressed. In the absence of a trusteeship agreement, the United Nations had no jurisdiction over South West Africa and therefore no right to receive petitions." (*G.A., O.R., Second Sess., Fourth Comm.*, 33rd Meeting, 27 Sep. 1947, pp. 15-16.)

Plenary

Mr. Lawrence: "In addition, the Government of the Union of South Africa has expressed its readiness to submit annual reports for the information of the United Nations. That undertaking stands.

Although these reports, if accepted, will be rendered on the basis that the United Nations has no supervisory jurisdiction in respect of this Territory, they will serve to keep the United Nations informed, in much the same way as they will be kept informed in relation to Non-Self-Governing Territories under Article 73 e of the Charter." (*G.A., O.R., Second Sess.*, Vol. I, 105th Plenary Meeting, 1 Nov. 1947, pp. 632-633.)

UNION OF SOVIET SOCIALIST REPUBLICS

Plenary

Mr. Stein: "It is also known that the South African Government refused to comply with this recommendation [to submit a trusteeship agreement] and set up an absurd juridical status for South West Africa which consisted in the administration of South West Africa being carried out 'in the spirit of the League of Nations Mandate'. I say that this is an absurd juridical status, since now, in 1947, after the League of Nations and the mandate system have ceased to exist, reference is made to this system in order to conceal the actual annexation of South West Africa." (*G.A., O.R., Second Sess.*, Vol. I, 105th Plenary Meeting, 1 Nov. 1947, p. 612.)

THE UNITED STATES OF AMERICA

Fourth Committee

Mr. Dulles: "The Union of South Africa had no legal title to the territory at present, because its only title was a Mandatory under the League of Nations." (*G.A., O.R., Second Sess., Fourth Comm.*, 38th Meeting, 7 Oct. 1947, p. 50.)

Trusteeship Council

Mr. Gerig: "It was said here earlier this afternoon, and I did not hear any member object, that while we all hope—my delegation as much as any delegation feels that way—that there will be a trusteeship agreement for this territory, we do not, in the absence of a trusteeship agreement, have supervisory functions over this territory. Therefore, I do not think we ought to imply that we do have supervisory functions to ensure that the Union Government discharges its duties under the present mandate, admitting that it exist." (*T.C., O.R., Second Sess., First Part*, 15th Meeting, 12 Dec. 1947, p. 505.)

URUGUAY

Fourth Committee

(i) *Mr. Arrosa:* "The duty to submit trusteeship agreements was not only a moral one. Article 80, paragraph 2, of the Charter permitted no delay on the part of the Mandatory Powers. At a time when only two classes of dependent territories remained in existence, the Non-Self-Governing Territories and the Trust Territories, South West Africa's position had clearly become anomalous." (*G.A., O.R., Second Sess., Fourth Comm.*, 33rd Meeting, 27 Sep. 1947, p. 14.)

(ii) *Mr. Arrosa:* "His delegation was of the opinion that since the mandate system was defunct and South West Africa was neither independent nor a colony, the Union of South Africa was under an obligation to place it under the international trusteeship system." (*G.A., O.R., Second Sess., Fourth Comm.*, 40th Meeting, 9 Oct. 1947, p. 60.)

Plenary

Mr. Arrosa: "We maintain once more that it is impossible to conceive of a mandate continuing, even only in spirit, now that the body which granted it, the League of Nations, has

ceased to exist. There is here a clear anomaly, for the Territory in question is neither independent nor a colony.

The international system now in force takes account of two classes of dependent territories only: those called by Chapter XI of the Charter 'non-self-governing', and those placed under the Trusteeship System in accordance with Chapters XII and XIII. There is no third category or class of dependent territories." (*G.A., O.R., Second Sess.*, Vol. I, 105th Plenary Meeting, 1 Nov. 1947, p. 615.)

1948

BELGIUM

Fourth Committee

Mr. Ryckmans: "Under the Mandate System, South West Africa had been administered under a C Mandate, and it had always been understood that the Territory would eventually be incorporated in the Union of South Africa.

On the other hand, [he] felt bound to draw the attention of the South African representative and the Committee to the terms of Article 80, which provided that nothing in Chapter XII of the Charter should be 'construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples . . .'. That included the people of South West Africa, who, having had the benefit of international supervision under the Mandate System, could not be deprived of that right." (*G.A., O.R., Third Sess., Part I, Fourth Comm.*, 79th Meeting, 12 Nov. 1948, pp. 325-326.)

CHINA

Fourth Committee

Mr. Liu-Chieh: "It was true that, as no trusteeship agreement had been concluded for South West Africa, the United Nations could not intervene or exercise its power of supervision in regard to that Territory. But paragraph 2 of Article 80 imposed an obligation to conclude such an agreement without delay." (*G.A., O.R., Third Sess., Part I, Fourth Comm.*, 76th Meeting, 9 Nov. 1948, p. 296.)

COSTA RICA

Fourth Committee

Mr. Canas: "The United Nations should not act as though its hands were tied by the Mandate. It had not been a party to the mandate agreement, and could not therefore be obliged to act in accordance with its provisions. Indeed, the Union of South Africa itself did not consider that the Mandate was still in existence, since it had stated that it would administer the Territory of South West Africa in the 'spirit' of the Mandate. As a legal contract between the Union of South Africa and the League of Nations, the Mandate had disappeared with the League, and there had been no provision whereby the United Nations became a party to the Mandate." (*G.A., O.R., Third Sess., Part I, Fourth Comm.*, 82nd Meeting, 17 Nov. 1948, p. 365.)

CUBA

Fourth Committee

Mr. Pérez Cisneros: "In his opinion, however, the revised joint resolution did not make it clear that the United Nations had assumed the League of Nations' responsibility in relation to South West Africa, the only Mandated Territory not yet placed under the Trusteeship System. . . . It should be clearly stated also that the reports were sent to the United Nations so that the Organization could exercise its functions of control and supervision, in the same manner as would have been done by the League of Nations . . ." (*G.A., O.R., Third Sess., Part I, Fourth Comm.*, 82nd Meeting, 17 Nov. 1948, p. 356.)

FRANCE

Fourth Committee

Mr. Garreau: "The French delegation had frequently had occasion to recall that the Trusteeship System had been substituted for the Mandate System. Once the League of Nations had ceased to exist, so had the institutions which functioned under its aegis. When the United Nations was set up, there remained nothing of the Covenant of the League of Nations except its moral influence. The Mandate System was reconstituted as the Trusteeship System with certain characteristic differences. . . .

The South African Government had on several occasions expressed its desire to administer the Territory of South West Africa in the spirit of the Covenant. It accepted the moral obligation of ensuring the well-being and the development of the population, leading it in due course to autonomy and ultimately to independence." (*G.A., O.R., Third Sess., Part I, Fourth Comm.*, 79th Meeting, 12 Nov. 1948, pp. 322, 324.)

INDIA

Fourth Committee

Mrs. Pandit: "The provisions of Article 80 of the Charter, safeguarding the existing rights of the people of South West Africa until a Trusteeship Agreement had been concluded, had to be recognized. One of those rights, under the mandate system, had been the examination, by the Permanent Mandates Commission, of annual reports submitted by the Union Government on the administration of the Territory of South West Africa. A representative of the Union Government had been personally present for interrogation. That right could not be extinguished merely because the Permanent Mandates Commission had ceased to exist." (*G.A., O.R., Third Sess., Part I, Fourth Comm.*, 81st Meeting, 16 Nov. 1948, p. 352.) [1]

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[1] "It is *respectfully submitted* that the only respect in which the position has changed [as a result of the dissolution of the League] is that Article 6 of the Mandate and the first portion of Article 7 of the Mandate have become incapable of being complied with. In other respects, the rights and obligations of the mandatory are exactly the same as they were before. The result is that the mandatory is not obliged to submit an annual report under Article 6 and that it cannot modify the terms of the Mandate at all because the procedure by which it could have modified the terms

UNION OF SOVIET SOCIALIST REPUBLICS

Trusteeship Council

(i) *Mr. Tsarapkin:* "... his delegation held that the Trusteeship Council could not consider the report submitted by the Government of the Union of South Africa, because the status of the Territory was at present undetermined. While it was true that the Union of South Africa had declared that it would administer the Territory in the spirit of the existing mandate, it should not be forgotten that both the mandate system of the League of Nations and the Permanent Mandates Commission no longer existed. Hence, there was no legal basis for the administration of that Territory by the Union of South Africa." (*T.C., O.R., Third Sess.*, 31st Meeting, 23 July 1948, p. 406.)

(ii) *Mr. Tsarapkin:* "He was of the opinion that a report on the Territory of South West Africa could be considered only after this Territory is included in the Trusteeship System and a Trusteeship Agreement is approved by the General Assembly... He considered that there exist only two alternatives to deal with the former Mandated Territory of South West Africa—either this Territory should become an independent State or should be included in the Trusteeship System ..." (*T.C., O.R., Third Sess.*, 41st Meeting, 4 Aug. 1948, p. 537.)

UNITED KINGDOM

Trusteeship Council

Sir Alan Burns: "The Council had been asked to consider the report on the administration of South West Africa simply because that Territory was formerly under mandate, and the General Assembly hoped soon to see it placed under the Trusteeship System. It was important, therefore, to bear in mind that the Council's consideration of the report on the administration of South West Africa and its report thereon to the General Assembly were *sui generis*; the Council had no right to assume that the General Assembly would take any particular course of action on the basis of the Council's report." (*T.C., O.R., Third Sess.*, 41st Meeting, 4 Aug. 1948, p. 531.)

URUGUAY

Fourth Committee

Mr. Gerona: "... pointed out that the obligation to send an annual report on the administration of mandated territories had been imposed on every Mandatory Power by the provision of Article 22, paragraph 7, of the Covenant of the League of Nations....

Article 80 of the United Nations Charter provided, in connection with the Trusteeship Agreements, that ...

That provision of the Charter clearly safeguarded the rights of indigenous populations and imposed on the Administering Authorities the duty of reporting progress and of communi-

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of the Mandate has ceased to be applicable." ("Written statement of the Government of India", in *International Status of South West Africa, Pleadings, Oral Arguments, Documents*, p. 148.)

cating to the international community how they were fulfilling their obligations.

It could be maintained that since the organ which was to receive that information, namely, the Council of the League of Nations, was no longer in existence, the Mandatory Power was automatically relieved of its obligation to report progress. The Council had studied the reports in its capacity as an organ of the international community; it acted as a co-ordinating centre for the other States concerned, i.e., members of the civilized and organized international collectivity. The dissolution of the League of Nations meant the disappearance of only the common co-ordinating centre. But that co-ordinating centre was once more in existence: it was the United Nations, and it was through the organization that the Union of South Africa should fulfil its obligations twards the international community and give an account of its administration." (*G.A., O.R., Third Sess., Part I, Fourth Comm.*, 78th Meeting, 11 Nov. 1948, pp. 311-312.)

1949

BRAZIL

Fourth Committee

Mr. d'Aquino: "South West Africa, however, was not a sovereign State, but a territory placed under the Mandate System of the League of Nations and, consequently, was under the supervision of the community of Nations, namely, the General Assembly." (*G.A., O.R., Fourth Sess., Fourth Comm.*, 132nd Meeting, 22 Nov. 1949, pp. 223-224.)

CANADA

Fourth Committee

Mr. Blais: "The Canadian delegation was submitting that amendment ['Expresses regret that the Government of the Union of South Africa has not continued . . . to submit reports on its administration of the Territory of South West Africa for the information of the United Nations'] because the use of the word 'repudiated' in the Indian text gave the impression that the Union Government was under a legal obligation to submit information, which was not the case." (*G.A., O.R., Fourth Sess., Fourth Comm.*, 139th Meeting, 28 Nov. 1949, p. 268.)

CUBA

Fourth Committee

Mr. Pérez Cisneros: "The prestige of the United Nations was at stake just as that of the League of Nations might have been in similar circumstances: the rights and duties of the United Nations were the same as those of the League of Nations for both organizations represented the international community. The substance of the question was clear: although there was no Trusteeship Agreement in respect of South West Africa, there remained the old Mandate which provided for a certain number of obligations. Those had to be observed and the Power concerned could not denounce them by unilateral action. Under the terms of the Mandate, the Union of South

Africa had been required to transmit information to the League of Nations, because it was the international community's duty to be informed how the territories it entrusted to the administration of some countries were being governed. That information was to have been examined by the international community; the populations concerned had had the right to send petitions; furthermore, the right of petition had been recognized as 'an essential human right' by the General Assembly at its third session ... as a result of a proposal made by the Cuban and French delegations. ...

No Trusteeship Agreement had in fact been concluded in respect of South West Africa. Attention should be drawn, however, to Article 80 of the Charter which explicitly stated ... It was therefore clear that the situation which had prevailed under the Mandate System should not be changed in the case under discussion. The rights of the people concerned were clearly compromised when the international community ceased to receive information on how they were being administered, and when the people themselves could no longer exercise their right of petition." (*G.A., O.R., Fourth Sess., Fourth Comm.*, 130th Meeting, 21 Nov. 1949, p. 216.)

GREECE

Plenary

Mr. Lely: "He recalled that at the third session of the General Assembly the representative of the Union of South Africa had stated that, when the Government of the Union of South Africa had given an assurance that it would send information on the Territory, it had made a specific reservation that the sending of such information would imply no commitment for the future and would not be indicative of accountability to the United Nations.

[He] felt that that statement spoke for itself. The sending of information was a voluntary act on the part of the Union Government. If that was so, and he believed that it was, then the Union Government had not repudiated any previous assurance." (*G.A., O.R., Fourth Sess.*, 269th Plenary Meeting, 6 Dec. 1949, p. 530.)

UNITED KINGDOM

Fourth Committee

Sir Terence Shone: "It could not be said that the Government of the Union of South Africa had repudiated its previous assurance since it had complete liberty to decide whether or not to transmit information." (*G.A., O.R., Fourth Sess., Fourth Comm.*, 135th Meeting, 24 Nov. 1949, p. 247.)

Annex B

ARTICLE 22 OF THE COVENANT OF THE LEAGUE OF NATIONS

[See Annex A to the Memorials, I, p. 200.]

Annex C

MANDATE FOR GERMAN SOUTH-WEST AFRICA

[See Annex B to the Memorials, I, p. 201.]

BOOK III

CHAPTER I

GEOGRAPHICAL FEATURES OF SOUTH WEST AFRICA

A. Introductory

1. A brief survey of the main geographical features of South West Africa is, in Respondent's submission, essential for a proper consideration of the issues before the Court.

The natural environment of a country not only regulates the size, character and distribution of its population, but also constitutes a major factor in determining the potential pattern and rate of its development. In the context of the present case, however, it is also true that geographical factors and natural resources are relevant and assume importance only to the extent that they can be used by man for his benefit, or that they constitute obstacles to be overcome in developing the Territory.

This survey will indicate that the natural environment of South West Africa is to a large extent unfavourable for man's purposes and that it displays great diversity, resulting in special problems of administration and development. The adverse physical environment places a premium on the role of man in realizing the limited and diverse natural potential of the Territory.

Consequently the two factors of natural environment and human resources, as well as their inter-relationship, are basic to the interpretation of conditions and achievements in South West Africa, and cardinal to the evaluation of any policy of administration and development in the Territory.

B. Location

I. General

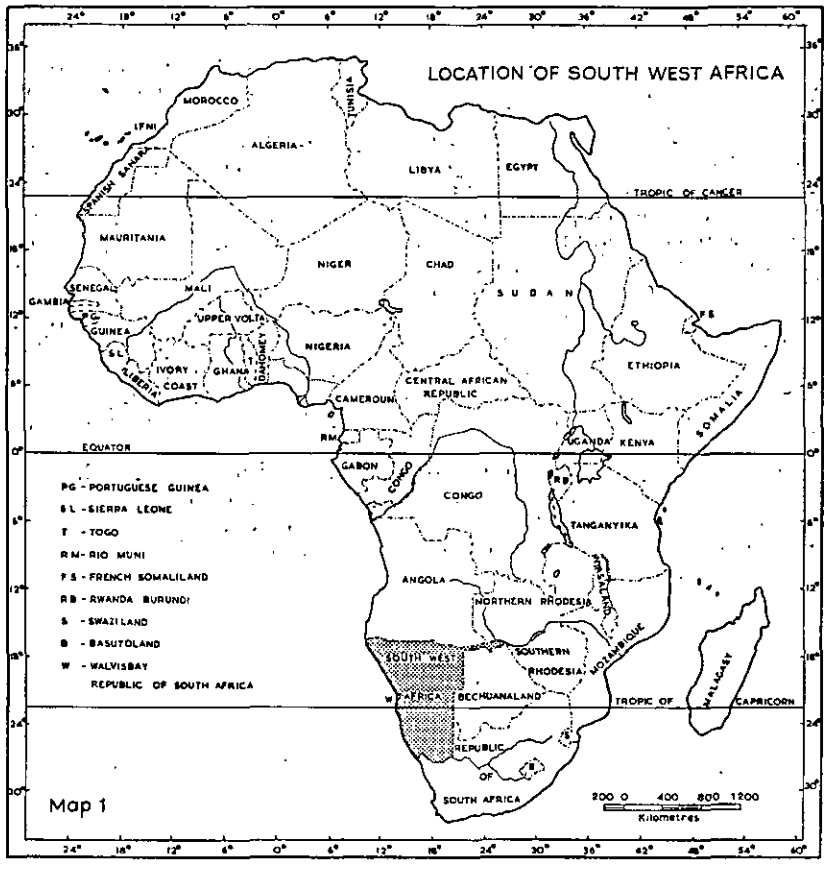
2. The Territory of South West Africa lies along the Atlantic seaboard in the south-western portion of Africa, as illustrated by Map 1, on page 290.

The Territory stretches from the southern border of Angola to part of the northern and north-western border of the Cape Province of the Republic of South Africa; and from the Atlantic Ocean in the west to the western border of Bechuanaland in the east. The Tropic of Capricorn divides the Territory into two nearly equal parts. The northern half of South West Africa therefore falls in what is generally known as Tropical Africa.

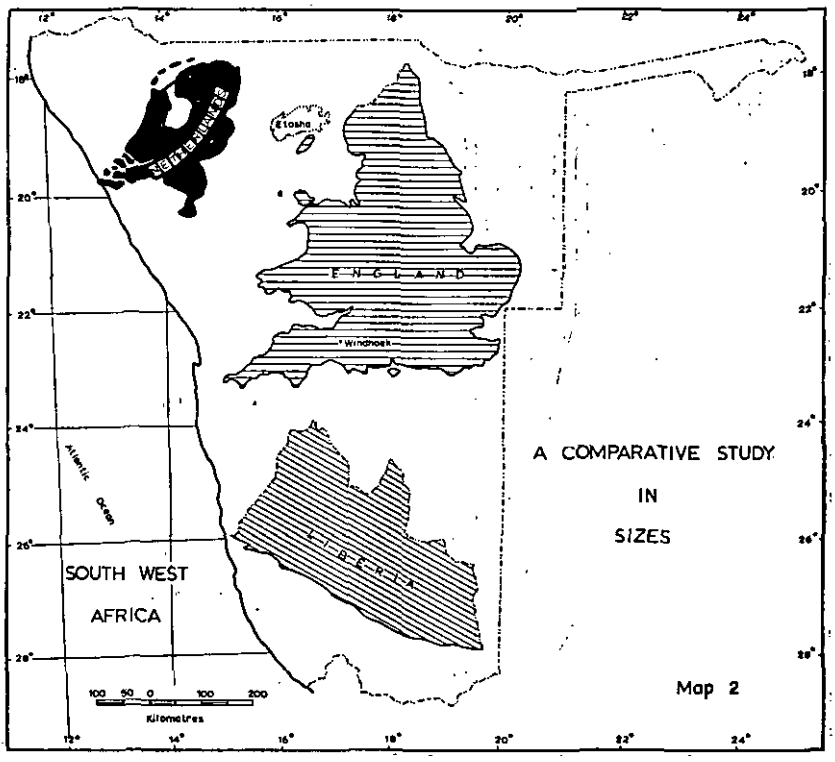
II. Borders

3. As in the case of many other territories in Africa, the land boundaries of South West Africa were originally drawn by statesmen who not only had little knowledge of local topographical and ethnic condi-

tions, but were mainly guided by considerations other than local interests and problems of administration. Thus, for instance, the northern boundary intersects the area inhabited by Ovambo tribes so that three tribes fall into Angola, north of the boundary, one tribe is cut in two, while the remainder fall into South West Africa. A similar position obtains in the case of the tribes living on the Okavango River. In such circumstances effective boundary control, e.g., to prevent the spread of human or animal diseases, becomes a virtual impossibility.



The Eastern Caprivi Zipfel presents the same problems arising from the fact that the political boundaries bear no relation to the borders of areas inhabited by particular ethnic groups. In addition its inclusion in the Territory adds to the diversity of the population by bringing portions of tribes living in Rhodesia and Bechuanaland into a political unit with the other inhabitants of South West Africa, with whom they have no ethnic or other ties at all, and from whom they are, for practical purposes, almost completely isolated geographically. This factor creates special problems of administration, which will be dealt with later.



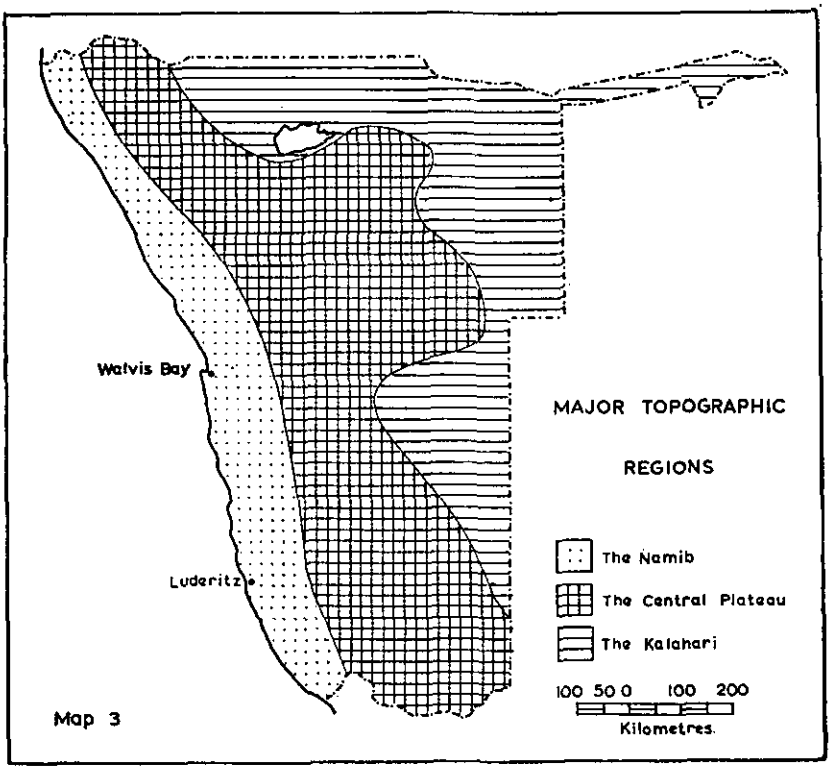
C. Area

4. South West Africa has an area of 824,269 sq. km. (318,261 sq. miles) including the area of Walvis Bay (measuring 1,124 sq. km. or 434 sq. miles) which, although part of the Republic of South Africa, is for convenience administered as part of South West Africa[1]. Map 2, above, shows the relative extent of the Territory.

The Territory is nearly four times the size of the United Kingdom and nearly seven and a half times as large as Liberia. On the other hand, it has less than half the population of Liberia [2]. While the area of South West Africa is virtually the same as that of Nigeria, the latter

[1] *Vide* British Letters Patent dated 14 Dec. 1878, in *British and Foreign State Papers 1878-1879*, Vol. LXX, pp. 495-496, for the British annexation of Walvis Bay. By *Proc.* No. 184 of 1884 (Cape of Good Hope), 7 Aug. 1884, in *The Cape of Good Hope Government Gazette*, No. 6519 (8 Aug. 1884), p. 1, it was annexed to the Colony of the Cape of Good Hope. Its administration as part of South West Africa was provided for by sec. 1 of Act No. 24 of 1922 and *Proc.* No. 145 of 1922 (S.A.), 11 Sep. 1922, in *The Laws of South West Africa 1915-1922*, p. 20 and pp. 56-57.

[2] The population of Liberia as at 1956 was given as 1,250,000 in U.N. *Demographic Yearbook 1960*, p. 99.



carries a population 60 times larger than that of South West Africa [1]. The Territory constitutes nearly 3 per cent. of the total area of Africa, while its population of approximately half a million amounts to only about 0.2 per cent. of the total population of Africa. With the exception of Bechuanaland, which adjoins the Territory, it has the lowest population density in Africa south of the Sahara [2], and one of the lowest density figures in the world [3].

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[1] The population of Nigeria as at 1959 was given as 33,663,000 in U.N. *Demographic Yearbook 1960*, p. 100.

[2] Both have population densities of less than one person per square kilometre, but the density in Bechuanaland is slightly lower than that of South West Africa—*vide* figures in U.N. *Statistical Yearbook 1962*, pp. 24-25.

[3] The only countries other than South West Africa and Bechuanaland which, according to the figures published in U.N. *Statistical Yearbook 1962*, pp. 21-39, have population densities of less than one person per square kilometre, are Libya, Mauritania, French Southern and Antarctic Territories, a small part of Spanish North Africa, Spanish Sahara, Tristan da Cunha, Greenland, French Guiana, the Falkland Islands, Mongolia, and the Svalbard and Jan Mayen Island (inhabited only during the winter season). For purposes of comparison, the following population densities in persons per square kilometre have been extracted from the same source: Liberia, 12; Ethiopia, 17; United States of America, 20; The Netherlands, 346.

From north to south the Territory measures about 1,280 km. (800 miles) and from west to east an average distance of 720 km. (350 miles), which gives it an oblong shape with nearly 80 per cent. of the population concentrated in the northern half of the Territory, that is, north of a line taken just north of Walvis Bay.

D. Topography

5. Topographically, the Territory can be divided into three separate regions, viz., the Namib, the Central Plateau and the Kalahari, as will appear from Map 3, on page 292.

6. The western marginal area between the escarpment and the coast is known as the *Namib*. It is an extremely arid and desolate desert region stretching along the entire coast-line of the Territory and rising rapidly but evenly inland. The lateral width of the area varies from 80 to 130 km. (50 to 80 miles), and it constitutes more than 15 per cent. of the total land area of South West Africa. It consists mainly of vast plains and seas of constantly moving sand, with occasional low, scattered mountains. Practically the whole population of this region, being less than 6 per cent. of the entire population of South West Africa, is concentrated in four coastal urban areas [1].

7. The *Central Plateau* is the area lying to the east of the Namib. It also stretches all the way from south to north. It varies in altitude between 1,000 and 2,000 m. (3,280 to 6,560 ft.) and in itself offers a diversified landscape of rugged mountains, rocky outcrops, sand-filled valleys and softly undulating plains. It covers slightly more than 50 per cent. of the land area of the Territory.

8. Finally, the *Kalahari* covers the eastern, north-eastern and northern areas of South West Africa. The dominant feature of this region is its thick cover of terrestrial sands and limestones. This region is often regarded as desert, but, as the rainfall of the northern Kalahari exceeds 600 mm. (24 in.), the Kalahari hardly falls into the same category as the Sahara or the Namib.

In appearance it is mainly an area of level monotonous plains covered with sand dunes, which, in contrast with those of the Namib, have been settled by vegetation. The main problem confronting present and future exploitation is not an inadequate total amount of rainfall or a sparse vegetation—indeed, the Kalahari offers considerable potential for large-stock rearing—but since the rainfall seeps away rapidly through the thick, loose sand and the underlying porous limestone, there is a near total lack of surface water, while ground water is sometimes so deep as to be economically unexploitable.

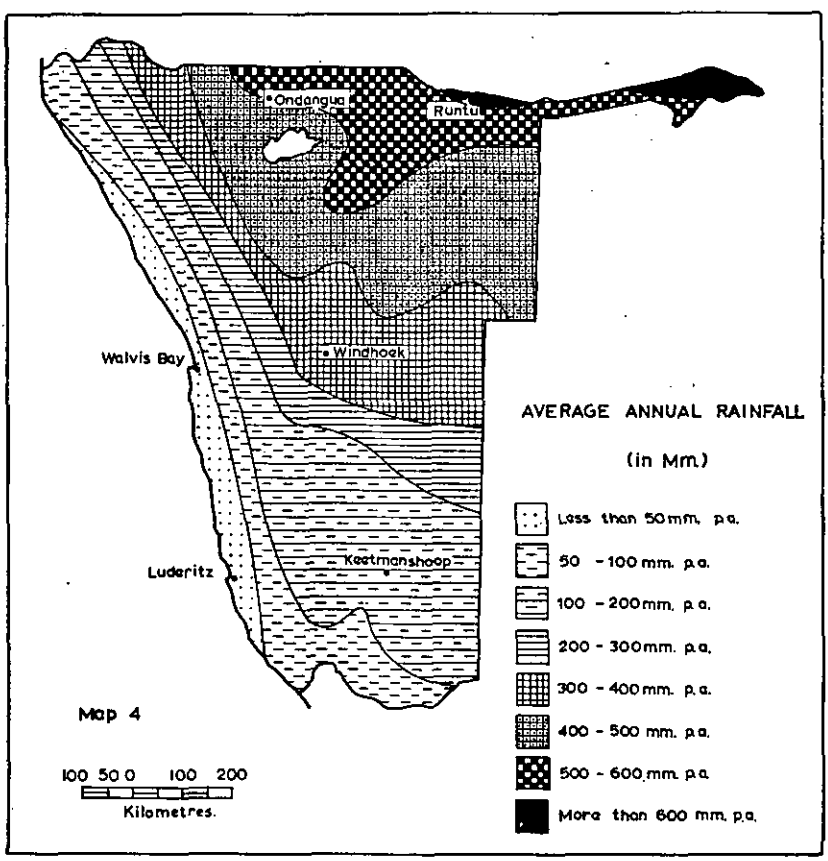
However, by way of contrast, the eastern section of the Caprivi Strip, which stretches out to the Zambesi and Linyanti (known in its higher reaches as the Kwando and the Chobe) Rivers, exhibits totally different conditions. Because of the extremely low gradients there, nearly one-quarter of the region is annually flooded during the period of peak flow. Floods also occur annually in the eastern part of Ovamboland, which is generally better watered than the rest of this area.

[1] Swakopmund, Walvis Bay, Luderitz and Oranjemund.

E. Climate

I. Introductory

9. The climate of any particular area is composed of various elements such as temperature, rainfall, prevailing winds, etc. Of these, rainfall is the most important climatic element in affecting life and economic development in the Territory, since it provides the key to agricultural potential. Respondent consequently proposes dealing separately with the rainfall of the Territory, before summarizing its various climatic regions with reference also to other climatic elements.

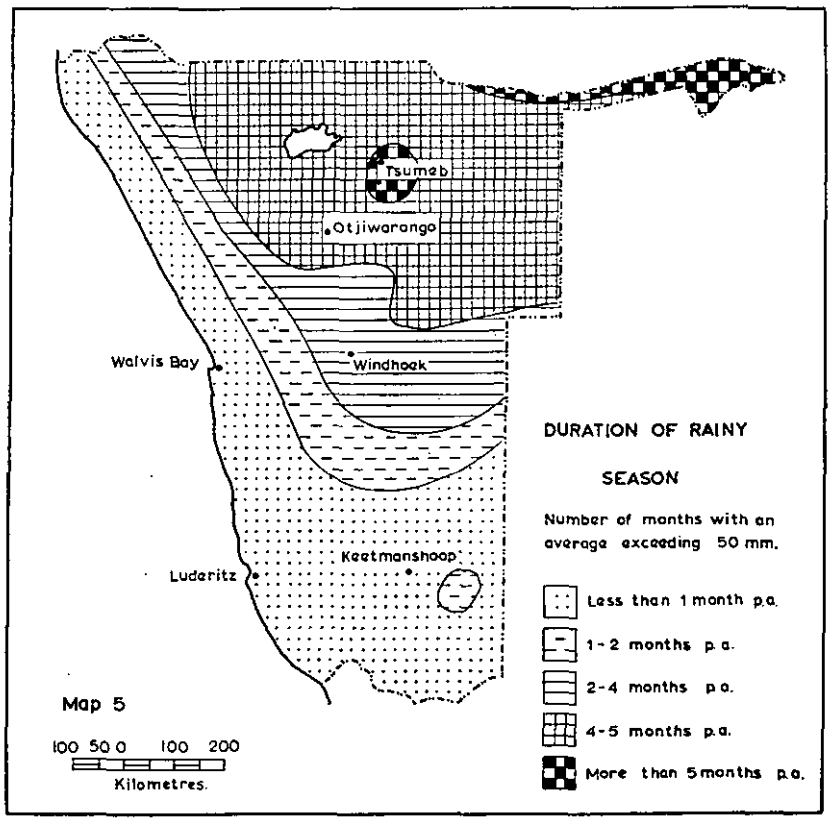


II. Rainfall

10. To assess the influence of rainfall properly, three aspects must be taken into account, namely the average annual *amount* of rainfall, its seasonal *distribution*, and its *effectiveness*.

(a) *Average Annual Rainfall*

11. The average annual rainfall appears from Map 4, on page 294. It will be seen that practically the whole of the coastal region receives an average annual rainfall of less than 50 mm. (2 in.), while the north-eastern part of the country has an average annual rainfall exceeding 400 mm. (16 in.). Thus the average annual rainfall over the Territory creates conditions varying from extreme aridity to sub-humidity. The rainfall over the plateau area improves steadily from south-west to north-east. It is only along the Okavango River in the north and in the Caprivi Zipfel that rainfall conditions—600 mm. (24 in.)—may be regarded as favourable for more intensive human occupation.



In terms of land area, only 32.1 per cent. of the Territory receives an average annual rainfall of more than 400 mm. (16 in.), which can be regarded as the absolute lower limit for dry-land agriculture in warm-temperate summer rainfall regions such as South West Africa.

(b) *Seasonal Distribution of Rainfall*

12. On the whole, South West Africa may be regarded as a summer rainfall region. Over the greater part of the interior plateau, more than

SEASONAL AND REGIONAL VARIATIONS IN RAINFALL INCIDENCE (1940-1960)

Station	*Seasons*		% *Distribution of Seasons*					*Average Annual Rainfall for Period (1940-1960)*
	No.	%	Serious droughts (0-59% of average annual rainfall)	Drought (60-74% of average annual rainfall)	Normal (75-125% of average annual rainfall)	Above average or good rainfall (126-140% of average annual rainfall)	Exceptionally good rainfall (140% of average annual rainfall)	
								(mm.)
Luderitz	28	100	61	4	10	0	25	17.4
Keetmanshoop . .	16	100	31	13	25	12	19	139.5
Windhoek . . .	20	100	10	20	45	10	15	356.4
Ondangua . . .	20	100	15	15	45	5	20	482.1
Runtu	19	100	5	0	90	0	5	603.7

70 per cent. of the annual rainfall occurs between the months of October and March—e.g., Windhoek 85.9 per cent. and Runtu 93 per cent. [1] The length of the rainy season varies in different parts of the Territory.

The northern and north-eastern areas are favoured not only by a larger annual amount of precipitation, but also by a rainy season of longer duration than the rest of the Territory. As is shown in Map 5, on page 295, if all months with an average rainfall exceeding 50 mm. are regarded as part of the rainy season, only the area to the north-east of a line corresponding roughly with the 400 mm. line on Map 4, on page 294, has a rainy season of 4 months or more. Over the central highlands the rainy season varies between two and four months and it then gradually decreases towards the south-east.

(c) *Effectiveness of Rainfall*

13. In common with other dry regions of the earth, the effectiveness of the South West African rainfall is even less than that indicated by the average annual amount. This can be attributed to two factors, viz.,

(i) high variability of rainfall, and
(ii) high evaporation.

(i) *Variability*

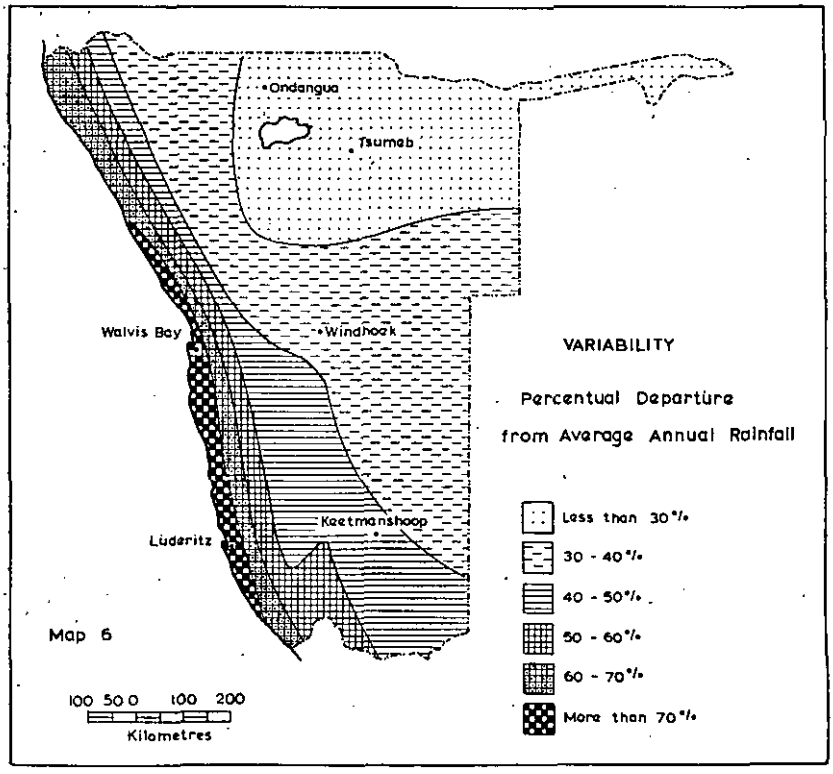
14. In South West Africa the rainfall is extremely variable from year to year, and differs from place to place so that the average can never be depended upon. Hence the Long Term Agricultural Policy Commission (1949) stated with regard to South West Africa:

> "The Territory has . . . no 'normal' rainfall as expressed by the mean annual amount of precipitation. What must be accepted in this connection is that drought and flood are normalities . . . [2]."

The table on page 296 shows that not only is there a greater tendency towards "normality" in the incidence of rainfall as one moves to areas of higher rainfall—that is, the departures from the "normal" are strikingly larger in the cases of Luderitz and Keetmanshoop (where the average rainfall is relatively low) than in Ondangua and Runtu (where the average rainfall is relatively higher)—but also that where the variations are largest they tend to be strongly on the side of sub-normality (droughts and serious droughts).

15. The regional distribution of rainfall variability is illustrated by Map 6, on page 298. Variability may be defined as the deviation from the mean annual rainfall computed from a fairly large number of years of observation, and is usually expressed as a percentage. Thus, the percentual average deviation from the average annual rainfall of rainy seasons during the period 1940 to 1960, was calculated for 27 stations well distributed over the Territory. Subsequently, lines of equal variability were drawn by means of interpolation at 10 per cent. intervals. A pattern identical to that of Map 4, on page 294, and Map 5, on page 295, emerges, namely a gradual decrease in variability from south-west to north-east. Along the coast line the variability exceeds 70 per cent. while it varies between 50 per cent. and 30 per cent. in the central part of the Territory and drops below 30 per cent. in the north-east. Hence the latter

[1] As measured over periods of 20 and 19 years respectively.
[2] *Report of the Long Term Agricultural Policy Commission* (S.W.A.), p. 8.



area has the combined advantages of a higher annual amount of rainfall, a longer rainy season and smaller variability of rainfall.

(ii) *Evaporation*

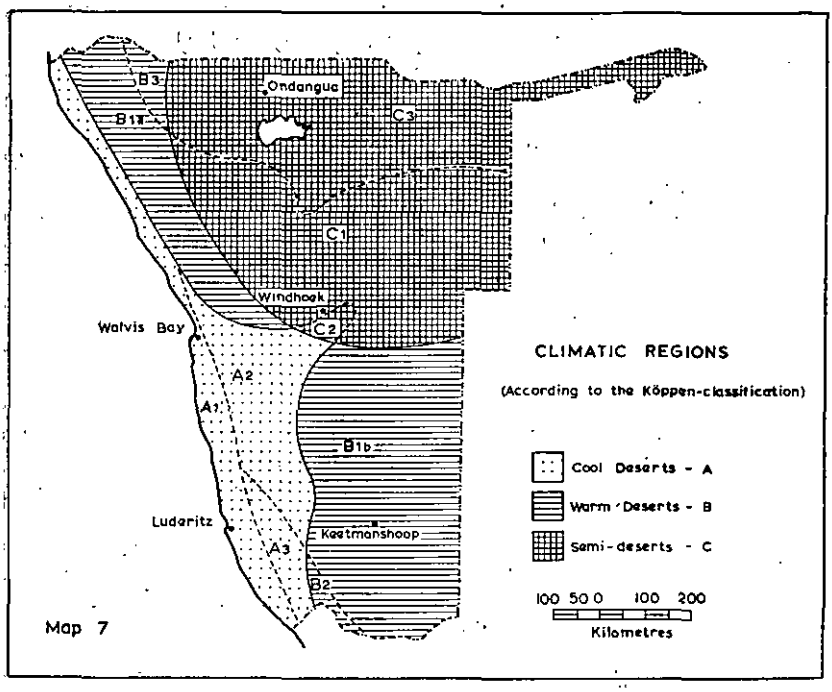
16. The effectiveness of rainfall in South West Africa, especially in the plateau areas, is further restricted by an extremely high rate of evaporation which is vastly in excess of the rainfall [1], and which is attributable to the fairly high day temperatures, the low humidity and a low air pressure owing to the high altitude.

The Territory being a summer rainfall region, the season of highest rainfall coincides with the season of maximum evaporation, with the result that dry-land cultivation is possible practically only in those areas where the annual rainfall exceeds 400 mm.

III. Climatic Regions

17. As indicated above, rainfall is the main factor distinguishing between various climatic regions in South West Africa. Taking into

[1] By "rate of evaporation" is meant the rate at which water evaporates from an open surface. As in the case of rainfall, evaporation is measured in millimetres or inches. Thus, for example, in Windhoek in January the average rainfall is 76.7 mm., whereas the average evaporation from an open surface is 270 mm.



account the various aspects relating to the rainfall mentioned above, as well as all other climatic elements, three basic climatic types may be differentiated, *viz.*,

(a) cool deserts, occupying approximately 17 per cent. of the Territory's area;

(b) warm deserts, occupying approximately 36 per cent. of the Territory's area;

(c) semi-deserts, occupying approximately 48 per cent. of the Territory's area.

These divisions, each with their subdivisions, are indicated on Map 7, above.

18. The main climatic features of each of the regions depicted on Map 7, above, are as follows [1]:

(a) *The Cool Deserts*

(i) *The Cool Littoral Desert of the Namib Coastal Region (indicated on Map 7, above, as A 1)*

This region, which comprises the whole coastal area up to 50 km. inland, is characterized by mild temperatures throughout the year, a virtual absence of rain, and frequent fog.

[1] The terms used to classify temperatures are defined as follows: *Cool:* 0°C. to 10°C.; *Mild:* 10°C. to 20°C. This class is further divided into *Cool-temperate* (10°C. to 15°C.) and *Warm-temperate* (15°C. to 20°C.); *Warm:* 20°C. to 27°C.; *Hot:* above 27°C.

(ii) *The Cool Desert of the Inner Southern Namib and the Adjacent Escarpment (indicated on Map 7, on p. 299, as A 2)*

Mild temperatures are also experienced by this region, but the rainfall is slightly higher (100-200 mm.) and the aspect less barren than in the true Namib.

(iii) *The Cool Desert of the South-Western Escarpment (indicated on Map 7, on p. 299, as A 3)*

This region has the lowest winter temperature in the Territory and at a station like Aus snow is recorded approximately once in five years. The amount of rainfall is the same as that of the previous region, but no pronounced summer maximum is registered.

(b) *The Warm Deserts.*

(i) *The Warm Desert of the Kaokoveld and the Northern Inner Namib (indicated on Map 7, on p. 299, as B 1 a)*

This area is essentially a transitional region with a meagre, unreliable summer rainfall which increases rapidly eastward. Summer temperatures are warm to hot and winter temperatures mild.

(ii) *The Warm Desert of Namaland (indicated on Map 7, on p. 299, as B 1 b)*

Namaland has warm to hot summers and cool-temperate winters with an unreliable summer rainfall ranging between 100 and 300 mm. As the rainfall is sufficient to support a sparse vegetation of small desert shrub and grass, the region can be utilized for extensive small stock farming [1].

(iii) *The Transitional Desert of the Eastern Kaokoveld (indicated on Map 7, on p. 299, as B 3)*

Temperature conditions in the Eastern Kaokoveld are subtropical, with the month of maximum temperature in the early summer. As temperatures are fairly high, the rainfall (approximately 300 mm.) is still too meagre to allow the area to be classed as semi-desert.

(iv) *The Transitional Desert of the Central Orange River Gorge (indicated on Map 7, on p. 299, as B 2)*

This region, which experiences what is probably the highest summer temperatures in the Territory, has no pronounced summer maximum rainfall, though the total amount is only slightly in excess of 50 mm.

(c) *The Semi-Deserts*

(i) *The Semi-Desert of Damaraland (indicated on Map 7, on p. 299, as C 1)*

Damaraland has warm summers and cool-temperate winters with a summer rainfall varying between 300 and 450 mm. As the rainfall reliability is higher and the duration of the rainy season longer than in the desert areas to the south, the vegetation has the character of a thorn savannah and supports extensive large stock farming.

(ii) *The Cool Semi-Desert of the Central Highlands (indicated on Map 7, on p. 299, as C 2)*

Owing to their altitude, the highlands immediately to the south and east of Windhoek experience fairly low summer temperatures, which

[1] As to the meaning of extensive stock farming, *vide* footnote to para. 31, *infra*.

lower the average annual temperature to less than the limit value of 18°C. In most other respects, the region forms a continuation of the semi-desert of Damaraland.

(iii) *The Warm North and North-Eastern Subtropical Semi-Desert (indicated on Map 7, on p. 299, as C 3)*

This region is favoured by the highest annual rainfall (500-600 mm.), the smallest variability of rainfall (less than 30 per cent.) and a rainy season of longer duration (4 to 5 months) than any other part of the Territory. Temperature conditions vary from warm to hot in early summer, when the highest temperatures are recorded, to warm-temperate in winter, while the vegetation may be described as deciduous savannah.

F. Vegetation

19. The great diversity observed in the topographic and climatic conditions is more or less paralleled by regional diversity in vegetation and soil. Thus, large areas of fairly dense vegetation are confined to the north and north-east of the Territory (the relatively favourable Semi-Desert Region). On the other hand, the areas to the west of the Escarpment are so barren or so sparsely vegetated as to preclude any form of agricultural exploitation whatsoever. In the central area the vegetation changes gradually from an arid shrub steppe in the south to an open thorn savannah with grass and scattered trees towards the north.

G. Natural Resources

I. Introductory

20. Natural resources are defined as "those aspects of man's endowment and (physical) environment upon which people are dependent for aid and support . . . [1]". Natural resources are essentially neutral material, but their assessment should be conducted in terms of their potential human utilization.

II. Water Resources

21. Agricultural and industrial development in South West Africa is seriously hampered by a severe lack of water resources. The effectiveness of the low and unreliable rainfall is diminished by the high rate of evaporation already mentioned [2]. It is estimated that more than 90 per cent. of the average annual rainfall of the Territory is lost directly by evaporation and indirectly through the transpiration of plants. Since the major part of the balance of the rainfall precipitates over the north-eastern sector of the Territory, where there is no surface drainage, it follows that only a small fraction of the total rainfall of the Territory is actually available for utilization.

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[1] James, P. E. and Jones, C. F. (eds.), *American Geography: Inventory and Prospect* (1954), p. 227.

[2] *Vide* para. 16, *supra*.

Surface Flow

22. *Inland rivers* in South West Africa are all intermittent. Since they are fed by a low and erratic rainfall, and because their beds are choked with erosional debris, there is a serious loss of surface flow through seepage. Actual flow is limited to a few short-lived streamfloods during the rainy season, leaving a dry, sandy river-bed during the rest of the year. During the highest flood of the Swakop River (which is a typical South West African inland river) recorded between 1946 and 1956, the river's flow was continuous for only 72 hours. The flood took only 4 hours to reach its maximum flow of 294 cub. m. per second [1] and discharge was practically negligible during the last 30 hours of recorded flow. The Fish River in the south is the only river with a fairly substantial number of permanent pools along its course and during good rainy seasons may have flowing water for up to 4 months of the year.

23. Attention has been given to the construction of surface storage dams in the intermittent rivers. Since the Second World War a number of storage dams for municipal use have been constructed in the south, so that five towns presently augment their water supplies from this source. In 1962 a dam was completed in the Fish River, from which eventually some 2,500 ha. are to be irrigated. However, serious difficulties are caused by the high silt content of flood water, and by the high rate of evaporation. To limit evaporation, dams are constructed as deep as possible; and for the same reason water is sometimes even purposely stored *under* a sandy silt-bed and brought to the surface again by pumping, when required for use.

24. In the Native Reserve of Ovamboland, in the northern part of the Territory, where the rainfall is normally sufficient to fulfil the requirements of the inhabitants, the recurrent periods of drought nevertheless make famine a real menace. To combat this problem the Administration had prior to 1960 caused nearly 100 dams of different types and sizes to be constructed. Owing to the low gradient and the lithological nature of the area [2] most of these dams had to be excavated in the shallow water channels, where they are filled during the period of flood. However, there is a limit to the depth to which such dams can be excavated, because of the presence of a high table of underground water which is unsuitable for human or animal consumption by reason of its mineral content. When larger dams are required, the excavations are enclosed by circular earthen embankments into which the water is pumped. The largest dam of this type in Ovamboland is larger than most of the municipal storage dams in the Territory.

25. The only *perennial rivers* to be found in South West Africa are exotic and, except for small sections, constitute part of the Territory's boundaries. In the south the Orange River flows in a 1,000 m. gorge, and offers only limited potential for irrigational development. According to the boundary delineation of the Treaty between Germany and Great Britain in 1890, the southern boundary of the Territory follows the northern bank of the Orange River, so that South West Africa has no

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[1] 1 cub. m. per second equals 35.2 cusecs (cubic feet per second) or 792,000 gallons per hour.

[2] The surface material in Ovamboland is sandy and porous to great depths, thus precluding ordinary dam construction which needs a firm bedrock.

legal claim to water from the river. Respondent has, however, accorded the same privileges to riparian owners on the northern side of the river as those being held by the riparian owners in the Republic itself [1]. Some small-scale irrigation is accordingly taking place on the South West African side of the river, while the Orange River water is also being utilized for diamond mining at the Oranjemund settlement within the Territory.

Along the northern boundary of the Territory, two perennial rivers, the Kunene and the Okavango, offer the most reliable and accessible water supplies in South West Africa, but there are a number of obstacles still to be overcome before the water of these rivers can be utilized for irrigation by the Native peoples living in their vicinity. Thus, in the case of the Kunene, owing to the low gradient and brackish soils in Ovambo-land, irrigation will have to proceed with caution and the most suitable crops and farming practices will have to be determined by experimentation. Furthermore, as a result of the rugged and inhospitable gorge along which the river descends to the sea, utilization of its water, whether for irrigation purposes or for the generation of electric power, will require detailed scientific surveys as well as considerable capital and skill.

The Okavango seems to offer better potentialities for irrigation than the Kunene. It has been determined that from the best potential dam site in the Okavango some 50,000 to 60,000 ha. could be irrigated. In this case problems concern the arousing of sufficient interest on the part of the inhabitants of the Okavango area, and the fitting of an irrigation scheme into planned and co-ordinated development—matters to be dealt with in appropriate parts of this Counter-Memorial.

The Linyanti and Zambesi Rivers are of importance only for the eastern tip of the Caprivi Zipfel, where difficulties are occasioned by the swampy character of the area, the presence of tsetse fly, and the lack of suitable dam sites.

Underground Water

26. Underground water comes to the surface at springs and fountains in some places in South West Africa, and many of the towns and Native settlements developed around the sites of perennial fountains. In addition, seepage water in river beds is utilized in some places for domestic purposes and even for small-scale irrigation.

For the most part, however, underground water cannot be tapped without making use of boreholes. In the central and extreme southern parts of the Territory, ground water is not stored readily and drilling is often discouraging. Towards the east conditions are more favourable, some boreholes yielding up to 30,000 cub. m. per day, but further on eastwards the depth of the boreholes increases to approximately 300 m., which, together with a corresponding decline in the quality of the water, make exploitation costs almost prohibitive.

Conclusion

27. From the foregoing it is apparent that the only considerable water potential is confined to the areas in the north and north-east of the Territory. The scarcity of water resources in the remainder of the

[1] *Vide* Act No. 54 of 1956, sec. 174, in *Statutes of the Union of South Africa 1956*, Part II, Nos. 48-73, p. 1301.

Territory is a serious impediment to substantial industrial development, and tends to restrict agricultural activity in the major part of the Territory to livestock farming.

III. Land Resources

28. The land resources of any country depend basically on its climate, vegetation and soils. As some of these aspects were discussed earlier, the exposition given here is largely an assessment of their significance with respect to agricultural development in South West Africa.

The three major primary industries based on land resources are cropping, stock farming and timber exploitation, and the Territory's potentialities in respect of each will be discussed in turn.

(a) *Cropping*

29. As a result of the low and erratic rainfall, normal dry-land cropping [1] may be practised over only 1.1 per cent. of the Territory's area; possibilities for marginal and sub-marginal dry-land cropping [2] exist over 10 per cent. and 21 per cent. of the area respectively, leaving 67.9 per cent. of the country in which dry-land cropping is precluded [3]. Irrigation potential is best in the north-eastern areas, which are already better off than the rest of the Territory in respect of rainfall; but these favourable conditions are to a certain extent off-set by the low fertility of the Kalahari sands. Over the rest of the Territory too the soil is at best only of moderate fertility. Since South West Africa is situated in the transitional belt between the tropics and the temperate regions, temperature conditions are not really favourable for either tropical or temperate crops.

(b) *Stock Farming*

30. Stock farming is the predominant type of land use in the Territory. Environmental factors such as vegetation and water supplies lead to a zonal distribution of stock farming in the Territory—small stock in the arid southern areas, mixed small and large stock in the central areas, and large stock in the better watered northern and north-eastern areas. These features cast an interesting light on some aspects of the pre-colonial history of some of the major population groups, viz., the Nama, the Herero, the Ovambo and the Okavango tribes: the agricultural Ovambo and Okavango occupied the sub-tropical north; the Nama, mainly interested in small stock, roamed over the arid steppes of the south and also made use of the mixed grazing offered by the thorn savanahs of the central areas; whereas the cattle-rearing Herero invaded the same savannahs from the north and became engaged in almost continuous warfare with the Nama [4].

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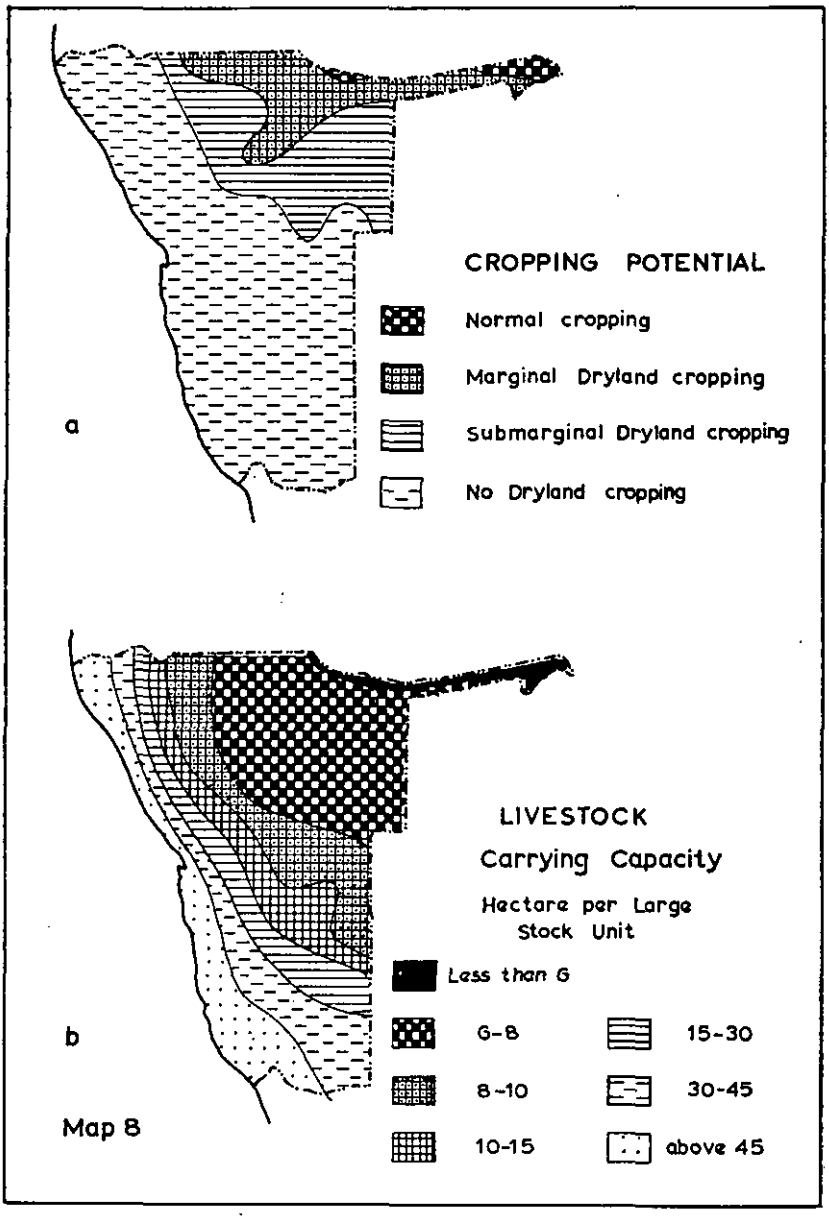
[1] *Dry-land cropping* is said to be normal when crop yields are fairly stable, the yearly variation in yield relatively small and *total* crop failures virtually unknown.

[2] *Marginal dry-land cropping:* On account of a higher rainfall variability, crop yields are not only smaller in quantity than in the case of normal dry-land cropping, but also liable to violent fluctuations. Total crop failures occur from time to time.

Sub-marginal dry-land cropping: Both the amount and the reliability of precipitation are smaller than in the case of marginal dry-land cropping. Dry years do not only result in crop failures, but preclude the possibility of cropping altogether.

[3] *Vide* Map 8 a, on p. 305.

[4] *Vide* Chaps. II and III, *infra*.


a
CROPPING POTENTIAL
Normal cropping
Marginal Dryland cropping
Submarginal Dryland cropping
No Dryland cropping
b
LIVESTOCK
Carrying Capacity
Hectare per Large Stock Unit
Less than 6
6-8
8-10
10-15
15-30
30-45
above 45
Map 8

31. The grazing areas in the Territory have an extremely low carrying capacity as can be seen from Map 8 b, on page 305 [1]. The southern areas support only one large-stock unit or six small-stock units on an area of 30 to 45 ha.; in the central area the carrying capacity is approximately one large-stock unit to 10 ha.; while to the north the carrying capacity increases to one large-stock unit per 8 ha. and probably one large-stock unit per 6 ha. along the Okavango, Linyanti and Zambesi Rivers. The low carrying capacity of the grazing is due chiefly to the sparseness of the vegetation as a result of the low rainfall. Because the quality of natural grazing in summer rainfall areas decreases with maturity, farmers experience great difficulty in providing adequate grazing for their stock in the spring and early summer months just before the advent of the rainy season. Moreover, grazing in the Territory generally suffers from a deficiency in phosphorus, and supplementary feeding is consequently necessary.

(c) *Timber Exploitation*

32. The woodland vegetation of the north-eastern portion of the Territory contains some species of trees that could be exploited commercially. It is estimated that the area of exploitable woodland is 20,000 sq. km. in the Ovamboland and Okavango Native Reserves, 10,000 sq. km. in the unoccupied state land in the Grootfontein district, and 5,000 sq. km. in the Eastern Caprivi Zipfel. Fire belts have had to be cut to divide the forest areas into smaller units and thus to protect them against fires, especially those lit by Bushmen in pursuit of game—a frequent occurrence, e.g., in the Okavango. At present timber is being supplied to the Tsumeb Mine, and two small saw mills are in operation near Grootfontein, but exploitation is hampered by the absence of adequate transport facilities in the uninhabited parts of the north-east and the variety of species of timber occurring in these parts, which necessitates selective exploitation and results in higher costs of labour and transportation.

(d) *Conclusion*

33. In Map 9, on page 307, the land resources of the Territory are depicted regionally in terms of areas of relatively similar agricultural land use and potential—so-called agricultural regions. The potential of each of these regions [2] in respect of dry-land cropping, irrigation, stock farming and timber exploitation is set out in the table on page 308.

In view of the facts set out in the previous paragraphs, it is not surprising that the greater part of the population of South West Africa is to be found in the northern and north-eastern parts of the Territory, i.e., in the Ovamboland, Okavango and Eastern Caprivi Reserves. This

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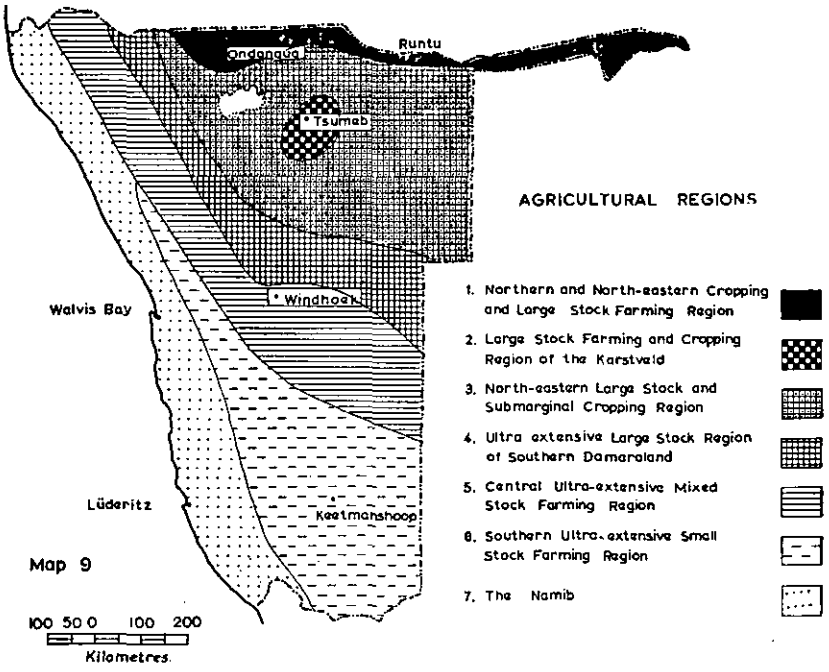
[1] The following limit values are applied in describing the potential intensiveness of pastoral land-use in Southern Africa (*vide* Wellington, J. H., "A Tentative Land Classification of Southern Africa", in *The South African Geographical Journal*, Vol. XXXV (1953), p. 17):

Intensive: One large-stock unit to 2 ha. or less.
Semi-intensive: One large-stock unit to 2-4 ha.
Extensive: One large-stock unit to 4-8 ha.
Ultra-extensive: One large-stock unit to 8 ha. or more.
One large stock unit equals 1 cattle unit or 5 sheep or goat units.

[2] Having regard to the climatic features, soil fertility, availability of water for irrigation and other relevant factors referred to above.



is, however, an aspect which will be dealt with more fully in later parts of this Counter-Memorial.

IV. Mineral Resources

34. South West Africa has a great variety of mineral deposits but only a few have proved of real economic importance. There are concentrated occurrences of diamonds, lead/zinc, copper and salt deposits; for the rest the Territory's mineral resources are characterized by rich samples from small quantities widely dispersed over the country.

35. Diamonds are found in the southern Namib area of South West Africa. The diamond mining at Oranjemund is by far the most profitable of all mining ventures in the Territory. Although the prospects for the immediate future are good, diamonds are a dwindling resource. The remaining life expectancy of the Oranjemund fields at present rates of exploitation is put at no more than a few decades. At present dredging for diamonds is taking place off the coast of the Territory, but this type of mining is still in its infancy and it is difficult to say with any certainty what its prospects are. Large-scale mining also takes place at Tsumeb, where various base metals such as lead, copper and zinc are mined. The Oranjemund and Tsumeb mines together account for about 96 per cent. in value of the Territory's total mineral output.

36. Apart from the two instances mentioned, mineral occurrences in South West Africa are generally of insufficient size to warrant large-

THE AGRICULTURAL POTENTIAL OF SOUTH WEST AFRICA

Region	*Dry-land cropping*	*Irrigation*	*Stock farming*	*Timber*
1	Normal to marginal; soil fertility low to moderate	Good	Large stock, extensive	Extensively exploitable
2	Marginal; soil fertility moderate	None	Large stock, extensive	Some exploitation possible
3	Submarginal; soil fertility low	None	Large stock, extensive	Extensively exploitable
4	None	Extremely limited	Large stock, ultra-extensive	Negligible
5	None	Extremely limited	Large stock, and small stock ultra-extensive	None
6	None	Limited	Small stock; ultra-extensive to marginal	None
7	None	Extremely limited	Marginal small stock farming in the better parts	None

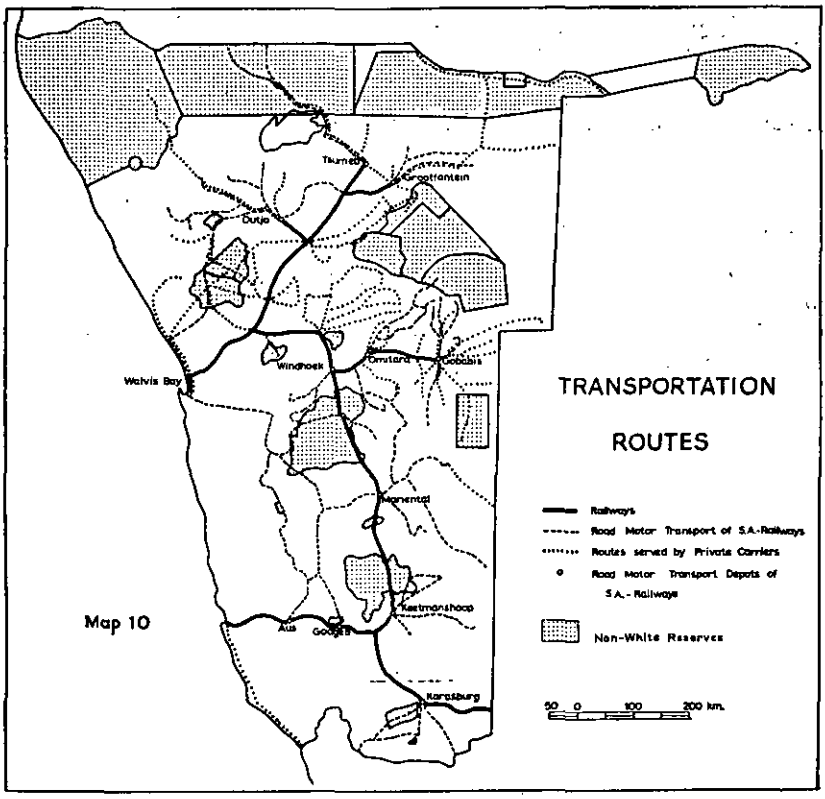
scale mining operations. There are a number of small-scale mines in the Territory producing tin, tungsten, copper, etc. On the coast, salt is produced by the evaporation of sea-water.

37. As far as mineral fuels are concerned, the known coal deposits in the Territory are not worth exploiting, whereas prospecting for petroleum, especially in the northern parts of the Territory, is still in progress.

38. Deposits of iron ore are to be found at various places in the Territory, but the iron content is generally too low to warrant exploitation. The only really good iron ores occur in a locality where transport difficulties have up to the present not made them an economic proposition, while the absence of known deposits of workable quantities of coal reduces their potential in a local iron and steel industry.

V. Marine Resources

39. In the period after the Second World War South West Africa has emerged as a considerable fish-producing Territory, due to the presence and exploitation of a teeming marine life along the otherwise barren and inhospitable coast. This marine asset is shared by Angola and the Republic of South Africa along the south-western coast of Africa, and



calls for close co-operation in research and conservation measures. The marine fishing resources support a pilchard and crawfish industry.

40. Inland fish resources occur only in the extreme northern and north-eastern parts of the Territory in perennial rivers and swamps. Although these resources are not exploited commercially to any considerable degree, they constitute an important part of the food supply of the local inhabitants.

H. Transportation

41. Since South West Africa possesses no navigable rivers or other natural means of transport, transportation within the Territory is normally effected by road or railway. The main transportation routes are indicated on Map 10, above. In view of the vastness of the Territory and its low population density, the cost of transportation is high and tends to be a limiting factor for both agriculture and industry.

42. The only natural harbour along the coastline is at Walvis Bay, which forms a part of the Republic of South Africa, and which is far from the more densely populated parts of the Territory. Overland

transport from the major production and marketing centres in the Republic of South Africa (whence the greater part of the imports to South West Africa is derived) is also rendered expensive by the long distance involved. Thus, for example, the distance from Windhoek to Johannesburg is more than 2,080 km. (1,292 miles) [1].

I. Conclusion

43. In the preceding paragraphs of this Chapter, the natural potentialities of South West Africa, and the problems involved in any attempt to realize them, have been very briefly sketched. The further factor on which the development of the Territory up to the present has depended, and which holds the key to its future progress, namely its people, will form the subject-matter of the succeeding two Chapters.

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[1] Comparable distances are: From *Rome* to Paris 1,102 km. or 685 miles; to London 1,563 km. or 971 miles; to Oslo 2,005 km. or 1,246 miles; to Moscow 2,386 km. or 1,483 miles.

CHAPTER II

POPULATION GROUPS OF SOUTH WEST AFRICA

A. Introductory

1. The population of South West Africa is today, and has been for centuries, a heterogeneous one. When Respondent assumed the Mandate in 1920, the Territory was occupied by at least nine major population groups differing widely as to appearance, ethnic stock, territories of origin, culture, language and general level of development. Some, like the Bushmen, lived a primitive nomadic life, existing from the proceeds of the hunt and the wild produce of the veld. Others, like the Ovambo, were agriculturalists, leading a settled existence in organized communities. Still others, like the Herero and the Nama, were traditionally pastoralists, following their herds wherever suitable grazing could be found, but had largely been crushed and impoverished by continual wars before Respondent assumed control of the Territory. It is impossible to understand and evaluate properly the nature and magnitude of the task undertaken by Respondent in accepting the Mandate, and the methods applied in performing this task, without having regard to the background and prior history of these various population groups. This topic will be considered in this and the following Chapter of the Counter-Memorial.

2. The main population groups found by Respondent in South West Africa were (in the order in which it is proposed to discuss them below) the following:

(i) the Eastern Caprivi Peoples;
(ii) the Okavango Peoples;
(iii) the Ovambo;
(iv) the Bushmen;
(v) the Dama (also known as Bergdama or Bergdamara or Damara of the Hills or Klipkaffir);
(vi) the Nama (also known as Khoi or Hottentots);
(vii) the Herero (also known as Cattle Damara, or Damara of the Plains);
(viii) the Rehoboth Basters;
(ix) the European or White population group (mainly of German and South African origin, including German officials and soldiers) [1].

Some of these groups have up to the present lived in their own areas in the northern and north-eastern parts of South West Africa, geo-

[1] In addition there were certain minor groups such as the Himba and the Tjimba of the Kaokoveld (who are herein dealt with as a part of the Herero nation—*vide* paras. 81-82, *infra*) and some Tswana and Xhosa, who at present amount to only approximately 0.61 per cent. of the population of the Territory and who are for that reason not specially dealt with. The Coloured People (apart from the Rehoboth Basters) are also not considered to have been of sufficient significance, historically or numerically, in 1920 (whatever the position may be today) to warrant their classification as a major population group as at that stage.

graphically isolated from one another and from the inhabitants of the central and southern parts of the Territory, and remote from the main stream of South West African history. In this category one finds the tribes of the Eastern Caprivi Strip, the Okavango, and, to a lesser extent, Ovamboland. It will be convenient, therefore, to consider each of these three groups separately before dealing with the other groups which had, prior to Respondent's assumption of control, come into closer, and often violent, contact with one another.

The history of the remaining groups, i.e., the Bushmen, Bergdama, Nama, Herero, Basters and Europeans, is one of interaction and frequent conflict with one another. The Bushmen and Dama did not, however, as groups influence this history to any extent—for the most part their role was played by individuals and consisted of submitting to, or attempting to escape, suppression by others. They also may, therefore, be considered separately, although, in the case of the Dama, brief reference will have to be made to general historical events in the nineteenth century and early part of the twentieth century.

As from the first part of the nineteenth century, the history of the Nama and the Herero is intertwined to such an extent with each other, and later also with that of the White man in South West Africa, that completely separate treatment of each group is impossible. The same applies to the Rehoboth Basters, who only appeared on the scene in South West Africa towards the latter part of the nineteenth century. In regard to these groups, a separate discussion of each will be given, including its history up to the beginning of the nineteenth century. Thereafter the history of these groups forms a part of the general history of southern and central South West Africa, and will be dealt with as such in Chapter III, which will also contain a short summary of the position of each of the population groups in the years immediately preceding the assumption of the Mandate by Respondent.

3. It may be mentioned that some of the information contained in the following paragraphs has derived from officials and ethnologists who have either worked with, or studied the various groups often for the purposes of unpublished theses or lectures. It will therefore not be possible to cite published works in support of all aspects of the information concerned. Should any of these facts be disputed, or should any member of the Court wish any aspect to be amplified or illustrated by oral testimony, Respondent would at the hearing willingly provide experts for that purpose.

B. The Eastern Caprivi Peoples

I. Composition of the Population

4. The peoples of the Eastern Caprivi Zipfel [1] (often referred to simply as the Caprivi, or the Caprivi Strip) are of Bantu stock, but are not ethnically related to any of the other Bantu clusters found in South West Africa, i.e., the Ovambo and the Okavango peoples [2], or the Herero.

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[1] As to the origin and meaning of the name "Caprivi Zipfel", *vide* footnote to para. 6, *infra*.

[2] Save that the Mbukushu of the Okavango (*vide* para. 22, *infra*) are related to the small number of Mbukushu found in the Caprivi.

The main population groups in the Caprivi are the Masubia and Mafue. Together they constitute almost 88 per cent. of the total population. Small numbers of the Mayeyi, Matotela, Mashi and Mbukushu tribes make up the rest of the population. These small segments have in course of time become incorporated in the Mafue group, to whose chief they bear allegiance.

II. Origin and History [1]

5. The peoples of the Eastern Caprivi were, prior to the coming of the White man, geographically, politically and historically cut off from the rest of South West Africa. Their history was bound up with that of the surrounding territories, Barotseland and Bechuanaland. In the early part of the last century, the area surrounding and including the Caprivi, was overrun by the Kololo [2], a Sotho tribe, under the leadership of one Sebitwana. After his death, the power of the Kololo waned, and eventually the Lozi (or Rotse—the inhabitants of Barotseland) overthrew their conquerors (after a total rule of about 40 years) and themselves became the dominant tribe in the area. Their rule over the tribes in the Caprivi came to an end when Germany effectively took over its control, which, as is shown hereunder, occurred only in the beginning of the present century.

6. In an agreement of 1 July 1890 the British Government recognized that the territory thereafter known as the Caprivi Zipfel [3] would thenceforth fall within the German sphere of influence. The purpose of the agreement was to provide access from South West Africa to the Zambesi by a strip not less than 20 English miles in width at any point. The German administration in South West Africa, however, made no immediate attempt to exercise control over the area. In the result it became a sort of no man's land, and is said to have been the happy hunting ground of poachers and ne'er-do-wells. Several German exploratory trips were undertaken and all reports referred to the unrestricted slaughter of game, including elephants, rhinos, etc., by numbers of European poachers.

7. In 1908 the German Government at Windhoek decided to initiate some form of administration in the Caprivi Strip. *Hauptmann* Streitwolf was sent with a small force, including a sergeant of police and a medical orderly, to be the first Imperial Resident. After a trying journey from South West Africa, he reached a spot on the Zambesi across the river from the British station at Sesheke, where he established his headquarters and which he named Schuckmannsburg in honour of the then Governor of South West Africa.

8. On the arrival of the Germans, the Lozi inhabitants of the area crossed the Zambesi and joined their fellows in Northern Rhodesia, taking with them a number of the Masubia (whom they considered their serfs) as well as their own cattle and that of the Masubia. After

[1] The material for this section is derived largely from the *Report on the Administration of the Eastern Caprivi Zipfel*, 1940 (unpublished).

[2] Andersson, C. J., *The Okavango River:* A Narrative of Travel, Exploration and Adventure (1861), p. 194.

[3] After Count von Caprivi, the German Chancellor at the time. The word "Zipfel" is descriptive and means "tip" or "point".

long negotiation, and with the assistance of the British authorities, the Lozi were prevailed upon to return the cattle belonging to the Masubia, as well as the members of the Masubia tribe taken by them. The Lozi themselves, however, were not prepared to return.

9. In May 1909, Streitwolf, after an extensive tour, estimated the total population of the Caprivi to be about 9,000, composed of some 5,000 members of the Masubia tribe, and some 4,000 of the Mafue and Mayeyi tribes [1].

10. Towards the end of January 1910 Streitwolf returned to South West Africa (travelling this time via Cape Town) to report to the Governor at Windhoek. German control, however, continued to be exercised from Schuckmannsburg until 1914.

11. During the period of German control the various tribes or remnants of tribes were consolidated into two units, the Masubia and the Mafue, the latter also incorporating the Mayeyi, the Mbukushu, and other smaller fragments. The Masubia occupied the eastern part of the Caprivi, and the Mafue proper and the Mashi inhabited the interior up to and along the Chobe River. The Mayeyi were settled on the north bank of the Linyanti opposite Bechuanaland [2]. The German administration of these tribal units was largely of an indirect nature, i.e., it was carried out by making use as far as possible of the traditional tribal authorities.

12. In 1914, after the outbreak of the First World War, a Rhodesian force collected at Sesheke, formally invested Schuckmannsburg, and took over control of the Caprivi [3]. During the period of the War, administration of the Caprivi was undertaken by the Bechuanaland authorities. Upon the grant of the Mandate, the Caprivi, together with the rest of South West Africa, fell under the control of the South African Government. Its further history is a matter which, in so far as it may be relevant, falls to be considered in later parts of this Counter-Memorial.

III. Social and Political Organization

13. The social system of the Eastern Caprivi peoples was based largely on the principle of patrilineal descent, i.e., children belonged to the social group of their father. This manifested itself, *inter alia*, in the custom of *lobola*, which is common among patrilineal Bantu. This custom required a man or his family to hand over cattle to the father of the woman whom he wished to acquire as wife. Payment of the *lobola* gave the man full legal rights over his children. Polygamy was practised.

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[1] The 1960 census (unpublished) gives the population figure for the Caprivi as 15,840, of which the Masubia is estimated to constitute 40 per cent. and the Mafue (with the smaller groups) the balance. In the introductory note to the report on the 1921 census in South West Africa, the population in the Zipfel was given as 4,249, apparently an under-estimate; *vide Report on The Census of the Population Taken on the 3rd May, 1921 and The Census of Agriculture 30th April, 1921* (S.W.A.), p. vi.

[2] It must be noted that the distribution of the population is considered here with reference to the Caprivi Zipfel only. Segments of the same tribes were, and still are, also found in surrounding areas such as Northern Rhodesia and Bechuanaland.

[3] This was actually the first Allied occupation of enemy territory in the 1914-1918 War.

The Eastern Caprivi people generally lived in small villages. A village sometimes had as many as 30 or more habitations, but it was often much smaller. The senior man of each village acted as village headman and had certain local powers, as will be indicated hereafter. People not related to the village head could join the village with his permission.

14. The inhabitants of the Eastern Caprivi were, as indicated above, really only portions of tribes forming part of a kingdom which existed during the greater part of the nineteenth century under alternate Kololo and Lozi domination. They were, at the time when the Mandate came into operation, ruled by two supposedly hereditary chiefs whose authority was, however, none too strong. Many of the people still looked upon the Lozi court as the most important governing body in tribal matters, and constantly sought contact with their kith and kin across the river. One of the chiefs was at the head of the Mafue, Mayeyi and Mbukushu sections, and the other of the Masubia section. Both chiefs followed the Lozi system of tribal government.

According to this system the chief was looked upon as head of his people, the preserver of peace and good order, and the protector of those in need. He was advised and assisted by a *Ngambela*, who functioned as a sort of "prime minister", and by counsellor-headmen. The chief, the *Ngambela* and such headmen constituted a council known as the *Kuta*.

The *Ngambela* was appointed by the chief from nominations received from the people in general assembly. Next to the chief, he was the principal figure in the management of affairs. All matters of State were first referred to him, and he could, after consultation with the counsellor-headmen, dispose of minor matters himself.

Each counsellor-headman represented a particular area. In the event of vacancies of headmen in the *Kuta*, new members were nominated by the chief in agreement with serving members, and the people were informed thereof at a public meeting. New tribal laws were made by the chief and other members of the *Kuta*, and all laws so made were announced at tribal gatherings.

15. For the purposes of local administration, the territory under the chief's jurisdiction was divided into wards. Each ward had its own headman, who was elected by the residents of the ward in conjunction with the *Kuta* member representing that area. The selection of a headman had to be confirmed by the Chief-in-Council, from whom the headman also received instructions as to the duties he had to perform. In addition, village headmen performed minor administrative and judicial functions under the general control of ward headmen.

IV. Language

16. Each of the five tribes had its own vernacular but all the people also knew, and spoke, Silozi or, as it is also called, Sikololo (the language of their erstwhile rulers, the Lozi). Silozi was therefore the common medium of communication, and in fact it still is. It later also became the language of the schools. It is a Bantu language, but quite different from the other Bantu languages spoken in South West Africa.

V. Religion

17. The Caprivi peoples have their own traditional religion. They believe in a supreme being, or deity, who decrees and supervises the fortunes of man in a remote way.

A form of ritual whereby the intercession of the spirits of departed ancestors is sought, is commonly practised. When the help of the ancestors is needed, a ceremonial feast is held, and the *Ngombodi* (a person who is believed to be in communion with the ancestral spirits) is summoned. A beast, black in colour, is slaughtered, and while its blood (or beer, or both) is poured over a rough framework or platform specially constructed for the occasion, the *Ngombodi* speaks to and implores the aid of the departed spirits. The ceremony concludes when women pour water over the *Ngombodi*, and then run away.

No missionaries settled in the Eastern Caprivi prior to 1920 (the year in which the Mandate was granted to Respondent).

VI. Economy

18. The Eastern Caprivi peoples were, by tradition, primitive agriculturalists and stock farmers, with the general material culture normally pertaining to such people. They added to their food supply by hunting, fishing, and collecting wild fruits. Their houses were usually made of material obtained in the immediate neighbourhood, mostly reed and thatch.

19. Land was normally used on a communal basis. When it was sought to establish a village, the chief's permission was first obtained. Thereafter, the *Kuta* member who had jurisdiction over the area, demarcated a stretch of land for the use of the village. The village headman then divided up the area so demarcated amongst the villagers. The individual to whom land was allotted, made no payment in respect thereof, and he retained the right to use it for his lifetime. It could, however, be taken away from him if he repeatedly flouted the authority of the chief, or otherwise seriously misbehaved.

20. Since there was no individual ownership of land, there was also no inheritance of land, but land once allocated to a village remained in the possession of its inhabitants. When a man died, his close relatives divided his movable property, or so much thereof as they considered equitable, among his children. The deceased's eldest son was then required to give whatever was not so distributed to his paternal uncles. When a woman died, her relatives distributed her possessions. The surviving husband did not inherit from his deceased wife.

21. The Eastern Caprivi tribes, as found by Respondent, still lived in the same way as their ancestors had for centuries. As late as 1938, for example, it was found necessary to depose a chief for refusing to stop practising witchcraft [1]. The people were content to produce only sufficient for their subsistence, and most of the work was done by the women-folk.

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[1] *U.G.* 20—1939, para. 420, p. 57.

C. The Okavango Peoples

I. Composition of the Population

22. There are five mutually independent tribes in the Okavango territory, viz., the Kuangari (or Kwangali), Djiriku, Bunja, Mbukushu and Sambiu. They are negroid, Bantu-speaking peoples. Like the Ovambo, these peoples differ completely in their way of life from the pastoral Herero, who are also of Bantu stock.

The size of the Okavango population in pre-Mandate days is not known. An estimate of 24,249, given in Respondent's Annual Report to the Council of the League of Nations on the Administration of South West Africa, 1921 [1], included the Natives in the Eastern Caprivi Zipfel [2].

The 1951 census showed the Okavango population to be 21,873, and the 1960 census, 27,871. The tribal percentages at the present time are estimated to be as follows: Kuangari 26.50; Bunja 18; Sambiu 17; Djiriku 20; Mbukushu 18.50.

II. Origin and History

23. In the early days of South West Africa, the larger part of each of the tribes lived on the north bank of the Okavango River (i.e., in Angola), while the smaller part of each lived on the south bank. There is evidence that this was still the position in 1859 [3]. It would therefore appear that the tribes in the Okavango territory must have established themselves in the areas now occupied by them in the course of the last hundred years.

Although the Okavango territory stretches a considerable distance away from the Okavango River and into the interior of the desert-like Omaheke-veld, most of the inhabitants of the territory are distributed along a narrow stretch of country on the south bank of the river, from Kuring-Kuru in the north to Bagani in the south.

Each one of the five tribes has its own defined tribal area. In some cases these areas are separated from each other by an uninhabited stretch of land.

24. Until fairly recently there was virtually no contact between the people of the Okavango and the groups to the south. This was due to the Okavango territory's virtual geographic isolation from the south by arid uninhabited stretches of country—a factor which probably also saved the Okavango people from the armed struggles which marked the history of the southern groups during the nineteenth century. At one time the Tswana from Ngamiland in northern Bechuanaland used to come on regular cattle-raiding expeditions [4], and it is also known that the Kuangari were sometimes subjected to raids by the Kuanyama of Ovamboland, but otherwise the Okavango people's main contact with the "outside world" was with the related tribes of Angola.

[1] *U.G.* 32—1922, p. 12.

[2] For the population figures of the Caprivi, *vide* para. 9, *supra*, and the footnote thereto.

[3] *Vide* Andersson, C. J., *The Okavango River*: A Narrative of Travel, Exploration, and Adventure (1861), pp. 146, 184, 190.

[4] Andersson, C. J., *op. cit.*, p. 194.

This secluded existence continued during the German regime. A military post was established on the Okavango River, but otherwise the territory was not brought under German administration. The first real attempt to bring European influence to bear on the territory was in 1910, when a Roman Catholic mission station was established at Diriko.

25. When the Okavango people settled in their present territory, they came across a group of Bushmen, now called the Mbarakwengo, along the river; and further inland, throughout the Omaheke, lived the nomadic !Khung Bushmen. Although the Okavango people employed the Bushmen as servants and cattle herds, they did not accept them as part of their society, and always looked upon them as people of inferior status [1].

III. Social and Political Organization

26. The basis of the social structure was the principle of matrilineal descent, *i.e., children belonged to the social group of their mother.* Specific patterns of behaviour towards individuals in the group of matrilineal kinfolk were determined by the system of kinship. Thus a very strong relationship existed between a man, his sisters and their children, and this relationship formed the basis of immediate succession and inheritance, a man inheriting both status and property from his mother's brother.

The unit of local grouping was the individual family (which consisted of a man, his wife or wives and their children) with its own kraal (i.e., the collection of huts belonging to the family together with their cattle pens). More often than not, however, an number of kinsfolk matrilineally related to the family head also shared the family residence.

27. The traditional political organization which existed in the Okavango when Respondent took over the administration of South West Africa was that of hereditary chieftaincy. Under this system, the central authority in each tribe was vested in a chief, who could be a man or a woman.

All ultimate legislative, executive and judicial powers were vested in the chiefs. Despite the theoretically absolute power of the chiefs, their authority and influence over their people were often weak, and heads of families displayed a great deal of independence [2].

IV. Language

28. The Kuangali language was, and still is, generally used by the Kuangari, Bunja, Sambiu and Djiriku with local dialectical versions, whereas the Mbukushu have a separate, definite language.

V. Religion

29. The traditional religious pattern of the Okavango peoples coincides with that of Bantu peoples in general, namely belief in ancestral spirits. Missionaries have been working among them since 1910 [3].

[1] Andersson, *op. cit.*, p. 194.
[2] *Ibid.*, p. 187.
[3] *Vide* para. 24, *supra.*

VI. Economy

30. The people of the Okavango were, and are still today, both agriculturalists and pastoralists. They had lands, or gardens, near their kraals, and their stock consisted of cattle and goats. Since they lived close to the Okavango River, fishing naturally played an important part in their activities, and fish provided a significant addition to their daily food [1].

The numbers of their cattle were, in olden times, regularly reduced by raiding [2]. The people could save their own lives by fleeing in their canoes, by fortifying islands in the river, or by hiding in places known only to themselves, but they could not save their stock so easily.

Ownership of all land was vested in the chief, who allotted specific pieces of land to individuals for agricultural purposes. Otherwise than in the case of the Ovambo [3], no payment was made by the individual for this privilege. Such individuals retained their rights in respect of land as long as they used it. Grazing, the produce of the bush, and fishing were free to all.

31. Since succession was matrilineal, a man's possessions were inherited by his matrilineal kinsfolk. The administrator of the estate was generally the eldest living brother of the deceased, and the major heir was the eldest sister's eldest son. Land could not be inherited, but since the heir usually occupied the kraal of the deceased and also acted as guardian of his family, he generally also utilized the deceased's lands.

32. At the time when Respondent assumed the administration of the Territory, it found the people of the Okavango at a low level of development. Respondent's Annual Report to the Council of the League of Nations, 1932 [4], mentioned for instance that the people of the Okavango were "blessed with every natural advantage" along the river, since there was an abundance of fish and crops grew readily, but that they nevertheless failed to plant substantial crops and to store surplus produce, being apparently content to lead their accustomed hand-to-mouth existence.

D. The Ovambo

I. Composition of the Population

33. The term "Ovambo" does not designate any particular tribe, but is a collective name for the various tribes of Ovamboland, of which there were eight when Respondent assumed the Mandate, viz., Kuanyama, Ndonga, Kuambi, Ngandjera, Mbalantu, Kualuthi, Nkolonkati and Eunda. The Ovambo are of Bantu stock, but differ significantly from the other Bantu groups in South West Africa [5].

Ovamboland is the most densely populated area in South West Africa,

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[1] *Vide* Andersson, *op. cit.*, pp. 191, 214-216.

[2] *Vide* para. 24, *supra*.

[3] *Vide* para. 48, *infra*.

[4] *U.G.* 16—1933, para. 436, p. 76.

[5] Hahn, C. H. L., "The Ovambo", in *The Native Tribes of South West Africa* (1928), p. 1; Vedder, H., *South West Africa in Early Times*, trans. and ed. by C. G. Hall (1938), p. 67.

and the Ovambo form the largest ethnic group in the Territory. Owing to the unreliable nature of population figures for Ovamboland prior to the 1951 census, it is difficult to give an accurate picture of the position at the stage when the Mandate was assumed.

In 1876, the British Commissioner, W. C. Palgrave [1], estimated the population of Ovamboland at 98,000 [2].

According to a census which was held shortly before 1928 the population of the various Ovambo tribes was made up as follows [3]: Ndonga 65,000; Kuanyama 55,000; Kuambi 8,000; Ngandjera 6,600; Kualuthi 6,100; Mbalantu 5,100; Nkolonkati 1,200; Eunda 600; a total of 147,600.

In 1921 the Ovambo population of South West Africa was estimated at 90,000, apparently an under-estimate [4].

In 1960, according to the census taken in that year, the total Ovambo population was 239,363, or approximately 45.5 per cent. of the total population of South West Africa (526,004).

The iribal percentages at present are as follows: Kuanyama 37; Ndonga 29; Kuambi 12; Ngandjera 7.5; Mbalantu 7; Kualuthi 5; Nkolonkati and Eunda together 2.5.

In addition some !Khung and Heikom Bushmen live in the areas of some of the Ovambo tribes [5].

II. Origin and History [6]

34. Nothing definite is known of the land of origin of the Ovambo [7]. This has given rise to some speculation, but, as stated by Dr. J. P. van S. Bruwer, Professor of Social and Cultural Anthropology at the University of Stellenbosch, who has done considerable field research among the Ovambo:

> "These speculations, very often based on assumed cultural traits and not reality, may be interesting, but have very little connection with tradition as still remembered by the people ... Tradition agrees on one point, namely that the ancestors of all the Ovambo peoples were the same, and that they migrated from the shores of a lake which is not identified, but lies somewhere to the East in the regions of Central Africa ...
>
> The Okavango is the first geographical link with the past of the Ovambo people. They settled on the banks of this river at a place called Oshimolo during the reign of one Sitenue. Vedder calculated that this happened during the middle of the sixteenth century [8]."

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[1] *Vide* Chap. III, para. 37, *infra*.

[2] *G.* 50—1877, *Report of W. Coates Palgrave, Esq., Special Commissioner to the Tribes North of the Orange River, of his Mission to Damaraland and Great Namaqualand in 1876*, pp. 48-49. (This report will be cited hereafter as *Palgrave's Report*.)

[3] *Vide* Hahn, *op. cit.*, p. 2.

[4] *U.G.* 21—1923, p. 10.

[5] Fourie, L., "The Bushmen of South West Africa", in *The Native Tribes of South West Africa* (1928), p. 83.

[6] *Vide* in general Hahn, *op. cit.*, pp. 1-2; Vedder, *op. cit.*, pp. 153-161.

[7] Schapera, I., "The Native Inhabitants", in *The Cambridge History of the British Empire*, ed. by J. Holland Rose, A. P. Newton and E. A. Benians (1929-1936), Vol. VIII (1936), *South Africa, Rhodesia and the Protectorates*, p. 36.

[8] Bruwer, J. P. van S., *The Kuanyama of South West Africa (A Preliminary Study)* (unpublished), p. 15.

35. Tradition has it that the ancestors of the present Ovambo and Okavango peoples were once known by the name Ajamba, and that they all occupied an area along the Okavango River, but that one section (viz., the present Ovambo) ultimately moved westwards as a result of internal quarrels [1], while the rest remained along the Okavango.

36. On account of its geographic isolation, being bordered on the south by vast uninhabited stretches, Ovamboland had very little contact with the groups living in other areas. Some trade was carried on outside the country's borders to obtain copper and iron, but few Ovambo ever left their tribal territory. The Ovambo peoples were rarely attacked by outside groups. They were raided by the Herero in the very early days [2] and later, in the nineteenth century, by the Orlam Nama leader, Jonker Afrikaner [3].

37. The various Ovambo tribes were often at war with each other, however, and, indeed, on entering the Territory during the First World War the South African forces found the Ovambos, in the words of General Smuts "riddled with witchcraft and engaged in tribal forays in which there was no security for man or beast" [4]. Such raids, which had been carried on intermittently for many generations [5], were not only motivated by a desire for gain, but also by traditional enmities between the various tribes dating back to the times when slave traders bought slaves from Native chiefs in Angola and Ovamboland [6] for export to Brazil. Whilst chiefs were seldom averse to selling their own subjects (especially criminals) to such slave traders, they often obtained their main supply by raiding neighbouring tribes. In return, chiefs were given brandy, gunpowder and firearms—which they learnt to handle at an early date, and which they continued to acquire long after the export slave-trade had ceased. Even in 1917, South African forces were involved in an armed clash with Chief Mandume [7] of the Kuanyama tribe, whose seat of government was then in Angola.

38. The Ovambos were little affected by the German rule of South West Africa. The Germans never extended jurisdiction over them, contenting themselves with establishing military posts at Namutoni on the south-eastern edge of the Etosha Pan, and at Okaukuejo, on its south-western approach [8]. They had no civil officials resident in the area [9]. Mission activities, however, commenced in 1870 [9]. For the rest, contact with the Europeans during the German regime was limited to the employment of Ovambo labourers in the Tsumeb copper mine and the Luderitzbucht diamond fields [10].

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[1] *Vide* Vedder, *op. cit.*, pp. 155-157.
[2] *Vide* para. 83, *infra*.
[3] *Vide* Chap. III, para. 18, *infra*.
[4] *U.N. Doc.* A/C.4/41, in *G.A., O.R., First Sess., Second Part, Fourth Comm.*, Part I, Annex 13*a*, p. 242.
[5] Hahn, *op. cit.*, pp. 19-24.
[6] *Vide*, e.g., Andersson, *op. cit.*, p. 196.
[7] *Vide* Hahn, *op. cit.*, p. 9.
[8] Vide *U.G.* 41—1926, para. 145, p. 48.
[9] Lord Hailey, *A Survey of Native Affairs in South West Africa* (1946) (unpublished), p. 4.
[10] Hailey, *op. cit.*, p. 5.

III. Social and Political Organization

39. The social structure of the Ovambo peoples was, and still is, based on the concept of matrilineal descent. Children belong to the social group or clan of their mother. This affects the system of succession in the case of chiefs, and also the rules as to inheritance [1].

The matriclans are not localized entities, for although their members are referred to as *ovakwethu* (i.e., "our people"), they may find themselves dispersed throughout the country. Such matrilineal kinsfolk may sometimes inhabit the same area, but generally the true corporate unit in Ovambo social life is the individual family, residing in its own kraal. The kraal is normally the abode of a man, his wife, or wives, and their children, although other relatives sometimes also live with them [2].

40. The various Ovambo tribes have for a very long time functioned as separate political entities, each with its own system of rule. They never developed one central system of government. When Respondent assumed the Mandate, four of the tribes, viz., the Ndonga, Kuambi, Ngandjera and Kualuthi were ruled by hereditary chiefs, and in the case of the other four (the Kuanyama, Mbalantu, Nkolonkati and Eunda) the supreme authority was vested in headman [3], with the assistance (particularly in the case of the Kuanyama) of officers which had been appointed during the period of military administration (1915-1920).

The chief's royal abode was far more elaborately built than that of the commoners [4]. In the case of tribes ruled by chiefs, his residence was the centre of the sacred tribal fire [5], which was always kept burning, and which served as a symbol of welfare and fertility in the land [6]. The sacred fire was held in special reverence among the Kuanyama where, indeed, despite the death of their last chief in 1917, it is still kept burning today by the headmen of the tribe [7].

The divine nature of the Ovambo chief of former times has often been stressed by writers, and there can be no doubt of the exalted position which he occupied [8]. Upon his health and well-being, it was believed, depended the welfare of the whole country and all its inhabitants. He was, therefore, always well protected by a strong bodyguard [9], and custom prohibited him from going beyond the boundaries of his own territory [10]. Succession to the chieftaincy was—and still is—matrilineal, passing either to a younger brother, or to a sister's son [3].

In early days chiefs had the power of life and death over their subjects, and as is not unusual in such cases, tradition recounts instances of abuse

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[1] Hahn, *op. cit.*, pp. 8, 25; Vedder, *op. cit.*, p. 72.
[2] Hahn, *op. cit.*, p. 24; Vedder, *op. cit.*, p. 69.
[3] Hahn, *op. cit.*, p. 8.
[4] Vedder, *op. cit.*, p. 69.
[5] *Ibid.*, p. 77.
[6] Hahn, *op. cit.*, p. 3.
[7] *Ibid.*, pp. 17-18.
[8] Vedder, *op. cit.*, pp. 73-74; Hahn, *op. cit.*, pp. 8-17; Andersson, C. J., *Lake Ngami*; or Explorations and Discoveries, during Four Years Wanderings in the Wilds of South Western Africa (2nd ed.), p. 198.
[9] Hahn, *op. cit.*, p. 10.
[10] Vedder, *op. cit.*, p. 72.

of such authority, sometimes cruel and inhuman, on the part of some of the chiefs concerned [1].

41. For purposes of administration, the tribal territory was divided into districts, each of which was placed under the jurisdiction of a councillor. The districts again were subdivided into wards with a sub-councillor in charge of each ward. The councillors did not belong to a specific clan or group within the people, but were appointed by the chief, and he was not obliged to ask, or heed, their advice. The chief and the councillors constituted the central tribal authority, which dealt with all civil and judicial matters affecting the people—a system which was closely connected with the system of land tenure in vogue amongst the Ovambo [2].

The political system of the tribes which did not have chiefs, may be illustrated by reference to the position of the Kuanyama. After the death of their last chief in 1917, the councillors proceeded to exercise the supreme authority over the tribe previously vested in the chief. Succession to a councillor (or headman) is effected by popular choice of the people of the district concerned, although the matrilineal rule is often followed [3].

IV. Language

42. Each tribe has its own dialect, but there are so many fundamental differences between them that some of them, at least, may more properly be regarded as separate languages. They all belong to the Bantu family of languages.

Two languages, those of the Kuanyama and Ndonga tribes, at present dominate the scene. This is due partly to their superior numbers, and partly to mission activity in setting the languages to writing and producing publications in them. Missionaries began their activities among the Ndonga at an earlier date than elsewhere in Ovamboland, and as a result the Ndonga language has been further developed than Kuanyama, or any other Ovambo language.

V. Religion

43. The traditional religion of the Ovambo tribes was a vague kind of monotheism, and there were, in addition, many beliefs and practices connected with spirits, both good and evil. Witchcraft was rife [4]. The first attempt by missionaries to enter Ovamboland occurred in 1857, when Dr. Hugo Hahn and the Rev. Rath, of the Rhenish Mission, tried to establish contact with the Ndonga tribe. They were attacked, and barely managed to escape death [5]. In 1870 Finnish missionaries obtained permission from the Ndonga tribe to establish a mission station in their territory, but it was many years before similar permission could be obtained from the other tribes [6]. However, in 1903 they established a

[1] Hahn, *op. cit.*, pp. 8-9; Vedder, *op. cit.*, pp. 73, 161-163.
[2] Hahn, *op. cit.*, pp. 18-19; Vedder, *op. cit.*, p. 72.
[3] Bruwer, *op. cit.*, pp. 32-33.
[4] Hahn, *op. cit.*, pp. 2-8; Vedder, *op. cit.*, pp. 74-77.
[5] Vedder, *op. cit.*, p. 269.
[6] *Palgrave's Report*, p. 49.

mission station in the territory of the Ngandjera, and thereafter in the territory of the Kuambi and Kualuthi (1908), Nkolonkati (1913) and Mbalantu (1918). From about the turn of the century, the Rhenish Mission also operated in the area.

VI. Economy

44. The Ovambo peoples have always been both pastoralists and agriculturalists [1], and this brought about a more settled form of existence than was the case with the purely pastoral peoples in other parts of the Territory. This circumstance probably accounts for the fact that the Ovambo peoples never penetrated into the southern sector of the country, where agriculture under primitive conditions was virtually impossible. Even today the southern belt of Ovamboland remains practically uninhabited, since the people have concentrated in those areas where there is a ready supply of water for agricultural purposes [2].

45. Owing to their settled form of existence, the Ovambo peoples developed permanent house structures built of timber and thatch. Their kraals were stockaded structures with many passages leading to the sleeping and other quarters [3]. Their cattle pens were generally attached to the kraals, and their gardens were in the immediate vicinity [4]. Whereas wells used to be the normal source of water supply in the early days, dams have now been made in many areas.

46. The material culture of the Ovambo peoples was very similar to that of most Bantu peoples. They developed many crafts which enabled them to provide for the ordinary necessities of life. Knowledge as to the production of primitive iron work, copper ornaments, wood utensils and ornaments, dress and decorations was already developed at the time of the coming of the White man [5].

47. The basic economy of the Ovambo peoples was a subsistence one based on agriculture and stock farming. The staple crop was finger millet and sorghum, but cucurbits and legumes were also produced. To some extent, surplus food was stored for use in times of scarcity [6]. The gardens usually comprised some 12 to 20 acres of arable land. On account of the flat nature of the country, the shallow soil and the possibility of periodic inundation, mound cultivation was practised. Women performed the greatest part of the work as far as a family's agricultural activities were concerned, including the preparation of the land, harvesting and threshing [7].

48. In accordance with tradition and custom, land ownership was vested in the chief or headman [8], who was entitled to grant, for remuneration, life interests of a usufructuary nature to individual members of the tribe in respect of specific pieces of land used for agricultural pur-

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[1] Andersson, C. J., *Lake Ngami* (2nd ed.) pp. 202-203.
[2] Hahn, *op. cit.*, pp. 33-35; Vedder, *op. cit.*, p. 156.
[3] Vedder, *op. cit.*, p. 69; Hahn, *op. cit.*, pp. 10, 24.
[4] Andersson, *op. cit.*, pp. 201-202.
[5] Hahn, *op. cit.*, pp. 24, 35-36; Andersson, C. J., *op. cit.*, pp. 204-205.
[6] Andersson, *op. cit.*, p. 202.
[7] Hahn, *op. cit.*, pp. 33-35; Vedder, *op. cit.*, pp. 68-69.
[8] Hahn, *op. cit.*, p. 18.

poses [1]. Non-agricultural land was reserved for grazing on a communal basis. Similarly any one was allowed to use the produce of the bush, but the cutting of fruit-bearing trees was prohibited since they were considered tribal property.

49. Practically every Ovambo family possessed its own cattle and goats, which were cared for by the man and his sons. Cattle, especially, were highly prized, and not easily parted with, or slaughtered, save during ceremonial feasts. A man's wealth was generally measured by the size of his herd [2]. Sheep do not thrive in Ovamboland, except in the western parts, nor do horses which were introduced as beasts of burden in more recent times [3].

50. The rules of inheritance among the Ovambo peoples followed the matrilineal nature [4] of their society, a man's principal heir being the eldest son of his eldest sister [5]. A man could, during his lifetime, donate his cattle to his own children, provided they were not lineage cattle. Personal belongings could also be disposed of during the owner's lifetime. A woman possessed rights over the produce of her lands, and on her death her personal belongings went to her daughters. Land itself was not heritable.

51. Already during the German period, numbers of Ovambo were employed in the Police Zone. The general practice was for Ovambo men to work in the Police Zone for a period and then to return home. This accorded with the wishes of the leaders of the various tribes, who were jealously on guard against all factors which could lead to detribalization [6].

E. The Bushmen

I. Composition and Distribution of the Group

52. The Bushmen are a short, relatively light-skinned people, and form part of the Bush people who at one time roamed over many areas throughout Southern Africa [7]. They, together with the Hottentots [8], belong to the Khoisan group of peoples of Southern Africa [9], and undoubtedly represent some of the earliest inhabitants of this part of the continent [10]. Their name derives from their roaming existence in the veld or bush. They were also collectively termed Saan of Sankwa by the Hottentot people. There are numerous indigenous names for the various groups or bands of Bushmen [11].

Schapera, the well-known expert on the races of Southern Africa, described them as follows:

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[1] Vedder, *op. cit.*, p. 72.
[2] Andersson, *op. cit.*, p. 199.
[3] Hahn, *op. cit.*, pp. 24-25, 33-35; Vedder, *op. cit.*, pp. 68-69.
[4] Hahn, *op. cit.*, p. 8.
[5] Andersson, *op. cit.*, pp. 199-200.
[6] Bruwer, *op. cit.*, pp. 21-22.
[7] Schapera, *The Cambridge History of the British Empire*, Vol. VIII, p. 23.
[8] *Vide* para. 72, *infra*.
[9] Schapera, *op. cit.*, p. 21.
[10] *Ibid.*, p. 22.
[11] *Vide* Fourie, *The Native Tribes of South West Africa* (1928), p. 84.

"The Bushmen are typically short in stature, averaging about five feet, with slender limbs, small hands and feet, and poorly developed bodies whose appearance is often marred by the protuberant stomachs and hollow backs of the men and the pendulous breasts and fat buttocks and thighs of the women. The skin is yellowish brown in colour and wrinkles very easily; the hair is short, woolly and sparse, and scattered on the scalp in small 'peppercorn' tufts. The head is small and relatively broad; the face rectangular, with bulging forehead, prominent cheekbones, nose extremely flat, eyes wide apart, narrow and often slightly oblique, and ears frequently lobeless [1]."

53. The Bushman population of South West Africa consists of three main sections, viz., the Heikom, !Khung and Mbarakwengo. Their distribution at the time of the assumption of the Mandate was, as far as can be ascertained from more or less contemporary writers such as Fourie [2], much the same as at present [3]. For convenience, the present position will be set out in this paragraph.

The Heikom Bushmen are scattered over a wide area in the southern sector of the country, nowadays often on farms, as well as over the areas surrounding the great Etosha Pan. Some of them have penetrated as far north as Ovamboland, where they live in the territories of the Ngandjera and Ndonga peoples [4].

The !Khung Bushmen also cover a vast area of the Territory in their wanderings. Although many of them live in the southern part of the Territory, they are to be found also in the eastern and north-eastern regions, the main areas of concentration in the northern sector being the Okavango area, the country between that area and the Police Zone, and Ovamboland. In Ovamboland they are confined to the eastern section of the country, where there is only a small Bantu population. Below the Okavango area they also occupy the wide stretches of the Omaheke, or desert-like area, which are not inhabited by the Bantu. Where they live in areas which are occupied by Bantu, Bushmen often serve them as cattle-herds.

The Mbarakwengo are a small group. They differ from the Heikom and the !Khung in that they are taller and of a darker complexion. They are scattered among the Mbukushu Bantu of the Okavango, and a few hundred of them also occupy a small area in the western Caprivi, across the Okavango River.

54. It is extremely difficult to obtain a reliable population figure in respect of the Bushmen. Most of the earlier figures given appear to be no more than estimates, and even today no accurate figure can be obtained. The following are examples of earlier estimates:

South West Africa Administration	1921	3,931 [5]
Fourie	1928	2,500-3,500 [6]
South West Africa Administration	1946	10,349 [7]

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[1] Schapera, *op. cit.*, p. 20.
[2] Fourie, *op. cit.*, pp. 82-84.
[3] *Vide* also Schapera, *op. cit.*, p. 23.
[4] Fourie, *op. cit.*, p. 83.
[5] *U.G.* 32—1922, p. 12.
[6] Fourie, *op. cit.*, p. 84.
[7] *U.G.* 49—1947, pp. 3-4.

According to the 1960 population census, Bushman was the mother tongue of 11,762 persons, but there were probably a few thousand more Bushmen whom it was not possible to enumerate by reason of their nomadic existence in geographically isolated areas.

II. Origin and History

55. It is generally believed that the Bushmen represent the earliest inhabitants of the present day South West Africa, that they originally roamed over wide stretches of the Territory, and that they were pushed into the more inaccessible regions of the country by other groups which advanced into their areas of habitation. Nobody knows when they first settled in the present-day South West Africa. Fourie states in this respect:

> "Of migration of the Bushmen from elsewhere no mention is made in local native traditions. The Hottentots, Hereros and Ovambos state that on their arrival the Bushmen were found in occupation and that the latter must have been living here ever since the creation of man. The Bushmen likewise believe that their present tribal divisions and distribution have been in existence since the very beginning of things when each tribe had its origin in a 'first big Bushman' and a 'first big Bushwoman' of its own by whom were handed down to their descendants the practices and customs still peculiar to and the territory still occupied by their respective tribes [1]."

56. Although the Bushmen led a roving life, each section, and each band within a section, was expected to keep within its own domain—its own defined area. Poaching groups constituted a threat to existence, and were treated as enemies. In time, as the more advanced Hottentot and Herero pastoral nomads, and Bantu agriculturalists, moved into their hunting fields, thereby threatening their very existence, life for the Bushmen became one long struggle for survival. They fared badly at the hands of the more powerful Hottentot [2], Herero [3] and Bantu groups by whom they were, over the years, hunted and killed as if they were wild game. Those who escaped death and servitude fled to inaccessible or desolate parts of the country, there to continue the struggle for survival against the encroaching forces of different cultures [4]—forces inimical to their way of life. As put by Dr. Vedder who lived and worked as a missionary in South West Africa for many years, and made a special study of its native peoples and history:

> "From the earliest times they were despised, hated, and fiercely persecuted by all other natives, and so the only dwelling-places left to them were inaccessible hiding-places in the mountains and just as unapproachable hidden refuges in the trackless thorn bush of the plains. Distrustful of every one who belonged to another tribe,

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[1] Fourie, *op. cit.*, p. 82.

[2] *Vide* para. 73, *infra*.

[3] Thus Andersson wrote in 1851 (*Lake Ngami* (2nd ed.), p. 211): ". . . the Damaras [Herero] themselves are always waging an exterminating war on the bushmen. Indeed, they hunt them down, wherever met with, like wild beasts." *Vide* also para. 84, *infra*.

[4] Vedder, *op. cit.*, p. 26.

suspicious of the members of their own unless they belonged to their own clan, they avoided all contact with the outer world . . . [1]"

General Smuts formed much the same impression, after the First World War, about the attitudes of other groups to the Bushmen. He said [2] that the South African occupation forces found "the roving Bushmen still regarded as little better than wild animals—human vermin of the veld" [3].

III. Social and Political Organization

57. The traditional social and political organization of the Bushmen was of a very simple nature. It centred around small groups, generally termed bands, and consisting predominantly of kinsfolk [4]. The size of these bands varied considerably from group to group [5], and was often dependent upon the availability or scarcity of food. Reported groupings range from a few to a few hundred individuals. Lorna Marshall [6] refers to a somewhat exceptional case among the !Khung, where 14 bands, ranging from 8 to 57 individuals in a band, formed a community of 353 people, composed as follows: married men (9 with 2 wives) 88; married women 97; old widowers 3; old bachelors 1; old widows 24; young widows 2; young divorced women 2; unmarried boys 78; unmarried girls 58; a total of 353.

The small community groups of the Bushmen were largely determined by their environment and peculiar mode of life [7]. During times of plenty the size of the band was at its maximum, but when food became scarce, bands broke up into several smaller groups, which reunited when the food position improved again.

There were also a number of traditional social controls which tended to keep down the size of the band. Firstly, in a nomadic way of life it was impossible for a mother to attend to two or more small children at the same time [8], and families accordingly tended to be small [9].

Some groups buried an infant with its mother when the latter died

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[1] Vedder, *op. cit.*, p. 78.

[2] *U.N. Doc.* A/C.4/41, in *G.A., O.R., First Sess., Second Part, Fourth Comm.*, Part I, Annex 13*a*, p. 242.

[3] *Vide* also: Andersson, C. J., *The Okavango River* (1861), p. 145; *Lake Ngami* (2nd ed.), pp. 210-211, 437-438; Alexander, J. E., *An Expedition of Discovery Into The Interior of Africa*, Through the Hitherto Undescribed Countries of The Great Namaquas, Boschmans, and Hill Damaras (1838), Vol. I, p. 295; Vol. II, pp. 116-117.

[4] Schapera, *The Cambridge History of the British Empire*, Vol. VIII, p. 24; Schapera, I., *Government and Politics in Tribal Society* (1956), p. 17.

[5] Schapera, I., *op. cit.*, p. 9; Schapera, *The Cambridge History of the British Empire*, Vol. VIII, p. 24.

[6] Marshall, L., "Marriage Among !Kung Bushmen", in *Africa*, Vol. XXIX, No. 4 (1959), p. 336.

[7] Schapera, *The Cambridge History of the British Empire*, Vol. VIII, p. 26.

[8] *Ibid.*, p. 25.

[9] Fourie writes in this regard with reference to the Bushmen of the Kalahari: "Children are suckled until they are able to walk well. If a new child is born while the last one is still on the breast it is buried alive in the nearest burrow or in a hole made for the purpose by the old woman who conducted the labour. When twins are born, one is invariably killed. It is for these reasons that it is rare to find families of five or more children in the Kalahari." (*The Native Tribes of South West Africa* (1928), p. 94.)

in childbirth. In addition, it was the custom to abandon the aged and helpless when a band had to move elsewhere in search of food, especially in times of great scarcity.

The organization within the band functioned on the basis of age, status and hunting success. Usually one of the elderly men was looked upon as the leader, and there was a well-balanced relationship among the various individuals of the band.

The social code of the Bushmen was simple, but, at the same time, well-adapted to their circumstances. If there was plenty, every individual in the band had plenty. If there was scarcity, everybody felt it.

IV. Language

58. The Bushmen have a language of their own, which is different form Hottentot and Bantu, but shares with the former and some of the latter (Zulu, Xhosa) the phonetic feature of clicks. There are also a number of Bushman dialects. Some Bushmen speak Nama (Hottentot)—no doubt a reminder of the days when Bushmen were the slaves or servants of the more powerful Nama.

Few people other than Bushmen can speak these languages and communication between Bushmen and members of the other groups is, even today, often a matter of great difficulty.

V. Religion

59. Fourie says the following about Bushman religion:

> "Except among the groups which have long been in contact with and largely influenced by other races belief in a supreme being would appear not to exist. The partly disorganised *ǂAo-//ẽin* and *//Aikwe* groups of the Gobabis district believe in a good being named */Khutse* or 'God' and a bad being called *Gãua* or 'Satan'. About the nature, however, of these beings they have no idea nor are their lives and activities influenced to any extent by them. People who die a 'good death' are said to go to */Khutse* and those dying a 'bad death' to *Gãua*. The former have a good time and live in plenty; the latter, on the other hand, often suffer hunger and distress. Among the primitive groups a deceased person is believed to move about in the form of a ghost at night. *Buchu (tsã)* is accordingly sprinkled over the grave to make the spirit of the departed happy so that it may not return at night to molest others; further, water is poured over or left at the grave in order that the spirit may not interfere with the rain, and the bow, quiver and arrows of the deceased placed at the graveside to obviate the necessity of his ghost returning to look for them. Every sphere of activity in life is influenced by some superstition or other which, as a rule, finds expression in certain avoidances or in ceremonial and other rites and practices [1]."

VI. Economy

60. The Bushmen of early South West Africa were traditionally a hunting people who used to roam far and wide over the Territory in search of

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

game and edible veld foods. The men were responsible for hunting, for which purpose they used bows with poisoned arrows, and also, to a lesser extent, snares and pitfalls. The Bushmen were also able to run down game until it was exhausted, when it was killed with an assegaai or club. The women looked after the gathering of plant foods [1].

The material culture of the Bushmen was a reflection of their nomadic existence and simple economy.

The roaming Bushman bands erected shelters of grass, or branches, which were adequate for their limited needs while the food in the vicinity lasted. When they moved, these shelters were abandoned and new ones erected elsewhere [2]. The Mbarakwengo of the Caprivi, however, developed a more permanent type of dwelling. They made grass mats which were hung over poles to form a shelter, and when they moved to another spot, these mats were taken with them.

Traditional Bushman attire was made of the skins of wild animals which had been softened manually. The women usually wore a small apron decorated with ostrich shell beads, and other parts of the body were adorned with bead ornaments. The men wore a triangular piece of hide drawn between the legs and tied round the waist [3]. Karosses (blankets made of skins)—where possessed—kept out the cold during the night. Otherwise, warmth was obtained from fires.

Household articles were of a simple nature, and were usually made of wood or clay. Ostrich-egg shells served as containers. Snuff-boxes (tortoise-shells), pipes and perfume holders (of tortoise-shell), formed the main personal belongings, other than the man's bows and poisoned arrows and the woman's digging stick. The Bushmen never developed any form of accumulation, and their economy made no provision for the future.

In some regions frequented by the Bushmen, water is extremely scarce during the dry seasons. Apart from springs and waterholes, the Bushmen had to rely on their own storage tanks (ostrich-egg shells) and water-rich plants, such as the tsamma *(colocynthus citrullus)*, the Gemsbok cucumber *(colocynthus naudinianus)* and juicy fruit, like the so-called Bushman apples. For this reason bands carefully guarded their springs and waterholes against intruders.

F. The Dama or Bergdama

I. Composition and Distribution of the Group

61. Physically the Dama are a short-statured, black-skinned negroid type, and, except where hybridized, quite distinct from the light-skinned Bushmen and Hottentots, on the one hand, and, on the other hand, the Herero and Ovambo negroids, who belong to the Bantu branch.

The Dama are also known as the Bergdama, Bergdamara or Klipkaffers, and are given various names, some with an uncomplimentary meaning, in certain of the Native languages of South West Africa [3]. They call themselves !Nu-Khoin, i.e., "black people".

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[1] Fourie, *op. cit.*, pp. 98-103; Schapera, *The Cambridge History of the British Empire*, Vol. VIII, pp. 25-26.

[2] Schapera, *op. cit.*, p. 26.

[3] *Vide* para. 65, *infra*.

Apparently the Hottentots did not at first appreciate that the Dama and the Herero were entirely different ethnic groups [1]. Consequently the Herero were in early times often called Damara of the Plains, or Cattle Damara (or sometimes just Damara), whereas the Dama were referred to as Damara of the Hills or Bergdamara ("Berg" meaning mountain in both German and Dutch) [2].

62. Very little is known about the earlier distribution and numbers of the Dama. When first encountered by Europeans in 1791, they lived in small groups in the mountainous areas of the Auas, Erongo, Amatja, Brandberg, Waterberg and Otavi highlands. Their fugitive existence [3], however, took them over a large area in the southern sector of the country, although the major group has always remained in the central area of the southern sector of the country.

Vedder [4] lists 11 groups of Dama, and gives their main habitat as the areas from Rehoboth northwards to the Erongo mountains, the Swakop River, Outjo, Waterberg and further north. In later times a few penetrated as far north as Zessfontein on the southern boundary of the Kaokoveld, and on the other hand, many are now to be found in the southern districts of the Police Zone.

63. Some earlier figures of the Dama population of the Territory are as follows:

Irle	1840	20,000 [5]
Irle	1874	20,000 [6]
South West Africa Administration	1921	20,883 [7]
South West Africa Administration	1939	25,308 [8]

It is difficult to say to what extent these figures are reliable. If Irle's estimates for the years 1840 and 1874 are in any way reliable, it would mean that the Dama population showed practically no increase up to 1921. If so, it may be an indication of the poor living conditions of the Dama in those early years. It must be pointed out, however, that a large number of Dama perished during the incessant Herero-Nama clashes and also in the Herero and Nama uprisings during 1903-1907 [9]. On the figures of the 1960 census the Dama population, calculated by officials of the South West Africa Administration as a percentage of the total Nama-speaking population, amounted to 44,353.

II. Origin and History

64. Very little is known of the origin or early history of the Dama. Dr. Vedder believes that they may well have been the first inhabitants

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[1] Vedder, H., "The Berg Damara", in *The Native Tribes of South West Africa* (1928), p. 39.
[2] Vedder, *op. cit.*, p. 60.
[3] *Vide* para. 65, *infra.*
[4] Vedder, *op. cit.*, p. 42.
[5] Irle, I., *Die Herero: Ein Beitrag zur Landes- Volks- und Missionskunde* (1906), p. 149.
[6] *Ibid.*, p. 52.
[7] *U.G.* 32—1922, p. 12.
[8] *U.G.* 30—1940, p. 213.
[9] *Vide* Chap. III, para. 86, *infra.*

of South West Africa [1], but, he says: "Impenetrable darkness lies over the origin and descent of the mysterious race of the Damas [2]". They were first encountered by Europeans in 1791, when one Pieter Brand made a journey into what is now South West Africa [3].

Many theories have been advanced as to their possible origin. One theory is that they entered the present South West Africa as serfs of the Nama (or Hottentot) people, and the mere fact that the Dama speak Nama proves that they must have had long affiliations with the Nama. Dr. Vedder, however, states in this regard:

> "The general view is that when the Hottentots arrived in South West Africa, they found the Berg Damaras as the aboriginal inhabitants, subjected them and forced them to adopt their language [4]."

This view was held also by the Rev. Hugo Hahn, a missionary who lived amongst the Dama for over 30 years. He wrote in 1873 that the Dama inhabited South West Africa long before the arrival of the Hottentots and—

> ". . . when the invasion of the Hereros took place, about one hundred and fifty or two hundred years ago, they were still to a great extent the owners of the mountainous parts of North Great Namaqualand, and the undisputed masters of Hereroland, living in large powerful tribes [5]".

65. According to all the available evidence, the position of the Dama among the other non-White groups in early times was not enviable [6].

As long ago as 1791, Pieter Brand referred to above, stated that they possessed neither sheep nor cattle, that their food consisted of roots, bulbs, berries and wild fruits, and that "they sometimes make useful slaves to the Namas" [7].

To escape persecution, many of the Dama sought refuge in the mountainous parts of the country: hence also the names Bergdama and

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[1] Vedder, *The Native Tribes of South West Africa* (1928), pp. 40-41; Vedder, *op. cit.*, p. 107.

[2] Vedder, *op. cit.*, p. 107.

[3] *Vide* para. 96, *infra*.

[4] Vedder, *The Native Tribes of South West Africa* (1928), p. 41.

[5] *Palgrave's Report*, p. 51; *vide* also the view of Sir Francis Galton, in *Palgrave's Report*, p. 45.

[6] *Vide*, e.g., Alexander, *op. cit.*, Vol. II, p. 133; Vedder, *The Native Tribes of South West Africa* (1928), p. 39; Vedder, *op. cit.*, pp. 62, 67, 119, 175; Andersson, C. J., *Lake Ngami* (2nd ed.), p. 114; Schinz, H., *Deutsch-Südwest-Afrika*: Forschungsreisen durch die deutschen Schutzgebiete Gross-Nama- und Hereroland, nach dem Kunene, dem Ngami-See und der Kalayari, 1884-1887, pp. 123-124; *Palgrave's Report*, pp. 45, 51-52, *Manning to Palgrave*, 22nd October, 1879, N.A. 287 [The "N.A." cited in this footnote, and in later footnotes, is an abbreviation for "Archive of the Secretary of Native Affairs, Cape Colony". The correspondence and papers in the N.A. Series are unpublished documents in the custody of the Cape Archives Depot, Cape Town, which falls under the aegis of the South African Department of Education, Arts and Science. Together with *Quellen* (*vide* Chap. III, p. 65, footnote 3, *infra*), they constitute a valuable source of information on the early history of South West Africa]; *G.A., O.R., Sixth Sess., Fourth Comm.*, 244th Meeting, 11 Jan. 1952, para. 9, p. 290; Schapera, *The Cambridge History of the British Empire*, Vol. VIII, p. 39.

[7] Vedder, *op. cit.*, p. 35.

Klipkaffer. ("Klip" in Dutch or Afrikaans means "stone" or "rock".) Vedder writes in this regard:

> "It was hardly from choice or predilection that they lived in the mountains. As most of them possessed goats, settlement in the lowlands would have suited their purposes better. Since, however, they were violently persecuted in the lowlands, their only protection and security lay in the mountain fastnesses. Wherever they found them the Hereros killed them with their *Kieries*, and at the best of times cast their young men into perpetual slavery, as herds and menials. The Hottentots exterminated complete sibs ... They seemed to regard a free Damara as a reproach against the Hottentot race. They looked upon the Berg Damaras as runaway slaves and subjected to slavery every serviceable man [1]."

Elsewhere Vedder writes:

> "As already mentioned the Hottentots and Hereros in olden times regarded the Berg Damaras living within their reach as their rightful servants. The Berg Damaras who lived free in the mountains were a source of annoyance to them. The Hottentots regarded them as incorrigible stock thieves [2]."

Various names given to the Dama by other indigenous groups show in what contempt they were apparently held by such groups. The Dama, as stated before, called themselves !Nu-Khoin, or black people [3]. The Nama, however, called them Chou-daman, which can be translated as dirty blacks, *choub* being the ordure of men and birds, and *daman* meaning "black people". The name has also been translated as Dung-Dama, or Dirty-Dama [4]. The Herero called them Ovazorotua, translated by Vedder as "black bondsmen" or "black slaves" [5].

On being asked in 1837 by the British explorer, Sir James Alexander, about their relations with the Herero, a Bergdama chief replied as follows: "... they are our enemies; they are black like ourselves; but they speak a different language; ... [6]"

Only with the coming of the White man was the Damas' position improved. They were only finally freed from oppression upon the defeat of the Nama and Herero in 1904-1907 [7].

III. Social and Political Organization

66. In olden times, the Damas' "hunting and collecting" economy compelled them to live in small groups, usually consisting only of families [8], and Dama social and political life therefore came to be

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[1] Vedder, *The Native Tribes of South West Africa* (1928), p. 39.

[2] *Ibid.*, pp. 42-43. *Vide* also Schinz, *op. cit.*, p. 124.

[3] Vedder, *The Native Tribes of South West Africa* (1928), p. 40.

[4] *Ibid.*, pp. 39-40. *Vide* also Alexander, *op. cit.*, Vol. II, p. 136.

[5] Vedder, *The Native Tribes of South West Africa* (1928), p. 40.

[6] Alexander, *op. cit.*, Vol. II, p. 133. *Vide* also *Manning to Palgrave*, 22nd October, 1879, N.A. 287.

[7] *Vide* Chap. III, para. 86, *infra* and also Vedder, *The Native Tribes of South West Africa* (1928), pp. 43-44.

[8] Vedder states "There is no place in a Berg Damara village for those who do not belong to the family sib". (*The Native Tribes of South West Africa* (1928), p. 48.)

organized on the basis of individual kin groups [1]. Polygamy was quite common, men with five or more wives being found "not seldom" according to Vedder [2]. Each family group functioned as an independent unit, and within each unit authority was exercised by the family elders, who were also the possessors of the holy fire [3]. Social and political organization on a wider basis only came into being with the establishment of the Dama Reserve in the Okombahe area [4].

The Dama also never developed any real judicial system or judicial institution. Life was controlled, and justice was administered, by the family elders who—

> ". . . consult at the holy fire concerning everything which may contribute to the welfare of the village and discuss all measures which have to be taken to prevent disasters or to deal out punishment [5]".

The reason for the Damas' failure to evolve anything like a real legal system no doubt lies in their early unsettled and servile existence. Vedder says in this regard:

> "When I commenced, two decades ago, to enquire as to the laws of the Berg Damaras, my questions were not understood even by intelligent Berg Damaras who were well versed in the lore of their people. 'An object, such as a Berg Damara has not anything like a law' [6]."

According to Vedder—

> "The only rules which may be regarded as having the character of law are those regulating inheritance. Small as the personal possessions may be, there are nevertheless fixed rules according to which they pass from one to another. The rule prescribes that the daughter may inherit from the mother but never from the father, and the son from the father but never from the mother [7]."

67. In 1870, on the urgent representations of missionaries, a tract of land was granted to a number of Bergdama at Okombahe in the Omaruru district by the Herero chief at Omaruru, who nevertheless still considered them his subjects. In 1895 the Hereros agreed to cede this area to the German authorities for the use of the Bergdama [8].

In the Okombahe area, one Cornelius Goraseb succeeded in developing some form of central organization amongst the Dama who were resident there. As headman with the assistance of a Council of Five Elders he kept the Dama together during the wars of 1880 to 1892 between the Herero and the Nama [9].

After the Herero War of 1904 the Bergdamas, as a reward for assist-

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[1] Vedder, *op. cit.*, pp. 42, 48; Schapera, *op. cit.*, pp. 9, 17.

[2] Vedder, *The Native Tribes of South West Africa* (1928), p. 55; Vedder, *Die Bergdama*, Part I (1923), p. 39.

[3] Vedder, *The Native Tribes of South West Africa* (1928), pp. 48, 68-70; Vedder, *South West Africa in Early Times*, trans. and ed. by C. G. Hall (1938), pp. 61-62.

[4] *Vide* para. 67 and Chap. III, paras. 73 and 86, *infra*.

[5] Vedder, *The Native Tribes of South West Africa* (1928), p. 72.

[6] *Ibid.*, pp. 70-71.

[7] *Ibid.*, p. 71.

[8] Hailey, *op. cit.*, pp. 34-35; *Palgrave's Report*, p. 51; Vedder, *The Native Tribes of South West Africa* (1928), pp. 43-44.

[9] As to which *vide* Chap. III, paras. 39-47, 52-56, 64-69.

ance given to the Germans, were confirmed in the occupation of the Okombahe area, which was constituted a Bergdama reserve [1].

IV. Language

68. Nothing is known of the original language of the Bergdama. The language they speak is Nama, presumably adopted from the Hottentots who enslaved them in remote times [2]. Stow says in this regard:

> "Thus, whilst they possess the physical characteristics of the Bantu nations, and are as a rule even blacker than the Ovaherero and although they are as different in colour and stature from the Hottentots as it is possible for two races to be, still we find the remarkable fact that one language is common to both peoples. The territory which the Namaqua (Hottentots) inhabit is entirely separate from that of the Berg-Damara, still none the less is the language of both nations the same ... Here then we find in this one race distinctive features which characterise the other three, still, notwithstanding these separate points of similarity, the Berg-Damara are a nation by themselves, and apparently quite distinct from the Ovaherero, the Namaqua, and the Bushmen [3]."

Not only their language disappeared, but also most of their traditional culture. As Köhler says:

> "In the obviously long period of their serfdom, the dependent Bergdama appear to have given up many of their customs in the same way as they gave up their own language and adopted Nama. What the independent Bergdama had preserved of their traditional culture seemed to have little strength to survive and began to fall into decay by the end of the 19th century [4]."

V. Religion

69. The old religion of the Dama was a vague monotheism [5]. Many Dama are today converts to Christianity (mission work among them having commenced in 1842) [6], but superstition and witchcraft still play a major part in their lives [5].

VI. Economy

70. The Bergdama's economy in olden times was probably little less primitive than that of the Bushmen [7]. They could not maintain them-

[1] Hailey, *op. cit.*, p. 35; Vedder, *The Native Tribes of South West Africa* (1928), pp. 43-44.

[2] Vedder, *The Native Tribes of South West Africa* (1928), pp. 41-42.

[3] Stow, G. W., *The Native Races of South Africa* (1905), p. 257.

[4] Köhler, O., "The Stage of Acculturation in South West Africa", in *Sociologus*, Vol. 6, No. 2 (1956), p. 138; Vedder, *The Native Tribes of South West Africa* (1928), p. 61.

[5] *Vide* Vedder, *The Native Tribes of South West Africa* (1928), pp. 61-70; Vedder, *op. cit.*, pp. 63-67.

[6] Hailey, *op. cit.*, p. 34.

[7] Vedder, *The Native Tribes of South West Africa* (1928), p. 42.

selves against the Hottentots and Herero who entered South West Africa after them and, as noted above, became the servants and slaves of both these more powerful groups [1]. As Hailey says:

> ". . . they had to yield to the growing pressure from the Hereros, and all their later history shows them as the bondsmen, or at all events as the unpaid servants of others, holding nowhere any territory of their own, possessing only such stock as their superiors allowed them, and adapting their costume and their customs to those of the people whom they served [2]".

The economy of the Dama was that of hunters and foodgatherers. Vedder states in this regard:

> "The Berg Damaras of the veld, i.e., those who are still untouched by European influence and live according to the manner of their fathers, subsist on the wild fruits of the veld and the spoils of the chase [3]."

As stated before, many families were at an early stage forced into the service of Nama and Herero, and in later years many took up employment with Europeans, which gave them a more settled form of existence. In the Okombahe area they turned to stock farming, and they soon possessed substantial herds.

The Dama of old had no concept of land ownership in either the individual or communal sense. As Vedder says:

> "Not even the tribal area is regarded as the property of the tribe. All that is claimed is freedom of hunting and of gathering of *veldkos* with which to supply daily wants [4]."

In the circumstances it is clear why land rights could play no part in the rules as to inheritance. In this regard it may be noted, as a point of interest, that a Bergdama house is, by tradition, the property of the wife, and not of the husband [5].

Clothing was of a very simple nature, consisting of skins [6]. Possessions were few and primitive. Bergdama dwellings were made of branches, twigs and grass [7].

G. The Hottentots or Nama

I. Introductory

71. Reference has been made to the interaction and conflicts between the Hottentots and other groups during the nineteenth century [8]. The present section will therefore be devoted to a discussion of the development of the Hottentots up to the end of the eighteenth century. Any changes or further developments of importance occurring during the nineteenth century will be dealt with in their historical context in Chap-

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[1] Vedder, *op. cit.*, pp. 39-43.
[2] Hailey, *op. cit.*, p. 33.
[3] Vedder, *The Native Tribes of South Africa* (1928), p. 59.
[4] *Ibid.*, p. 71.
[5] *Ibid.*, pp. 48-49.
[6] *Ibid.*, p. 57.
[7] *Ibid.*, p. 48.
[8] *Vide* para. 2, *supra.*

ter III, *infra*. In addition, the position of the Hottentots immediately prior to the assumption of the Mandate, will be summarized in Chapter III, *infra* [1].

II. Composition, Distribution and Early History

72. The Hottentots are a short, yellowish brown-skinned people, with dark eyes and short, woolly and sparse hair. They have prominent cheekbones, small receding chins, and flat noses. Their general bodily build and colour resemble those of the Bushmen [2], although the Hottentots are taller, with longer, narrower and higher heads, and more pointed and projecting faces [3].

Schapera states:

> "There is little doubt that they are of the same original stock as the Bushmen, but have obviously been affected by the incorporation of alien blood. It is now generally held that they owe their origin to the mixture of Bushmen with early invading peoples of Hamitic stock from whom they also acquired certain distinctive linguistic and cultural features. Consequently, although Bushmen and Hottentots belong to the same great ethnic division, for which the name 'Khoisan' has ... been coined ... they have become sufficiently differentiated to be regarded as two separate groups [4]."

73. It is believed that the Hottentots lived originally somewhere in the region of the Great Lakes of East Africa. Presumably as a result of pressure from the north by the Bantu, they gradually moved south-west across central Africa until they reached the Atlantic. Then they turned south, crossing the Kunene into what is now South West Africa. The migration continued down the west coast across the Orange River [5] and into the present Cape Province right down to the Cape Peninsula. Thereafter they moved eastwards along the coast until their outposts reached the Umtamvuna River on the south coast of Natal [6].

At different stages on their route south of the Kunene, sections of the people remained behind, each of which grew into a separate tribe. Thus in South West Africa, a number of different Hottentot tribes inhabited parts of the Territory prior to the advent of the Hereros [7]. They are often referred to as Nama, after their language. Similarly, Hottentot tribes were found by the early European settlers in various parts along the coastal stretches of what is now the Cape Province [8].

As the Hottentots advanced, the Bushmen were generally driven from the fertile plains to the mountain fastnesses of the interior, and, on the

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[1] *Vide* Chap. III, para. 85, *infra*.

[2] *Vide* para. 52, *supra*.

[3] Vedder, H., "The Nama", in *The Native Tribes of South West Africa* (1928), pp. 109-112; Vedder, *op. cit.*, pp. 51-52, 119-123.

[4] Schapera, *The Cambridge History of the British Empire*, Vol. VIII, pp. 20-21.

[5] Originally known by its Nama name "Garib River".

[6] Schapera, *The Cambridge History of the British Empire*, Vol. VIII, pp. 28-29; Vedder, *The Native Tribes of South West Africa* (1928), pp. 112-118.

[7] Vedder, *The Native Tribes of South West Africa* (1928), pp. 114-115.

[8] *Ibid.*, pp. 113-114; Schapera, *The Cambridge History of the British Empire*, Vol. VIII, p. 28.

whole, relations between the two groups remained unfriendly or hostile [1]. As noted above, the treatment meted out to the Bergdama was no better [2].

74. The early population estimates for the Hottentots cannot be regarded as accurate, but in order to give a broad indication of their numbers, the following figures may be referred to:

Palgrave	1876	16,850 [3]
German Administration	1913	14,591 [4]
South West Africa Administration	1921	21,000 [5]
South West Africa Administration	1939	20,733 [6]
1960 Census	1960	34,806 [7]

III. Language

75. All the various Hottentot tribes spoke one of four closely related languages, of which Nama, spoken by the tribes in South West Africa, was one [8]. These languages have no clear affinities with other languages of the Continent, except structural ones with distant groups. The peculiar feature of click sounds is shared with Bushman and some southern Bantu languages [9].

IV. Economy

76. The Hottentots were nomadic pastoralists. They had no agriculture, but depended on their herds—cattle, fat-tailed sheep and goats—and, to a certain extent, also on hunting and collecting [10]. Each tribe had what it regarded as its own territory in which to graze its herds, and in which no strangers were allowed without special permission [11]. As pastoral nomads they had no opportunity of building permanent structures or of accumulating any material things beyond such arms, tools and utensils as they could carry with them on their wanderings [12].

The tribal country was communal property, and a system of individual ownership of land did not exist [13]. The various groups laid special

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[1] *Vide* in general: Schapera, *The Cambridge History of the British Empire*, Vol. VIII, p. 28; Fourie, *The Native Tribes of South West Africa* (1928), pp. 82-84 and Vedder, *op. cit.*, p. 124.

[2] *Vide* para. 65, *supra*.

[3] *Palgrave's Report*, p. 94.

[4] *Die deutschen Schutzgebiete in Afrika und der Südsee 1912/1913*.—Amtliche Jahresberichte, Herausgegeben vom Reichs-Kolonialamt (1914), *Statistischer Teil*, p. 46.

[5] *U.G.* 32—1922, p. 12.

[6] *U.G.* 30—1940, p. 213.

[7] Calculated by officials of the South West Africa Administration as a percentage of the Nama-speaking population.

[8] Schapera, *The Cambridge History of the British Empire*, Vol. VIII, pp. 28-29.

[9] Vedder, *op. cit.*, pp. 56-57, 119-121.

[10] *Ibid.*, pp. 51, 53; Schapera, *The Cambridge History of the British Empire*, Vol. VIII, pp. 30-31.

[11] Schapera, *The Cambridge History of the British Empire*, Vol. VIII, pp. 30-31.

[12] Vedder, *op. cit.*, pp. 52-54, 127.

[13] Vedder, *The Native Tribes of South West Africa* (1928), p. 144; Vedder, *op. cit.*, p. 54.

stress on their sole rights in regard to certain springs and waterholes. To the Hottentots, tribal lands were closely connected with their ancestors, a concept which stimulated a ritual procedure, connected with water, when certain areas were visited [1].

Although tribal land was regarded as common property whereon all members of the group concerned could move freely, water their cattle and partake of the fruit of the veld, the idea of individual ownership was in other respects not unknown [2]. Individuals and families could acquire movable property, such as stock, and an individual who had dug a waterhole had a prior right to its water. Among the Topnaars (a tribe in South West Africa) a person or family could have private rights over certain *nara* bushes, which are peculiar to the area in which they lived.

Inheritance followed the male line. The eldest son was the principal heir, and it was his responsibility to guard over the general interests of the family. The widow. and all the other children, were also entitled to a share of the estate [3].

V. Social and Political Organization

77. The social organization of the Nama, as described by Hoernlé in 1925 [4], functioned within three well-defined units, namely the family, the clan and the tribe. The importance of kinship was evidenced by the fact that near kin tended to congregate on the same *werf* [5].

Numbers of kinship groups were organized into a clan [6], i.e., people who claimed a common descent in the male line from an original progenitor. Members of a clan tended to live together in the same area, and the clan was in fact the strongest cohesive unit attained by the Nama. Very often individual clans broke away from the greater body, the tribe, to form an independent unit, thus actually forming a new tribe [7].

78. The tribe consisted of a number of clans and formed the largest unit in Nama society. The true Nama distinguished eight units of this nature, and the Orlams Nama five, each with its own name [8]. Within each tribe there was a senior clan which provided the tribal chief, and within each clan a senior family which provided the clan head, both offices being hereditary from father to son. The central authority in

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[1] Hoernlé, R. F. A. (A. W.), "The Expression of the Social Value of Water among the Nama of South West Africa", in *The South African Journal of Science*, Vol. XX (1923). pp. 514-526.

[2] Vedder, *The Native Tribes of South West Africa* (1928), p. 144; Vedder, *op. cit.*, p. 54.

[3] Vedder, *The Native Tribes of South West Africa* (1928), p. 145.

[4] Hoernlé, A. W., "The Social Organization of the Nama Hottentots of South West Africa", in *American Anthropologist*, New Series, Vol. 27 (1925) [reprinted by Kraus Reprint Corporation, New York, 1962], pp. 1-24.

[5] Piece of land on which dwellings were erected.

[6] Schapera, *op. cit.*, p. 30.

[7] Vedder, *op. cit.*, pp. 126-131; Schapera, *The Cambridge History of the British Empire*, Vol. VIII, pp. 29-30.

[8] Vedder, *The Native Tribes of South West Africa* (1928), pp. 114-118; Vedder, *op. cit.*, p. 128. On the distinction between true Nama and Orlam, *vide* para. 79, *infra*.

each unit consisted of its chief, or headman, together with a body of councillors, composed of leading elders within the group [1].

The political authority also acted as the body which administered justice. Each group had its body of customary laws, and disputes were usually resolved by local councils. Appeals were heard by the central, or tribal, authority. In important trials the tribal councillors acted as judges [2].

79. During the eighteenth century, a number of Hottentot tribes moved north out of the Cape Colony (which was until 1795 a possession of the Dutch East India Company) in the direction of South West Africa. These tribes, who are generally called the Orlam Nama, found it impossible to live their former nomadic pastoral lives in the more settled areas of the Cape, and in many cases their numbers were increased by fugitives from justice. During the first part of the nineteenth century, some of the Orlam Nama tribes settled in South West Africa [3], whence their ancestors had come generations back. The Orlam Nama tribes showed many signs of European influence in their organization and customs [4]. Thus their chiefs were called by the title of *kaptein*, and the headmen became a definite body of councillors to whom the term *raad* was applied. The *raad* was the governing body, and it constituted also the judicial tribunal both for criminal and civil purposes. In addition certain officials on the European pattern were appointed, such as the sub-chief *(onderkaptein)*, magistrate *(magistraat)*, the chief field cornet *(hoofdveldkornet)*, and later among the Christian groups, the elders *(ouderlinge)*. There was a growing tendency under missionary influence to reduce their constitutions to writing. Some of the Orlam Nama had also adopted the Dutch language [5].

80. By the end of the eighteenth century, six of the original Nama tribes in South West Africa were joined in a loose alliance under the leadership of one of them, called the Red Nation [6]. According to Vedder [7], this alliance was originally formed as a direct result of trouble with the Bushmen and Bergdama.

H. The Herero

I. Composition, Distribution and Early History

81. The Herero population of South West Africa is composed of various sections, known as Herero, Mbanderu, Tjimba and Himba [8].

In the course of this survey, all references to the "Herero", should, except where the text or context indicates otherwise, be taken to include

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[1] Vedder, *The Native Tribes of South West Africa* (1928), pp. 142-145; Schapera, *The Cambridge History of the British Empire*, Vol. VIII, p. 30.

[2] Vedder, *The Native Tribes of South West Africa* (1928), pp. 142-145.

[3] *Ibid.*, p. 116.

[4] *Ibid.*, pp. 115-118.

[5] Hailey, *op. cit.*, p. 31.

[6] Vedder, *The Native Tribes of South West Africa* (1928), pp. 114-115.

[7] Vedder, *op. cit.*, p. 128.

[8] Vedder, H., "The Herero", in *The Native Tribes of South West Africa* (1928), p. 155; van Warmelo, N. J., *Notes on the Kaokoveld (South West Africa) and its People*, Ethnological Publications, No. 26 (1951), pp. 9-12.

all the various sections, and, as in the case of the Hottentots [1], the present discussion will be confined to developments up to roughly the end of the eighteenth century, leaving subsequent events for future treatment [2].

The Herero belong to the southern group of Bantu peoples [3]. They have negro-type crinkly hair, chocolate brown to dark-brown skin colour, and, for the most part, a tall and slender build [4].

The following population figures give some indication of their numbers:

Irle	1874	90,000 (Herero 70,000, Mbanderu 20,000) [5]
Palgrave	1876	84,000 (Herero 71,000, Mbanderu 13,000) [6]
German Administration	1913	21,699 [7]
Vedder	1928	33,000 (Herero 25,000, Mbanderu 3,000, Tjimba 5,000) [8]
1960 Census	1960	44,580 (Total of Herero, Mbanderu, Himba and Tjimba) [9]

82. According to Herero tradition, their forebears originally lived in the "land of fountains", west of Lake Tanganyika, whence they emigrated to the south [10]. It is believed that this southward movement began in the sixteenth or seventeenth century, and that the Herero reached the upper Zambesi by about the middle of the eighteenth century. From there, it is believed, they moved westwards until they reached the sea, and then downwards into the Kaokoveld [11]. Some writers are of the opinion that they entered the Kaokoveld from the direction of Bechuanaland, where they had lived for some time until they were defeated by the Bechuanas [12]. Precisely when they entered the Kaokoveld is not known, nor is it known for how long they remained there before the main body of them later moved southwards. In any event, it is known that the Mbanderu section were living somewhere east of Okahandja and north of Gobabis by about the middle of the eighteenth century, and that the Herero, properly so-called, had not left the Kaokoveld by about

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[1] *Vide* para. 71, *supra*.
[2] In Chap. III, *infra*.
[3] Schapera, *The Cambridge History of the British Empire*, Vol. VIII, p. 36.
[4] Vedder, *op. cit.*, p. 45; *U.G.* 41—1926, para. 48, p. 12.
[5] Irle, *op. cit.*, p. 52.
[6] *Palgrave's Report*, p. 53.
[7] *Die deutschen-Schutzgebiete in Afrika und der Südsee, 1912/1913, Statistischer Teil*, p. 46.
[8] Vedder, *The Native Tribes of South West Africa* (1928), p. 156.
[9] 1960 Census (unpublished).
[10] Vedder, *op. cit.*, p. 134, *Palgrave's Report*, p. 14, *U.G.* 41—1926, para. 47, pp. 11-12.
[11] Schapera, *The Cambridge History of the British Empire*, Vol. VIII, p. 39; *Palgrave's Report*, p. 45; Vedder, *The Native Tribes of South West Africa* (1928), p. 156.
[12] *Vide* Vedder, *op. cit.*, pp. 133-135.

1790 [1]. The Himba and Tjimba sections remained behind in the Kaokoveld when the main body of immigrants moved south [2].

83. The Herero were still in the Kaokoveld when they gave an indication of what their future relations with other groups in the Territory were going to be. Vedder says in this regard:

> "As soon as they became prosperous they became arrogant. They felt that they were strong enough to try a fall with the Ovambos who lived to the east of them. A raid was made into Ovamboland to get Ovambo cattle. But the Ovambos were stronger than the Hereros, for the separate tribes had chiefs whom all the people obeyed to a man while the Hereros did not have a common commander or leader [3]."

84. Their procedure in occupying the new areas south of the Kaokoveld was described as follows by Andersson, the Swedish explorer and scientist [4], who lived among the Herero for many years and assisted them in their wars against the Hottentots [5]:

> ". . . they [i.e., the Herero] invaded the country, then inhabited by bushmen and Hill-Damaras, the last being in all probability the aborigines. Not having a warlike disposition, the Hill-Damaras were easily subdued, and those who were not killed were made captives. The few that escaped took refuge among the mountains, or other inhospitable and inaccessible regions, where they are still found dragging on a most miserable and degraded existence [6]."

And, in regard to the relations between the Bushmen and the Herero, Andersson said:

> ". . . both parties were in the habit of butchering each other indiscriminately (men, women, and children) whenever an opportunity occurred for gratifying their mutual hatred [7]".

II. Social and Political Organization

85. The basic determinants of traditional Herero social organization are totally different from those of any of the other indigenous groups. They are based on a system of double descent, for an individual belongs to two social entities, namely the *oruzo* (plural *otuzo*) of his father and the *eanda* (plural *omaanda*) of his mother [8]. "Thus the Herero is a member of two groups; . . . Both these groups have their ordinances and laws [9]."

The *oruzo*, membership of which is inherited through the father, is predominantly a religious concept, centring around the ancestor cult and the sacred fire. There are about 20 such *otuzo*, each with its own name. People belonging to the same *oruzo* tend to live together, the sacred

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[1] Andersson, C. J., *Lake Ngami* (2nd ed.) pp. 218-219; *Palgrave's Report*, p. 45.
[2] Van Warmelo, *op. cit.*, p. 10.
[3] Vedder, *op. cit.*, pp. 136, 140.
[4] Andersson, C. J., *Notes of Travel in South Africa* (1875), pp. 91-92, 331-338.
[5] *Vide* Chap. III, paras. 22 and 24, *infra*; Andersson, C. J., *Notes of Travel in South Africa* (1875), pp. 64-125.
[6] Andersson, C. J., *Lake Ngami* (2nd ed.), pp. 218-219; *vide* also Vedder, *op. cit.*, pp. 138, 141.
[7] Andersson, C. J., *The Ohavango River* (1861), p. 145.
[8] Vedder, *The Native Tribes of South West Africa* (1928), p. 185.
[9] *Ibid.*, p. 186.

fire being the centre of the *oruzo*-community. The *oruzo*, however, also has a practical significance in the sense that it has its own property, which is inherited only within the *oruzo*, and that it is guided by laws and traditions which originated with the ancestors [1].

The *eanda*, membership of which is inherited through the mother, is a social concept and embraces an exogamous entity. There are six principal *omaanda*. Each has its own property, which can only be inherited through the mother, i.e., by brothers by the same mother, by the mother's brother or by the son of the sister of the deceased born of the same mother. The *eanda*, therefore, also has considerable significance in ordinary social arrangements [2].

The *oruzo* forms the basis of local groupings, since marriage is virilocal (i.e., wife living at husband's home), and *oruzo*-kin tend to congregate together. A family settlement, therefore, consists of *oruzo*-related males, their wives (Herero marriage is traditionally a polygamous institution) and children. In a pastoral community such family settlements are small [2].

Bilateral descent, as found amongst the Herero, is unknown amongst the other ethnic groups of South West Africa and Southern Africa [3]. It cannot be widened in scope, and it can only exceptionally be applied to non-Herero who might wish to become Herero, since normally only the children of a Herero father and Herero mother can possibly belong to one of the recognized patriclans and matriclans. The number of these is very small and known to everybody, and every Herero can define precisely where he stands, genealogically, in the framework of the whole Herero system. There is hardly room for interlopers, joiners, new citizens; the Herero people can only regenerate itself from within. In this sense it is the perfect model of a "Chosen People": by immutable law, ordained from the beginning, all humanity consists only of Herero and Strangers [4].

That such a social system should colour the thinking of the Herero on practically every subject, is only to be expected.

86. The Herero never developed a centralized political structure with a paramount central authority [5]. Hererodom simply meant a loose conglomerate of factions, each in itself independent, and headed by an *omuhona* who was both leader and priest, and whose powers derived from his possession of the holy fire, and his wealth. The basis of organization was religious cult within the *oruzo*, and since there were several such sections, none in reality being senior or paramount, the development of central authority was not possible [6]. As will be seen hereunder, the lack of central political authority proved to be a great disadvantage in the wars between the Herero and the Nama [7].

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[1] Vedder, *The Native Tribes of South West Africa* (1928), pp. 186-187.

[2] *Ibid.*, p. 187.

[3] Murdock, G. P., *Africa: Its Peoples and Their Culture History* (1959), pp. 372-373.

[4] *Vide* in general, Gibson, G. D., "Double Descent and Its Correlates among the Herero of Ngamiland", in *American Anthropologist*, Vol. 58, No. 1 (1956), pp. 109-139; Vedder, *op. cit.*, pp. 49-50.

[5] Murdock, *op. cit.*, p. 372.

[6] *Vide* Andersson, C. J., *Lake Ngami* (2nd ed.), p. 198; Vedder, *The Native Tribes of South West Africa* (1928), pp. 187-190.

[7] *Vide* Chap. III, *infra*, and *Palgrave's Report*, p. 16.

Before the advent of German influence, the Hereros had seven recognized chief-priests. There were also others who were less significant. In the Kaokoveld there was none of any importance [1]. None of these chief-priests, or "cattle kings", was in fact paramount [2].

The status of priest-chief was hereditary, passing from father to eldest son, but only with the consent of the councillors [3]. The office of councillor was regulated by law on a basis of relationship and property as well as personal attributes. Chiefs and councillors discussed tribal matters at the holy fire [4]. The power of administering justice was vested in the chief, together with a few eminent men who served as judges [5]. According to Vedder:

> "When the evidence of witnesses is heard many oaths are taken . . . They swear by the ancestral grave, the missionary, the church, the bones of the father, the headgear or tears of the mother, heaven, the colour of the oruzo oxen . . . [6]"

87. As mentioned above, the Herero took an exclusive view of their national or ethnic group—a Herero could normally only become one by birth. But even this essential qualification was not enough; even children born of Herero parents had to be presented to their departed ancestors, and made legitimate and accepted members of the lineage by certain rites. An infant was introduced to its ancestral spirits at the sacred hearth with prayer and the sprinkling of consecrated water by the family priest, and there given its name. Its navel cord was kept in a bag by the head of the family, together with a thong in which there was a knot for each member of the family. The knot was untied when the member whom it represented died or became a Christian—which was considered to amount to the same thing [7].

When a child had got its permanent teeth, the Herero national mark of front teeth mutilation was put upon it. As soon as a number of children were ready for this operation, it was performed at the sacred hearth. A v-shaped notch was filed between the upper middle incisors, and the two or four lower incisors were knocked out with a chisel or stick, a stone being used as hammer [8]. In the Kaokoveld the custom was to knock out only the two middle incisors. Such tooth deformation was not for the sake of adornment, but was deemed an essential mark of a Herero [9].

Another mark of membership of the Herero people was circumcision, performed between the ages of 6 and 10, but often much later [10]. There were attendant rites, and the circumcised lads had to live in seclusion for a long time. Those who were circumcised together formed an association. They called each other "co-eval", and were obliged to help each other in certain ways [9].

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[1] Vedder, *The Native Tribes of South West Africa* (1928), p. 166.
[2] Vedder, *op. cit.*, pp. 146-147.
[3] Vedder, *The Native Tribes of South West Africa* (1928), p. 188.
[4] *Ibid.*, p. 189
[5] *Ibid.*, pp. 195-196.
[6] *Ibid.*, pp. 196-197.
[7] Vedder, *The Native Tribes of South West Africa* (1928), pp. 176, 190.
[8] Andersson, C. J., *Lake Ngami* (2nd ed.), p. 226; Vedder, *The Native Tribes of South West Africa* (1928), pp. 177-178.
[9] Vedder, *The Native Tribes of South West Africa* (1928), p. 178.
[10] Andersson, C. J., *Lake Ngami* (2nd ed.), p. 225.

For girls there were puberty rites, which were deemed necessary for them if they were to be true Herero [1]. These are still observed.

III. Language

88. The Herero language belongs to the Bantu family of languages, and is a pure Bantu language in the sense that it does not in sound system, structure or vocabulary betray any significant non-Bantu influence. It does not, for example, have the "click" (implosive) sounds found in south-eastern Bantu languages like Zulu and Xhosa, which derive from ancient contact with Bush and Hottentot populations.

The Bush and Nama speaking peoples in South West Africa also make copious use of "click" sounds, and the absence of such "clicks" in Herero speech would therefore seem to point to a shorter period of contact between the Herero and these peoples, as is also borne out by tradition and other ethnographic clues.

IV. Religion [2]

89. The ancestor cult of the Herero of pre-European times was inextricably bound together with their social and political structure. Social and political institutions and customs were regarded as "right" because they were inherited from the ancestors, and were not to be questioned. The ancestors were all-powerful. They could give and withhold help. They were glad to give help to their children, and continually watched over their interests, but, if neglected, then anger brought misfortune [3].

In times of dire need the Herero felt themselves compelled to seek direct communication with their ancestors, and for that purpose it was necessary that the priest should visit the ancestral graves. Vedder describes the procedure that was followed on such occasions as follows:

> "Having come near the grave he [i.e., the priest] barks like a dog, thereby intimating his arrival. Having reached the grave he lays his suit before the ancestors and solicits favours in a few words. Then he replies to his requests in a dissembled voice on behalf of the ancestors. At his departure he barks again. He thus imitates the visit of a petitioner who comes to the priest-chief, is barked at by the dogs, speaks to him, attains his end and is led off the premises under the barking of the dogs [4]."

A notable feature of this cult was the holy fire, which was kept going at the sacred hearth *(okuruuo)* by a family priestess, and could only be rekindled with sacred firesticks inherited from earlier generations [5]. There were numerous rituals to be performed by the head of the family as priest, and numerous rules and tabus to be observed by all members

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[1] Vedder, *The Native Tribes of South West Africa* (1928), pp. 178-179.

[2] *Vide* in general Vedder, *The Native Tribes of South West Africa* (1928), pp. 164-175.

[3] *Ibid.*, pp. 166-175; Vedder, *op. cit.*, pp. 47-50.

[4] Vedder, *The Native Tribes of South West Africa* (1928), p. 170.

[5] Andersson, C. J., *Lake Ngami* (2nd ed.), pp. 223-224; Vedder, *The Native Tribes of South West Africa* (1928), pp. 167-178.

of the family [1]. The main basis of Herero existence being their herds [2], these were hedged round with the strictest imperatives of the ancestor cult. Most of the animals which a Herero owned were actually not his personal property at all, but, having been inherited from his ancestors, were held in trust for them on behalf of their descendants in the family. Cows were allotted to each member of the family, young and old, who therefore knew that his daily sustenance derived from the bounty of his ancestors, who had carefully nursed the family wealth, and who expected him to do likewise. The legendary covetousness and parsimony of the Herero with regard to cattle were therefore founded on conceptions that went very deep indeed. Their devotion to their stock had the same origin [3].

V. Economy

90. The Herero of early South West Africa were pure pastoral nomads. In fact, they were the only Bantu nation in Africa who did not practise agriculture but pursued a life of independent pastoral nomadism [4]. Of their early history in the Territory they themselves say that there was nothing more to it than trekking from one grazing area to another and quarrelling with other people over water and pasture. They were primarily a cattle-owning people, but also kept sheep and goats [5]. Their large herds of cattle impressed early European travellers in the Territory, and were also the envy of raiding Hottentot groups. As stated before, cattle played an important part in the social and religious life of the Herero, and because of a peculiar spiritual attachment to their herds, they rarely parted with or slaughtered a beast [6].

Apart from planting a patch of tobacco here and there they did not utilize the soil for agricultural purposes. Their herds always provided the necessary subsistence in the form of milk and meat, and skins served as clothing [7].

Land and ground were regarded by the Herero as belonging to the community or tribe. Individual rights were only recognized in regard to movables, i.e., cattle, goats, sheep and household or personal possessions. Such movables were, as stated before, inherited either through the *oruzo* or through the *eanda*, as the case might be. Usually a trustworthy person was appointed as administrator of the estate, and very often a deceased would, before his death, have expressed his wish that provision be made for favourites [8].

The pastoral economy of the Herero compelled them to live in small

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[1] Andersson, C. J., *Lake Ngami* (2nd ed.), pp. 221-223; Vedder, *The Native Tribes of South West Africa* (1928), pp. 166-175.

[2] Andersson, C. J., *Lake Ngami* (2nd ed.), pp. 114-115; *Palgrave's Report*, pp. 12-13.

[3] Vedder, *The Native Tribes of South West Africa* (1928), pp. 169, 179-180, 183-184, 186, 194-195; Vedder, *op. cit.*, pp. 47-50.

[4] Murdock, *op. cit.*, p. 370.

[5] *Ibid.*; Vedder, *op. cit.*, p. 145; Andersson, C. J., *Lake Ngami* (2nd ed.), pp 114-115, 217-220, 232; *Palgrave's Report*, pp. 12-13.

[6] Vedder, *The Native Tribes of South West Africa* (1928), pp. 182-183; Vedder, *op. cit.*, p. 50.

[7] Vedder, *The Native Tribes of South West Africa* (1928), pp. 181-183.

[8] *Ibid.*, pp. 193-195; Vedder, *op. cit.*, p. 46.

groups. A *werf*, or family settlement, was limited to people who were related, and unrelated families did not live in one *werf* [1].

I. The Rehoboth Basters

91. The Basters of Rehoboth formed a separate group living in its own territory (or, as they called it, *Gebiet*), when Respondent assumed control over South West Africa. Since they only arrived in the Territory in the latter half of the nineteenth century [2], it will be convenient to consider their history briefly in the context of the events at that stage [3] and to deal with them slightly more fully when describing the groups as they were when Respondent assumed the Mandate [4].

J. The Europeans

92. The earliest contacts with South West Africa by Europeans, came from the adjacent Cape of Good Hope, which was a possession of the Dutch East India Company from 1652 until 1795, from which time onwards it was a British colony (save for the short period between 1803 and 1806). The incentives for the first expeditions to South West Africa arose from contacts between the White settlers and the Hottentots, who visited the Cape seasonally and traded with the White men. From the Hottentots the authorities at the Cape learnt of the existence of other ethnic groups living further to the north. Consequently, two ships, the *Grundel* and the *Bode*, were despatched from Cape Town in 1670 and 1677 respectively in an endeavour to gather information about these people and the country they inhabited. Although the crews of these ships went ashore along the coast of South West Africa, they found the whole coastal area desolate and unapproachable. The results of these expeditions were thus largely negative [5].

93. In view of the barren and inhospitable nature of the coast, further attempts to explore the interior of South West Africa were made overland. In 1738 a farmer, Willem van Wyk, traversed the arid regions of the north-western Cape and reached the Orange River. In 1760, another farmer, Jacobus Coetzee of Piquetberg, near Cape Town, explored the territory beyond the Orange River, ultimately reaching the hot springs of Warmbad. There he encountered Namas, who told him about the Dama, living further to the north [6].

94. The Governor of the Cape at the time, Ryk Tulbagh, was interested in Coetzee's report and immediately organized a scientific expedition to the territory north of the Orange River. The party consisted of 17 Europeans and 68 Hottentots, under the leadership of Hendrik Hop, an officer of the civil guard of Stellenbosch (a town near Cape Town), and included a land surveyor and cartographer, a botanist, a doctor, a philologist and an ethnographer. Fifteen ox-wagons provided the transport. This expedition reached the site of the present Keetmanshoop, and

[1] Vedder, *op. cit.*, p. 46.
[2] *Vide Palgrave's Report*, p. 78.
[3] *Vide* Chap. III, para. 34, *infra*.
[4] *Ibid.*, para. 88, *infra*.
[5] *Vide* Vedder, *op. cit.*, pp. 9-12.
[6] *Ibid.*, p. 19.

members of the expedition discovered the Fish River, a tributary of the Orange. Although no contact was made with any inhabitants of the Territory other than the Nama, valuable scientific information was gathered [1].

95. After these first expeditions, Europeans from the Cape ventured into the interior of South West Africa with greater frequency. Of particular interest was the case of one Wikar, a Swede, who deserted from his employment as an official at the Cape in 1775, and roamed for four years in the wilds across the Orange River. In 1779 he was pardoned when the Governor learnt of his wanderings. His report to the Governor contained surprisingly reliable information about almost all the various peoples at that time occupying South West Africa, although for the most part it was based on hearsay [2].

96. From 1791 to 1792 one Willem van Reenen headed an important expedition to the interior of South West Africa. The expedition went as far as the present Rehoboth, and one of its members, Pieter Brand, proceeded even further north and became the first White man to encounter the Bergdamas, probably in the vicinity of the Auas Mountains. They were living in dire poverty, having been deprived of their livestock, according to them, by the Nama. This expedition did not meet any Hereros. They did, however, find a White family by the name of Visagie farming near Keetmanshoop [3].

97. As the result of the abovementioned and other expeditions of discovery launched from the Cape, South West Africa up to the Swakop River was thoroughly explored by the end of the eighteenth century, and some economic activity by Whites (e.g., farming and hunting) had commenced in the Territory. Further European contacts with South West Africa form part of the general history of the Territory, which is dealt with in the next Chapter.

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[1] Vedder, *op. cit.*, pp. 19-22.
[2] *Ibid.*, p. 22.
[3] *Ibid.*, pp. 32-35, 230.

CHAPTER III

HISTORY OF SOUTH WEST AFRICA FROM APPROXIMATELY 1800 TO 1920

A. Introductory

1. The history of South West Africa during the nineteenth century consists of a record of almost uninterrupted warfare, particularly between the Nama and the Herero. As will be seen, in the period between 1835 and 1861 the Nama became undisputed masters over the Herero. After 1861, the tide turned in favour of the Herero, and in 1870 they concluded a peace treaty which confirmed their position as the dominant group in central South West Africa. After ten relatively peaceful years, the year 1880 saw the beginning of renewed hostilities, which were not finally terminated until the Germans, who had in the meanwhile acquired authority over the Territory, suppressed the warring tribes by force of arms in the last couple of years of the century.

The first two decades of the present century were marred by further warfare—first between various dissident groups and the German authorities in the years between 1903 and 1907, and thereafter by the First World War, in the course of which South African troops conquered the Territory.

The manner in which the destinies of the various groups were affected by these happenings, is the subject-matter of the present Chapter.

B. First Contacts Between the Herero and the Nama

2. The first contact between the Herero and the Hottentots or Nama came about when Herero hunters encountered Nama bands in the region of the Swakop and Okahandja. Clashes occurred, and the Nama were driven back. The fierce appearance of the Herero, with their teeth filed into points, struck terror into the Nama [1].

3. The southward movement of the Herero was accentuated by droughts in 1829 and 1830, which caused them to move with thousands of cattle into the territory claimed by the Hottentots. Although the Red Nation, who were at that stage the leaders of a Nama alliance [2], organized a raid and took several thousand cattle from the Herero [3], this did not halt the Herero invasion, but merely led to the herds being protected by stronger guards. Any resistance to the Herero advance was ruthlessly crushed [4]. It soon became apparent to the Hottentots that they were no match for the more powerful Herero. Consequently Games, the female chief of the Red Nation, sought the assistance of one Jonker Afrikaner, the chief of a tribe of Orlam Hottentots who

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[1] Vedder, *op. cit.*, pp. 130-131.
[2] *Vide* Chap. II, para. 80, *supra*.
[3] Vedder, *op. cit.*, p. 177.
[4] *Ibid.*, pp. 177-178.

were then living far south near the Orange River [1]. In view of the role to be played by the Afrikaner tribe in the succeeding years, it will be convenient to give a brief account of its history up to the receipt of this request.

C. Early History of the Afrikaner Tribe [2]

4. During the first British occupation of the Cape in 1795, a Hottentot tribe, calling themselves the Afrikaners, lived in the district of Tulbagh in the Cape. Their leader was one Jager Afrikaner. The British authorities provided the Afrikaner tribe with ammunition for use against the Bushmen, but Jager Afrikaner gradually extended his activities to the more profitable pursuit of robbing persons who were wealthier than the primitive nomadic Bushmen. This led him into conflict with the authorities, and he moved to a stronghold on an island in the Orange River, where he collected a band which soon terrorized the whole area. In 1799 the authorities at the Cape put a price on Jager's head, and sent a commando against him. Although this commando did not reach his hideout, Jager thereafter became more cautious and restricted his activities to the area beyond the boundaries of the Cape Colony.

After being the scourge of the area for years, Jager was converted to Christianity by a missionary, and died in 1823 at peace with the authorities.

5. The death of Jager gave rise to a dispute about succession to the chieftainship, which caused a split in the tribe. His son, Jonker, moved at the head of the larger section of the tribe across the Orange River into South West Africa. While living a short distance north of the Orange River he received the request for assistance against the Herero mentioned above. This request suited the ambitious Jonker very well. He agreed to wage war against the Herero on condition that he would be allowed a free choice of a place of residence in the Red Nation's tribal areas [3].

D. The Era of Nama Domination

6. On his way to the north, Jonker clashed with Korana Namas, and carried off some of their cattle [3]. In 1835 he defeated the Herero in three battles. First he came down on Herero herdsmen north of Gibeon. His possession of horses and firearms gave him a tremendous advantage—he shot most of the Herero down and took their cattle. Soon thereafter he defeated them in two further clashes, and proceeded up to Okahandja where all the Herero had fled into the mountains [4]. In the following years, raiding of Herero cattle continued. Many Herero

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[1] Vedder, *op. cit.*, pp. 177, 180; Andersson, C. J., *Lake Ngami* (2nd ed.), p. 219; Alexander, *op. cit.*, Vol. II, p. 151.

[2] See in general *U.G.* 41—1926, pp. 10-11.

[3] Vedder, *op. cit.*, p. 180.

[4] *Ibid.*, p. 181; Alexander, *op. cit.*, Vol. II, p. 151; Andersson, C. J., *Lake Ngami* (2nd ed.), p. 219.

were either killed or enslaved by the Afrikaner Namas and other Nama tribes [1].

After his successful battles against the Herero, Jonker established himself at Eikhams, which he renamed Windhoek, in about 1840 [2].

7. Although the Herero had been severely defeated and had lost half [3] of their cattle to Jonker, and many had fled to the Kaokoveld, some of them preferred to come to terms with Jonker. Amongst them were the chiefs Tjamuaha, Mungunda and Kahitjene. After the losses inflicted on them by Jonker, they had again managed to improve their economic position, not only by their energy and skill in raising stock, but also by raiding other tribes of their own race. A retreat to the north in fear of further onslaughts by Jonker would have subjected them to the risk of falling into the hands of these other Herero tribes. As a result, they placed themselves under Jonker's protection [4], and, with the assistance of three missionaries, a peace treaty was concluded between Jonker and Tjamuaha on 25 December 1842. For the moment the future appeared to promise peace and security. Jonker increased the number of his followers by adding new members to his tribe, and improved the amenities of Windhoek by inviting traders to settle there [5].

8. Relations between Jonker and his Herero allies soon became strained. In 1844 Oasib, the successor to Games as chief of the Red Nation Namas, visited Kahitjene and was hospitably received. Suddenly, however, he fell upon the Hereros, killing all who offered resistance, and taking Kahitjene's cattle. Jonker did nothing to intervene on behalf of Kahitjene, who, not unnaturally, concluded that Jonker's protection was not worth having, and withdrew from his alliance with the Afrikaner Namas [6]. At the same time, Jonker himself was becoming progressively more imperious and arrogant in his relations with the Herero, even those allied to him. Thus, for instance, Vedder states:

> "... when a fit of anger took him, he used to order the Namas to 'bind my friend's calf to the wagon wheel' [i.e., Maharero, son of Tjamuaha], and Maharero had then to stand, for days and nights at a time, with his feet and arms bound with riems to the wheel of an ox wagon [7]".

9. In March 1846 Jonker decided to arrange an expedition (accompanied by Maharero and some Herero warriors) to punish another Herero chief, called Katuneko. The latter had treacherously attacked and annihilated five Mbanderu [8] kraals (or villages) and taken their stock. When Jonker arrived at Katuneko's residence it was deserted. Jonker became so angry that he fell upon a wealthy and completely

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[1] By 1837 it had already become a common practice for the Nama to have Herero slaves, *vide* Alexander, *op. cit.*, Vol. I, pp. 221-224, Vol. II, pp. 39, 163, 211-212; *Palgrave's Report*, p. 17; Andersson, *Lake Ngami* (2nd ed.), pp. 218-220.

[2] Vedder, *op. cit.*, p. 182.

[3] Andersson, C. J., *Lake Ngami* (2nd ed.), p. 220.

[4] *Palgrave's Report*, pp. 16-17; Vedder, *op. cit.*, p. 197.

[5] Vedder, *op. cit.*, pp. 198-205.

[6] *Ibid.*, p. 206.

[7] *Ibid.*, p. 208.

[8] The eastern branch of the Herero.

innocent Herero, named Kahena, and carried off more than 4,000 of his oxen [1].

10. While Jonker was on a further expedition to the north, Oasib, of the Red Nation Namas, attacked the Mbanderus in the east and brought back rich spoils [2].

11. In December 1848 Jonker heard of a ship which was lying wrecked somewhere north of Walvis Bay. He started in search of the wreck but could not find it. He felt annoyed at the idea of having to return empty-handed. Passing near some Herero villages, he invited one of the wealthy Hereros, Kamukamu (a half brother of Kahitjene, Jonker's former ally) [3], and received him in a friendly way, but had him murdered at night. Thereafter he wiped out the villages of Kamukamu and two other Herero headmen by killing all the inhabitants, and drove their cattle away to Windhoek [4].

Kahitjene endeavoured to take revenge but was defeated. Thereafter he went to settle in the vicinity of Barmen, where, to make space for himself and to compensate for his losses, he attacked other Hereros [5].

12. Oasib of the Red Nation Namas made a raid on one of the posts of Jonker's ally, Tjamuaha, and drove him out of it. Jonker thereupon authorized Tjamuaha's son, Maharero, to undertake an expedition against other Hereros to compensate for the losses. No steps were taken against Oasib [5].

At this stage, the whole central area of South West Africa had lapsed into chaos. Raiding and plundering became general. Kahitjene, afraid to attack Jonker directly, took punitive measures against Jonker's servants, the Bergdamas [6].

Jonker finally decided to take action against the whole Herero nation [7]. The first on the list were the Mbanderu. They had surprised one of Jonker's cattle posts and in order to take revenge, Jonker entered into an alliance with Oasib of the Red Nation, who was entrusted with a punitive expedition against the Mbanderu. Oasib did his best to make a clean sweep. All the men upon whom hands could be laid were killed. At first the young women and children were spared and carried off as slaves. However, when it was found that they were unable to endure the long journey, they were also despatched [8].

Thereafter, Jonker dealt with the Hereros in Windhoek. Those who did not escape immediately were killed. Since these Hereros had previously separated from their own people and linked up with Jonker, they were intensely hated by their own nation, who killed them wherever they could lay hands on them [9].

13. Both Kahitjene and Tjamuaha were at that stage living at Okahandja (Schemelen's Hope). When rumours of Jonker's designs against the Herero reached him, Kahitjene decided to flee. In August

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[1] Vedder, *op. cit.*, p. 210.
[2] *Ibid.*, pp. 210-211.
[3] *Vide* paras. 7-8, *supra*.
[4] Vedder, *op. cit.*, pp. 211-212; Andersson, C. J., *Lake Ngami* (2nd ed.), p. 124.
[5] Vedder, *op. cit.*, p. 213.
[6] *Ibid.*, pp. 213-214.
[7] *Ibid.*; Andersson, C. J., *Lake Ngami* (2nd ed.), p. 124.
[8] Vedder, *op. cit.*, pp. 214-215.
[9] *Ibid.*, p. 218.

1850, he left with his herds and followers, but walked straight into an ambush. Kahitjene managed to escape, but everything he possessed in Okahandja fell into Jonker's hands. Thereafter the Namas fell upon Tjamuaha's Herero, murdering and plundering whoever came into their hands [1].

14. At about the same time as the massacre at Okahandja took place, there landed at Walvis Bay a person who was destined to play a considerable role in the history of South West Africa. He was Charles John Andersson, a Swedish explorer, trader and physical scientist. He was accompanied by Sir Francis Galton, an English explorer, hunter and scientist, who spent 15 months in South West Africa. Andersson remained in the Territory, and eventually died there in 1867. Both these men recorded their experiences in books [2].

On his arrival in South West Africa, Galton was anxious to induce the Nama and Herero to make peace. He visited Jonker, who apologized to the Rhenish missionary at Okahandja, Mr. Kolbe, for the brutal behaviour of the Afrikaner tribe [3], and gave a written undertaking to Galton in the following terms:

> "Statement and Pledges, sent by Jonker to the English Government:
>
> 'I acknowledge that I have done much wrong in this land but I pledge my word to the English Government that I will from this day forward abstain from all injustice to the Damaras. [i.e., Hereros] —I promise that I will with all my power keep peace with them and that I will use my influence as well as I can to persuade the other Namaquas to do the same.' signed:—Jonker Africaner [4]."

Other Nama tribes adopted the attitude that they had every justification for fighting their old enemies (i.e., Herero) who "wanted to take [their] land away from [them]" [5]. Jonker, however, was restrained for a while. Tjamuaha continued living in subservience to him [6].

15. With the Hereros thus temporarily freed from attack by their most persistent enemy, they commenced bitter internecine struggles in which Kahitjene was killed and his whole tribe broken up [7]. The attitude of the Hereros has been summed up as follows:

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[1] Vedder, *op. cit.*, pp. 218-219; Andersson, C. J., *Lake Ngami* (2nd ed.), pp. 121-123; *Chronik Otjimbingwe*, 1850, *Quellen zur Geschichte von Südwestafrika* 1, p. 17. (The last-mentioned source consists of 30 unpublished volumes of extracts from the original records of the Rhenish Missionary Society. These extracts were compiled by Dr. H. Vedder, former Praeses of the Rhenish Mission in Damaraland, at the request of the South West Africa Administration, and constitute a very valuable source of information on the early history of South West Africa. They are housed in the Carnegie Library, University of Stellenbosch. Hereinafter, this source will be cited as *Quellen* 1-29.)

[2] Andersson, C. J., *Lake Ngami* (2nd ed.); *The Okavango River* (1861); *Notes of Travel in South Africa* (1875); Galton, F., *Interior of South Africa* (1852); *The Narrative of an Explorer in Tropical South Africa* (1853).

[3] Andersson, C. J., *Lake Ngami* (2nd ed.), pp 132-136.

[4] *Diary, F. Kolbe*, Jan.-Apr. 1851, *Quellen* 28, p. 28.

[5] Vedder, *op. cit.*, p. 247.

[6] *Ibid.*, pp. 247-248.

[7] Andersson, C. J., *Lake Ngami* (2nd ed.), pp. 142-144, 148-149.

"Whenever the Hereros were not worried by the Orlams and the Namas, they fought all the more fiercely amongst themselves. It was a war of each one against all the rest, and every small chief who had a few cattle plundered and murdered the others who had rather more, and every one who had been despoiled looked for a third at whose expense he could recoup his loss. Bloodshed and misery, murder and horror, were so prevalent throughout the land that people were almost inclined to wish that the times when Jonker inspired universal fear and terror would return. It is much easier to be ready for a lion than to protect oneself against a whole pack of hungry wolves [1]."

16. Galton left on 6 January 1852 [2]. Jonker immediately broke loose, and Andersson, after a detailed description of investigations made by himself to ascertain the facts, recorded, *inter alia*:

"Here [i.e., at Barmen] fugitives arrived daily, bringing tidings of plunder and bloodshed. I felt grieved and angry at Jonker's outrageous behaviour. Only a year before, he had most solemnly promised Mr. Galton never again to molest the Damaras [i.e., the Hereros] . . .

The result of my own and Mr. Hahn's inquiries, was a conviction that Jonker, with his murderous horde, had destroyed in his recent foray upwards of forty werfts or villages; and that the aggregate number of cattle carried off could not have been much short of ten or eleven thousand. One powerful tribe of Damaras had been completely broken up [3]."

As a result of his success, Jonker gathered a large number of followers, servants and slaves from other Nama tribes, Herero and Bergdama [4].

17. Other Nama tribes were envious of Jonker's success, and in the years 1852 to 1855 he was involved in clashes with the Red Nation and the Topnaars. In May 1854 the Topnaars launched a fierce attack on Windhoek. Jonker sent his bondsmen, the Herero, to ward off the attack, but after a large number of them had been shot down, they broke and fled. Jonker had all those shot who ran away, and launched a successful counter-offensive [5].

In November 1855, under influence of missionaries and Europeans who were mining copper in the area, peace was concluded between Jonker and the Red Nation. Further attempts to secure a more universal cessation of hostilities resulted in a peace treaty being signed at Hoachanas in January 1858 by 11 Nama chiefs [6].

18. While the peace negotiations amongst the Namas were proceeding, Jonker, having either impoverished or subjugated the Herero, turned his attention to the Ovambos. In October 1857 he sent a combined force of Nama and Herero into Ovamboland. Eighteen cattle posts were stripped of all their cattle and a number of sons and wives of Ovambo chiefs were taken prisoner. On the return journey, one sec-

[1] Vedder, *op. cit.*, p. 251, quoting von Rohden, an author who wrote in 1888.
[2] Andersson, C. J., *Lake Ngami* (2nd ed.), pp. 251-252.
[3] *Ibid.*, pp. 295-296.
[4] Vedder, *op. cit.*, pp. 255-258.
[5] *Ibid.*, p. 263.
[6] *Ibid.*, pp. 265-269.

tion of the party made a detour to Grootfontein, killing a number of Herero cattle herdsmen and taking their stock [1].

In August 1860 Jonker himself paid a visit to Ovamboland. Andersson gives the following account of his activities:

> "There was at the time a strong party [of Ovambos] who inclined for another chief, at the head of which was Nakonjona (a remarkably intelligent and fine-looking man), but Chypanza [the chief], dreading his influence, caused him to be put out of the way. On this, the younger brother of the murdered man, the present chief Chykongo, sent for assistance to Jonker Afrikaner, the famous Namaqua freebooter, who shortly afterwards appeared in Ovamboland with a considerable force. For a while he amused himself by laying heavy contributions of cattle, etc., on the natives, besides slaying very many of them [2]."

After six months he returned with 40 ox-wagons loaded with booty together with 20,000 cattle [3].

19. During Jonker's absence, other Namas followed his example by raiding Ovambo and Herero tribes. Reports of missionaries of the time abound in stories of the atrocities committed on these raids, such as, to quote one example, imprisoning men, women and children in their huts, putting combustible material around them, and burning alive the people inside [4].

20. By 1860, the Hereros were entirely subjugated and demoralized. Large numbers of them were slaves to the Nama, at whose hands they often received cruel and inhuman treatment. This fact also is illustrated by contemporary missionary reports [5].

E. The Liberation and Rise of the Herero

21. Shortly after Jonker's return from Ovamboland, both he and Tjamuaha fell ill and both died in 1861, within a few months of each other [6]. Jonker was succeeded by his son Christian, who was a fearful, ineffectual man [7].

22. Tjamuaha's son and successor, Maharero, on the other hand, was made of sterner stuff than his father, and bondage held no charms for him. He was determined to liberate the Herero from the Nama rule. After his father's death, he gathered his people and cattle (as well as Christian's cattle) and escaped to Otjimbingwe, where Andersson had established a trading store. As a result of their service with the Afrikaners, the Hereros had learnt to use firearms. Maharero immediately began preparing for an attack from the Afrikaners, which he knew was inevitable. He collected Herero warriors from the whole area, and his strength increased rapidly. In the meanwhile, Christian was gathering

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[1] Vedder, *op. cit.*, pp. 269-270.
[2] Andersson, C. J., *Notes of Travel in South Africa* (1875), p. 217.
[3] Vedder, *op. cit.*, p. 271.
[4] *Chronik Otjimbingwe*, 1860, *Quellen* 1, pp. 39-40; *Report by G. Krönlein*, Berseba, 16 Mar. 1861, *Quellen* 11, p. 299.
[5] Vedder, *op. cit.*, p. 260.
[6] *Ibid.*, pp. 275-277.
[7] *Ibid.*, p. 329.

his own forces. By a ruse, Christian managed to launch a surprise attack on the Hereros at Otjimbingwe in June 1863. After initial uncertainty, the Hereros, however, rallied and routed their attackers [1]. Andersson gives a vivid account of the battle, from which the following is an extract:

> "A grand but appalling scene followed. Fully fifteen hundred Damaras [i.e., Hereros] set off in hot pursuit of the flying Namaquas, who now only thought how they might best use their legs; it was, however, short work, as the broad assegaai of the Damaras made terrible havoc in the ranks of their opponents ... The carnage was fearful, ... Had every Damara present that day done his duty, not one Hottentot ought to have survived, as they might have been cut off to a man with the greatest ease. But, until the pursuit began, there was not certainly three hundred actually engaged, and instead of pursuing the enemy in earnest, most of them fell to plundering; and hundreds of Damaras might have been seen carrying off booty, or stripping the slain. It was not unusual to see a fellow hastily covered with the torn garments of some slaughtered foe, still reeking with gore. As it was, the Damaras had gained a complete victory ... [2]"

23. Christian, the Nama chief, was himself killed in the battle of Otjimbingwe. He was succeeded by his brother, Jan Jonker. Despite missionary efforts to secure peace, the Afrikaner Namas were determined to take revenge on the Herero [3]. Deciding that attack was the best means of defence, a Herero fighting force in March 1864 attacked and surprised Jan Jonker's tribe and the Topnaar Namas, who had united with him, east of Windhoek. A large number of cattle was captured [4].

24. After the defeat, Jan Jonker organized a Nama alliance comprising his tribe, the Red Nation under Oasib, the Veldskoendraers under Hendrik Ses, the Grootdodens under Aimab and the Topnaars, with a commando from Garib [5]. Maharero, assisted by Andersson, also prepared for war, and he collected a force of 3,000 Hereros. In addition he was assisted by the troops of the Swartbooi Namas. In June 1864 the combined Herero-Swartbooi force encountered Jonker's men at a place called Two Waters in a mountain range near Seeis. After severe resistance, Jonker's men were defeated [6].

25. Jan Jonker escaped, determined to take revenge on the Swartboois for their assistance to the Herero. In order to get beyond his reach into territory where they could be protected by the Herero, the Swartboois left Rehoboth where they had been living up to then, to settle in the area between the Swakop and Omaruru rivers [7]. The party was, however, overtaken by Jan Jonker, and, after heavy fighting, the Swartboois abandoned their camp and took up a more favourable position. The women and children sought refuge in the sandy bank of a

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[1] *Palgrave's Report*, p. 71; Andersson, C. J., *Notes of Travel in South Africa* (1875), pp. 64-78; *Chronik Otjimbingwe*, 1863, *Quellen* 1, pp. 47-49.
[2] Andersson, C. J., *Notes of Travel in South Africa* (1875), pp. 75-76.
[3] Vedder, *op. cit.*, pp. 337-338.
[4] *Ibid.*, p. 341.
[5] *Ibid.*, p. 342.
[6] *Ibid.*, pp. 344-345; *Diary, Kleinschmidt*, Jun., 1864, *Quellen* 20, p. 134.
[7] Vedder, *op. cit.*, pp. 345-347.

river near the camp, which was covered with a species of long wiry grass. This did not, however, enable them to escape Jan Jonker's men, who set fire to the grass, by which means a number of women and children were killed and others seriously injured. Having also captured the camp, and taken considerable booty, Jonker was content with his success, and did not pursue the Swartboois further [1].

26. Having thus settled with the Swartboois, Jan Jonker turned his attention to Maharero. Since his tribe had been considerably weakened, he entered into an alliance with the Gobabis Namas under their leader Vlermuis [2]. Thereafter, sporadic fighting took place between this alliance on the one side and the Herero and Mbanderu on the other.

Towards August 1865 Jan Jonker heard that the Nama chief, Hendrik Ses (Nanib), intended to attack the Hereros at Otjimbingwe. Jan Jonker immediately decided to join Hendrik Ses for, if Hendrik were successful, the danger might arise of his jeopardizing Jan's claim to paramountcy [3]. In September 1865, the Namas attacked Otjimbingwe, but fought in such a half-hearted manner that they were soon put to flight [4]. The Herero, once again accompanied by their former allies, the Swartboois, followed up their victory and moved against Hendrik Ses (Nanib). On the arrival of the Herero, Jan Jonker and his men fled immediately. Hendrik Ses, however, offered a resolute resistance, and in the words of Andersson:

> ". . . had it not been for the presence of the Rehobothians [Swartboois], the Damaras [Hereros] would have been driven back with shame and slaughter. As it was they lost many men, but the day, somewhat inauspiciously begun, ended in the most complete victory, every one of the enemy, including the obnoxious chief, being slain [5]."

27. During the years 1865 and 1866, warfare also continued among the other Nama tribes and the Herero, in the course of which the Namas at Gobabis in particular suffered many casualties [6].

28. Towards the end of 1867, Jan Jonker marched on Otjimbingwe once more, supported on this occasion by men under Jacobus Booi, another Nama leader. They managed to surprise the Hereros, "and the best and bravest of them were shot down before they could lay their hands on their guns" [7].

After the battle Jan Jonker retreated to Anawood with his booty. The Herero followed him and in the night of 22 December 1867 they surrounded the Nama camp at Salem (near Anawood). The next day heavy losses were inflicted on the Namas, who finally managed to break through and to escape to Tsaobis where, however, the Hereros had cut off the water supply so that the Namas were forced to flee even further [8].

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[1] Vedder, *op. cit.*, pp. 347-348; Andersson, C. J., *Notes of Travel in South Africa* (1875), pp. 122-124; *Chronik Otjimbingwe*, 1864, *Quellen* 1, pp. 54-55.

[2] Vedder, *op. cit.*, pp. 349-350.

[3] *Ibid.*, pp. 350-351.

[4] Andersson, C. J., *Notes of Travel in South Africa* (1875), p. 145; Vedder, *op. cit.*, p. 351.

[5] Andersson. C. J., *Notes of Travel in South Africa* (1875), p. 147.

[6] Vedder, *op. cit.*, pp. 355-356.

[7] *Ibid.*, pp. 356-357.

[8] *Ibid.*, pp. 357; *Chronik Otjimbingwe*, 1867, *Quellen* 1, p. 67.

Approximately a year later, Jan Jonker and Jacobus Booi attempted another campaign against the Herero, but at Omukaru, on the western side of Okahandja, the Namas were defeated, and the Boois tribe was exterminated and disappeared from history [1].

29. After this battle, Maharero decided that the time was ripe to settle finally with the Namas. In July 1869 a strong force was sent to the south. Insufficient food was taken along, since the Herero contemplated living off the livestock of the Namas. However, no Namas could be found, and the army returned in a starving condition [2].

F. The Early History of the Witboois

30. During the incessant wars between the Namas (particularly the Afrikaner tribe) and the Herero, another tribe of Orlam Namas had become prominent. These were the Witboois, who established themselves at Gibeon in April 1863, after a nomadic existence of 13 years. Their chief, Kido Witbooi, subscribed to the peace treaty of Hoachanas in 1858 [3], and he held himself to its terms, refusing to take part in the wars against the Hereros [4]. This attitude brought on him the enmity of some of the other Nama tribes, and in 1864 he was attacked by Oasib of the Red Nation, Hendrik Ses (Nanib) of the Veldskoendraers and Aimab of the Grootdodens. The battle lasted for two days, after which the Witboois were forced to surrender. The enemy left Gibeon in ruins, and the inhabitants reduced to poverty [5]. However, in a number of forays against the Red Nation during the following year, the Witboois managed to recover their position [6].

31. In September 1866, during Kido Witbooi's absence, Oasib turned up at Gibeon with a large force. He pretended that he had not come to fight since Kido only, and not the Witbooi tribe, was his enemy. However, when some 30 Witboois accepted his invitation to visit his camp, he had them overpowered and shot. He then fell on Gibeon, capturing all the women and children and all the stock [7]. On being informed of this, Kido gave chase, recovered the women and children, and defeated the Red Nation in a battle at Rehoboth. Oasib escaped, but died shortly afterwards, being succeeded by his son Barnabas [8]. In December 1867 a peace treaty was signed which ended the wars between the Witboois and the Red Nation [9].

G. Attempts at Restoring Peace

32. The interminable bloodshed and chaos [10] led the inhabitants, particularly the European ones, to consider the possibility of assumption

[1] Vedder, *op. cit.*, p. 362.
[2] *Ibid.*, pp. 362-364.
[3] *Vide* para. 17, *supra.*
[4] Vedder, *op. cit.*, pp. 366-367.
[5] *Ibid.*, pp. 367-369.
[6] *Ibid.*, pp. 370-371.
[7] *Ibid.*, pp. 373-374.
[8] *Ibid.*, pp. 374-377.
[9] *Ibid.*, pp. 377-378.
[10] Andersson who died on 5 July 1867 near the Kunene River (on an expedition to the north) wrote shortly before his death: "The cursed mutual distrust . . . makes

of control by some European power. Thus in 1868 a petition signed by 31 Europeans and 25 Hereros was sent to the British Government at the Cape, asking for its protection [1]. In 1869, the management of the Rhenish Missionary Society requested the Government of the North German Confederation to afford protection to its missionaries in South West Africa. Nothing tangible resulted from these requests [2].

33. However, circumstances in the Territory were becoming more conducive to peace—even though only temporarily. In addition to the ravages of war, the country in 1869 suffered from the effects of a severe drought. Maharero's last campaign had been a failure, resulting in near starvation of his armies [3]. The Nama tribes, and in particular the tribe of Jan Jonker, were weakened and impoverished by warfare and drought [4]. Through missionary intervention, and after months of intrigue and treachery amongst the various Nama and Herero leaders, a peace treaty was signed at Okahandja on 23 September 1870. The main dispute for settlement at the conference related to the area to be occupied respectively by Jan Jonker and his tribe, and by the Herero. Maharero tried to force Jonker away from Windhoek to the south, but the other Nama chiefs bluntly refused to agree to this proposal. Eventually a compromise agreement was reached—Jan Jonker would remain at Windhoek, but "on feudal tenure". This expression was not defined, and in addition no boundaries between his territory and that of the Hereros were determined. It will be apparent therefore that the peace of Okahandja carried within it the seeds of further dissension and bloodshed [5].

34. Also present at the conference of Nama and Herero chiefs at Okahandja was a deputation of Basters under Hermanus van Wyk. The Basters were a group of mixed Hottentot-European descent who had moved from the Cape Colony and were looking for a place in which to settle. They were given permission by the Swartboois to live at Rehoboth (which had previously been occupied by the Swartboois) [6]. Other interested tribes present at the conference apparently approved of the arrangement [7].

H. The Period of Herero Domination

35. After the peace of Okahandja, Maharero's strength and cattle increased immensely, and he took full advantage of his opportunity to repay the Namas for the sufferings of his people in former years. He sent his cattle to pasture in the lands of the Namas, and even prevented the Namas from hunting [8]. Jan Jonker's tribe had been so weakened that they were forced to submit to this treatment, and were progressively

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a thorough reconciliation so difficult, if not impossible, between so many conflicting interests." (*Notes of Travel in South Africa* (1875), p. 150.) And further ". . . the country is once more thrown into a state of the utmost confusion, and the prospects of peace farther off than ever". (*Notes of Travel in South Africa*, p. 157.)

[1] Vedder, *op. cit.*, p. 379.
[2] *Ibid.*, pp. 379-382.
[3] *Vide* para. 29, *supra*.
[4] Vedder, *op. cit.*, p. 385.
[5] *Ibid.*, pp. 385-393.
[6] *Vide* para. 25, *supra*.
[7] Vedder, *op. cit.*, p. 412; *Palgrave's Report*, pp. 70, 75, 77-82.
[8] Vedder, *op. cit.*, pp. 407-410.

reduced to a state bordering on starvation. As a result, cattle-stealing became prevalent [1].

36. Nevertheless Maharero never felt quite safe with Jan Jonker so near him, and realizing that in the state of general prosperity in which the Herero were, it would be difficult to collect an army, he and Aponda, the Chief of the Mbanderu, in 1872, sent a letter to the Governor at the Cape in which they asked for British guidance and assistance in preserving peace. In view of their relations with the Namas, the letter stated, lack of British assistance would result in "a war of extirpation"[2]. This letter produced no concrete results, and consequently Maharero made a similar request in June 1874.

37. In 1876 the British Government sent a Special Commissioner, in the person of Mr. W. C. Palgrave to South West Africa to ascertain the wishes of the inhabitants and to advise the Government [3]. Palgrave held a series of meetings with both Herero and Nama chiefs. Maharero requested the protection of the British Government, and offered a large piece of territory (which did not belong to him) [4] to the Government. Jan Jonker consented to the appointment of a magistrate at Windhoek. As far as the other Nama leaders were concerned, some were prepared to accept British protection, whereas others claimed to be able to maintain peace and order without assistance. The problem of boundaries between the various groups was a burning question, on which divergent and irreconcilable views were held [5].

Thus, according to Jan Jonker, Maharero—". . . thought it would be better that [they] should be far apart that if [they] lived close together [they] should be sure to make war" [6]. Jan Jonker also told Palgrave:

> ". . . I wish to have a boundary line fixed, which shall clearly define where I can work and procure a living. I am responsible for my people, and I want to know what country I have to use [7]."

Petrus Swartbooi, a brother of the Chief of the only Nama tribe to have sided with the Herero, informed Palgrave:

> "We stand alone, . . . neither our own colour nor the black people (Damaras) understand us, and that is why we are glad you have come . . . The Damaras [Herero] have told us that we can look for a place towards the sea. If we find a place, we are not sure that the Damaras will keep their promise, and allow us to leave here and occupy it [8]."

Regarding the Bergdama, Palgrave stated: "At present, of course, their claims to the land are disregarded by the Namaquas [Nama] as well as by the Hereros [9]."

The question of the Rehoboth Basters' right to the Rehoboth area was a particularly complicated one. Apparently the terms of the trans-

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[1] Vedder, *op. cit.*, p. 415.
[2] *Palgrave's Report*, pp. 19-21.
[3] *Ibid.*, p. 1.
[4] Vedder, *op. cit.*, p. 431.
[5] *Palgrave's Report*, pp. 25-26, 40-42, 44-45, 50, 52-54, 57, 61-83.
[6] *Ibid.*, p. 65.
[7] *Ibid.*, pp. 65-67.
[8] *Ibid.*, pp. 18, 25, 26.
[9] *Ibid.*, p. 51.

action on which the Basters based their claims to the area had not been complied with and Swartbooi, the former occupant of Rehoboth [1], wanted to return to the area with his tribe. Hermanus van Wyk, leader of the Basters, and members of his Council, earnestly implored the Cape Government "to rule the country and secure protection" for them [2]. Palgrave returned to the Cape and submitted a report to his Government in which he recommended that the coast of South West Africa be proclaimed British Territory [3].

As a result of Palgrave's recommendations, Walvis Bay and the surrounding territory was proclaimed a British Crown Territory on 12 March 1878. The boundaries of the "Port or Settlement" of Walvis Bay were proclaimed as follows:

> "... on the south by a line from a point on the coast fifteen miles south of Pelican Point to Scheppmansdorf; on the east by a line from Scheppmansdorf to the Rooibank, including the Plateau, and thence to ten miles inland from the mouth of the Swakop River; on the north by the last ten miles of the course of the said Swakop River [4]".

38. During the period between October 1877 and January 1879, Palgrave paid a second official visit to the Territory, but he was not very pleased with its results. The Hereros had started to distrust him. The Namas opposed him. The cattle raids and killings continued [5], and the chiefs did not turn up at meetings which he arranged [6]. Maharero was always urging that the Government ought to display more power. With this Palgrave was in agreement. He considered that a military force "large enough to inspire fear on the one side and confidence on the other", would be necessary to enforce peace in Namaland [7].

Palgrave again returned to South West Africa in January 1880, this time as magistrate of Walvis Bay and Commissioner for Hereroland. A resident magistrate, Manning, was also appointed at Okahandja [8].

I. The Wars of 1880 to 1884

39. By 1880 war between the Namas and Herero once more became imminent. The reasons appear from the following contemporary reports from British officials in South West Africa:

> "I can quite see that it [a war] must come before long, because I think it is almost a matter of course. The Damaras [Hereros] are

[1] *Vide* para. 25, *supra*.

[2] *Palgrave's Report*, pp. 75, 78-83.

[3] G. 50—1877, *Report of W. Coates Palgrave, Esq., Special Commissioner to the Tribes North of the Orange River, of his Mission to Damaraland and Great Namaqualand in 1876*.

[4] *Vide* Proclamation by Staff-Commander Dyer, of 12 Mar. 1878, in C.2144, p. 8, as confirmed by Letters Patent of 14 Dec. 1878, in *British and Foreign State Papers 1878-1879*, Vol. LXX, pp. 495-496.

[5] *Palgrave to Capt. Jacobus Isaac, etc.*, 19 Dec. 1877, N.A. 287; *letter by H. van Wyk*, Rehoboth, 1 Jan. 1878, *Quellen* 15; *Palgrave to Secretary for Native Affairs*, 31 Jan. 1878, N.A. 287; *Report by F. Heidmann*, Rehoboth, 27 Apr. 1878, *Quellen* 21, p. 137; *Rhenish Missionaries to Palgrave*, 25 Aug. 1878, N.A. 287; *Hermanus van Wyk to Maharero*, 6 Nov. 1878, N.A. 1136.

[6] Vedder, *op. cit.*, pp. 439-441.

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

[8] *Ibid.*, pp. 441-442.

increasing, and what is more to the point their cattle are increasing by tens of thousands annually. They neither slaughter, nor sell, to any extent worth naming, and consequently they must soon either have fewer cattle or more land to graze them on. They will probably prefer the latter alternative, and then, the land must be taken from some other tribes, and their cattle posts are pushed even beyond their own boundaries already [1]."

"The Damaras [Hereros] are behaving very badly—never before so bad—and want to provoke a war. Their treatment of John Afrikaaner is a proof of this. I expect every day to hear that they have fallen upon him and massacred every man, woman and child in Windhoek [2]."

40. In the circumstances, it is not surprising that various incidents [3] took place which sparked off general hostilities. In August 1880 some Herero, after receiving a report that the Namas were preparing for battle, shot down all the inhabitants of a Nama village. The Herero commando was followed and most of its members killed [4]. When Maharero heard of this, he had all the Nama living at Okahandja murdered during the night of 22 August 1880, and gave orders that all Namas in the country were to be exterminated [5].

The whole country was plunged into bloodshed. The British officials fled to safety, and the Herero hordes attacked and killed Namas wherever they could find them [6]. However, the Namas were also successful in a number of battles in September 1880 [7].

41. On 28 October 1880 a devastating battle was fought on the Olifants River near Okangondo. Many Herero warriors fell, and thousands of Herero cattle were captured [8].

42. The Namas had now been organized into two main forces. One was under the leadership of Jan Jonker, and consisted of men from a number of Nama tribes, as well as the Basters of Rehoboth. A second force was established at Seeis under Moses Witbooi [9].

Jan Jonker's force attacked Barmen in December 1880, and, despite fierce opposition, it routed the Herero who were there and captured all their cattle. After the battle the night was given over to the celebration of victory, but before dawn a fresh Herero force attacked the Namas, defeating them decisively [10]. Jan Jonker escaped, and thereafter kept himself busy with cattle raiding [11].

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[1] *Musgrave to Secretary for Native Affairs*, 9 June 1880, N.A. 288.

[2] *Palgrave to Bright*, 13 June 1880, N.A. 288.

[3] *Vide Report by F. Heidmann*, Rehoboth, 14 Sep. 1880, *Quellen* 21, pp. 155, 157-158; Vedder, *op. cit.*, pp. 452-457; *Official Journal of the Secretary of the Transgariep Commission, Minutes*, 21 Sep. 1880, N.A. 288; *Report by F. Judt*, Okahandja, 14 Sep. 1880, *Quellen* 7, p. 40.

[4] Vedder, *op. cit.*, p. 454.

[5] *Ibid.*, pp. 454-455; *Chronik Otjimbingwe*, 1880, *Quellen* 1, pp. 99-100; *Report by F. Judt*, Okahandja, 14 Sep. 1880, *Quellen* 7, p. 40.

[6] *Chronik Otjimbingwe*, 1880, *Quellen* 1, p. 102; Vedder, *op. cit.*, p. 458.

[7] Vedder, *op. cit.*, p. 458; *Irle to Palgrave*, 20 Dec. 1880, N.A. 288.

[8] Vedder, *op. cit.*, pp. 458-459.

[9] *Ibid.*, pp. 459-460.

[10] Vedder, pp. 461-462; *Chronik Otjimbingwe*, 1880, *Quellen* 1, p. 100; *Letter by F. Meyer*, Otjikango (Barmen), 19 Dec. 1880, *Quellen* 27, pp. 6-7.

[11] Vedder, *op. cit.*, pp. 463-464.

Maharero followed up his success against Jonker by sending an army against the other Nama force under Moses Witbooi. A battle was fought on 23 and 24 December 1880, and the Namas were forced to retreat when their ammunition gave out. Witbooi, however, immediately started making arrangements for a new onslaught [1].

43. In the meanwhile cattle raiding and marauding expeditions continued unabated. The warfare was bitter and cruel, and grave atrocities, of which examples may be found in contemporary reports of missionaries, were common [2].

44. Towards the end of 1881, Moses Witbooi, together with Jan Jonker, had at last collected a strong force, but Maharero had also not been idle. The two armies met in November 1881 at Osona, and the greatest battle that had yet been fought in South West Africa then took place. The Nama were utterly defeated, and lost all their wagons, horses, ammunition and a large number of men. The way to Windhoek and beyond was strewn with Namas who had died of their wounds [3]. Completely defeated, Moses Witbooi returned to Gibeon. Jan Jonker left Windhoek, and sought refuge in the Gansberg [3], whence he thenceforth carried on raiding operations.

45. While the major forces of Nama and Herero were fighting, the Swartbooi Namas, who in years gone by had been the only Nama allies [4] of the Hereros, were also harassing them and raiding their cattle [5].

46. Various attempts were made by missionaries to negotiate peace treaties, and although some such treaties were signed, they were on the whole ineffective [6]. Nevertheless, Jan Jonker was incensed with Hermanus van Wyk for concluding a peace treaty with the Hereros, and launched a successful attack on Rehoboth, burning down half the village and capturing many cattle [7].

47. After the attempts at peace, the Territory was in a worse state of unrest than it had ever been before. Raids, robbery and murder were daily occurrences [8]. Various requests for protection were made to the British Government [9].

Since the British Government had decided in 1880 to restrict its responsibilities to the Walvis Bay territory [10], the Resident Magistrate was powerless. He did, however, put a stop to the sale of arms and ammunition in Walvis Bay [11]. This had no noticeable effect on the

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[1] Vedder, *op. cit.*, pp. 464-465; *Report by E. Heider*, Hoachanas, *Quellen* 6, 3 Jan. 1881, p. 61.

[2] See for instance *Report by F. Rust*, Gibeon, 6 Jan. 1881, *Quellen* 17, p. 13 and *Report by F. Heidemann*, Rehoboth, 9 June 1881, *Quellen* 21, p. 206.

[3] Vedder, *op. cit.*, p. 465.

[4] *Palgrave's Report*, p. 18.

[5] *Chronik Otjimbingwe*, 1880, *Quellen* 1, pp. 100-102; *Diary, Station Okahandja*, Dec. 1881, *Quellen* 28, p. 4.

[6] Vedder, *op. cit.*, pp. 465-470.

[7] *Ibid.*, p. 469.

[8] *Report by F. Meyer*, Otjikango, 23 Feb. 1883, *Quellen* 27, p. 35.

[9] *Vide* Petition of P. Haibib for annexation of rest of his territory, 5 Jan. 1883, N.A. 290; *Hermanus van Wyk to Resident Magistrate*, 31 Jan. 1883, N.A. 290.

[10] C. 2754, p. 8.

[11] *Resident Magistrate Whindus, Walfish Bay, to Under-Secretary for Native Affairs*, 4 Jan. 1883, p. 3, N.A. 290; *Whindus to Under-Secretary for Native Affairs*, 6 Jan. 1883, pp. 3-6, N.A. 290; *Resident Magistrate Simpson to Under-Secretary for Native Affairs*, 11 Oct. 1883, N.A. 290.

hostilities, which continued uninterruptedly. Both the reports of the Resident Magistrate at Walvis Bay, and those of missionaries, were full of accounts of battles, thefts and atrocities. Thus men, women and children were dismembered, scalped, or throttled [1]. The Resident Magistrate for instance recounted an incident where—

> ". . . three prisoners were captured by the Damaras [Hereros], one of them was skinned and quartered, cooked in a pot and the remaining prisoners were compelled to partake of the flesh, living on it for three days [2]".

J. German Acquisition of South West Africa

48. As has been noted, the British Government had decided in 1880 to restrict its responsibilities to the Walvis Bay settlement [3]. At about the same time, a German merchant, F. A. E. Lüderitz, was contemplating the establishment of a business enterprise on the coast of South West Africa [4]. In November 1882 he informed the German Government of his scheme and requested its protection for his proposed enterprise [5]. This led to involved diplomatic activity [6] between Germany and Great Britain, which was still in progress when Lüderitz commenced his scheme by purchasing from the Nama chief, Joseph Frederick of Bethanie, the Bay of Angra Pequena (later called Luderitzbucht) and a lengthy strip of arid coast on 1 May and 25 August 1883, respectively [7].

49. Despite Lüderitz's acquisitions, the diplomatic negotiations between Germany and Great Britain dragged on [6]. Eventually, before finality had been reached, Bismarck instructed the German Consul in Cape Town on 24 April 1884, that Lüderitz and his settlement were under the protection of the German Empire [8]. In September 1884 a German Protectorate was proclaimed in South West Africa, and on 22 September 1884, the British Government "decided to acquiesce in the action of the German Government and to welcome Germany as a neighbour . . .[9]"

50. Thus, with the exception of Walvis Bay [11] which was recognized

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[1] *Vide Resident Magistrate Simpson to Andries Lambert*, 10 Sep. 1883, N.A. 290; *Resident Magistrate Simpson to Under-Secretary for Native Affairs*, 1 May 1884, pp. 11-12, N.A. 291; *Report by F. Meyer*, Otjikango, 9 Oct. 1884, *Quellen* 27, p. 60; *Report by J. Bam*, Bethanie, 13 Nov. 1884, *Quellen* 4, pp. 44-45; *Report by F. Heidmann*, Rehoboth, 24 Oct. 1884, *Quellen* 22, p. 300.

[2] *Resident Magistrate Simpson to Under-Secretary for Native Affairs*, 1 May 1884, pp. 1-3, N.A. 291.

[3] *Vide* para. 47, *supra*.

[4] Hintrager, C., *Südwestafrika in der deutschen Zeit* (1955), pp. 7-8.

[5] *Ibid.*, p. 10; C. 4265, p. 12.

[6] C. 4262, pp. 7-11, 39-44; C. 4265, pp. 3-7.

[7] C. 4262, p. 68; C. 4190, pp. 10, 32.

[8] C. 4262, p. 9; Headlam, C., "The Race for the Interior", in *The Cambridge History of the British Empire*, Vol. VIII, p. 517.

[9] C. 4265, p. 6; C. 4262, pp. 36, 50.

[10] As well as certain islands off the coast which had been annexed by Britain some years previously—*vide* British Letters Patent of 27 Feb. 1867, in C. 4262, pp. 73-74.

as British Territory [1], the way was open for Germany to establish her authority effectively over the territory of South West Africa. This was done by the conclusion of treaties of friendship and protection with the various Herero, Baster and Nama chiefs as follows:

(a) on 2 September 1885, with Manasse of Hoachanas, a Nama leader;
(b) on 15 September 1885, with Hermanus van Wyk, the leader of the Rehoboth Basters;
(c) on 21 October 1885, with Maharero at Okahandja;
(d) on 3 November 1885, with Manasse of Omaruru, a Herero chief;
(e) on 21 August 1890, with Willem Christian of Warmbad and Jan Hendriks of Keetmanshoop, two Nama leaders;
(f) in 1894 with other Nama tribes, namely that of Simon Koper of Gochas and the Swartboois of Fransfontein (after they had asked for treaties);
(g) it was not until after his defeat by the Germans that Hendrik Witbooi was induced to sign a treaty on 14 September 1894 [2].

51. Dr. Heinrich Göring was appointed *Reichskommissar* for South West Africa and he arrived towards the middle of 1885 at Angra Pequena (the present Luderitz) with a small staff of officials to assist him. In October 1885 he made Otjimbingwe his headquarters [3].

K. The Wars between Hendrik Witbooi and the Herero

52. While South West Africa was the subject of diplomatic activity in Europe, Moses Witbooi at Gibeon was again preparing for war against the Herero. His son Hendrik was, however, filled with visions and ideals of a promised land lying to the north of the Herero to which he considered himself destined to lead his people. His views caused a split between him and his father [4]. Hendrik collected a band of his own followers, and started moving northwards. In June 1884 he was attacked by Maharero, but after a day's shooting, peace was negotiated at Onguheva. *Inter alia*, it was agreed that Hendrik Witbooi would be given a free passage to the north [5].

53. Hendrik Witbooi returned to Gibeon as a victor having succeeded (without being a chief) in doing what the Nama chiefs had been trying to accomplish for a long time [6].

He now started to make preparations for his march to the unknown promised land in the north [7]. In the middle of July 1885 he set out, with all his people, in the direction of Rehoboth and after his arrival there, he wrote to Maharero that he was "coming to confirm the peace of

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[1] *Vide* Proclamation of 12 Mar. 1878, as confirmed by Letters Patent, 14 Dec. 1878.
[2] *Vide* para. 72, *infra*; Headlam, *The Cambridge History of the British Empire*, Vol. VIII, p. 517; Vedder, H., *The Cambridge History of the British Empire*, Vol. VIII, pp. 694-696; Vedder, *op. cit.*, pp. 503-504.
[3] Hintrager, *op. cit.*, p. 19; Vedder, "The Germans in South West Africa, 1883-1914", in *The Cambridge History of the British Empire*, Vol. VIII, p. 695.
[4] Vedder, *op. cit.*, pp. 479-480.
[5] *Ibid.*, p. 483; *Die Dagboek van Hendrik Witbooi*, Kaptein van die Witbooi-Hottentotte, 1884-1905 (1929), pp. 6-10.
[6] Vedder, *op. cit.*, pp. 483-484.
[7] *Ibid.*, p. 484.

Onguheva, and to pass through to the north, in accordance with the promise which Maharero had given him [1]."

Maharero replied that he was prepared to observe the terms of their agreement, but that he was surprised that Hendrik had not kept his promise, viz., that he would do his utmost to persuade the other Nama chiefs to make peace with Maharero. Maharero then suggested that he and Hendrik should meet at Osona to negotiate further [2].

Hendrik Witbooi and his followers arrived at Osona in October 1885. Although the two chiefs greeted each other in a friendly fashion, Maharero would not allow the Witboois free access to the watering-place.

> "It went against the grain of the Witboois . . . to be ordered about by the Hereros. Those who were drawing water tried to take possession of the waterhole and the Hereros beat them back [3]."

In a moment large-scale fighting took place but as the Witboois were overwhelmed by a force twice their size they had to flee. Their wagons, oxen and horses fell into the hands of the Herero [4].

54. Hendrik Witbooi was furious, and immediately prepared for war. It was some time before he had collected a strong force consisting of his own followers, the Topnaars, Grootdodens, Veldskoendraers and the unruly elements amongst the Basters. Although Maharero had been waiting for Hendrik's revenge for months, he and his people were caught by surprise when Hendrik attacked the sleeping inhabitants of Okahandja on 17 April 1886. However, the Hereros managed to get into their well-prepared fortifications and succeeded towards evening in driving the Namas back and even in surrounding them [5]. During the night the Witboois escaped but the Hereros pursued them. Further running fights took place at Otjiseva, Otjihavera and at Okapuka. The Hereros finally overran the camp of the Witboois at Nauas, and followed them as far as Hoachanas. Hendrik was badly defeated and had again lost everything [6].

55. The only way in which Hendrik Witbooi could continue his fight against the Herero was by seeking out some mountain fastness, from which he could make lightning raids against them. This was the method which Jan Jonker had been employing successfully for a number of years. Hendrik Witbooi found such a retreat at the Gansberg, and wrote to Maharero that he proposed making war against him in the same manner as Jan Jonker did [7].

In April 1887 he attacked Otjumbingwe and "he took from the inhabitants . . . everything which they had acquired through years of

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[1] Vedder, *op. cit.*, p. 485.

[2] *Ibid.*, pp. 485-486; *Witbooi to Maharero*, 27 June 1884, *Die Dagboek van Hendrik Witbooi* (1929), pp. 9-10; *Witbooi to Maharero*, 13 Oct. 1885, *Die Dagboek van Hendrik Witbooi* (1929), p. 12.

[3] Vedder, *op. cit.*, pp. 486-487.

[4] *Ibid.*, p. 487; *Witbooi to Maharero*, 19 Oct. 1885, *Die Dagboek van Hendrik Witbooi* (1929), pp. 12-13; *Witbooi to Heidmann*, 20 Oct. 1885, *Die Dagboek van Hendrik Witbooi* (1929), pp. 13-14; *Witbooi to Maharero*, 30 Oct. 1885, *Die Dagboek van Hendrik Witbooi* (1929), pp. 15-16.

[5] *Letter by Ph. Diehl*, Okahandja, 19 Apr. 1886, *Quellen* 27, pp. 102-103.

[6] Vedder, *op. cit.*, pp. 490-491; *Report by W. Eich*, Okahandja, 24 Apr. 1886, *Quellen* 28, pp. 52-56.

[7] Vedder, *op. cit.*, p. 491.

careful industry". More than a thousand cattle were carried off. Dr. Göring, the German Commissioner, was at the time at Walvis Bay [1].

Another attack was made in June of the same year. Otjimbingwe was kept under fire from early in the morning until late in the afternoon. A herd of cattle was carried off [2].

In retaliation, Maharero despatched a force under one of his best commanders to bring Hendrik Witbooi to bay. The Hereros arrived at the Gansberg and saw the light of fires between two mountain ranges, but were led into an ambush and forced to flee. When they returned to Okahandja, Maharero's warriors "declared that they would never march out against them [the Witboois] again into that terrible neighbourhood" [2].

In the years that followed Hendrik Witbooi made many attacks and raids on the Hereros. Thousands of Herero cattle were carried off into Hendrik's mountain fastnesses [3].

56. As has been seen, Maharero had placed himself and his people under German protection on 21 October 1885. However, the representative of the German Government, Dr. Göring, who had been in the territory since 1885, had no military force at his disposal and was powerless to provide any protection against Hendrik Witbooi's incessant raids. In addition, Maharero was subject to the constant influence of a British trader, Robert Lewis, who resented German penetration into South West Africa. Finally, in October 1888, Maharero renounced his treaty of protection with the Germans. At the same time Lewis had arrived at Okahandja with a staff of 15 and he produced a treaty concluded with Maharero dated 9 September 1885, in terms of which Maharero had transferred almost all his rights as chief to Lewis. Dr. Göring and his staff then withdrew from Otjimbingwe to Walvis Bay [4].

L. The Wars Between Hendrik Witbooi and Other Namas

57. During the period in which Hendrik Witbooi was engaged in successful guerrilla warfare against the Hereros, he was encountering severe and effective opposition from members of his own nation. His first major dispute with other Namas arose out of events in his own former tribe, i.e., that of his father, Moses Witbooi. In 1885 dissension set in between Moses Witbooi and his uncle Paul Visser, which finally resulted in a clash between the factions led by these two men, in which Visser was successful. Moses was taken prisoner. In August 1887 Moses wrote a letter to Manasse of Hoachanas requesting his assistance, but when Manasse turned up, Moses had already resigned his chieftainship in favour of Paul Visser and had been released. Hendrik Witbooi was at first too occupied to render his father much assistance, but he induced the opposition chief of Hoachanas and the disloyal section of the Red Nation to attack Paul Visser. Visser, however, defeated them in a number of battles.

Hendrik was then left to fight for the "throne of Gibeon" alone. He found in Paul Visser an obstinate and resolute opponent and on

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[1] Vedder, *op. cit.*, p. 491.
[2] *Ibid.*, p. 492.
[3] *Ibid.*, pp. 492-493.
[4] *Ibid.*, p. 502; Hintrager, *op. cit.*, pp. 23-24.

several occasions he had to run for his life. Even after his father's followers had joined him he could not succeed in conquering Visser [1].

58. While he was thus engaged in trying to bring Paul Visser to heel, Hendrik Witbooi suddenly decided to attack the Grootdodens who had annoyed him. He destroyed their dwellings and carried off all their stock; he killed the women and children and even had their dogs destroyed, practically annihilating this whole tribe [2].

This action was followed up by an attack on Arisemab, the chief of the Veldskoendraers, who was well-disposed towards Paul Visser. Arisemab was wounded, and begged Hendrik Witbooi to spare his life, but Hendrik himself shot Arisemab dead [2].

Although Paul Visser came onto the scene and drove Hendrik Witbooi away, he had come too late to save Arisemab's life. The Veldskoendraers then urged him to march against Moses Witbooi who was in the district of Berseba. They told him that Arisemab was killed because he, Paul Visser, was too slow and he could now only absolve himself by killing Moses, Hendrik's father. Paul Visser agreed. They captured Moses and took him to Gibeon in February 1888, where he and one of his councillors, Adam Klaase, were accused of "high treason" and sentenced to death. They were both shot [3].

59. Jan Jonker and Hendrik Witbooi, both arch-enemies of the Hereros, never developed a liking for one another [4]. Jan Jonker was glad to hear of Moses' death and he wrote to Paul Visser that he would now forget about anything else and join him in an attack on the Hereros. After the Hereros were properly humbled, they could jointly march against Hendrik Witbooi [5].

60. Hendrik Witbooi went to Gibeon in July 1888 to visit his father's grave and to avenge his death. On 12 July 1888, while Hendrik was proceeding towards Paul Visser's headquarters at Girichas, Visser was on his way to Gibeon. Hendrik discovered Paul Visser's commando first and placed his men under cover on both sides of the road by which Visser's troops were travelling. Hendrik caught them unawares and the first man to be killed was Paul Visser, shot by Hendrik himself. Hendrik defeated Visser's force, destroyed his headquarters and burnt everything that was not useful and which he could not take with him [6].

61. From October 1888 Hendrik Witbooi was continuously on the war-path against Manasse of the Red Nation, whom he finally succeeded in routing in August 1889 [7].

There remained only Jan Jonker to dispute Hendrik Witbooi's predominance. To add to the antipathy between these two men, Hendrik

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[1] Vedder, *op. cit.*, pp. 494-497.

[2] *Ibid.*, p. 496.

[3] *Ibid.*, pp. 496-497; *Witbooi to Olpp*, 3 Jan. 1890, *Die Dagboek van Hendrik Witbooi* (1929), pp. 67-68.

[4] Vedder, *op. cit.*, p. 493.

[5] *Ibid.*, p. 497.

[6] *Ibid.*, pp. 497-498; *Report by F. Rust*, Berseba, 11 July 1888, *Quellen* 29, p. 170.

[7] *Die Dagboek van Hendrik Witbooi* (1929), pp. 34-38; *Heidmann to Böhm*, 15 Aug. 1889, *Quellen* 22, p. 349; *Witbooi to Göring*, 11 Apr. 1889, *Die Dagboek van Hendrik Witbooi* (1929), p. 32; *Witbooi to Manasse*, 10 Dec. 1888, *Die Dagboek van Hendrik Witbooi* (1929), pp. 19-21.

Witbooi had discovered amongst Paul Visser's possessions Jan Jonker's letter suggesting joint action against Hendrik [1].

62. In the beginning of August 1889 Jan Jonker set out with all his possessions to escape Hendrik's fury, but Hendrik learnt of his flight and followed him [2]. When the two forces met, a fierce battle ensued. Before the issue had been settled, the fighting was interrupted to enable the two sides to attempt to agree on armistice terms. While the negotiations were proceeding, Jan Jonker was treacherously shot by his illegitimate son who was a follower of Witbooi. Thereafter the remnant of the once powerful Afrikaner tribe fled into Hereroland. Maharero gave them Kuandua in which to live, where they stayed until 1897, when almost all of them died of malaria [3].

63. Hendrik Witbooi almost immediately went south and continued to attack and kill remnants of his Nama enemies. Bad news from the north, however, forced him to leave the south. The Hereros and some of Manasse's men [4] had attacked his headquarters then situated at Hornkrans and had killed and captured a large number of his people, including women and children. It must have been clear to Maharero that Witbooi would never leave the matter at rest [5].

M. The Extension of Effective German Control Over South West Africa

64. It will be recalled that Maharero, under the influence of the trader Lewis, cancelled the treaty of protection with Germany in October 1888 as a result of the inability of the Germans to afford him any protection against Witbooi [6].

Early in 1889 a Protectorate Force arrived under the command of Captain C. von Francois, who first occupied Otjimbingwe [7].

In August 1889 von Francois heard that Lewis was planning unrest and he had an order of expulsion served on him [8].

In the same month, he established a fortified post at Tsaobis (Wilhelmsfeste) on the road to Walvis Bay [8].

In January 1890 43 more soldiers arrived as reinforcement for von Francois' troop [9].

Maharero now had reason to reconsider the question of his treaty with Germany. Witbooi was seeking his life, and he needed assistance, which the Germans could now provide, to some extent at least. On 20 May 1890 von Francois and Dr. Göring visited Maharero and the latter renewed his former treaty [10]. He also asked the German authorities to assist him against Witbooi. Dr. Göring wrote to Hendrik Witbooi

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[1] *Vide* para. 59, *supra*; Vedder, *op. cit.*, pp. 493, 498; *Witbooi to Olpp*, 3 Jan. 1890, *Die Dagboek van Hendrik Witbooi* (1929), p. 68.

[2] Vedder, *op. cit.*, p. 499.

[3] *Ibid.*, pp. 499-500; *Resident Magistrate, Walfish Bay to Cape Government*, 25 Sep. 1889, N.A. 293; *Heidmann to Böhm*, 15 Aug. 1889, *Quellen* 22, pp. 349-351.

[4] Of the Red Nation—*vide* para. 61, *supra*.

[5] *Witbooi to Maharero and Manasse*, 5 Jan. 1890, *Die Dagboek van Hendrik Witbooi* (1929), pp. 69-71.

[6] *Vide* para. 56, *supra*.

[7] Vedder, *op. cit.*, p. 502; Hintrager, *op. cit.*, p. 26.

[8] Hintrager, *op. cit.*, p. 27.

[9] *Ibid.*, p. 28.

[10] *Ibid.*, p. 24.

in May 1890 presenting him with an ultimatum which threatened action if he failed to stop his hostilities against the Herero [1]. The reply was a defiant refusal [2].

65. It was apparent to Witbooi, as it must have been to Dr. Göring, that the German force was far too weak to enforce the terms of the ultimatum. Hendrik Witbooi duly expressed his view by an attack on the Hereros at Otjituezu in July 1890, in which he looted several thousand head of cattle [3]. Thereafter he carried on several raids in the following months, even attacking Otjimbingwe where there were German officials, in September 1890, and passing with his commando within a short distance of the German fort at Tsaobis.

Towards the end of September 1890 he attacked Okahandja, losing many men, but "butchering many Herero women and children" [4].

Maharero died on 7 October 1890. His son Samuel Maharero succeeded him [5].

66. Dr. Göring departed from South West Africa in August 1890 leaving von Francois in charge [6].

Von Francois thought that a conflict with Hendrik Witbooi was unavoidable, and requested the German Government to send adequate reinforcements. As his position at Tsaobis was not suitable for the prevention of Witbooi's raids into Damaraland, he determined on the establishment of new military posts in the area considered by the Germans as "No-mansland" between Okahandja and Rehoboth. He decided on Windhoek, which had been deserted since Jan Jonker's tribe fled from it in 1881, as his headquarters, and took possession of Heusis as a cattle post. The civil offices of the Administration remained for the time being at Otjimbingwe, while the troops established themselves at Windhoek in October 1890 [7].

67. In May 1891, Hendrik Witbooi wrote to Samuel Maharero asking him whether he was not yet tired of war and prepared to make peace. He himself had been quiet since the beginning of the year, but the tone of his proposals was such that the Herero refused to treat with him [8].

In September 1891, Witbooi led his commando to Okahandja, but had to retire after several successes on account of the exhausted state of his horses. This retreat gave fresh courage to the Herero, and a Mbanderu commando marched on Gibeon, which it attacked without being able to take the place or much booty. Witbooi retaliated, and took 2,000 head of cattle east of Okahandja in November 1891. In the following month he attacked the miserable remnant of the Red Nation at Hoachanas, and marched in the direction of Seeis, with the object of punishing the Mbanderu for their attack on Gibeon. While on the march he received a letter from the chief of Otjimbingwe, which changed

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[1] Hintrager, pp. 24-25.
[2] *Witbooi to Göring*, 29 May 1890, *Die Dagboek van Hendrik Witbooi* (1929), pp. 73-77.
[3] Hintrager, *op. cit.*, p. 25.
[4] *Resident Magistrate, Walfish Bay, to Cape Government*, 11 Oct. 1890, N.A. 293.
[5] Vedder, *op. cit.*, pp. 506-507.
[6] Hintrager, *op. cit.*, p. 25.
[7] *Ibid.*, p. 29.
[8] *U.G.* 41—1926, para. 114, p. 40.

his course. In this letter the Herero chief had called him a Bushman, and he turned towards Otjimbingwe, which he attacked on 31 December 1891, taking many cattle. He returned with his loot to Hornkrans, marching past the German fort at Tsaobis [1].

In February 1892 he resumed his expedition against the Mbanderu, but was defeated at Otjihaenena with heavy losses. In the following April the Hereros invaded Hornkrans, but were unable to take the stronghold [1].

68. By this time a prohibition on the traffic in firearms which had been ordered by von Francois some time previously, made itself felt, both Hereros and Hottentots running short of ammunition. The territory occupied by the Germans had been the corridor through which the hostile tribes sent their forces, and the Germans had so far been powerless to prevent this. The Commissioner now decided to pay a visit to Hendrik Witbooi at Hornkrans to induce him to conclude peace and to accept a German Protectorate. By making liberal promises and by offering to recruit a certain number of the tribe for service with the German troops, he succeeded in winning over Witbooi's councillors. However, Witbooi himself saw no advantage in subscribing to a treaty of protection such as von Francois proposed, and again refused von Francois' offers [2].

69. Von Francois thereafter decided to approach the Hereros with a view to launching a combined attack against Witbooi. He negotiated with Samuel Maharero, who agreed to join him on a certain date with a Herero commando. Samuel Maharero did not keep his appointment, making the excuse that he could not assemble his men in time. It appears that Witbooi had received news of von Francois' visit to Okahandja, and had promptly offered to make peace with the Hereros. After various negotiations, peace was concluded at Rehoboth in November 1892. Witbooi, however, mocked at this peace which he called a *"blou vrede"* (blue peace) that is to say a false peace which meant nothing [3].

70. Von Francois was now faced with the possibility of united action against the Germans on the part of the Hereros and the Namas. Further reinforcements were called for and in April 1893 von Francois' troops attacked Hornkrans. The surprise, however, failed. Witbooi and most of his fighting men escaped. The German troops returned to Windhoek, and there received news that Witbooi had captured their spare horses from a neighbouring farm, and had taken 120 horses from a German trader who had imported them from Griqualand for the Protectorate authorities [4].

The guerrilla war which followed went, on the whole, in favour of Witbooi, whose reputation among the other tribes was growing steadily [5].

71. On 1 January 1894 Major Leutwein arrived from Germany and took personal command of half the German forces in the country. Leutwein left von Francois to watch Witbooi, while he proceeded

[1] *U.G.* 41—1926, para. 114, p. 40.

[2] *Ibid.*, para. 115, p. 40.

[3] Voigts, G., in *Die Dagboek van Hendrik Witbooi* (1929), p. xviii; *U.G.* 41—1926, para. 115, p. 41.

[4] Hintrager, *op. cit.*, p. 33; *U.G.* 41—1926, para. 117, p. 41.

[5] *U.G.* 41—1926, para. 117, p. 41.

against the tribes in the eastern portion of the Protectorate. Andries Lambert, the chief of the Khauas Hottentots, was taken prisoner at Naosanabis, and executed for the murder of a trader and several Bechuanas [1].

A treaty of friendship and protection was next concluded with his successor, Eduard Lambert. Thereafter a visit was paid to Simon Koper, the chief of the Franzmann Hottentots, at Gochas, and a similar treaty concluded with him. Military posts were established at Gibeon, Berseba and other places [2].

In the meantime, von Francois had established similar posts at Keetmanshoop, Bethanie and Warmbad [3].

72. Leutwein took command over the united forces in July 1894 while von Francois proceeded overland to Cape Town on home leave. Leutwein thereupon became Governor. He returned to Windhoek, where he concentrated his troops and prepared for a decisive blow against Witbooi. As his force was not strong enough, he requested further reinforcements. The reinforcements arrived in July 1894, and on 27 August 1894, he attacked the Witboois in the Naukluft with three companies, aggregating over 300 men with two guns, and a Baster contingent of 50 men. The occupation of Witbooi's stronghold took two weeks, the German losses being 27 per cent. of their total strength [4].

Witbooi realized that he could not continue the fight, and on 15 September 1894, he concluded a treaty of friendship and protection with Leutwein. The Witboois evacuated the Hornkrans region in accordance with the peace treaty, and were granted a reserve at their former home at Gibeon. The tribe kept the peace until 1904, and frequently assisted the Germans against other groups [5].

73. Leutwein proceeded to establish military posts in Damaraland, first at Okahandja, ostensibly to protect Samuel, who had been recognized by the German authorities as paramount chief of the Herero, against the intrigues of his rival Riarua, and later at Omaruru, where he induced Manasse, the local Herero chief (not to be confused with Manasse, the chief of the Red Nation Nama), to cede Okombahe to the German Government, for the use of the Bergdama [6].

A demonstration against the chiefs of the eastern Hereros, who were disregarding the southern boundary agreement concluded between Samuel Maharero and the German authorities, resulted in their acknowledging Samuel Maharero as the paramount chief, and posts were established at Seeis and Oas to guard the boundary. Assisted by Samuel Maharero, the Germans made a demonstration in force through the Herero area, visiting the various chiefs. The impression made upon the Hereros by this display of force was not lasting. In March 1896 trouble broke out amongst the eastern Hereros and some Khauas Namas. The Khauas Namas were defeated on 6 April 1896 and lost

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[1] *Report by F. Rust*, Gochas, 4 Jan. 1894, *Quellen* 19, p. 28; Hintrager, *op. cit.*, p. 35; *U.G.* 41—1926, para. 117, p. 41.

[2] Hintrager, *op. cit.*, p. 35; *U.G.* 41—1926, para. 117, p. 41.

[3] *U.G.* 41—1926, para. 117, p. 41.

[4] *Ibid.*; Hintrager, *op. cit.*, p. 36.

[5] *U.G.* 41—1926, para. 117, p. 41; Hintrager, *op. cit.*, pp. 36-37.

[6] *Vide* Chap. II, para. 67 *supra*; *U.G.* 41—1926, para. 118, p. 41; Hintrager, *op. cit.*, p. 37.

their leader on the battlefield. Nikodemus, a leader of the Hereros, was likewise defeated and fled towards the north. Reinforcements for the German troops arrived from all directions, amongst them Hendrik Witbooi with 70 men. At Otjuandja in the Epukiro area the eastern Hereros were forced into an engagement and on 6 May 1896 decisively defeated [1].

In June 1896 a further contingent of 400 men arrived from Germany and Leutwein undertook another demonstration through the western areas of the Hereros, establishing new military posts at Outjo, Grootfontein, Otavifontein, Naidaus and Franzfontein. By the end of 1897 the total strength of the German forces in the Protectorate was 700 men [1].

In February 1898 the Swartboois (Namas) of Franzfontein were defeated at the Grootberg and the whole tribe, 150 men, 400 women and children, removed to Windhoek [2].

N. The Period 1898-1903

74. By 1898 the whole of the southern part of South West Africa had been temporarily pacified, and the attention of the authorities was turned to the economic development of the country, which had been gravely retarded by almost a century of incessant hostilities as well as by a severe rinderpest epidemic in 1897. First priority was given to communications, and in 1898 a start was made with the construction of a railway line between Swakopmund and Windhoek. By 1901 Windhoek was in telegraphic communication with Germany and in 1902 the first train steamed into Windhoek station. At the same time, improvements were effected to the harbour of Swakopmund and a regular steamship service to and from Europe instituted.

75. The improvement of communications paved the way for German settlement. Favourable prices and conditions were laid down to encourage Germans to settle in South West Africa. Between the years 1894 and 1903 the White civilian population increased from 803 to 3,701 [3].

However, the relationship between the German authorities and the Native peoples, particularly the Herero, in time became increasingly strained. It would be out of place in a general survey like the present to attempt to analyse all the reasons for these deteriorating relations, particularly inasmuch as they are largely in dispute amongst historians. Reference may nevertheless be made to one vital factor since it assumed importance also during the period of Mandatory Administration, and that is that economic conceptions differed widely between the Hereros and the Germans. This manifested itself, *inter alia*, in conflicting claims to land. Thus the Germans bought land from the chiefs, intending thereby to obtain sole rights of property; but this concept was not understood by the Herero, who resented being prevented from grazing their cattle on land which they had sold.

A further source of friction, which required attention also during the period of mandatory administration, arose from the sale of goods on credit. Many Herero were unable to resist the temptation to incur debts in this way, and German traders, seeking to secure payment of

[1] *U.G.* 41—1926, para. 118, pp. 41-42.
[2] *Ibid.*, para. 119, p. 42.
[3] Hintrager, *op. cit.*, pp. 39-41.

these debts, sometimes in ignorance of Herero traditions attached *oruzo* or *eanda* cattle which, in terms of Herero concepts, were not disposable property but were held in trust for their descendants [1].

In order to protect the Natives against their proclivity for incurring debts, the German authorities in Berlin issued a Credit Decree dated 23 July 1903 which provided that as from 1 April 1903 [2] commercial debts of Natives would become prescribed after one year. The Decree was clearly intended to have a long-term favourable effect for the Natives. But its immediate result was unfortunate: traders started pressing their debtors for payment of debts, even those that had been outstanding for years, and this further exacerbated the feelings of the Natives [2].

O. The Wars of 1903-1907

I. The Bondelswarts Rising 1903-1904

76. In 1903 serious trouble broke out among the Bondelswarts, a Nama tribe. Abraham Christian had succeeded his father as chief of this tribe in 1902. In October 1903 he became involved in a dispute with the district officer at Warmbad, Lieut. Jobst, who led out police to arrest the captain. The Namas fired on the police patrol, killing the district officer and two of his men. The garrison of Warmbad, consisting of 11 men, was next besieged by the Bondelswarts, and troops were sent to its relief. Witbooi assisted the Germans with 80 men. The revolt became general amongst the Bondelswarts tribe who were led by their new chief Johannes Christian. By the end of December the Germans with 200 German and 300 Nama troops were operating against the rebels, but the Herero rebellion, which broke out early the following month prevented a decisive blow against the Bondelswarts. Leutwein entered into negotiations with them and on 27 January 1904, the peace of Kalkfontein was concluded, in terms of which the reserve of Warmbad was granted to the Bondelswarts [3].

II. The Herero-German War 1904-1906

77. While the Bondelswart rising was in full swing and all available troops were gathered in the south, the Hereros seized their opportunity and in the beginning of January 1904 Samuel Maharero gave an order for all Germans to be murdered.

Okahandja was taken by the Hereros on 11 January 1904 and many of the white inhabitants murdered before they could reach the safety of the fort. Windhoek was also threatened, but was not actually attacked. Other military posts were attacked by the Hereros, and some of the smaller ones taken and the garrisons and other occupants killed. Farmers to the number of 150 were murdered on the farms, these destroyed and the cattle driven away. The relief of Okahandja was the first signal success of the Germans. Captain Franke led a column by

[1] *Vide* Chap. II, paras. 85, 89, *supra*; Vedder, *The Cambridge History of the British Empire*, Vol. VIII, p. 697; Vedder, *The Native Tribes of South West Africa* (1928), p. 169.

[2] Hintrager, *op. cit.*, p. 47.

[3] *U.G.* 41—1926, para. 120, p. 42; Vedder, *The Cambridge History of the British Empire*, Vol. VIII, p. 697.

road from Gibeon to Okahandja and relieved the post on 27 January 1904. On the following day the Hereros were driven from Okahandja and on 4 February 1904 Omaruru was relieved. Reinforcements now began to arrive from Germany and on 11 February 1904 Governor Leutwein assumed direction of military operations at Swakopmund in person [1].

78. After the preliminary actions and just prior to the main offensive planned by Leutwein, his successor Lieut.-General von Trotha arrived in the Protectorate and took over the command in June 1904. Leutwein left the Protectorate shortly afterwards having been its Governor for 11 years. His successor immediately proceeded to prepare for a decisive blow and on 11 and 12 August 1904 the Hereros were defeated with heavy losses at Hamakari in the Waterberg. The Witboois as well as the Basters were represented by contingents on the German side. The majority of the enemy escaped towards the south-east into the arid Omaheke or Sandveld, which was surrounded by a cordon of troops, and the Hereros were gradually pressed on to the Kalahari [2].

By September 1905 the northern portions of the Protectorate had been cleared of Hereros, and Dr. Friedrich von Lindequist, who succeeded General von Trotha on 19 November 1905, as Governor, issued a proclamation calling upon the Hereros to surrender at the mission stations of Omburo and Otjihaenena. On 1 May 1906, the portion of the Herero nation remaining in South West Africa, had surrendered [3].

III. The Nama-German War 1904-1907

79. During the first months of the Herero war the Bondelswart Namas again became restless. They did not abide by the terms of the peace of Kalkfontein [4] and had disturbed the eastern boundaries of Namaqualand.

When the other Nama chiefs saw that this action of the Bondelswarts went unpunished, they decided to join in the rebellion. Witbooi who for over ten years had been a faithful ally of the Germans and had placed a considerable number of his men at the disposal of the German authorities in the Herero War, listened to the counsel of his under-captain and repudiated his treaty with Germany [5].

Von Burgsdorff, the district officer at Gibeon, hoping to avoid hostilities with Witbooi by a personal interview, went to him without a guard, relying on his good personal relations with Witbooi. On the way he was treacherously murdered. This happened in October 1904 and heralded the commencement of a general Nama uprising [6]. However, the Berseba Namas and a portion of the Bethanie Namas remained loyal to the German Government. The rebels collected around Rietmond and Kalkfontein with a strength of about 600 rifles, and it was not

[1] *U.G.* 41—1926, para. 120, p. 42; Vedder, *The Cambridge History of the British Empire*, Vol. VIII, pp. 697-698.

[2] *U.G.* 41—1926, para. 120, pp. 42-43.

[3] *Ibid.*, para. 120, p. 43; Hintrager, *op. cit.*, p. 81.

[4] *Vide* para. 76, *supra*; Vedder, *The Cambridge History of the British Empire*, Vol. VIII, p. 700; *U.G.* 41—1926, para. 121, p. 43.

[5] Hintrager, *op. cit.*, p. 65; Vedder, *The Cambridge History of the British Empire*, Vol. VIII p. 700; *U.G.* 41—1926, para. 121, p. 43.

[6] Vedder, *The Cambridge History of the British Empire*, Vol. VIII, p. 700.

until November 1904 that the Germans were prepared to take the offensive. The Witbooís were defeated on 22 November 1904 and again on 4 December 1904 [1].

In the next year (1905) the fortunes of war swayed to and fro, but by the end of the year the superior equipment and discipline of the German force began to tell. On 29 October 1905 Witbooi was run down and killed in the course of a battle at Vaalgras—now called Witbooisende [2].

80. In western Namaqualand a portion of the Bethanie Namas had risen under the leadership of Cornelius, who at first had assisted the Germans in the Herero war but had afterwards murdered a German officer. From October 1905 to January 1906 he successfully evaded capture and put the Germans to heavy loss in the Tiras Mountains. In February 1906 several decisive actions were fought against him along the Aub River, and on 17 February 1906, Christian Goliath, the captain, of the Berseba, succeeded in persuading some 160 men with 25 rifles and 140 women and children to surrender. Cornelius was captured in the following month at Heikoms with 86 men and 36 women [1].

81. The Bondelswarts continued to give trouble under their captain Johannes Christian. From April to December 1906 the German forces were continually on the heels of Johannes Christian. On 23 December 1906, through the intervention of the Rev. Father Malinowski of the Roman Catholic Mission, the Bondelswarts agreed to surrender to the authorities. The peace of Ukamas, early in 1907, marked the end of the Nama war [1].

P. The Last Years of the German Period

82. German rule in South West Africa was firmly established in the years between 1907 and 1914. The wars had necessitated the introduction of thousands of troops into the Territory, and this had the effect of bringing the country to the notice of the German public, whilst the discovery of diamonds near Luderitzbucht in 1908 supplied a stimulus to investment and immigration. Many of the soldiers, upon completion of the campaign, settled in the Territory. In 1909 the German Government commenced the establishment of horse, cattle and sheep breeding centres at Nauchas, Neudamm and other places.

During the wars, it was found necessary to commence the construction of further railway lines from Luderitzbucht to Keetmanshoop, Karibib to Tsumeb, and Windhoek to Keetmanshoop, and this work was completed after the termination of hostilities.

The German Government followed an active land settlement policy. Farms were granted to settlers on easy terms of payment; money was advanced them by a Land Bank supported by the Government, and water-boring facilities were provided [3].

However, by 1914 South West Africa was still not completely inde-

[1] *U.G.* 41—1926, para. 121, p. 43.

[2] Vedder, *The Cambridge History of the British Empire*, Vol. VIII, p. 701; *U.G.* 41—1926, para. 121, p. 43.

[3] *Official Year Book of the Union and of Basutoland, Bechuanaland Protectorate and Swaziland*, No. 3, 1919 (1920), pp. 876 ff.

pendent financially, and its economy was heavily dependent on the production and export of diamonds. Although much had been done to widen the economic structure of the Territory, and particularly to promote livestock farming, the central problem of opening up the Territory and developing its resources still remained unsolved [1].

Q. The Position of the Various Population Groups after a Century of Strife

I. The Inhabitants of the Northern and North-Eastern Part of the Territory

83. As has been noted in Chapter II, *supra*, the interminable bloodshed in the central and southern parts of South West Africa had no effect on the Ovambo, the tribes along the Okavango, or the inhabitants of the Caprivi Zipfel. It is interesting to note that the Ovambo population, which had been estimated by Palgrave at 98,000 in 1876 [2], had increased to about 150,000 towards 1928 [3].

II. The Hereros

84. The Hereros suffered severely in their wars with the Namas and the Germans. Thus in 1874 Irle had estimated their number at 90,000 [4] and Palgrave in 1876 at 84,000 [5], whereas official German figures in 1912 showed only 19,721 [6]. It must be kept in mind, however, that after their defeat at the hands of the Germans in 1904, substantial numbers left South West Africa to settle in Bechuanaland or the Transvaal [7]. Others fled to Angola, but returned after 1915 and settled in the Kaokoveld [8].

After the war, the German authorities took severe steps in retribution against the Herero [9]. All tribal lands were confiscated [10] and the chiefships abolished. In 1907, the Herero were prohibited from owning cattle [11].

After a century of warfare, the Hereros were thus dispersed over the Territory, and their traditional economic, social, political and religious institutions, which were all dependent on the possession of cattle, to a large extent broken up. They were forced to gain their livelihood by

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[1] *Official Year Book, op. cit.*, pp. 903-905. *Vide* also the more detailed treatment of the subject in Respondent's reply to Applicants' allegations regarding the economic aspects of the Mandate.

[2] *Palgrave's Report*, pp. 48-49.

[3] *Vide* Chap. II, para. 33, *supra*.

[4] Irle, *op. cit.*, p. 52.

[5] *Palgrave's Report*, p. 53.

[6] *Die deutschen Schutzgebiete in Afrika und der Südsee, 1912/1913, Statistischer Teil*, p. 46.

[7] Hailey, *op. cit.*, p. 23.

[8] van Warmelo, *op. cit.*, p. 11.

[9] Again, the question whether these steps were justified or not, falls outside the scope of the present survey, and has given rise to considerable controversy, even in Germany at the time—*vide* Hintrager, *op. cit.*, p. 92.

[10] *Die deutsche Kolonial-Gesetzgebung*, Sammlung der auf die deutschen Schutzgebiete bezüglichen Gesetze, Verordnungen, Erlasse und internationalen Vereinbarungen mit Anmerkungen und Sachregister, Neunter Band (Jahrgang 1905), pp. 284-286; Zehnter Band (Jahrgang 1906), pp 142, 298.

[11] Hailey, *op. cit.*, p. 23.

working for others. A result of their changed circumstances was that Christianity gained favour among the Herero [1]. This, however, proved to be largely a temporary manifestation. With the relaxation of the various restrictions and the provision of land for reserves, particularly after the conquest of the Territory by Respondent, there was a reversion to heathenism by the Herero [2] which was symbolized by the lighting of holy fires. After 1915, even grown men, sometimes of advanced age, submitted to circumcision rites and the filing of their teeth [3].

III. The Nama

85. Also in respect of the Nama, a comparison between Palgrave's figures and the 1912 German figures, shows a reduction in numbers. Thus Palgrave's 1876 figure was 16,850 [4] as against the 1912 figure of 14,320 [5]. After the 1903-1907 wars, the Germans, however, adopted a less rigid attitude towards the Nama than that which had marked their relations with the Herero. They did limit the amount of stock which the Nama might maintain, but they also permitted some of the tribes to use certain defined pieces of land [6].

During the wars of the nineteenth century, the political organization of some of the Nama tribes had changed in that the military achievements of certain of the chiefs enabled them to assume autocratic positions.

Association with the Orlams and the growing influence of the missions resulted in the political and social institutions of the original Namas being increasingly adapted to those of the Orlams, so that, by the turn of the century, the distinctions between the two groups were no longer clear-cut [7].

IV. The Bergdamas

86. Many Bergdamas shared the fate of their masters, the Nama or the Herero, in the general hostilities. Their numbers remained unchanged from an estimated 20,000 [8] in 1874 to 19,581 (German 1912 figure) [9]. With the defeat of the Herero and the Nama in the 1904-1907 wars, the Bergdama were for the first time in known history released from their bondage to these tribes [10]. They secured employment in the towns and on the farms, and not only were they paid for their labour, but their living conditions were also much improved. The establishment of the Bergdama reserve at Okombahe was confirmed after the war as a

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[1] Hailey, *op. cit.*, p. 23.

[2] *U.G.* 26—1936, p. 25.

[3] *Vide* also Vedder, *The Native Tribes of South West Africa* (1928), p. 178; Chap. II, para. 87, *supra*.

[4] *Palgrave's Report*, p. 94.

[5] *Die deutschen Schutzgebiete in Afrika und der Südsee, 1912/1913, Statistischer Teil*, p. 47.

[6] Hailey, *op. cit.*, p. 28.

[7] *Ibid.*, p. 31.

[8] *Vide* Chap. II, para. 63, *supra*.

[9] *Die deutschen Schutzgebiete in Afrika und der Südsee, 1912/1913, Statistischer Teil*, p. 46.

[10] Vedder, *The Native Tribes of South West Africa* (1928), p. 44; *vide* also Chap. II, para. 65, *supra*.

reward for assistance given to the Germans [1]. In the words of Lord Hailey: "For the first time the Bergdamas could feel that they had lands which were in some sense their own [2]."

V. The Europeans

87. During the last years of the German period, the European population (amounting to 14,830 in 1913) [3] were engaged in farming, mining, commerce, and other occupations. Mission activity had commenced during the early years of the nineteenth century, and by 1920 many mission stations had been firmly established for many years.

Although the majority of Europeans were Germans, a considerable portion, particularly of the farming community, were South Africans.

VI. The Rehoboth Basters

88. As has been shown [4], the Basters obtained possession of Rehoboth in 1870, and they have lived there ever since. Before the advent of the German rule, they had their own system of government, based partly on the Hottentot pattern, and partly on democratic principles. At the head of the tribe was a *Kaptein* (Captain) assisted by a *Raad* (Council) of two, and later four *Burghers* (citizens). There also was an elected *Volksraad* or Parliament. The territory (or *Gebiet*) was governed in terms of a body of written laws, called *Vaderlike Wette* (Patriarchal Laws). Their economy was based largely on animal husbandry. The original mother-tongue of the Basters was Nama, but in course of time they adopted Afrikaans. Their social organization was also modelled on that of the Europeans [5].

The well-known ethnologist Dr. E. Fischer estimated their numbers at 2,500-3,000 in 1912 whereas according to official German statistics there were 3,544 Bastards in 1912 [6].

89. In 1906 the German Government, with the consent of the Baster Community, abolished the office of *Kaptein* (Captain) and replaced it with a *Gemeendehoof* (Communal Head). The *Volksraad*, too, was abolished, and replaced with the Baster Council comprising nine members, whose election was made subject to the approval of the German Governor. A German magistrate acted as chairman of this Council, except when matters of purely domestic interest were discussed [7]. The Germans made laws for the *Gebiet*, and in the end the Basters lost some of their former rights of self-government [8].

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[1] Hailey, *op. cit.*, pp. 34-35; Vedder, *The Native Tribes of South West Africa* (1928), p. 44.

[2] Hailey, *op. cit.*, p. 35.

[3] *Die deutschen Schutzgebiete in Afrika und der Südsee, 1912/1913, Statistischer Teil*, p. 22.

[4] *Vide* paras. 34 and 37, *supra*.

[5] *Vide Law Book of the Rehoboth Basters*, promulgated in 1872 and 1874, in *U.G.* 41—1926, Annexure VI, pp. 79-91.

[6] Fischer, E., *Die Rehobother Bastards und das Bastardierungsproblem beim Menschen* [1913] (1961), pp. 14, 236; *Die deutschen Schutzgebiete in Afrika und der Südsee, 1911/12, Statistischer Teil*, pp. 40-41.

[7] Notice issued by the District Magistrate of Rehoboth, dated 30 Jan. 1906, in *U.G.* 41—1926, pp. 91-92.

[8] *U.G.* 41—1926, pp. 58-59.

R. The Conquest and Military Occupation of South West Africa by South African Forces

90. During the First World War, the South African Government undertook the conquest of South West Africa (save for the Eastern Caprivi Zipfel, which, as has been shown, was occupied by Rhodesian forces) [1]. After a military campaign by the South African forces, the German troops surrendered on 9 July 1915. For the remainder of the war, South West Africa was administered under military occupation by the South African forces, although a civilian administrator and officials were appointed.

[1] Chap. II, para. 12, *supra*.

BOOK IV

CHAPTER I

INTRODUCTORY

1. Save for the legal issues dealt with in Book II of this Counter-Memorial, Applicants' main attack in the present proceedings is based upon alleged contraventions by Respondent of the second paragraph of Article 2 of the Mandate [1].

Respondent has submitted above [2] that the Mandate as a whole lapsed on dissolution of the League of Nations. If this submission is accepted, it would follow that, for that reason alone, Applicants' complaints in the present regard would have no validity.

However, Respondent proposes entering into the merits of Applicants' complaints on the assumption, for purposes of argument, that the Mandate is still in existence [3]. This will be done in the present and the succeeding Books of this Counter-Memorial, against the background of the introductory material set out in Book III.

2. In view of the comprehensive nature of Applicants' contentions regarding alleged contraventions of Article 2 (2) of the Mandate, covering, as they do, *virtually every aspect of the administration of the Territory* for the whole period since the inception of the Mandate, Respondent's reply must necessarily be a lengthy one, which cannot be accommodated in one Book [4]. The reply to Chapter V of the Memorials will consequently be divided into the following Books of the Counter-Memorial:

Book IV: Introductory (this Chapter);
Statement of the Law relative to Article 2 (2) of the Mandate (reply to **I**, pp. 104-108 of the Memorials);
Reply to Applicants' Background Information (Chapter V, paras. 3-10, **I**, pp. 109-110 of the Memorials);
A General Survey of Respondent's Policies in South West Africa.

Book V: Well-being, Social Progress and Development: the Economic Aspect (reply to Chapter V, paras. 11-77, **I**, pp. 111-131 of the Memorials);
Well-being, Social Progress and Development: Government and Citizenship (reply to Chapter V, paras. 78-128, **I**, pp. 131-143 of the Memorials).

Book VI: Well-being, Social Progress and Development: Security of the Person, Rights of Residence and Freedom of Movement (reply to Chapter V, paras. 129-154, **I**, pp. 144-151 of the Memorials).

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[1] *Vide* Chap. V of the Memorials, **I**, pp. 104 ff.
[2] *Vide* Book II, Chap. V, of this Counter-Memorial.
[3] *Vide* Book I, Chap. I, para. 2 *(c)*, of this Counter-Memorial.
[4] *Ibid.*, paras. 3-5.

Book VII: Well-being, Social Progress and Development: Education (reply to Chapter V, paras. 155-186, **I**, pp. 151-161 of the Memorials).

Inasmuch as Applicants' "Legal Conclusions" (Chapter V, paras. 187-190, **I**, pp. 161-166) consist merely of a repetition of allegations made earlier in Chapter V under the various headings referred to above, Respondent will deal with them in conjunction with the factual allegations on which they are based.

In view of the fact that Respondent's reply to Chapter V of the Memorials is spread over a number of Books, Respondent's formal Submission in this regard does not appear in any of these Books, but is covered by the Submissions in Book I [1].

3. On analysis of Applicants' Memorials, it appears that there is no complaint or allegation that Respondent has failed to promote the well-being and development of *all the inhabitants* of the Territory, but that the charges are restricted to an alleged failure in respect of only the *Native* population. Thus Applicants say, in introducing their Statement of Facts regarding alleged contraventions of Article 2 of the Mandate, that—

> "by law and by practice, the Union has followed a systematic course of positive action which inhibits the well-being, prevents the social progress and thwarts the development of the overwhelming majority of the people of South West Africa. In pursuit of this systematic course of action, and as a pervasive feature of it, the Union has installed and maintained the policy and practice of *apartheid* [2]."

Apartheid, according to the Applicants—

> "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 [3]". (Italics added.)

When finally summarizing their allegations, Applicants repeat the above definition of apartheid as constituting the element which "has shaped the Mandatory's behaviour and permeates the factual record" [4]. They then continue:

> "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 special 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 [5]." (Italics added, save for the words "to the utmost".)

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[1] Book I, Chap. I, para. 11.
[2] **I**, p. 108.
[3] *Ibid.*, p. 109.
[4] *Ibid.*, p. 161.
[5] *Ibid.*, p. 162.

This feature, viz., that Applicants' complaints regarding alleged contravention of Article 2 are limited with respect to Natives, appears throughout Chapter V of the Memorials [1].

The main emphasis of this part of the Counter-Memorial will consequently also fall on policy, practice and administration regarding the Native population, and regarding relations between that population and the European or White inhabitants of the Territory, which relations form an important part of the theme of Applicants' complaints. It will nevertheless be necessary from time to time to refer also to other population groups, such as the Coloured group, or the Rehoboth Basters. Inasmuch, however, as these groups do not in any way feature in the complaints or charges, a systematic or complete survey in regard to them would be out of place, and is consequently not attempted. Any reference to them will be only for the purpose of explanation or example, or to answer some specific point or allegation raised in the Memorials.

4. A similar position pertains regarding references to South Africa. This case is concerned with Respondent's policies and actions in South West Africa, and not with those in South Africa itself. Nevertheless it will be necessary from time to time to refer to events, policies or circumstances in South Africa, either by way of explanation or illustration, or to answer some specific point raised by the Applicants. The intention is not, however, to provide a complete or comprehensive review of such events, policies or circumstances—such review would be entirely irrelevant to the issues before the Court and would add an unnecessary burden to an already bulky pleading.

5. In addition to South Africa, various other countries or territories in Africa and elsewhere will be referred to by way of example, comparison, or illustration. Respondent wishes to emphasize at the outset that such references are not intended to convey any criticism, express or implied, of any country or territory or its government. On the contrary, the purpose of such references will in most cases be to show the similarity of problems found elsewhere in the world, and to compare the various methods designed to solve them. In some instances the purpose is to show contrast between conditions in South West Africa and other territories, necessitating differences of approach in the framing of policies of legislation and administration. And in some respects the references also render possible a measure of comparison of standards of achievement in comparable circumstances—a matter not touched upon by Applicants at all, but which can nevertheless be of assistance, particularly inasmuch as Applicants' charges in essence amount to an allegation of bad faith on Respondent's part, as will appear.

6. In the next Chapter, Respondent will deal with the legal principles involved in Applicants' Submissions regarding alleged breaches of the provisions of Article 2 (2) of the Mandate.

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[1] *Vide* regarding Agriculture, para. 33, **I**, p. 117; regarding Industry, Industrial Employment and Labour Relations, para. 77, **I**, p. 130; regarding Government and Citizenship, para. 128, **I**, p. 142; regarding Security of the Person, Rights of Residence and Freedom of Movement, para. 154, **I**, p. 151; regarding Education, para. 186, **I**, p. 159; and generally, paras. 187-190, **I**, pp. 161-166.

CHAPTER II

STATEMENT OF THE LAW

1. In their Submissions 3 and 4, Applicants request the Court to declare that:

> "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 [1]."

For the purposes of this legal argument (as, indeed, of the whole argument regarding alleged contraventions of Article 2 of the Mandate) Respondent will assume that the Mandate is still in existence.

2. Respondent has submitted [2] that this Court does not, in terms of the Mandate, possess jurisdiction to decide disputes in matters not affecting the rights or legal interests of other Members of the League of Nations (whatever meaning this expression may bear since dissolution of the League); and further that Members individually never possessed any right or legal interest in the observance by the Mandatory of the obligations imposed upon it by the Mandate for the benefit of the inhabitants of the Territory, except in cases where the breach of these obligations affected the material interests of individual League Members, either directly or through their nationals.

In the course of Respondent's argument as aforesaid, attention has been drawn to the wide and general provisions of Article 2. In this respect it has been submitted that it is foreign to the essential nature and purpose of a court of law to entertain matters of a purely political or technical nature, such as might well arise if the Court were required to adjudicate on disputes arising from an alleged breach of the obligation to ". . . promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory . . ." [3]. For the

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[1] I, p. 197.
[2] *Vide* Book II, Chap. V B, paras. 2-29, of this Counter-Memorial.
[3] Book II, Chap. V B, para. 16.

reasons set out [1], it was submitted that the authors of the Mandate did not intend the Court to have jurisdiction to entertain such disputes, the Permanent Mandates Commission and the Council of the League being the technical and political bodies specially charged with the function of dealing with such matters.

Respondent abides by the submissions aforestated, and its argument in the rest of this Chapter is accordingly offered as an alternative thereto, which would require decision only pursuant to a finding that the Court does possess jurisdiction to entertain disputes arising from the application of Article 2 of the Mandate, even in cases affecting only the interests of the inhabitants of the Territory.

3. Article 2 of the Mandate, on which Applicants' said submissions are based reads as follows:

> "The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.
>
> 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."

4. The purport and effect of Article 2 cannot be fully appreciated without referring first to Article 22 of the Covenant, in terms of which the Mandate was granted. This Article commenced in its first paragraph by setting out the principle to be applied to certain territories (including South West Africa) as being "that the well-being and development of [the inhabitants of the said territories] form a sacred trust of civilization"; and it further recorded the signatories' agreement that "securities for the performance of this trust" should be embodied in the Covenant.

This paragraph was clearly of the nature of an introductory statement of the main objective of the mandate system, together with an intimation that the ensuing provisions would be directed towards the attainment thereof [2].

5. The method designed by the authors of the Covenant to give effect to their objective, comprised the following main elements:

(a) "The best method of giving practical effect to this principle" was considered to be—

(i) that the tutelage of such peoples be entrusted to suitable "advanced nations"; and

(ii) "that this tutelage should be exercised by them as Mandatories on behalf of the League" [3].

The aspect of accountability to the League has been considered above [4] and is not relevant for present purposes. In the present argument, the emphasis will fall on the concept of tutelage.

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[1] Book II, Chap V B, paras. 2-29.

[2] *Vide* Book II, Chap. III, para. 13 and Book II, Chap. V A, para. 9, of this Counter-Memorial.

[3] Art. 22 (2) of the Covenant; *vide* Book II, Chap. V A, para. 9 *(b)*, of this Counter-Memorial.

[4] *Vide* Book II, Chaps. III, para. 14 *(e)*, IV, para. 2 *et seq.* and V A, para. 9 *(c)*, of this Counter-Memorial.

(b) In regard to C Mandates, such as South West Africa, the concept of "tutelage" would include authority and control over the territories concerned [1], or, in other words, power of government and administration which could best be exercised "under the laws of the Mandatory as integral portions of its territory" [2].

(c) However, the "sacred trust" principle required that the "degree of authority, control, or administration" to be exercised by the Mandatory was to be "explicitly defined" in each case [1] and, in particular, that the power of administration be made subject to "safeguards ... *in the interests of the indigenous population*", consisting of—

> "... 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 ... [3]".

6. The scheme set out in broad terms in Article 22 of the Covenant was duly implemented. The Mandate for South West Africa was conferred on Respondent as the "advanced nation" who could "best undertake this responsibility" [4]. And, to enable it to perform its functions as Mandatory, Respondent was granted "full power of administration and legislation over the territory ... as an integral portion of the Union of South Africa" [5].

7. The principle that the main objective of the Mandate was to promote the "well-being and development" of the inhabitants (the "sacred trust" principle) was given effect to in two essentially different ways. In the first place, provision was made in Articles 3 to 5 of the Mandate for the "safeguards" referred to in Article 22 (5) and (6). These "safeguards" (consisting mainly of the "prohibition of abuses") placed certain limitations on the governmental powers of the Mandatory, and were in effect merely specific implementations, in certain defined spheres, of the overriding objective of the mandate system.

Beyond making such provision for the "safeguards" it was, however, in the nature of things impossible (or at any rate not considered feasible) for the authors of the Mandate to reduce the objective of promoting the well-being and development of the inhabitants of the Territory to a series of specific injunctions or prohibitions, breaches of which would be capable of objective determination. No comprehensive set of rules can be devised, the application of which in the sphere of government would inevitably and in infinity have a beneficial effect on the people governed. The authors of the Mandate consequently coupled the grant to the Mandatory of full legislative and administrative powers [6] with

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[1] Art. 22 (8) of the Covenant.
[2] *Ibid.*, Art. 22 (6).
[3] *Ibid.*, Art. 22 (5) read with (6).
[4] *Ibid.*, Art. 22 (2).
[5] Art. 2 of the Mandate for German South West Africa.
[6] *Vide* Art. 2 (1) of the Mandate.

a provision which required the Mandatory to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory" [1]. These words in effect merely constitute a paraphrase of the main objective of the mandate system as expressed in the Covenant—i.e., "the principle that the well-being and development of such peoples form a sacred trust of civilisation"—and in their context they consequently indicate the objective to be pursued by the Mandatory, or the spirit with which he should be imbued, in exercising his power of administration and legislation.

8. Some significant differences between Article 2 (2) of the Mandate, on the one hand, and Articles 3 to 5, on the other, illustrate the essentially different origin and purpose of these provisions. Thus the wording of Article 2 (2) is wide and general, which is in keeping with its nature as an expression of an idealistic objective. The "safeguards" contained in Articles 3 to 5, on the other hand, being specific obligations, are couched in relatively clear and precise language—they prohibit or enjoin particular acts or omissions and provide objective criteria by which the Mandatory's administration may be judged.

The general, overriding nature of Article 2 (2) as denoting the spirit in which, or the purpose for which, the Territory is to be administered, appears also from its position in the mandate instrument: it is not inserted in a separate Article, or included with provisions limiting the Mandatory's powers (as is the case with Articles 3 to 5), but is found in the same Article as the *grant* of "full power of administration and legislation" to the Mandatory.

9. Reading Article 2 as a whole and in the light of the provisions of Article 22 of the Covenant, the intention of the authors of the Mandate becomes quite clear. Save for Articles 3 to 5, no limits in respect of subject-matter were placed on the full power of administration and legislation granted by the Article; but the Mandatory was nevertheless required to exercise these full powers for the purpose of promoting to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory.

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

In the *Lighthouses* case, the Permanent Court said:

> "... any grant of legislative powers generally implies the grant of a *discretionary right* to judge how far their exercise may be necessary or urgent; ... It is a question of appreciating political considerations and conditions of fact, a task which the Government, as the body possessing the requisite knowledge of the political situation, is *alone qualified* to undertake [2]." (Italics added.)

More specifically with reference to C Mandates, Mr. Justice Latham, the Chief Justice of Australia, said:

> "In the case of 'C' mandates ... the mandatory power ... has full powers of 'administration and legislation over the territory

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[1] Art. 2 (2) of the Mandate.

[2] *Lighthouses case between France and Greece, Judgment, 1934, P.C.I.J., Series A/B, No. 62*, p. 22.

subject to the mandate as an integral portion of its territory' (Art. 2 of the Mandate). This provision is in accordance with the terms of Art. 22 [of the Covenant]. In the original draft of the covenant the relevant provision of art. 22 provided that the territories in respect of what are now known as 'C' mandates were granted 'can be best administered under the laws of the mandatory *as if* integral portions of its territory'. But on the suggestion of the Japanese delegate the word 'if' was omitted (see *Wright, op. cit.*, p. 42). *It is clear that it was intended that in the case of 'C' Mandates, the fullest powers of government should be conferred upon the mandatory power* [1]." (Italics added.)

And with reference to the mandate system as a whole, M. Orts, a member of the Permanent Mandates Commission, was recorded to have said:

"The development of primitive peoples could be carried on by different means, and these means would be such as were proper to the native genius, traditions, and the political and philosophical conceptions of each mandatory State . . . The mandatory States would fail in their task if a system and method foreign to their mentality were imposed upon them.

The duty of the Commission was confined to discovering whether the mandatory Powers conformed to the definite obligations imposed upon them by the Covenant and by the mandates, and in addition, whether, within the limits of these acts, they were *honestly performing their task* in order to justify the confidence reposed in them [2]." (Italics added.)

Quincy Wright points out that—

". . . the prescriptions of the Covenant and of the mandates vary greatly in definiteness. Some regulations like those on slave, arms and liquor traffic, military bases, recruiting, and the open door are quite definite; but, on the other hand, certain principles like 'the well-being and development' of the inhabitants . . . are so vague as to admit of a broad variety of policies [3]."

And in 1946 Lord Hailey, who had himself been a member of the Permanent Mandates Commission, stated with reference to Native Affairs in South West Africa:

"It need hardly be recalled that the Mandate did not itself set forth the methods to be pursued in the conduct of Native Affairs. Article 22 of the Covenant of the League placed on the Mandatory a general obligation to consider the well being and development of the population whose tutelage it had undertaken. The Mandate laid down that while the Mandatory should have full power of administration and legislation over the territory as an integral portion of its own territory, it should promote to the utmost the material and moral well being and the social progress of the inhabitants. The primary object of this provision was clearly to protect the interests of the Native inhabitants of the territory. . . .

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[1] *Ffrost* v. *Stevenson*, 1937, 58 C.L.R. 528, at p. 550.
[2] *P.M.C., Min.*, IX, p. 134.
[3] Wright, Q., *Mandates Under the League of Nations* (1930), p. 226.

> In regard, however, to the policy to be observed in Native Affairs the prescriptions of the Mandate, where they were in any sense precise, were of a negative rather than a positive character. Thus it required the Mandatory Government to prohibit the slave trade and the supply of intoxicating beverages to Natives, to control the traffic in arms, and to permit forced labour only for essential works and services. It prohibited the military training of Natives, save for purposes of internal police and local defence, and it guaranteed the free exercise of all forms of worship and the free entry of all missionaries belonging to any State member of the League of Nations. *But in other respects it left the Mandatory Government to interpret the methods by which it should promote the well being of the Natives of the territory. Thus it remained for it to frame its own policy, within this general objective,* in respect of matters such as the control over land, the system of justice, the procedure of taxation, the extent to which regard should be had to native law and custom, the provision to be made for the social services of health and education, and the part to be taken by the Native population in the political institutions of the country [1]." (Italics added.)

To a certain extent this was an amplification by Lord Hailey of a similar view expressed by him in 1938 as follows:

> "There are indeed certain difficulties inherent in the form which the mandates have taken. They indicate general policies, necessarily in wide or even negative terms. But experience shows that within the scope of general objectives such as those indicated there is room for a great variety of methods of approach [2]."

10. As appears from the foregoing, therefore, the only qualification imposed by Article 2 (2) on Respondent's full powers of legislation and administration in respect of South West Africa, was that Respondent was required to use such powers for the purpose of promoting to the utmost the material and moral well-being and the social progress of the inhabitants. The discretion to decide as to the most appropriate means of attaining such purpose, vested in Respondent.

11. The nature of the limitation on Respondent's powers in terms of Article 2 must be borne in mind when considering the correct approach by the various supervisory organs in respect of Mandates. Thus the Council of the League and the Permanent Mandates Commission were respectively political and technical organs, which could make practical suggestions or recommendations, or could level criticisms, on the technical details of administration of mandated territories, even in circumstances where there was no suggestion that the Mandatory concerned had acted contrary to the terms of its Mandate.

12. The Court, on the other hand, could make no order adverse to any Mandatory except on the basis of a finding that there had been a breach of the provisions of the Mandate. This is an obvious result of the very nature of the Court's judicial functions. In addition, it is implicit in the Judgment on the Preliminary Objections. Thus it was stated that the role of the Court in respect of Mandates was ". . . to serve as the final

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[1] Lord Hailey, *A Survey of Native Affairs in South West Africa* (1946) [unpublished], pp. 51-52.

[2] Lord Hailey, *An African Survey* (1938), p. 220. *Vide* also p. 251.

bulwark of protection by recourse to the Court against possible *abuse or breaches of the Mandate*" [1]. (Italics added.)

In the Court's view the main type of dispute for which the compromissory clause had been designed, was where the Mandatory persisted in pursuing a particular course despite the objection of the Council of the League that it constituted "a violation of the Mandate" [2].

Later, when defining the ambit of the rights of Members of the League in respect of Mandates, the Judgment reads:

> "... the Members of the League were understood to have a legal right or interest in the *observance by the Mandatory of its obligations* ... towards the inhabitants of the Mandated Territory ...[3]". (Italics added.)

13. Where, as in the case of Articles 3 to 5 of the Mandate, the obligations of the Mandatory relate to the performance or non-performance of specific acts, the determination of the question whether a breach, abuse or violation of such obligations has been committed is, apart from possible difficulties of interpretation, confined to the ascertainment of the existence or otherwise of certain objective facts.

The position under Article 2 is, however, essentially different. The only obligation resting on Respondent in terms of that Article, was to use its powers of legislation and administration for the purpose of promoting to the utmost the well-being and progress of the inhabitants [4]. Consequently, to establish a breach of this Article, it would be necessary to prove that a particular exercise of Respondent's legislative or administrative powers was not directed in good faith towards such purpose. To put the same proposition in a different form, no act or omission on Respondent's part would constitute a violation of this Article unless such act or omission was actuated by an intention, or directed at a purpose, other than one to promote the interests of the inhabitants of the Territory. If there was any intention at all that the Court should, in the interest of the inhabitants, adjudicate upon allegations of violation of Article 2 (2), this is the only possible juridical basis upon which such adjudication could be undertaken.

14. In advancing the above proposition, Respondent is concerned only with the particular situation pertaining under Article 2 of the Mandate, and is not to be understood as suggesting that in all cases where a discretionary power of legislation or administration has been granted to a person or body, the possibility of judicial interference with acts of the holder of the power must necessarily be equally limited.

So, for instance, a power may be limited to certain subjects, as is frequently the case with legislative as well as administrative jurisdiction. In such instances a legislative or administrative act could deal with a subject falling outside those included in the power, or could transgress their limits, and would consequently be *ultra vires* and liable to be declared so by a court of law. The same situation would in principle apply to an act running counter to any prohibition or restriction, express or implied, attached to a grant of power. Limits, prohibitions and re-

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319, at p. 336.
[2] *Ibid.*, p. 337.
[3] *Ibid.*, p. 343.
[4] *Vide* para. 10, *supra*.

strictions of the kind mentioned need not be, and frequently are not, concerned with a question of purpose at all, with the result that the element of purpose, or good or bad faith, could in such cases be irrelevant to an allegation of violation, the only question being whether the act complained of in fact falls within or outside the limits of the power as prescribed. Allegations of violation of certain of the provisions of Articles 3 to 5 of the Mandate would fall in this category.

Again, the manner in which a power is defined and circumscribed, even if the limitations include a reference to a purpose, may be such as to give rise to genuine misunderstanding on the part of the holder of the power as to the nature or scope of the power or of the purpose. In such circumstances there would be room for a possible finding that the holder has committed a violation by reason of pursuing an unauthorized purpose, despite a complete absence of *mala fides* on his or its part.

However, these and similar considerations do not arise in respect of Article 2 of the Mandate. The "full power of administration and legislation" granted in terms of the Article covers the whole field of government, the only limitation (apart from Articles 3 to 5) being the element of purpose. And both the power and the purpose are defined in such a manner as to preclude any possibility of misunderstanding. (Indeed, as will be shown later, the Applicants do not allege or suggest any possibility of misunderstanding.) The question before the Court can therefore in essence only be one of intentions, or purpose, or good faith.

15. The conclusion stated in the previous paragraphs, is supported by a further consideration. The Court is a judicial organ and can accordingly not come to decisions otherwise than in accordance with legal norms. If the Court were to decide whether in fact a particular policy promoted the "well-being" of the inhabitants "to the utmost", it would have to consider that policy and weigh it against other policies which might be followed in an attempt to achieve such a purpose. In order to arrive at a decision, the Court would thereupon have to decide which policy it considers best. The Court's function in so deciding would be one which is, in its very nature, not a judicial one. No legal criteria can be used in such adjudication. The decision can only be based on social, ethnological, economic and political considerations.

It is true that a particular provision of a statute in municipal law, or of a treaty in international law, could have the effect of requiring a court to venture onto one or other of these terrains. The particular provision or stipulation itself then provides the legal basis upon which the Court is to act; and with the assistance of such special prescriptions, if any, as may be contained therein, the Court would have to perform the function concerned as best it could. But such a situation is always an unusual and exceptional one [1], involving, as it does, a departure to a greater or lesser extent from ordinary legal norms as the criteria for decision; and in the absence of explicitly clear language or manifest intent, an instrument will not readily be understood as requiring such a function of a court of law.

An analogous illustration of the need for an exceptional arrangement to bring about a departure from ordinary legal norms as the criteria for adjudication by a court, is afforded by Article 38 of the Statute of this honourable Court. Paragraph 1 of the Article states that the Court's

[1] *Vide* Book II, Chap. V B, paras. 16-17, of this Counter-Memorial.

"function is to decide in accordance with international law", and sets out sources of international law. This is the normal manner in which the Court functions in respect of disputes submitted to it, and no special arrangement is needed to bring it about. Paragraph 2 of the Article provides for power on the part of the Court to decide *ex aequo et bono*, but only "if the parties agree thereto"—thus underlining the need for special arrangement if there is to be a departure from normal juridical bases for adjudication.

In the present case there is no exceptional or special arrangement of the kind mentioned above. There is no explicitly clear language or manifest intent perceivable in the mandate instrument, and no special agreement between the parties as contemplated in Article 38 (2) of the Statute, so as to require or enable the Court to adjudicate *ex aequo et bono* or upon the basis of political and technical criteria. This, accordingly, again leaves, as the only possible juridical basis for adjudication, the question whether a Mandatory in Respondent's situation has *bona fide* directed the exercise of its full power of administration and legislation towards achievement of the prescribed purpose, viz., promotion to the utmost of the inhabitants' well-being and progress.

16. The question before the Court in respect of Article 2 therefore being one of intentions, or purpose, or good faith, it follows that the political and technical merits or otherwise of particular legislative and administrative measures, practices and policies—not being in issue as such—can be of relevance only in so far as they may tend to prove good or bad faith in the sense of an authorized or unauthorized purpose, on the part of Respondent.

Whatever the Court may think of the merits of a particular legislative or administrative act, practice or policy, if it was devised and performed or practised in the exercise of the Mandatory's discretion with the *bona fide* intention of benefiting the inhabitants of the Territory, it would not constitute a violation of Article 2 of the Mandate.

This situation is logically inherent in all cases where courts have to decide on the legality or otherwise of the exercise of a discretionary power [1], whether conferred by treaty or by statute. In the latter instance municipal courts "... have repeatedly affirmed their incapacity to substitute their own discretion for that of an authority in which the discretion has been confided" [2].

17. Although the Memorials do not contain any analysis of the powers and obligations granted and imposed by Article 2 of the Mandate, Applicants seem to reach the same conclusion as the one set out above. Consequently their whole case relating to the alleged violations of Article 2 (2) of the Mandate [3] appears to be based on a contention of bad faith on the part of Respondent. Thus they contend:

> "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

[1] Save, again, where jurisdiction of an abnormal kind may specifically have been conferred upon a court, e.g., to test for reasonableness.

[2] de Smith, S. A., *Judicial Review of Administrative Action* (1959), p. 167.

[3] I, p. 104.

> 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 [1]." (Italics added save for the words "to the utmost".)

And again:

> "A sober and objective 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]." (Italics added.)

Later, the actions of the Respondent to which exception is taken are stigmatized as constituting "a deliberate, systematic and consistent course of conduct" discriminating against the Native population of the Territory [3]; "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" [4]; "a systematic and active programme which prevents the possibility of progress by the 'Native' population" [5]; "a systematic course of positive action which thwarts the well-being, inhibits the social progress and frustrates the development" of the Native population [6]; "deliberate policy and practice" [7]; "deliberate and systematic control of the processes of education" [8]; "positive action which drastically restricts opportunities for education" [8]; "cohesive and systematic pattern of behavior" [9].

In their Final Conclusion, the result of the foregoing is summed up in the following words:

> "In its administration of ... South West Africa, the Union, as Mandatory, has *knowingly and deliberately violated* the letter and spirit of the second paragraph of Article 2 of the Mandate and of Article 22 of the Covenant upon which Article 2 of the Mandate was based [10]." (Italics added.)

18. Although the Applicants do make the allegation, e.g., in the first passage quoted in the previous paragraph [11], that Respondent has "failed to promote such material and moral well-being and social progress", they do not appear to make any independent or alternative case relative to this allegation, but state it purely as a consequence flowing

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[1] I, p. 108.
[2] *Ibid.*, pp. 108-109.
[3] *Ibid.*, p. 117.
[4] *Ibid.*, p. 130.
[5] *Ibid.*, p. 143.
[6] *Ibid.*, p. 152.
[7] *Ibid.*, p. 159.
[8] *Ibid.*, p. 160.
[9] *Ibid.*, p. 161.
[10] *Ibid.*, p. 166.
[11] *Vide* also I, pp. 117, 130, 143, 151-152, 160 and 162.

from the positive course of *mala fide* conduct which they seek to lay to Respondent's charge.

This is apparent not only from the manner of formulation of the charges [1] but also from the nature of the material sought to be adduced in support thereof. Respondent, in submitting that the Court can arrive at a conclusion of violation of Article 2 only on the basis of a finding that Respondent has used its powers of administration and legislation for an unauthorized purpose, has pointed out that there are not norms of a legal (as distinct from a political or technical) nature for deciding on merit whether a Mandatory has or has not promoted well-being and progress to the utmost. It is significant that Applicants themselves do not suggest any such norms. They do not in any way suggest or indicate what standards ought to have been achieved. They make no attempt at objective assessment or even description of the circumstances pertaining to the task undertaken by the Mandatory, and of the effect which those circumstances could be expected to have upon the rate of progress and development. They do not systematically compare conditions of well-being and progress as they existed in the Territory in 1920 with the conditions existing today. They do not even refer at all to standards in fact applying in comparable territories and circumstances.

19. From the foregoing it becomes patent that Applicants' assertion that Respondent *"has failed to promote"* well-being and progress on the part of the Natives, "to the utmost" or "in any significant degree whatever", is a mere derivation from the charge that *"efforts of the Union have in fact been directed to the opposite end"* [2], and that Applicants' real and only case against Respondent in respect of Article 2 is a charge of bad faith. Applicants themselves indicate this almost explicitly in the following passage:

> "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 [3]." (Words "In so doing" italicized by Respondent.)

20. In their Submission 3 [4] Applicants' complaint is formulated as follows:

> "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 . . ."

Read by itself this Submission may possibly create the impression that Applicants make the case that any distinction as to race, etc., in establishing the rights or duties of the inhabitants of the Territory, is

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[1] *Vide* also I, pp. 117, 130, 143, 151-152, 160 and 162.
[2] *Vide* para. 17, *supra*.
[3] I, p. 162.
[4] Quoted in full in para. 1, *supra*.

per se to be regarded as a violation of the Mandate. The Submission commences, however, with an incorporation by reference of "the respects set forth in Chapter V of this Memorial and summarized in paragraphs 189 and 190 thereof". These incorporated "respects" render clear that the possible impression just mentioned cannot be correct. It will be recalled that Applicants have been careful to set out explicitly what they allege is to be understood under the term "*Apartheid*", and that they have inserted this "definition", *inter alia*, in paragraph 189 of the Memorials [1]. Reference to the definition, as well as to the further contents of Chapter V generally, including paragraphs 189 and 190 thereof, conclusively demonstrates that no part of Applicants' case is founded on the mere existence of distinctions between the rights and duties of various groups in the Territory, but that the basis of their whole case is as set out in the preceding paragraphs.

21. To conclude, the case alleged against Respondent, in regard to the suggested breach of Article 2 of the Mandate, is one of bad faith in the exercise of its powers in terms of the said Article, in the sense that it has pursued actions ostensibly within its powers for a purpose not authorized thereby. And an analysis of the mandate instrument and the Covenant shows, in Respondent's submission, that this is in law the only possible basis on which such a case could be sought to be founded.

22. By making use of some of the provisions of Chapters XI, XII and XIII of the Charter of the United Nations, which are said to be *in pari materia* with Article 22 of the Covenant and Article 2 of the Mandate, Applicants seek to read into the general statement of objective in Article 2 (2) of the Mandate certain "clear and meaningful norms marking the duty of the Mandatory "[2].

It is submitted that the invocation of the principle of *in pari materia* as an aid to interpretation in the present case, is entirely unjustified. The only authority relied upon by Applicants in this regard [3], is a passage from the case of *Interpretation of the Convention of 1919 concerning Employment of Women during the Night* [4]. In that case the Court, in interpreting one convention, was led to "attach some importance" to the presence of a particular provision in another convention. The reason given by the Court for the invocation of the *in pari materia* principle was the "similarity both in structure and in expression between the various draft conventions adopted by the Labour Conference in Washington in 1919".

It is understandable that where a particular conference adopts a number of similar conventions, the terms of one of them may be of some assistance in interpreting another. To assert, however, that a convention concluded in 1945 can be used as an aid to ascertain the intentions of the parties to a convention concluded between different States in 1920, is, in Respondent's submission, so obviously absurd as not to warrant serious consideration [5].

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[1] *Vide* Chap. I, para. 3, *supra*.
[2] I, pp. 104-108.
[3] *Ibid.*, pp. 105-106.
[4] *P.C.I.J., Series A/B, No. 50.*
[5] *Vide Interpretation of the Convention of 1919 concerning Employment of Women during the Night, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 50,* at p. 377.

23. The provisions of the Charter cannot, therefore, be relevant to the *interpretation* of the Covenant and the mandate instrument. Whether they are in their own right of application to Mandates, is not a question which arises in the present proceedings, in that Applicants' whole case is based on the provisions of the Mandate [1]. The only possible relevance, in the present proceedings, of the provisions of the Charter, is that they may afford evidence of what was in 1945 considered proper aims of administration in dependent territories. As such, the Charter could conceivably be a factor from which, together with all other relevant material, an inference of good or bad faith on the part of the Mandatory might be drawn.

For this purpose it is, however, important to read the relevant provisions as a whole; and it is particularly instructive to refer to their text with emphasis on the qualifications rather than, as in Applicants' citation [2], on certain aspects of the obligations. Thus Article 73 provides as follows:

> "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.)

In so far as the above provisions (or some of them) may be in advance

where the Court refused to apply the *in pari materia* principle when it was sought to invoke the provisions of the Berne Convention of 1906 in interpreting the Washington Convention of 1919.

[1] And necessarily so, regard being had to the compromissory clause on which they rely for jurisdiction.

[2] I, p. 108.

of what was current thought in 1920, Respondent is nevertheless in entire accord with them, provided they are read as a whole, i.e., without disregarding the qualifications inherent in them. As will be shown later in this Counter-Memorial, Respondent's policies have in fact been designed to give effect to the principles underlying the above-quoted provisions of the Charter.

24. Having made the submission regarding "clear and meaningful norms" as stated above [1], Applicants proceed to formulate certain specific duties which they allege are, in accordance with the said legal norms, included in Respondent's obligations as Mandatory [2].

Before dealing with some of these specific duties, one general aspect must be emphasized, namely that the duty to promote the material and moral well-being and social progress of the inhabitants cannot be split up into a number of different, self-contained fragments, but is in its nature indivisible. Although Respondent is in general agreement that the specific "clear and meaningful norms" relied upon by Applicants [2], can, on the whole [3], be said to be matters to which regard ought to be had in the exercise of the Mandate, it must be kept in mind that they represent ultimate aims, which in certain circumstances or at certain stages of development may be inconsistent or even irreconcilable. It is therefore artificial, in Respondent's submission, to divide Respondent's duty in terms of Article 2 of the Mandate into a number of different obligations and then to suggest, expressly or by implication, that Respondent is obliged to attempt to comply with all these obligations to the same degree at the same time. Respondent's duty is to promote the *total* material and moral well-being and social progress of the inhabitants, and in the process of performing this duty particular aspects of such well-being and progress may, in the exercise of Respondent's discretion, receive particular emphasis, or may, conversely, be deferred or even reduced for the purpose of achieving a greater and compensatory improvement in some other respect.

25. As has been noted above, Respondent is in general agreement that the duties referred to by Applicants, constitute matters to which regard is to be had in administering the Mandate. To avoid misunderstanding, however, something more requires to be said in regard to three of them, as will be done in the next succeeding paragraphs.

26. The first duty which is said to be included within the general terms of Article 2 of the Mandate, reads as follows:

> "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 . . . [4]"

Respondent acknowledges a duty to promote the economic progress of all the inhabitants of the Territory, and considers that no group can claim any preferential treatment save upon the basis of its needs, which may be greater than those of other groups and for that reason require special attention.

Respondent does not, however, accept the proposition, which seems

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[1] *Vide* para. 22, *supra*.
[2] I, pp. 108-109.
[3] Subject to what is said in paras. 25-28, *infra*.
[4] I, p. 108.

to be implicit in the above-quoted "duty", that it owes a special obligation towards certain inhabitants of the Territory merely because they are Natives, or merely because they constitute the greater part of the population.

27. Applicants' duty No. 3 seeks to impose on Respondent the obligation to promote the "political advancement of [the inhabitants of the Territory] *through rights of suffrage* . . ." [1]. (Italics added.) Neither in the Mandate, nor in the Charter, is there any provision requiring that the political advancement of the inhabitants of dependent territories should necessarily be promoted "through rights of suffrage". Whereas Respondent admits that it is under a duty, *inter alia*, to promote the political advancement of the inhabitants of the Territory, it is submitted that the method to be adopted in this regard rests in its own discretion, which is to be exercised by applying policies "as may be appropriate to the particular circumstances of [the] territory and its peoples" [2]. Respondent, while in no way opposed to the idea of suffrage for all or any peoples in appropriate circumstances, does not consider that provision for such rights in one integrated political entity is the only or best method of achieving political advancement in all cases, and is satisfied that it would certainly not be the best method for the peoples of South West Africa.

28. Applicants' duty No. 5 reads as follows:

> "Equal rights and opportunities for [members of the population of the Territory] in respect of home and residence, and their just and non-discriminatory treatment [3]."

Respondent is in entire accord with this proposition, although it is evident that differences could arise as to the best methods of giving effect to the ideal expressed therein. Respondent must stress that in its view the expression "equal rights and opportunities" is not to be interpreted to mean "identical rights and opportunities". In later parts of this Counter-Memorial Respondent will show that differential treatment is often the only way of achieving in practice the ideal of equality for various population groups. Reference may in this regard be made to the *Minority Schools in Albania* case, where the Permanent Court said:

> ". . . equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.
>
> It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact . . . [4]"

29. In the succeeding Chapters in this Book, Respondent will, after dealing first with background information, survey the broad lines of policy adopted by it in promoting the well-being and progress of the inhabitants of South West Africa.

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[1] I, p. 108.
[2] Art. 76 *(b)* of the Charter.
[3] I, p. 109.
[4] *Minority Schools in Albania, Advisory Opinion, 1935, P.C.I.J., Series A/B, No. 64*, p. 19.

CHAPTER III

BACKGROUND INFORMATION: AREA AND POPULATION

1. In this Chapter Respondent replies specifically to the statements and allegations contained in paragraphs 3 to 10 of Chapter V of Applicants' Memorials [1]. For the most part the reply concerns information which has been set out systematically in previous Chapters [2]. It will nevertheless be convenient to summarize, or refer to, such information with specific reference to the relevant paragraphs of the Memorials.

2. *Paragraph 3.*

(a) The area of South West Africa, according to figures obtained from the Surveyor-General of the Territory, is 824,269 sq. km. (318,261 sq. miles) [3].

(b) The Territory is not divided into two main segments (or administrative units) as alleged by Applicants, but into three; viz., the Police Zone, the northern section beyond the Police Zone, and the Eastern Caprivi Zipfel. Such division was not effected by Respondent as alleged by Applicants, but had been introduced by the former German administration. The division reflected different attitudes on the part of the German authorities to the administration of these three areas. Thus the Police Zone was the area under direct control of the authorities and was patrolled by the police (whence its name), whereas the northern section was never subject to German control at all (save, to a limited extent, the Kaokoveld). The Eastern Caprivi Zipfel occupied an intermediate position whereby German control was exercised in an indirect way by making use largely of the traditional tribal authorities [4].

(c) The northern section (i.e., excluding the Caprivi) consists mainly of the Kaokoveld, Ovamboland and the Okavango. The main population groups in the Kaokoveld are the Himba and Tjimba [5], as well as certain Herero who fled from the Territory during the war against the Germans in 1904-1906, but returned after the German defeat in 1915 [6].

The composition of the population of Ovamboland and the Okavango has been set out above [7].

(d) The areas of these various sections are as follows [8]:

Police Zone: 570,980 sq. km.
(220,463 sq. miles).

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[1] I, pp. 110-111.
[2] *Vide* Book III, Chaps. I to III, of this Counter-Memorial.
[3] *Ibid.*, Chap. I, para. 4.
[4] *Ibid.*, Chap. II, para. 11.
[5] Two tribes closely related to the Herero, who remained behind when the early Herero migration left the Kaokoveld—*vide* Book III, Chap. II, paras. 81 and 82.
[6] *Vide* Book III, Chap. III, para. 84.
[7] *Ibid.*, Chap. II, paras. 22 and 33.
[8] Departmental information.

Northern section and the Eastern Caprivi:

253,289 sq. km.
(97,798 sq. miles).

It will be seen therefore that the figures given for these sections in paragraph 3 of Chapter V of the Memorials, and for which no source is quoted [1], are entirely erroneous.

(e) It is correct to say that the Police Zone embraces generally the southern and central sections of the Territory, and also that it is larger and better developed than the northern section and the Caprivi. Respondent is not sure, however, what Applicants mean to convey by referring to the Police Zone as "richer" and to the northern section as "poorer". If these adjectives are meant to refer to the relative extent of natural resources of the two parts of the Territory, Respondent disputes this allegation.

As far as land resources are concerned, the areas beyond the Police Zone (and, in particular, Ovamboland, the Okavango and the Eastern Caprivi) are situated in the most favoured part of the Territory. It will be recalled that the northern and north-eastern parts of the Territory have the combined advantages of a higher annual rainfall, a longer rainy season, and less variability in rainfall [2]. These areas are consequently best suited for dry-land cropping [3], stock farming [4], and timber exploitation [5]. In addition, the highest potential for irrigation is found in those parts of the Territory [6]. The region in which all these advantages are combined (called the northern and north-eastern cropping and large stock farming region) [7], falls entirely within parts of Ovamboland and the Okavango, and covers the whole of the Eastern Caprivi. The rest of Ovamboland (with the exception of a portion to the extreme west) and the Okavango fall within an area which is also a favourable one compared to the rest of the Territory [8].

3. *Paragraph 4.*

The 1951 census figure given in this paragraph is correct. Respondent is not called upon to reply to the alleged 1958 estimate, and refers to particulars of the 1960 census as given below [9].

It is admitted that one of the classifications employed for census purposes, is the one referred to by Applicants. In addition, the official census classifies the total population in groups according to the geographical distribution, home language, sex, occupation, etc., of individual members thereof.

4. *Paragraph 5.*

In this paragraph Applicants state why they refer to the various population groups in the way they do, and Respondent is not called

[1] The Report of the Committee of South West Africa quoted in respect of the relevant sentence in para. 3 of the Memorials contains no figures relating to the areas of the two sections.

[2] *Vide* Book III, Chap. I, para. 15.

[3] *Ibid.*, para. 29.

[4] *Ibid.*, para. 31.

[5] *Ibid.*, para. 32.

[6] *Ibid.*, para. 25.

[7] *Ibid.*, para. 33 and Map 9.

[8] The north-eastern large stock and sub-marginal cropping region.

[9] *Vide* para. 5, *infra.*

upon to reply thereto. Respondent would point out, however, that the Territory's population is a heterogeneous one, and that the classification thereof in various groups for various purposes is not an artificial or arbitrary one, as Applicants would seem to suggest. It will have been seen that the terms "Whites" and "Europeans" are used in the Counter-Memorial to denote the same population group.

The allegation that the division of the population into groups reflects "*differences in the legal, as well as in the economic and social, status of* the inhabitants", will be dealt with in reply to Applicants' specific allegations in this regard.

5. *Paragraph 6.*

The allegations in this paragraph regarding the 1951 census are admitted. Respondent repeats that it is not called upon to deal with the alleged 1958 estimate.

According to a census taken in 1960, the numbers of the various sections of the population referred to by Applicants, were as follows:

Natives	428,575
Whites	73,464
Coloureds	23,963
Asiatics	2
Total	526,004

A division into the main population groups of the Territory, gives the following result [1]:

Groups	*Total*	*Approximate % of population*
1. Bushmen	11,762	2.24
2. Dama	44,353	8.43
3. Nama	34,806	6.62
4. Herero	44,588	8.48
5. Ovambo	239,363	45.50
6. Okavango	27,871	5.30
7. Caprivi	15,804	3.01
8. Rehoboth Basters	11,257	2.14
9. Other Coloureds	12,708	2.42
10. White or European Group (Afrikaans, German and English speaking)	73,464	13.97
11. Tswana	2,632	0.50
11. Xhosa	601	0.11
11. Other (not classified)	6,759	1.28
Total	526,004	100

[1] Departmental information (South African Bureau of Census and Statistics). The total Nama-speaking group has been divided into the Dama and Nama groups by the South West African Administration on the basis of reports and information obtained from officials.

6. *Paragraph 7.*

The figures quoted are correct, save that the population of the Police Zone was 206,169, not 203,169, and that it included three Asiatics. According to the census taken in 1960 the populations of the Police Zone and of the area outside the Police Zone were as follows:

	Police Zone	*Outside the Police Zone*
Natives	170,720	257,855
Whites	73,106	358
Coloureds	23,954	9
Asiatics	2	—
Total . . .	267,782	258,222

The higher density of population in the area outside the Police Zone is to be ascribed to the more favourable conditions for agriculture in the sector [1] as well as to historical circumstances [2].

7. *Paragraph 8.*

The statement that the vast majority of the population outside the Police Zone live in the Ovamboland Native Reserve is correct. Respondent is not called upon to comment on the alleged 1956 estimate.

According to the census taken in 1960, the Native population of Ovamboland numbered 203,666, White persons 195, and Coloureds 1.

The figures for the other areas outside the Police Zone were, according to the same census, as follows:

	Kaokoveld	*Okavango*	*Eastern Caprivi*
Natives	10,099	28,252	15,840
Whites	34	104	25
Coloureds	2	—	6

8. *Paragraph 9.*

This paragraph is admitted. The significance of the classification of an area as "urban" is that urban local government as known to Europeans, is in force in the area. Beyond the Police Zone, there are no towns or villages of the European type, the Native mode of living being different.

Furthermore, such limited local concentrations of people as may be found there, fall under the authority of traditional Native institutions, and not under the type of municipal institutions in force in the European towns of the Police Zone.

[1] *Vide* para. 2 *(d)*, *supra.*

[2] *Vide* Book V, Sec. B, Chap. IV, para. 1, of this Counter-Memorial.

9. *Paragraph 10.*

The 1951 census showed the home languages of the White population to be as follows:

English and Afrikaans	273
English	4,158
Afrikaans	33,091
German	11,931
Other	477
	49,930

In 1960, according to the census held in that year, the position regarding home language was as follows:

English and Afrikaans	397
Afrikaans	49,422
English	6,280
German	16,533
Other	832
	73,464

The nationalities at the time of the 1951 census were as follows:

South Africa	41,048	45,439
South Africa naturalized	4,391	
British Commonwealth	237	
Germany	3,493	
Other countries	761	
	49,930	

The reference to "mid-1958" in paragraph 10 is not understood. The figures quoted refer to the 1951 census, as will be seen from the above.

In regard to nationalities, the figures of the 1960 census are not yet available, but Respondent agrees that by far the greater part of the White population consists of South African citizens.

CHAPTER IV

RESPONDENT'S POLICIES: THE SITUATION IN 1920

A. Introductory

1. The policies applied by Respondent in its administration of South West Africa were from the outset shaped largely by circumstances prevailing in the Territory. In this regard, the basic situation as Respondent found it at the inception of the Mandate has been sketched above [1]. As has been shown [2], the natural environment of South West Africa is to a large extent unfavourable for man's purposes and displays great diversity, resulting in special problems of administration and development. The adverse physical environment places a premium on the role of man in realizing the limited and diverse natural potential of the Territory [2].

On the assumption of the Mandate, Respondent was faced with the task of achieving the ideals of the Mandate, paying due regard to economic potentialities and human material within the Territory. Both these elements had been affected by events prior to the grant of the Mandate. In the following survey, Respondent will give a brief account of the facts and circumstances which determined, and in many cases dictated, the policies applied.

B. The Economy of the Territory

2. One of the basic determinants of Respondent's policies was the nature and extent of the actual and potential economic activity in the Territory as at the stage when the Mandate was assumed. In this regard there was a sharp distinction between conditions in the Police Zone and those in the areas outside the Police Zone. The economic life of the latter areas had hardly been affected by the German regime, except in so far as some migrant Ovambo labourers were employed in the mines at Tsumeb and Luderitzbucht. The tribes in those areas were therefore still engaged in their traditional economic life. All production was purely for subsistence, and the economic system was severely limited and static.

3. The position in the Police Zone was entirely different. The whole German colonial effort had been concentrated on this area, and the foundations of a modern exchange economy had in part been laid. For a proper appreciation of the possibilities and problems inherent in the economic situation in the Police Zone, it will be necessary to give a brief résumé of economic conditions prior to Respondent's assumption of the Mandate.

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[1] *Vide* Book III, Chaps. I, II and III, of this Counter-Memorial.
[2] *Vide* Book III, Chap. I, of this Counter-Memorial.

EXPORT TRADE

4. In pre-colonial times and during the German regime, South West Africa produced very few items for export. Thus during the first half of the nineteenth century, economic activity for purposes of export was virtually limited to the exploitation of the coastal assets in the form of whaling, sealing and guano by English, French, Dutch and American interests [1].

Trade with the interior also assumed some importance towards the latter half of the nineteenth century, the principal export products being ivory and wild ostrich feathers, both products of the hunt which were high in value and low in bulk or weight [1]. Under the German administration the picture remained much the same until 1907. Coastal products continued to be the most important export items, while ivory, ostrich feathers and skins accounted for the main exports coming from the interior. In 1897, for example, guano exports amounted to £55,000 out of total exports to the value of £62,000 [2].

5. This situation was drastically changed by two occurrences. With the completion of the narrow-gauge railway between the coast and the north-eastern part of the Territory after 1907, copper mining could be undertaken on a considerable scale. The export value of copper ore from the interior averaged nearly £300,000 per annum in the years between 1909 and 1913 [3].

A second, and even more important event affecting the Territory's export trade, was the discovery of diamonds along its southern coastal area in 1908. The value of diamond exports increased from £2,600 in 1908 to £771,800 in 1909; £1,343,500 in 1910; £1,151,700 in 1911; £1,520,700 in 1912 and £2,945,500 in 1913 [4].

In the five years ending 1913 mineral exports (including diamonds) accounted in value for no less than 95 per cent. and diamond exports alone for more than 75 per cent., of the total exports. In 1913 diamonds represented over 80 per cent. of the total exports [5].

6. For almost the whole period of the German regime, imports into the Territory exceeded exports. Between the years 1897 to 1907 the most favourable ratio of exports to imports was in 1903, when the value of exports amounted to 43 per cent. of the value of imports (£172,000 as against £397,000). The least favourable ratio during this period was in 1906, when exports amounted to only 6 per cent. of imports (£81,000 as against £1,620,000) [6]. The value of imports continued to exceed that of exports until 1911. In 1912 and 1913 the position was reversed for the first time. Exports in 1912 amounted to £1,952,000 and imports to £1,625,000. The position improved still further in 1913, when the corresponding figures were £3,515,000 and £2,171,000 [7]. As was indicated above,

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[1] Vedder, H., *South West Africa in Early Times* (1938), pp. 16-17.

[2] *Trade and Shipping in Africa*, C. 9223, p. 33.

[3] Schnee, H., *Deutsches Kolonial Lexikon* (1920), Vol. I, p. 436, *Memorandum on the country known as German West Africa* (1915), p. 58.

[4] Schnee, *op. cit.*, p. 451.

[5] *Ibid.*, p. 436.

[6] Schnee, *op. cit.*, Vol. II, p. 34.

[7] *Ibid.*, Vol. I, p. 436.

the favourable export position was entirely dependent on the production of minerals, and, in particular, diamonds.

Revenue

7. The administration of South West Africa proved to be expensive for Germany. Up to 1906 the Imperial Government subsidized the Territory in more than one way to an amount of £4.7 million, in addition to internal war expenditure amounting to about £16 million, giving a total of about £21 million for the first 22 years of German occupation [1]. Only a small part of this total amount was invested in lasting economic benefits, such as public buildings and railway and harbour facilities, the bulk being connected with military operations which were of a destructive nature from an over-all long term point of view of economic development [2].

After the wars which ended in 1907, and particularly after the discovery of diamonds, the position improved considerably. Nevertheless, an ordinary subsidy was paid to the Territory until 1911, and a military subsidy amounting to about £700,000 per annum was still paid during the last three years of the German regime [1]. In addition, considerable government loans were advanced for the financing of development projects [2].

It is apparent therefore that at no stage during the German regime was South West Africa self-supporting.

8. The progress made in the direction of fiscal self-sufficiency during the last years of the German period was dependent largely on diamond revenue, which in the years 1910 to 1913 annually constituted between 47 per cent. and 65 per cent. of the total ordinary revenue of the Territory, and amounted to about a third of the total value of diamond exports [3].

Agriculture

9. During the last years of the German regime, great emphasis was placed on the development of the Territory's agricultural potentialities, and public funds derived from the high diamond taxation were to a large extent diverted towards this end. Progress was, however, slow and costly, due mainly to adverse geographical features, especially the necessity for securing water facilities, and to inaccessibility of markets. In 1913 immigrants were officially advised that capital to an amount of at least £2,000 to £2,500 was required to develop a farm under normal conditions in the Territory.

10. Although the number of farmers did not increase greatly during this period, the growth in livestock numbers was more impressive. Thus the number of cattle increased from 96,140 in 1909 to 205,646 in 1913, and sheep from 280,644 to 554,641 in the same period [4]. With the exception of wool and skins, practically the whole agricultural production was disposed of in the local market. The growing livestock production was however on the verge of exceeding local demand at the outbreak of

[1] Schnee, *op. cit.*, Vol. I, p. 622.
[2] *Ibid.*, Vol. III, p. 315.
[3] *Ibid.*, Vol. I, p. 621.
[4] *U.G.* 16—1935, para. 30, p. 5.

the First World War, and there is evidence that the question of finding external markets was being seriously investigated [1].

Railways and Harbours

11. Reference has been made to the construction of railways in the Territory during the German period [2].

By 1915 the Government controlled and operated more than 1,310 miles of railways in the Territory, while private lines measured a distance of 152 miles [3]. During the period of military occupation, the South African authorities connected this system with the South African railways, while the railway to Swakopmund was extended to the Walvis Bay harbour [4]. This had the effect of placing markets in South Africa and overseas within easier reach of producers in South West Africa.

C. The Population

12. The population of the Territory reflected the same divergence between the Police Zone and the areas beyond it as was referred to above with reference to its economy. The areas beyond the Police Zone, consisting as it did of the territories of the Kaokoveld, Ovamboland, the Okavango and the Caprivi Zipfel, resembled at least four independent countries. These areas were all largely unaffected by contact with Europeans, as well as with one another and with the inhabitants of the Police Zone, but wide differences in language and custom existed between their inhabitants [5]. The Eastern Caprivi Zipfel was the only one of these four areas to be actively administered by the German authorities, and even there the control was of an indirect nature, being exercised through the traditional tribal authorities [6].

13. In the Police Zone, on the other hand, Respondent found various Native groups which had been in contact with one another for at least a century. This contact had not led to the creation of a common society —on the contrary, tribal and racial differences, and conflicting claims to land, had led to continual bloodshed, resulting in the subjugation or even extermination of the weaker by the stronger.

14. By 1920 the traditional tribal economies of most of the Native inhabitants of the Police Zone had been shattered by wars and by the measures taken by the German authorities to restrict or limit the holding of livestock by Natives [7]. According to German statistics for 1913, approximately 80 per cent. of the total non-White adult male population in the Police Zone including migrant labourers were employed as wage-earners by White households, farmers, mines and other business enterprises and the Government [8].

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[1] *U.G.* 16—1935, para. 30, p. 5.
[2] *Vide* Book III, Chap. III, paras. 74 and 82, of this Counter-Memorial.
[3] *U.G.* 16—1935, para. 25, p. 4.
[4] *Ibid.*, paras. 34-35, p. 6.
[5] *Vide* Book III, Chap. II, of this Counter-Memorial.
[6] *Ibid.*, para. 11, of this Counter-Memorial.
[7] *Ibid.*, Chap. III, paras. 84-85, of this Counter-Memorial.
[8] *Die deutschen Schutzgebiete in Afrika und der Südsee, 1912-1913*, Berichtsteil, p. 130.

15. The absorption of the non-White population in the money economy of the White group did not lead to the creation of an integrated society, even among the Native groups. Each group still regarded itself as different from the others.

To a certain extent different provision was made for the various groups by the German authorities. Thus the Bergdama were confirmed in the possession of their reserve at Okombahe, and the Basters enjoyed a certain measure of autonomy in their *Gebiet* at Rehoboth. Various Nama tribes were permitted to graze their stock on specified pieces of land, while the Herero, on the other hand, had been denied possession of both cattle and land.

16. The most significant difference amongst the population groups in the Police Zone existed between the White group, on the one hand, and the various non-White groups, on the other. The White group consisted of civil servants, soldiers, traders, bankers, farmers, etc., and was in control of the economic activity and administration of the Territory. Many members of this group were Germans, but even before the First World War a number of farmers were South Africans, and the war witnessed further immigration of South Africans, particularly civil servants.

The various non-White groups, however, possessed neither the experience nor the training to play any significant role in the administration of the Territory, or as entrepreneurs in its economic life. They were for the most part illiterate, and their contact with modern skills and in particular with the money economy, had been of short duration and limited extent.

17. A further factor relating to the population of the Territory which was to affect future policy, was that, as a result of the wars preceding the assumption of the Mandate, the Natives in the Police Zone had become dispersed over the Territory, and in many cases separated from their tribes, clans or families, and unable to exercise their traditional economic pursuits. In consequence the Native population was to a large extent unsettled and disaffected. In addition a substantial proportion of the population had in former years made a living out of brigandage, and, as has been shown, cattle raiding had previously played a large part in the lives of many of the inhabitants of the area. Habits and attitudes which had arisen in this period, still persisted when Respondent assumed the Mandate, thus presenting a serious problem in securing elementary safety for the persons and property of the people of the Territory.

18. A further result of the wars in the southern part of the Territory in pre-mandate times, is evident from a comparison of relevant population statistics. Thus Palgrave had estimated the total non-White population of the area later known as the Police Zone as 137,850 in 1876 [1], and the German governor Leutwein as between 118,000 and 144,000 in 1892 [2]. According to German statistics, the non-White population of the Police Zone (excluding migrant labourers) numbered 75,185 in 1913 [3]. On analysis, Respondent's report to the League of Nations for 1921 [4] gives an

[1] *Palgrave's Report*, pp. 83 and 94, i.e., of Damaraland and Namaland.

[2] Leutwein, T., *Elf Jahre Gouverneur in Deutsch-Südwestafrika* (1908), p. 11.

[3] *Die deutschen Schutzgebiete in Afrika und der Südsee, 1912-1913*, Berichtsteil, p. 130.

[4] *U.G.* 32—1922, p. 12.

estimate of under 84,000. Although the reliability of these figures may be questioned, they nevertheless point to the fact that the Police Zone had in pre-Mandate days carried a much larger population than that found in the Territory by Respondent.

D. Summary of the Situation in 1920

19. To sum up, the situation as found by Respondent in 1920 revealed a wide divergence between conditions outside the Police Zone, and those inside.

20. Outside the Police Zone, the social, political and economic lives of the inhabitants were virtually untouched by contact with the White man.

21. Inside the Police Zone, the salient features were as follows:

(a) A modern economy had been developed by the White population, the major export products of which were minerals, and, in particular, diamonds.

(b) The revenue of the Territory was also largely dependent on the production of diamonds, and had never been sufficient to cover the costs of administering the Territory.

(c) The only other possible source of revenue which was apparent at that stage, was livestock farming. Progress had been made in this field, but it had been limited and retarded by the high capital expenditure required, and the inaccessibility of markets.

(d) The Territory was served by an extensive railway system, which had been joined to that of South Africa during the war.

(e) The traditional tribal economies of the Native tribes had been shattered, but wide differences between the various groups were still found, and each group retained its own identity.

(f) The Native inhabitants did not possess the skills required for modern economic or administrative activities.

(g) The Police Zone was considerably underpopulated.

E. The Implications Arising from the Situation in 1920

1. The Necessity for Differentiation

22. The wide differences between the population groups found by Respondent in South West Africa necessitated policies involving differentiation between the various groups. No over-all policy of administration and development would have been suitable both for the Police Zone and for the northern areas. And within the Police Zone itself, the different levels of development between the groups called for differential treatment. This was so not only as between the Europeans and the indigenous peoples generally, but also as between the indigenous groups *inter se*. For example, a particular policy, which might have been beneficial for the Herero, could have had disastrous effects if applied to the Bushmen. Furthermore, the desire of the various groups to retain their separate identities, which desire was in many cases rooted in traditional enmities or prejudices, was a factor which no government could afford to ignore.

II. The Role to Be Played by the European Population

23. By reason of the stage of development of the non-White population, and the nature of the Territory, administration and development in the whole of South West Africa required White leadership and initiative. Indeed, the realization of this basic fact by the authors of the mandate system was implicit in the grant of the Mandate to Respondent.

24. The extent to which White involvement was necessary, varied as between the different sections of the Territory. In the areas outside the Police Zone there existed functioning political, economic and social organizations. The need for White leadership and guidance in those areas related primarily to the preservation of peace and the promotion of the general advancement and development of the inhabitants.

25. Inside the Police Zone the situation was entirely different. The traditional social, political and economic organizations of the Native groups had ceased to function. The primary needs of the inhabitants related, therefore, to basic aspects of life. Amongst these were the necessity of an organized administration which could provide certain elementary protections, including those envisaged in the provisions of the Mandate relating to abuses such as forced labour, traffic in arms and ammunition, and the supply of liquor. Law and order had to be preserved, and peace secured, among peoples with a long history of violence and bloodshed. Opportunities to earn a living had to be maintained and created, and provision made for housing, medical services, etc.

26. It is apparent that the Native inhabitants were not in a position in 1920 to provide even the elementary requirements set out in the previous paragraph. They were incapable of managing or administering the mines, railways, harbours, hospitals and civil service (including police) which had, in the circumstances of 1920, come to play an indispensable role in the Police Zone. Consequently, merely to maintain the primary elements of the *status quo* required the presence of a number of Europeans in the area.

27. However, as has been pointed out, the German authorities never managed to raise sufficient revenue to cover their costs of administration, and they were in later years largely dependent on mineral, and, in particular, diamond, taxation. Apart from the fact that these products constituted wasting assets, their prices fluctuated considerably, as was to be dramatically demonstrated in later years. In the general atmosphere prevailing in 1920, the concept of financial aid by international agencies or others to underdeveloped or non-viable States was an unknown one. It was consequently implicit in the situation in South West Africa as Respondent found it, that additional sources of income and revenue had to be created, if only for the purpose of balancing the budget and making provision for possible unfavourable conditions in later years. The creation of such additional sources was even more essential if any attempt were to be made to raise the standard of living and promote the progress of the inhabitants of the Territory. In this regard, Respondent was required under the Mandate to extend its responsibilities also to the areas beyond the Police Zone, which would involve expenditure from which the German authorities had been exempt.

28. It would have been idle to expect the Native inhabitants of the Police Zone to provide the capital, initiative and entrepreneurial skill

required for exploitation of the resources of the Police Zone for the purposes set out above. Their general level of development was far too low to enable them to play the dynamic role in mining, agriculture, commerce and industry which was necessary to broaden the economy, as well as to stimulate exports, increase revenue and create sources of employment. The main emphasis in developing the country consequently had to fall on European skill and initiative.

29. In relation specifically to agriculture, the stimulation of White initiative was the more necessary since the indigenous tribes were unacquainted with the concept of producing stock for the market, and were generally averse to parting with their cattle, the possession of which was important to them from the point of view of status and/or religion, with a resultant emphasis on numbers rather than quality. Any attempt to exploit the markets of South Africa (which was the only market available, since it had been rendered accessible by rail) [1] required a standard of product which could overcome the disadvantages inherent in the long distances involved, and could compete successfully with animals raised in better situated areas. Farming of this type required capital, skill and attitudes entirely foreign to the Natives of the Territory. And no shortage of land existed to prevent the immigration of progressive farmers—indeed, as has been shown, the Police Zone had previously carried a much larger population than that found by Respondent, and could by the adoption of better methods of exploitation and preservation of water supplies, provide a livelihood for a still greater population.

III. The Role of the Native Population

30. The same factors which dictated the development of the Police Zone by means of White capital and initiative, led inevitably to the result that the only role which the Native population could initially play in the money economy was by providing labour, which, in the first instance, was entirely unskilled. The unfamiliarity, or very brief acquaintance, of the unskilled and for the most part illiterate Native workers with the aims, requirements and demands of modern economic life, in turn called for the adoption of measures to guide and assist them in the difficult transition upon which they were engaged from their earlier means of subsistence to the exigencies of paid employment; this factor also called for measures to regulate the supply of labour so as to obviate the existence of unemployment in some areas while there was an unsatisfied demand for labour in others.

31. Although the provision of the basic essentials of life, such as opportunities for employment, housing, medical services, protection of life and property, etc., for the Native population was the first task with which Respondent was faced on assumption of the Mandate, this did not constitute the sum total of Respondent's obligations. In addition Respondent was required to promote the development of the peoples of the Territory. However, the very circumstances which in the first instance determined the position of the Native population in the White economy as that of unskilled labourers, rendered it inevitable that their development, both in the Police Zone and in the northern areas, would be a slow process. The complexity of the factors involved

[1] *Vide* para. 11, *supra*.

in a transition from a traditional economic and social system to a modern one, and the resultant undesirability and even impossibility of forcing the pace in this respect, have been frequently emphasized.

32. The main problem which, according to experts, is inherent in such a transition, is that of an unavoidable clash between the two objectives of social security and well-being, on the one hand; and economic progress in the modern sense, on the other. Professor Frankel, a well-known economist, says in regard to this dilemma:

> ". . . in all African territories the development of modern methods of economic organization is in greater or lesser degree accompanied by increasingly rapid disintegration of the indigenous economic and social structure. However primitive those indigenous institutions may now appear to Western eyes, they did in fact provide the individuals composing the indigenous society with that sense of psychological and economic security without which life loses its meaning [1]."

And other authorities on the subject of socio-economic development in underdeveloped countries have expressed the view that: "Generally a slow but steady development is likely to create fewer political, social and economic tensions [2]." In a recent United Nations report it is stated that:

> "the problem of how to enable the indigenous populations to raise their own standards of life without exposing them to the harmful effects of disintegration which accompanies the break-up of the tribal order and security, is one of the major problems of social and economic policy in many dependent Territories [3]".

The complexity of changing the ways of life of a society is also referred to by B. F. Hoselitz. He writes that—

> "to adapt another society to new ways of living involves the formidable process of reshaping basic habits that are manifest both in belief and in behaviors. It calls for an induced shift in pre-established ends and a directed re-orientation of value systems [4]."

Disintegration of the traditional systems of control can give rise to destructive emotional patterns. In this regard, Hoselitz refers to China as well as Africa. He says that cultures in these two countries are deeply rooted in traditions of the continuity of ancestral generations. In such circumstances: "it is not difficult to see how the derogation of established ways, even by implication, can arouse both latent and manifest hostilities" [5].

N. S. C. Jones is more explicit on the effects of attempts at rapid change. He says that, in the process of adaptation, a social "gap" occurs when the old ways have become obsolete and the new ways have not matured. The gap tends to be filled by revolutionary politics:

> "The social strivings of the individual find no outlet and their place is taken by emotional yearnings of any kind which, in the

[1] Frankel, S. H., *The Economic Impact on Under-developed Societies* (1953), p. 134.
[2] Bauer, P. T. and Yamey, B. S., *The Economics of Under-developed Countries* (1957), p. 71.
[3] *U.N. Doc.* ST/TRI/SER. A/13, p. 131.
[4] Hoselitz, B. F., *The Progress of Under-developed Areas*, p. 90.
[5] *Ibid.*, p. 111.

hands of a few forceful 'leaders', take the common forms of class and race and colour hatred [1]."

33. It has also been remarked that the stage to modern economic growth which follows the timeless state of traditional socio-economic organization extends over "a long period (up to a century or, conceivably, more)" [2].

Whilst it is, of course, impossible to state in general terms how much time is likely to be required to achieve this transition in a particular situation, experts on the subject are agreed that the process is a long one, particularly because it also involves the change of a number of socio-cultural and other non-economic factors. It has been said that:

> "Investment in human resources is usually a lengthy process; and to be economically effective it may require far-reaching social changes which are also likely to take much time [3]."

and that:

> "... capital formation in the ordinary sense of the term cannot shorten this time appreciably: in at least one important sense capital cannot buy time ... [4]"

In regard to changes in the agriculture of traditional societies, it has been said that "the organizational changes required for agricultural innovations affect some of the most deeply rooted features of traditional society" [5], and with reference to the conservatism of traditional pastoralists, like the Herero, a well-known authority has stated:

> "Conservatism and adaptation are, of course, cultural reactions which cannot, or only to a limited extent, be prevented or brought about by outside pressure. Where for instance, a political, social and economic system is smashed by force as was that of the Herero, this does not necessarily prevent a conservative cultural attitude from maintaining itself over a long period of time, even in the face of adverse outward conditions. Similarly, adaptation must come from within; it is a response which a culture must achieve by itself. It can never be effected from outside though conditions favourable to its achievement may be created [6]."

34. Prof. Frankel has pointed out that it took Europe several centuries to envolve the enterprising and dynamic human qualities which make for modern development and "capital accumulation". He writes:

> "To repair and maintain; to think of to-morrow not only of to-day; to educate and train one's children; to prepare oneself for new activities; to acquire new skills; to search out new contacts; to widen the horizon of individual experience; to invent, to improve, to question the 'dead hand of custom', and the heritage

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[1] Jones, N. S. C., *The Pattern of a Dependent Economy* (1953), p. 121.

[2] Rostow, W. W., "The Take-Off into Self-Sustained Growth", in *The Economic Journal* (1956), p. 27.

[3] Bauer and Yamey, *op. cit.*, p. 129.

[4] *Ibid.*, p. 130.

[5] Millikan, M. F. and Blackmer, D. L. M. (eds.), *The Emerging Nations*, their growth and United States Policy (1961), p. 52.

[6] Wagner, G., "Some Economic Aspects of Herero Life", in *African Studies*, Vol. 13, No. 3-4 (1954), p. 119.

> of the past—in all these, and not in mechanical calculations, or mechanical regimentation, lay the causes of capital accumulation [1]."

He also says that development does not depend on the formulation of abstract goals or the enforcing of decisions, but on the piecemeal adaptation of individuals to objectives—

> "which emerge but slowly and become clearer only as those individuals work with the means at their disposal; and as they themselves become aware, in the process of doing, of what can and ought to be done next [2]".

Discussing the same aspect, a United Nations document declares that, if it is to be a smooth and not unduly painful process, the transition from rural peasant to urban industrial worker is not one that can be greatly accelerated. It requires, at the point of departure, emancipation from the dictates of custom and tradition; and, at the places of employment, adjustment to an unfamiliar kind of work and labour discipline and to a new type of social environment [3].

35. For the reasons aforestated, it was inherent in the situation in South West Africa at the time the Mandate was assumed that for a long time in the future any system of administration and development would have to be based on White leadership and initiative, and that the development of the indigenous races would perforce have to be a slow process. This in turn emphasized the need for differentiating between groups according to their various levels of development.

F. A Policy of Differentiation Was in Keeping with the Conceptions of the Times

36. As has been stressed in the aforegoing, the circumstances inherent in the situation in South West Africa itself at the time when the Mandate was granted, were the basic motivating factors as far as policies were concerned, and rendered inevitable differential treatment as between various population groups. However, with a view to a proper evaluation of Respondent's policies and practices, as set out below, it is relevant also to note that at the inception of the Mandate, and for years thereafter, it was generally accepted as sound policy that provision should be made for differential treatment of population groups which had different backgrounds and were at different stages of development. In 1917 General Smuts said, referring to political rights of the various groups in South Africa:

> ". . . although in this regard nothing can be taken as axiomatic we have gained a great deal of experience in our history, and there is now shaping in South Africa a policy which is becoming expressed in our institutions which may have very far-reaching effects in the future civilization of the African continent . . . a practice has grown up . . . of creating parallel institutions—giving the natives their own separate institutions on parallel lines with institutions for

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[1] Frankel, S. H., *op. cit.*, pp. 69-70.
[2] *Ibid.*, p. 95.
[3] *U.N. Doc.* ST/ECA/29, p. 21.

whites. It may be that on those parallel lines we may yet be able to solve a problem which may otherwise be insoluble [1]."

The experiment, General Smuts pointed out, was not a new one: "It has now been in progress for some two hundred and fifty years as you know, and perhaps the way we have set about it may be the right way [2]." He explained what that "way" was in the following terms:

> "Instead of mixing up black and white in the old haphazard way, which instead of lifting up the black degraded the white, we are now trying to lay down a policy of keeping them apart as much as possible in our institutions. In land ownership, settlement and forms of government we are trying to keep them apart, and in that way laying down in outline a general policy which it may take a hundred years to work out, but which in the end may be the solution of our Native problem [3]."

The result would be, General Smuts said:

> "... you will have in the long run large areas cultivated by blacks and governed by blacks, where they will look after themselves in all their forms of living and development, while in the rest of the country you will have your white communities, which will govern themselves separately according to the accepted European principles. The natives will, of course, be free to go and to work in the white areas, but as far as possible the administration of white and black areas will be separated, and such that each will be satisfied and developed according to its own proper lines [4]."

And, addressing the Paris Peace Conference in 1919 with reference to South West Africa, he stated:

> "A white community in South Africa had been established there for two or three centuries. It had done its best to give a form of self-government to three million natives, and its policy had been tested and found good. It was suited as much to the whites as to the natives, and this policy should be applied to the natives in South-West Africa ... The community to which he belonged had been in South Africa since 1650. They had established a white civilization in a savage continent and had become a great cultural agency all over South Africa. Their wish was that one of the effects of the great settlement now to be made should be to strengthen their position and to consolidate the union of the white races in South Africa. The Boer pastoralists were always looking for uninhabited country in which to settle. He was quite sure that if German South-West Africa were given by the Conference to the Union its work in this respect would be good [5]."

37. The States represented at the said Conference could hardly have been unaware of Respondent's policy of differentiation. In this regard General Smuts said in 1947:

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[1] Smuts, J. C., *Toward a Better World* (1944), p. 11.
[2] *Ibid.*, p. 8.
[3] *Ibid.*, p. 12.
[4] *Ibid.*, p. 13.
[5] *For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, p. 723.

"The Great Powers which at the Paris Peace Conference had entrusted the Mandate to the Union, had been well acquainted with the Union's native policy. Nothing in that policy had deterred them from entrusting the Mandate to the Union [1]."

The same view had been expressed in 1927 by M. Freire D'Andrade, a member of the Permanent Mandates Commission, when he stated that:

"[He] . . . agreed with the accredited representative that Article 22 of the Covenant did not stipulate that only the native should be looked after, but spoke of the inhabitants of the territory, which included, therefore, everyone: He had often emphasised this fact. The experience of the Union of South Africa in dealing with the problems in that continent was of the longest. If its system of laws and the general principles which it applied had been unsatisfactory, why had the mandate been assigned to it . . .? The fact that it had been so assigned would seem to show that the system, which was well known, had been approved. The Commission should never forget the very special conditions under which the mandate had been entrusted to the Government of South Africa. He would add from his own experience that, when travelling throughout South Africa, it was easy to understand why the system adopted was a good system. In some places in that territory, the natives were so advanced as to have the right to vote. Certainly no other colony that he had visited was in such a high state of civilization. He would therefore conclude that the system adopted by South Africa in regard to the natives was one upon which reliance could be placed [2]."

38. It is clear from reports of the Peace Conference that the desirability of applying Respondent's Native policy to the Territory was, in fact, one of the factors which influenced at least some of the delegates to form the opinion that South West Africa "can be best administered" under the laws of South Africa as an integral portion of its Territory [3]. Thus Dr. G. L. Beer, the alternate United States member of the Commission on Mandates [4] and at that time chief of the colonial division of the American delegation at the Conference, said with reference to South West Africa:

"The development of this territory would be gravely handicapped if it were administered entirely apart from the adjoining Union of South Africa, with distinct *native*, fiscal, and railroad *policies* and systems [5]." (Italics added.)

And it will be recalled that President Wilson himself said: "If South Africa managed South West Africa as well as she had managed her own country, then she would be married to South West Africa [6]."

39. Indeed, the necessity for differentiating between various groups was implicit in the whole mandate system. Thus Article 22 (3) of the

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[1] *G.A., O.R., First Sess., Second Part, Fourth Comm.*, Part I, 19th Meeting, 13 Nov. 1946, p. 101.

[2] *P.M.C., Min.*, XI, p. 101.

[3] Art. 22 (6) of the Covenant.

[4] *Vide* Book II, Chap. II, para. 11, of this Counter-Memorial.

[5] Beer, G. L., *African Questions at the Paris Peace Conference* (1923), pp. 443-444.

[6] *For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, p. 788.

Covenant provided that the character of the various mandates should differ, *inter alia*, "according to the stage of the development of the people". And the same principle emerges from the specific provisions of the various mandates. In the case of South West Africa, although it was Respondent's duty to promote the interests of the "inhabitants of the territory" [1] it was required to prohibit the supply of intoxicating liquor only in respect of "the Natives" [2], and to prevent military training of only "the natives" [3].

Similar provisions in protection of Natives appeared in the other "C" Mandates, and also in the "B" Mandates, which latter, in addition, contained safeguarding measures relating to "native land" [4].

40. In debates in the Permanent Mandates Commission, the necessity for differentiating between various groups was recognized. The minutes for 1937 record the following discussion:

> "The Chairman remarked that South West Africa differed from other parts of tropical Africa in the striking inequalities that existed between the physical and moral capacity and potentialities of the different races living there. The principal cause was no doubt to be found in the past history of the territory—that was to say, in the dispersals and wars of the past. That inequality called for great elasticity in the native administration and the adoption of different rules for the various tribes to which they were applied.
>
> Mr. Courtney Clarke said that this was indeed the case. One might almost say that there was as great a difference between a Herero and a Damara as between a Herero and a European; and the difference between a Damara and a Bushman was almost as great [5]."

Further examples may be multiplied. For the most part the necessity of differentiation was considered by the Commission with reference to specific aspects of administration, and the relevant discussions will be dealt with when replying to Applicants detailed allegations. Reference may however be made to the following random examples of statements or comments by the Permanent Mandates Commission or members thereof.

(a) In 1922 the Commission is recorded to have said:

> "The Commission expresses the hope that the primitive organisation in tribes may be maintained unaltered wherever it still exists [6]."

(b) In 1923 M. Yanaghita expressed the view—

> "that the mandatory Governments are to be commended on their adoption of the principle of maintaining the former organisation of the tribes, and of recognising the power of the chiefs up to a certain point [7]".

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[1] Art. 2 of the Mandate.
[2] *Ibid.*, Art. 3.
[3] *Ibid.*, Art. 4. The supply of liquor to Europeans was clearly permissible—*vide P.M.C., Min.*, X, pp. 86 and 176-177.
[4] *Vide* for example, Art. 5 of the British Mandate for the Cameroons.
[5] *P.M.C., Min.*, XXXI, p. 138.
[6] *Ibid.*, II, p. 49.
[7] *Ibid.*, III, Annex 6, p. 282.

(c) In 1924 the Commission was—

"of opinion that the soundness of the views which have prompted the Administration to adopt a system of segregation of natives in reserves will become increasingly apparent if there is no doubt that, in the future, the Administration will have at its disposal sufficient fertile land for the growing needs of the native population and that the reserves will be enlarged in proportion to the progressive increase in the population [1]".

(d) In 1937 Mlle Dannevig—

"agreed that great precaution should be exercised as regards interference with Native customs [2]".

41. It is therefore apparent that the necessity for differentiating between the different groups in South West Africa was not only inherent in the situation as Respondent found it, but was also recognized by the authors of the Mandate and by the Permanent Mandates Commission. In addition, an approach based on this principle was in accord with policies elsewhere in Africa, as will be demonstrated below [3].

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[1] *P.M.C., Min.*, IV, p. 154.
[2] *Ibid.*, XXXI, p. 129.
[3] *Vide* Chap. VI A, *infra*.

CHAPTER V

RESPONDENT'S POLICIES: INITIAL PHASES AND EARLY DEVELOPMENT

A. Introductory

1. The basic elements or considerations mentioned in Chapter IV manifest themselves in aspects of policy relative to political and economic development, and also in regard to certain other matters raised by Applicants in their Memorials, e.g., rights of residence, freedom of movement, and education [1]. Respondent deals with these specific matters in other parts of this Counter-Memorial. Here the intention is to draw attention only to certain basic aspects of policy, particularly in regard to the political and economic spheres. In these respects also the exposition is in broad outline only, more detailed treatment being contained in later parts of this Counter-Memorial dealing specifically with the topics concerned.

2. The situation as it existed in the Territory at the inception of the Mandate, gave rise to the application by Respondent of certain policies and practices which were natural, and almost inevitable, in the prevailing circumstances. It should, however, not be supposed that Respondent thought that such policies and practices would, or could, remain unaltered as circumstances changed. It would have been impossible to decide on any policy which could meet all future circumstances, and it would have been unreasonable to attempt the formulation of a policy which could meet all future developments and eventualities. Changed circumstances have, indeed, called for adaptations to existing policies, and will no doubt do so in future.

In the paragraphs below Respondent will deal briefly with certain facets of policy.

B. Importance of the European Population in Regard to the Economic Development of the Territory, and the Implications Thereof

3. In the circumstances described above, and for the reasons stated, it was obvious that the White group with its modern, albeit at that time limited, economy, would necessarily have to form the basis of development in the Territory, and that any development would require the expansion of that group. This was particularly the case as far as the farming industry was concerned. The Administration accordingly encouraged the settlement in the Police Zone of White immigrants, chiefly from South Africa, to assist in such development.

4. It was mainly under the Land Settlement Proclamations [2] which

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[1] I, pp. 146-161.

[2] *Proc.* No. 14 of 1920 (S.W.A.). in *Laws of South West Africa 1915-1922*, pp. 219-220, superseded by *Proc.* No. 310 (S.A.), in *Laws of South West Africa 1927*, pp. 22-82.

provided for the issue of leases to allottees, with the option to purchase, and for the advance of moneys to lessees for the purpose of acquiring stock, implements, etc., that settlers came to the Territory.

European land settlement was actively encouraged for the greater part of the 1920s, when more than 1,000 farmers settled permanently in the Territory; but, due to economic reasons, it came to a standstill in 1931. When it was resumed in 1935, the Administration no longer granted financial assistance to prospective settlers [1].

5. A Commission of Inquiry in 1936 [2] referred, *inter alia*, in the following terms to the importance of the European population for the development of the Territory:

> "Without the settlement of European farmers on the land within the police zone there would have been hardly any development in that portion of South West Africa. Both the nature of the country and of its non-European inhabitants are such that there can be no question of any real development in the Territory without the intervention of the White man . . . [3]"

Later the Commission mentioned as a possibility which "[might] be suggested" that Respondent could have "repatriated the Germans and administered the whole country, like Ovamboland, as a native reserve". The Commission proceeded:

> "Apart from humanitarian considerations however, we are convinced that such a course would not have been possible . . .
>
> In view of the present stage of development of the Native and the highly specialized nature of the only farming industries possible in the country, it is clear that any administration which is not merely negative in its effect, will, for a long time to come, have to be based on the European as a producer of revenue [4]."

The Commission indeed described the "demographic position" in the Territory as being that of a "White minority leavening the mass of the indigenous population" [5].

At a later stage Lord Hailey also had occasion to consider the European settlement scheme in the Territory, and in that regard said:

> "The economic policy of the Territory has, apart from other considerations, been determined by the financial position encountered by the Administration in 1920 and the years immediately following. It had been relieved of the cost of maintaining a military garrison (even after 1910 the Imperial German Exchequer had made an annual contribution of £700,000 on this account). The personnel of the civil administration was on a lower scale than that which had led German colonists themselves to complain of the excess of bureaucratic government. The cost of constructing new railways, or any loss on the working of existing lines, fell on the Union Government. But in the initial years of the Mandatory régime the public

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[1] *U.G.* 30—1940, para. 339, pp. 74-75.

[2] The Commission consisted of two judges of the Supreme Court of South Africa and a well-known economist, who later became Secretary for Finance in South Africa.

[3] *U.G.* 26—1936, para. 125, p. 30.

[4] *Ibid.*, paras. 380-381, p. 74.

[5] *Ibid.*, para. 248, p. 54.

revenues amounted only to an average of about £800,000, and roughly 50 per cent. of this sum was accounted for by receipts from the mining industries. (The instability of revenue derived from the diamond industry was seen when the production of the Luderitz field was reduced partly owing to the opening of the Lichtenburg alluvial diamond field and partly to the discovery of the Alexander Bay field in 1926.) Considerations relating to the political status of the territory appear to have prevented recourse to loan funds for capital expenditure on schemes of development, and the sums available from current revenue were small for this purpose. Everything pointed to the need for a policy which would develop as rapidly as possible the agricultural resources of the territory. This seemed the more obvious because the railway system, which in German times stopped short of Kalkfontein, had now been linked up with that of the Union, thus opening the South African market to the stock and dairy products of the colonist. In these circumstances, it is intelligible that policy should have been directed mainly to the encouragement of European farming enterprise [1]."

6. The presence in the Territory of a substantial European population naturally raised the question of their political rights, just as it raised specific questions in some other fields, e.g., the provision of social services for that group, and of education for their children.

The European population of the Territory was, from the inception of the Mandate, at a stage of development which justified the grant of a measure of self-government to them. The major issue was the extent of self-governing powers which could, or should, be granted, having regard, *inter alia*, to the fact that South West Africa was a mandated territory.

General Smuts dealt with this matter in a letter to the Chairman of the Permanent Mandates Commission, dated 16 May 1923. He wrote, *inter alia*:

> "The majority of the White population in S.W.A. are Union citizens accustomed to our free system of self-government. For them it would be impossible to apply any other form of government than the free democratic régime to which they had been accustomed in the Union of South Africa. But I feel that to extend our institutions to the Union population in the mandated territory to the exclusion of the comparatively large German minority would be in every way undesirable . . .[2]"

A form of government, similar in principle to the South African parliamentary system, was subsequently introduced for all Europeans in the Territory with the enactment of the South West Africa Constitution Act (Act No. 42 of 1925), which came into force in 1926 [3]. This Act made provision for the establishment of a Legislative Assembly, an Executive Committee, and an Advisory Council.

The composition and powers of these organs, and subsequent constitutional developments affecting them, are dealt with elsewhere in this Counter-Memorial [4]. For present purposes it is sufficient to note that powers of legislation relating to Native affairs have at all times been

[1] Lord Hailey, *A Survey of Native Affairs in South West Africa* (1946), pp. 53-54.
[2] *P.M.C., Min.*, III, p. 215.
[3] Act No. 42 of 1925, in *Statutes of the Union of South Africa 1925*, pp. 734-800.
[4] *Vide* Book V, sec. E, Chap. I, paras. 17-30, of this Counter-Memorial.

excluded from the competence of the South West African Legislative Assembly, such powers being retained by the South African Government.

Other constitutional developments, including the provision made by Act No. 23 of 1949 [1] for the representation of the European population of the Territory in the South African Parliament, are also dealt with elsewhere [2].

C. Considerations Affecting the Native Groups

7. In the case of the indigenous population groups considerations were totally different from those applicable to the European population. The question in the case of the Natives was primarily one of how they could best be governed, and to what extent and in which parts of the country use could be made of their traditional systems.

The vast differences between the White group and the indigenous groups—differences relating to civilization and culture, levels of development, standards of living and ways of life, social and political institutions and habits of thought—militated against any idea of an integrated society, socially or politically. Such integration was not desired by any of the groups concerned, and was in fact not a matter which called for, or was given, any active consideration.

The traditional systems of government of the indigenous peoples of the Territory are briefly described in Book III, Chapter II, above. Those systems not only differed *inter se*, but were all vastly different from that to which the European population was accustomed.

In regard to the administration of the affairs of the indigenous groups, it was decided from the outset to make use of indigenous institutions where such systems still existed, and to try, where such systems had disintegrated as a result of events of the past, to re-establish so much thereof as was practicable in the circumstances. Such an approach, Respondent believed, would serve the best interests of the Native groups: it involved the recognition of the separate identities of the groups, an opportunity for preserving and fostering their traditional community life, and the possibility of their progressive development on a foundation of their own cultures.

Final control over Native affairs was vested in the Governor-General of South Africa, who was empowered by law [3] to delegate his authority "to such officer in the said Territory as he may designate to act under his instructions". By his Proclamation No. 1 of 1921 the Governor-General delegated his powers under the said Act, including the power to legislate by proclamation, to the Administrator of the Territory, as the agent of the South African Government [4]. By Administrator's Proclamation No. 1 of 1921 a Council was appointed to advise the Administrator, *inter alia*, in regard to "matters of general policy in relation to the legislation of the Territory apart from routine matters of administration"; and one of the members of the Council was required to be a person specially qualified to advise on all matters concerning the Native races of the Territory [5]. When a new Advisory Council was established in

[1] *Statutes of the Union of South Africa 1949*, pp. 178-196.

[2] *Vide* Book V, sec. E, Chap. I, paras. 17-30, of this Counter-Memorial.

[3] Act No. 49 of 1919 in *The Laws of South West Africa 1915-1922*, pp. 10-12.

[4] *Proc.* No. 1 of 1921 (S.A.), *The Laws of South West Africa 1915-1922*, pp. 44-46.

[5] *Proc.* No. 1 of 1921 (S.W.A.), *The Laws of South West Africa 1915-1922*, pp. 493-495.

terms of Act No. 42 of 1925, referred to above, it was provided that one of the members of the Council was to be an official who was to be selected mainly for his knowledge of the reasonable wants and wishes of the Native population of the Territory [1].

Subsequent legislation, i.e., from 1949 onwards, the effect of which has been to establish more direct control by the South African Government over Native administration in the Territory, is dealt with elsewhere in this Counter-Memorial.

8. In the territories outside the Police Zone, where traditional institutions had remained intact and were in operation at the time when the Mandate came into being, a policy of employing such institutions for purposes of the government of the peoples concerned admitted of fairly easy application, and a system of so-called "indirect rule" could be established successfully.

In most cases the role of European officials, who acted as links between the Administration and the groups concerned, was largely confined to one of assistance and guidance. The policy was, as far as practicable, not to force upon any of the groups measures which they were not prepared to accept, but rather to make them appreciate the need to change such practices and customs as were in conflict with civilized notions or were no longer conducive to peaceful administration. This general approach was referred to in the following terms in Respondent's report to the Council of the League for 1924:

> "The policy since our establishment has been to allow the natives to rule themselves according to ordinary native law and no attempt has been made to change this or in any way to interfere with native custom, in accordance with which the whole population still live. Through the influence of Government officials, however, the different tribal heads have more or less come to look to the Native Affairs Staff for advice and guidance in determining their affairs, especially as far as the more complicated and inter-tribal or sectional questions are concerned [2]."

The following was stated in the same regard in Respondent's report for 1937:

> "The objective of the native affairs officers of the Administration in South West Africa has been as far as possible not to interfere with native organization or customs as far as they were not in conflict with good government and to allow the native peoples to develop gradually; adopting European customs and methods in place of such of their own customs and habits as they are brought to realise from time to time are unsuitable to the changed conditions of life [3]."

9. In the Police Zone conditions were vastly different from those obtaining in the northern territories as far as community life and tribal institutions were concerned. Such institutions had, to a large extent, been destroyed. Members of tribes were scattered all over the country, and the first and major task facing the Administration was, to quote Lord Hailey, "a problem of social reconstruction" [4].

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[1] Act. No. 42 of 1925, in *Statutes of The Union of South Africa, 1925*, pp. 734-800.
[2] *U.G.* 33—1925, para. 103, p. 28.
[3] *U.G.* 25—1938, para. 303, p. 50.
[4] *P.M.C., Min.*, XXXI, p. 135.

Part of the process of reconstruction was the establishment of reserves where the Native occupants would enjoy security of tenure, and where they would have an opportunity of re-establishing, as far as possible, their traditional social life and customs.

Respondent's annual report for 1925 stated the following in this regard:

> "The natives, however, will in future have centres where they can develop on their own lines, from which they can go freely in search of work in European centres, and to which they can return to their families. At the same time the foundation has been laid for the building of self-contained native communities developing on their own lines, under the supervision of selected Native Affair officials . . .[1]"

10. The absence of traditional leaders, and the fact that traditional systems of tribal government and all the normal restraints inherent therein had been destroyed, made it necessary to provide for a special form of control of the reserves.

After the establishment of the first reserves, regulations for their control were issued under Government Notice No. 68 of 1924 [2]. In terms of these regulations the general control of a reserve was vested in the Magistrate of the district concerned, whilst the duties of exercising actual day-to-day control and supervision were entrusted to a European Superintendent. Provision was made for Native headmen to assist the Superintendent in the exercise of his functions.

As a means of developing the reserves and of giving Native residents of such areas an opportunity of participating in the management of their own affairs, Reserve Boards of Native leaders, under the chairmanship of the Magistrate or Superintendent, were established [3]. These Boards are consulted in regard to the administration of tribal trust funds, the moneys of which are expended for the sole benefit of the Native community concerned, and also assist Superintendents in the general administration of the reserves [4].

D. Early Stages of Economic Advancement of the Natives

I. Labour in the European Economy

11. Wage-earning employment opportunities constituted an immediate benefit to the Native population of the Police Zone, considering the situation in which they found themselves at the time when the Mandate came into being. Save in a few cases they had, during the German regime, lost the lands formerly occupied by them, and their right of owning livestock had been severely restricted. The rate at which the Native reserves could be developed, ruled out the possibility of any significant full-time support from that sphere in the early stages—significant, that is, as compared with the much more attractive opportunities of regular wage-employment.

Apart from the benefit of wages, the absorption of the Natives in a modern economy as regular workers had the advantage that it would

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[1] *U.G.* 26—1926, pp. 109-110.
[2] *G.N.* No. 68 of 1924 (S.W.A.), *The Laws of South West Africa 1924*, pp. 57-63.
[3] *Proc.* No. 9 of 1924 (S.W.A.), *The Laws of South West Africa 1924*, pp. 40-42.
[4] *Vide* Book V, sec. E, Chap. I, paras. 91-93, of this Counter-Memorial.

gradually transform their traditional approach to work and inculcate in them new economic interests and attitudes.

Since Native labourers were largely illiterate and unaccustomed to regular wage employment, the Administration, in an effort to secure satisfactory labour relations, adopted what might be called a policy of "economic paternalism" in respect of their wages and conditions of employment. Respondent accordingly introduced certain regulatory measures, such as the Master and Servants Proclamation [1]. In the case of migrant labourers from beyond the Police Zone, who were employed largely by mining enterprises, standardized terms and conditions of employment were laid down.

II. Agriculture in the Native Reserves

12. The stage of development of the Native groups, their traditional subsistence type of farming and the fact that the commercialization of such farming requires large capital investment and involves a time-consuming process of change in production techniques, inevitably meant that development towards commercialized production in their case would be a slow process [2].

In the Police Zone circumstances were particularly difficult, and development could only be contemplated in stages. The Natives being largely landless at the inception of the Mandate, the first step was to settle them on land, to create conditions for settled farming, to open up supplies of water and to build up herds. Thereafter could follow a process of improving the quality of stock by selective breeding or the introduction of new strains, the improvement of farming methods generally, and, finally, production of animals and produce for marketing and sale on a competitive basis.

13. To finance development in the reserves, and to inculcate in the Native at the same time a spirit of self-reliance, trust funds were established for the various reserves. These funds derive their revenue directly from the inhabitants of reserves, largely by way of grazing fees and various minor taxes. All expenditure from such funds is for the direct benefit of the reserves concerned and their inhabitants.

The following official statement deals generally with the purposes for which trust funds were utilized in the early years:

> "These funds, built up as they are almost entirely from the fees Native residents of the reserves pay in respect of the grazing of their livestock upon the communal reserve lands have, in the case of most reserves, proved more than adequate during recent years to meet immediate requirements with regard to the conservation of water, the opening up of new supplies, the construction of fencing, the purchase of stud or high-grade bulls, the construction of dairies, the acquisition of cream-cans and, generally for all services necessary to enable the utmost use to be made of the available grazing and of the produce of the livestock depastured thereon . . . The time will no doubt arrive—sooner in the case of some reserves than with others—when, basic development having been completed, trust funds will

[1] *Proc.* No. 34 of 1920 (S.W.A.), *The Laws of South West Africa 1915-1922*, pp. 336-366.

[2] *Vide* Chap. IV, paras. 32-34, *supra*.

be used for other betterment services on behalf of the natives in reserves [1]."

Commercialized production in the Police Zone began in the latter half of the 1930s, largely in the form of production of dairy products for sale. Commercialization by way of livestock sales reached significant proportions only after the Second World War.

14. In the northern territories, where the various Native groups inhabited land which they had occupied for a long time, conditions were naturally more settled than in the Police Zone; but there, too, since all economic activity had always been merely for subsistence purposes, development could only come in stages as certain basic requirements could be met.

Water supplies had to be augmented, particularly in areas away from the rivers, so as to ensure, *inter alia*, a better distribution of population. Farming methods and the quality of livestock had to be improved, the latter largely by selective breeding. Commercialization by way of sale of livestock has at all times been hampered by animal diseases, the combating of which is a never-ending task.

In these territories, too, the system of tribal funds was introduced, for the same purposes as in the Police Zone.

E. Policy regarding Land and Rights of Residence

15. Reference has been made above to the policy of setting aside reserves for the sole use and occupation of Native groups [2]. For the protection of the groups concerned, the alienation of the land comprising such reserves was prohibited "save under the authority of Parliament" [3]. And no Europeans, except missionaries and government officials, were allowed entry into Native reserves, save on permission specially granted.

16. At the inception of the Mandate, some communities in the Police Zone occupied certain restricted areas as a result of treaties or agreements with the German Administration. Respondent recognized these areas as reserves for the communities concerned and proclaimed additional reserves for other communities and groups—mainly in pursuance of recommendations by Commissions of Enquiry [4]. In due course the northern areas which had not been under German control, i.e., the Kaokoveld, Ovamboland and the Okavango, as well as the Eastern Caprivi, were also proclaimed as reserves for the sole use and benefit of their traditional inhabitants.

17. Private ownership of land was a concept foreign to the indigenous groups of the Territory, and all land, whether considered the property of the Chief or of the tribe, was traditionally used on a communal basis. Some of these traditional systems recognized the right of persons to purchase, or to be allotted, the *use* of individual portions of land for agricultural purposes [5]; but individual *ownership* of such allotments was unknown, and rights of grazing were always held in common.

In the circumstances Respondent made the land in the reserves avail-

[1] *U.G.* 30—1940, para. 799, p. 138.
[2] *Vide* para. 9, *supra*.
[3] Act No. 49 of 1919 (S.A.), in *The Laws of South West Africa 1915-1922*, p. 12.
[4] *Vide* Book VI, Chap. III, paras. 55 to 62, *infra*.
[5] *Vide* Book III, Chap. II, paras. 19, 30 and 48.

able for the joint use of tribes or groups of people, leaving it to tribal leaders or, in certain cases, to Superintendents of reserves, to allot portions thereof to individuals.

18. As has been pointed out, residence in reserves was limited to Natives. Various practical considerations furthermore made it necessary to impose certain regulatory measures in regard to residence of Natives in such reserves. The need to maintain order and control, to protect the rights of those for whom a particular reserve had been set aside, to prevent overcrowding and to ensure the proper conservation of land and grazing, obviously required certain protective measures and restraints. An unfettered right on the part of individuals to reside in whatsoever reserve they pleased, or to move from one reserve to another as often as they wished, would not only have made efficient administration and control an impossible task, but would have been to the ultimate detriment of the people themselves.

19. It was believed that the reservation of land for the sole use and occupation of the Native groups had decided advantages for all concerned. It confirmed all the tribes in the northern territories in the possession of their traditional lands, and it provided a largely landless population in the Police Zone with opportunities for reconstructing their traditional social and economic life and leading a more settled existence than that to which they had been reduced before the inception of the Mandate.

The policy of creating separate areas for the Native people of the Territory was not only a necessary or, indeed, inevitable consequence of the factual situation as Respondent found it at the inception of the Mandate, but was also in accordance with Respondent's experience gained over many years in governing a heterogeneous society in South Africa, where Respondent was applying a policy which had as basis the belief that each of the population groups was, as far as was practicable, entitled to develop in its own sphere, where it could best advance on a foundation and within the framework of its own social and political institutions.

20. In urban areas in the Police Zone provision was made for the establishment of separate residential areas for Natives where they could acquire "the lease of sites for the erection of houses or huts for their own occupation" [1]; and local authorities were empowered to provide housing for individual Natives or Native families in such areas [2]. Persons other than Natives were prohibited from acquiring any rights to any site or premises in the areas concerned [3].

The provision of separate residential areas for Europeans and Natives was in accord with the existing pattern of social and residential separation between those population groups, and was part of the general policy of creating separate spheres of settlement and ownership of land between the European and Native groups.

The control of such Native residential areas, and the participation of Natives in the administration thereof, are dealt with elsewhere in this Counter-Memorial [4].

[1] *Proc.* No. 34 of 1924 (S.W.A.), in *The Laws of South West Africa 1924*, pp. 178-190.

[2] *Ibid.*, sec. 1 (1) *(b)* and *(c)*, p. 178.

[3] *Ibid.*, sec. 5, p. 180.

[4] *Vide* Book V, sec. E, Chap. III, of this Counter-Memorial.

F. Development in Early Years up to the Second World War

21. In the unsettled conditions which prevailed initially, it was essential first of all to establish certain elementary protections and to lay the foundations of social and economic development.

As has been shown, measures were taken at an early stage to provide the largely landless Native population of the Police Zone with homes in areas specially reserved for them, and to supply those who sought employment in urban areas with proper accommodation.

Various steps were taken to bring about more settled conditions of life for the Natives, to discourage their movement to areas where there was no work or accommodation for them and where overcrowding could only be to the detriment of health and morals, and to inculcate in them an appreciation of the need for, and value of, regular work, whilst endeavouring, at the same time, to ensure proper labour relations by protecting them against exploitation. It is against this background that the Territory's vagrancy laws, pass laws, influx control measures and master and servant laws, which are dealt with elsewhere in this Counter-Memorial, must be considered.

22. The field of Native education [1] affords a good example of how various circumstances contributed to retard development in the early stage (till the Second World War), but how steady progress was nevertheless made. All education was initially, as in many parts of Africa [2] in the hands of various mission societies. There were few Native teachers with any training and, at the beginning, no uniform courses of study. Efforts at persuading Native students to be trained as teachers gradually bore fruit, school enrolments gradually increased, and the standards of education were gradually raised.

23. Development in the Territory was necessarily dependent on the rate of its economic advancement, and on the availability of capital for expenditure. Initially, as during the German regime, mining constituted the major single source of public revenue, but, due largely to poor prices obtained for diamonds, this position changed in 1925-1926, when Customs and Excise became the largest source of such revenue. The latter increased its contribution from 8 per cent. in 1920-1921 to almost 40 per cent. in 1929-1930, due to increased imports of consumer, intermediary and capital goods to meet the needs of the growing European population.

24. The farming industry, developed largely as a result of the Administration's European settlement scheme, proved to be a considerable stabilizing force in the difficult circumstances which arose in the world-wide economic depression of the 1930s. Practically the whole mining industry then came to a standstill, and in 1934 and 1935 its contribution to the total income of the Territory was virtually nil. The farming industry also suffered severely as a result of drought conditions, which lasted till the end of 1933, an outbreak of foot-and-mouth disease, and poor prices on the South African livestock markets. Nevertheless, the level of income originating in farming recovered to its high level of R3,100,000 (£1,550,000) in 1929 by 1934-1935, whereas the high income contribution by mining in 1929, viz., R5,300,000 (£2,650,000) was never

[1] *Vide* Book VII, Chap. V, of this Counter-Memorial.
[2] *Ibid.*, para. 37.

equalled during the 1930s, the highest figure reached being R3,700,000 (£1,850,000) in 1938.

Steady advancement in agriculture was also made in Native reserves during the period up to the Second World War. Substantial increases in the number of livestock, and the improvement of their quality, were due largely to the application of Reserve Funds, to which reference was made above [1].

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[1] *Vide* para. 13, *supra*.

CHAPTER VI

RESPONDENT'S POLICIES: COMPARISON WITH OTHER AFRICAN TERRITORIES

A. Up to the Second World War

1. The practices and policies evolved by Respondent, and described in broad outline in Chapter V above, can in their application to the indigenous population groups of South West Africa be characterized as tutelage or guardianship appropriate to relatively early stages of the development of the wards.

The European or White population group occupied an intermediate position in the above respect. In part this group was one of the wards, the Mandate having committed "the inhabitants of the territory", without exception, to Respondent's charge [1]. In part, however, due to a greater ability "to stand by themselves"[2], the members of this group could assist the Mandatory, subject to its control, in its guardianship and civilizing mission in respect of the indigenous peoples.

In keeping with the basic situation, the White population group could be allowed a measure of self-government and of participation in processes of central government—subject, however, to arrangements which left the effective administration and control of Native affairs and interests with Respondent. Central government in this latter respect was essentially the Mandatory's task, as in the case of all B and C Mandates [3]. Indeed, the inability of the peoples concerned to perform this function themselves was the reason for their coming under B and C Mandates—in contrast with A Mandates, which limited the Mandatories' functions to "administrative advice and assistance" [4]. Through processes of indirect rule, where appropriate and practicable, indigenous groups were allowed a considerable measure of self-government of a traditional and localized nature: but their non-participation in the processes of central government was, *inter alia*, completely in keeping with the early stages of their development under tutelage.

2. In the respect above-stated, the practices and policies applied by Respondent in South West Africa were fundamentally—as distinct from their detailed aspects—in close accord with systems and tendencies operative throughout Africa south of the Sahara [5]. This remained the situation until about the time of the Second World War, and to some extent even for a number of years thereafter.

Quite apart from other cases of Mandate—viz., Tanganyika (British), Ruanda-Urundi (Belgian), the French Cameroons, the British Cameroons,

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[1] Art. 2 of the Mandate for South West Africa.

[2] Art. 22 (1) of the Covenant.

[3] Art. 22 (5) and (6) of the Covenant.

[4] Art. 22 (4) of the Covenant.

[5] I.e., excluding from consideration, as was done in Lord Hailey's *An African Survey* (1938) and (1957), the northernmost territories, with which comparisons would be complicated by reason of Mediterranean littoral influences.

French Togoland and British Togoland—where the same basic situation in regard to guardianship applied by express provision, colonial powers regarded and described their functions *vis-à-vis* indigenous population groups as resting upon moral concepts of the same or a closely similar nature. Thus "trusteeship" was a term favoured in this regard in British colonial policy [1], and "paternalism" has been used to describe the general nature of relevant French policy [2] as well as the officially recognized principle on which Belgium's traditional policy was based [3]. Portuguese traditional methods have also been described as approximating to what Lord Lugard called "dual mandate" [4]. In the Union of South Africa and in Southern Rhodesia political leaders used the terms "guardianship" and "trusteeship", with or without the adjective "Christian", to describe the relationship between the White population and the Native groups [5].

3. In Annex A to this Book a brief, factual account is given of relevant constitutional and attendant arrangements in each of the African territories south of the Sahara (other than South West Africa and the Union of South Africa) up to the outbreak of the Second World War. From the facts therein set out certain significant features will be readily apparent, as dealt with in the next succeeding paragraphs.

4. As can largely be observed from Annex A itself, it was generally, almost universally, accepted as natural for the indigenous African peoples to have absolutely or virtually no participation or even representation in the legislative and executive processes of the central government of their respective territories—as distinct from traditional or tribal institutions of a localized nature. Leaving out of account the independent territories of Abyssinia and Liberia—where the systems of central government could perhaps best be described as an authoritarian monarchy and an oligarchy respectively [6]—the functions of central government were performed, in most cases exclusively and in the others almost exclusively, by representatives of European colonial or mandatory Powers and/or of European or White African populations in the respective territories.

In accordance with the concepts of tutelage, guardianship, paternalism and trusteeship mentioned above, there was frank acceptance of the proposition that "... *the White man must rule*", an expression used by Lord Milner in 1903, when he was High Commissioner for South Africa [7].

5. Franchise amongst African Native populations was highly exceptional.

(a) In the large majority of the Territories concerned such franchise

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[1] *Vide*, e.g., Hailey, *An African Survey* (1956), pp. 246 and 193.

[2] Meaning "in effect, a special regime for the mass of Africans who were subjects, not citizens". Hodgkin, T., *Nationalism in Colonial Africa* (1956), p. 35.

[3] *Ibid.*, pp. 51-52.

[4] Caetano, M., *Colonizing Traditions, Principles and Methods of the Portuguese* (1951), p. 43.

[5] As to the Union of South Africa, *vide*, e.g., Pirow, O., *James Barry Munnik Hertzog*, p. 198; Krüger, D. W., *South African Parties and Policies 1910-1960* (1960), p. 87 and Chap. VII, para. 13, *infra*; and as to Rhodesia, Walker, E., *A History of Southern Africa* (1957), p. 666.

[6] *Vide* Annex A, paras. 61 and 62, *infra*.

[7] Milner Papers, Vol. II, p. 467.

did not exist at all. In this category fell *all the Mandated Territories* [1] and also the following colonial territories:

British: Kenya [2], Uganda [3], Nyasaland [4], British Somaliland [5], Gambia [6], Swaziland [7], Basutoland [8] and Bechuanaland [9].
Italian: Eritrea and Somaliland [10].
Belgian: The Belgian Congo [11].
French: The provinces Niger and Mauritania of the Federation of French West Africa [12].
Spanish: Spanish Guinea [13].

(b) In the minority of cases in which there was provision at all for a franchise in respect of which Natives could qualify, the basis thereof was such that, for a variety of reasons, the potential influence of such Native franchise was extremely limited, and in some instances virtually nil. The following are the territories falling in this category:

British: The two Rhodesias and the three West African territories, Gold Coast, Nigeria and Sierra Leone.
French: The provinces Dahomey, Ivory Coast, French Sudan, French Guinea and Senegal of the West African Federation, French Equatorial Africa and Madagascar.
Portuguese: Portuguese Guinea, Angola and Mozambique.

The actual arrangements in these territories are set out in Annex A and need not be repeated here.

As will be noted, the reasons for limited or negligible political influence of the Native franchise included:

(i) qualifications which resulted in very few Natives in fact coming on to the voters' roll [14];
(ii) limitation to election of a relatively small minority of the members of the body concerned [15];
(iii) the body concerned having a consultative function only [16] or its powers being otherwise limited [17], or

[1] As to Tanganyika, *vide* Annex A, para. 22, *infra*; Ruanda-Urundi, para. 55; British Cameroons, para. 35; British Togoland, para. 36; French Cameroons, para. 47; French Togoland, para. 44.
[2] *Vide* Annex A, para. 16, *infra*.
[3] *Ibid.*, para. 19.
[4] *Ibid.*, para. 8.
[5] *Ibid.*, para. 25.
[6] *Ibid.*, para. 38.
[7] *Ibid.*, para. 10.
[8] *Ibid.*, para. 11.
[9] *Ibid.*, para. 14.
[10] *Ibid.*, para. 53.
[11] *Ibid.*, para. 54.
[12] *Ibid.*, para. 41.
[13] *Ibid.*, para. 60.
[14] *Vide*, e.g., Southern Rhodesia (Annex A, paras. 2 and 4); Northern Rhodesia (para. 6); French West Africa other than Senegal (para. 43); French Equatorial Africa (para. 45); Portuguese Territories (Annex A, paras. 57 and 58, read with Annex B, para. 76).
[15] *Vide*, e.g., Gold Coast (Annex A, para. 27); Nigeria (para. 31); Sierra Leone (para. 34); Senegal (para. 42, *re* deputy to French Chamber).
[16] *Vide*, e.g., French West Africa other than Senegal (Annex A, para. 40); French Equatorial Africa (para. 46); the Portuguese Territories (para. 58).
[17] *Vide* Senegal (Annex A, para. 42, *re* General Council and Colonial Council).

(iv) a combination of these [1].

6. Actual participation by Africans in the central legislative and executive organs of the territories concerned, was also highly exceptional. This resulted partly from the franchise situation indicated above, and partly from policies adopted by the Powers in regard to nominations. Here again the facts are given in Annex A, and the following serves only to emphasize certain features:

(a) There was no such participation by Natives in any of the mandated territories. Apart from South West Africa, Tanganyika was the only mandated territory in Africa with Legislative and Executive Councils of its own. These consisted entirely of official and nominated members. Although a practice arose of appointing 2 to 3 Indian members to a Legislature totalling 23, all the other members were European [2].

In the other mandated territories central government was more or less by decree of the Mandatory or its representative. Although the Legislative Councils of Nigeria and the Gold Coast could legislate for the southern parts of the British Cameroons and British Togoland respectively, the mandated territories had no representation in these Legislatures [3]. Each of the two French mandated territories, the Cameroons and Togo, was administered under a Commissioner. Native opinion was consulted through advisory bodies, constituted by nomination and election by electoral colleges [4].

(b) In all the British territories, there was not a single one in which a Native became a member of an Executive Council during the period under review. And the only British territories in which Natives became members of a Legislative Council, were Gold Coast, Nigeria and Sierra Leone. In each of these three cases there were nominated as well as elected Native members, together with nominated European members; but in each case the principle of an official majority (European) was maintained during the whole period [5].

Of the other British colonial territories, Southern Rhodesia [6], Northern Rhodesia [7], Nyasaland [8] and Gambia [9] had all-White Legislative Councils, while the Legislative Councils of Kenya [10] and Uganda [11] were preponderantly White, with some Indian and Arab representation (no Native). British Somaliland [12], Basutoland [13], Swaziland [14] and Bechuanaland [15], had no Legislative or Executive Councils, but in the case of the last-mentioned two, there was

[1] E.g., the French territories other than Senegal.
[2] *Vide* Annex A, para. 24, *infra.*
[3] *Ibid.*, paras. 35 and 36.
[4] *Ibid.*, paras. 44 and 47.
[5] *Ibid.*, paras. 27, 31 and 34.
[6] *Ibid.*, para. 4.
[7] *Ibid.*, para. 6.
[8] *Ibid.*, para. 8.
[9] *Ibid.*, para. 38.
[10] *Ibid.*, para. 17.
[11] *Ibid.*, para. 19.
[12] *Ibid.*, para. 25.
[13] *Ibid.*, para. 11.
[14] *Ibid.*, para. 10.
[15] *Ibid.*, para. 14.

machinery for separate consultation of the White population and the Natives in regard to their respective affairs and interests, and in the case of Basutoland machinery for consultation of traditionally organized Native opinion.

Apart from reliance placed upon officials to represent and watch over Native interests—e.g., the Governor of Southern Rhodesia [1] and the Governor, Chief Secretary for Native Affairs in Tanganyika [2]—it was relatively common practice in British territories for representation of Native interests on a governmental body to be secured by the nomination of one or more unofficial European members regarded as specially acquainted with those interests. For example reference may be made to Northern Rhodesia [3], Kenya [4] and Nyasaland [5].

(c) In the Belgian Congo (as in the mandated territory of Ruanda-Urundi) there was no participation by the Native population in the processes of central government. Rule was largely direct from Brussels, with some delegation to the Governor-General, assisted where necessary by advisory bodies [6].

(d) In essence the same situation applied in the Italian, Portuguese and Spanish territories, Native participation or representation in central government being again nil [7].

(e) The situation in the French territories will be largely apparent from what has been said above in regard to franchise. The governmental powers of legislation and administration as such were in the main exercised from France and through Governors-General, Governors, Lieutenant-Governors and senior officials [8].

In all territories other than Senegal [9], Native representation and participation were confined to membership, nominated and elected, of various advisory bodies [10].

7. It will be evident, therefore, that all the colonial and mandatory territories south of the Sahara were indeed being ruled by "the White man", and that, with very limited exceptions [11], the Native populations concerned did not participate at all in the European systems and methods of central government and the political processes associated therewith.

These systems, methods and processes were indeed strange and unknown to the Native populations, and greatly at variance with their own customs and traditions. Moreover, the diversity of traditional systems cherished and applied by different Native ethnic groups was by no means a phenomenon confined to South West Africa, but on the contrary a characteristic of Native life encountered in varying degrees throughout Africa. So, for

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[1] Annex A, para. 3.
[2] *Ibid.*, para. 23.
[3] *Ibid.*, para. 5.
[4] *Ibid.*, para. 17.
[5] *Ibid.*, para. 8.
[6] *Ibid.*, para. 54.
[7] *Ibid.*, paras. 51-53, 58 and 60.
[8] *Ibid.*, paras. 40, 46, 47 and 49.
[9] *Ibid.*, para. 42.
[10] *Ibid.*, paras. 40, 45, 46 and 50.
[11] I.e., those pertaining to certain West African territories and to the handful of Natives on the voters' rolls in the Rhodesias.

example, the following description has been given of the situation in the Congo area colonized by Belgium:

> "When the Belgians penetrated into Central Africa they discovered there an extraordinary multiplicity of peoples, organized according to extremely varied political principles, practising very different morals and customs, whose economic pursuits differed considerably according to the geographic region, and presenting a remarkable diversity of beliefs, languages and arts . . .
>
> The African pluralism is pushed to such an extreme that the uninitiated often have an impression of it as lack of cohesion or even anarchy.
>
> The whole lot of these ethnic groups scattered throughout the extent of the territories administered by Belgium in Central Africa have never in the past constituted a centralized government above the tribe, the small tribe or a political federation. The country was composed of a mosaic of entities, of which the importance varied from the simple village of a few score individuals to kingdoms of several million subjects such as the Sultanate of Zande and the Luba Empire [1]." (Translation from French.)

And Sir Patrick Renison, who was Governor of Kenya from 1959 to 1962, recently wrote as follows about the Native peoples of that territory:

> ". . . the peoples of Kenya are not of homogeneous stock. Besides the Bantu, there are Nilotic, Hamitic and Nilo-Hamitic; the African tribes of Kenya are as different in appearance, customs, language and way of life as Eskimos from Italians. They are at every stage of civilization from the most primitive to the most sophisticated [2]."

Under such circumstances administering Powers, in the course of their experience, not unnaturally came to the conclusion that political activity on the part of Natives could, at any rate at early stages of their development, best be achieved within the known framework of the traditional systems of the various groups. And so there was born a wide-spread practice of utilizing, in varying degrees, traditional systems in the government of Native groups—a practice known in British colonial practice as "indirect rule".

8. A leading protagonist and practical exponent of the policy of indirect rule was Lord Lugard (later for many years a member of the Permanent Mandates Commission), who applied and developed the policy while he was High Commissioner of Nigeria at the beginning of the century, and elaborated the implications thereof in publications such as *Political Memoranda, 1918*, and *The Dual Mandate in British Tropical Africa, 1929*. Other well-known protagonists have been Margery Perham, C.B.E., lecturer and writer on colonial administration, Fellow in Imperial Government, Nuffield College, Oxford, *inter alia*, in *A Re-Statement of Indirect Rule* [3], and also Sir Donald Cameron, Governor of Tanganyika from 1925 to 1931 and thereafter of Nigeria. Lord Hailey wrote in 1938:

> "Sir Donald Cameron's Memorandum of 1934 reasserts in substance the principles formulated in the *Political Memoranda* in which

[1] Brausch, G. E. J. B., "Pluralisme Ethnique et Culturel au Congo Belge", in *Ethnic and Cultural Pluralism in Inter-tropical Communities*, publication by the International Institute of Differing Civilizations (1957), pp. 243 and 245.

[2] Renison, Sir Patrick, "The Challenge in Kenya", in *Optima*, Mar. 1963, p. 9.

[3] Published in *Africa*, Vol. VII (1934), p. 321.

Lord Lugard embodied his views of native administration. If the Memorandum of 1934 differs from the earlier *Memoranda* it is mainly in the emphasis it lays on certain principles selected as underlying the application of the system. It insists that, if the native authorities are to become not only a part of the machinery of government but a living part of it, the political energies and ability of the people must be directed to the preservation and development of their own institutions; the native authority selected for recognition by government must therefore be that which according to tribal tradition and usage has in the past regulated the affairs of each unit of native society; it is equally important that it should be that which the people of to-day are willing to recognize and obey. But the objective is not merely the utilization of native authorities as instruments of local government; native administration is conceived as a means of trying 'to graft our higher civilization upon the soundly rooted native stock . . . moulding it and establishing it into lines consonant with modern ideas and higher standards' [1]."

Earlier in the same work Lord Hailey observed:

"The system of indirect rule is regarded by its exponents as a better starting-point for an evolution towards self-government than any other yet devised by British administrations. Sir Donald Cameron, when Governor of Tanganyika, expressly stated that in no other way could the obligation, implied in the mandate, to encourage such an evolution of peoples 'not yet able to stand by themselves', be carried out. The political traditions of Great Britain involve the assumption that self-government implies representative parliamentary institutions, and this is held also by the majority of educated Africans. It is implicit in the philosophy of indirect rule, however, that the nature of the political forms which may ultimately be evolved should not be prematurely defined, and it is possible that a development deliberately based on African institutions may lead to some new type of self-governing organization [2]."

9. The policy of indirect rule was practised in each of the three British mandated territories, Tanganyika [3], British Cameroons [4], and British Togoland [5]. And although not by that name, the principles underlying the policy were applied also in each of the other three African mandated territories, Ruanda-Urundi [6], French Cameroons and French Togoland [7].

Similarly the policy found application, under its name or by way of its underlying principles, in a large number of other territories [8].

10. In pursuance of, or in addition to, the policy and principles of indirect rule, differentiation as between members of various population groups was practised in a spirit of guardianship, trusteeship and pater-

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[1] Hailey, *An African Survey* (1938), p. 432.
[2] *Ibid.*, pp. 134-135.
[3] *Vide* para. 8, *supra*, and also Hailey, *An African Survey* (1938), pp. 434 ff.
[4] *Ibid.*, pp. 433-434.
[5] *Ibid.*, pp. 477-478.
[6] *Ibid.*, pp. 494-496.
[7] *Vide* Annex A, paras. 44 and 47, *infra*.
[8] As examples, reference may be made to: Northern Rhodesia (Annex A, para. 7), Uganda (para. 20), Tanganyika (para. 24), Gold Coast (para. 28), Gambia (para. 39), Kenya (Hailey, *An African Survey* (1957), pp. 446-451), and Nigeria (*ibid.*, pp. 453-470).

nalism, also in regard to legal systems, land tenure, residential facilities, aspects of economic policy, control of population movement, education, and other aspects of government. In later parts of the Counter-Memorial, dealing with specific complaints by Applicants, relevant comparisons are made on such aspects of governmental policies and practices.

11. Throughout the period under review, the bulk of the Native populations in the African territories concerned showed little or no sign of desiring any material change in the constitutional arrangements and governmental practices in operation.

It is notable that the first "Congress against Colonial Suppression and Imperialism", held at Palais Egmont in Brussels from 10 to 15 February 1927, was attended by only eight delegates from the whole of Africa as against 24 delegates from China and 27 from other Asian countries. This Congress, with such paltry representation from Africa, formulated, *inter alia*, a resolution on Africa which set the aims at independence of the African nations, racial equality and termination of all racial and class distinctions [1].

Yet, when this political clarion-call sounded in 1927, the bulk of Africa neither partook nor took note of the new vision of the future.

12. During the years 1930 to 1933 the first formulation of modern African political ideals was articulated more or less clandestinely in Hamburg in the publication *Negro-worker*, by such leaders as George Padmore, the friend, mentor and subsequent adviser on foreign affairs to President Kwame Nkrumah and Premier Jomo Kenyatta, whilst the African Continent as such still displayed no recorded political interest of the masses [2].

13. Another significant indication of the same nature is afforded by events in Kenya over the years 1920 to 1931. A long struggle raged over the question of franchise and representation on the Legislative and Executive Councils for Asiatics in addition to those planned and provided for the White population [3]. Yet it does not appear that, throughout this controversy, the question of similar rights for African Natives as at that stage was raised or seriously considered.

14. Margery Perham, C.B.E., to whom reference has been made above [4], commented on the phenomenon under discussion as follows:

> "... For many years after annexation, though there was much bewilderment, revolts were very few, and there does not *appear* to have been much sense of indignity at being ruled. It was not until a small minority, through their attainment of the higher levels of Western education, and above all through travel, came to understand something of the world at large and of their own place in it that the spell of acceptance began to be broken. Excited by the wine of these new ideas, and smarting, perhaps, from some experiences of the colour bar in Europe, and especially in Britain, the young African would return after some years to his own country. He would see its poverty and subjection with new eyes, and he was now ready to believe and to preach the idea that only by self-government could Africans

[1] Italiaander, R., *Schwarze Haut im Roten Griff* (1962), pp. 21-22, 27-31, 39-41.
[2] *Ibid.*, pp. 53, 54, 62 and 68.
[3] Hailey, *An African Survey* (1938), pp. 164-166.
[4] *Vide* para. 8, *supra*.

> escape from personal humiliation and win equality of status in a world of which they are at last becoming aware. This purpose had its adherents much earlier in West than in East Africa. The writer, in studying African affairs and visiting Africa in the 10 years before the second World War, could mark its rapid growth in the minds of Gold Coast and Nigerian students in Britain, and in the towns of the West Coast and the Sudan. But before 1939 the numbers of those whose education had reached the stage of world consciousness was still small, and the masses outside the few towns on or near the coast seemed to be unaware that their status was, as the young Press was beginning to declare, a humiliating slavery [1]."

15. In regard to all territories in which there existed a settled White population of substantial numbers, there was general realization of a special problem. Although variously expressed and described in different instances, the problem in substance amounted to this: how progressive participation by African Natives in the process of central government could in future be provided for without exposing the White population to the prospect of political domination by numerically stronger but generally less advanced population groups, with an outlook completely different from its own.

On the other hand, although the problem was at times raised and to some extent discussed, the prevailing sentiment appears to have been that is was considerably beyond the scope of practical political consideration: the general expectation in this regard was apparently that it would take a very long time before African Native populations would become sufficiently advanced—educationally, economically, socially, technologically and in attendant respects—to take a full part in representative, self-governing institutions upon the European model.

Illustration of the aforegoing is afforded particularly in the cases of Kenya and Southern Rhodesia, as is very briefly indicated in the next succeeding paragraphs.

16. Although consideration was given during the 1920s to the future roles to be played in Kenya by the White and indigenous groups respectively, and although it was the considered opinion of the British Government as expressed in the well-known Devonshire White Paper of 1923, "... that the interests of the African Natives must be paramount" [2], inasmuch as "primarily Kenya is an African territory" [2], the Passfield White Paper of 1938 rendered clear that there was at that stage no contemplation of the grant of political rights to such Africans other than—

> "... the adaptation of native institutions to the purposes of local self-government, with the possibility that native and settled areas might eventually be placed under separate administration [3]".

17. As indicated above [4] and in Annex A, *infra* [5], Natives were prior to the Second World War excluded from the franchise and had no direct

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[1] Perham, M., "The Psychology of African Nationalism", in *Optima*, Mar. 1960, pp. 28-29.

[2] Hailey, *An African Survey* (1938), p. 135.

[3] *Ibid.*, pp. 136-137.

[4] *Vide* paras. 5 *(a)* and 6 *(b) supra.*

[5] *Vide* Annex A, paras. 16 and 17.

participation in central government. The Native population was evidently not considered sufficiently advanced for participation in such institutions, and the British Government considered itself as exercising a trust on their behalf, as a result of which it should for the time being retain control over Kenya under the Crown Colony system [1].

18. An expression of the attitude prevailing at the time, contained in a report of a Commission under the chairmanship of Sir E. Hilton Young, is summarized as follows by Hailey [2]:

> "They [the Commission] insisted . . . that until the Native population was able to take part in a representative system the imperial government must retain, as their trustee, 'a right to intervene in all the business of government'; further, *they held that the differences of outlook between African and European which must persist,* to whatever stage of development the African community may attain, *would make it necessary for the imperial government permanently to retain the function of an arbiter between the two communities.*" (Italics added.)

19. In Southern Rhodesia, as has been noted, the franchise was open to all British subjects, but as a result of the property and income qualifications only a handful of Natives qualified as voters. Lord Hailey wrote in 1938:

> "The constitution of 1923 established a legislative assembly, which at present consists of thirty members, and provided for the creation of a second chamber when the assembly should have passed a law to this effect. The Buxton Commission of 1921, on whose recommendations the constitution was based, held that the numbers of the European population from whom legislators could be drawn were at that time too small to warrant the immediate establishment of an upper house. The duration of the assembly is five years. The franchise is open to all British subjects, male and female, including Natives, subject to a property qualification of £150, and an income qualification of £100. The European population represented numbers some 55,000. The admission of Natives to the franchise was consistent with the spirit of the claim of Rhodes for 'equal rights for all civilized men'; but it is not in keeping with the policy of separate development for the African and European populations which is now the accepted principle in the territory. The possibility of introducing some alternative system was discussed in the legislative assembly at every session from 1931 to 1933. In the latter year the Prime Minister (Mr. Moffat) stated that he had found the Dominions Office sympathetic to 'the arguments in favour of protecting the European people of this country from a majority of natives getting on the roll' [3]."

20. The British Government did not commit itself to any period of time which would be necessary for the Natives of Kenya or Rhodesia to reach a stage of development where they could participate in the central governmental sphere [4]. The Devonshire White Paper of 1923 stated that

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[1] Hailey, *An African Survey* (1938), pp. 165-167.
[2] *Ibid.*, p. 168.
[3] *Ibid.*, p. 159.
[4] *Ibid.*, pp. 250-253.

in view of the need to safeguard Native interests, the grant of responsible government to Kenya was *"out of the question within any period of time which need now be taken into consideration"* [1].

B. Developments during and after the Second World War

21. In 1938 Lord Hailey wrote:

> "It is not in the British tradition to explore far-reaching constitutional issues until the force of circumstances makes it essential to do so; and it is not reasonable to expect that any government would now enter on an explicit commitment regarding the future status of the African colonies. But there is one reason at least why some further consideration should be given to the question whether a responsible government based on representative institutions is to be held to be the most suitable constitution for the African colonies. It is increasingly clear that Africans must before long be given a material addition to their very limited representation in the legislative councils. There is not in the African Crown Colonies any body similar to the newly constituted Native Council in the Union, which, though it may have only a consultative status, can nevertheless claim to be widely representative. The French administrations have on the whole been more liberal in their provision of advisory bodies than the British. *If, however, native representation in the legislative councils is progressively increased, this will stimulate a hope, if it does not convey a promise, that parliamentary institutions will be allowed to pursue their normal evolution in the African colonies; all experience shows the difficulty of calling a halt when political representation has once become a serious matter of interest* [2]." (Italics added.)

The italicized words in due course turned out to be prophetic, as will appear.

22. Margery Perham, after commenting as above indicated on the apathy shown up to 1939 by the masses of the African population, even in the west coast territories, on the question of participation in central government and advancement towards independence [3], proceeded as follows:

> "But the next 10 war and post-war years saw a concentration of events and influences that spread the consciousness of 'colonialism' as an evil, and raised hopes, especially along the West Coast and in the Sudan, that its super-session in Asia would be followed soon in Africa [4]."

During the years succeeding those referred to by Miss Perham, the wave of anti-colonial feeling in Africa gathered momentum. The demand for an ever-increasing share in the governments of their countries found growing support among the politically conscious Africans, and was strongly influenced by events in other parts of the world, particularly Asia. The results of this awakening African nationalism or anti-colonialism form a part of contemporary history and it is accordingly not necessary

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[1] Hailey, *An African Survey* (1938), p. 251.
[2] *Ibid.*, pp. 252-253.
[3] *Vide* para. 14, *supra*.
[4] Perham, *op. cit.*, p. 29.

to give a full account thereof in this Counter-Memorial. It was reflected, *inter alia*, in the constitutional development of the various territories in Africa south of the Sahara, which is summarized in Annex B to this Book. There are however certain aspects of the anti-colonial movement which are of relevance for present purposes, and which will consequently be dealt with in the succeeding paragraphs.

23. As will be seen from Annex B, the development of participation by African Natives in the central government of African territories continued to be a gradual process up to approximately the middle of the 1950s, after which it moved at an ever-accelerating pace. This reflected not only the results of a strengthened demand for independence on the part of the indigenous populations of the territories concerned, but also the effects of increasing pressure in international affairs, particularly by the newly independent States of Africa and Asia.

24. The effects of these political demands and pressure may be seen by comparing the actual situation today with views expressed previously regarding the period within which dependent territories could be expected to develop to self-government or independence. In this regard it will be recalled that before the Second World War, and even for a number of years thereafter, it was generally accepted that most of these territories would not be ripe for independence for a very long time, if ever.

In a work written in 1962, Prof. W. E. Abraham, Associate Professor of Philosophy at the University of Ghana, said—

> "The reasons why Africa has suddenly become independent and so finds herself loaded with problems for which she has not even adumbrated solutions are evidently not rooted in the colonial policies of the metropolitan powers, for even with the eight points of the Atlantic Charter which Britain admitted to apply to Africa, speculation about the coming of political independence was in terms of sixty to one hundred years. Likewise in an article in *Time and Tide* for February, 10th 1940, on 'The Future of the Colonies', there appeared a prophetic deposition, somewhat anticipating the Atlantic Charter, in which the author, Dr. W. B. Mumford, broached a sixty-year plan. And even the American Committee on Africa, the War and Peace Aims, sitting in 1942, hardly expected that the generation of Kwame Nkruma, Ako Adjei, Ross Lohr, Ibanga Udo Akpabio—men from Ghana, Sierra Leone, and Nigeria whom it had asked to submit memoranda—would claim and obtain independence for Africa [1]."

Even in 1952, Mr. Ingles the delegate of the Philippines in the Fourth Committee of the United Nations, stated that—

> ". . . it was reasonable to assume that Territories formerly under 'B' Mandate should attain self-government or independence *within approximately a generation* [2]". (Italics added.)

And in 1954 the visiting Mission of the Trusteeship Council suggested in respect of Ruanda-Urundi "the formulation of a programme leading to the achievement of self-government in 20 to 25 years" [3]. The Mission

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[1] Abraham, W. E., *The Mind of Africa* (1962), p. 163.
[2] *G.A., O.R., Sixth Sess., Fourth Comm.*, 239th Meeting, 8 Jan. 1952, p. 258.
[3] *T.C., O.R., Fifteenth Sess., Supp.* No. 2, p. 17.

recorded that the Governor-General of the Belgian Congo had expressed the contrary view that—

> "in three or four generations, providing the inhabitants would have the possibility of associating with other societies which could guide them, the inhabitants of the Trust Territory could take over the major task of governing the country [1]".

The Mission further recorded that its Chairman, Mr. Reid, was unable to support its suggestion, and that he—

> "does not consider that any adequate evidence is available to the Mission or the Administering Authority on which to estimate that self-government should be achieved in twenty, twenty-five or any other number of years [2]".

With the latter view the Representative of Belgium at the United Nations later expressed complete agreement [3].

25. The effects of the intensification of the pressure on the Powers administering colonial and trusteeship territories to speed up the grant of self-government or independence to the territories concerned, may also be seen in changed attitudes adopted by these Powers. Examples of this may be found, *inter alia*, in debates in the Fourth Committee of the United Nations in relation to so-called target dates for self-government or independence of trusteeship territories. In 1949, for instance, the representative of the United Kingdom said:

> "Any attempt to force the pace of advancement might in fact have the undesirable result of placing the mass of the indigenous population at the mercy of the better educated minority [4]."

In 1957,

> "... the United Kingdom policy was to advance step by step, neither too quickly nor too slowly judging the exact nature of each step in the light of experience of the last one ... [5]".

But by 1961, the attitude of the United Kingdom was expressed as being—

> "[that] in the advance towards self-government it was better to go fast than slowly, and that the attainment of self-government and independence accelerated the economic advancement of the Territories [6]".

A similar change of policy occurred in the case of other States which administered colonies or trusteeship territories. By the middle 1950s (and for some years afterwards) these States were not prepared to commit

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[1] *T.C., O.R., Fifteenth Sess., Supp.* No. 2, p. 16.
[2] *Ibid.*, p. 18.
[3] *T.C., O.R., Fifteenth Sess.*, 602nd Meeting, 18 Mar. 1955, p. 294. As to a similar suggestion and similar reactions *re* Tanganyika, *vide T.C., O.R., Fifteenth Sess., Supp.* No. 3, pp. 67 and 68 and *T.C., O.R., Fifteenth Sess.*, 584th Meeting, 24 Feb. 1955, p. 167.
[4] *G.A., O.R., Fourth Sess., Fourth Comm.*, 93rd Meeting, 6 Oct. 1949, p. 24.
[5] *G.A., O.R., Twelfth Sess., Fourth Comm.*, 731st Meeting, 5 Dec. 1957, p. 439.
[6] *G.A., O.R., Sixteenth Sess., Fourth Comm.*, 1182nd Meeting, 24 Oct. 1961, p. 156.

themselves to target dates at all [1]. In fact, however, most of the territories concerned attained self-government or independence before the end of that decade, or within the first few years of the next. In the words of Sir Patrick Renison, who was Governor of Kenya from 1959 to 1962:

> "... the cry was 'faster, faster!' and there was no turning back; India, Burma, Ceylon, West Africa, the Sudan, Malaya, Jamaica, Trinidad—with the French and Belgians on the same bandwagon. Now it is East Africa's turn, with Central Africa to follow. When it was decided to match the Italians and set an early date for Somaliland's independence, it was clear that the remaining formative and educative years in East Africa would be few in number. Nevertheless, the estimates of the time remaining then made by the experts look ludicrous to-day [2]."

26. The demand for accelerated political progress and the compliance therewith by the Powers which controlled non-self-governing territories, reflected a significant change in attitudes towards the state of advancement required for self-government or independence.

In 1931, the Permanent Mandates Commission, in its report to the Council of the League of Nations, stated:

> "Whether a people which has hitherto been under tutelage has become fit to stand alone without the advice and assistance of a mandatory is a question of fact not of principle. It can only be settled by careful observation of the political, social and economic development of each territory. This observation must be continued over a sufficient period for the conclusion to be drawn that the spirit of civic responsibility and social conditions have so far progressed as to enable the essential machinery of a State to operate and to ensure political liberty [3]."

The same attitude was expressed even in the middle 1950s. Thus in

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[1] *Vide* as regards the United Kingdom:
G.A., O.R., Sixth Sess., Fourth Comm., 239th Meeting, 8 Jan. 1952, pp. 259-260; *Eleventh Sess., Fourth Comm.*, 639th Meeting, 16 Feb. 1957, p. 441; *Twelfth Sess.*, 731st Meeting, 5 Dec. 1957, pp. 438-439; *Thirteenth Sess., Fourth Comm.*, 795th Meeting, 12 Nov. 1958, p. 277;
France: *G.A., O.R., Sixth Sess., Fourth Comm.*, 240th Meeting, 9 Jan. 1952, p. 262; *Eighth Sess., Fourth Comm.*, 389th Meeting, 3 Dec. 1953, p. 499;
Australia: *G.A., O.R., Sixth Sess., Fourth Comm.*, 240th Meeting, 9 Jan. 1952, p. 262; *Eighth Sess., Fourth Comm.*, 389th Meeting, 3 Dec. 1953, p. 501; *Eleventh Sess., Fourth Comm.*, 628th Meeting, 8 Feb. 1957, p. 392;
Belgium: *G.A., O.R., Sixth Sess., Fourth Comm.*, 240th Meeting, 9 Jan. 1952, p. 263; *Tenth Sess., Fourth Comm.*, 519th Meeting, 23 Nov. 1955, p. 280; 538th Meeting, 8 Dec. 1955, p. 401; *Eleventh Sess., Fourth Comm.*, 638th Meeting, 15 Feb. 1957, p. 435;
New Zealand: *G.A., O.R., Sixth Sess., Fourth Comm.*, 240th Meeting, 9 Jan. 1952, p. 265; *Eighth Sess., Fourth Comm.*, 390th Meeting, 3 Dec. 1953, p. 507;
The United States of America: *G.A., O.R., Eighth Sess., Fourth Comm.*, 386th Meeting, 1 Dec. 1953, p. 482; *Thirteenth Sess., Fourth Comm.*, 794th Meeting, 11 Nov. 1958, p. 269.

[2] Renison, P., "The Challenge in Kenya", in *Optima*, Mar. 1963, p. 8.

[3] *P.M.C., Min.*, XX, Annex 16, pp. 228-229.

1955, the representative of the United States of America, speaking of the indigenous inhabitants of Tanganyika, said in the Trusteeship Council that:

> "... the problem was not whether they would be capable of governing themselves in twenty-five or thirty years, but whether they would by that time be economically self-sufficient, which was essential to independence [1]".

In the same year the representative of the United Kingdom said, also in the Trusteeship Council:

> "The essential requirements for true self-government might be reduced to two. The first was a fairly large body of persons with education, knowledge and experience, prepared to assume responsibility, who had and deserved the confidence of the majority of the people. The second requirement was that the resources of the country should be so developed that, through its own production and trade, the country was self-sufficient and in a position to provide adequate funds to maintain the Government, including all public services [2]."

A Belgian representative pointed out in 1956 that—

> "Educational, social, health and economic developments were as important in promoting a people's advancement towards self-government as the establishment of legislative councils and the introduction of universal suffrage, and it would not further self-government to reduce the problems involved in its attainment to formulae to be studied out of their social and economic context [3]."

27. However, the view that economic, social and cultural progress should precede political independence, came to be strongly contested by many States. Thus, in 1960, the representative of Iraq stated that—

> "... political advancement took precedence over economic and social advancement, because the populations were impatiently demanding independence [4]".

In 1959 the Liberian delegate had said: "No amount of development could compensate for lack of freedom" [5]—a view which had also been expressed as follows by a delegate of Ceylon: "... the so-called new nations ... certainly believed that good government was no substitute for self-government [6]."

And in 1961 the Guinean representative stated:

> "Irrespective of the state of development of a particular Territory, its full independence based on territorial integrity was the *sine qua non* for rapid progress in all fields [7]."

The manner in which the progress referred to by the Guinean representative was expected to be achieved in many cases, was well summarized in 1960 by the delegate of Tunisia in the following words:

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[1] *T.C., O.R., Fifteenth Sess.*, 592nd Meeting, 7 Mar. 1955, p. 223.
[2] *T.C., O.R., Fifteenth Sess.*, 584th Meeting, 24 Feb. 1955, p. 167.
[3] *T.C., O.R., Seventeenth Sess.*, 687th Meeting, 16 Mar. 1956, p. 267.
[4] *G.A., O.R., Fifteenth Sess., Fourth Comm.*, 1013th Meeting, 17 Oct. 1960, p. 68.
[5] *G.A., O.R., Fourteenth Sess., Fourth Comm.*, 982nd Meeting, 2 Dec. 1959, p. 600.
[6] *G.A., O.R., Eleventh Sess., Fourth Comm.*, 607th Meeting, 22 Jan. 1957, p. 292.
[7] *G.A., O.R., Sixteenth Sess., Fourth Comm.*, 1186th Meeting, 26 Oct. 1961, p. 186.

"If non-Self Governing Territories, upon becoming independent, were economically, socially and educationally under-developed, they could be helped by the United Nations, which would, of course, respect their sovereignty, but there could be no question of delaying their independence [1]."

28. The view expressed by the speakers cited in the previous paragraph, found increasing support in world politics. In 1960 a resolution was proposed in the United Nations General Assembly by 43 Afro-Asian States and adopted by 89 votes to 0, with 9 abstentions (both Applicants, and all African members who were present, voting with the majority, the colonial powers and administering authorities generally abstaining) [2]. This resolution (which was called the "Declaration on the granting of independence to colonial countries and peoples") contained the following paragraphs:

"1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. *Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.* (Italics added.)

5. *Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations*, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, *in order to enable them to enjoy complete independence and freedom* [3]." (Italics added.)

Paragraph 5 of this declaration was quoted in a resolution adopted the next year. This resolution read:

"The General Assembly . . . *Noting with regret* that, with a few exceptions, the provisions contained in the aforementioned paragraph [i.e., the quoted paragraph 5] of the Declaration [on the granting of independence to colonial countries and peoples] have not been carried out,"

and

"*Emphasizing* that inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence,

1. *Solemnly reiterates and reaffirms* the objectives and principles enshrined in the Declaration on the granting of independence to colonial countries and peoples contained in its resolution 1514 (XV) of 14th December, 1960;

2. Calls upon States concerned to take action without further

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[1] *G.A., O.R., Fifteenth Sess., Fourth Comm.*, 1025th Meeting, 27 Oct. 1960, p. 147.
[2] *G.A., O.R., Fifteenth Sess.*, 947th Plenary Meeting, 14 Dec. 1960, pp. 1273-1274.
[3] *Resolution 1514 (XV) in G.A., O.R., Fifteenth Sess., Supp.* No. 16 (A/4684), p. 67.

delay with a view to the faithful application and implementation of the Declaration [1]."

Again the independent States in Africa played a major role in the proposal and adoption of this resolution.

It will also be seen from these resolutions that by 1960 the prevailing atmosphere in the United Nations was one requiring trusteeship territories to receive independence forthwith, irrespective of the level of advancement of their populations.

29. The approach that dependent territories should receive political self-government or independence as a first priority—i.e., before they had reached the stage of advancement and economic self-sufficiency which had previously been regarded as a *sine qua non* for the proper functioning of the machinery of government—was eventually accepted by the colonial powers and administering authorities. Reference has been made to the statement of a British representative in 1961 that—

> "in the advance towards self-government it was better to go fast than slowly, and that the attainment of self-government and independence accelerated the economic advancement of the territories [2]".

This general approach was given effect to by most of the colonial powers, with the resultant creation towards the end of the 1950s and in the early 1960s of a number of new politically independent but economically dependent States in Africa. Difficulties encountered by these States in their attempts to provide peace, order and good government despite the lack of economic and political maturity in the majority of their populations, will be considered below.

30. Reference has been made above to the increasing pressure exerted by the newly independent African States to enforce the grant of self-government or independence to dependent territories and peoples in Africa. The present proceedings against Respondent are to be seen as part of this political campaign designed to bring South West Africa (and eventually the Republic of South Africa itself) into line with the new governmental systems established in other parts of Africa, and to achieve for the Territory majority rule by the Native population—as an overriding objective to which all other aspects and implications are to be subordinated. This feature appears clearly from debates at, and resolutions of, conferences of African States, which will be dealt with in the succeeding paragraphs.

31. In July 1959 a conference was held at Sanniquellie, Liberia, between the Presidents of Liberia and Guinea, and the Prime Minister of Ghana.

In a joint communique, the leaders of the said three States stated in regard to South West Africa:

> "We maintain that this Territory is in fact a Trust Territory of the United Nations, and as such the United Nations cannot relinquish its legal and moral responsibilities to the indigenous inhabitants who are entitled to the same treatment given to other Trust Territories. Consequently, we will request the United Nations to give further

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[1] Resolution 1654 (XVI), *G.A., O.R., Sixteenth Sess., Supp.* No. 17 (A/5100), p. 65.

[2] *G.A., O.R., Sixteenth Sess., Fourth Comm.*, 1182nd Meeting, 24 Oct. 1961, p. 156, *vide* also para. 96, *supra*.

consideration to this question, declare the Territory not a part of South Africa and fix a date for the independence of the Trust Territory of South West Africa [1]."

It is to be noted that the composite aims of trusteeship as set out in the Charter, viz., to promote the advancement of the inhabitants of the territories in a number of different respects, had, in the minds of the authors of the communique, been reduced to the one single aim, namely the speedy attainment of independence irrespective of other considerations.

32. The same attitude towards dependent territories, and particularly South West Africa, permeated the proceedings of the Monrovia Conference of Foreign Ministers of Independent African States held later in the same year (1959) at which both Applicants were represented [2].

In his opening address, the President of Liberia said, *inter alia:*

> *"In our relationships with non-self-governing territories, what is most important to us is the independence of these territories.* Any policy which tends to hinder the attainment of this aim is reproachful to the Liberian point of view [3]." (Italics added.)

At this Conference, the following resolution was adopted:

> *"Resolution on the Question of South-West Africa*
>
> The Conference of Independent African States,
>
> Deeply concerned by the situation in the territory of South-West Africa.
>
> 1. Urges the Government of the Union of South Africa to implement the Resolutions of the United Nations concerning the territory of South-West Africa.
>
> 2. Maintains that this territory is in fact a Trust Territory of the United Nations, and as such the United Nations cannot relinquish its legal and moral responsibilities to the indigenous inhabitants who are entitled to the same treatment given to other Trust Territories.
>
> 3. *Appeals to the United Nations to fix a date for the independence of the territory of South West Africa* [4]." (Italics added.)

33. The next year, when the Second Conference of Independent African States met at Addis Ababa [5], the question of South West Africa was again discussed. Mr. J. Rudolph Grimes, the Secretary of State for Liberia, is quoted as saying:

> ". . . my Government, as a former Member of the League of Nations at the time of its dissolution, had 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 [6]." (Italics added.)

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[1] Joint Communique in *The First West African Summit Conference held at Sanniquellie, July 15-19, 1959,* issued by the Liberian Information Service, p. 30.

[2] 4-8 Aug. 1959, *vide* Legum, C., *Pan Africanism* (1962), p. 165.

[3] Departmental information.

[4] Legum, C., *Pan Africanism,* p. 168.

[5] 15-24 June 1960.

[6] I, p. 82

As indicated above, by 1960 trusteeship was considered a brief prelude to complete political independence.

The result of the discussion at the Conference was embodied in a resolution, which read as follows:

> "The Conference of Independent African States, meeting in Addis Ababa, *(a)* Having considered the question of the Territory of South-West Africa, *(b)* Recalling United Nations resolution 1361 (XIV) of November 17, 1959, which drew 'the attention of Member States to the conclusions of the special report of the Committee on South-West Africa, covering the legal action open to Member States to refer any dispute with the Union of South Africa concerning the interpretation or the application of the Mandate for South-West Africa to the International Court of Justice for adjudication, in accordance with article 37 of the Statute of the Court.
>
> 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;
>
> 2. Notes that the Governments of Ethiopia and of Liberia have signified their intention to institute such a proceeding.
>
> 3. *Decides that a Steering Committee of four African States, including the delegations of Ethiopia and of Liberia, should be established to determine the procedures and tactics incident to the conduct of the juridical proceedings in this matter*' [1]." (Italics added.)

34. It will be apparent from the facts set out in the previous paragraphs, that the Applicants in the present case are in substance only nominal parties to the proceedings, the real parties being the independent African States, and that the main purpose of this action is to secure political independence for the Territory. Both these features are emphasized by a resolution taken by the Summit Conference of independent African States (which included the two Applicants) at its Meeting in Addis Ababa on 22 to 25 May 1963. This resolution, in so far as it is relevant, reads as follows:

> "*Agenda item ii: Decolonization*
>
> The Summit Conference of Independent African States . . .
>
> *Having considered* all aspects of the questions of decolonization;
>
> *Unanimously convinced* of the imperious and urgent necessity of co-ordinating and intensifying their efforts to accelerate the unconditional attainment of national independence by all African territories still under foreign domination;
>
> *Reaffirming* that it is the duty of all African Independent States to support dependent peoples in Africa in their struggle for freedom and independence;
>
> *Noting* with deep concern that most of the remaining dependent territories in Africa are dominated by foreign settlers;
>
> *Convinced* that the colonial powers, by their forcible imposition of the settlers to control the governments and administrations of those territories, are thus establishing colonial bases in the heart of Africa;
>
> *Having agreed* unanimously to concert and co-ordinate their efforts and action in this field, and to this end have decided on the following measures:

[1] Legum, *Pan Africanism* (1962), p. 151.

1. *Declares* that the forcible imposition by the colonial powers of the settlers to control the governments and administrations of the dependent territories is a flagrant violation of the inalienable rights of the legitimate inhabitants of the territories concerned;

2. *Invites* the colonial powers to take the necessary measures for the immediate application of the *Declaration on the Granting of* Independence to Colonial Countries and Peoples; and insists that their determination to maintain colonies or semi-colonies in Africa constitutes a menace to the peace of the continent;

. . . . . .

5. *Reaffirms* further, that the territory of South-West Africa is an African territory under international mandate and that any attempt by the Republic of South Africa to annex it would be regarded as an act of aggression; *Reaffirms* also its determination to render all necessary support to the second phase of the South-West Africa case before the International Court of Justice; *Reaffirms* still further, the inalienable right of the people of South-West Africa to self-determination and independence [1]."

As will be seen, the present proceedings are considered as part of a concerted effort to advance the process of "decolonization" towards the "unconditional attainment of national independence" of all African territories.

35. It is not Respondent's concern to criticize adaptations which other governing powers have made in their policies in the light of the rise of nationalism on the part of African peoples and of the growing vehemence of the "anti-colonialism" campaign. There can be no question about the soundness of the principle that guardianship and trusteeship exercised over peoples unable to stand by themselves, are inherently intended to be terminated upon attainment by the "wards" of a stage of maturity which enables them to decide upon their own future. If, upon reaching such a stage, the wards strongly desire self-government and independence, there can be no question about a moral right on their part to attain such ideal, nor about the soundness of a policy of allowing them to do so—in both instances, however, subject to due consideration of adjustments to be made, and of a balance to be struck, between competing or conflicting claims of comparable moral potency on the part of various peoples.

In some parts of Africa the adaptations to be made were not complicated to a material extent by this last-mentioned factor. As was said by the South African Prime Minister, Dr. H. F. Verwoerd, in London in April 1960:

> "In certain parts of Africa where the white man also ruled alone before, a solution is relatively easy . . . I refer to the countries of Africa which undoubtedly belong to the black man by settlement and inheritance, although they were taken over, administered and developed by different white nations. It is right that their land should now politically become their own [2]."

The complications regarding application of the principle in such

[1] Official Text, Resolutions in *Summit*, C.I.A. S/Plen. 2/Rev. 2, pp. 1-2.

[2] Address to the South Africa Club, London, in *Fact Paper 91*, Apr. 1961, p. 12.

instances have been rather of the nature of timing, of co-ordinating different aspects of development projects, or compensating for lack of co-ordination, and the like. In other instances, however, the complications have involved a more serious weighing and balancing of competing and conflicting moral claims and rights of different population groups at various stages of civilization and development, as will appear below.

36. What Respondent does wish to emphasize is that the decisions which had to be made by the Powers concerned, were of a political nature, and were not dictated by legal principles or engagements which fall to be adjudicated upon by a court of law. Moreover, the nature of the decisions made, the forces that had an influence upon them, and their factual implications and consequences in various African territories, afford a very instructive background for comparing and evaluating the adaptation of policies being applied and planned for future application by Respondent in South West Africa with a view to attainment of the ideals of the Mandate in the altered present-day circumstances. It is with a view to relevance in these respects that Respondent in the next succeeding paragraphs gives brief consideration to some of the manifested tendencies involved in the adaptation in other territories.

37. Political boundaries in Africa were for the most part drawn in Europe by statesmen with inadequate knowledge or appreciation of the nature and importance of the ethnic composition or tribal affiliations of the inhabitants. The result is twofold. Firstly, most, if not all, of the territories in Africa are inhabited by a variety of different and often widely divergent population groups, and, secondly, many population groups straddle the political boundaries between two or more territories. Under colonial rule, any disputes or enmities between the various groups were controlled or suppressed by the colonial Powers. During the transitional period leading to independence, such disputes or enmities were often submerged beneath the surface of "nationalism", which frequently did not take the positive form of a common allegiance to a nation consisting of all the inhabitants of a territory, but rather the negative form of "anti-colonialism", or a common opposition to the Power in political control of the territory. On attainment of independence, the cohesive force of such "nationalism" would tend to fall away, leaving loyalty to the individual tribes or clans as the strongest political emotion felt by the inhabitants of the newly independent State.

Thus it has been said:

> "The spirit of nationalism and the struggle for independence create in many of the new countries an illusory sense of national unity. Once independence is achieved, however, the old ethnic, linguistic, religious, or tribal loyalties tend to reassert themselves with renewed strength: India had to be divided into two countries, Burma has had to fight five separatist movements, Indonesia has been torn by the divisive forces of fanatical Muslims and non-Javanese nationalists, Ghana has had the opposition of the Ashanti chiefs, and more casualties have resulted from intertribal fighting in the Congo than from the attacks on Europeans [1]."

38. The unfavourable implications of the situation sketched in the

[1] Millikan and Blackmer, *op. cit.*, p. 76.

previous paragraph, are also referred to by Sir Patrick Renison, who says:

> "Kenya is not the first country approaching independence in which, as soon as the coming transition of power was certain, all the old tribal jealousies, animosities and fears, which the British had controlled, came straight up to the surface [1]."

In regard to the Congo (Brazzaville) Republic (the former French Congo) Gwendolen M. Carter, Professor at Smith College in the United States of America, said:

> "What conclusions can one draw from the early experience of the Congo Republic? It suggests that territories without a defined nationalist movement are particularly susceptible to tribal divisions. Moreover, in the absence of a substantial Westernized elite and of widespread sentiments of nationalism, political organization almost inevitably rests on tribal sentiment. As the French anthropologist had pointed out to me in our conversation in Brazzaville, political organization and the stimulus of elections may, in fact, revive old and half forgotten tribal connections and make them again significant. As the fierce riots in Poto-Poto revealed, political tensions with such a tribalized base may create divisions which were not there before [2]."

39. As is well known, similar problems manifested themselves in the former Belgian Congo. The history of the secession of Katanga and Kasai, the disputes between various tribes within these break-away provinces and in the rest of the country, received wide publicity at the time and need only be mentioned here [3].

40. The problem is also illustrated by the case of Ruanda-Urundi, formerly a mandated territory and later a trust territory under the administration of Belgium. The ethnic situation in the territory shortly before it was granted independence was described in the following terms by the Belgian Representative in addressing the Fourth Committee of the United Nations:

> "A second problem, and one more likely to cause disturbances and imbalance, was the result of the ethnic-social structure of the population, which was stratified into the Batutsi, Bahutu and Batwa. In some areas, there was real tension between the Hutu peasant masses and the Tutsi pastoral and ruling class. The growing self-awareness of the Bahutu was the direct result of increased education, the spread of Christianity and the breaking up of the classes of the feudal pastoral system, which no longer corresponded to the economic classes. The peasant masses were no longer satisfied with the treatment which they sometimes received in their traditional society. That problem, which at the present time was making party rivalries particularly acute, was not insurmountable. Those tensions could be reduced only if all concerned accepted the same principles of fairness and justice [4]."

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[1] Renison, *op. cit.*, pp. 8-9.

[2] Carter, G. M., *Independence for Africa* (1960), p. 94.

[3] *Vide* Legum, C., *Africa: A Handbook to the Continent* (1961), pp. 193-194 and Millikan and Blackmer, *op. cit.*, p. 76.

[4] *G.A., O.R., Fourteenth Sess., Fourth Comm.*, 944th Meeting, 9 Nov. 1959, p. 334.

41. A solution to the problem in Ruanda-Urundi was found by way of territorial separation of the former provinces into the separate independent States Rwanda and Burundi. Speaking in the Fourth Committee of the General Assembly of the United Nations, Mr. Ngendandumwe, the Deputy Prime Minister of Burundi, dealt as follows with the reasons which motivated such separation:

> "After several weeks of discussion in Brussels, the representatives of the two States had been unanimous in recognizing the need for an economic union and had agreed to study the establishment of a single system for the administration of monetary and customs matters and controls. The main question to decide was whether to stop at economic union or to go further and seek political union. As matters were, the peoples of Rwanda and Burundi had no desire to share a common destiny or to send representatives to the same assembly. It was significant that the General Council established by the Administering Authority had proved a failure and that the persons who had agreed to serve on it had been regarded with disfavour by the population. Recent events had further emphasized the divergencies and even rivalries between the two States, which had entirely different, if not incompatible, systems. It was therefore further necessary to seek a solution other than a contrived union which would break up as soon as independence was declared, just as various other unions of that kind had broken up elsewhere. Moreover, economic necessity was not enough to create politically viable States. If that were so, Europe would have been united long ago.
>
> The only possible compromise for Rwanda and Burundi, therefore, was an economic union of two genuinely independent States. Later on, it might be possible to devise solutions that were better suited to the circumstances and more practicable, but not before radical changes of structure had been introduced in accordance with the wishes of the two populations. Rivalry, accentuated by recent political developments, was a factor that must be taken into account. Any attempt at political union was bound to fail and might even prove dangerous, for it would complicate the problem unnecessarily and would be likely to impede a future union. Accordingly the representatives of the two States were seeking solutions that would leave the future open [1]."

42. Similar problems arose in the British Cameroons. During the mandate period, the mandated territory of the British Cameroons was administered as a part of the adjoining Territory of Nigeria. This was done, according to the British authorities, "in the interests of the natives of the mandated territory", and had "resulted in the revival of historic associations between tribes and states which formerly were severed by the Anglo-German frontier" [2].

In 1946 the General Assembly of the United Nations approved a Trusteeship Agreement for this Territory. By 1954 the northern section of the Cameroons was closely integrated with the Northern Territories

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[1] *G.A., O.R., Sixteenth Sess., Fourth Comm.*, 1262nd Meeting, 18 Jan. 1962, p. 652.

[2] *Report by His Britannic Majesty's Government on the Administration under Mandate of the British Cameroons for the Year 1924*, p. 5.

of the Federation of Nigeria, whereas the Southern Cameroons was a separate federal constituent [1].

Subsequent referendums showed the strength of tribal and ethnic affiliations—the Northern Cameroons elected to join the Federation of Nigeria, while the Southern Cameroons preferred a political association with the Republic of Cameroun [2].

43. The history of British Togoland followed much the same course. Under the British Mandate it was, on 1 April 1924, divided for administrative purposes into two sections, one of which was administered as a part of the Northern Territories of the Gold Coast, and the other as a part of the Eastern Province of the Gold Coast. The reason for this was given as follows:

> "This measure accords best with the geographical and ethnographical conditions as well as with administrative convenience, and has resulted in unifying tribes which were previously divided [3]."

In 1946, Togoland was placed under United Nations Trusteeship. The United Nations Visiting Mission in 1955 gave consideration to the future of Togoland, and in its report said, *inter alia*:

> "As is equally true of geographic and climatic divisions throughout this part of West Africa, ethnographic and linguistic boundary lines run roughly east and west, with the result that tribal and cultural associations tend to extend across the frontiers into neighbouring territories and the ethnic composition of the population is extremely complex [4]."
>
> . . . . . .
>
> ". . . the Mission found that in the Northern Section of Togoland under British administration, opinion was overwhelmingly in favour of integration of the Territory with the Gold Coast. In view of the distinctive ethnic and linguistic characteristics of the population and of general conditions in this area, the Mission felt that its future should be determined, not by a majority of the total vote in the Trust Territory, but by a majority of votes within this area. In the southern districts of Kpandu and Ho, the Mission found opinion well divided between the supporters of integration and those who advocated independence for a unified Togoland. In these districts, moreover, the majority of the population is Ewe and the question of Ewe unification has exerted considerable influence on the course of events in this region in recent years [5]."

In the result, a plebiscite held in 1956 resulted in a majority in favour of integration of the whole area with an autonomous Gold Coast. This was effected when Ghana (previously the Gold Coast) became independent in 1957 [6].

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[1] *Report by Her Majesty's Government in the United Kingdom to the General Assembly of the United Nations on the Cameroons under United Kingdom Administration for the Year 1954*, pp. 12-13.

[2] *Vide* Annex B, para. 47, *infra*.

[3] *Report of His Majesty's Government on the Administration under Mandate of British Togoland for the Year 1924*, p. 9.

[4] *T.C., O.R., Fifth Special Sess., Supp.* No. 2, p. 7.

[5] *Ibid.*, p. 16.

[6] *Vide* Annex B, para. 49.

44. A particular manifestation of the lack of unity in many newly independent African States, can be seen where a substantial part of the population is of European origin. Despite attempts in the past, it has never been possible to establish in an integrated political entity a basis of real and successful co-operation between a settled White community and African Native populations. The tendency has always been towards attempted domination of one over the other.

45. The tendency referred to in the previous paragraph may be seen in the break-up of the Central African Federation, where a serious attempt was made to create a form of "partnership" between Black and White. Its three constituent States are now, as regards two (Northern Rhodesia and Nyasaland), politically dominated by the Native populations, whereas the third ex-member, Southern Rhodesia, is White-controlled by virtue of a qualified franchise, but is under continual and severe pressure to afford political hegemony to the Native inhabitants on the basis of "one man one vote" [1].

Kenya is another case in point. In regard to its political development, Sir Patrick Renison mentions that by 1960 "the slender hopes of multi-racialism were dying "[2].

46. Where political control has been handed to an African Native majority, the tendency has been for any settled White population to leave the country. Thus in regard to the former Belgian Congo, it has been said: "Kivu was called the Congo's 'White Highlands' till political violence drove out its 14,000 European settlers. . .[3]" And, in regard to Kenya:

> "The Europeans who used to have so much say in the government insisted on the standards to which they were accustomed in Western Europe. The administration was run to those standards, as were—on the European side—production and marketing, commerce, schools and hospitals, research—and, indeed, houses, gardens, clubs, games, sport, wild-life safaris and everything else that has made Kenya, with its superb highland climate and great variety, one of the most attractive countries in the world in which Europeans may live. The independent African Kenya will have no chance of maintaining these standards, yet, if it lets them fall too suddenly or too greatly, it will lose even more of those [i.e., the Europeans] on whom the economy and revenue depend [4]."

At the time of the writing of this portion of the Counter-Memorial Kenya has just become independent, and news reports abound of European inhabitants leaving the country.

These are not isolated examples—the tendency for Europeans to leave newly independent States under Native domination, has also been manifested to a greater or lesser extent in all other parts of Africa.

47. The reasons for the tendency described in the previous paragraph, vary as between individual and individual, and as between State and State. Apart from instances where disorder, chaos and bloodshed caused an exodus of Europeans (of which the former Belgian Congo is an example), the

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[1] *Vide* Chap. VII, para. 22, *infra.*

[2] Renison, *op. cit.*, p. 9.

[3] Legum, C., *Africa, A Handbook to the Continent* (1961), p. 194.

[4] Renison, *op. cit.*, p. 9.

reasons may largely be sought in the vast difference in outlook, attitude and standards of development as between African Native populations in general and European or White groups in general. These differences have manifested themselves in various ways, of which examples will be given in the succeeding paragraphs.

48. Although all the newly independent States in Africa initially possessed democratic constitutions, there has been a tendency throughout the Continent to adopt one party systems of government. In this regard Chief H. O. Davies of Nigeria has said:

> "The ordinary people do not understand party politics, except as a call to war against the members of the rival parties . . .
>
> Broadly speaking, the African Parliamentarian does not understand the meaning or function of the Opposition. He believes that once a leader has been elected, he is in for good and everybody must accept his leadership. He tends to regard the opposition member as a saboteur who should be hounded out of the political arena [1]."

Consequently, in at least 15 of the independent States in Africa south of the Sahara, there is at present no parliamentary opposition [2]. This situation has in some cases resulted from overwhelming public support for one party, but has mainly been achieved by legislation, including, in some instances, the proscription of opposition parties.

This attitude on the part of governing parties was referred to by an American political scientist, who is said to have defined African democracy as "one man, one vote, once" [3].

49. The Africanization of the Public Service has been a prolific source of dissatisfaction in many African States and territories. The newly independent territories in Africa have generally embarked on a more-or-less ambitious programme of "Africanizing" their Public Service; that is, replacing European or Indian personnel with Africans. The inevitable effect of this process has been to reduce the standard of efficiency of the service. Reference has been made to this aspect by Sir Patrick Renison, in the passage quoted in paragraph 46, *supra*. In regard to Tanganyika, Gwendolen M. Carter says:

> "In practice, it seems generally admitted that Africanization has affected the efficiency of the Tanganyika civil service, though to what extent remains a matter of debate [4]."

And in the "Report of the Seminar on Urgent Administrative Problems of African Governments", submitted to the Economic Commission for Africa during its fifth session held in Leopoldville in February-March 1963, the following appears:

> ". . . while there may be differences in timing and intensity, the basic problems with which this paper deals are similar in kind and Africanisation has proceeded rapidly everywhere.

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[1] Chief Davies, H. O., "The New African Profile", in *Foreign Affairs*, Jan. 1962, p. 297.

[2] Ghana, Tanganyika, Chad, Guinea, Liberia, Congo Republic (Brazzaville), Gabon, Central African Republic, Burundi, Dahomey, Ivory Coast, Mali, Upper Volta, Niger, Senegal.

[3] Houghton, D. H., "Africa through American Eyes", in *Optima*, Sep. 1963, p. 112.

[4] Carter, G. M. (ed.), *African One-party States* (1962), p. 463.

> The product of so rapid and extensive a staff turnover is, then, a young, inexperienced and largely untrained Civil Service, struggling to cope with an ever expanding range of governmental programmes through institutional devices and patterns largely unsuited to the situation [1]."

Further references will be made to the Africanization of Public Services in the part of the Counter-Memorial dealing with Applicants' complaints regarding the general administration of South West Africa. At present, Respondent merely wishes to emphasize that such a process necessarily leads to a decline in the general standard of administration.

50. As a consequence of the Africanization of the Public Services, and the evacuation of settled White communities, new States frequently run into economic difficulties. Reference has been made to this problem in Kenya [2].

In an earlier passage out of the article by Sir Patrick Renison than the one cited in paragraph 46, *supra*, it was stated:

> "In a population of about eight million, there were, at the peak, only about 65,000 Europeans and rather more than double that number of Asians. But an extraordinarily large part of the economy depends upon them, and if they find they cannot make a life of it in an independent Kenya, not only will there be all the human problems of exodus for people who have no other home, but it is difficult to see how the African leaders will find the revenue to prevent a catastrophic drop in the whole standard of African living, not to speak of the abandonment of all their dreams and promises of accelerated development and welfare [3]."

In the former Belgian Congo, the departure of Europeans also exercised a strong adverse influence on the economic life of the country [4].

It will be apparent that the feature referred to in this paragraph constitutes a vicious circle—the economic depression caused by the exodus of Europeans in turn results in a further White emigration.

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[1] *U.N. Doc.* E/CN. 14/180, Annex IV, pp. 121-122.
[2] *Vide* para. 46, *supra*.
[3] Renison, *op. cit.*, p. 9.
[4] *Vide* Legum, C., *Africa, A Handbook to the Continent* (1961), pp. 199-200.

CHAPTER VII

RESPONDENT'S POLICIES: POST-WAR ADJUSTMENTS

1. As has been indicated in the aforegoing exposition, Respondent did not set about its task of administering South West Africa with a set of fixed and unalterable ideas, or with a policy based on an inflexible political or economic philosophy. The policies and practices adopted and applied have always been moulded with reference to circumstances as they existed in the Territory, and were aimed at finding such methods of achieving the ideals of the Mandate as might best be suited to circumstances and conditions in the Territory. In forming its considered views in this regard, Respondent was frequently influenced by experience gained in South Africa itself in regard to comparable problems and policies aimed at their solution, and also by instructive indications afforded by events, tendencies and policies in other parts of Africa and the world at large. But any translation of such experience and indications into action in South West Africa occurred solely on the basis of due adaptation to the needs, interests and circumstances of that Territory and the principles and objectives of the Mandate.

2. Events during and after the Second World War in the world at large, and in other parts of Africa in particular, as discussed above, have had their repercussions also on the conditions and problems in South West Africa to which regard has been and is to be had by Respondent in the formation and application of its policies. And just as Colonial and Administrative Powers have throughout Africa found adaptations to be necessary and desirable in regard to policies and the manner and tempo of their application, so the need and desirability of adaptations in South West Africa have become apparent to Respondent. Fundamental objectives, and tried and tested methods of approach, have required no change. But adaptation has been found desirable particularly in regard to clearer formulation of the methods whereby ideals may ultimately be attained, and in regard to the pace at which further progress towards such attainment is to be attempted.

3. There are several factors which have paved the way for such adaptations in South West Africa. Though progress in various spheres has been relatively slow, for reasons indicated earlier, certain aspects of progress have brought the situation as a whole out of the primary and elementary stages of the early years of the Mandate to a phase in which both the economy of the Territory and the receptivity of the indigenous peoples render possible a hastening of the pace of advancement.

Perhaps the most important single factor operating in this regard, however, is that of awakened political consciousness on the part of an increasing number of members of the Native groups of South West Africa. It is no longer true, as it was in the pre-war days, that the Native peoples of Africa show little or no interest in the processes of central government of their respective territories, or that they appear to accept as natural their rule by the White man as far as those processes are concerned. Increasing numbers of Natives desire participation in such processes; and experience in other parts of Africa has shown that partici-

pation on a minority basis, or as a junior partner, never satisfies nationalistic demands for any length of time [1]. On the contrary, such expedients only seem to act as a spur for demands for more and more, faster and faster, stopping only at complete political domination of the whole territory by its African population on a basis of universal adult suffrage—or, as has frequently happened, by a clique of Africans who manage to secure dictatorial control through exploitation of the awakened nationalistic sentiments of the masses.

These, then, are the altered factual circumstances under which Respondent is to continue to promote to the utmost the well-being and progress of "*the inhabitants*", without exception, of the Territory.

4. From what has been set out in the aforegoing, it will readily be appreciated that the problem of finding suitable adaptation, in consonance with the ideals and objectives of the Mandate, has not been an easy one. In making the statement cited above about a "relatively easy" solution in some parts of Africa [2], the South African Prime Minister, Dr. Verwoerd, added the following:

> "Those who find it easy there and do not realize the great difference between the two situations, are unfortunately tempted to wish to transplant that solution to South Africa [3]."

The Prime Minister was contrasting the solution for the particular territories with a solution for South Africa itself—which, of course, is not a matter in issue in this case. But in principle a similar contrast is valid as regards South West Africa, as will be apparent from the above exposition of circumstances and conditions in the Territory, the differences and relations between its population groups, and the historic development of present situations.

If, without preconceived ideas about any policy, slogan, creed, dogma or philosophy, a solution is sought for the specific problem of South West Africa, what answers present themselves? Are the aims to be set at self-determination for the peoples of the Territory as a first priority, regardless of real ability on the part of some of them to "stand by themselves under the strenuous conditions of the modern world"? [4] If so, would that not involve abandonment of one of the basic premises and objectives of the mandate system? Could self-determination, in any just and equitable sense, be obtained by the expedient of artificially regarding the peoples of South West Africa as a unit, the majority of which must determine the future of the whole Territory and all its inhabitants? Would that not in fact mean that "self-determination" by some groups could involve a total negation of self-determination for others? What moral justification could there be for the Ovambo people, by virtue of their superiority of numbers, to be able to determine the future of the Nama, living in a part of the country which the Ovambo had never occupied or attempted to occupy, and to which they had never laid claim—or the future of the Caprivi peoples who, by a mere accident of history, over which they could not exercise the slightest control, had been artificially severed from their kinsfolk in surrounding

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[1] *Vide*, e.g., para. 22, *infra*.
[2] *Vide* Chap. VI, para. 35, *supra*.
[3] Address to the South Africa Club, London, in *Fact Paper 91*, Apr. 1961, p. 12.
[4] Art. 22 (1) of the Covenant of the League of Nations.

areas and made an appendage of a territory of which their area did not even geographically form part? Must the past and present contributions of the White population group in regard to economic and other development of the Territory, under circumstances where their presence for such purposes was necessary and encouraged, count for nothing in a form of "self-determination" which could flood their wishes and interests in a sea of African nationalism? Must the sacred trust, the protection of which will still be needed for a considerable time to come by the most primitive groups like the Bushmen, the Himba and the Tjimba, be abandoned and such groups left to their fate in what would amount to an experiment with, at best, an uncertain outcome?

Such questions can be multiplied, but for present purposes the above should suffice. They illustrate how extremely complicated the problem is in the specific circumstances of South West Africa, and how utterly inappropriate the type of solutions found suitable in respect of other African territories.

5. In seeking a just and practicable solution, Respondent considers itself bound in honour, if not in law, to observe the principles and approach of the mandate system in terms of which it assumed a sacred trust in respect of the "peoples" [1] of South West Africa. As has been observed above, the emphasis under that system fell very strongly, in practice as well as in theory, on the advancement of peoples to a stage where they could indeed "stand by themselves"—economically, educationally and socially as well as politically—as a pre-requisite to a mature political act of self-determination [2]. The General Assembly of the United Nations, in December 1946, relied heavily on the political aspect of this approach in rejecting the proposal made at the time by Respondent in regard to possible incorporation of South West Africa in the Union of South Africa. It will be recalled that consultation of the Native groups had resulted in an overwhelming majority in favour of incorporation [3], and that the resolution adopted by the General Assembly contained the following paragraph relative to this aspect:

> "*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 [4]."

6. Moreover, Respondent is as mindful as any other State of the objectives regarding underdeveloped peoples as set out in the Charter of the United Nations—in contrast to interpretations and applications later sought to be given to the Charter by some States for the purposes of an emotional "anti-colonialism" campaign. Respondent has already drawn attention to certain aspects of the undermentioned provisions of the Charter [5], and would again like to stress the following in regard to them:

Article 73a, whereby members administering non-self-governing terri-

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[1] Art. 22 (1) of the Covenant of the League of Nations.
[2] *Vide* Chap. VI, para. 26, *supra*.
[3] *Vide* Book II, Chap. II, para. 43, of this Counter-Memorial.
[4] I, p. 44.
[5] *Vide* Chap. II, para. 23, *supra*.

tories undertake to ensure the political, economic, social and educational advancement of the peoples concerned, their just treatment and their protection against abuses, is qualified by the words ". . . *with due respect for the culture of the peoples concerned*". (Italics added.)

Article 73b, setting out the undertakings "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", qualifies all this by the words ". . . *according to the particular circumstances of each territory and its peoples and their varying stages of advancement*". (Italics added.) The concept "peoples" (plural) of "each territory" (singular) is of special interest.

Article 76b, setting out some of the basic objectives of the trusteeship system as being "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", proceeds to state the qualification ". . . *as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned* . . .". (Italics added.) Again the expression "each territory and its *peoples*" is specially notable.

7. Due application of the above principles and objectives to the problems posed by the circumstances of South West Africa, has led Respondent to shape its policies in such a manner as to make provision, as far as practicable, for each of the major ethnic groups to achieve an increasing measure of self-government and to develop towards self-determination in a political and territorial entity of its own. Only thus, in Respondent's view, and through reasonable subsequent co-operation between the entities, especially in the economic sphere, can self-determination, "the freely expressed wishes of the peoples concerned" and "development to the utmost" become meaningful realities "according to the particular circumstances of [the] territory and its peoples and their varying stages of advancement".

8. The policy (or aggregate of detailed aspects of practices and policies) designed to promote the objectives set out in the previous paragraph, can for convenience be called by the descriptive name of separate development. This is the name also employed for a similar, though not identical, policy approach to similar problems in the Republic of South Africa itself regarding future relationships between a multiplicity of population groups. Alternative descriptive expressions that have been employed are "Harmonious Multi-Community Development" [1], and "Live and Let Live" [2].

Respondent, for reasons to be indicated, prefers not to use the name "apartheid" employed by Applicants in their Memorials [3]. "Apartheid" is a coined word, the equivalent of which in English would be "separate-

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[1] Dr. Eiselen, W. W. M., "Harmonious Multi-Community Development", in *Optima*, Mar. 1959, p. 1. Dr. Eiselen was at that time Secretary for Bantu Administration and Development.

[2] Address by the South African Prime Minister, Dr. H. F. Verwoerd, in his address to the South Africa Club, London, in *Fact Paper 91*, Apr. 1961, p. 14.

[3] I, pp. 108-109; para. 109, p. 138; para. 154 (3), p. 151; para. 158, p. 153; and para. 189, p. 161.

ness", i.e., the state of being separate or apart. By its protagonists in South African politics, the word was used as a name for what may be termed an earlier stage of evolution of the policy of separate development, in order to distinguish that stage from a yet earlier one generally called "segregation". Thus the late Dr. D. F. Malan, in 1944, as Leader of the Opposition—four years before becoming Prime Minister of the Union—stated the following in the House of Assembly in regard to the approach to race relationships which he was advocating:

> "I am purposely not using the word 'segregation' because that implies a certain amount of detachment [1] . . . Separation (apartheid) affords the opportunity [to] those who . . . stand on their own feet . . . to improve themselves on the foundation of what is their [own] [2]."

In course of time, however, the word "apartheid" came to be very much more abused and vilified by political opponents and critics, at home and abroad, of post-1948 South African governments, than "segregation" had ever been. What is important for present purposes, is the confusion that has been engendered through the use of the word in a variety of different connotations. It came to mean whatever particular facet of policy, practice or action, real or imaginary, the critic in question might have had in mind. Through factors of causation which are themselves a subject of controversy in politics, and which need not now be considered, "apartheid" came to be regarded widely as synonymous with or indicative of some form or other of racial oppression—which, as indicated above, was the very opposite of what was sought to be conveyed thereby by Dr. Malan when he first began to use the word. It was also the very opposite of the objectives for which the policy under that name was in fact conceived, as will be demonstrated.

In the light of the aforestated, it is significant that Applicants themselves have considered it necessary to give their own definition of what they seek to convey by the word "apartheid" [3]. Respondent will deal specifically with the accusations and charges involved in that definition and in the elaboration thereof in Applicants' more detailed allegations. But in order to stay clear of the sphere of confusion and controversy mentioned above, which is in any event not in issue in this case, Respondent will in its own account as far as possible avoid the use of the word "apartheid".

9. Respondent does not propose to attempt anything approaching a full or detailed exposition or even sketch of the development, contents and implications of policies relating to group relationships in South Africa itself, as would be necessary if those policies themselves had been, on some legal basis or other, a matter for judicial pronouncement. Nevertheless, in view of a certain measure of inter-action between policies in South Africa and South West Africa, of the nature and within the limits that have been indicated above [4], and with a view to illustration, some brief reference is necessary to certain specific aspects of policies in South Africa.

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[1] The Afrikaans word used by Dr. Malan was *afhokking*, which connotes separation into "cages", i.e., into enclosed or sealed-off units.

[2] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 49 (1944), Col. 6695.

[3] *Vide* I, Chap. V, para. 2, pp. 108-109, and Chap. V, para. 189, p. 161.

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

10. Historically, as from about the seventeenth century, Europeans and Native or Bantu groups converged in relatively small numbers on what was then a nearly empty part of the African Continent—the part which later became the Union and eventually the Republic of South Africa, together with the British Protectorates of Basutoland, Swaziland and Bechuanaland. The Europeans came from the south and the Bantu from the north, and on the whole the tendency was for each to settle in separate and distinct parts of the country, the various Bantu groups *inter se*, with few exceptions, also keeping apart from one another. There were clashes and frontier adjustments in border areas, but, as was stated by Dr. Verwoerd in his above-mentioned London address in 1960:

> "The White man did not use his power to overrun and acquire black man's country. In fact ... the White man deliberately reserved it for him and endeavoured (mostly in vain) to train him to make the best use of it, as he did with his own, and to such good purpose that the black man came to him for employment, food and the good things of life, and not for political conquests [1]."

11. It was on the basis of this historical background that, after the formation of Union, the policy generally known as segregation, and referred to by General Smuts in his 1917 address in London [2], was sought to be founded and promoted, with the expectation, as General Smuts said, that "it may take a hundred years to work out" [2]. A fundamentally important step in this direction was the passing by Parliament of the Natives Land Act, 1913 [3] in terms of which certain areas were set aside and scheduled as Native Reserves. The areas initially thus affected were progressively added to in later stages, pursuant to recommendations by Commissions of Enquiry [4] and eventually in terms of the Native Trust and Land Act, 1936 [5], mainly through purchases by means of public funds of land owned by Europeans. Forms of self-government in such Native areas were provided for and encouraged, but subject to "The paramount position of the European population *vis-à-vis* the native ... in a spirit of Christian guardianship" [6].

12. The stage of development to be known as "apartheid" was born of the view held by leaders of Dr. Malan's National Party, during and immediately after the Second World War, that the existing policy of segregation had undue limitations as a means of reconciling the natural development potential and national aspirations of the Bantu with the equally natural desire of the White population group to preserve its identity and way of life. Horizons for the Bantu were, in the earlier views of the situation, considerably limited—a factor becoming of increased importance with advancement in Bantu education and with accelerated influx of Bantu to European areas for purposes of employment in industry and other phases of the white man's economy. So, e.g., under the segregation policy, General Hertzog had indicated that in his view the

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[1] Address to the South Africa Club, London, in *Fact Paper 91*, Apr. 1960, p. 10.
[2] *Vide* Chap. IV, para. 36, *supra*.
[3] Act No. 27 of 1913 in *Statutes of the Union of South Africa 1913*, pp. 436-448.
[4] Neame, L. E., *White Man's Africa* (1952), p. 38.
[5] Act No. 18 of 1936 in *Statutes of the Union of South Africa 1936*, pp. 90-142.
[6] Basis of policy adopted in 1915 by the National Party of General Hertzog, who was to become Prime Minister from 1924 to 1939—*vide* Pirow, O., *James Barry Munnik Hertzog*, p. 198.

Native areas would "never become the independent or semi-independent Native states which certain natives sometimes refer to" [1]. In the economic sphere Natives who had attained educational standards above the average, were often frustrated in that the somewhat static economies in the reserves offered no scope for them, whereas in the White man's economy avenues were closed through reactions born of historical social distinctions—e.g., unwillingness of Europeans to serve under a Native superior, preference for Europeans in the more advanced spheres of employment and in the utilization of professional or artisan services—as well as by reason of understandable inability of such Natives to succeed on their merits in open competition with Europeans. The National Party leaders saw in this situation an unfair curb on the reasonable aspirations of the Natives, and a threat of growing demands for increased participation in political and governmental institutions on an integrated basis with the White population, leading eventually to political and attendant domination of the whole country by the Natives by reason of superiority of numbers.

13. It is against the above background that the significance will be appreciated of the following extracts from a declaration issued by Dr. Malan's National Party in 1947, i.e., shortly before the election which brought that party into office in 1948:

> "It [apartheid] is a policy which sets itself the task of preserving and safeguarding the racial identity of the White population of the country, of likewise preserving and safeguarding the identity of the indigenous peoples as separate racial groups, *with opportunities to develop into self-governing national units*; of fostering the inculcation of national consciousness, self-esteem and mutual regard among the various races of the country.
>
> The choice before us is one of these two divergent courses: either that of integration, which would in the long run amount to national suicide on the part of the Whites; or that of apartheid, which professes to preserve the identity and safeguard the future of every race, *with complete scope for everyone to develop within its own sphere while maintaining its distinctive national character*, in such a way that there will be *no encroachment on the rights of others*, and *without a sense of being frustrated* by the existence and development of others." (Italics added.)

Further, under the heading "General Guiding Principles",

> "... the party undertakes to combat any policy, doctrine or attempt calculated to undermine or endanger the *continued existence of the White race*. Conversely, however, the party *rejects any policy of oppression or exploitation of the non-Whites by the Whites* as incompatible with the Christian character of our people and therefore unacceptable." (Italics added.)
>
> "Within their own areas the non-White communities will be afforded full opportunity to develop, implying the establishment of their own institutions and social services, which will enable progressive non-Whites to take an active part in the development of their own peoples. *The policy of our country should envisage total*

[1] *Die Burger*, 4 Dec. 1925, pp. 7 and 8.

apartheid as the ultimate goal of a natural process of separate development [1]." (Italics added.)

It is of interest to note, also, that in 1948 General Smuts' United Party declared that it was "not in favour of a policy of equality or assimilation", but stood for "European leadership and authority and reaffirms the principle of Christian trusteeship towards the Native peoples as a permanent part of the population" [2].

14. In view of the two-fold aspect of the policy approach indicated in the above extracts from the National Party declaration, viz., the preservation of the identity of the White population group, and the provision of greater scope, in separate communities, for the development of the non-White peoples, it will be readily understood that in particular expositions by political leaders, and in particular legislative measures or administrative action, the accent would sometimes fall to a greater extent on the one aspect, and sometimes to a greater on the other. It must, moreover, be borne in mind that the policy was one of transition from general acceptance of the idea of White supremacy as an indefinite projection into the future, to acceptance of the fact that this idea had outlived its acceptability, and must yield to a policy which provides for eventual achievement of national aspirations on the part of the Bantu peoples.

It may be that the factors just mentioned contributed in part—together with wrong factual assumptions, emotionalism and rank distortions—to misconceptions of the nature that have been mentioned above [3], whereby "apartheid" was not only understood in different senses, but associated with racial oppression. Thus in 1950, Dr. Verwoerd, at that time Minister of Native Affairs, had occasion to say the following in an address to the Native Representative Council:

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

15. On the whole, however, while there was acknowledgement in principle of full opportunity for the Bantu to develop into self-governing national units [5], and of their right to supremacy in their own areas [6], there was in the earlier post-1948 years no official announcement, as a matter of practical politics, of complete political independence of Bantu homelands as an attainable ultimate stage of development.

The general formulations of policy and principle were wide enough to include the possibility of such an end result, and there can be no doubt about its being contemplated by the National Party leaders as logically inherent in the policy they were advocating. But explicit formulation

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[1] Krüger, D. W., *South African Parties and Policies 1910-1960* (1960), pp. 402-403.
[2] *Ibid.*, p. 408.
[3] *Vide* para. 8, *supra.*
[4] Grobler, J. H., *Africa's Destiny* (1958), p. 89.
[5] *Vide* para. 13, *supra.*
[6] *Vide* para. 14, *supra.*

and public announcement at first remained in abeyance, for various reasons. These concerned mainly the need to proceed, in the matter of practical application, by progression, in accordance with the fruition of preparatory steps paving the way for each successive stage. A factor of particular importance to be kept in mind was the level of advancement, receptivity, readiness to co-operate, and psychological approach generally of the Bantu peoples themselves. A pace too far in advance of stages of development attained in these respects, could have wrecked the whole project, or could at least have set the clock back considerably.

16. As early as 1950 Dr. Eiselen [1] outlined certain of the steps that were required to be taken in the promotion of a policy of separate development, writing in that regard, *inter alia*, as follows:

> "Separation as defined above represents an aim which cannot be achieved without a constructive policy, a policy making people ready for separation. Preparing millions of people for an independent form of life is a tremendous task, which requires careful planning and thereafter working to a constructive programme of purposeful action [2]."

As examples of the constructive steps to be taken, the author mentioned firstly the building-up of "self-supporting native communities in certain carefully chosen areas", whereby a desire would be created "among the natives in general for similar opportunities of self-realisation", and, secondly, adjustment of its economy by the European community with a view to functioning with a progressively decreasing supply of "cheap labour". He proceeded:

> ". . . the success of the policy of separation will be determined, on the one hand, by the willingness of the European to guide and to assist the natives during the initial stages, and, on the other hand, no less on the ability of the natives themselves to profit by such guidance and help. Separation, therefore, depends on constructive education, a process much more comprehensive than the literary training offered in our native schools to a minority of children of school-going age. Such education cannot be given overnight, more particularly as the teaching personnel too will have to adapt itself to the new requirements [3]."

17. Successive stages of preparation [4], were duly reached, as will be briefly indicated later in this Chapter [5]. And thus the stage was set for Dr. Verwoerd, as Prime Minister in 1959, in an historic address to the House of Assembly, to announce unequivocally the practical acceptance of the logical conclusion, viz., independence for separate Bantu states as an attainable end result. The Prime Minister, *inter alia*, stated explicitly:

> "Indeed we regard the territorial authorities . . . [in the Bantu areas] as *independent bodies in the first stage of development*. There are a number of unpopular control methods which the guardian exercises

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[1] *Vide* para. 8, *supra*.

[2] Eiselen, W. W. M., "Is Separation Practicable?", in *Journal of Racial Affairs*, Jan. 1950, p. 13.

[3] *Ibid.*, pp. 13-14.

[4] More or less in accordance with those foreshadowed by Dr. Eiselen.

[5] *Vide* paras. 36 and 41-49, *infra*.

at the moment only in order to guide them along that road, but which will lapse as they advance from one stage to another [1]." (Italics added.)

And in his abovementioned London address of April 1961 the Prime Minister concluded by saying:

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

South Africa will proceed in all honesty and fairness to seek—albeit by necessity through a process of gradualness—peace, prosperity and justice for *all* by following the model of the nations which in this modern world means *political independence coupled with economic interdependence* [2]." (Italics added.)

In the light of the aforegoing, certain relevant, basic aspects of the policy of separate development as it has evolved in South Africa, can briefly be emphasized, as in the next succeeding paragraphs.

18. *The policy is not one of domination*, but its very antithesis, viz., one aimed at the evolutionary termination of the supremacy of the guardian and the emancipation of the wards. In so far as it involves continued control by the guardian over the wards, this is a necessary arrangement of a temporary, transitional nature only, continued with express acknowledgement of the principle that it is exercised "only to guide them along the road" and that "it will lapse as they advance from one stage to another" [1].

In his London address of April 1961, after stating the concept of "our population groups to be controlled and governed by themselves, as nations are", with possible co-operation as in a Commonwealth or economic association [2], Dr. Verwoerd proceeded:

"Where is the evil in this? Or in the fact that in the transition stage the guardian must needs keep the ward in hand and teach him and guide him and check him where necessary? This is separate development [2]."

19. *The aim of the policy is to secure justice for all, on a basis of potential equality and freedom.* The policy indeed rests on acknowledgement of the just claims and moral rights of each group to advancement, *inter alia*, towards self-government and independence, but with due recognition of the need to strike a balance between competing or conflicting claims or aspirations of comparable moral value, resulting in some necessary measure of abatement of each of such claims.

"To judge the morality of a policy it must be remembered that in all ethics a balance must be struck between different values, different rights. Absolute right for the one may mean tremendous injustice to the other [3]."

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[1] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 99 (1959), Cols. 63-64.

[2] Address to South Africa Club, London, in *Fact Paper 91*, Apr. 1961, p. 14.

[3] Address by Dr. Verwoerd to South Africa Club, London, in *Fact Paper 91*, Apr. 1961, p. 9.

Failing such balancing and abatement, the situation arises of an emancipated people governing not only itself but other peoples as well. As was stated in 1960 by Sir Charles Arden-Clarke, experienced Administrator in Africa and last Governor-General of the Gold Coast:

> "The question in East and Central Africa is not really one of Africans governing themselves: it is one of Africans governing people of other races. If they misgovern badly, they will injure not only the Europeans and Asians but themselves [1]."

20. *The objects and aims of the policy are in principle the same as those professed for suggested attempts at bringing about an integrated, multi-racial State*, as will be obvious from the previous two paragraphs. But the methods employed are diametrically opposed, because of the belief that attempts at a multi-racial community cannot, in the African context, succeed in achieving the objectives of justice, equality and freedom for all.

It is therefore not true, as is often represented, that in its moral outlook and idealistic objectives the policy of separate development runs counter to modern conceptions of human rights, dignities and freedoms, irrespective of race, colour or creed. On the contrary, these very conceptions underlie the policy, and its objectives are to achieve an end result obviating all domination of groups by one another. The difference between protagonists of this policy and their sincere opponents (i.e., excluding those motivated by ulterior considerations) concern only questions of means: which of the two methods, attempted integration or separate development, is calculated better to achieve the common ideal?

The following are some extracts, relevant to this topic, from an address by the Prime Minister to the House of Assembly of the South African Parliament on 23 January 1962:

> "... either it is not realized that there are two ways, not one, of applying the principles on the basis of which one can satisfy moral arguments, or that fact is deliberately shut out of their thoughts. The one is by way of a multi-racial state and the other by way of separation, that is to say, where there is a separation within states or amongst communities. Let me illustrate that with an example. There is the franchise principle or even that one form of it, namely 'one man, one vote'. You can have the franchise on the basis of 'one man, one vote' in a multi-racial state but you can also have voting rights for each group even on the basis of 'one man, one vote' where a separation is brought about in the political life of those groups. It is possible therefore to give effect in two ways to the principle on which people rely so much, namely, the principle of human dignity, of the right to vote. The difficulty is this: There are people ... who advocate one method, a multi-racial state, and there are others who advocate the path of separation as the method to comply with all those lofty principles. That is the issue about which the struggle is being waged. The problem therefore is how to give political rights in South Africa on a sound basis and in a way which is fair and suited to each group [2]."

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[1] Arden-Clarke, C., "The Changing role of White leadership in tropical Africa", in *Optima*, Dec. 1960, p. 181.

[2] *R. of S.A. Parl. Deb., House of Assembly*, 19 Jan. to 26 Jan. 1962 (Weekly edition), Col. 69.

In the course of mentioning advantages of a policy of creating separate states, Dr. Verwoerd stated:

> ". . . it could offer an opportunity of developing equalities amongst the groups. It could satisfy the desire for the recognition of human dignity. Because just as it is possible for us to live with the Black states on a basis of equality as separate states, to negotiate with each other and to help each other when necesasry, so it would also be possible here if separation could be put into effect [1]".

And further:

> ". . . the creation of states has brought with it contentment, not only in the present age but right throughout history. In what way has satisfaction been given in Africa, notably in our time? Africa has been given satisfaction through the creation of states, and where there is conflict that is as a result of the fact that these new states are not states which embrace national entities but which have state boundaries cutting right across national entities. There they have trouble. Difficulties arise where the founders try to throw together in one state more than one national community. Whenever account has been taken of national entities when creating new states, contentment has been the result [1]."

Reverting to South Africa he stated:

> "It is as unlikely that it will be possible to hold together the Whites and the Bantu in peace and free of strife in one multi-racial unit as it is to do so in the case of Black nations in other parts of Africa or as it is to throw together Xhosa, Basuto and Zulu without conflict into one communal entity. They too are just as proud of their own national identity as we as Whites are of our national identity . . .
>
> Any attempt to force different communities into one national entity will never succeed. Suppression will be possible but never co-operation between separate groups who desire to remain separate. The White man the Coloured and the Indian can only be pushed out or absorbed. Just as little as it is possible in Tanganyika, from which more was expected, just as little as it is possible in Kenya, from which less is expected, and just as little as it is possible in the Federation where fear and anxiety are gripping the hearts of the people because they realize which way things are heading, so little will it be possible in South Africa to get the groups to live separately and to co-operate on a basis which will be fair in a multi-racial state. In other words, it is only the policy of nation building, the policy of good neighbourliness which can hold out any hope that one will be able to eliminate racial hatred which cannot be eliminated in an enforced multi-racial state [2]."

21. The basic view that it will not in practice be possible for Europeans and Africans to govern a common homeland jointly, in a manner which is fair and satisfactory to both, is one that is steadily and continually gaining support, not only in the form of comment by students of the problem, but also by proof through actual, current events.

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[1] *R. of S.A. Parl. Deb., House of Assembly,* 19 Jan. to 26 Jan. 1962 (Weekly edition), Col. 71.

[2] *Ibid.,* Col. 72.

The realization is breaking through that the protagonists of multi-racialism can point to no single instance where their idea has in practice succeeded, or is even showing signs of success, in cases where the population groups in question differ so greatly as is the case with Europeans and African Natives.

Thus H. V. Hodson, a former editor of *The Sunday Times*, London [1], wrote in December 1962 of "the problem . . . [in Africa] . . . of finding a way in which people of different races could live and work together under political independence", stating that "This latter problem is *the great unresolved conundrum of Africa. Let us admit that with all our efforts and theories no acceptable solution has been found* [2]." (Italics added.)

W. van Heerden, an accomplished South African newspaper editor and student of African Affairs, wrote in June 1962:

> "Race consciousness, race antagonism and race ambitions are everywhere blasting to futility the efforts in different territories to generate bi-racial or multi-racial nationhoods. *In not a single African territory can one, up to now, discern even the beginnings of success* [3]." (Italics added.)

In an article entitled "Black and White Reality" in the *Sunday Telegraph* of 19 May 1963, Peregrine Worsthorne wrote, *inter alia*:

> "The latest evidence in Alabama of how deep, cruel and passionate racial feelings remain, coupled with the recent tragic collapse of Britain's multi-racial experiment in Central Africa, surely raises a grim question which must be burked no longer. Is it reasonable or realistic for men of good will to go on assuming that blacks and whites, at least in the crucial continents of Africa and North America, are ever going to live amicably side by side in genuinely multi-racial societies?
>
> My answer is emphatically 'no'. White men in predominantly black societies are almost certainly going to *become* under-privileged and black men in white countries are going to *remain* so. . . .
>
> It is surely quite unrealistic to imagine that existing white minorities in Kenya or the Rhodesias, or any whites who in future may be tempted, either for reasons of gain or idealism, to go and live in the black States, will receive equal treatment . . ." [4]

The article concluded by suggesting—

> ". . . that a whole host of new ideas might emerge, enormously beneficial to both races, if men of good will henceforth took reality as their point of departure, and worked forward from there, rather than setting their eyes blindly but firmly on a multi-racial goal that each year recedes ever faster into the realm of tragic illusion".

22. Actual events in Africa more than bear out the above comments, and also the following, earlier statement on the same topic by Dr. Verwoerd in his 1961 London speech. Referring to cases of territories

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[1] Now Provost of the Ditchley Foundation, an institution aimed at the furthering of understanding between the British and American peoples.

[2] Hodson, H. V., "Where America and Britain Agree and Disagree about Africa", in *Optima*, Dec. 1962, p. 173.

[3] Van Heerden, W., "Why Bantu States?", in *Optima*, June 1962, p. 60.

[4] Worsthorne, P., "Black and White Reality", in the *Sunday Telegraph*, 19 May 1963.

elsewhere in Africa where White communities of substantial numbers had become settled, he stated, *inter alia*:

> "In the first planning it was accepted that their rights should be fully protected and the idea of partnership was born. This partnership was, for a long time to come, actually intended to be junior partnership for the Blacks and the continued control as senior partner by the Whites. Warnings made no impression on the rulers overseas that this theory would not work out that way, with the inevitable result that the black majorities soon demanded, and are quickly receiving, the right to what amounts to full control with the white man pushed out of politics to all intents and purposes [1]."

The trend of events in this regard in the Congo, Kenya, Tanganyika and Nyasaland are too well known to require recounting [2].

Perhaps the only remaining instance on the continent of Africa where a real attempt is still being made at the creation of a genuine multi-racial community on a basis of partnership between White and Black, is Southern Rhodesia. As will appear from Annex B below [3], the present constitution and franchise arrangements are such as will probably result in a majority of the members of the Legislative Assembly being White for some time to come. But the fact is well known, and has been much emphasized, that this process is likely to be reversed in favour of an African majority in about 15 years' time—i.e., if the present arrangements continue in force. There is overwhelming evidence, however, that this arrangement does not satisfy any African national leader, whether in or outside Southern Rhodesia.

Thus Mr. Joshua Nkomo, a leader of the Zimbabwe African Peoples Union (ZAPU), a major African political party in Southern Rhodesia, told a Committee of the United Nations in the first half of 1963 that—

> "The Africans of Southern Rhodesia did not recognize the Government . . . which had come to power under a Constitution which they had rejected without reservation [4]."

On another occasion he said:

> ". . . all ZAPU branches in Northern Rhodesia, Nyasaland and other countries will be consolidated 'to carry on the struggle we are fighting to run the country, and anything short of that is unacceptable' [5]".

Already in June 1962 the General Assembly of the United Nations had passed a resolution (supported by all African Members) reading, *inter alia*, as follows:

> *"The General Assembly, . . .*
>
> *Considering* that the vast majority of the people of Southern Rhodesia have rejected the Constitution of 6 December 1961,
>
> *Deploring* the denial of equal political rights and liberties to the vast majority of the people of Southern Rhodesia,
>
> *Noting with regret* that the Government of the United Kingdom of

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[1] Address to South Africa Club, London, in *Fact Paper 91*, Apr. 1961, p. 13.

[2] *Vide* in general, Chap. VI, paras. 44-47 and 50, *supra*, and Annex B, paras. 10, 23 and 27, *infra*.

[3] *Vide* Annex B, para. 2, *infra*.

[4] *U.N. Doc.* A/5446, Add. 3, para. 40, p. 12.

[5] The *Star*, 22 Sep. 1962.

Great Britain and Northern Ireland has not yet taken steps to transfer all powers to the people of Southern Rhodesia, as required under paragraph 5 of resolution 1514 (XV),

. . . . . .

2. *Requests* the Administering Authority:

(a) To undertake urgently the convening of a constitutional conference, in which there shall be full participation of representatives of all political parties, for the purpose of formulating a constitution for Southern Rhodesia, in place of the Constitution of 6 December 1961, *which would ensure the rights of the majority of the people, on the basis of 'one man, one vote'*, in conformity with the principles of the Charter of the United Nations and the Declaration on the granting of independence to colonial countries and peoples, embodied in General Assembly resolution 1514 (XV); [1]." (Italics added.)

On 5 August 1963 the Governments of Ghana, Guinea, Morocco and the United Arab Republic submitted a letter and memorandum to the Security Council alleging that the continuance of the constitutional position in Southern Rhodesia "is likely to endanger the maintenance of international peace and security" [2].

23. *The policy of separate development is not based on a concept of superiority or inferiority, but merely on the fact of people being different.* This factor emerges clearly from those that have been discussed in the preceding paragraphs. The point has been made explicitly, e.g., by Dr. Verwoerd in his 1961 London speech as follows: ". . . the Government's policy is not based on people being inferior but being different . . . [3]"

Addressing the House of Assembly in the South African Parliament in June 1961, Mr. M. D. C. de Wet Nel, Minister of Bantu Administration and Development, stated as follows:

"The traditional approach has always been a policy of recognizing the equal status . . . of the Bantu, a policy of differentiation . . . but differentiation without inferiority . . . This is my approach to this problem of the Bantu, and it is the basis of the approach of the people of South Africa . . . What is the 'equality' of many of these people who advocate so-called equality? His 'equality' is the retention of what is his own and the condemnation of what is peculiar to the other man. He comes to the Bantu and he says: 'Look, we are equal but we are so equal that you must only speak my language, your language means nothing to me; we are so equal that you have no culture, only my culture counts. We are so equal that we must pray together in the same church but not in your church; it is an inferior church, we must worship together in my church', . . . Our attitude is that there are differences . . . but these are differences which are not accompanied by inferiority [4]."

24. *The policy of separate development is constructive, not destructive.* This factor will also be abundantly apparent from what has been set

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[1] *G.A., O.R., Sixteenth Sess., Supp.* No. 17 A (A/5100 Add. 1), p. 3.

[2] *U.N. Doc.* S/5382, p. 1.

[3] Address to South Africa Club, London, in *Fact Paper 91*, Apr. 1961, p. 8.

[4] *R. of S.A. Parl. Deb., House of Assembly*, 12 June to 16 June 1961 (Weekly edition), Cols. 7994 and 7998.

out in the preceding paragraphs. Dr. Verwoerd, in his 1959 address to the Assembly of the Union Parliament, referred to above [1], stated as follows in this regard:

> "It is on that point which I wish to place all the emphasis: That our struggle is not in the first place destructive, but constructive. We want to build up a South Africa in which the Bantu and the White man can live next to one another as good neighbours and not as people who are continually quarrelling over supremacy [2]."

25. Having regard to the specific problem of the future of South West Africa and its peoples, as outlined earlier in this Chapter, Respondent can by way of solution see no alternative to an approach involving similar objectives and principles to those of the South African policy of separate development, in the respects set out in the preceding paragraphs. Respondent emphasizes in this regard that the approach regarding objectives and principles is the important matter—in regard to detailed policies, measures and practices designed to achieve the objectives and to implement the principles, there must always be a necessary adaptation to the peculiar circumstances of the Territory and the specific principles of the Mandate. The aforegoing reference to policies in South Africa is therefore to be regarded as being merely for purposes of illustration, and not as a matter for adjudication *per se*. By way of recapitulation, brief further reference only is required to the question of possible alternatives, as in the next succeeding paragraphs.

26. One method of approaching the problem may be to abandon all sense of moral responsibility towards minority groups, in favour of the African nationalistic ideal of government of the whole territory by African Natives as representatives of the majority of an integrated electorate—which government could well, sooner or later, become a dictatorial clique.

The minority groups which would thus be left to their fate would include those at the highest and the lowest levels of development. In respect of the latter, there would be no sacred trust, as now in existence, to curb the conduct of the governing group. There would be a danger of the old tribal animosities coming to the surface again, so that, e.g., the Himba and Tjimba might be completely dispossessed of the areas traditionally occupied by them, as they were in part by a Herero group in 1915 [3], and of the Bushmen again becoming hunted as "human vermin of the veld" [4].

As regards the European group, its members would be faced with the alternatives of evacuation from a country which has become their only home, by birth or adoption, which they and their forebears have developed from a desert-like wilderness to its present stage of economic advancement—or, on the other hand, of staying and being ruled by a preponderantly Black African population or a dictatorial clique. Similar considerations, if not to quite the same extent, would apply to the Coloured and Baster communities.

From the population figures set out in Chapter III above [5], it will be

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[1] *Vide* para. 17, *supra*.
[2] *U. of S.A. Parl. Deb., House of Assembly*, Vol. 99 (1959), Col. 66.
[3] *Vide* Book VI, Chap. III, para. 39, of this Counter-Memorial
[4] *Vide* Book III, Chap. II, para. 56, of this Counter-Memorial.
[5] *Vide* Chap. III, para. 5, *supra*.

apparent that the Ovambo is by far the largest population group in the Territory, constituting about 45 per cent. of the total population. Under a system of universal adult or adult male suffrage for the whole Territory as an integrated political entity, the Ovambo group must necessarily be able to gain political control, save in the most unlikely event of all other groups combining to keep them out [1]. Political control by the Ovambo would operate not only in respect of minority groups such as the Europeans, the Coloured group, the Basters, the Nama, the Damia, the Herero and the Bushmen, but also in respect of the whole of the Territory of South West Africa. It may be emphasized again that basically the Ovambo have always been inhabitants of Ovamboland alone, and not of South West Africa as a whole. The more central and southern parts of the Territory formed a battle-field between other groups, and eventually became apportioned between the abovementioned minority groups as their homelands or places of residence. Control by the Ovambo, would therefore in effect mean aggrandisement or colonization on their part—although as a people they have never attempted or aspired at the achievement of such a situation. This would be only one of the anomalies that could arise from the artificial expedient of treating all the population groups of the Territory as an integrated political entity.

It does not seem to Respondent that anyone could seriously suggest that an approach as outlined above would be in consonance with Respondent's obligations under or in pursuance of the Mandate.

27. Another method of approach may be to attempt to establish a multi-racial society on the basis of identical rights for all. In view of the utter failure, noted above, of all such attempts in other parts of Africa, and of the fact that no experiment of this kind has ever succeeded, or is showing any signs of being likely to succeed, it does not seem to Respondent that this alternative can really commend itself. The evidence is overwhelming that African nationalism does not in fact desire such a multi-racial State, that it will not tolerate any process of gradualism aimed at bringing about such a State, and that its only demand is absolute power for African Natives on the basis of their majority. In other words, this second alternative is but a slightly longer drawn out process than the first, but otherwise one involving exactly the same results.

28. The only remaining alternative is therefore that of "live and let live", a policy which seeks to remove the competition and conflicts of interest which lead to friction and a struggle for supremacy in an attempted process of integration, and which seeks to bring about free, self-governing communities which can co-operate with one another as the nations of the world do in matters of mutual economic and other interest.

In the next succeeding paragraphs consideration is given to certain implications of the application of a policy with the above objectives to South West Africa and its peoples.

29. Self-determination for various groups could possibly and fitly be achieved at different points of time. This implication renders unnecessary any delay in the attainment of self-determination by more advanced groups merely because of lack of advancement and maturity on the part

[1] In co-operation with even a relatively minor group such as their neighbours the Okavango peoples, they would have an over-all majority *vis-à-vis* all the other population groups combined.

of other groups. Conversely, it involves for the latter groups the safeguard of retention by Respondent of the sacred trust obligations towards them, after other groups may have chosen independence in the exercise of their right of self-determination—and protection against the threat that "self-determination" by the stronger groups could result in a denial of self-determination to them.

30. An implication inherent in the previous one is that during the transitional stage Respondent must, as guardian, retain control over the various groups until they have reached a level of sufficient maturity for the exercise of self-determination [1].

31. With a view to assisting and guiding various groups towards possible self-determination, development of their political institutions is essential. Respondent proposes in this regard to apply experience gained in the same direction in South Africa, and to guide the groups towards an application of measures whereby an evolution will be possible from traditional systems to others more suited to the conditions of the modern world. Further indications of what is envisaged in this regard will be found later in this Chapter [2] dealing with political rights. Respondent wishes to emphasize, however, the importance which it attaches to the factor of evolution as opposed to revolution. It considers that the traditional basis is not to be discarded suddenly or completely in favour of systems evolved in European or other countries for circumstances and peoples totally different from those of Africa. It therefore favours a course whereby modern elements are grafted upon the traditions and cultures of the particular African groups. Consequently Respondent in this process regards as of vital importance the actual co-operation of the relative groups in the matter of their political advancement, and seeks as far as practicable and equitable to give effect to the wishes of the groups themselves as to the forms which successive stages of advancement are to take [3].

32. It will be evident that the success and also the equity of the solution aimed at through the application of a policy of separate development will rest basically on the apportionment of a sufficient area of South West Africa to each major population group to serve as a homeland for it, in which its members can develop to full self-realization.

History has largely made the necessary provision in respect of the northern Native groups, i.e., the Caprivi peoples, the Okavango group, the Ovambo and the inhabitants of the Kaokoveld. The internecine warfare and strife between some of the more southern groups, and also the armed conflicts during the German regime, did not affect these northern territories and their peoples. Although they have been assisted by Respondent towards improvement of their traditional methods of agriculture and stock farming, their economies are on the whole still of a subsistence nature. In order to cope with the growth of the populations, the standard of economic life in these areas will have to be raised, and this is therefore a matter to which special attention is being directed in the next phase of development. But subject to these qualifications, and possibly to some adjustment of the areas available to the particular groups, the provision

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[1] Compare paras. 17 and 18, *supra*.
[2] Para. 40, read with paras. 36-39, *infra*.
[3] Compare *ibid.*, particularly para. 37.

made for them by history appears to be substantially adequate and fair.

In the case of the Native groups in the Police Zone, different considerations apply. On the assumption of the Mandate, Respondent, as has been indicated, found them in a largely scattered and dispossessed state, except for some provision made during the German regime for places of residence for certain specific communities. As has been indicated, and will be dealt with in more detail later, Respondent has made provision for considerable additional reserves for these groups. Nevertheless, the existing reserves are, *inter alia*, because of the population increases on the part of these groups under Respondent's tutelage, not nearly adequate to serve as homelands in which each group can develop to proper self-realization.

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

33. In the case of all homelands, presently existing and planned for the near future, a scheme of accelerated economic development is also a matter of first priority. This is so not only for the basic reason that the subsistence of a growing population is to be provided for, but also in order to provide individual members of the group concerned, who may have attained a level of education and development above the average, with opportunities to find a proper outlet for their abilities and qualifications. It is in this respect particularly that, in Respondents' view, the policy of separate development offers advantages in the economic sphere far in excess of those involved in any alternative policy. It avoids the possibility of members of one population group feeling themselves threatened by the educational and economic development on the part of others. It avoids, also, the processes of discrimination in the private economic sector which appear to be virtually unavoidable in all cases where attempts are made at encouraging economic integration between groups as divergent as African Natives and Europeans. In order to smooth out transitions to be effected in this regard, and indeed to encourage members of the Native groups to employ their training and capabilities towards the advancement of their own peoples and the development of their own homelands, Respondent will for the time being have to apply certain measures which will, within the economy of the White population group, favour members of the latter group in regard to higher forms of employment and economic activities. Conversely, however, absolute preference, encouragement and protection are consistently being given to members of the Native groups in these same respects in all matters pertaining to such groups themselves and their particular homelands, as will be indicated further in later portions of this Counter-Memorial.

34. For various reasons, progress in the actual implementation of the constructive aspects of the policy of separate development has in South

West Africa been slower than in the Republic of South Africa itself. One of the reasons is that ever since assumption of the Mandate by Respondent, the stage of advancement of the indigenous peoples of South West Africa was always considerably below that attained by many Bantu in South Africa, particularly in the educational and economic spheres. Another important factor has been that, by reason of the specific international obligations undertaken by Respondent in respect of South West Africa, Respondent has been cautious about applying to the Territory any policies operative in South Africa, even with adaptations to local conditions, without first having established their soundness in practice in South Africa itself. This has become all the more necessary in the postwar years, during which application of South African policies to South West Africa has continually met with a barrage of emotionally hostile criticism from some members of the United Nations, particularly African countries. The application to South West Africa of the new methods and policies introduced in Bantu education in South Africa affords an example in point, as will appear from the treatment of education in a later portion of this Counter-Memorial.

35. Respondent has for some time now been convinced that circumstances in South West Africa have also developed to a stage where accelerated and co-ordinated application of the constructive aspects of a suitably adapted policy of separate development has become possible and highly desirable. With this objective in view, Respondent has appointed a Commission of experts of exceptional standing to investigate the conditions of the inhabitants of South West Africa and particularly the non-White inhabitants, and to make recommendations in respect of their further advancement.

The composition of the Commission is as follows:

Chairman: The Hon. F. H. Odendaal, Administrator of the Transvaal;
Other Members: Dr. H. J. van Eck, a leading South African industrialist and economist, and Chairman of the National Development Corporation;
Dr. H. W. Snyman, Professor of Internal Medicine and Vice-President of the South African Medical and Dental Council;
Dr. J. P. van S. Bruwer, Professor of Social Anthropology, who has done much previous research in South West Africa;
and
Dr. P. J. Quin, an agricultural economist and ethnologist, member of the National Nutrition Council, the National Food Research Committee and the National Soil Conservation Board.

Its terms of reference read:

> "Having regard to what has already been planned and put into practice, to enquire thoroughly into further promoting the material and moral welfare and the social progress of the inhabitants of South West Africa, and more particularly its non-White inhabitants, and to submit a report with recommendations on a comprehensive five year plan for the accelerated development of the various non-White groups of South West Africa, inside as well as outside their own territories, and for the further development and building up of such Native territories in South West Africa.
>
> With a view to this investigation, your attention is particularly directed to the task of ascertaining—while fully taking into con-

sideration the background, traditions and habits of the Native inhabitants—how further provision should be made for their social and economic advancement, effective health services, suitable education and training, sufficient opportunities for employment, proper agricultural, industrial and mining development in respect of their territories, and for the best form of participation by the Natives in the administration and management of their own interests. You are empowered to investigate any other matter which in your opinion may be of importance in this connection, including the financial implications and the manner in which any appropriation of funds should take place [1]."

The report of this Commission has been due for some months now, and is expected to be published in the very near future. Unfortunately it has not become available at an early enough stage to be dealt with in this Counter-Memorial. In so far as its recommendations, and the Respondent Government's reactions thereto, will be relevant to the matters concerned in this case, Respondent will at a subsequent stage take the necessary steps, with the leave of the Court in so far as necessary, to present such information to the Court for its consideration.

36. For the reasons given above [2] developments affecting the Bantu in South Africa have progressed further than has been the case in respect of the Natives of South West Africa. A full and comprehensive review of such progress would again be out of place in a case in which policies and practices in South Africa are not in themselves matters for adjudication. The case concerning Article 2 (2) of the Mandate is, however, in essence concerned with questions of intentions or purpose or good faith [3], relative to a sacred trust originally undertaken by Respondent by international engagement. It may therefore, by way of illustration, be instructive to have brief regard to certain aspects of what has been done and accomplished in South Africa, in pursuance of a policy of separate development, independently of any international engagement.

In particular, considerable progress has been made in South Africa in respect of political development. In this regard, Respondent has sought to promote growth from the roots of the indigenous Native institutions. As was said by Respondent's Prime Minister with reference to the policy in respect of political development of the Bantu:

"... a system which has developed over the centuries amongst the Bantu, a system which is known to them, indeed a system which is engraved in their souls and which is incorporated in their own Native laws, is being taken as the starting point for development [4]".

He further said that political advancement—

"... starts with the system which is known to them and which is their own, and that their form of government and freedom will grow and be adapted in accordance with the demands of modern civilization. It will be adapted by the Bantu themselves with the assistance that we can give them [5]."

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[1] Departmental Information.
[2] *Vide* para. 34.
[3] *Vide* Chap. II, para. 14 *in fine*, and paras. 16 and 21, *supra*.
[4] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 101 (1959), Cols. 6215-6216.
[5] *Ibid.*, Col. 6216.

In accordance with these principles, statutes passed in 1951 [1] and 1959 [2] made provision for three types of Bantu authorities, viz., tribal, regional and territorial authorities.

Tribal authorities consist of a captain or chief of a tribe and a number of advisers. As their name indicates, their functions are confined to the sphere of the particular tribe. Regional authorities are established for two or more tribal authorities, from which their members are drawn. Their functions pertain, *inter alia*, to educational institutions, the construction of roads, bridges, canals, dams, etc., supervision of hospitals and clinics and the improvement of farming methods.

Territorial authorities are established for two or more regional authorities so as to comprise Bantu national units. They consist of a chairman, nominated by the State President, and as many members as may be required. The chairman and members are chosen from members of the regional authorities. The functions of territorial authorities, in broadly the same sphere as those of regional authorities, extend over the whole area of the national unit, and enable the authority to speak on behalf of its people.

In the Transkei, in view of a distinctive historical background, there are some slight variations in the composition, powers and names of the authorities corresponding to those in other parts of the country. In this area there are tribal or community, district and regional authorities, and formerly there was also a territorial authority, which has developed further, as will be shown below.

These Bantu authorities have been introduced progressively, and with the co-operation of the Bantu. Today there are no less than five territorial authorities, 86 regional authorities [3] and 445 tribal authorities [4].

37. These Bantu authorities formed part of an evolutionary growth and were not considered to constitute the limit to which Bantu political development could take place. In 1951 already, the then Minister of Native Affairs (now Prime Minister) said:

> "I want, furthermore, to emphasize that the whole process is one of gradual development. We shall make a start by establishing tribal authorities. In areas which may already be ripe for the establishment of a regional authority, that will then be done as soon as possible. In the areas in which the required maturity does not yet exist we shall proceed to the establishment of regional authorities only after the tribal authorities have proved their maturity. As the regional authorities develop and show that they can fulfil the duties entrusted to them and can carry the responsibilities which they will have to carry, the following step can be taken, namely, the development towards territorial authorities . . . When the stage has been reached that territorial authorities are functioning satisfactorily, the possibility of a further stage of development will, in consultation with them, have to be considered and determined [5]."

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[1] Act No. 68 of 1951 (S.A.), in *Statutes of the Union of South Africa 1951*, pp. 1152-1179.

[2] Act No. 46 of 1959 (S.A.), in *Statutes of the Union of South Africa 1959*, pp. 513-531.

[3] Including district authorities in the Transkei.

[4] Including community authorities in the Transkei.

[5] *U. of S.A., Parl. Deb., House of Assembly*, Vol. 76 (1951), Cols. 9809-9811.

As will be seen below, political authority in the Transkei has in fact proceeded further than the stage of a territorial authority.

The acceptance of Bantu authorities by the indigenous population groups and the development potential of this system has been strikingly illustrated by events in the Transkei. In April 1961 the Transkei Territorial Authority adopted a motion calling on Respondent Government to grant self-government to the Transkei and appointed a committee to go into the implications of such a request.

The attitude of Respondent Government to this request, was stated by the Prime Minister as follows:

> "The Government then declared its willingness to grant self-government to the Transkei. Approximately five months after the resolution passed by the Transkeian Authority in May of last year, that is to say, towards the end of last year, I personally met the Executive Council of the Transkei, who were supported by their Councillors, in Pretoria.
>
> . . . . . .
>
> I conveyed to them the Government's willingness to help them in connection with this step, since their own organization apparently considered itself capable of undertaking this task . . . I put it to them, therefore, that I would like to hear from them precisely what type of constitution they had in mind.
>
> . . . . . .
>
> The Government will therefore grant the Transkei self-government. The Transkeian Authority will have to obtain clarity as to its ideas concerning the form and content of the constitution and will then have to come and discuss it with us [1]."

Regarding the composition and constitution of the various governmental organs, the Prime Minister said:

> "If, as indicated by the Basuto and Swazi nations, it is desired that there should be a suitable form of representation through the Chiefs, directly or indirectly, in the Transkei Parliament, then they will have to say so. As far as the Government is concerned, it wants the element of representation to be introduced in one form or another, but as to the details and as to how it is to go hand in hand with the idea of Chieftainship, that is a matter on which the Bantu themselves will have to inform us in the course of consultations . . .
>
> Secondly, this Parliament will have to have an executive body. I do not know whether at this stage the Bantu in that area will be prepared to accept the Cabinet system—that a Prime Minister be appointed who will then himself appoint his other Ministers. As far as the government is concerned, it is prepared to introduce the Cabinet system in the Transkeian Parliament [2]."

The Prime Minister continued by pointing out that the Bantu would have to take an increasing part in the civil service of the self-governing Transkei. In this regard he said:

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[1] *R. of S.A., Parl. Deb., House of Assembly*, 19 Jan. to 26 Jan. 1962 (Weekly edition), Cols. 74-75.

[2] *Ibid.*, Cols. 75-76.

"... it is the intention to help the Transkei Government to replace the White officials, from the lowest grades upwards, as soon as possible, with Bantu officials who have been properly trained.

In conjunction with the Bantu Government, the Department of Bantu Administration and the Department of Bantu Education will try to draw up a programme of replacement as the target to be aimed at over the next five years. In this way increased opportunities will be given to the Bantu in their own territory [1]."

38. The report of the Committee of the Transkei Territorial Authority to which reference has been made above, contained a draft constitution. This draft was accepted by the territorial authority. A Bill giving effect to the proposals of the Committee was subsequently prepared and approved by the territorial authority. The Transkei Constitution Act, No. 48 of 1963, was passed by Parliament and assented to by the State President on 24 May 1963 [2].

The Act confers self-government on the Bantu resident in the Transkei and on certain Bantu related to the Bantu of the Transkei. Provision is made for a legislative assembly and a cabinet as the executive authority. The traditional institutions of government and modern western principles of representative government have been combined in the constitution of the Legislative Assembly, which consists of 109 members, including four Paramount Chiefs of the Transkei and 60 Chiefs as *ex officio* members, and 45 members elected by popular vote.

The Legislative Assembly has been granted wide powers of legislation, including powers regarding direct taxation, Bantu education, agriculture, the establishment, administration and control of inferior courts, the protection of life, persons and property, land settlement, public works, roads and bridges, local authorities, road traffic, labour, welfare services and civil services [3].

The executive vests in a cabinet which consists of a Chief Minister and five other Ministers, all elected by the Legislative Assembly.

The Transkeian Government initially has the following departments under its control:

the Department of Education;
the Department of Agriculture and Forestry;
the Department of Justice (with control over the lower courts; higher courts will be controlled by the present division of the Supreme Court for the Eastern Cape);
the Department of Finance (to be managed by the Chief Minister);
the Department of the Interior;
the Department of Roads and Works.

In December 1963 the Legislative Assembly was constituted for the first time, after an election of its elective members, and a cabinet was formed under the leadership of Chief K. Matanzima, the first Chief Minister of the self-governing Transkei.

39. The majority of Bantu have welcomed the creation of the Bantu

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[1] *R. of S.A., Parl. Deb., op. cit.*, Col. 77.

[2] Act No. 48 of 1963 (S.A.), in *Government Gazette*, Vol. VIII, No. 516, 30 May 1963, pp. 2-48.

[3] *Vide ibid.*, Second Schedule, pp. 44-48.

authorities, and have afforded Respondent an increasing measure of co-operation in developing and extending them. Typical of the attitudes found, is a statement made by Chief Isaac Matiwane in addressing a gathering of chiefs and headmen in the Transkei. He said, *inter alia*:

> "The institutions provided by the Government for the advancement of the Bantu people and to assist them to attain the standard of living reached by the White races, should be safeguarded by the Bantu themselves. The Government desires us to get off its back and start to learn to walk on our own feet.
>
> I wish you to bear in mind that I am now full-mouthed, talking about 'Home', and what is more, I am talking about home in the same way as an Englishman calls England 'Home'.
>
> With a land and home thus guaranteed, our emancipation presents no anxiety at all about the future [1]."

40. Although these systems have not been introduced in South West Africa, a similar development, adapted to the peculiar circumstances of the Territory, is to be expected. In this regard the Prime Minister said:

> "I am not discussing South West Africa now. If, however, UN asks us to do the same for the various communities in South West that we are doing for the communities in the Republic, I shall be only too glad. We shall be only too glad, for example, to do for the Ovambos what we are doing for the Transkei [2]."

41. The development of Bantu political institutions was preceded by, and combined with, considerable progress in the fields of education, housing, welfare services and economics. In addition, political development, already attained and visualized for the future, served as a stimulus for further expansion in the fields mentioned. Some examples will be given in the succeeding paragraphs.

42. In the sphere of education, R222 million (£111 million) was spent between 1948 and 1962. A staff of 28,000 qualified Bantu teachers are at present engaged in the education of 1.6 million Bantu pupils. On Bantu school boards 4,000 parents and on school committees 35,000 parents play an active part in the control of the education of their children, and at the same time receive training in democratic practices [3].

43. Bantu are encouraged to trade in their own areas, and more than 7,000 trading licences have already been issued to them. The more than 500 Bantu authorities [4] will employ Bantu officials only—secretaries, treasurers, clerks, etc. The 80-odd post offices already functioning in the Bantu areas are staffed entirely by Bantu—from the postmaster down to the postman.

In addition, some 7,700 Bantu nurses, 14,000 Bantu policemen and 2,500 other Bantu public servants cater for the needs of the Bantu. The Bantu nurse can advance to matron and the policeman to station commander. Already 40 police stations are manned entirely by Bantu.

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[1] *The Progress of the Bantu People towards Nationhood* (Department of Information), p. 6.

[2] *R. of S.A. Parl. Deb., House of Assembly*, 19 Jan. to 26 Jan. 1962 (Weekly edition), Col. 92.

[3] Regarding the system of Bantu Community schools, *vide* Book VII, Chap. IV, paras. 37-40, of this Counter-Memorial.

[4] *Vide* para. 36, *supra*.

44. As a result of spectacular success achieved with the employment of Bantu ticket clerks at railway stations used predominantly by the Bantu, the Railways Administration has decided to appoint more Bantu clerks to serve their people. Bantu instructors are used in the training of the clerks. Commercial banks successfully employ Bantu tellers in branches and agencies situated in Bantu areas and townships.

45. Also in other respects, Respondent's policies have brought about tangible benefits to the Bantu population. A few examples of this should suffice. Thus, in respect of urban housing, vast improvements have been effected in recent years. At the end of the Second World War chaotic conditions existed in this regard. As a result of unprecedented industrial development during the war and post-war years, and the largely uncontrolled movement of Natives to the towns, vast slums and squatter camps were created adjacent to the industrial centres. To remedy this situation, 133,886 homes were constructed between 1948 and 1960 at a cost of R81,162,280 (£40,581,140) which sum was provided on a loan basis by the Government. In addition, local authorities obtained finances from other sources, with the result that a total of approximately R126 million (£63 million) was employed for this purpose. Rail and transport services cost an additional amount of approximately R109 million (£54,500,000). In building these houses, use was made as far as possible of Bantu artisans, and a special programme instituted to train greater numbers of them. At the same time, vigorous slum clearance projects were implemented.

46. In 1960 a five-year plan of development of rural housing was initiated, in terms of which modern villages are to be built in the Native areas. This programme calls for the construction of 81,505 dwellings in the years 1960 to 1965, and its execution is well under way.

47. Bantu health services cost the Government, Provincial Administrations and Municipalities approximately R40 million (£20 million) per year. Some 72,000 beds are available for the Bantu in South African hospitals. These include Baragwanath hospital, for non-White patients only, mainly Bantu, near Johannesburg, which is the biggest hospital on the African Continent, with 46 wards, 10 surgical theatres, and 2,500 beds. It annually treats nearly 600,000 out-patients, and the 182 full-time doctors in its employ, half of whom are specialists, include 16 Bantu doctors.

48. In 1948 approximately 10,000 morgen of land [1] in the Native areas were under irrigation. By 1960 this had increased to 15,267 morgen. In that year, a five-year scheme was initiated to bring a further 14,911 morgen under irrigation. A scheme of this sort necessarily takes some time to produce results, but nevertheless an additional 2,252 morgen were already under irrigation by the end of 1962.

49. In addition to the specific topics mentioned in the previous paragraphs, development of the Bantu homelands has proceeded in all its aspects, with more and more active co-operation from the Bantu themselves—a matter towards which efforts have continually been directed, particularly through the system of Bantu authorities. Thus ambitious programmes have been commenced, dealing with a variety of subjects

[1] Approximately 8,569 hectares (1 hectare = 1.167 morgen).

such as afforestation, fencing, roads, bridges, dams, boreholes, home industries, crop and stock improvement, social services, etc.

50. In the preceding brief summary, Respondent has given some indication of measures which have been taken in the Republic of South Africa. The success achieved with them has suggested that future developments in South West Africa should take a similar course, although the unique nature of local conditions would naturally require differences in the methods and tempo of application. It is particularly in this respect that the enquiry by the Commission referred to above [1] and programmes which may follow upon its recommendations, are designed to play an important and constructive role in the next phase of development.

51. Respondent is fully aware of the existence of a vast amount of adverse criticism, hostile comment, vilification and abuse directed at its policy of separate development. Much thereof has arisen from wrong or inadequate factual information or assumptions, misrepresentation, partisan political motivation and the like. In particular, Respondent's policies have often been assumed or misrepresented to be founded on the concept of White supremacy, or to be directed at the oppression of the non-Europeans, and condemned on that basis. So, for instance, Mr. R. J. Stratford, a former member of the South African Parliament (in what is now the main Opposition party) who has been living in Europe for the past ten years, is reported to have said on a recent visit to South Africa:

> "Most people overseas were still under the impression that the policy of separate development was aimed at keeping the Bantu down. They did not realise that the policy was aimed at uplifting them [2]."

Direct instances of this particular fallacy are legion, and some examples should suffice. Indeed, this attitude appears from the 1960 Report of the Committee on South West Africa, which referred to "the policy of *apartheid* based on the concept of 'White supremacy' over all other races" [3].

In 1962 the delegate of Ghana told the General Assembly of the United Nations that:

> "... the pernicious system of apartheid continues to be applied, resulting not only in segregation, discrimination and deprivation of basic human rights but also in the complete subordination, to those of a small minority of Europeans, of the interests of the indigenous people who are treated in their own country as outcasts, a source of cheap labour and denied even the solace of education [4]".

A Liberian delegate, in addressing a Committee of the United Nations in 1961 said: "What exactly was 'apartheid'? A doctrine of racial superiority, which held that the Africans were mentally inferior to the whites [5]." As a further example, reference may be made to a statement by the Sudanese delegate in the General Assembly of the United Nations in 1962. He is recorded to have referred to—

> "... the question of the race conflict in the Republic of South Africa

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[1] *Vide* para. 35, *supra*.
[2] The *Pretoria News*, 16 Dec. 1963, p. 1.
[3] I, p. 83.
[4] *U.N. Doc.* A/PV. 1143, pp. 64-65.
[5] *G.A., O.R., Sixteenth Sess., Spec. Pol. Comm.*, 272nd Meeting, 30 Oct. 1961, p. 61.

arising from the policies of apartheid practised by the Government of that country . . . the continuance of this obsolete myth of racial superiority [1]".

52. In addition to the almost automatic condemnation of Respondent's policies based on misapprehensions or misrepresentations of their true nature and purpose, some portion of the total volume of criticism—how much is difficult to say—may well be the product of constructive reflection upon a basis of substantially correct factual information. Where a difficult problem exists, differences of opinion about a solution are to be expected, in accordance with the weight which different observers may attach to various aspects of the situation.

In this regard it is, however, of importance to note that an increasing number of impartial observers who have studied or considered the problems involved, have come to appreciate the positive aspects of Respondent's policy, its true aims and the basic reasons underlying it. The reaction of such observers has been either to approve of Respondent's approach, or alternatively to urge that time be given to enable Respondent to prove its *bona fides* and/or the practicability of its policies. Examples of this are given in the next succeeding paragraphs.

53. Sir Carl Berendsen, former New Zealand Ambassador and delegate to the United Nations, said at Dunedin, after a two months' tour of Africa:

"Until I have found an alternative policy which would do greater justice to all concerned—and I cannot—I do not propose to criticise South Africa's policy [2]."

54. Clarence B. Randall, formerly president of Inland Steel, Chicago, and economic adviser to President Kennedy, wrote in an article entitled "South Africa Needs Time", published in the *Atlantic Monthly* of May 1963:

"*Apartheid* is conceived of by the government of South Africa as a 'separate and parallel' development, and to implement it the government is creating Bantu states or provinces, where complete self-government will be not only permitted but encouraged, after a period of transition. The ultimate objective will be a dual commonwealth in which the Bantustans will be constituent units . . .

Self-government is to be developed on the basis of tribal traditions, the objective being full democracy, but in the form most readily assimilated by the African . . . Next year general elections will be held, a Bantu Parliament chosen, and a Bantu Prime Minister placed in power.

Time will be required for this transition, and it is my firm opinion that the republic is entitled to a fair trial period within which to prove its good faith before it is condemned by outside opinion. If the world wants another Congo, the fastest way to get it is to move in explosively and block an orderly turnover . . .

The white people of South Africa are charged with a great responsibility toward the black people, and they know it . . .[3]."

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[1] *U.N. Doc.* A/PV. 1136, p. 8.

[2] The *Evening Post* (New Zealand), 4 Dec. 1962.

[3] Randall, C. B., "South Africa Needs Time", in *The Atlantic Monthly*, May 1963, p. 80.

55. Writing about partition in a recent series of articles after an extensive tour in Southern Africa, Smith Hempstone, a well-known American author and journalist, said:

> "It might not work in South Africa. On the other hand it might. This is the principal fact: no other solution even remotely fair to white or black appears possible [1]."

56. Senator Allan Ellender, member of the United States of America Senate Appropriations Committee, while on a tour of all United States Foreign Service Posts in Africa, said in Durban, South Africa:

> "Notwithstanding my Government's views on the matter, I personally have the greatest sympathy with your problems. I think your Government is on the right track and I am convinced the time will come when my Government will have to change its view about your policy [2]."

In his subsequent report to the Senate Committee he stated:

> "The policy of apartheid, or separate development, is very nearly the only method which promises to solve the many problems facing the Republic. Instead of developing their state along multiracial lines, which could not lead to anything except native political dominance, the South African leaders have chosen the only possible policy—the political separation of the races. If the policy is carried out without prejudice and objectively it should be acceptable to the world, and entirely fair to the native population.
>
> The principle of separate development has long been recognized the world over as a means of avoiding friction between two different races of peoples who have been thrown together because of geographic accident [3]."

57. Writing to the London *Daily Telegraph*, Leslie Beilby said:

> "Whatever the position may have been in the past, the whites of South Africa no longer have to be bludgeoned into realising the need for African political advancement. The majority, and I would include Dr. Verwoerd among them, accept this. What they do require is a way of giving the Africans political rights which will not endanger their own security . . .
>
> There are only three courses open to the Country: To have 'one-man-one-vote' immediately. To allow the Africans to take a gradually increasing role in government. To have some form of partition which will result in a majority of whites in one sector and a majority of Africans in the other.
>
> The first course would be catastrophic, resulting in something far worse than the Congo and bringing misery to Africans as well as Europeans. As a peaceful solution it is out of the question.
>
> The second course is admirable except that no one has been able to convince South Africans, by word or by deed, that it will work satisfactorily. Most of the whites consider that it will lead inevitably, and rapidly to black domination, . . .
>
> The third course open to South Africa—that of partition—is pursued

[1] Hempstone, S., "Partition—A Solution for South Africa", in *Chicago Daily News*, 9 Sep. 1963.

[2] The *Star*, 28 Nov. 1962.

[3] Ellender, A. J., *A Report on United States Foreign Operations in Africa*, p. 121.

by the Government on the grounds that it will remove the fear of domination. For a long time the Government was thought to be bluffing to gain time and maintain white control but, whatever the original intention, Dr. Verwoerd now appears determined to try to divide the country. Whether he can do it is arguable [1]."

58. Mr. C. G. Brandt, Chief Editor of The Netherlands daily paper, *De Telegraaf*, is reported to have said:

"I have spoken to many people black and white (on the subject of Apartheid), and none has been able to produce an alternative solution well thought out in all its consequences.

I consider it a sound and logical system which might result in a satisfactory solution of the whole problem . . .[2]."

59. The Vice-President of the French National Assembly, M. Raymond Schmittlain, said he was certain the Government's Transkei policy would succeed and he thought that is was correct [3].

60. M. Paul Giniewski (French journalist and author of, *inter alia*, "Bantustans—a trek towards the Future") was quoted in the *Territorial News* of 30 August 1962, as having said that whereas he had doubts two years before about the ultimate aims of the Government as regards the Transkei, his second visit gave him the answer: "Bantu States are going to be." He added that: "Political independence would have to be geared to economic interdependence."

61. In a work published in July 1962, Sir Penderel Moon, an experienced British colonial administrator, who was also an adviser to the Government of India from 1948 to 1961, *inter alia*, said the following:

"To understand South Africa's problems, these are the basic facts which have to be kept in mind. It is recognised now by most South Africans that the present system of complete White political dominance cannot continue indefinitely and that opportunities for political self-expression must be made available to other racial groups; further that this will have to be done far more rapidly than was envisaged ten to fifteen years ago. But if parliamentary democracy of the ordinary pattern were to be introduced, the whites would be overwhelmed by the superior number of Black voters and would soon become an impotent minority in a Black State. They would thus surrender not only their dominance over others but their own right of self-determination which they necessarily and justly claim.

This the vast majority of the Whites are not at present prepared to do. . . . Apartheid is the logical culmination of a policy deriving from the nineteenth century and followed consistently—but not very energetically as there seemed to be no hurry—by Botha, Hertzog and Smuts. Its logical conclusion will be the formation of Bantu States (Bantustans). Whether they would be completely independent, or become units in a federation, or remain subordinate in some respects to the Republic, are problems for the future. Up till three years ago, maintenance of White political supremacy was certainly contem-

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[1] The *Daily Telegraph*, 20 Aug. 1963.
[2] The *Star*, 23 Feb. 1963.
[3] The *Natal Mercury*, 14 Mar. 1963.

plated [1]. But since then Dr. Verwoerd has publicly conceded that they can become, if they show the desire and ability, 'as free as Ghana is today'. But the intention and hope is that they will remain linked with the Republic by political and economic ties. It is difficult to see how anyone could object in principle to such a policy, if it is *honestly* and *fairly* carried out . . . In our own day, Ireland, Palestine and India—to mention only three of the more prominent examples—have all been partitioned, and all basically for the same reason, namely that one race or self-conscious group refused to be subjected to the dominance of another. There is no apparent reason why in the case of South Africa such a possible outcome should be regarded as damning a whole policy [2]."

62. It is instructive to note, by way of contrast with the above, certain views expressed in 1956 by Lord Hailey. He said:

> "From time to time Europeans who have settled in other territories have shown an inclination to look to South Africa for countenance in their effort to maintain policies based on separatist ideas, while to those who look forward to a greater measure of integration, the regime of the Union has become a natural target for attack. But there is here something more than a contrast of philosophies. Both sides realize that the essence of the matter lies in the fact that *the doctrine of apartheid implies that the European community must continue to hold a position of control over the non-European communities. It is actually on this basic issue,* and not because of any argument about the maintenance of a European pattern of civilization, *that the two schools of thought tend to range themselves so decisively in opposite camps* [3]." (Italics added.)

Lord Hailey's view "that the doctrine of apartheid implies that the European community must continue to hold a position of control over the non-European communities" was based on, or must at least have been influenced by, a consideration referred to by him in a later passage, namely that—

> "It is true that the sponsors of the doctrine of apartheid have held out to Africans the prospect of a future in which they may in their own sphere of action live under a regime of institutions inspired by Bantu tradition. *But there has been no pledge that this will secure for the Bantu any measure of political autonomy, whole or partial, in any defined area of the Union* [4]." (Italics added.)

As has been demonstrated, the views expressed by Lord Hailey did not, even in 1956, correctly reflect Respondent's policies [5]. At present, however, whatever basis for misunderstanding there may have been in that regard, has been removed. Not only has a "pledge" of political autonomy been given, but the Transkei has already, with active assistance and encouragement from the South African Government, proceeded a considerable distance towards "political autonomy . . . in

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[1] This impression on the author's part, though understandable, is not entirely correct in the unqualified form in which it is put: *vide* paras. 14-17, *supra*.

[2] Moon, P., *World Opinion and South Africa* (1962), pp. 7-10.

[3] Lord Hailey, *An African Survey*: Revised 1956, p. 169.

[4] *Ibid.*, p. 254.

[5] *Vide* paras. 13 to 17, *supra*.

[a] defined area" of South Africa. In these circumstances it is clear that the factor which Lord Hailey regarded as the "basic issue" between supporters and opponents of Respondent's policies (i.e., the implications which he saw in Respondent's policy, that control by Europeans over non-Europeans would continue) has now fallen away. Consequently the basic issue at present relates not to the question whether political autonomy is to be granted to the Bantu, but to which method would be the most appropriate one for achieving this purpose. And it is the realization of this feature which has increasingly influenced commentators to express views such as those set out in paragraphs 53 to 61 above.

63. Respondent must stress again that evaluation of policies applied in the Republic of South Africa is *per se* not an issue in this case, and that a systematic and detailed discussion of such policies and their applications has therefore deliberately been avoided. What is important, however, in view of the nature of the accusations brought by the Applicants, is the question of basic aims and ultimate objectives, and of methods best suited towards their achievement.

It is in the light of the indications afforded by the various matters dealt with in the above four Chapters regarding Respondent's policies—to be further particularized in succeeding parts which deal with specific topics—that Applicants' charges of *mala fides* on Respondent's part relative to policies applied in South West Africa are submitted to be devoid of foundation or substance.

Annexes to Book IV of the Counter-Memorial filed by the Government of the Republic of South Africa

Annex A

BRIEF FACTUAL ACCOUNT OF THE CONSTITUTIONAL ARRANGEMENTS IN AFRICAN COUNTRIES SOUTH OF THE SAHARA, PRIOR TO THE OUTBREAK OF THE SECOND WORLD WAR, SHOWING THE DEGREE TO WHICH THE INDIGENOUS INHABITANTS PARTICIPATED OR WERE REPRESENTED IN THE LEGISLATIVE AND EXECUTIVE PROCESSES OF GOVERNMENT

I. BRITISH CONTROLLED TERRITORIES IN CENTRAL AND SOUTHERN AFRICA

Southern Rhodesia

1. In 1898, shortly after the territory of Southern Rhodesia had been brought under British Administration by the British South Africa Company in pursuance of a Royal Charter, a Legislative Council was established for the territory [1]. It consisted originally of nine members, of whom five were nominated by the British South Africa Company and four were elected by the registered voters of the territory [2]. Thereafter the composition of the Council was altered from time to time. Thus, as from 1920 it consisted of 13 elected members and six nominated members [3]. Control over Native Affairs was expressly reserved to the British Government [4].

2. In terms of the qualifications of voters laid down in 1898, the franchise was extended to all adult male British subjects regardless of race, but subject to certain property, income and educational qualifications [5]. Although the Native population in 1901 was estimated at 500,000 as against 11,070 Europeans [6], the effect of the franchise qualifications was to exclude all but a few dozen Natives from the voters' roll [7].

3. In 1923 Southern Rhodesia was formally annexed to the British Crown, and given self-government in a new constitution which came into force in 1924 [8]. The Executive was made responsible to the Legislature [9], which consisted of a fully elected legislative assembly of 30

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[1] *The Southern Rhodesian Order in Council, 1898*, in *The Statute Law of Southern Rhodesia* (from the Charter to Dec. 1898), pp. 32-55.

[2] *Ibid.*, secs. 17 and 18, p. 38.

[3] *Official Year Book of Southern Rhodesia*, No. 4 (1952), p. 41.

[4] Lord Hailey, *An African Survey* (1938), p. 158.

[5] *Proc.* No. 17 of 1898 (Southern Rhodesia), secs. 3-5, in *The Statute Law of Southern Rhodesia* (from the Charter to Dec. 1898) pp. 158-159.

[6] *Official Year Book of Southern Rhodesia*, No. 4 (1952), p. 130.

[7] Franck, T. M., *Race and Nationalism:* The Struggle for Power in Rhodesia—Nyasaland (1960), p. 17.

[8] *Cmnd.* 5949, p. 12.

[9] *Southern Rhodesia Constitution Letters Patent, 1923*, sec. 37, in *Statutory Rules and Orders and Statutory Instruments Revised* (1948) (hereinafter referred to as *S.R. & O.* Revised (1948), Vol. XXI, p. 379.

members [1]. A few subjects were excluded from the competence of the new legislature, and these included Native affairs [2]. The Governor was charged with the protection of Native interests; he had to reserve for the pleasure of the British Secretary of State for the Colonies, *inter alia*, any laws which were discriminatory as regards the Natives, "save in respect of the supply of arms, ammunition or liquor to the natives" [3]. Except for some amendments of minor importance in 1937, the constitution of Southern Rhodesia remained virtually unchanged until the establishment of the Federation of Rhodesia and Nyasaland after the Second World War.

4. The franchise for the election of members of the legislative assembly was open to all British subjects, male and female, including Natives, but it was still subject to property and income qualifications [4] which resulted in very few Natives in fact coming onto the voters' roll. It was said that only 58 Natives were on the roll in 1933 [5], when the Native population was estimated at 1,130,000 as against 52,210 Europeans [6]. In 1939 the population consisted of approximately 1,374,000 Natives, 64,000 Europeans, 3,640 Coloureds and 2,410 Asiatics [6], but in that year there were only 39 Natives on the voters' roll, out of a total of 24,626 voters [7]. All members of the Legislative Assembly and the Executive were Europeans.

Northern Rhodesia

5. Prior to 1911, and after the British South Africa Company had extended its rule to the Territory of Northern Rhodesia, mostly through treaties, the Territory was organized by means of a series of British Executive Orders in Council into two Protectorates, being Barotseland (North-western Rhodesia) and North-eastern Rhodesia. An Order in Council of 1911 joined the two regions into the Protectorate of Northern Rhodesia [8], and provided for a Council to advise the Protectorate Administrator [9]. The Council, which was first appointed in 1917, consisted of six members, three being Company officials *ex officio*, and three appointed by the Company from the European settled population. In 1923 the Company's administrative authority was transferred to the British Crown [10], and in the following year a Legislative Council was established [11], consisting of the Governor, five *ex officio* members, not more than four

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[1] *S.R. & O.* Revised (1948), Vol. XXI, sec. 3, p. 372.
[2] *Ibid.*, secs. 26 (2) and 39-47, pp. 377, 380-382.
[3] *Ibid.*, sec. 28 *(a)*, p. 377.
[4] *Voters Qualifications and Registrations Amendment Ordinance 1912*, sec. 2, in *The Statute Law of Southern Rhodesia from 1st January 1911 to 31st December 1922*, pp. 225-227.
[5] Hailey, *An African Survey* (1938) pp. 159-160.
[6] *Official Year Book of Southern Rhodesia* No. 4 (1952), p. 130.
[7] *Cmnd.* 5949, p. 15.
[8] *Northern Rhodesia Order in Council, 1911*, in *British and Foreign State Papers* (series hereinafter referred to as "State Papers"), Vol. CVI, pp. 463-476.
[9] *Ibid.*, sec. 13, pp. 466-467.
[10] *Cmnd.* 5949, p. 13.
[11] *The Northern Rhodesia (Legislative Council) Order in Council, 1924*, in *State Papers*, Vol. CXIX, pp. 36-41.

nominated official members, and five elected unofficial members [1]. An Executive Council was also established to advise the Governor [2]. Although provision was made for the appointment of unofficial members to the Executive Council, no such appointments were in fact made up to 1938 [3]. As from that year the Legislative Council consisted of the Governor, five *ex officio* members, three nominated official members, one (European) nominated unofficial representative for Africans and seven elected members [4].

6. Up to the outbreak of the Second World War the Natives did not participate directly in the Government of Northern Rhodesia, their interests being represented at that time by the single European unofficial member of the Legislative Council nominated for that purpose, and referred to above [4]. It is estimated that in 1934 [5] there were 1,366,425 Natives, 11,464 Europeans and 188 Asiatics in the Territory [6]. The Native inhabitants were regarded as British protected persons and not as British subjects [7], and were therefore primarily excluded from the franchise [8], which was limited to British subjects [9]. Natives could become British subjects by naturalization and thus acquire the franchise, provided they could comply with the prescribed property and income qualifications [10]; but few ever availed themselves of this opportunity [11]. Again, therefore, the membership of the Legislative and Executive Councils was entirely European.

7. In Barotseland, as a result of an agreement in 1936 between the Paramount Chief and the Protectorate Government [12], the Governor was empowered [13] to recognize Native Authorities which exercised jurisdiction within certain prescribed limits and which were empowered to issue orders and make rules on certain specified subjects of minor importance [14]. However, the Governor could, after consultation with the Paramount Chief, revoke or alter any such order or rule [15].

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[1] *The Northern Rhodesia (Legislative Council) Order, op. cit.*, sec. 3, p. 37.
[2] *The Northern Rhodesia Order in Council, 1924*, sec. 12, in *State Papers*, Vol. CXIX, p. 45.
[3] Hailey, *An African Survey* (1938), p. 170.
[4] *The Northern Rhodesia (Legislative Council) Amendment Order in Council, 1938*, sec. 3, in *State Papers*, Vol. CXLII, p. 40.
[5] No figures are available after that date, until 1944.
[6] Kuczynski, R. R., *Demographic Survey of the British Colonial Empire* (1959), Vol. II, p. 416.
[7] *Cmnd.* 5949, p. 19.
[8] *Ibid.* See also Hailey, *An African Survey* (1938), p. 170 and Hailey, *An African Survey:* Revised 1956 (1957), pp. 290-291.
[9] *The Legislative Council Ordinance, 1925*, sec. 9, as quoted in *The Constitutions of All Countries*, Vol. I, pp. 532-533.
[10] *Ibid.*, secs. 9 and 10, pp. 532-534.
[11] Hailey, *An African Survey* (1957), p. 291.
[12] Hailey, *Native Administration*, Part II (1950), p. 89.
[13] *Barotse Native Authority Ordinance*, in *Laws of Northern Rhodesia, 1963 Edition*, Vol. V, Chap. 159, pp. 2-13.
[14] *Ibid.*, secs. 3, 8 and 19 (1).
[15] *Ibid.*, secs. 11 (1) and (2) and 19 (5).

Nyasaland

8. In 1902 a Commissioner was appointed to administer the Territory of Nyasaland on behalf of Great Britain [1]. In 1907 he was replaced by a Governor and Commander-in-Chief and at the same time Executive and Legislative Councils were instituted [2]. The Executive Council consisted of the Governor and nominated officials [3]. The Legislative Council consisted of the Governor, three *ex officio* official members, and such unofficial members as the Governor might from time to time appoint [4]. In 1937 the members of the Legislative Council were the Governor, four official members and four unofficial members, all being Europeans. The Senior Provincial Commissioner and one of the unofficial members, a European selected from one of the missionary societies, were the chief representatives of Native interests on the Council [5]. As at 1937, there were 1,635,804 Natives, 1,894 Europeans and 1,631 Asians in Nyasaland [6].

Swaziland

9. Conventions of 1881 and 1884 between the United Kingdom and the South African Republic guaranteed the independence of Swaziland [7]. As a result, however, of numerous concessions being granted by the King of the Swazis, some form of European control came to be considered necessary [8]. After a provisional arrangement which operated from 1890 to 1894, a further Convention provided for the exercise of powers of protection and administration, without annexation, by the South African Republic [8]. This endured until the Anglo-Boer War (1899-1902), which resulted in the annexation of the South African Republic (Transvaal) by Great Britain and in Swaziland becoming a British Protectorate. In 1903 the Governor of the Transvaal was empowered to administer Swaziland [9], with authority to legislate by proclamation [10]. His authority was transferred in 1906 to the British High Commissioner for South Africa [11], and in 1907 provision was made for the appointment of a Resident Commissioner, a Government Secretary and Assistant Commissioners [12].

10. In 1921 an Advisory Board consisting of nine European members elected by the European residents was instituted administratively, to advise the Resident Commissioner in regard to affairs affecting the

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[1] *The British Central Africa Order in Council, 1902*, in *State Papers*, Vol. XCV, pp. 646-656.

[2] *The Nyasaland Order in Council, 1907*, in *State Papers*, Vol. C, pp. 94-99.

[3] *Ibid.*, sec. 8, p. 96.

[4] *Royal Instructions, 1907*, in *The Constitutions of All Countries*, Vol. I, pp. 537-538.

[5] Colonial Reports, *Nyasaland, 1937*, No. 1885, p. 5.

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

[7] Colonial Reports, *Swaziland*, 1938, No. 1921, p. 3. *Vide* also Lord Hailey, *Native Administration in British African Territories*, Part V (1953), pp. 361-369.

[8] Colonial Reports, *Swaziland*, 1938, No. 1921, p. 3.

[9] *The Swaziland Order in Council, 1903*, in *State Papers*, Vol. XCVI, pp. 1126-1129.

[10] *Ibid.*, sec. 5.

[11] *Ibid., 1906*, sec. 2, in *State Papers*, Vol. XCIX, pp. 863-864.

[12] Colonial Reports, *Swaziland*, 1938, No. 1921, p. 4.

European residents [1]. In regard to Native affairs, an Order in Council of 1903 required the Governor, in issuing proclamations, to respect Native civil laws, except in so far as "incompatible with the due exercise of His Majesty's power and jurisdiction, or clearly injurious to the welfare of the said natives" [2]. Furthermore, in all matters affecting Native interests, the central administration usually consulted the Paramount Chief, together with one or other of the two traditional Native bodies, viz., the inner council *(Liqogo)*, or the "national" council *(Libandhla)*, which consisted of all Chiefs, councillors, headmen and all adult males who cared to attend [3]. This consultation was purely a matter of practice; the Native bodies themselves did not receive any statutory recognition until after the outbreak of the Second World War [4]. Up to that time, therefore, the Natives in Swaziland, who in 1936 had numbered 153,270 out of the Territory's total population of 156,715 [5], had had no direct participation in the central government of the Territory.

Basutoland

11. In 1884 the British Government appointed the High Commissioner for South Africa to exercise all legislative and executive authority in respect of Basutoland [6]. In 1890 official recognition was given to the traditional Basuto Council (the *Pitso*), but purely as a consultative body with no legislative or executive responsibility [7]. The Council at first consisted of 40 members selected by the Paramount Chief and approved of by the Resident Commissioner, who was also empowered to appoint five additional members [7]. Membership was increased in 1903 to 100, of whom five were nominated by the Resident Commissioner and the rest by the Paramount Chief, subject to the Commissioner's approval [8]. The Council received statutory recognition in 1910 [9], but remained a purely advisory body throughout the period under consideration [10]. Towards the end of this period there were approximately 559,273 Natives, 1,434 Europeans and 1,604 Coloureds and Asiatics in the Territory [11]. A system of "indirect rule" was introduced in 1938, but only implemented after the outbreak of the Second World War [12].

Bechuanaland

12. The population figures for Bechuanaland in 1936 were 260,064 Natives, 1,899 Europeans, and 3,793 Coloureds [13].

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[1] Hailey, *Native Administration*, Part V, pp. 377-378 and Colonial Reports, *Swaziland*, 1938, No. 1921, p. 4.

[2] *The Swaziland Order in Council, 1903*, sec. 5, *State Papers*, Vol. XCVI, p. 1128.

[3] Hailey, *Native Administration*, Part V, p. 357.

[4] *Ibid.*, p. 388.

[5] Colonial Reports, *Swaziland*, *No. 1921*, p. 5.

[6] *Basutoland Order in Council, 1884*, in *S.R. & O.*, Revised (1948), Vol. III, pp. 79-80.

[7] Basutoland Council, *Report on Constitutional Reform and Chieftainship Affairs*, Basutoland Constitutional Handbook, p. 28.

[8] *Ibid.*, p. 30.

[9] *Ibid.*, p. 31.

[10] *Ibid.*, pp. 31-32.

[11] Kuczynski, *op. cit.*, Vol. II, p. 23.

[12] Basutoland Council, *op. cit.*, pp. 38-42.

[13] *Official Year Book of the Union of South Africa and of Basutoland, The Bechuanaland Protectorate, and Swaziland*, No. 22 (1941), p. 1193.

13. By 1890 British jurisdiction had been established over the territory [1], and in 1891 provision was made for its administration through the British High Commissioner for South Africa [2]. In issuing proclamations for the Territory, the High Commissioner was bound to respect Native civil laws and customs, "except so far as the same may be incompatible with the due exercise of Her Majesty's power and jurisdiction" [3].

14. In 1920 two Advisory Councils were established by means of administrative orders [4]. Firstly, there was a European Advisory Council, consisting originally of six members elected in six electoral areas, the membership being increased to seven in 1927 [5]. The function of the Council was to advise the Resident Commissioner on matters directly affecting the European residents of the Territory, and the franchise was confined to British subjects of European descent and aliens of European parentage who had resided in the Territory for at least five years [5]. This Council only received statutory recognition after the Second World War [5]. Secondly, there was a Native Advisory Council, consisting of a maximum of 30 members, five being nominated by each of the six tribes in the Territory, "according to their custom" [6]. In practice the members were headmen, or, in a few instances, persons of standing described as Councillors [6]. The function of this Council was "to discuss with the Resident Commissioner all matters affecting Native interests which the members desired to bring forward, especially the administration of the Native Fund" [7]. During the period under consideration, therefore, the Natives of Bechuanaland had no direct participation in the central government of the Territory.

II. BRITISH CONTROLLED TERRITORIES IN EAST AFRICA

Kenya

15. The population of Kenya was estimated to be 3,365,888 in 1938, of which 3,280,774 were Natives, thus leaving a balance of some 85,000 Europeans, Asians and others [8].

16. In 1895 the responsibilities of the Imperial British East Africa Company in the Territory of Kenya, where it had assumed control in terms of a Royal Charter, were transferred to the British Government [9]. Kenya was then known as the British East Africa Protectorate, and became the "Kenya Colony and Protectorate" in 1920 [10]. In 1906 a Legislative Council, consisting of six official members and two nominated

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[1] *British Order in Council, 1890*, in *State Papers*, Vol. LXXXII, pp. 1061-1062.
[2] *Ibid., 1891*, in *State Papers*, Vol. LXXXIII, pp. 809-812.
[3] *Ibid.*, sec. 4, p. 810.
[4] Hailey, *Native Administration*, Part V (1953), pp. 318-320.
[5] *Ibid.*, p. 319.
[6] *Ibid.*, p. 318.
[7] *Ibid.*, p. 138. The Native Fund was derived from the proceeds of a local tax, and earmarked for local development.
[8] Colonial Reports, *Kenya Colony and Protectorate*, 1938, No. 1920, p. 10.
[9] Central Office of Information, *Kenya*, Pamphlet No. R4489 (1960), pp. 2-3.
[10] *The Kenya (Annexation) Order in Council, 1920*, in *State Papers*, Vol. CXIII, pp. 74-76.

unofficial members (Europeans), was established for the Territory[1]. Thereafter the membership of the Council was increased from time to time[1]. Unofficial European members were elected to the Council for the first time in 1920, when there were 11 such seats[1]. The franchise was confined to British subjects of European descent[2]. At the same time the official membership was also increased to preserve the official majority. One European member was nominated by the Governor to represent the Native community[3]. In 1924 provision was made for the election of 17 members, viz., 11 Europeans, five Indians to represent the interests of the Indian community and one Arab to represent the interests of the Arab community[4].

17. As from 1925 the supreme executive power in the Territory was vested in the Governor, who was advised by an Executive Council of seven *ex officio* members and such other official and unofficial members as might be appointed[5].

The membership of the Legislative Council was again increased in 1927[6]. It then consisted of the Governor, 11 *ex officio* members, nine nominated official members, 11 European elected members, five Indian elected members, one Arab elected member, and one (European) nominated unofficial member to represent the interests of the African community[7]. In 1938 a second unofficial member, also European, was nominated to represent African interests, and the official representation further increased to preserve the official majority[8].

Uganda

18. In 1938 it was estimated that there were 3,725,798 Natives in Uganda, as against 2,282 Europeans and 19,141 Asians[9].

19. Uganda became a British Protectorate in 1902[10]. It was administered by a Commissioner until 1907, and thereafter by a Governor. Executive and Legislative Councils were first established in 1921[11]. The Executive Council consisted entirely of *ex officio* and official members, and remained so constituted until after the Second World War[12]. The Legislative Council at first consisted of four official members and two unofficial appointed members but by 1938 these members had been increased to seven and four respectively[13]. The Indian community was offered one

[1] Central Office of Information, *op. cit.*, p. 17.
[2] Hailey, *An African Survey* (1957), p. 296.
[3] Colonial Reports, *Kenya Colony and Protectorate*, 1931, No. 1606, p. 5.
[4] *Legislative Council (Amendment) Ordinance, 1924*, in *Colony and Protectorate of Kenya, Ordinances 1924*, Vol. III, pp. 1-2.
[5] *Additional Royal Instructions, G.N.* No. 61, in *Colony and Protectorate of Kenya, Proclamations, Rules and Regulations*, Vol. V, pp. 32-35.
[6] *Additional Royal Instructions, G.N.* No. 248, in *Colony and Protectorate of Kenya, Proclamations, Rules and Regulations*, Vol. VI (New Series), pp. 524-528.
[7] *Ibid.*, p. 526.
[8] Central Office of Information, *Kenya*, Pamphlet No. R4489 (1960), p. 17.
[9] Kuczynski, *op. cit.*, Vol. II, pp. 239 and 251.
[10] *The Uganda Order in Council, 1902*, in *State Papers*, Vol. XCV, pp. 636-646.
[11] *Ibid.*, 1920, in *State Papers*, Vol. CXXIII, Part I, pp. 105-111.
[12] Central Office of Information, *Uganda*, Pamphlet R5316 (1962), p. 4.
[13] Central Office of Information, *Constitutional Development in the Commonwealth*, Part II, *British Dependencies* (1950), p. 22.

representative on the Council in 1921, but initially declined to co-operate in nomination [1]. However, one Asian was appointed to the Council in 1926, and a second as from 1933 [2]. All the other members were Europeans.

20. Here also indirect rule was systematically practised in Native administration, the system being differentiated in order to fit in with the differing traditional systems, viz., centralized kingdoms in Buganda, Bunyoro, Toro and Ankole, and decentralized organizations based on small villages and clans in other provinces [3].

Tanganyika

21. Tanganyika, which formed the major portion of the former German East African Protectorate, was after the First World War administered by Great Britain under a mandate. Its population in 1938 was estimated at 5,260,484, of which 5,217,345 were Natives, 9,165 Europeans and 33,974 Asiatics [4].

22. In terms of a British Order in Council of 1920 [5], Tanganyika was to be administered by a Governor assisted by an Executive Council composed of four officials [6], the number being increased to six in 1926 [7]. In the same year a Legislative Council was constituted, consisting of the Governor, 13 official members and not more than ten unofficial members [8]. These members were all appointed by the Governor and during the whole of the period under consideration the legislature contained no elective element.

23. With regard to the unofficial members of the Legislative Council, the British Government in 1926 reported to the League of Nations as follows:

> "The unofficial members are nominated by the Governor without regard to representation of particular races, interests, or public bodies . . . There is at present no native member of the Council. In this connection the Governor at the opening meeting of the Legislative Council on the 7th December, 1926, stated as follows:
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> 'The native community cannot be directly represented because for the present a native cannot be found with sufficient command of the English language to take part in the debates of the Council; indeed to understand what is said. I speak now, of course, of natives of standing who could speak on behalf of the various tribes of the country. But I do not by any means regard the large body of natives as being altogether unrepresented on the Council. Their interests are directly in the hands of the Secretary for Native Affairs, the Chief Secretary, and the Governor himself' [7]."

[1] Apter, D. E., *The Political Kingdom in Uganda* (1961), pp. 163-164.

[2] Central Office of Information, *Uganda*, Pamphlet No. R5316, p. 4.

[3] Hailey, *Native Administration*, Part I, pp. 49-50; Colonial Reports, *Uganda Protectorate*, 1931, pp. 5-6.

[4] Kuczynski, *op. cit.*, Vol. II (1949), pp. 343 and 353.

[5] *The Tanganyika Order in Council, 1920*, in *State Papers*, Vol. CXIII, pp. 97-111.

[6] *Report by His Britannic Majesty's Government to the Council of the League of Nations on the Administration of Tanganyika Territory for the Year 1924*, p. 5.

[7] *Report by His Britannic Majesty's Government to the Council of the League of Nations on the Administration of Tanganyika Territory for the Year 1926*, p. 5.

[8] *The Tanganyika (Legislative Council) Order in Council, 1926*, in *State Papers*, Vol. CXXIII, Part I, pp. 135-142.

24. As from 1930, two or three of the ten appointed unofficial members were usually Indians [1], but as far as Native representation was concerned, the position remained unchanged throughout this period [2]. An official publication in 1930 mentioned a contemplation of reserving a proportion of seats for Africans "when suitable persons became available" [2], but by 1938 the matter had not proceeded any further. In Native administration the system of indirect rule was practised, involving extensive use of the traditional Native authorities [3].

British Somaliland

25. By 1938 there were only 80 Europeans in Somaliland, while the Native population was estimated at 344,700 [4]. Until 1929 the Territory was administered by officials nominated from time to time by the British Government for that purpose [5]. A Governor was then appointed to take charge of the administration of the Territory [6]. He possessed legislative powers, but was bound to respect existing Native laws and customs "except so far as the same may be opposed to justice or morality" [7]. At the time of the Second World War the Territory had not yet acquired either an Executive or a Legislative Council [8].

III. BRITISH CONTROLLED TERRITORIES IN WEST AFRICA

Gold Coast

26. In 1874 the Gold Coast Colony was constituted as a distinct administrative unit [9] and Executive and Legislative Councils were established for the Colony [10]. The Executive Council had no jurisdiction over the adjoining areas of Ashanti and the Northern Territories until 1934 [11], while the Legislative Council's jurisdiction remained confined to the Colony until after the start of the Second World War [11]. The Governor legislated by proclamation for Ashanti, the Northern Territories and Togoland [11].

27. By the beginning of the Second World War the Natives of the Gold Coast had not yet been represented on the Executive Council [12], but the first African member of the Legislative Council had been nominated

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[1] *Report to the Council of the League of Nations on the Administration of Tanganyika Territory for the Year 1930*, p. 8.

[2] Hailey, *An African Survey* (1938), p. 164.

[3] *Ibid.*, pp. 435-436 ff.

[4] Kuczynski, *op. cit.*, Vol. II, pp. 641-642.

[5] *The Somaliland Order in Council, 1899*, in *State Papers*, Vol. XCI, pp. 1114-1129.

[6] *The Somaliland Order in Council, 1929*, in *State Papers*, Vol. CXXXII, Part I, pp. 22-39.

[7] *Ibid.*, sec. 15, pp. 28-30.

[8] Colonial Reports, *Somaliland* 1937, No. 1880, p. 5.

[9] *Royal Charter of 24 July 1874*, in *State Papers*, Vol. LXVI, pp. 942-947.

[10] *Ibid.*, p. 944; *British Order in Council, 1874*, in *State Papers*, Vol. LXVI, pp. 957-958.

[11] Elias, T. O., *Ghana and Sierra Leone*: The Development of their Laws and Constitutions (1962), pp. 31-32.

[12] *Ibid.*, p. 37.

as far back as 1889 [1]. In 1897 the Legislative Council consisted of four official members, the Chief Justice and three nominated unofficial members [2]. In 1916 the total membership had been increased to 20; of these nine were unofficial nominated members, three to represent the Europeans, three the Paramount Chief and three the educated Africans—the Native representation therefore forming slightly less than one-third of the total membership [2]. Under a new constitution of 1925 [3] there were 15 official and 14 unofficial members on the Council [4]. Of the latter number five were nominated Europeans representing European interests, and six were nominated African representatives, two from each of the three Provinces in the Colony area [5]. The remaining three unofficial members were municipal members representing the towns of Accra, Cape Coast and Sekondi [6]. These members (who were usually African [7]) were elected, the franchise being based upon a property qualification [8]. The Governor with eight executive heads brought the total membership of the Council to 38. The principle of an official majority was thus retained throughout the period under consideration [7].

28. A system of indirect rule was practised in local administration in the provinces in an effort to safeguard the development of self-governing indigenous institutions such as chieftaincy and customary laws [9].

Nigeria

29. The port and island of Lagos, annexed by Great Britain in 1862, were administered by a Governor and Legislative Council [10]. The Council consisted entirely of British officials and acted merely as an advisory body to the Governor [11]. The Council remained in existence until 1922, when it consisted of six official members and four nominated unofficial members, two of whom were Africans [11].

30. In 1914 Lagos and other territories over which control had been assumed by Charter Companies were amalgamated in a united Nigeria [12]. A legislative body, called the Nigerian Council, was then established, consisting of 36 members appointed by the Governor [13]. There was a

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[1] Elias, *op. cit.*, p. 32.

[2] *Ibid.*, p. 31.

[3] *Royal Instructions, 1925*, in *The Constitutions of All Countries*, Vol. I (1938), p. 466; *The Gold Coast Colony (Legislative Council) Order in Council, 1925*, in *State Papers*, Vol. CXXI, pp. 208-230; *British Letters Patent, 1916*, in *State Papers*, Vol. CX, pp. 276-281.

[4] *The Gold Coast Colony (Legislative Council) Order in Council, 1925*, in *State Papers*, Vol. CXXI, sec. 3, p. 210.

[5] *Ibid.*, secs. 16-19, pp. 214-217.

[6] *Ibid.*, sec. 20, pp. 217-218.

[7] Elias, *op. cit.*, p. 33.

[8] *The Gold Coast Colony (Legislative Council) Order in Council, 1925*, in *State Papers*, Vol. CXXI, sec. 23, pp. 219-220; *Royal Instructions, 1925*, in *The Constitution of All Countries*, Vol. I (1938), p. 466; *British Letters Patent, 1916*, in *State Papers*, Vol. CX, pp. 276-281.

[9] Elias, *op. cit.*, pp. 37-38.

[10] Hailey, *Native Administration*, Part III (1951), p. 24.

[11] Padmore G., *Pan Africanism or Communism?*, p. 268.

[12] Central Office of Information, *Nigeria: The Making of a Nation* (1960), p. 8.

[13] *Ibid.*, p. 28.

majority of senior British officials, six unofficial European members representing foreign vested interests, and six Africans (mostly chiefs) representing tribal communities [1]. The Nigerian Council and the Lagos Legislative Council functioned separately until 1922 [2].

31. In that year Nigeria received a new constitution. An Executive Council was established, consisting entirely of *ex officio* and nominated official members [3], the Natives not being represented on this body until after the beginning of the Second World War [4]. The new Legislative Council had 46 members, 27 being official and 17 unofficial [5]. Of the latter 13, of whom 6 were Africans [6], were nominated by the Governor and four (Africans) [7] were elected to represent the municipal areas of Lagos and Calabar [8]. Franchise was open to adult British subjects and Natives of Nigeria, but was subject to an income qualification [9]. The number of registered voters in the first elections in 1924 was 1,055 out of a total adult African population of 126,108 [10]. The Council had no jurisdiction over the Northern Provinces, for which the Governor-in-Council was the legislative authority [11].

Sierra Leone

32. The area of Sierre Leone, which had initially been occupied by a Charter Company, was transferred to the British Crown as a Colony in 1808. It was administered by a Governor assisted by eight Councillors [12] until 1863, when separate Executive and Legislative Councils were set up [13]. The latter Council contained a minority of nominated unofficial members. It was reconstituted in 1874 [14], and in 1923 the number of nominated unofficial members was increased from one to five [15].

33. In 1896 a protectorate was proclaimed over the hinterland of Sierra Leone [16]. It was administered by five district commissioners.

34. In 1924 a new constitution was granted to the Colony [17], new

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[1] Central Office of Information, *op. cit.*, p. 28.

[2] Padmore, *op. cit.*, p. 268.

[3] *Royal Instructions*, 1922, in *Constitutions of All Countries*, Vol. I (1938), pp. 523-524; Ezera, K., *Constitutional Development in Nigeria* (1960), pp. 27-28.

[4] Central Office of Information, *op. cit.*, p. 29; Ezera, *op. cit.*, pp. 29, 32.

[5] *The Nigeria (Legislative Council) Order in Council, 1922*, in *State Papers*, Vol. CXVI, pp. 249-259.

[6] Wheare, J., *The Nigerian Legislative Council* (1950), p. 39.

[7] *Ibid.*, p. 33.

[8] *The Nigeria (Legislative Council) Order in Council, 1922*, in *State Papers*, Vol. CXVI, secs. 6 and 14, pp. 251, 253.

[9] *Ibid.*, sec. 20, p. 254.

[10] Padmore, *op. cit.*, p. 269.

[11] Hailey, *Native Administration* (1951), Part III, p. 3; Central Office of Information, *op. cit.*, pp. 28-29.

[12] Elias, *op. cit.*, pp. 223, 227.

[13] *Ibid.*, p. 239.

[14] *British Charter dated 17 Dec. 1874*, in *State Papers*, Vol. LXVI, pp. 948-953.

[15] Elias, *op. cit.*, p. 246.

[16] *Ibid.*, p. 243.

[17] *Letters Patent, 1924*, in *S.R. & O. Revised* (1948), Vol. XXI, pp. 1-6, *Sierra Leone Protectorate Order in Council, 1924*, in *S.R. & O. Revised* (1948), Vol. VIII, pp. 384-389.

Executive and Legislative Councils being established and their jurisdiction extended to the Protectorate territory [1]. The Executive Council comprised the Governor and six *ex officio* members [2]. Africans were not represented on this Council prior to the Second World War [3]. The Legislative Council consisted of 11 official members, three elected unofficial members, and not more than seven nominated unofficial members, of whom three had to be Paramount Chiefs of the Protectorate [4]. Of the ten unofficial members, six were Africans [4]. The three elected members were elected in two electoral areas, viz. the urban and the rural districts [5]. The franchise was granted to adult male British subjects and Natives of Sierra Leone, subject to certain property, income and educational qualifications [6]. In 1940 a total of 5,164 voters qualified for the franchise [7], out of a population which in 1939 was estimated at about 2 million [8], of which probably not more than 1,000 were Europeans [9].

British Cameroons

35. This Territory was a portion of the former German Cameroons and was placed under the Mandate of Great Britain after the First World War. For economic and geographic reasons the Northern and Southern parts of the Territory were administered as integral parts of the Northern and Eastern provinces of Nigeria respectively [10]. Thus, legislation for the southern section of the Territory was enacted by the Governor of Nigeria with the advice and consent of the Nigerian Legislative Council, in the same way as for the Colony and Southern provinces of Nigeria, while legislative authority over the northern section was exercised by the Governor of Nigeria, as for the Northern provinces of that Territory. [11] However, the Cameroons had no representation whatever on the Nigerian Legislative Council until the Second World War [12].

British Togoland

36. After the First World War the western portion of the former German Togoland was placed under the Mandate of Great Britain. The

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[1] Elias, *op. cit.*, p. 247.

[2] *Letters Patent, 1924,* in *S.R. & O. Revised* (1948), Vol. XXI, sec. 6, p. 2; Elias, *op. cit.*, pp. 250-251.

[3] Elias, *op. cit.*, p. 251.

[4] *The Sierra Leone (Legislative Council) Order in Council, 1924,* in *State Papers,* Vol. CXIX, sec. 4, p. 6.

[5] *The Sierra Leone (Legislative Council) Order in Council, op. cit.,* sec. 7 (1), p. 6.

[6] *Ibid.*, secs. 23 (1) and 24 (1), pp. 10-11.

[7] Hailey, *Native Administration and Political Development in British Tropical Africa,* 1940-1942, p. 81.

[8] Kuczynski, *op. cit.*, Vol. I (1948), p. 161.

[9] *Ibid.*, pp. 189-191; Elias, *op. cit.*, p. 217.

[10] *The British Cameroons Order in Council, 1923,* in *State Papers,* Vol. CXVII, pp. 60-63; *Report by His Majesty's Government to the Council of the League of Nations on the Administration of the British Cameroons for the Year 1928,* p. 4.

[11] *The Nigeria (Legislative Council) Order in Council, 1922,* in *State Papers,* Vol. CXVI, sec. 24, pp. 255-256.

[12] Wheare, *op. cit.*, p. 199.

northern section of the Territory was administered by the Chief Commissioner of the Northern Territories of the Gold Coast [1] as an integral part of the Gold Coast Dependency [2], while the southern section was made a district of the Eastern Province of the Gold Coast Colony. Legislative enactments made for the Northern Territories by the Governor of the Gold Coast applied also in the northern section of British Togoland, but the Governor could also legislate specially for this latter area [3]. Similarly, in the southern section of the Territory, the legislative enactments of the Gold Coast Legislative Council applied but in addition the Governor was empowered to legislate specially for that area [3]. The local administration was carried out as far as possible through Chiefs with the assistance of tribal authorities [3].

Gambia

37. The territory of Gambia comprised a Colony and a Protectorate. The total population in 1931 was estimated at 199,520 of whom only 274 were Europeans [4]. The Colony was transferred to the British Crown in 1821 and declared a separate Colony with its own legislature in 1888 [5]. In 1893 provision was made for the Legislative Council of the Colony to legislate also for the Gambia Protectorate [6].

38. Throughout the period before the Second World War neither the Executive Council nor the Legislative Council of Gambia contained any elective element; all members of both Councils were appointed by the Governor [7]. In 1938 the Executive Council consisted of the Colonial Secretary and three other senior officials, while the Legislative Council consisted of the Governor, the Colonial Secretary, five official members and four unofficial members [8].

39. A system of indirect rule through Chiefs and Commissioners was introduced for the Gambia Protectorate in 1894 [9]. This system was defined in greater detail by two Ordinances passed in 1933 [10], which were directed towards the development of local self-government by various Native authorities, such as the Head Chiefs, under the advice and supervision of the Commissioners, who represented the Governor [10].

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[1] *British Sphere of Togoland Order in Council, 1923*, in *State Papers*, Vol. CXVII, pp. 116-121.

[2] *P.M.C., Min.* V, p. 42.

[3] *Report of His Majesty's Government to the Council of the League of Nations on the Administration of Togoland under British Mandate, 1928*, p. 5.

[4] Kuczynski, *op. cit.*, Vol. I (1948), pp. 337, 347.

[5] *British Letters Patent, 1888*, in *State Papers*, Vol. LXXXI, pp. 140-145.

[6] *British Order in Council, 1893*, in *State Papers*, Vol. LXXXV, pp. 1251-1253.

[7] *British Letters Patent, 1888*, in *State Papers*, Vol. LXXXI, secs. 7 and 8, p. 142; *Letters Patent, 1915*, secs. 6 and 7, in *The Constitutions of All Countries*, Vol. I (1938), pp. 453-454; *Royal Instructions, 1915* (as amended 1928), sec. 4.

[8] Colonial Reports, *The Gambia*, 1938, No. 1893 (1939), p. 10.

[9] *Ibid.*, pp. 10-11.

[10] *Ibid.*, p. 11.

IV. FRENCH CONTROLLED TERRITORIES

French West Africa

40. The territories comprising French West Africa, viz., Niger, Dahomey, Upper Volta [1], Ivory Coast, Sudan, French Guinea, Mauritania and Senegal, had all been placed under effective French control by 1890. In 1904 the territories were reorganized into a federation under a Governor-General [2], each territory becoming a province headed by a Lieutenant-Governor [3]. The Governor-General was assisted by a *conseil de gouvernement*, which had consultative powers only [4], while each Lieutenant-Governor was assisted by an Administrative Council, a purely advisory body [5] (except in the case of Senegal, the position of which is dealt with later). The provinces (except for Senegal, Niger and Mauritania) also had representation in the Higher Council of Colonies in France [6], which was also a purely consultative body [7]. On the whole, therefore (i.e., again excepting Senegal), opportunities for participation by the population in the processes of government were limited to membership of consultative bodies.

41. The manner of filling the positions on the consultative bodies varied between the provinces. In Niger and Mauritania there was no franchise—the Administrative Councils consisted only of officials and nominated unofficial members [8], and these in turn elected their representatives in the *conseil de gouvernement* [9]. In the other provinces (save Senegal) there was a limited franchise. The limitative feature generally was French citizenship, which was not enjoyed by the Natives [10], except by naturalization [11]. Thus in these provinces representatives in the Higher Council in France and in the *conseil de gouvernement* were elected by French citizens [12]. For their Administrative Councils, however, some members were also appointed and some elected by Chambers of Commerce and Agriculture and by a special electorate consisting of specified categories of non-citizens (such as holders of certain public positions, traders, certain property owners, etc.) [13].

42. The position in Senegal was for historical reasons different from that in the other provinces. All people born in the four communes of Senegal (Gorée, Dakar, Rufisque and St. Louis), including Africans,

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[1] Upper Volta ceased to exist as a separate entity in 1932, when it was absorbed into the other territories adjoining it. (*Vide* Thompson, V. and Adloff, R., *French West Africa* (1958), p. 23.)

[2] Thompson, V. and Adloff, R., *French West Africa* (1958), pp. 22-23.

[3] Robinson, K., "Political Development in French West Africa", in *Africa in the Modern World*, ed. by C. W. Stillman (1955), pp. 140, 147-148; Thompson, V. and Adloff, R., *French West Africa*, p. 23.

[4] Robinson, *Africa in the Modern World*, pp. 148-149.

[5] *Ibid.*, pp. 147-148.

[6] Thompson, V. and Adloff, R., *French West Africa* (1958), p. 44.

[7] Deschamps, H., *The French Union* (1956), pp. 32-33.

[8] Robinson, *Africa in the Modern World*, p. 148.

[9] *Ibid.*, pp. 148-149.

[10] Deschamps, *op. cit.*, pp. 39-40.

[11] *Ibid.*, p. 40.

[12] Thompson, V. and Adloff, R., *French West Africa* (1958), p. 44.

[13] Robinson, *Africa in the Modern World*, p. 148.

enjoyed French citizenship [1]. The inhabitants of the communes had ever since 1848 enjoyed the right to elect a deputy to the French Chamber in Paris [2] and in 1914 Senegal's first African deputy was elected [3]. In 1879 a General Council was established in Senegal, consisting of representatives of the four communes elected by the citizens, and having limited legislative and administrative jurisdiction over the communes only [4]. This was replaced in 1920 by a Colonial Council, with limited legislative jurisdiction over the whole of Senegal [5]. Some of its members were elected by the citizens and some by the Native Chiefs acting as an electoral college, but since 1925 representatives of the citizens were in the majority [6]. In 1939 the franchise for members of the Council was extended to French subjects who had completed their military service. They could elect 18 representatives, as against 26 citizens' representatives and 18 Chiefs' representatives [7].

43. Despite the special treatment of Senegal, the participation of the Natives of French West Africa in the processes of government was extremely limited. Apart from the consultative nature of the various bodies referred to above, only a very small number of Africans became citizens and thus acquired the right to vote. By 1936, out of a total population of 14.5 million some 78,000 were citizens by virtue of their connection with the communes, while about 2,000 persons all over the Federation had acquired citizenship by naturalization [8].

French Togoland

44. The territory of Togoland under the French Mandate was administered by a Commissioner [9]. Between 1933 and 1946 it was brought into close administrative association with French West Africa [9]. Four Advisory Councils were introduced in 1922 [10] whose members were elected by electoral colleges [11].

French Equatorial Africa

45. French Equatorial Africa comprised the territories of Gabon, Oubangui-Chari, Tchad and Moyen-Congo. From 1910 until after the Second World War the basic structure of the federation of these territories remained unchanged [12]. Before the Second World War only Senegal in French West Africa sent a deputy to the French Parliament [13]. French

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[1] Robinson, *op. cit.*, pp. 143-144; Thompson, V. and Adloff, R., *French Wes Africa* (1958), pp. 108-109.
[2] Thompson, V. and Adloff, R., *French West Africa* (1958), p. 108.
[3] *Ibid.*, p. 108.
[4] *Ibid.*, pp. 109-110; Robinson, *Africa in the Modern World*, pp. 145-146.
[5] Robinson, *Africa in the Modern World*, pp. 145-146.
[6] *Ibid.*, p. 146.
[7] *Ibid.*; Thompson, V. and Adloff, R., *French West Africa* (1958), p. 111.
[8] Robinson, *Africa in the Modern World*, p. 147.
[9] Hailey, *An African Survey* (1957), p. 333.
[10] *P.M.C., Min.*, XV, p. 27.
[11] *Ibid.*, p. 133.
[12] Thompson, V. and Adloff, R., *The Emerging States of French Equatorial Africa* (1960), p. 26.
[13] Thompson, V. and Adloff, R., *French West Africa* (1958), p. 108.

Equatorial Africa was represented in France by one delegate, elected by French citizens alone, to the Superior Council of the Colonies, which was a purely consultative body and which rarely convened [1].

46. At the head of the administration of French Equatorial Africa was a Governor-General, who was assisted by an Administrative Council, a purely advisory body consisting of nominated federal officials, four French citizens selected by the Chamber of Commerce and four French-speaking Africans to represent the Natives who were French subjects. The latter were elected by regional electoral colleges from among those of the inhabitants who were not French citizens [2]. Each of the four colonies or territories was headed by a Lieutenant-Governor, assisted by an appointed Advisory Council [3].

The French Cameroons

47. The Cameroons, under a mandate entrusted to France, was since 1921 administered as a separate unit under a Commissioner [4]. By a decree of 9 October 1925 the Councils of Notables were introduced. These Councils possessed only advisory powers and were elected by an electoral body of tribes which nominated a certain number of members, the list of whom it submitted to the Administrator. The latter then proposed a certain number of names to the Governor [5].

Madagascar

48. Madagascar was declared a French colony in 1896 [6]. Initial policy differentiated between three sections of the Territory according to the degree of Native self-government in each [7]. Indirect and direct rule were practised in varying degrees, and consultation with Advisory Councils of Native Notables was effected in the more advanced parts.

49. 'Later policy was directed at the training of the Natives towards ways and outlooks which were essentially French [8]. The Native tribes were all placed under direct control of French officials. By 1924 only 150 Natives had been granted French citizenship [9].

50. In 1924 advisory bodies called Economic and Financial Delegations were created [10]. One section consisted of 12 French citizens elected by the Chambers of Commerce in the principal towns, and another 12 were elected in constituencies, while the indigenous section consisted of 24 members elected by the notables of each district council [10]. The Dele-

[1] Thompson, V. and Adloff, R., *French West Africa* (1958), p. 44; Thompson, V. and Adloff, R., *The Emerging States of French Equatorial Africa* (1960), p. 26.

[2] Thompson, V. and Adloff, R., *The Emerging States of French Equatorial Africa* (1960), p. 26.

[3] *Ibid.*, p. 26; Hailey, *An African Survey* (1957), p. 341.

[4] Hailey, *An African Survey* (1957), p. 335.

[5] *P.M.C., Min.*, XV, p. 133.

[6] Howe, S. E., *The Drama of Madagascar* (1938), p. 290.

[7] Roberts, S. H., *History of French Colonial Policy (1870-1925)* (1929), Vol. II, pp. 397-398.

[8] Kent, R. K., *From Madagascar to the Malagasy Republic* (1962), pp. 72, 79-82; *Encyclopaedia Britannica*, Vol. 14 (1947), p. 606.

[9] *Encyclopaedia Britannica*, Vol. 14 (1947), p. 606.

[10] Kent, R. K., *From Madagascar to the Malagasy Republic* (1962), p. 78.

gations were initially consulted on matters of budgets, public loans and works [1], but were not considered a success [2], and fell into disuse. By the time of the Second World War there was no responsible body in existence representing the population of Madagascar either formally or informally [2].

V. ITALIAN CONTROLLED TERRITORIES

Eritrea

51. Eritrea was until 1936 administered by Italy as a Colony. The administration was in the hands of a Governor, who was responsible to the Italian Minister for the Colonies, and who was assisted by a local council consisting of the heads of departments. There was no direct representation of the indigenous peoples in the government of the country, although Native headmen and tribal Chiefs were used in local administration [3]. In each of the seven principal towns local administration was in the charge of a European mayor who was appointed by, and responsible to, the Governor [4].

52. In 1936 the Territory became one of the six provinces of Italian East Africa. The Governor of Eritrea became responsible to the Governor-General and Viceroy in Addis Ababa [5]. The system of government was greatly centralized; the Governor-General himself held only limited responsibility, most of the important questions being referred to Rome [5].

Italian Somaliland

53. The constitutional position in this Italian Colony was substantially the same as in Eritrea. The southern portion of the Territory had been administered by a Governor from 1910 [6], and when Italian authority was imposed on the northern section in 1925-1926 [6], it was administered by civil commissioners in each district, who were responsible to the Governor [6]. The Territory formed part of the Italian East Africa Colony constituted in 1936 [7], its Governor becoming responsible to the Governor-General in Addis Ababa, who in turn was responsible to the Minister of Italian Africa in Rome [5]. Here also, therefore, the indigenous population had no participation in the central government of the Colony.

VI. BELGIAN CONTROLLED TERRITORIES

Belgian Congo

54. Until its independence in 1960, the Belgian Congo was for all practical purposes ruled directly from Brussels [8]. While certain functions

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[1] Kent, R. K., *From Madagascar to the Malagasy Republic* (1962), p. 78.
[2] *Ibid.*, p. 89.
[3] *Encyclopaedia Britannica*, Vol. 8 (1947), p. 690.
[4] Trevaskis, G. K. N., *Eritrea* (1960), p. 27.
[5] Royal Institute of International Affairs, *The Italian Colonial Empire* (Information Dept., Paper No. 27) (1940), p. 37.
[6] *Encyclopaedia Britannica*, Vol. 20 (1947), p. 968.
[7] *Ibid.*, pp. 968-969.
[8] *Vide* Charte Coloniale, Loi Sur le Gouvernement du Congo-Belge, 1908, in

rested with the Governor-General, assisted where necessary by advisory bodies, the indigenous population had no say whatsoever in the government of the country [1].

Ruanda-Urundi

55. This former German Colony was entrusted as a mandate to Belgium in 1924. In 1926 the Belgian King approved of an Act which made provision for the administration of the Territory as an integral part of the Belgian Congo [2], but the legislative enactments of the Belgian Congo were not applicable to the Territory unless specifically so provided [3], and the Territory maintained its own budget. The Territory was administered by a Vice-Governor-General [4], to a large extent on the same basis as the Belgian Congo [5], and thus without any participation by the indigenous peoples in the central government.

VII. PORTUGUESE TERRITORIES

56. Portuguese territories on the African Continent south of the Sahara are Portuguese Guinea, Angola and Mozambique. Since the nineteenth century these territories have been regarded as parts of Portugal [6].

57. The population was made up of two distinct juridical classes: "citizens" and "aborigines" [7]. Europeans fell automatically into the former while Africans and Coloureds could obtain the status of citizen by satisfying the necessary qualifications, namely adoption of the European way of life, the ability to speak and write Portuguese and the possession of some trade or calling giving recognized financial status [8]. Special provisions protected the "Natives" or "aborigines" against abuse [9] and permitted their relations *inter se* to be governed by Native or adapted laws and customs [10].

58. In the nineteenth century the territories were administered under strict direct control, but early in the twentieth century a contrary trend set in and control was transferred in part to the Colonial Governors [6]. Since 1926 the Governors-General and Governors were assisted by local advisory bodies called Councils of Government [11]. They were composed of officials and nominated members, and since 1930 also of members elected by commercial organizations and municipal councils [12]. Through-

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Codes et Lois du Congo-Belge, Tome I (1954), p. 9; Hailey, *An African Survey* (1938), pp. 206-213.

[1] Merriam, A. P., *Congo: Background of Conflict* (1961), p. 14.

[2] Loi Sur le Gouvernement du Ruanda-Urundi, 1925, in *Codes et Lois du Congo-Belge* (1954), Tome I, p. 17.

[3] Loi Sur le Gouvernement du Ruanda-Urundi, 1925, *op. cit.*, sec. 3.

[4] *Ibid.*, sec. 1.

[5] Hailey, *An African Survey* (1938), pp. 212-213.

[6] *Ibid.* (1957), p. 228.

[7] *Ibid.*, pp. 231-232.

[8] *Ibid.*, p. 231.

[9] *Colonial Act*, Art. 15, in *Political Constitution of the Portuguese Republic* (2nd ed.), p. 66.

[10] *Ibid.*, Art. 22, p. 67.

[11] *Ibid.*, p. 355.

[12] Hailey, *An African Survey* (1938), p. 215.

out the period under review there was therefore no direct or general franchise in the territories, the only form of franchise existing at municipal level, where two councillors were elected by the citizens of the area and two by economic organizations or by the 20 principal taxpayers [1].

VIII. SPANISH TERRITORIES

Spanish Guinea

59. Spanish Guinea consists of Continental Guinea (Rio Muni) and the islands of Fernando Po, Annobon, the Elobeys and Corisco [2].

60. Throughout their occupation of these areas the Spaniards have treated them as appendages of Spain [3]. The territories were administered by a Governor stationed at Fernando Po, with sub-Governors at Bata and Elobey [4]. Legislation was undertaken by decree of the metropolitan Ministry [5]. The local population therefore had no participation in the central government.

IX. INDEPENDENT STATES

Ethiopia

61. After Ethiopia had existed as an independent, absolute monarchy for more than 2,000 years, a constitution was first adopted in 1931, whereby the monarchy became a constitutional one [6]. The constitution created a Chamber of the Senate and a Chamber of Deputies [7]. The members of the Senate were all appointed by the Emperor from among the dignitaries who had "for a long time served his empire as princes or ministers, judges or army leaders" [8]. In regard to the Chamber of Deputies, the Constitution provided that "as a temporary measure until the people are capable of electing them themselves, the members of the Chamber of Deputies shall be chosen by the dignitaries and the local chiefs" [9]. In fact there were no elections in Ethiopia prior to the Second World War [10].

Liberia

62. The Constitution of Liberia was drawn up in 1847 and is to a great extent modelled on the Constitution of the United States of America [11]. The constitution provides that the delegates to the House of Represen-

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[1] Hailey, *An African Survey* (1938), pp. 215-216.

[2] British Foreign Office, *Peace Handbooks*, Vol. XX (1918-1919), Doc. No. 132, p. 1.

[3] Hailey, *An African Survey* (1957), p. 234.

[4] *Ibid.*, p. 233.

[5] *Ibid.*, p. 234.

[6] Sandford, C., *Ethiopia under Haile Selassie* (1946), p. 46.

[7] "The Constitution of Ethiopia" (1931), Chap. II, Art. 7, in Peaslee, A. J., *Constitutions of Nations*, Vol. I (2nd ed.), p. 855.

[8] *Ibid.*, Art. 31, p. 857.

[9] *Ibid.*, sec. 32, p. 857.

[10] Silberman, L., "Ethiopia Elects", in The *Listener*, 14 Nov. 1957.

[11] "Constitution of the Republic of Liberia", in Peaslee, A. J., *Constitutions of Nations*, Vol. II (2nd ed.), pp. 586-594.

tatives "shall be elected by and for the inhabitants of the several counties of Liberia" [1] (i.e., the coastal strip stretching approximately 40 miles inland). As a result, the tribal people living in the provinces in the hinterland of Liberia, who constitute by far the greater portion of the population of the country [2], were excluded from the franchise. However, the Native tribes were entitled to send delegates to the Legislature (one from each tribe which paid more than 100 dollars in tax per annum) [3], where delegates had the right to discuss matters pertaining to Native interests and to vote thereon [3]. With regard to the Senate, the constitution confined membership to inhabitants of the counties of Liberia [4], the hinterland was therefore excluded from representation. It has been said that Liberia presented the paradox of being a Republic of 12,000 citizens with 1 million subjects [5].

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[1] Peaslee, *op. cit.*, Art. 2, sec. 2 of Legislative Powers as amended in 1849, 1861, 1907 and 1927, pp. 588-589.

[2] Carter, G. M., *African One-Party States* (1962), p. 356.

[3] Huberich, C. H., *The Political and Legislative History of Liberia*, Vol. II (1947), p. 1107.

[4] "The Constitution of the Republic of Liberia", Art. 2, sec. 5 of Legislative Powers in Peaslee, A. J., *Constitutions of Nations*, Vol. II, 2nd edition (1956), p. 589.

[5] Report of the experts designated by the Committee of the Council of the League of Nations, appointed to study the problem raised by the Liberian Government's request for assistance, *Papers concerning Affairs in Liberia, Dec. 1930—May 1934* (1934), p. 59.

Annex B

BRIEF SUMMARY OF THE CONSTITUTIONAL DEVELOPMENTS IN THE SAME COUNTRIES AFTER THE BEGINNING OF THE SECOND WORLD WAR

I. BRITISH CONTROLLED TERRITORIES IN CENTRAL AND SOUTHERN AFRICA

Southern Rhodesia

1. In 1951 the income and property qualifications for voters were increased [1], by 1953 only 481 Natives had been registered as voters [2], although the Native population in 1951 was estimated at 2 million, as against 136,017 Europeans, 4,343 Asiatics and 5,964 Coloureds [3]. The establishment of the Federation of Rhodesia and Nyasaland in 1953 did not affect the franchise qualifications for the Legislative Assembly in Southern Rhodesia [4]; but in 1957 a new system of franchise qualification was introduced, providing for a voters' roll with "ordinary" qualifications and a voters' roll with "lower" qualifications [5]. The number of "lower" roll voters who were entitled to be registered as such was restricted to a maximum of 20 per cent. of the total number of other voters [6]. Under this system there were 67,132 registered ordinary voters in 1959, of whom 1,157 were Africans and 64,280 Europeans, and 1,107 "lower" voters, of whom 876 were Africans and 173 Europeans [7]. These arrangements did not result in any African members being returned to the Assembly.

2. Southern Rhodesia received a new constitution in 1961 [8]. The executive authority is vested in Her Majesty the Queen and is exercised on her behalf by a Governor and Cabinet [9]. For the Legislative Assembly the "ordinary" or "A" roll and "lower" or "B" roll of voters were retained, with broadly the same franchise qualifications as before, except for a number of extensions [10]. The Territory was divided into 50 constituencies and 15 electoral districts; in the former the value of "B" votes was to be calculated according to a formula based on the proportion of "A" and "B" votes cast, while conversely in the latter the value of "A" votes was to be determined on that basis [11]. The first elections under

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[1] *Vide* Annex A, para. 4, *supra* and Lord Hailey, *An African Survey* (1957), p. 185.
[2] Hailey, *An African Survey* (1957), p. 185.
[3] *Official Year Book of Southern Rhodesia*, No. 4 (1952), p. 130.
[4] *Cmnd.* 1149, p. 33.
[5] *Ibid.*, pp. 34-35.
[6] *Ibid.*, p. 34.
[7] *Ibid.*, p. 35.
[8] The Southern Rhodesia (Constitution) Order in Council, 1961, *Statutory Instruments*, 1961, No. 2314.
[9] The Constitution of Southern Rhodesia, 1961, secs. 42 and 43, *Statutory Instruments*, 1961, No. 2314, Annex, p. 25.
[10] *Ibid.*, Second Schedule, pp. 61-63.
[11] *Ibid.*, para. 10, p. 63.

the new constitution held in 1961 resulted in 14 Africans and one Coloured being elected to the Assembly out of a total membership of 65; these were the first non-Whites to sit in the Southern Rhodesia Parliament [1].

3. The constitution also contained a Declaration of Rights, safeguarding personal liberty, freedom of conscience, assembly, association, and the like, and provided that no law could discriminate against any one in respect of race, tribe, colour or creed [2]. A Constitutional Council was established to safeguard against infringements of the Declaration of Rights [3].

Northern Rhodesia

4. In 1945 the number of nominated European unofficial members of the Legislative Council [4] who represented Native interests was increased from one to three [5]. As from 1948 the Africans were represented on the Council by members of their own race, two Africans having been appointed in that year [6], by 1959 there were six nominated unofficial African members on the Council, which then consisted of 26 members altogether [7]. The franchise for the 12 elected members of the Council remained unchanged to 1959, in practice leaving virtually all Africans without a vote [7].

5. A new constitution in 1959 resulted in the Africans obtaining two representatives of their own race on the Executive Council, out of a total membership of ten [8]. The Legislative Council was reconstituted [9] and the franchise for the elected members was given to "ordinary" voters and "special" voters, the qualifications for the latter being considerably lower than for the former [10]. In certain constituencies the weight accorded to votes cast by "special" voters was limited in relation to votes cast by "ordinary" voters, while other seats were reserved by race [11]. The elections held under this system resulted in eight African elected members being returned in addition to one nominated African member [12], out of a total membership of 30.

6. Further amendments to the constitution in 1962 extended the franchise [13] and resulted in an increased African representation in the Legislative Council. In 1963 there were 19 elected African members on the Council, as against 17 elected European members, one elected Asian member, and six nominated European officials. The Executive Council

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[1] *Keesing's Contemporary Archives*, Vol. No. XIII, 1961-1962, p. 19135.
[2] The Constitution of Southern Rhodesia, 1961, Chapter VI, secs. 57-72, *Statutory Instruments*, 1961, No. 2314, Annex, pp. 29-43.
[3] *Ibid.*, Chapter VII, secs. 73-91, pp. 43-51.
[4] *Vide* Annex A, para. 6, *supra*.
[5] *Cmnd.* 1149, p. 39; *vide* also Hailey, *An African Survey* (1957), pp. 290-291.
[6] *Cmnd.* 1149, p. 39.
[7] *Ibid.*, paras. 47-48, pp. 39-40.
[8] *Ibid.*, para. 59, p. 43.
[9] *Ibid.*, para. 60, p. 43.
[10] *Ibid.*, para. 65, pp. 44-45.
[11] *Ibid.*, paras. 61 and 62, pp. 43-44.
[12] *Keesing's Contemporary Archives*, Vol. No. XII, 1959-1960, p. 16793.
[13] The Northern Rhodesia (Electoral Provisions) Order in Council, 1962, *Statutory Instruments*, 1962, No. 626.

of 11, now includes four unofficial African members, as against two unofficial and five official Europeans [1].

Nyasaland

7. Africans obtained membership of the Legislative Council [2] for the first time in 1950, when two Africans were nominated [3]. A third nominated African member was added in 1953 [3], the total membership of the Council then being 19.

8. A form of election was first introduced in 1956, when the Council was reconstituted to include six non-African members elected by the European, Asian and Coloured communities, and five African members [4] elected indirectly by electoral colleges [5].

9. In 1959 two Africans were added to the Executive Council as additional nominated unofficial members [6].

10. The Territory received a new constitution in 1961 [7]. The Executive Council now contains a majority of members drawn from the elected members of the Legislative Council and appointed by the Governor [8]. The 28 elected members of the Legislative Council are elected in the majority of constituencies by voters on a lower roll and in the remaining constituencies by voters on a higher roll [9]. The first elections under the new constitution returned a Legislative Council containing six Europeans, one Asian and 21 Africans [10]. Official membership at first maintained a balance between Europeans and Natives on the Executive Council [10]; but when Nyasaland became self-governing on 1 February 1963, a Cabinet was formed consisting of nine Africans and one European [11]. Independence is planned for June 1964.

The Federation of Rhodesia and Nyasaland

11. The Federation was created in 1953 [12]. Executive power was vested in Her Majesty, to be exercised by a Governor-General and Cabinet [13]. The federal executive and legislative authority extended only to certain matters specified in the Constitution, the residual powers remaining vested in the Territorial Governments [14]. Legislative power was exercised by the federal Assembly consisting of 26 European members, elected

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[1] Central Office of Information, *Commonwealth Survey*, Vol. 9, No. 1 (1963), p. 5.
[2] *Vide* Annex A, para. 8, *supra*.
[3] *Cmnd.* 1149, para. 89, p. 52.
[4] *Ibid.*, para. 90, p. 53.
[5] *Ibid.*, paras. 91 and 96, pp. 53-54.
[6] *Ibid.*, para. 98, p. 54.
[7] The Nyasaland (Constitution) Order in Council, 1961; *Statutory Instruments*, 1961, No. 1189.
[8] *Ibid.*, secs. 6-8, p. 7.
[9] *Ibid.*, sec. 20 and sec. 60, pp. 10 and 24.
[10] *Keesing's Contemporary Archives*, Vol. No. XIII, 1961-1962, p. 18373.
[11] Steinberg, S.H. (ed.), *The Statesman's Year-Book 1963*, p. 510.
[12] The Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953, *Statutory Instruments*, 1953, No. 1199.
[13] *Cmnd.* 1149, paras. 45 and 47, pp. 11 and 12.
[14] *Ibid.*, para. 9, p. 2.

in common roll constituencies, six specially elected African members and three European members charged with special responsibility for African interests (one elected in Southern Rhodesia and one each appointed by the Governors of Northern Rhodesia and Nyasaland respectively) [1]. The common roll franchise was open to all races but was subject to property, income and other qualifications [2].

12. In 1957 the composition of the Assembly was altered, and an intricate voting system was introduced based on two separate voters' rolls and various categories of members of the Assembly [3]. As a result the Assembly now contains 12 African members out of a total membership of 59 [4].

13. The Federation is at present in the process of dissolution pursuant to an Act of the British Parliament passed in 1963 [5].

Swaziland

14. The traditional Native bodies which had been consulted by the administration [6] recieved statutory recognition in 1944 [7]. In 1950 the Paramount Chief in *Libandhla* was authorized [8] to make rules for the "peace, good order, and welfare" of the Natives of Swaziland, subject to the approval of the Resident Commissioner of the Territory [9].

15. A new constitution for the Territory has been under discussion since 1960 [10].

Basutoland

16. The system of indirect rule which had been introduced in 1938 [11] led to the establishment of District Councils in each of the nine districts of the Territory in 1943 [12]. Some of the members of the Councils were elected by the people in each district [13]. From each Council one member, elected by that Council was nominated to the Basutoland Council [13] by the Paramount Chief [14]. By 1950 the number had been increased to four for each District Council [15].

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[1] *Cmnd.* 1149, para. 20, p. 5.
[2] *Ibid.*, paras. 21-27, pp. 5 and 6.
[3] *Ibid.*, paras. 31, 33, 35-38, 41, pp. 7-9.
[4] *Keesing's Contemporary Archives*, Vol. No. XI, 1957-1958, p. 16546.
[5] *Ibid.*, Vol. No. XIV, 1963-1964, p. 19540.
[6] *Vide* Annex A, para. 10, *supra.*
[7] Native Administration Proclamation of 1944, *vide* Hailey, *Native Administration*, Part V, pp. 388-389.
[8] Native Administration (Consolidation) Proclamation, 1950 (No. 79 of 1950), *vide* Hailey, *Native Administration*, Part V, p. 389.
[9] *Ibid.*, sec. 22, *vide* Hailey, *Native Administration*, Part V, p. 390.
[10] Central Office of Information, *Commonwealth Survey*, 1962, Vol. 8, No. 8, pp. 340-343.
[11] *Vide* Annex A, para. 11, *supra.*
[12] Basutoland Council, *Report on Constitutional Reform and Chieftainship Affairs*, Basutoland Constitutional Handbook (1960), pp. 42-44.
[13] *Ibid.*, p. 43.
[14] Basutoland Council, *op. cit.*, pp. 42-43.
[15] *Ibid.*, p. 43.

17. In 1959 the Territory received a new constitution, which established Executive and Legislative Councils [1]. Half of the members of the Executive Council are Africans and half Europeans. The Resident Commissioner has a deliberative and a casting vote [1]. The Legislative Council known as the Basutoland National Council, has 80 members of whom all but four European officials are Africans [1]; of these 40 are elected by the District Councils which have now become fully elective bodies on the basis of a franchise extended to all adult taxpayers [1]. The remaining members are Chiefs and members nominated by the Paramount Chief [1]. The legislative power in respect of certain matters such as defence and external affairs, has been reserved for the High Commissioner of the Territory [1].

Bechuanaland

18. The European Advisory Council [2] was established on a statutory basis in 1947 [3] and in 1950 a Joint Advisory Council was created consisting of four officials and eight members from each of the African and European Advisory Councils [4].

19. The Territory received a new constitution in 1960 [5], which is still in force. Africans were given two nominated members in an Executive Council of nine [6], and 12 members (two appointed and ten elected), in a Legislative Council of 36 [7]. The election is by an electoral college called the African Council, a newly constituted advisory body relative to Native administration [8]. Apart from official membership this Council consists of the African authorities of the eight tribes and 32 Africans appointed or elected from 13 electoral districts [9].

II. BRITISH CONTROLLED TERRITORIES IN EAST AFRICA

Kenya

20. In 1944 an African was appointed to the Legislative Council of Kenya [10] for the first time, having been selected from a list of names proposed by the local Native Councils [11]. A second African seat was

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[1] Central Office of Information, *Commonwealth Survey*, 1959, Vol. 5, No. 20, pp. 858-859.

[2] *Vide* Annex A, para. 14, *supra*.

[3] Proclamation 44 of 1947. *Vide* Hailey, *Native Administration*, Part V, p. 319.

[4] Commonwealth Relations Office: *Bechuanaland Protectorate Report for the Year 1957*, p. 84; Lord Hailey, *Native Administration*, Part V, pp. 320-321.

[5] The Bechuanaland Protectorate (Constitution) Order in Council, 1960; *Statutory Instruments*, 1960, No. 2416.

[6] The Bechuanaland Protectorate (Constitution) Order in Council, 1960, *op. cit.*, secs. 3-5, p. 4.

[7] *Ibid.*, secs. 22, 24 and 25, pp. 9-10.

[8] *Ibid.*, sec. 24 and sec. 62, pp. 9, 23-24.

[9] *Ibid.*, sec. 56, pp. 21-22.

[10] *Vide* Annex A, para. 17, *supra*.

[11] Central Office of Information, *Kenya*, Pamphlet No. R4489 (1960), p. 17.

created in 1947 [1]. The Legislative Council was again enlarged in 1948 [2] and in 1952, when there were six appointed Africans in a membership totalling 45. There were also six Asians and two Arabs, the other members being official and elected Europeans [3]. In the same year an African for the first time took a seat on the Executive Council in the place of the European representing African interests [3].

21. As from 1954 a large number of successive constitutional changes were introduced, the one following rapidly on the other. In 1957 the first African elections in the territory were held for eight African seats in the Legislative Council, on a qualitative franchise coupled with a system of multiple voting [4]. Shortly thereafter Africans were given 18 seats (14 by direct election and four through an electoral college) out of a total membership of 91 [5].

22. The 1960 Constitution provided for a Legislative Council of 65 elected members. By a system of "reserved seats" and "national members" it guaranteed a certain minimum number of seats to each population group (European, African, Asian and Arab) [6]. These were coupled, however, with common roll elections for the remaining seats on the basis of such low franchise qualifications [7] as to result in an over-all African majority (37 out of a total of 65) [8]. The Executive Council then consisted of 12 Ministers, of whom four were Africans [9].

23. In 1962 there was tentative agreement upon a constitution introducing universal adult suffrage and a bicameral legislature [10]. Without having been put into effect, however, this Constitution was in March 1963 superseded by one drawn up for internal self-government of Kenya [11], which became independent on 12 December 1963 [12]. A House of Representatives consists of 117 members elected by universal adult suffrage and 12 members [13] elected by the elected members of the House forming an electoral college [14], and a Senate of 41 members representing each of the

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[1] Colonial Office *Notes on Colonial Constitutional Changes, 1940-1950*, p. 13.

[2] Additional Royal Instructions, *G.N.* No. 431, Colony and Protectorate of Kenya *Proclamations, Rules and Regulations*, Vol. XXVII, pp. 139-148.

[3] Colonial Reports, *Report on the Colony and Protectorate of Kenya for the Year 1952*, p. 139.

[4] Central Office of Information, *Kenya*, Pamphlet No. RF.P.5611 (1963), p. 27.

[5] *Cmnd.* 309, p. 3; *Cmnd.* 369, pp. 3-4.

[6] The Kenya (Constitution) (Amendment No. 2) Order in Council, 1960, *Statutory Instruments*, 1960, No. 2201; *Cmnd.* 960, pp. 7-8.

[7] Legislative Council Elections Ordinance, 1960 (No. 48 of 1960), sec. 9. *Kenya Ordinances*, 1960, Vol. XXXIX, p. 342.

[8] Colonial Office, *Report on the Colony and Protectorate of Kenya for the Year 1960*, pp. 115-116.

[9] *Ibid.*, p. 115.

[10] *Cmnd.* 1700, p. 16.

[11] The Kenya Order in Council, 1963, *Statutory Instruments*, 1963, No. 791.

[12] *Cmnd.* 2082, p. 1.

[13] The Kenya Order in Council 1963, secs. 28-30 and Schedule 2, Part II, *Statutory Instruments*, 1963, No. 791, pp. 36-37, 222-224; Central Office of Information, *Kenya*, Pamphlet No. RF.P.5611 (1963), p. 30.

[14] *Ibid.*, sec. 30 and Schedule 3, pp. 37 and 228-230.

Districts and the Nairobi area [1]. The Executive power rests in a Cabinet advising the Governor, on a basis of collective responsibility to the two Houses of the National Assembly [2].

Tanganyika

24. In 1945 the membership of the Legislative Council [3] was increased [4], and the Africans gained representation on it for the first time. Two Africans were then appointed as nominated unofficial members [5], and by 1948 two additional Africans had been appointed [6].

25. In 1946 the territory was placed under the international trusteeship system [7]. Certain changes in the Executive and Legislative Councils were introduced in 1948 [6], and in 1955 these bodies were again reorganized. Africans were given two members in an Executive Council consisting of 14 members, and ten appointed representatives on a Legislative Council of 61 members [8].

26. Elections were first held in 1958-1959. There was a common voters' roll, and the voters' qualifications were such that African voters formed an over-all majority; but a special voting system designedly maintained racial parity [9].

27. In 1960 there were further major constitutional changes. The franchise qualifications were substantially reduced [10], resulting in many more voters coming on to the roll [10]. The principle of parity of the races no longer applied; but in certain constituencies seats were reserved for European and Asian members and there were also a number of nominated members of each race [10]. As a result the Legislative Council returned in 1960 consisted of 50 elected African members, 11 elected Asians, ten elected Europeans, two *ex officio* European members, and nine nominated members of whom three were Africans, two Asians and four Europeans [11]. The Executive Council was replaced by a Council of Ministers and Cabinet government was introduced in 1961, resulting in seven African Ministers being appointed out of a total of 14 [12]. Tanganyika became independent in December 1961, adopted a republican form of government (within the Commonwealth) in December 1962, and now has universal adult suffrage and a Cabinet of 15, being 12 Africans, one Arab, one Asian and one European [13].

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[1] The Kenya Order in Council, *op. cit.*, secs. 26 and 27, p. 36.
[2] *Ibid.*, secs. 66 and 67, pp. 59-60.
[3] *Vide* Annex A, paras. 22-24, *supra.*
[4] The Tanganyika (Legislative Council) Amendment Order in Council, 1945, *State Papers*, Vol. CXLV, pp. 651-653.
[5] *Cmd.* 7987, p. 9.
[6] *G.A., O.R., Fifth Sess., Supp.* No. 4 (A/1306), pp. 5-6.
[7] *U.N. Doc.* T/Agreement 2, 9 June 1947.
[8] *G.A., O.R., Eleventh Sess., Supp.*, No. 4 (A/3170), p. 36.
[9] *G.A., O.R., Fourteenth Sess., Supp.* No. 4 (A/4100), pp. 25-26.
[10] *G.A., O.R., Sixteenth Sess., Supp.* No. 4 (A/4818), p. 25.
[11] *Ibid.*, pp. 24-25.
[12] *Ibid.*, p. 24.
[13] Steinberg, S. H. (ed.), *The Statesman's Year-Book 1963*, p. 548; *Keesing's Contemporary Archives*, Vol. XIII, 1961-1962, p. 19132.

Uganda

28. Three African members were appointed to the Legislative Council of Uganda [1] in 1945 [2], and a fourth was added in 1947 [3]. Two of the four African members were henceforth elected by Councils in their respective provinces [4]. In 1950 Africans were given eight seats in a Legislative Council then totalling 32 [3], but as yet no direct representation on the Executive Council [3]. A new constitution in 1955, however, gave them three Ministers in an Executive Council of 13 [5], and 30 members (appointed) in a Legislative Council of 60 [5]. Further changes in 1958 raised the total membership of the Legislative Council to 62, of whom 34 were Africans [6]. At the same time direct elections for the African representatives were introduced, the franchise being based on qualifications relating to property, literacy, public service, regular employment, or income [7]. In 1960 the franchise was broadened and in the next year direct elections on a common roll were held in 82 constituencies [8], resulting in 78 seats being held by Africans [9] and a Cabinet with nine African Ministers out of a total of 14 being formed [9].

29. Uganda received self-government in March 1962 and became independent in October of the same year. The new constitutional arrangements provided for an all-elected National Assembly based on universal adult suffrage with a common roll, with Buganda in federal relationship and the three Agreement Kingdoms (Toro, Ankole and Bunyoro) in semi-federal relationship with the central Government [10].

British Somaliland

30. A Protectorate Advisory Council was established for this territory in 1947 [11], but no further significant changes took place until 1957. Then, in the short space of three years, as a result of a number of constitutional changes, the territory developed from one having neither Executive nor Legislative Councils, into a fully independent country with a Cabinet system of Government and a Legislative Council elected on the basis of universal adult male suffrage [12]. The first Executive and Legislative Councils established in 1957 contained no elective element [12]; this was first introduced in 1959 in respect of a minority of the members of the Legislative Council [12], and in the next year the Legislative Assembly

[1] *Vide* Annex A, para. 19, *supra*.
[2] *Cmd.* 7167, p. 34.
[3] Central Office of Information, *Constitutional Development in the Commonwealth*, No. RF.P.2010, Part II, p. 22.
[4] *Cmd.* 7715, p. 23.
[5] Central Office of Information, *Uganda: The Making of a Nation*, No. RF.P. 5441, pp. 31-32.
[6] Central Office of Information, *Political Advance in the United Kingdom Dependencies*, No. RF.P.4324 (1959), p. 16.
[7] Apter, D. E., *The Political Kingdom in Uganda* (1961), p. 429.
[8] Central Office of Information, *Uganda: The Making of a Nation*, No. RF.P. 5441, p. 33.
[9] *Keesing's Contemporary Archives*, Vol. XIII, 1961-1962, p. 18044.
[10] *Cmnd.* 1523, pp. 4-5, 14-19.
[11] Colonial Office, *Annual Report on the Somaliland Protectorate for the Year 1948*, p. 32.
[12] *Cmnd.* 1044, pp. 3-4.

became fully elected [1]. The executive authority was vested in a Council of Ministers who were responsible to the Legislative Assembly [2]. British Somaliland became independent on 26 June 1960 and merged with the former Italian Trusteeship Territory of Somalia to form the Somali Republic on 1 July 1960 [3].

III. BRITISH CONTROLLED TERRITORIES IN WEST AFRICA

Gold Coast

31. In 1946 the Legislative Council of the Gold Coast [4] was reconstituted to become the first such Council with a majority of African unofficial members in the whole of British Africa [5]. Some of the elected African members were directly elected through a franchise based on property and other qualifications [6], but the majority were elected by various electoral colleges [6].

32. A new constitution of 1951 provided for a Legislative Council of 84 members, of whom 75 were elected African members [7], but of the latter number five only were directly elected [7]. At the same time there were eight Africans in the new Executive Council of 11 members [7]. An African filled the post of Prime Minister newly created in 1952 [8].

33. A further revision of the constitution in 1954 resulted in the direct election of all members of the Legislature [9], on the basis of universal adult suffrage [9]. The Executive Council now became a Cabinet of Ministers presided over by the Prime Minister [10].

34. The Gold Coast thus became the first African Colony to have a Legislature wholly elected on the basis of universal adult suffrage with an all-African Cabinet of Ministers. It became independent in 1957, thenceforth to be known as Ghana.

Nigeria

35. In 1942 the Africans of Nigeria gained representation on the Executive Council, two of the three unofficial members appointed then for the first time being Africans [11].

36. Major constitutional changes were brought about in Nigeria in 1947, 1951, 1954 and 1960, culminating in a Federal Constitution under which the country became independent in the last-mentioned year.

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[1] The Somaliland Order in Council, 1960, *Statutory Instruments 1960*, No. 1060, Annex, sec. 17, p. 6.

[2] *Ibid.*, secs. 3 and 4, pp. 3-4.

[3] Steinberg, S. H. (ed.), *The Statesman's Year-Book 1963*, p. 1389.

[4] *Vide* Annex A, para. 27, *supra*.

[5] Royal Institute of International Affairs, *Chatham House Memoranda*, Ghana, A Brief Political and Economic Survey (1957), pp. 13-14.

[6] *Ibid.* and Elias, T. O., *Ghana and Sierra Leone*, The Development of their Laws and Constitutions (1962), p. 70.

[7] *Ibid.*, p. 16.

[8] Elias, *op. cit.*, p. 41.

[9] *Ibid.*, p. 42.

[10] *Ibid.*, p. 65.

[11] Central Office of Information: Nigeria: *The Making of a Nation*, 1960, p. 29.

37. As from 1947 the Legislative Council contained a majority of African members, most of whom were indirectly elected by regional electoral colleges [1]. In 1954, however, universal adult suffrage for the members of the Legislative Council (by then known as the House of Representatives) was introduced in the Eastern Region of Nigeria; the members representing the Western Region were elected by tax suffrage, while the electoral college system was still in force in the Northern Region [2].

38. Although the Legislative Council had jurisdiction over the whole of Nigeria [3], Nigerian diversity was acknowledged in a system of Regional Legislative Houses with legislative powers on a wide number of subjects [3]. Similarly, the Executive Council of Nigeria (which became a Council of Ministers in 1951) [4] was the principal instrument of policy in Nigeria [4], but at the same time there were Regional Executive Councils in the various regions of the country [4].

39. Under the 1960 Constitution the Federal Parliament consists of a Senate and a House of Representatives [5]. The members of the House of Representatives are now elected on the basis of universal adult suffrage in the Eastern and Western Regions, Lagos and the Southern Cameroons, the franchise being restricted to adult males only in the Northern Region. Each Region is, subject to the federal Constitution, a separate self-governing state with its own executive and legislative organs [6].

Sierra Leone

40. In 1943 the Africans obtained representation on the Executive Council [7] of the territory for the first time, when two unofficial African members were nominated by the Governor [8]; and in 1948 a third African member was added [9].

41. The Legislative Council was reconstituted in 1951 [10], after its composition had remained unchanged for 27 years [11]. About two-thirds of its members were now elected, some directly, on the basis of adult suffrage with property and literacy qualifications [12], and the majority indirectly by means of electoral colleges [12].

42. At the same time the Executive Council was reconstituted so that

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[1] *Report by His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland to the Trusteeship Council of the United Nations on the Administration of the Cameroons under United Kingdom Trusteeship for the Year 1947*, Colonial No. 221, p. 15.

[2] Ezera, K., *Constitutional Developments in Nigeria* (1960), pp. 201-202 and 208.

[3] *Ibid.*, p. 202.

[4] *Ibid.*, p. 204.

[5] The Nigeria (Constitution) Order in Council, 1960, *Statutory Instruments*, 1960, No. 1652, sec. 36.

[6] *Ibid.*, Schedules 3, 4 and 5.

[7] *Vide* Annex A, para. 34, *supra*.

[8] Elias, *op. cit.*, p. 251.

[9] Central Office of Information, *Sierra Leone: The Making of a Nation*, No. RF.P. 4851 (1960), p. 26.

[10] The Sierra Leone (Legislative Council) Order in Council, 1951, *Statutory Instruments*, 1951, No. 611.

[11] *Vide* Annex A, para. 34, *supra*.

[12] Elias, *op. cit.*, pp. 247-248.

the majority of its members were drawn from the elected members of the Legislative Council [1].

43. Constitutional changes in 1956 resulted in a majority of directly elected African members being returned to the Legislature (the House of Representatives) [2], on the basis of a franchise extended to virtually all adult taxpayers [3]. In 1958 the territory received its first all-African Executive Council and an African Prime Minister [4].

44. Further constitutional developments in 1958, 1960 and 1961 resulted in Sierra Leone becoming a fully independent State within the British Commonwealth [5], with an all-African Cabinet and a House of Representatives directly elected by universal adult suffrage [6].

British Cameroons

45. In 1946 the General Assembly of the United Nations approved a trusteeship agreement for the British Cameroons. The administration of the Territory was fully integrated with the adjoining areas of the Protectorate of Nigeria [7], so that the Cameroons had no legislative, administrative or budgetary autonomy, but shared a common executive, legislative and judicial system with the Protectorate of Nigeria [8]. In the 1951 Nigerian constitutional changes the Cameroons obtained its own representation in the Central House of Representatives [9] and also in the Northern and Eastern Regional Houses of Assembly [10].

46. Under the 1954 Nigerian Constitution and thereafter the Northern Cameroons continued to be closely integrated with the Northern Territories of Nigeria, sharing in the election of members to the Federal House of Assembly and to the Northern House of Assembly [11], while the Southern Cameroons became a separate federal constituent with its own Regional House of Assembly and Executive Council [12]. The franchise for the election of members of the House of Assembly was the same as in the other Regions [13].

47. In 1961 plebiscites were held in the Northern and Southern parts of the Trust Territory for the purpose of determining whether the people wished to achieve independence by joining the independent Federation of Nigeria or the independent Republic of Cameroun [14]. As a result, the

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[1] Elias, *op. cit.*, p. 251.
[2] *Ibid.*, p. 249.
[3] *Ibid.*, p. 254.
[4] Central Office of Information: *Sierra Leone : The Making of a Nation*. No. RF.P. 4851 (1960), p. 28.
[5] Elias, *op. cit.*, p. 258.
[6] *Ibid.*, pp. 259-260.
[7] The Nigeria (Protectorate and Cameroons) Order in Council, 1946, sec. 6, *State Papers*, Vol. CXLVI, p. 301.
[8] *Report on the Cameroons under United Kingdom Trusteeship for the Year 1947*, p. 14.
[9] *Ibid.*, *1951*, p. 39.
[10] *Ibid.*, pp. 39-40.
[11] *G.A., O.R., Tenth Sess., Supp.* No. 4 (A/2933), pp. 144-145.
[12] *Ibid.*, p. 144.
[13] *Ibid.*, p. 146.
[14] *G.A., O.R., Sixteenth Sess., Supp.* No. 4 (A/4818), p. 35.

Northern Cameroons joined the Federation of Nigeria as a separate province of the Northern Region of Nigeria, while the Southern Cameroons joined the Republic of Cameroun [1].

British Togoland

48. In 1946 the Southern Section of Togoland was included in the Gold Coast Colony for legislative and administrative purposes [2], and four years later the Southern Togoland Council was established for the purpose of electing one member to represent the territory in the Central Gold Coast Legislature; but the Northern Section of Togoland remained administratively integrated with the Northern Territories of the Gold Coast and subject to the legislative power of the Governor [3].

49. With the constitutional changes effected in the Gold Coast in 1951 and 1954 Togoland obtained more representatives on the Legislative Council. In 1956 a plebiscite showed a majority of the people of British Togoland to be in favour of complete integration with an autonomous Gold Coast, and this was effected when Ghana became an independent State in 1957 [4].

Gambia

50. New Executive and Legislative Councils [5] were established for the Colony and Protectorate of Gambia in 1946 [6], as a result of which Africans received minority representation in both Councils [6].

51. A new constitution of 1954 provided for a Legislative Council with a majority of elected members [7], most of whom were elected by various electoral colleges [7]. As a result, Africans became the majority of the members of the Council [7]. The Executive Council was also reconstituted so as to have a majority of members appointed from the elected or nominated members of the Legislative Council [7].

52. A new constitution was again introduced in 1960 [8] providing for 27 elected members in the Legislature—19 directly elected by universal adult suffrage and the remaining eight by the Head Chiefs [9]. Internal self-government under yet a new constitution came in May 1962, the House of Representatives now having 36 elected members (32 by universal adult suffrage and four by Chiefs) out of a total of 39. An all-African Cabinet consists of a Premier and eight Ministers drawn from the Legislature [10].

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[1] *G.A., O.R., Sixth Sess., Supp.* No. 4 (A/4818), p. 35

[2] *G.A., O.R., Fourth Sess., Supp.* No. 4 (A/933), pp. 31-32.

[3] *G.A., O.R., Sixth Sess., Supp.* No. 4 (A/1856), p. 153.

[4] *G.A., O.R., Twelfth Sess., Supp.* No. 4 (A/3595), p. 23.

[5] *Vide* Annex A, para. 38, *supra.*

[6] Colonial Office, *Annual Report on the Gambia for the Year 1947*, pp. 46-47.

[7] *Gambia Report for the Years 1958 and 1959*, pp. 84-85.

[8] The Gambia (Constitution) Order in Council, 1960, *Statutory Instruments*, 1960, No. 701.

[9] *Ibid.*, secs. 22, 23 and 27 and Central Office of Information, *Gambia*, Pamphlet No. R.5519, p. 12.

[10] Steinberg, S. H. (ed.), *The Statesman's Year-Book 1963*, p. 183.

IV. FRENCH CONTROLLED TERRITORIES

French West Africa

53. In 1946 all the French West African territories obtained representation in the French National Assembly and in the Council of the Republic [1]. In addition, French West Africa was represented in the French Union Assembly [1], which was a newly created advisory body, half of whose members represented metropolitan France and half the associated States of the new French Union [2]. The franchise qualifications for the election of deputies to the National Assembly were such that only a limited number of the indigenous people gained voting privileges [3]. The Senators in the Council of the Republic and the representatives on the French Union Assembly were elected by electoral colleges consisting of each territory's deputies and/or the members of each General Council [3].

54. The General Councils, later known as Territorial Councils, were representative bodies established in 1946 and 1948 for the various territories except Senegal [4]. The electorate for these Councils consisted of a double college of voters, the first being composed of citizens having French civil status and the second of what may be termed territorial citizens, being in practice Africans belonging to certain specified categories [5].

Universal adult suffrage was introduced in French West African territories in 1956 [6]. The Territorial Assemblies elected on this basis had legislative powers over local affairs [6]. At the same time Executive Councils were established, consisting of a majority of members elected by the Territorial Assembly [7], with a Territorial Head as Chairman [7].

55. In 1958 the French Union was transformed into the Community. All the French West African territories, with the exception of Guinea, which preferred immediate independence through secession, voted to become sovereign republics within the Community.

French Togoland

56. After the Second World War the Territory was placed under a trusteeship agreement.

57. The Territory was given a Territorial Assembly in 1946 [8] which consisted of 26 Africans and four Europeans [9]. The two electoral colleges were retained. The first was estimated at 400 voters who were French citizens and elected six members. Out of a total adult population of 944,446, only 39,615 registered in 1947 in the second college [9]. The franchise qualifications were similar to those in force in the other French Territories [9]. In 1952 the size of the electoral body was increased and the

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[1] Thompson V. and Adloff R., *French West Africa* (1958), p. 45.
[2] Robinson, K., "Political Development in French West Africa", in *Africa in the Modern World*, edited by C. W. Stillman (1955), p. 157.
[3] *Ibid.*, pp. 159-160.
[4] Thompson, V. and Adloff, R., *French West Africa* (1958), p. 54.
[5] Robinson, K., *Africa in the Modern World* (1955), pp. 159-160.
[6] Thompson, V. and Adloff, R., *French West Africa* (1958), p. 80.
[7] *Ibid.*, p. 81.
[8] Hailey, *An African Survey* (1957), p. 333.
[9] *G.A., O.R., Fourth Sess., Supp.* No. 4 (A/933), p. 42.

representation of the second college was raised [1]. In 1956 the Territory became part of the French Union and universal adult suffrage was introduced [2].

French Equatorial Africa

58. The post-war developments in French Equatorial Africa followed substantially the same pattern as in the case of French West Africa. In 1946 French Equatorial Africa obtained seats in the French National Assembly, in the Senate and in the new French Union Assembly [3]. The local Assembly consisted at first of members elected on a restricted franchise with the same type of two-fold electorate as in the case of French West Africa [4], but here too universal adult suffrage was introduced in 1956 [5]. At the same time the position of the Governor-General and Governors was modified by the establishment of Councils of Government which in effect were cabinets under a system approaching closely to full responsible government [5].

59. The establishment of the French Community in 1958 led to the four Territories comprising French Equatorial Africa all becoming Republican member States of the Community.

French Cameroons

60. After the Second World War a trusteeship agreement was concluded for this Territory.

61. In 1942 it was given a Consultative Economic and Social Council consisting of 34 members [6], which was succeeded in 1945 by a Territorial Assembly [7]. The members of the Assembly were elected by two electoral colleges, the first consisting of French citizens and the second of others falling in specified categories [8]. The first college had a proportionately higher representation; it consisted of 2,590 voters in 1946 and elected 16 European members [9]. In the second college it was estimated in 1946 that 450,000 to 500,000 persons were eligible to vote out of a total adult population of 1,400,000; however, only 39,615 had registered in 1947. This college elected 24 African members [9]. In 1956 the Cameroons was included in the French Union, and universal adult suffrage was introduced.

Madagascar

62. The post-war constitutional changes in Madagascar were similar to those in the other French African territories. Under the constitution of the French Union established in 1946, Madagascar was one of the

[1] *G.A., O.R., Ninth Sess., Supp.* No. 4 (A/2680), pp. 208-209.
[2] Hailey, *An African Survey* (1957), p. 334.
[3] Thompson V. and Adloff R., *The Emerging States of French Equatorial Africa* (1960), p. 37.
[4] *Ibid.*, pp. 37-38.
[5] *Ibid.*, p. 34.
[6] Hailey, *An African Survey* (1957), p. 335.
[7] *Rapport Annuel du Gouvernement Français aux Nations Unies sur l'administration du Cameroun placé sous la tutelle de la France, année 1947*, p. 12.
[8] *Ibid.*, pp. 24-25.
[9] *G.A., O.R., Fourth Sess., Supp.* No. 4 (A/933), p. 17.

"Overseas Territories" with representation in the French National Assembly, the Council of the Republic and the Assembly of the French Union [1]. The franchise and voting arrangements for the local legislative organs were similar to those in the other French Territories discussed above [2].

63. The French constitutional reforms in 1956 extended the principle of universal adult franchise to Madagascar [3].

64. In 1958, when the French Union was transformed into the Community, the Representative Assembly of Madagascar proclaimed the establishment of the Malagasy Republic.

V. ITALIAN CONTROLLED TERRITORIES

Eritrea

65. After the conquest of the Territory in 1941, a military administration was set up under which various advisory councils were established from time to time [4].

66. In 1952, as a result of a resolution of the General Assembly of the United Nations [5], Eritrea was constituted an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown. Under the federal Act Eritrea has executive, legislative and judicial powers in the field of domestic affairs [6]. The Eritrean Constitution [7] provides for a Legislative Assembly [8] elected either by direct or indirect ballot, the first stage of the latter being conducted in accordance with local custom [9]. The franchise is given to adult male citizens [10]. The executive power vests in a Chief Executive elected by the Assembly and assisted by a Council of Secretaries appointed by him [11]. Eritreans participate in the federal executive, legislative and judicial processes in the proportion that the population of Eritrea bears to the population of the Federation [12].

Italian Somaliland

67. In 1946 the British military administration of the territory established a number of Advisory Councils [13].

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[1] *Madagascar et les Territoires Français de l'Océan Indien et de la Mer Rouge: Comores—Iles Australes—Somalis (1954)*, p. 17; Deschamps, H., *The French Union* (1956), p. 71.

[2] Deschamps, H., *The French Union* (1956), pp. 113 and 150.

[3] *Livre d'Or de la Republique Malgache* (1959), p. 55.

[4] Trevaskis, G. K. N., *Eritrea* A Colony in Transition: 1941-1952 (1960), p. 32.

[5] *G.A. Resolution* 390 A (V), 2 Dec. 1950, in *G.A., O.R., Fifth Sess., Supp.* No. 20 (A/1775), pp. 20-22.

[6] *Ibid.*, sec. 5, p. 20.

[7] *Constitution of Eritrea*, in *G.A., O.R., Seventh Sess., Supp.* No. 15 (A/2188), pp. 76-89.

[8] *Ibid.*, Art. 39, p. 82.

[9] *Ibid.*, Art. 43 (4), p. 83.

[10] *Ibid.*, Art. 20, p. 80.

[11] *Ibid.*, Arts. 67-69 and 74, pp. 85-86.

[12] *Ibid.*, Art. 7, p. 79.

[13] Administrative Instruction No. 125/46. *Annual Report by the Chief Administrator, 1946*, British Military Administration Somalia. Appendix 16, p. 42.

68. In 1950 Somaliland was entrusted to Italy to administer as a Trust Territory until it attained its independence [1]. Various new advisory, non-elective Councils were thereupon established [2].

69. In 1956 a fully elective Legislative Assembly was introduced, consisting of 60 members to represent the Somali population and ten members representing the non-Somali communities [3]. There was universal adult male suffrage, but in rural districts an indirect electoral system through tribal councils was in force [4]. The executive government was vested in a Council of Ministers, appointed by the Administrator, and responsible to him and to the legislature [5].

70. In 1958 the electoral laws were amended to introduce universal adult suffrage and to extend the direct ballot system, and in the next year the second Legislative Assembly was returned on this basis [6]. In 1960 Somalia obtained independence.

VI. BELGIAN CONTROLLED TERRITORIES

Belgian Congo

71. As from 1951 Africans were appointed in the minority, to the Central and Provincial Advisory Councils [7]. Until 1959 there was no material further change in constitutional arrangements.

On 13 January 1959 King Baudouin of Belgium declared his will to lead the Congolese population to independence [8]. Provision was thereupon made for the election by universal suffrage of municipal councillors and members of territorial councils, who together would appoint provincial councillors and, later on, general counsellors [8]. Forerunners of a Chamber of Representatives and a Senate were also established [8].

72. A year later a conference in Brussels decided on independence for the Belgian Congo to be granted on 30 June 1960 and adopted a number of resolutions providing for the preliminary constitution of the new State [9]. The legislative power was to be exercised by a House of Representatives, whose members were to be elected by universal suffrage, and a Senate, whose members were to be designated by the provincial assemblies (including a minimum number of tribal chieftains or leaders) [10]. The two Houses, convened as a Constituent Assembly, were to draw up the constitution of the Congo State and to designate the Head of the State [11]. Other resolutions regulated the division of powers between the Central Legislature and the provinces, and the organization of Provincial

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[1] *U.N. Doc.* T/Agreement/10, 8 Aug. 1951.
[2] *G.A., O.R., Sixth Sess., Supp.* No. 4 (A/1856), pp. 84-85.
[3] *G.A., O.R., Eleventh Sess., Supp.* No. 4 (A/3170), p. 90.
[4] *Ibid.*, p. 92.
[5] *Ibid.*, p. 91.
[6] *G.A., O.R., Fifteenth Sess., Supp.* No. 4 (A/4404), p. 90.
[7] Hailey, *An African Survey* (1957), pp. 350-351.
[8] "The Congo on the Road to Democracy", in Infor Congo, *The Belgian Congo Today*, Vol. VIII, No. 3, p. 9.
[9] Ganshof van der Meersch, W. J., *Fin de la Souveraineté Belge au Congo* Documents et Réflexions (1963), pp. 161-164.
[10] *Ibid.*, pp. 167-168 and 126-129.
[11] *Ibid.*, pp. 167-169.

Assemblies and institutions [1]. These resolutions became the law under which independence was granted to the country on the fixed date [2]. Internal hostilities delayed the adoption of the contemplated constitution until October 1962 [3]. It concerned mainly the division of power between central and provincial authorities [3].

Ruanda-Urundi

73. In 1946 the United Nations approved a trusteeship agreement, with Belgium as the administering authority [4]. In the next year an Advisory Council was established, consisting entirely of *ex officio* and appointed members [5]. In 1949 the two Native Kings of Ruanda and Urundi were appointed *ex officio* members of the Council [6]. By 1954 the number of African members on the Council had been increased to five [7]. In 1957 this Council was replaced by a General Council which was still a purely advisory body with a majority of appointed European members [8].

74. In the meantime, however, developments in the system of loca government provided for the indigenous peoples increasing participation in administration. The members of the indigenous Sub-chiefdom Councils, Chiefdom Councils, District Councils and High Councils of the States were elected indirectly and by means of electoral colleges [9], and steps were taken to make the local institutions more democratic [10]. Major reforms in 1959 and 1960 extended the principle of direct adult male suffrage, and conferred limited legislative powers on the King and State Council in each of the two territories of Ruanda and Urundi [11]. Further developments [12] included the abolition of the monarchy in Ruanda and the holding of general elections in the two territories resulting in the Trusteeship Agreement being terminated on 1 July 1962 and Rwanda and Burundi emerging as two independent and sovereign States [13].

VII. PORTUGUESE TERRITORIES

75. Portugal did not adopt a policy of granting separate independence to its African territories on the basis of a general franchise. The system of regarding the territories as part of Portugal was retained and they were now called "provinces" [14].

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[1] Ganshof van der Meersch, *op. cit.*, pp. 167-169.
[2] *Britannica Book of the Year, 1961*, Encyclopaedia Britannica, p. 144.
[3] Steinberg, S. H. (ed.), *The Statesman's Year-Book 1963*, p. 914.
[4] *U.N. Doc.* T/Agreement/3, 9 June 1947, secs. 1-2, p. 2.
[5] Arrêté Royal, 4 Mar. 1947 as cited by Hailey, *An African Survey* (1957), p. 352
[6] *G.A., O.R., Fifth Sess., Supp.* No. 4 (A/1306), p. 19.
[7] *G.A., O.R., Tenth Sess., Supp.* No. 4 (A/2933), p. 78.
[8] *G.A., O.R., Thirteenth Sess., Supp.* No. 4 (A/3822), Vol. II, p. 41.
[9] *G.A., O.R., Tenth Sess., Supp.* No. 4 (A/2933), p. 79.
[10] *G.A., O.R., Twelfth Sess., Supp.* No. 4 (A/3595), p. 59.
[11] *G.A., O.R., Fifteenth Sess., Supp.* No. 4 (A/4404), pp. 64-66.
[12] *G.A., O.R., Sixteenth Sess., Supp.* No. 4 (A/4818), p. 30.
[13] *G.A., O.R., Seventeenth Sess., Supp.* No. 4 (A/5204), p. 9.
[14] Law No. 2048, *Political Constitution of the Portuguese Republic* (1957), Chap. VII, Art. 134, p. 36.

76. Provision was made in 1951 for the representation of the provinces in the Portuguese National Assembly. Angola and Mozambique each elected three Deputies and Portuguese Guinea one, out of a total of 120 Deputies [1]. The franchise was confined to citizens, i.e., adult members of the *população civilizada* [2]. The composition of the population in 1950 was as follows [3]:

	Total pop.	*População Civilizada*	*White*	*Half-caste*	*Indian*	*Native*
Guinea	510,777	8,320	2,263	4,568	11	1,478
Angola . . .	4,145,266	135,355	78,826	26,335	—	30,039
Mozambique	5,782,982	92,619	48,813	25,165	12,673	4,353

77. The New Organic Law of 1953 introduced Legislative Councils, with advisory powers only, for Angola and Mozambique [4]. In Angola 11 out of a total of 36 members and in Mozambique nine out of a total of 24 members were directly elected by the citizens [4], thus introducing a direct elective element for the first time in the central government of these territories—the other seats on the Councils being filled in basically the same manner as had applied to the Councils of Government [5]. The latter Councils were retained and here also an elective element was introduced, i.e., the election of one member for each district by citizens [4].

78. Consideration has been given since 1962 to provide for "adequate representation" for the territories at the national level, i.e., in the National Assembly, the Corporate Chamber and the Overseas Council [6], and for the establishment in the Territories of fully elected Legislative Councils with legislative powers [7].

VIII. SPANISH TERRITORIES

Spanish Guinea

79. Until 1960 the Territory was administered on the same basis as in the pre-war period. The Governor had, however, two Advisory Councils, one composed of the civil and military heads of local services, and the other of representatives of the Chambers of Commerce and certain nominated officials [8].

80. In 1960 the Territory was divided into two provinces, each becoming a province of Metropolitan Spain under a civil governor, the inhabitants having the same rights as Spanish citizens [9], and therefore

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[1] Hailey, *An African Survey* (1957), p. 230.

[2] Art. 23, Native Statute as cited by Egerton, F. C. C., *Angola in Perspective* (1957), p. 118.

[3] Anuàrio Estatistico do Ultramar, 1952, pp. 26-27 as cited by Hailey, *An African Survey* (1957), p. 232.

[4] Hailey, *An African Survey* (1957), p. 355.

[5] *Vide* Annex A, para. 58, *supra*.

[6] According to a statement apparently made by the Permanent Representative of Portugal at the 1155th Plenary Meeting of the General Assembly on 18 Oct. 1962, *vide U.N. Doc.* A/5446/Add. 1 (19 July 1963), pp. 23-24.

[7] *Ibid.*, p. 25.

[8] Hailey, *An African Survey* (1957), p. 234.

[9] Whitaker, J., *An Almanack*, 1961, p. 928.

the right to partake in the election of the elected members of the *Cortes de Espãna.*

During this year autonomy for these provinces was provided for in a statute, subject to a plebiscite recently held. The result is not yet known [1].

IX. INDEPENDENT STATES

Ethiopia

81. Ethiopia received a new constitution in 1955, providing for a Chamber of Deputies elected by universal suffrage [2]. Two years later the first elections in the history of the country were held [3]. The members of the Senate are still appointed by the Emperor [4].

Liberia

82. The tribal people of the hinterland of Liberia received representation in the legislature of the country for the first time in 1945, when the three provinces were allotted one representative each in the House of Representatives [5]. By 1962 six members of the House of Representatives represented the provinces out of a total membership of 40 [6]. According to the Liberian Government, the tribes living in the counties are represented by an additional number of representatives [7]; accordingly approximately one-third of the members represent the tribes [8], which are estimated at 1,250,000 people, as against approximately two-thirds representing the Americo-Liberians, whose number is estimated at between 12,000 and 20,000 [9].

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[1] A.F.P. Africa South of the Sahara, No. 1012, 21 Oct. 1963.

[2] Articles 93-95 of the *Revised Constitution of Ethiopia* (1955) in *Ethiopia Observer*, Vol. V, No. 4 (1962), p. 375.

[3] Silberman, L., "Ethiopia Elects", in *The Listener* (14 Nov. 1957), pp. 774-775.

[4] Article 101 of the Constitution, in *Ethiopia Observer*, Vol. V, No. 4 (1962), p. 375.

[5] Hailey, *An African Survey* (1957), p. 357.

[6] *Liberia Annual Review* 1962-1963, pp. 278-281.

[7] Carter, G. (ed.), *African One-Party States* (1962), p. 356.

[8] Townsend, E. R. (ed.), *President Tubman of Liberia Speaks* (1959), p. 155.

[9] Kitchen, H. (ed.), *The Press in Africa* (1956), p. 85; Buell, R. L., *Liberia: A Century of Survival 1847-1947* (1947), p. 7.

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