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SOUTH WEST AFRICA CASES

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



AFFAIRES DU SUD-OUEST AFRICAIN

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

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

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LIBERIA *v.* SOUTH AFRICA)

VOLUME V

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 V



PRINTED IN THE NETHERLANDS

The present volume contains the Rejoinder (Parts I, II and Sections A-E of Part III) filed in 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 delivered, 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 la duplique (1^{re} et 2^e parties et sections A-E de la 3^e partie) déposée dans les affaires du *Sud-Ouest africain*. Ces affaires ont été inscrites au rôle général de la Cour sous les nos 46 et 47 le 4 novembre 1960 et les deux instances ont été jointes par ordonnance de la Cour le 20 mai 1961 (*Sud-Ouest africain, ordonnance du 20 mai 1961, C.I.J. Recueil 1961*, p. 13). Elles ont fait l'objet de deux arrêts rendus le 21 décembre 1962 (*Sud-Ouest africain, exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 319) et le 18 juillet 1966 (*Sud-Ouest africain, deuxième phase, arrêt, C.I.J. Recueil 1966*, p. 6).

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

La Haye, 1966.

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1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that this is crucial for ensuring transparency and accountability in the organization's operations.

2. The second part of the document outlines the various methods and tools used to collect and analyze data. It highlights the need for consistent and reliable data collection processes to ensure the validity of the results.

3. The third part of the document describes the different types of data that are collected and how they are used to inform decision-making. It notes that a combination of quantitative and qualitative data is often used to provide a comprehensive view of the organization's performance.

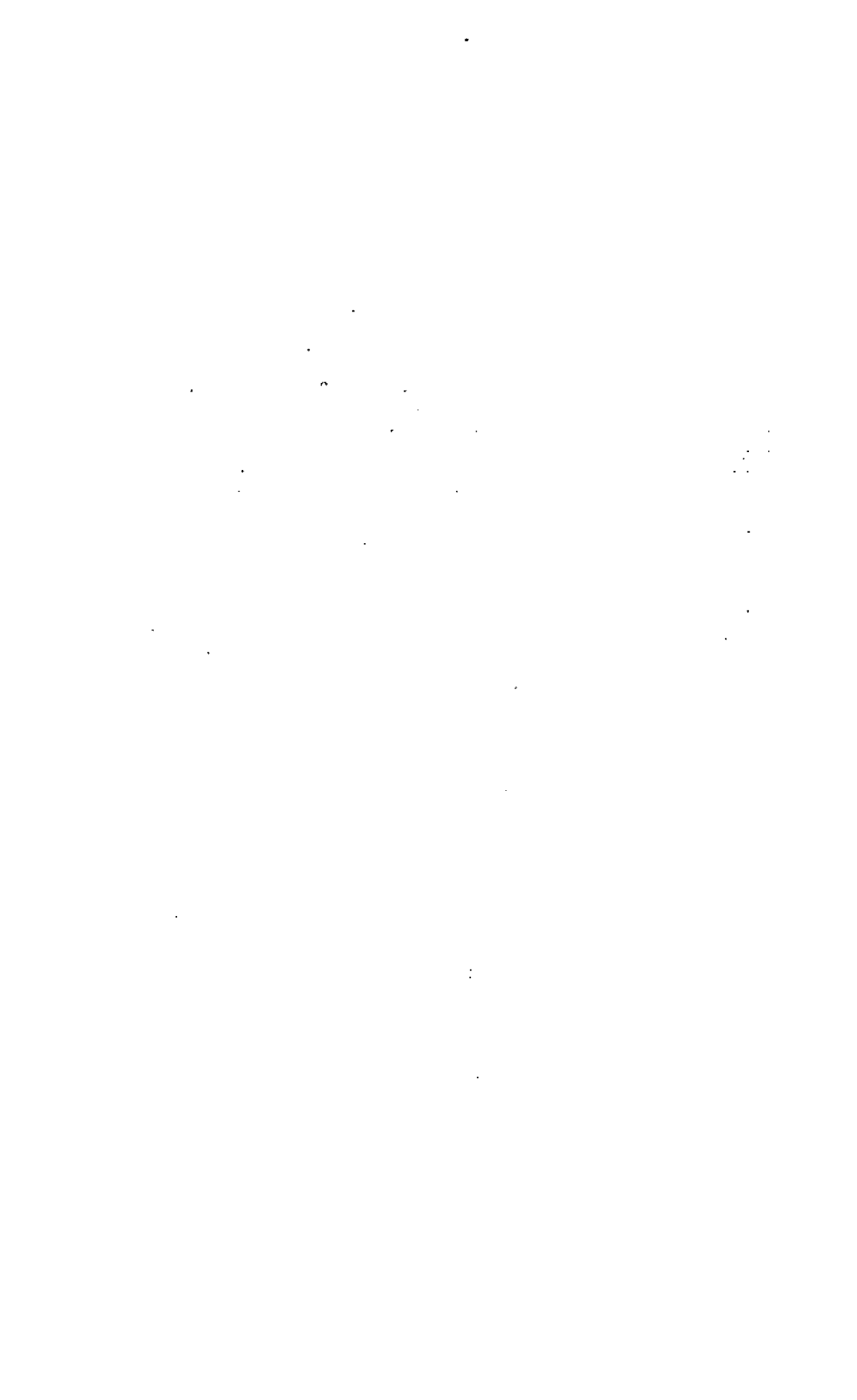
4. The fourth part of the document discusses the challenges and limitations of data collection and analysis. It identifies common issues such as data quality, bias, and incomplete information, and provides strategies to address these challenges.

5. The fifth part of the document concludes by summarizing the key findings and recommendations. It emphasizes the importance of ongoing monitoring and evaluation to ensure that the organization remains on track and is able to adapt to changing circumstances.

**7. REJOINDER FILED BY THE GOVERNMENT OF THE
REPUBLIC OF SOUTH AFRICA**

LIST OF ABBREVIATIONS

A.D.	Appellate Division of the Supreme Court of South Africa.
B.Y.B.I.L.	British Year Book of International Law.
Ecosoc.	Economic and Social Council.
G.A.	General Assembly.
G.N.	Government Notice.
I.L.O.	International Labour Organisation.
L. of N., O.J.	League of Nations, Official Journal.
O.R.	Official Records.
Ord.	Ordinance.
P.M.C., Min.	Permanent Mandates Commission, Minutes.
Proc.	Proclamation.
Rand	(unit of currency: South Africa).
R.P.	"Republic Publication": Prefix to serial number which has been allocated to official publications (usually "blue books") since South Africa became a republic on 31 May 1961.
S.A.	South Africa.
Sec.	Section.
Sess.	Session.
Suppl.	Supplement.
S.W.A.	South West Africa.
U.G.	"Union Government": Prefix to serial number which was allocated to official publications (usually "blue books") of the Government of the Union of South Africa.
U.N. Doc.	United Nations Document.
U. of S.A., Parl. Deb.	Union of South Africa, Parliamentary Debates.
1961 U.S.C.C.R.R.	United States Commission on Civil Rights Report, 1961
1963 R.U.S.C.C.R.	Report of the United States Commission on Civil Rights, 1963.



PART I

GENERAL INTRODUCTION

1. This Rejoinder is submitted pursuant to the Orders of the Court dated 20 January 1964 and 20 October 1964, and the filing thereof marks the closure of the written proceedings in these cases.

2. The material presented is divided into seven parts dealing respectively with the following matters:

Part I: General introduction.

Part II: Legal argument regarding the lapse of the Mandate and the supervisory functions of the League of Nations.

Part III: Alleged violations of Article 2, paragraph 2, of the Mandate.

Part IV: Alleged violations of Article 4 of the Mandate.

Part V: Alleged violations of Article 2, paragraph 1, of the Mandate.

Part VI: Alleged violations of Article 7, paragraph 1, of the Mandate.

Part VII: Respondent's submissions.

Some of the aforementioned parts are further divided into sections, the basis of division being explained at the commencement of each such part.

3. In view of the bulk thereof this Rejoinder is bound in two volumes. The first volume contains Part I, Part II and sections A to E of Part III, and the second contains sections F to I of Part III and Parts IV to VII.

4. In addition to the material presented by Applicants relative to the issues at present before the Court, the Reply also contains a chapter¹ headed "History of the Dispute Since 1960". As appears from the conclusion to the said chapter, Applicants rely on the record of events recounted therein as excluding any—

“... doubt that persevering effort on the part of the United Nations, by its responsible organs and agencies, in and through which Applicants have sought to settle their dispute with Respondent relating to the interpretation and the application of the provisions of the Mandate, have been unavailing”².

In the Judgment on the Preliminary Objections this Court, in holding that there was in existence a dispute such as contemplated in Article 7 of the Mandate, expressed the view that “no reasonable probability exists that further negotiations would lead to a settlement [thereof]”³. In so far as Chapter II of the Reply purports to demonstrate that the alleged dispute between Applicants and Respondent has not been settled by negotiation, it is not relevant to the issues at present before the Court. Applicants also submit that the record of events recounted in the said Chapter “makes clear that the General Assembly's . . . finding [i.e., that Respondent had ‘failed and refused to carry out its obligations under the

¹ Chapter II, IV, pp. 222-230.

² IV, p. 230.

³ *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319, at p. 345.

Mandate'] . . . remain[s] valid"¹. The relevance of the subject-matter of the said Chapter in the respect stated by Applicants is dealt with later in this Rejoinder².

However, in the course of recounting events which have occurred since 1960, Applicants in the said Chapter deal, *inter alia*, with a particular matter to which reference was made in the Counter-Memorial³, i.e., the visit to South West Africa in 1962 of the Chairman and Vice-Chairman of the Special Committee for South West Africa and declarations made by them relative to conditions in the Territory. Inasmuch as Applicants' version of the circumstances surrounding the said visit and the aftermath thereof is incomplete and distorted, Respondent considers it necessary to set the record straight in this respect, a matter which will be dealt with in the Annex to this Chapter.

¹ IV, p. 22.

² Part III, sec. A, paras. 16-20, *infra*.

³ II, p. 4.

Annex to Part I

1. In proof of the unreliability of reports and resolutions of organs and agencies of the United Nations relevant to South West Africa, Respondent in the Counter-Memorial¹ referred to General Assembly resolution 1702 (XVI) of 19 December 1961, and in contrast therewith quoted an extract from the joint communiqué issued after the visit to South West Africa in 1962 of the Chairman (Mr. Carpio) and the Vice-Chairman (Dr. de Alva) of the Special Committee for South West Africa, to which said communiqué they were parties. In reaction thereto Applicants state in the Reply that—

“[t]he actual circumstances surrounding the brief visit (the itinerary of which was fixed by Respondent); the preparation of the ‘joint communiqué’ at the conclusion thereof; the acrimonious, though temporary, misunderstanding between the Chairman and Vice-Chairman as to both occurrence and substance; and the ultimate understanding between them, embodied in a jointly-signed Report to the Special Committee, are all fully set forth in a Report of the Special Committee itself, and, as Respondent concedes, ‘to canvass them fully would be a lengthy process which could serve no purpose in these proceedings’².” (Footnotes omitted.)

It should be observed at the outset that, as will be pointed out with reference to many other parts of the Reply, Applicants in the above passage quote out of context a statement made in the Counter-Memorial. What Respondent in fact said, was that to canvass fully *the statements or conclusions of fact in the reports and resolutions referred to in the Memorials*, “would be a lengthy process which could serve no purpose in these proceedings”. This statement had no application to the circumstances surrounding the said visit and its aftermath. It is true, however, that these circumstances, as also the reports and resolutions referred to in both the Memorials and the Reply, are in Respondent’s view not relevant to the issues at present before the Court. The declarations of Mr. Carpio and Dr. de Alva were relied upon by Respondent only for the limited purpose of demonstrating the unreliability of reports and resolutions of the United Nations organs and agencies relied upon by Applicants.

2. In the succeeding paragraphs Respondent will show that, contrary to what Applicants suggest, Mr. Carpio and Dr. de Alva had the fullest opportunity to visit any locality in the Territory; that the joint communiqué was in fact issued at the conclusion of their visit with the full knowledge and approval of both visitors, and that they never reached an “ultimate understanding” in regard to Mr. Carpio’s subsequent repudiation of the communiqué.

3. As was stated in the Counter-Memorial³, Mr. Carpio and Dr. de Alva visited the Territory during May 1962 as guests of Respondent.

During the first discussion that took place between these two gentlemen and Respondent’s representatives, it was decided that no formal record

¹ II, p. 3.

² IV, pp. 225-227.

³ II, p. 4.

would be kept but that the participants should be free to take notes if they so wished¹. The Prime Minister of the Republic made it clear that the South African Government would be happy to arrange a visit to South West Africa, where the visitors would be at liberty to see what they wished and to speak to whomsoever they desired. He outlined the suggested itinerary briefly, saying that it would not be possible to fit in a proper programme in only seven days—as Mr. Carpio was reported to have suggested. He stated that another itinerary, covering three weeks or longer, could be drawn up, but the Chairman and Vice-Chairman intimated that a ten-day itinerary would satisfy them.

In the course of this discussion Mr. Carpio enquired whether the itinerary included a visit to the Caprivi Zipfel, and stated that he did so in view of the alleged fortifications and military bases in that area. The Prime Minister replied that no provision was made for such a visit since the Zipfel was far distant from the rest of South West Africa but that a visit thereto could be arranged if desired by the visitors².

A visit to the Caprivi Zipfel was subsequently included in the itinerary. The Prime Minister also intimated that if Mr. Carpio and Dr. de Alva should for any reason wish to go to any place not included in the itinerary, they should request their conductor to make the necessary arrangements, even if that meant prolonging the visit. They did not avail themselves of this offer; on the contrary, a visit to the Waterberg-East Reserve scheduled in the itinerary was excluded, and in addition the Chairman did not proceed from Windhoek to another place which was on the itinerary, nor did he accompany Dr. de Alva to the Caprivi Zipfel.

4. After the return of the visitors from the Territory, discussions were resumed in Pretoria on 24 May 1962. The Prime Minister pertinently asked Mr. Carpio and Dr. de Alva whether they had noticed any threat to the peace or any signs of militarization in South West Africa. Dr. de Alva immediately replied that he personally had seen nothing to substantiate the relevant charges which had been made by United Nations organs in that regard. Mr. Carpio initially stated that he could not form an opinion since he had not visited every important locality in the Territory. Asked to name the alleged centres of militarization Mr. Carpio mentioned the following places: Ohopoho, the Kaokoveld, Ondangua, the Caprivi Zipfel and Windhoek. It was then pointed out that at least one member of his party had visited all these centres, and that no signs of militarization had been noticed³.

The Prime Minister remarked that he was concerned about the fact that the allegation of militarization had not been unequivocally repudiated by Mr. Carpio. He offered to arrange for impartial observers, e.g., military attachés of any two local embassies named by the visitors to be sent immediately to inspect any of the areas mentioned by Mr. Carpio; such observers to report directly to the latter. These observers could leave for South West Africa straightaway, so that it might not be said afterwards that the South African Government had in the meantime removed evidence of militarization. This offer was, however, not accepted.

¹ Notes were in actual fact taken down by several of the South African officials. Some of the information contained in the succeeding paragraphs is derived from these notes.

² *Vide G.A., O. R., Seventeenth Sess., Fourth Committee, 1381st Meeting, pp. 339-340.*

³ *Vide footnote 2, para. 7, infra.*

The Prime Minister then enquired whether the visitors had encountered any evidence in substantiation of the charge of extermination or genocide which had been levelled against the South African Government. Mr. Carpio replied in the negative.

5. When discussions were resumed on 25 May, it was agreed that a joint communiqué would be issued after completion of the deliberations, and that officials on both sides would prepare a draft of such a statement during the lunch interval.

At the afternoon meeting, the Prime Minister stated that he had learned with regret that Mr. Carpio was indisposed and could not be present¹. He enquired if Dr. de Alva would meanwhile proceed with the discussion of the preliminary draft statement which had been drawn up by the officials. Dr. de Alva said that he would, but that the text of the document would have to be put to Mr. Carpio since it was essential that he agree to it. The draft was then read out and discussed paragraph by paragraph. Proposals for changes were made by both sides and a new draft was agreed upon which Dr. de Alva undertook to discuss with Mr. Carpio.

6. When discussions were resumed the next morning, Dr. de Alva drew attention to two important changes which had been proposed by Mr. Carpio in paragraphs 3 and 4 of the draft communiqué. Mr. Carpio had insisted that reference be made in paragraph 3 thereof to the limited duration of the mission's stay in South West Africa, and that their finding as to a threat to peace be circumscribed by limiting it to the places visited and the evidence heard. The Prime Minister agreed to accept the changes with regard to the reference to a "ten day visit", but made it clear that he understood that the report to the United Nations would explain that every facility had been given to the visitors to go where they pleased, and to extend their stay if they so wished.

As regards paragraph 4, Dr. de Alva said that Mr. Carpio had requested that reference be made to the fact that the mission did not have an opportunity to investigate fully the allegation with respect to political prisoners. It was then agreed to redraft the first sentence of paragraph 4 to meet this point.

Several other minor textual changes were discussed and disposed of. The Prime Minister then enquired if the text could be regarded as agreed to by everybody concerned, and Dr. de Alva replied in the affirmative.

7. The relevant portion of the text of the communiqué, as issued on 26 May read as follows²:

"1. Discussions between Ambassadors Carpio and Martinez de Alva and the Prime Minister and the Minister of Foreign Affairs were resumed in the same friendly and frank atmosphere that characterised the former meetings. Ambassador Carpio expressed the appreciation of the visitors for all the arrangements made and for the free and uninhibited opportunities given to the Vice-Chairman and himself to meet with all sections of the population of South West Africa desiring to contact them, and hoped that further visits could in the future be arranged.

2. In reply to a proposal that further visits by persons connected

¹ This was the first occasion during the talks on which Ambassador Carpio was not present.

² Also issued by the U.N. Office of Information as G.A.2501, 26 May 1962.

with the United Nations could usefully be arranged, particularly one by the whole Special Committee for South West Africa the Prime Minister stated that it would be best to await the issue of the report of the Chairman and Vice-Chairman and its reception by the Committee and the General Assembly before considering this matter further. He added, however, as was indicated in the invitation extended to the Chairman and Vice-Chairman, that South Africa could not be expected to receive a committee with instructions to act contrary to the juridical position of the Republic of South Africa.

3. At the request of the Prime Minister both the Chairman and the Vice-Chairman gave their impressions gained during their ten day visit to the Territory. They stated 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 territory¹; or that the indigenous population was being exterminated.

4. While naturally a detailed investigation as to the question of the detention of political prisoners could not be made, the Chairman and Vice-Chairman noted that no case of detention of political prisoners had been brought to their attention during their visit. They have, however, received allegations that a few persons have been repatriated to Ovamboland or elsewhere because of political activities. The Prime Minister stated that he would have these allegations investigated.

5. The further discussions dealt with suggestions by both Ambassadors to improve relations between South Africa and the United Nations."

8. At midday on 26 May 1962, Respondent's Foreign Minister paid a courtesy call on Mr. Carpio at his hotel. A little later Mr. B. G. Fourie, at the time Respondent's permanent representative at the United Nations, also visited Mr. Carpio. During neither of these visits did Mr. Carpio suggest that he had in any way dissented from the joint communiqué.

On Sunday, 27 May 1962, on the advice of his doctors, Mr. Carpio was taken to hospital where he remained until 3 June. During his stay in hospital he received the daily newspapers in which prominence was given to the joint communiqué. He was regularly visited by Mr. D. B. Sole, Under-Secretary for Foreign Affairs, who was a participant in all the discussions. He was also visited by Mr. R. Jones, Deputy-Secretary for Foreign Affairs. To neither of these persons did he intimate that he was not a party to the joint communiqué. It was only at an airport press conference on 5 June 1962 when about to depart from South Africa that Mr. Carpio hinted that he was not responsible for the communiqué.

9. Dr. de Alva has consistently pointed out that both Mr. Carpio and he approved *in toto* of the joint communiqué and that it was issued with the full authority of all parties concerned, including Mr. Carpio.

¹ A footnote to paragraph 3 appeared here which read: "The Chairman and Vice-Chairman were informed by the South African authorities and noted the existence of a nine-man military administrative headquarters in Windhoek. There is also a unit of the citizens' force (which undergoes training for two weeks per annum) with 17 Officers and 206 Other Ranks."

It is noteworthy that Dr. de Alva mentioned in his letter of 16 July 1962 to the Under-Secretary for Trusteeship and Information from Non-Self-Governing Territories that Mr. Berendsen and Miss Yarrow, the two United Nations officials who accompanied the visitors to South Africa and the Territory, actually conveyed to him Mr. Carpio's—

“... full authority to accept the joint communiqué as it had been drafted, including paragraphs 3 and 4, but with the changes on which he [Mr. Carpio] had been so insistent ...”¹.

The said officials, while in South Africa, also informed the Press that Mr. Carpio had been consulted throughout as if he had been present at the official discussions.

During the course of a statement made at the 95th meeting of the Special Committee on the Situation in regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Mr. Mburumba Kerina, one of the regular petitioners to the United Nations regarding South West Africa, made certain serious allegations against, *inter alios*, the aforementioned two officials. This led to a decision of the Secretary-General to conduct an enquiry as to the assertions regarding the members of the Secretariat. An appointed committee carefully examined the matter for a period of more than six months. Mr. Kerina appeared before the committee, but declined to support his allegations and refused to answer any questions of the committee. On receipt of the findings of the committee of enquiry, and after careful consideration, the Secretary-General came to the conclusion that “... the staff members concerned acted throughout in good faith”, and he stated that he was—

“... satisfied that whatever assistance they [Mr. Berendsen and Miss Yarrow] gave to the Chairman and Vice-Chairman of the Special Committee for South West Africa was requested of them and was given in accordance with the traditions and established practices of the Secretariat.

Accordingly ... the Secretary-General has determined that the allegations against the staff members were not well founded and that, from his point of view, the matter is closed².”

10. Speaking at the eighth meeting of the Special Committee for South West Africa on 24 July 1962, Dr. de Alva stated that—

“... Mr. Carpio and he had gone to South Africa, not in their personal capacity as the Chairman had indicated, but as officers of the Committee.

The Chairman³ had said that the joint communiqué issued at Pretoria had come as a disagreeable shock to the Committee. Such an adjective could describe only a subjective personal reaction; he hoped the Committee would give him an opportunity to discuss the question of the joint communiqué with the thoroughness it required.

Whether the work accomplished by the mission to South Africa

¹ Report of the Special Committee for South West Africa, *G.A., O.R., Seventeenth Sess., Suppl.*, No. 12 (A/5212), p. 20.

² United Nations Secretariat, Information Circular to Members of the Staff from the Director of Personnel, ST/ADM/SER.A/837, 29 Mar. 1963.

³ At that meeting Mr. Arteh of Somalia.

and South West Africa was regarded as a triumph or as a disaster, it represented a solid achievement . . .¹,”

and in commenting on a draft letter under cover of which the Special Committee for South West Africa proposed to despatch its report to the “Committee of Seventeen”², Dr. de Alva stated at the 13th meeting of the first-mentioned Committee that—

“ . . . the communiqué existed and had actually been issued jointly by the South African Government, the Chairman and the Vice-Chairman; consequently, it could not be described . . . as an ‘alleged’ joint communiqué, nor could it be attributed solely to the South African Government . . . Since the Chairman continued to deny that he had had any part in the preparation, drafting or publication of the communiqué, and the Vice-Chairman challenged his position, the text should refer to the letters they had sent to the Under-Secretary explaining their respective positions³.”

Dr. de Alva continued:

“The Chairman had participated in those conversations; he had been fully aware of the position and it had been with his consent that the communiqué had been prepared. Indeed, the Chairman and the Vice-Chairman had proceeded in full agreement from the time the communiqué was drafted until it was issued. He personally was not prepared to alter a single word of the statement to which he had subscribed.

. . . the existence of the communiqué could not be denied, irrespective of the Committee’s opinion of its contents, and since it had, in fact, been issued jointly by the spokesmen of the South African Government and by the Chairman and Vice-Chairman, acting in their official capacity as representatives of the Committee⁴.”

II. The reaction of Mr. Arteh (Somalia) to Dr. de Alva’s statement affords a good example of the degree of responsibility adopted by some of the United Nations delegates when dealing with questions affecting South West Africa. Despite the overwhelming weight of evidence known at that stage, he said that—

“ . . . his delegation regarded the Chairman’s statement that he had had no part in the drafting or publication of the communiqué as an authoritative statement, and accepted it as official. He therefore wished to retain the word ‘alleged’ before ‘joint communiqué’ in the draft letter of transmittal. The Committee should endeavour to be objective; *it should not assume the attitude of a court of enquiry*; the Chairman’s assertions should be regarded as final and absolute⁵.” (Italics added.)

12. At the 14th meeting of a Special Committee on 3 August 1962,

¹ *U.N., G.A., Special Committee for South West Africa: Summary Record of the Eighth Meeting, 24 July 1962, U.N. Doc. A/AC.110/SR.8, p. 5.*

² Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

³ *U.N., G.A., Special Committee for South West Africa: Summary Record of the Thirteenth Meeting, 2 Aug. 1962, U.N. Doc. A/AC.110/SR.13, p. 7.*

⁴ *Ibid.*, p. 8.

⁵ *Ibid.*, Mr. Arteh was the Rapporteur and at one stage Chairman of the Special Committee for South West Africa.

Dr. de Alva, replying to a lengthy statement by Mr. Carpio in which the latter once more sought to disown the joint communiqué, stated that he (Dr. de Alva)—

“... would have been willing to give full credence to the Chairman's explanation if it had not been offered *ex post facto*. Whatever his reasons for not joining in the communiqué, the fact was that he nevertheless had done so and was responsible for that action to the same extent as the Mexican representative, the only difference between them being that the one maintained his position while the other now repudiated¹.”

13. In conclusion attention is drawn to the manner in which the joint communiqué was eventually dealt with by the Special Committee. At the 13th meeting of the Committee several members expressed disagreement with the letter of transmittal drafted by the representatives of Somalia and Burma, which in effect ignored the communiqué. The Norwegian representative wanted all the available documents to be forwarded to the “Committee of Seventeen”². Later Mr. Borja (Philippines) however stated that “[t]he Philippine Government would not permit its Ambassador [Mr. Carpio] to be subjected to a police interrogation by the Committee”³.

At the 14th meeting of the Special Committee various members persisted in opposing the draft letter of transmittal, but after some cursory discussion, the proposal of the Norwegian representative was put to the vote. In the end the third paragraph of the draft letter was adopted by 4 votes to 3⁴. This meant that the joint communiqué was not included in the evidence forwarded to the “Committee of Seventeen” and that it was not considered by the United Nations when resolution 1805 was adopted⁵.

14. Many delegates to the United Nations had, prior to the issue of the joint communiqué in 1962, concentrated on the three charges concerning a threat to the peace, genocide and militarization in South West Africa. The main charge was that international peace was being endangered as a result of the alleged situation in the Territory. No less than 31 delegations had during 1960-1961 made that charge, on which heavy reliance was placed because it could be used in the Security Council as a ground for taking action against Respondent. The admission by the two emissaries of the United Nations disposed of the main charge, as also the other two serious charges, against Respondent. If these delegates, or the members of the Special Committee had the interests of the inhabitants of the Territory at heart, one would have expected that the contents of the joint communiqué would have been a great relief to them. Instead, but perhaps not surprisingly, the general reaction was that “[t]hat Communiqué had come as a disagreeable shock . . .”⁶.

¹ *U.N., G.A., Special Committee for South West Africa: Summary Record of the Fourteenth Meeting*, 3 Aug. 1962, *U.N. Doc. A/AC.110/SR.14*, p. 6.

² *Ibid.*, Summary Record of the Thirteenth Meeting, 2 Aug. 1962, *U.N. Doc. A/AC.110/SR.13*, pp. 4-5 and 7.

³ *Ibid.*, p. 9.

⁴ *Ibid.*, Summary Record of the Fourteenth Meeting, 3 Aug. 1962, *U.N. Doc. A/AC.110/SR.14*, pp. 3-11.

⁵ *Vide IV*, p. 227.

⁶ *Ibid.*, Summary Record of the Eighth Meeting, 24 July 1962, *U.N. Doc. A/AC.110/SR.8*, p. 3.

15. As already pointed out ¹ Applicants take up the attitude that the communiqué is irrelevant for the purpose of the present proceedings. They proceed to allege, however, that—

“[w]hat is of relevant, and indeed decisive, significance are their [Mr. Carpio and Dr. de Alva’s] jointly-approved conclusions, based upon ‘what they saw and heard during their visit to the Mandated Territory . . .’”².

The fact that these “jointly-approved conclusions” involve that the Territory “has been and continues to be pervaded by the rigorous application of *apartheid*”² is said to be of “decisive . . . significance”; yet the statement in the joint communiqué to the effect that the above-mentioned three serious charges are without substance, Dr. de Alva’s maintained support thereof, and the clear evidence that Mr. Carpio was a party to the communiqué, are considered to be irrelevant.

The phenomenon of measuring by double standards is, so it seems, not something peculiar to United Nations organs.

16. The point of immediate importance is that, despite the evidence of Dr. de Alva and that of the members of the Secretariat in question, the Special Committee refused to give recognition to the joint communiqué to which Mr. Carpio and Dr. de Alva were parties, for the very reason that the declarations in the said communiqué relevant to conditions in South West Africa were in conflict with what the majority of the Committee wished the world to believe.

Respondent submits that there can be no clearer proof of the correctness of its submission that no reliance can be placed on reports and resolutions of organs and agencies of the United Nations regarding conditions in South West Africa and Respondent’s administration of the Territory.

¹ *Vide* para. 5, *supra*.

² IV, p. 226.

PART II

CHAPTER I

INTRODUCTORY

1. The present part of the Rejoinder will be devoted to the issues arising from Applicants' Submissions 1, 2, 7 and 8, and, in particular, their contentions that the Mandate is still in existence, and that Respondent is obliged to render account to, and submit to the supervision of, the General Assembly of the United Nations Organization.

2. Respondent's arguments regarding the issues dealt with herein are contained in Book II of the Counter-Memorial. In their Reply, Applicants do not furnish a self-contained or comprehensive answer to Respondent's arguments, but pick out bits and pieces with which they deal in a number of different chapters and annexes. The position is further obscured by the fact that many of the portions thus singled out for comment are rendered inaccurately or out of context, as will be seen, and in addition by the fact that the chapters and annexes in which they are dealt with, contain also other matter not relevant to the issues concerning the submissions under discussion.

Thus Applicants commence their treatment of the issues dealt with herein, in a chapter of their Reply¹ entitled "The Nature of the Mandate". There they deal with "the respective positions" allegedly taken by the Parties to the present proceedings on "certain key issues" concerning "the nature and essential principles of the Mandate"¹. Applicants' contentions in this regard overlap with those in Chapters V and VI of their Reply, which are concerned respectively with the "Legal Basis and Legal Nature of Respondent's Obligations towards the Inhabitants of the Territory" and "Respondent's Violations of its Obligations towards the United Nations", as well as to a certain extent with those in Chapter VII, Part B, dealing with Respondent's alleged "Violations of Article 2 (1) of the Mandate and Article 22 of the Covenant". Their Annex 8 ("Brief Survey of Legal Arguments Previously Advanced by Respondent, and Dispositions thereof previously made by this Honourable Court, with respect to Respondent's Obligations toward the United Nations") although apparently intended as supplementary to Chapter VI, in fact partly covers the same ground, only, however, to reach an inconsistent conclusion².

3. To avoid as far as possible a similar overlapping, as well as to indicate more precisely the aspects on which Applicants have chosen to join issue with Respondent (and, perhaps more important, the aspects which they have not seen fit to contest), Respondent proposes in this part, as in the Rejoinder as a whole, to deal with matters raised in the Reply in the same order as that adopted in the Counter-Memorial. The further chapters in this part will accordingly be the following, each being

¹ IV, Chap. III, p. 231.

² *Vide* Chap. II, para. 2, *infra*.

concerned with the same subject-matter as the corresponding chapter in Book II of the Counter-Memorial:

Chapter II: The foundations of Respondent's legal argument.

Chapter III: The Mandatory's procedural obligations.

Chapter IV: The lapse of the Mandate as a whole.

CHAPTER II

THE FOUNDATIONS OF RESPONDENT'S LEGAL ARGUMENT

A. General

1. In the present chapter, consideration will be given to issues arising in respect of matters dealt with in the corresponding chapter of Book II of the Counter-Memorial, irrespective of where such issues are dealt with in the Reply¹. The said chapter of the Counter-Memorial was devoted to a number of different topics, which all underlie the rest of Respondent's legal argument, but some of which are otherwise unrelated². For the greater part they are not contested in the Reply. It is accordingly only necessary to reply herein to the few isolated points on which Applicants join issue with Respondent.

B. Effect of the Previous Advisory Opinion and Effect of the Judgment and Opinions on the Preliminary Objections³

2. In this regard, Applicants state:

"It is in the nature of legal proceedings, and perhaps especially so of a Proceeding before this Honourable Court, that the parties are entitled to the fullest opportunity to be heard. Applicants cannot, and do not, dispute Respondent's privilege to reassert in a contentious proceeding that the Mandate, and the obligation to respond to international supervision, have lapsed, even though the arguments are the same as those twice before considered in 1950 and 1962⁴."

The statement of legal principle contained in the above passage (as distinct from the assertion that "the arguments are the same as those twice before considered")⁵ is in accordance with Respondent's own submissions⁵, and its soundness can hardly be open to question.

Later, however, Applicants adopt a different attitude. There they say:

"... it is submitted that the contentions of Respondent in respect of the lapse of the Mandate, or any of its provisions, are *res judicata* by virtue of the Judgment on the *Preliminary Objections*.

If not *res judicata*, technically speaking, by virtue of the *Advisory Opinion of 1950*, they are nonetheless *res judicata* within the broad

¹ *Vide* Chap. I, para. 3, *supra*.

² The various topics are: a general outline of Respondent's legal argument in respect of the lapse of League supervision and the lapse of the Mandate; the effect of the previous Advisory Opinion; the effect of the Judgment and Opinions on the Preliminary Objections; the origin and contents of the Mandate; and the general principles applicable in determining whether particular provisions of the Mandate still exist (i.e., the principles of interpretation and implication, and the legal rules affecting relationships between States but operating independently of their consent, express or implied).

³ II, pp. 98-103.

⁴ IV, p. 522.

⁵ As to which, *vide* Chap. III, paras. 4-6 and 46-49; and Chap. IV B, para. 14, *infra*.

meaning of the doctrine, on the basis of the Advisory Opinion. The rationale of the doctrine is that there must be an end to litigation. . . . It is fair to say that Respondent has had its day in Court on these issues¹."

For the reasons given in the Counter-Memorial², it is submitted that Applicants' earlier concession is to be preferred to their second thoughts.

C. Origin and Contents of the Mandate³

3. Reference was made above to Applicants' allegations regarding divergent positions supposed to be maintained by the Parties hereto on "the nature and essential principles of the Mandate"⁴. Those of the "key issues", as singled out by Applicants, which relate to topics dealt with under the above head in Chapter III of Book II of the Counter-Memorial, will be considered herein, leaving the remainder for treatment in other sections of this Rejoinder.

I. WHETHER THE MANDATE SYSTEM "REPRESENTED A VICTORY FOR THE OPPONENTS OF THE PRINCIPLE OF ANNEXATION"⁵

4. During the latter part of the First World War and in the negotiations and discussions preceding the conclusion of the Treaty of Versailles, certain States (including Respondent) were in favour of the annexation of certain of the former German colonies. Other States were in favour of one or another form of international control over all such colonies. In the result, agreement was reached on the basis of the mandate system as embodied in Article 22 of the Covenant of the League of Nations⁶. When regard is had only to the facts that all the former German colonies thus obtained a separate international status as mandated territories and were made subject to the supervision provided for in the Covenant, it is correct to say that the mandate system "represented a victory for the opponents of the principle of annexation"⁷. Indeed, Respondent stated in its Counter-Memorial:

" . . . 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 question⁸".

5. On the other hand, when regard is had to the division of mandates into three classes, and particularly to the content of the C Mandates, it becomes apparent that the "full power of administration and legislation"⁹ granted to the Mandatories, empowered them in the latter instance to exercise most of the attributes of sovereignty in the day-to-

¹ IV, p. 552.

² II, pp. 98-103.

³ *Ibid.*, pp. 104-111.

⁴ *Vide* Chap. I, para. 2, *supra*.

⁵ IV, p. 232.

⁶ *Vide* II, pp. 9-11.

⁷ I, p. 33 and IV, p. 232.

⁸ II, p. 169.

⁹ Expression used in C Mandates to define the governmental power exercisable, subject to the mandate, by the Mandatories. *Vide*, e.g., Art. 2 of the Mandate for German South-West Africa.

day administration of the mandated territories. Respondent submits that the grant of such wide powers resulted in a situation in which C Mandates were, in their practical effect, not far removed from annexation¹.

6. Whether in its totality (i.e., taking account of the separate international status of a mandated territory, of the Mandatory's accountability to the Council of the League of Nations and, on the other hand, of the extent of the Mandatory's powers of administration and legislation) a C Mandate could be said to be close to or far removed from annexation, is a matter of opinion, evaluation or appreciation, and the answer could largely depend on which aspect of the Mandate is emphasized for the purposes of the subject under discussion. By itself, this question is not of any importance. What is clear—and this was the point sought to be made by Respondent—is that when all aspects are considered, the mandate system could not fairly be described as “a victory for the opponents of the principle of annexation” or as a victory for anybody else². In the words of the Counter-Memorial “[a] compromise can hardly be regarded as a victory for either side”².

That the mandate system indeed represented a compromise between conflicting interests can hardly be doubted. It is in Respondent's submission established not only by the authorities and historical facts referred to in its Counter-Memorial³, but also by a further authority quoted by Applicants (in another context) as saying that the Mandate for South West Africa—

“... constituted a new institution set up under Article 22 of the Covenant as an historic compromise between extremely complicated interests”⁴. (Italics added.)

7. As pointed out in the previous paragraph, the extent to which the C Mandates, taking into account their various aspects, approximated to annexation, is in itself of no particular importance. Applicants have, however, sought to use Respondent's submission that, as far as the ordinary powers of administration and legislation were concerned, such approximation was close, to draw unwarranted inferences about Respondent's attitude in regard to other aspects of the Mandate. Examples of this will be given in the next succeeding paragraphs.

II. WHETHER RESPONDENT WAS OBLIGED IN TERMS OF THE MANDATE TO LEAD THE INHABITANTS OF THE TERRITORY TOWARDS EVENTUAL SELF-DETERMINATION

8. Applicants suggest that there is an inconsistency between Respondent's view that its powers of administration and legislation under the Mandate approximated to those that would have existed pursuant to annexation, and acceptance by Respondent of a duty to lead the peoples of the Territory towards eventual self-determination⁵. The fallacy in this reasoning is obvious.

Even full annexation of a territory, and the exercise of complete sovereignty over it (and *a fortiori* any situation falling short thereof, such

¹ *Vide* II, pp. 9-15 and p. 95 (para. 128).

² I, p. 33 and II, p. 15 (para. 9).

³ II, pp. 10-15.

⁴ M. Palacios, a member of the Permanent Mandates Commission, *P.M.C., Min., XXVI*, p. 164. *IV*, p. 252.

⁵ *IV*, pp. 238-240, 586.

as one "not far removed from annexation") would clearly not be inconsistent with the recognition of a duty, legal or otherwise, to lead its inhabitants towards self-determination, self-government or even independence. In this regard, very pertinent illustration is afforded by Article 73 of the Charter of the United Nations, in terms of which those Members of the organization who possessed colonies, undertook "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". Nevertheless the sovereignty of these members over their colonies was not, and could not be challenged or disputed.

9. In fact, Respondent has acknowledged in these proceedings that the Mandate, in requiring the Mandatory to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory, thereby embraced, as one of the facets of well-being, the ideal of political advancement of such inhabitants towards ultimate self-determination¹. And more recently Respondent, in pursuance of its often expressed purpose of continuing to administer South West Africa in the spirit of the Mandate, gave special consideration to the manner in which the objective of self-determination for the peoples of South West Africa could best be achieved².

III. WHETHER THE MANDATED TERRITORY POSSESSED A SEPARATE INTERNATIONAL STATUS

10. A further example of fallacious reasoning on the part of Applicants (*allied with incorrect factual allegations*) is found in the supposed relationship between Respondent's admitted view that the powers of administration granted by the Mandate were in effect close to those supervening on annexation, and Respondent's alleged attitude towards the separate international status of the Territory. Applicants' allegations in this regard, and the conclusion they draw therefrom, are found in one paragraph which reads:

"Respondent's current contention that the Mandate (now asserted to have lapsed *in toto*) was, in any event, 'not far removed from annexation' thus reflects its continuing and long-standing posture of denial to the Territory of a separate international status. The conclusion is inescapable that Respondent's purpose and motive has been, and remains, that of incorporating or annexing the Territory . . .³"

Since 1915 Respondent has been in effective control of the Territory and has carried on its administration. If, as Applicants say, Respondent's attitude has been a "continuing and long-standing" one of "denial to the Territory of a separate international status", then surely there would have been a completed annexation, real or purported, of the Territory, not merely "a purpose or motive . . . of incorporating or annexing the Territory" which is, according to Applicants, still being pursued in a piece-meal and devious manner⁴. In fact, as has been shown in the

¹ *Vide IV*, p. 70.

² *Vide ibid.*, p. 213.

³ *IV*, p. 576.

⁴ At *IV*, p. 591. Applicants allege that implementation of certain of the recommendations of the Odendaal Commission "would involve a step toward incorporation or annexation of the Territory".

Counter-Memorial¹, Respondent has always respected the separate international status of South West Africa and continues to do so exactly as if the Mandate were still in force.

IV. WHETHER THE "SACRED TRUST" AND "TUTELAGE" PRINCIPLES GAVE RISE TO LEGAL OBLIGATIONS

II. Associated with the above instances of faulty understanding or rendering of Respondent's arguments, and fallacious deductions therefrom, is a further assertion by Applicants. They say that Respondent denies that the "sacred trust" and "tutelage" principles, embodied in Article 22 of the Covenant, gave rise to legal obligations on the part of the Mandatory², and that Respondent construes the second paragraph of Article 2 of the Mandate—

"... as not embodying obligations of a legal nature, but as indicating merely 'the objective to be pursued by the Mandatory, or *the spirit with which he should be imbued*, in exercising his power of administration and legislation'³".

Respondent's argument in this regard is later rendered as follows:

"Article 2, paragraph 2, does not... create or embody obligations of a legal nature, but is assertedly a merely political or moral exhortation; this argument Respondent seeks to reinforce by reference to the generality of the terms of the Article⁴."

To counter this argument allegedly used by Respondent, Applicants devote considerable space to establish the self-evident and undisputed proposition that—

"... the Mandates, including the Mandate for South West Africa, were conceived and executed as legally binding instruments—as a whole and in each of their parts...⁵".

In fact, of course, Respondent has never disputed that the mandate instrument—including Article 2, paragraph 2, thereof—read in the light of Article 22 of the Covenant, created legal obligations.

In their attempt to ascribe such a contention to Respondent, Applicants rely on the use by Respondent of expressions regarding the "idealistic or humanitarian objectives", or "the spirit" with which a Mandatory should be imbued, which are set forth in the opening paragraphs of Article 22 of the Covenant and paragraph 2 of Article 2 of the Mandate⁶. In the passages quoted by Applicants, Respondent was, however, not purporting to distinguish between parts of the Mandate or of Article 22 of the Covenant on the basis that some parts created legal obligations and others not. Clearly the mandate instrument as a whole, read in the light of the whole of Article 22, gave rise to legal rights and obligations. But in order to determine the content, the nature and the extent of such rights and obligations, due weight must be given to each of the parts of these docu-

¹ IV, in particular p. 68 (paras. 4 and 5) and p. 87 (para. 4). *Vide* also Part V, *infra*.

² IV, pp. 232-233.

³ *Ibid.*, pp. 244-245. *Vide* also pp. 232-237 and pp. 478-483.

⁴ *Ibid.*, p. 477.

⁵ *Ibid.*, p. 480. The discussion ranges over pp. 478-483.

⁶ *Ibid.*, pp. 232 and 244-245.

ments. For the purposes of such interpretation, it can hardly be doubted that the "sacred trust" and "tutelage" principles, to which effect was given in Article 2 of the Mandate, relate, in the words of an authority much relied upon by Applicants, "... to the fundamental objective of the mission undertaken by the Mandatories . . ." ¹ or that, as another authority stated in a report unanimously adopted by the Council of the League of Nations,

"[p]aragraphs 1 and 2 of Article 22 have indicated the spirit which should inspire those who are entrusted with administering peoples not yet capable of governing themselves . . ." ².

In expressing this concept, Respondent has, *inter alia*, used the expressions "main objective" ³, "over-riding objective" ⁴, "basic principle or objective" ⁵ and "idealistic or humanitarian objectives" ⁶. The mere fact that the overriding objective of the Mandate was of an idealistic or humanitarian nature, does not, of course, mean that the provisions relative thereto were devoid of legal effect. Applicants indeed concede this, e.g., when they say: "Although the term 'sacred trust of civilization' obviously imports a high moral principle, it was intended to have legal significance as well" ⁷.

12. There is consequently no dispute between Applicants and Respondent as to whether Article 2 (2) of the Mandate, read in the light of Article 22 of the Covenant, created legal obligations.

The only issues in this regard are:

- (a) whether the Court (as distinct from the Council of the League assisted by the Permanent Mandates Commission) possessed jurisdiction to pronounce on alleged contraventions of the Article; and
- (b) what legal basis or norm was to be applied in determining whether there had been a violation of the obligation laid down by the Article.

On neither of these issues, as will be demonstrated below ⁸, does Respondent's contention expressly or by implication involve a denial of the legally binding nature of the obligation imposed by Article 2, paragraph 2, of the Mandate.

13. The first main issue then is whether the Court was, under the compromissory clause, Article 7, paragraph 2, vested with jurisdiction in respect of allegations of contravention of Article 2, paragraph 2, of the Mandate. Respondent contends that only the Council of the League (assisted by the Permanent Mandates Commission), and not the Permanent Court of International Justice, was intended to have jurisdiction to entertain such matters. Applicants submit that the Court also was vested with competence in this regard. Accordingly the dispute between the Parties does not relate to the existence or otherwise of legal duties in terms

¹ *The Mandates System—Origin—Principles—Application* (1945), p. 53.

² Report of M. Hymans dated 5 Aug. 1920. *L. of N., O.J.*, 1920 (No. 6), pp. 339-340.

³ *Vide*, e.g., II, pp. 385 and 386.

⁴ *Ibid.*, p. 386.

⁵ *Ibid.*, p. 169 (para. 9).

⁶ *Ibid.*, p. 104 (para. 13) and p. 169 (para. 8).

⁷ IV, p. 233.

⁸ *Vide* paras. 13-14, *infra*.

of Article 2, paragraph 2, of the Mandate, but merely as to the nature of the supervisory machinery provided by its authors to ensure compliance with such duties. It is of course obvious that a lack of compulsory jurisdiction on the part of the Court would not have rendered the Article devoid of legal effect, particularly since its enforcement was entrusted to the Permanent Mandates Commission and the Council of the League of Nations. This trite proposition of law is apparently, however, not recognized by Applicants, as appears from the gloss put by them on Respondent's argument in the respect set out hereunder.

Thus Respondent said:

"... 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 ...' For the reasons set out, *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*¹." (Italics added and footnotes omitted.)

This submission is rendered by Applicants as follows:

"Article 2, paragraph 2, does not ... create or embody obligations of a legal nature, but is assertedly a merely political or moral exhortation; *this argument Respondent seeks to reinforce by reference to the generality of the terms of the Article*²." (Italics added.)

Respondent will deal at a later stage with Applicants' argument in reply to their above-quoted rendering of Respondent's submission³. Its concern at the present stage is only to point out that the rendering itself is totally wrong.

14. The second issue in regard to Respondent's obligations under Article 2, paragraph 2, of the Mandate relates to the legal basis or norm which was to be applied in determining whether there had been a violation of such obligations. Respondent contended that Article 2, paragraph 2, read in the light of the Covenant, required Respondent to use its "full power of administration and legislation" for the *purpose* of promoting to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory⁴. The consequence of this was, in Respondent's submission, that the particular *method* to be employed towards achieving this purpose was left to Respondent's discretion, and that legislative or administrative action could therefore violate Article 2, paragraph 2, only if actuated by a motive or intent other than one to achieve such purpose⁴. That Respondent's duty to use its powers for the purpose of promoting the interests of the inhabitants was a legal one

¹ II, pp. 384-385. *Vide also ibid.*, pp. 183-184.

² IV, p. 477.

³ *Vide* Part III, sec. C, paras. 4-19, *infra*.

⁴ *Vide* II, pp. 384-392.

(and not merely a "political or moral exhortation") was always conceded¹.

In a later chapter of this Rejoinder Respondent will demonstrate that Applicants indeed never reply to Respondent's above submission². At the present stage Respondent wishes to emphasize only that the true issue between the Parties in this regard does not relate to the question whether Respondent's obligation in terms of Article 2, paragraph 2, was of a legal nature or not, but merely as to the basis or norms to be applied in determining whether there had been a violation of such obligation. In other words, it is admitted that the obligation was a legal one, but the *content* of the obligation is in dispute.

¹ *Vide*, e.g., II, p. 116 (para. 4) and *ibid.*, pp. 384-392. In the latter passage explicit reference is made to the "obligation resting on Respondent in terms of [Article 2, paragraph 2] . . . to use its powers of legislation and administration for the purpose of promoting to the utmost the well-being and progress of the inhabitants" (*ibid.*, para. 13, p. 390) and also to the proof that would be required "to establish a breach of this Article" (*ibid.*).

² *Vide* Part III, sec. C, para. 25, *infra*.

CHAPTER III

THE MANDATORY'S PROCEDURAL OBLIGATIONS

A. Applicants' Approach to the Issue

1. Respondent's argument dealing with the lapse of the Mandatory's procedural obligations and of the Mandate as a whole was summarized as follows in the Counter-Memorial:

- "(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 body¹."

Respondent's argument, as thus summarized, was developed in Chapters IV and V of Book II of the Counter-Memorial. Even a cursory perusal of the said chapters would have rendered it clear that Respondent's basic argument is that the provisions for supervision of Mandatory administration became inoperable or impossible of performance on the dissolution of the League, and consequently lapsed, irrespective of whether the Mandate remained in operation in other respects. *On the premise of the lapse of supervision*, Respondent further submitted that the Mandate as a whole fell away².

2. With such an explicit and clear statement of Respondent's contention, it is surprising to find it completely distorted by Applicants at the very outset of Chapter VI of the Reply, dealing with Applicants' Submissions 1, 2, 7 and 8. Thus one finds the following passages:

"... starting from the premise that 'the Mandate as a whole has lapsed', Respondent contends that its '... obligations to report and account to, and submit to the supervision of, the Council of the League of Nations, lapsed upon dissolution of the League...'"; (Italics added.)

¹ II, p. 97.

² *Vide also ibid.*, pp. 164 (para. 74 conclusions regarding the *Procedural Obligations*), 165 (para. 1), 174 (para. 18), 256 and 257 (submissions).

³ IV, p. 521. It is perhaps even more surprising that Applicants rely on II, pp. 97, 163 and 182 for this version of Respondent's argument.

and

"Respondent's arguments in Book II of the Counter-Memorial center essentially on two points: that the Mandate has ceased to exist; and that Respondent, *accordingly*, has no obligation to report to the United Nations for its administration of the territory of South West Africa, or in any other manner submit to its supervision ¹." (Italics added.)

In other contexts Applicants show an awareness of the true nature of Respondent's submissions. Thus, in dealing with what they allege to be "fatal inconsistencies" in Respondent's "central contentions", they show an appreciation of Respondent's contention that even if the Mandate is still in force, its provisions relating to supervision have lapsed ². And later they say correctly:

"Respondent contends that if, as it asserts, the duty of international accountability lapsed with the dissolution of the League, it is 'impossible for a Court to presume that the authors of the Mandate would have intended it to continue in existence . . .'³"

Reference is also made by Applicants to Respondent's "argument that the lapse of Article 6 of the Mandate collapsed the Mandate as a whole" ⁴.

The fact that Applicants commence the presentation of their reply with a false rendering of Respondent's submissions, can hardly be taken as an indication of much confidence on their part in the strength of their own argument. As will be shown, this is a feature which is also encountered elsewhere in the Reply.

3. Respondent's main submission then is that the provisions in Article 22 of the Covenant and the mandate instrument (hereinafter jointly referred to as "the mandate documents") relating to the supervision of Mandatory administration by organs of the League, became inoperable upon the dissolution of the League, and consequently lapsed. It will be recalled that the provisions in question were the following, viz.,

(i) 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."

(ii) 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."

(iii) Article 6 of the Mandate for German South-West Africa:

"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 provisions made reference to specific supervisory organs only

¹ IV, p. 521. *Vide* also p. 523.

² *Ibid.*, p. 240. They fail to note, however, that the inconsistent contentions were advanced in the alternative by Respondent. *Vide* para. 24, *infra*.

³ *Ibid.*, p. 524. *Vide* also p. 534, footnote 4.

⁴ *Ibid.*, p. 540.

(viz., the Council of the League and the Permanent Mandates Commission), which organs, upon the dissolution of the League, ceased to exist. Applicants nevertheless submit that Respondent's procedural obligations continue in force as obligations to report and account to the General Assembly of the United Nations, which must for the purpose of the said obligations be regarded as the new supervisory authority¹. The crucial question then is: *On what legal basis can such an averred substitution of supervisory organs be said to have been effected?* Consideration was given in the Counter-Memorial to the following bases, which, in Respondent's contention, would cover every possibility in the circumstances of the present case:

- (a) the interpretation of the express provisions of the mandate documents with reference to both the meaning of the words used and the light thrown thereon by surrounding circumstances²;
- (b) the possibility of implied terms or intentions in the mandate provisions³;
- (c) the possibility of an agreement, express or implied, in 1945-1946 or thereafter⁴;
- (d) the possibility of succession by virtue of an objective principle of international law⁵.

After dealing fully with each of the above possibilities in the light of all available information and relevant considerations, Respondent concluded that substitution of the supervisory authority did not take place.

4. In their Reply, Applicants avoid any attempt at providing a systematic answer to Respondent's contentions regarding the alleged substitution of supervisory organs. This avoidance they seek to justify on two grounds which, however, rest on two false premises. The first premise is the above mentioned incorrect rendering of Respondent's argument, i.e.,

"... that the Mandate has ceased to exist; and that Respondent, *accordingly*, has no obligation to report to the United Nations ..."⁶
(Italics added.)

This distortion then leads to the second false premise, namely that Respondent's contention—

"... that the Mandate, and the obligation to respond to international supervision, have lapsed, ... [is based on arguments which] ... are the same as those twice before considered in 1950 and 1962"⁷.

A comparison of the arguments now used to establish the lapse of supervision by organs of the League, and the lapse of the Mandate as a whole, with those used in 1950 and 1962 in respect of the issues then before the Court, demonstrates the incorrectness of Applicants' second premise, as appears from the next succeeding paragraphs.

5. In 1950, the argument on the lapse of the Mandate as a whole was

¹ *Vide* Applicants' Submissions No. 2 and No. 7 (I, pp. 197-198) read with I, pp. 52-53 and 95-103.

² II, pp. 119-122.

³ *Ibid.*, pp. 122-124.

⁴ *Ibid.*, pp. 124-163.

⁵ *Ibid.*, pp. 163-164.

⁶ IV, p. 521. *Vide* paras. 1 and 2, *supra*.

⁷ *Ibid.*, p. 522.

based on the submission that the Mandate was a contractual relationship which lapsed on the falling away of the League as a party to a mandate contract¹. Respondent's present argument, as summarized above², is based on different considerations, viz., on the lapse of supervision, and on questions of divisibility. Regarding the issue of supervision, this Court now has the benefit of much fuller information than was presented in 1950³. In addition, further light has been thrown on this issue by authorities on international law, and by the Judgment and Opinions on the Preliminary Objections⁴. For all these reasons, Applicants are wrong in saying that the arguments now used are the same as those considered in 1950.

6. As far as the 1962 proceedings are concerned, the question whether the Mandate had lapsed or not, was not then dealt with at all by Respondent. On the contrary, before arguing the merits of its Preliminary Objections, Respondent stated explicitly:

"No submissions are advanced about the questions whether the Mandate, in the wider sense of being an institution, lapsed upon dissolution of the League or survived the League . . . 5"

This attitude was maintained throughout⁶.

Applicants are, however, correct in saying that argument was presented to the Court in 1962 on the question whether Respondent's procedural obligations lapsed on dissolution of the League, but their averment that this issue was decided against Respondent is without foundation⁷.

In its Counter-Memorial Respondent carefully analysed the Judgment and Opinions, and came to the conclusion that—

" . . . 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 eleven Judges did not deal expressly with this point; but the findings or reasoning of seven of them are to a greater or lesser extent inconsistent with any survival of the Mandatory's procedural obligations. They are Judges Alfaro, Badawi, Moreno Quintana, Wellington Koo, Koretsky, Jessup and Mbanefo. In respect of the remaining four Judges (*i.e.*, President Winiarski and Judges Basdevant, Spiropoulos and Morelli) no indications are in this regard afforded by their Opinions⁸."

Neither this conclusion, nor the argument presented in support thereof, is dealt with in the Reply. Instead, Applicants content themselves with making the unmotivated and inaccurate statements referred to above regarding the purport and effect of the 1962 Judgment⁹.

Only in respect of the scope and purpose of the compromissory clause,

¹ *International Status of South-West Africa, Pleadings, Oral Arguments, Documents: Advisory Opinion of July 11th, 1950*, pp. 276-277.

² *Vide* para. 1, *supra*.

³ *Vide* II, pp. 124 (para. 19), 145-148 and para. 48, *infra*.

⁴ *Vide ibid.*, pp. 125 (para. 20), 148-151 and 152 (para. 55). *Vide* also para. 6, *infra*.

⁵ I, p. 214 (para. D).

⁶ *Vide*, e.g., I, pp. 299 (para. 3) and 360 (para. 54); Oral Proceedings, 2 and 3 Oct. 1962 and *vide* II, pp. 165-166.

⁷ IV, pp. 522, 539 and 550.

⁸ II, p. 153.

⁹ *Vide* also para. 47, *infra*.

and the issue as to its present existence, are the Judgment and some of the Opinions in the 1962 proceedings in conflict with Respondent's argument in the Counter-Memorial. These topics, which were of fundamental importance for the jurisdictional questions decided in the Preliminary Objections proceedings are, however, of only indirect relevance to the present issues¹. In particular, they are of no relevance at all to the question whether Respondent's procedural obligations lapsed on dissolution of the League.

7. It is, then, on the above false premises relating to the nature of Respondent's submissions, and the effect of the previous Judgment and Opinions, that Applicants seek to present a twofold justification for their failure to deal systematically with the issue regarding Article 6 of the Mandate. Firstly, they state that, in re-arguing matters previously decided in the Judgment or Opinions, Respondent "... does not merely maintain positions inconsistent with several of these Opinions. In many instances, Respondent singles them out for critical analysis"².

Applicants then define their attitude to this matter as follows:

"Without suggesting that Respondent is not at liberty to proceed in this manner, Applicants would prefer not to join issue with the Counter-Memorial in its critical analyses of Opinions by members of this honourable Court. It is one thing to maintain positions inconsistent with Opinions expressed by Judges now sitting. Applicants themselves will respectfully maintain views in this Reply that may not always be consistent with all these Opinions. It is quite a different thing to place such Opinions in controversy. Applicants do not believe that any useful purpose would be served by replying to what the Counter-Memorial has to say about them"².

Respondent does not understand what Applicants mean by the expression "to place such Opinions in controversy". Where Respondent has made submissions which are inconsistent with views of recognized authorities on international law referred to in these proceedings, Respondent has conceived it its duty to point out to this Court why, in its submission, such views should not be accepted. It is submitted that a party would be entitled to disregard or ignore an adverse expression of opinion by an authority only where the latter's standing is such as to render his opinion valueless. *A contrario*, where a view is expressed by as eminent an authority as a judge of this honourable Court, Respondent considers that it would not only be failing in its duty towards the Court, but would be guilty of disrespect towards the learned judge concerned, by adopting a contrary attitude without indicating the grounds on which its contention disagrees with such view. Thereby Respondent does not wish to place any opinion "in controversy"—it merely seeks to assist the Court by analysing the reasoning which has led such eminent lawyers to express views inconsistent with Respondent's contentions, and thus to facilitate the Court's task of determining which conclusion is correct. Indeed, the ascertainment of the real issues between the Parties, and the weighing of the merits of their rival contentions, would in Respondent's submission have presented much less difficulty if Applicants should also

¹ *Vide* II, Book II, Chap. V B and Part II, Chap. IV B, para. 1, *infra*.

² IV, p. 522.

have presented "critical analyses" of arguments used by judges who maintained views inconsistent with their contentions.

8. In the second instance, Applicants do not stop at preferring "not to join issue with the Counter-Memorial in its critical analyses of Opinions by members of this honourable Court"¹; they also apparently prefer not to join issue with Respondent on the major part of its argument which either contains no reference to, or expresses respectful agreement with, Opinions of members of this Court. Their purported justification for this is that—

"... inasmuch as the issues of lapse of the Mandate and lapse of international accountability already have been presented to the Court by the parties, it is difficult for Applicants to deal with these issues without engaging in mere repetition of arguments already made in the *Preliminary Objections* phase of these Cases"²,

and that they "... deem it appropriate to refrain in their Reply from a merely mechanical repetition of the replies previously given to Respondent's arguments ..."³.

The weakness in this position is that Applicants have never given a systematic reply to Respondent's arguments regarding the lapse of Article 6 of the Mandate or of the Mandate as a whole. In the Preliminary Objections proceedings Applicants' agent summarized their attitude as follows:

"But, Mr. President, it is not the Applicants who 'rely on' United Nations succession. The Court itself decided that issue in the Advisory Opinion of 1950. We draw the necessary inference from the Court's Opinion. *We do not bear the burden of sustaining the validity of the Opinion of the International Court of Justice*."⁴ (Italics added.)

Although in his Rejoinder Applicants' agent belatedly sought to add some qualification to this statement, it is still clear that his argument relating to the issue of the Mandatory's procedural obligations was based largely, if not wholly, on the assumed correctness of the 1950 Opinion⁵. In their written Observations in the Preliminary Objections proceedings, Applicants had raised a contention regarding a "principle" or "doctrine" of "succession", and had developed it to some extent, although not fully or systematically, with reference to an "organized international community"⁶. However, as has been seen⁷, after this contention had been analysed and fully dealt with by Respondent in its oral statement⁸, Applicants' representatives refrained from attempting to support it, or even from mentioning it at all, in the oral proceedings.

Also at the Preliminary Objections proceedings, therefore, Applicants failed to answer on merit Respondent's arguments directed at showing that the conclusion arrived at in the 1950 Opinion with respect to the issue arising from Article 6 of the Mandate, was wrong.

¹ IV, p. 522.

² *Ibid.*, pp. 303-304.

³ *Ibid.*, p. 304.

⁴ Oral Proceedings, 17 Oct. 1962.

⁵ *Ibid.*, 22 Oct. 1962.

⁶ I, pp. 443-444 and 444-449.

⁷ II, p. 122 (para. 14) and p. 164 (para. 72).

⁸ Oral Proceedings, 5 Oct. 1962.

The further question whether the Mandate was capable of continued existence despite the absence of the supervisory machinery provided for in Article 6, did not arise in the Preliminary Objections proceedings, and was not then argued by Respondent ¹.

9. Rather than provide "the merely mechanical repetition" referred to in the previous paragraph, Applicants adopt what they term "... a somewhat different approach to the task of presenting to the Court their arguments concerning this aspect of the merits of issues in dispute" ², namely an "... endeavour ... to identify the nature [of?] and apparent explanation [for?] underlying differences between the parties" ².

These underlying differences they identify as "... essentially differing views in respect of the nature of the obligation of international accountability" ², and "... divergent major premises concerning the essential role of accountability under the Mandates System" ³.

This then is the issue on which Applicants choose to join battle, recognizing, at the same time, that the deciding factors are, ultimately, "conclusions concerning interpretations of the relevant texts" ².

10. What then are the "divergent major premises" to which Applicants attach so much importance? The following passage appears, on analysis, to reflect their conception thereof (in so far as the issue relating to Article 6 is concerned):

"... in performing its supervisory function with respect to Mandates, the League of Nations was ... acting not as party to a contract, but 'as an organized international community'.

The United Nations has replaced the League of Nations as such 'organized international community' ... ⁴" (Footnote omitted.)

From these premises follows Applicants' crucial conclusion, viz., "... Respondent's obligation of international accountability, accordingly, is owed to the United Nations in that capacity" ⁴.

11. The words "acting not as a party to a contract" reflect an apparent misapprehension on Applicants' part as to the true content of Respondent's submissions regarding the lapse of Article 6 of the Mandate. This apparent misapprehension is also found elsewhere in the Reply.

Thus Applicants refer to—

"Respondent's contention that its obligations were *merely contractual* with the League of Nations and lapsed when the League terminated ... ³", (Italics added.)

and to "Respondent's conception of the relationship between itself and the League ... *as one of mere contract* ... ⁵". (Italics added.) This is later amplified as follows:

¹ *Vide* para. 6, *supra*.

² IV, p. 523.

³ *Ibid.*, p. 524.

⁴ *Ibid.*, p. 539. Applicants appear to suggest that a further "divergent major premise" is found in the Parties' respective attitudes towards the question whether the "sacred trust" and "tutelage" principles gave rise to legal obligations (*vide* IV, p. 524): no argument is, however, explicitly based on this premise, and, as has been noted above (*vide* Chap. II, paras. 11-14, *supra*), the alleged divergence between the Parties' attitudes in this respect is completely imaginary.

⁵ *Ibid.*, p. 534.

"Respondent contends that its obligations to report on its administration of the Mandate and the right of the League to supervise and verify its observance of these obligations, *were undertakings of a contractual character*. It argues that the obligation to report and the right to supervise were intended to give practical effect to the words 'mandatories on behalf of the League' *in accordance with the principle of 'mandatum', which is a contractual principle*. The suggestion is that the League delegated authority to the mandatories and received in exchange their promise to report to the League and to submit to its supervision. On this basis, Respondent contends that on dissolution of the League, the notion of 'mandatories on behalf of the League' fell, and with it Respondent's undertaking to report and to submit to international supervision ¹." (Italics added.)

Applicants have not disclosed the source from which they purport to derive this version of Respondent's argument ². This honourable Court will be aware that Respondent's submissions regarding the lapse of the League's supervisory functions were based upon inoperability or impossibility of performance, not on any contractual lapse ³. Indeed, Respondent's contentions on this aspect did not advert at all to the question whether the League of Nations ever was a contractual party to the Mandate, since this was not a relevant issue in respect of such contentions. In the section of Respondent's argument where this issue was relevant (i.e., in the chapter dealing with the lapse of the compromissory clause), Respondent argued that the Mandate never was an international contract (a "treaty or convention") ⁴. And if the Mandate were to be held to have been a "treaty or convention", Respondent left the question open whether the League of Nations was ever a party thereto ⁵.

12. Respondent's contention therefore is that the *content* of the obligations accepted by it, irrespective of who, if anybody, was a contractual party to the Mandate, involved supervision by specific organs, viz., the Council of the League of Nations, assisted by the Permanent Mandates Commission. The content of the obligations can be determined only by a process of interpretation, i.e., the ascertainment of the intentions of their authors as expressed or implied in the documents embodying such obligations. Consequently, if Applicants' arguments were to be relevant at all to Respondent's contention, they would have to be directed at showing that interpretation of the documents concerned reveals obligations of a content different from that contended for by Respondent. In other words, Applicants must then submit that the Mandatory's procedural obligations were intended to be defined with reference to the organs of the League of Nations in a special capacity, viz., as then constituting or representing the "organized international community". This indeed appears to be the effect of Applicants' case ⁶. Thus they say that at the

¹ IV, pp. 537-538.

² Respondent did say that accountability was imposed as a "feature" of "broad resemblance" to the *Mandatum* institution (II, p. 115, para. 2). Perhaps Applicants base their whole contention on this slender foundation.

³ *Vide* para. 1, *supra*.

⁴ *Vide* II, pp. 193-204.

⁵ *Ibid.*, pp. 207-208.

⁶ Although, for reasons best known to themselves, they do not inform the Court in so many words of their attitude in that regard.

Peace Conference "[i]t was clearly understood by all concerned" that "as a matter of international law, the well-being and social progress of [indigenous peoples in certain areas of Africa and Asia] would be the responsibility of the 'organized international community'"¹ (italics added), and also that "the Covenant vested responsibility in the organized international community"²; they refer to "international accountability" as a "duty" which was "imposed"³, and as something "incorporated in paragraphs 7 and 9 . . . of Article 22 of the Covenant"³. And, finally, as already observed, they describe the dispute between the Parties as one concerning "interpretations of the relevant texts"⁴.

Consequently, despite lack of a comprehensive explanation to that effect, it seems clear that Applicants rely on an intention alleged to be embodied expressly or by implication in the provisions of Article 22 of the Covenant (and, as a result, probably also in Article 6 of the mandate instrument). In other words, they join issue with Respondent on the application of the bases (a) and (b) set out in paragraph 3, *supra*, and their contentions must accordingly be weighed against the considerations set out by Respondent under the corresponding headings in the Counter-Memorial. In addition, Applicants appear to rely to some extent on basis (c), although apparently not as an independent factor said to have effected a substitution of supervisory organs by itself. Thus they say that, "*consistently with the foregoing*" (italics added), i.e., with their interpretation of the mandate documents,

" . . . the proceedings at the period of the dissolution of the League of Nations and the organization of the United Nations, manifested the clear intention of all concerned to preserve and assure proper discharge by the organized international community with respect to its responsibilities toward the inhabitants of mandated territories"⁵.

No reliance is, however, placed on basis (d), i.e., succession by virtue of some objective principle of international law.

To summarize: Applicants have chosen to join issue with Respondent on its contentions regarding the meaning of, or implications in, the mandate documents, and, to a lesser extent, on its arguments relating to the events of 1945-1946. It is, accordingly, necessary to analyse the material adduced by Applicants in support of their contentions, and to place it on the scales against the factors relied upon by Respondent. This will be done in the next succeeding paragraphs, dealing first with the meaning of, or implications in, the mandate documents, and thereafter with the events of 1945-1946.

B. The Meaning of, or Implications in, the Mandate Documents

I. THE NATURE AND IMPLICATIONS OF THE PARTIES' RESPECTIVE ATTITUDES

13. Applicants' "organized international community" argument may be summarized as follows:

¹ II, p. 233.

² *Ibid.*, p. 534.

³ *Ibid.*, p. 538.

⁴ *Vide* para. 9, *supra*.

⁵ IV, p. 539.

- (a) The Covenant of the League vested responsibility in the "organized international community" to assure that Mandatories would promote the well-being and social progress of inhabitants of mandated territories¹.
- (b) Accordingly, any reference in the mandate documents to the performance of supervisory functions by organs of the League must be construed as a reference to such organs in their capacities as constituting or representing the "organized international community"².
- (c) Since the dissolution of the League of Nations, the obligations of the Mandatory have been owed to the United Nations as the new "organized international community"³.

It will be recalled that the provisions regarding supervision in respect of Mandates by organs of the League refer to such organs by name and without any qualifications⁴. In order to arrive at the conclusion that such organs acted merely in a special capacity (i.e., as constituting or representing the "organized international community"), it would consequently be necessary to read such an unexpressed intention into the terms of the relevant documents. In this connection it must be borne in mind that a tacit intent or consent may be implied only where it arises necessarily or inevitably in the sense that all other reasonable inferences are excluded⁵. And, when dealing with instruments such as the mandate documents, there is a very much increased difficulty about deriving such intent from sources *dehors* the instruments themselves. In this regard reference may be made to the following passage from an opinion by Sir Percy Spender, which, although dealing with the United Nations Charter, contains reasoning which is equally applicable to the instruments now under consideration:

"Moreover the *intention* of the parties at the time when they entered into an engagement will not always—depending upon the nature and subject-matter of the engagement—have the same importance. In particular in the case of a multilateral treaty such as the Charter the intention of its original Members, except such as may be gathered from its terms alone, is beset with evident difficulties. Moreover, since from its inception it was contemplated that other States would be admitted to membership . . . the intention of the framers of the Charter appears less important than intention in many other treaties where the parties are fixed and constant and where the nature and subject-matter of the treaty is different. It is hardly the intention of those States which originally framed the Charter which is important except as that intention reveals itself in the text. What is important is what the Charter itself provides . . ."⁶

¹ IV, pp. 233-242 and 534.

² *Ibid.*, pp. 240 and 533-534. For a fuller discussion of the relationship, as disclosed in the Reply, between the "organized international community" and the League; *vide paras.* 38-39, *infra*.

³ IV, pp. 537 and 539.

⁴ *Vide para.* 3, *supra*.

⁵ II, pp. 111-112 and references there given. *Vide also Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 151 at p. 159.*

⁶ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 151 at pp. 184-185. Vide also Lord McNair,*

Inasmuch as the mandate documents by themselves do not give rise to any necessary inference of the sort relied upon by Applicants, the considerations stated in the above passage might well be regarded as rendering unnecessary any further enquiry as to the intentions of the authors of the Mandate. Nevertheless Respondent does not propose resting its argument purely on this basis, but will proceed on the same lines as in the Counter-Memorial and demonstrate that such further enquiry does not invalidate, but on the contrary supports, the conclusion reached on examination of the terms of the instruments themselves.

14. The first question which arises is: What is the content of the provision sought to be implied? As Respondent will indicate below, Applicants have avoided any clear definition of the nature or composition of the "organized international community", or of its relationship with, successively, the League of Nations and the United Nations Organization¹. However, whatever the "organized international community" may be (or may have been), the basic concept involved in Applicants' argument, viz., that the League organs were assertedly intended to act in a special capacity as constituting or representing some other entity or concept, contains certain implications which, it is submitted, exclude the possibility of any implied provision of the type contended for by Applicants.

The legal device of entrusting functions to persons acting in a particular capacity, or to the incumbent for the time being of a particular office, is *ex hypothesi* resorted to only in order to make provision for the possible future loss of capacity or office by the individual holder thereof. Thus, on the one hand, this device serves the positive purpose of ensuring that there will always be a suitable person to perform the functions in question. On the other hand it ensures negatively that a particular incumbent of an office is prevented from continuing to exercise the functions in question after loss of his office. Both these aspects serve to stress that a grant of a function in this form is derived from a contemplation that the present incumbent of the office will or may not remain alive (or in existence) as well as suitable and able to carry out the function for a sufficient length of time to bring it to its completion.

Because of this essential purpose of this legal device, it finds its main application in connection with natural persons, who are subject to death, disease, insanity, resignation, dismissal, promotion or demotion, and may thus become incapable of performing a particular function.

The position of associations (whether incorporated or not) is, however, substantially different. They are capable of perpetual existence, and are not subject to the ordinary human vicissitudes referred to above. Consequently the normal contemplation is that an association will continue in existence and remain available and capable to carry out a function until its completion. Furthermore, an association usually does not act in a number of different capacities (as distinct from engaging in a variety of activities). It would, consequently, only in exceptional cases be considered appropriate, or necessary, or desirable, to appoint an association

The Law of Treaties (1961), p. 745. Wright, Q., *Mandates under the League of Nations* (1930), p. 363.

¹ *Vide* paras. 37-42, *infra*.

to perform a function in its capacity as the holder of a particular office or qualification. Such a situation would arise only where there exists a specific contemplation that the association might cease to hold a stipulated office or qualification, in one or the other of the following ways: firstly, in that the association might, while remaining in existence, lose the office or qualification, and thereby become either incapable, in fact or in law, or unfit in the contemplation of the stipulator, to perform the function concerned, or secondly, in that it might be dissolved and thereby cease to exist at all.

15. It is consequently implicit in Applicants' "organized international community" theory that the authors of the mandate system must have contemplated the possibility that the League might at some future date, for one of the two possible reasons referred to above, cease to represent or constitute the "organized international community" and consequently to be able or fit to perform the supervisory functions entrusted to it in the mandate system.

Applicants do not appear to suggest that the authors had in mind the possibility that the League might lose its quality of constituting or representing the "organized international community" despite remaining in existence¹.

By a process of elimination it therefore follows that Applicants' "organized international community" theory amounts merely to an averment that the authors of the Mandate, by a particular method, intended to guard against the consequences of a possible future *dissolution* of the League, viz., by making provision for a succession of supervisory organs in such event. And, as demonstrated above, Applicants seek to base this particular succession-argument on an implication to be found in the mandate documents².

16. By reason of the conclusions reached in the preceding paragraph, the arguments adduced by Respondent in its Counter-Memorial in order to demonstrate in principle the untenability of any suggested implication in the mandate documents of a provision regarding future succession of supervisory organs, are fully applicable to the particular implication alleged by Applicants in their "organized international community" theory. These arguments may be briefly summarized as follows:

- (a) Since in fact nobody in 1920 contemplated the possibility of the future dissolution of the League, it would be unrealistic to impute an intention to the authors of the Mandate to guard against the possible consequences of such dissolution³.
- (b) Even if it be assumed that the future dissolution of the League

¹ It nevertheless remains a necessary corollary of Applicants' argument that the Mandatories would have been entitled to refuse to submit to supervision by the League if it ceased to constitute or represent the "organized international community" even if it remained in existence. In this regard it may possibly be questioned whether the League could be said to have been fully representative of the international community during its last few years of existence, even prior to the foundation of the United Nations, when a number of States, including major powers such as the United States of America, the U.S.S.R., Germany, Japan and Italy, were not members of the League. And who constituted or represented the "organized international community" during the simultaneous existence of the League and the United Nations?

² *Vide* para. 13, *supra*.

³ II, p. 123.

was contemplated, it must be borne in mind that certain of the Mandatories were reluctant to accept the extension of the mandate system to particular territories occupied by them, being influenced in their acceptance, *inter alia*, by the nature of the supervisory machinery, which was carefully checked and balanced so as to render unlikely any injurious, biased or unfair interference with mandatory government, and so as to contain the minimum of political element and a maximum of independent, expert approach. 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, and in circumstances which were unpredictable¹.

(c) The provisions regarding amendment in Article 7 of the Mandate (and similar provisions in other mandates) enabled the mandates to be amended to meet changes in circumstances, and indicate an attitude on the part of the authors of the mandates that such changes should be dealt with as and when they arose. Is it then likely that they would have attempted to make provision in advance for something as uncertain in its nature and consequences as the dissolution of the League²?

(d) No State alleged the existence of such an implied agreement, despite discussions concerning the future of the mandates by the founders of the United Nations (including many founders of the League) in 1945-1946, by the members of the League at its final session in April 1946, and by Members of the United Nations in the years 1946-1949³.

The argument that rights or interests in respect of mandates passed to the United Nations as representing "the civilized and organized collectivity" or the "international community" or similar phrases, indeed first came to be used, by representatives of a few States, as from the end of 1948 only, i.e., after years of debate regarding mandates⁴. These representatives did not, however, base this argument on the facts, circumstances and intentions existing in 1920, or on any contention of implied consents by the authors of the mandate system. They treated it rather as based on a principle of law, operating independently of the intentions of the authors of the Mandate, and in some cases they joined it with arguments based on Article 80 (1) of the Charter⁵. That these States were relying on their construction of principles of law, and not on alleged facts within their knowledge, appears also from the fact that in the case of some of them this argument was inconsistent with the attitudes adopted by them at an earlier stage⁶.

¹ II, pp. 119-120 and 123-124.

² *Ibid.*, pp. 123-124 (para. 16).

³ *Ibid.* (para. 17).

⁴ *Ibid.*, p. 70.

⁵ *Ibid.*, and speeches of representatives referred to there. Applicants also at one stage placed heavy reliance on Article 80 (1) of the Charter of the United Nations (*vide* II, p. 111, para. 24), but apparently no longer do so—their Reply makes no reference to this Article.

⁶ *Ibid.*, p. 70 (para. 60).

17. Despite the fact that Applicants' "organized international community" theory, being based on the alleged intentions of the authors of the mandate system, is covered by the arguments advanced in the Counter-Memorial and summarized in the preceding paragraph, Applicants have not attempted to controvert the facts presented or inferences drawn by Respondent. Instead they apparently seek to avoid the arguments, facts and inferences concerned, and to develop a line of argument, spread over two chapters¹, which makes no reference thereto. The contentions advanced by them appear to differ to some extent as between the two parts, and will consequently be dealt with separately.

II. CHAPTER III OF THE REPLY

18. The manner in which Applicants present their "organized international community" theory in Chapter III of the Reply, is instructive. In purported answer to a contention not advanced by Respondent, they introduce this theory as follows:

- "Applicants submit . . . that the 'sacred trust' and 'tutelage' principle, in itself, must be regarded as a statement of legal obligation, embodying juridical content. The enforcement of the 'sacred trust', moreover, became a responsibility 'laid upon the League as an organized international community'²." (Footnote omitted.)

The rest of their section A of Chapter III is devoted largely to developing the submissions:

- (a) that the provisions regarding the "sacred trust" and "tutelage" principles gave rise to legal obligations; and
 (b) that enforcement of the "sacred trust" was the legal responsibility of the "organized international community" as an entity or concept distinct from the League of Nations.

19. It must be noted that proposition (b) referred to in the previous paragraph is not a necessary corollary of proposition (a). Thus, although it is admitted that the authors of the mandate system intended the "sacred trust" to give rise to legal obligations³, that does not answer the real question at issue for present purposes, viz., in what manner did such authors seek to ensure compliance with the "sacred trust"—a question which, as noted above⁴, can be resolved only by an examination of their intentions.

20. As indicated above, Applicants do not indeed contend that there is any basis other than the intention of the authors of the mandate system for their construction of the element of accountability to the administrative supervisory organs of the League⁴. Rather, by combining their treatment of their submissions (a) and (b) referred to above⁵ (there being ample authority and sound argument in support of the uncontested "issue" (a), but not of (b)), they attempt to show that both aspects were in accordance with the intention of the parties. When, however, the

¹ IV, Reply, Chaps. III and VI.

² IV, p. 233. *Vide* Chap. II, paras. 11-14, *supra*.

³ *Vide* Chap. II, paras. 11-14, *supra*.

⁴ *Vide* para. 12, *supra*.

⁵ *Vide* para. 18, *supra*.

authorities and arguments relied upon specifically to establish Applicants' submission (b) are examined by themselves, it is revealed how far they fall short of the purpose for which they are adduced—as will, it is submitted, appear from the succeeding paragraphs.

21. Applicants' authority in support of their allegations regarding the legal responsibility of the "organized international community" consists of the following:

- (a) A statement in the Judgment of this Court in 1962 that the Mandate System involved "... the recognition of 'a sacred trust of civilization' laid upon (sic) the League as an organized international community and upon its Member States"¹.
- (b) A statement by President Wilson in 1919, who said with reference to his proposals for the mandate system (which proposals were not accepted without major modifications) that "[t]he fundamental idea would be that *the world was acting as trustee through a mandatory ...*"². (Footnote omitted.)
- (c) A statement by P. H. Kerr in 1916 that in colonial policy generally "... the ruling people ought to govern the dependency *as trustees for all mankind*"². (Footnote omitted.)
- (d) A statement in the "Cobb-Lippman-House Memorandum" of 1918, with reference again to colonial policy in general, "... that a colonial power acts not as owner of its colonies, but as trustee for the natives and *for the interests of the society of nations ...*"³. (Italics added.)
- (e) A statement in 1945 by the League Secretariat that the mandate system was "... calculated to safeguard the interests both of the natives and of those countries which had asserted special claims, and *in addition, the interests of the international community in general*"⁴. (Footnote omitted.)

22. Dealing first with the quotation from the 1962 Judgment, on which Applicants rely so heavily⁵, Respondent submits that the construction contended for by Applicants is entirely erroneous. The concept which the Court expressed in the passage under consideration, was that the "sacred trust of civilization" had been laid upon two different entities, namely "*upon the League as an organized international community and upon its Member States*". (Italics added.) The words "as an organized international community" serve in the context to describe the feature distinguishing the League from its Members, and consequently mean, it is submitted, no more than "as an international organization". The use of the indefinite article "an" is significant in this regard. There can hardly be more than one "organized international community" in the sense contended for by Applicants, or, indeed, in the sense of a concept like "the society of nations" or like phrases on which Applicants also rely⁶.

23. The highest possible effect of the other four statements relied upon by Applicants⁶, would appear to be that the mandate system was shaped,

¹ *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319 at p. 329. IV, p. 233.

² IV, p. 235.

³ *Ibid.*, p. 236.

⁴ *Ibid.*, p. 237.

⁵ *Vide* IV, pp. 233, 524 and 539.

⁶ *Vide* para. 21, *supra*.

inter alia, by the view that "the world" or "all mankind" or "the society of nations" or "the international community in general" was interested in, or would benefit by, the proper administration of dependent territories generally, and of the former German and Turkish colonies and territories in particular. This may indeed be conceded. That conclusion does not, however, answer the real question, namely: In what manner did the authors of the mandate system seek to give effect to this interest of "the international community in general"? Applicants' authorities fail to provide any answer thereto. In particular they do not suggest that there was any intention or attempt to bestow legal personality, or legal rights, interests or obligations upon "the world", "all mankind", "the society of nations" or "the international community in general".

24. An examination of the arguments used by Applicants in support of their "organized international community" contention shows them to be as inconclusive as the authorities relied upon. Thus Applicants point to the objective of self-determination for the peoples of mandated territories¹; to the "necessity" for "international accountability"²; and to the fact that the Mandate constituted a "new international institution, the primary, overriding purpose of which is to promote the 'well-being and development' of the people of the territory under Mandate"². These considerations do not, however, answer the vital questions, namely what did the authors of the Mandate intend the *content* of the new institution to be; *how* did they seek to promote the well-being of the inhabitants; *what type* of international supervision did they intend to create? No argument, as distinct from mere assertion, is directed towards showing that these questions are to be answered in the manner contended for by Applicants³.

Applicants also point at certain alleged "fatal inconsistencies" in Respondent's "central contentions"⁴. The first two contentions referred to by Applicants are indeed inconsistent and were for that reason advanced by Respondent in the alternative⁵. The third contention relied upon by Applicants appears to be merely their paraphrase of the first contention⁶. In this regard it is to be particularly noted that the description in the said contention of the powers claimed by Respondent as being "powers equivalent to annexation . . . or sovereignty"⁷ represents Applicants' characterization, and does not correctly reflect any submission made by Respondent⁸.

25. For the reasons aforesaid, it is submitted that Applicants have failed to establish in their Chapter III that any legal responsibility or interest in respect of mandates was granted to the "organized international community", or any other international entity or body save the League of Nations. In the next succeeding paragraphs, Respondent will consider

¹ IV, pp. 239-242.

² *Ibid.*, p. 240.

³ *Vide* also para. 35, *infra*.

⁴ IV, p. 240.

⁵ II, p. 257.

⁶ Unless it is intended to refer to the situation on the basis that the Mandate has lapsed—in which event *vide* Chap. IV A, paras. 20-30, *infra*.

⁷ IV, p. 241.

⁸ *Vide* Chap. II, paras. 4-10, *supra*.

the arguments advanced and authorities quoted in Chapter VI of the Reply, apparently in support of the same argument.

III. CHAPTER VI OF THE REPLY

The General Tenor of Chapter VI

26. In dealing with Applicants' arguments in Chapter VI of the Reply regarding the lapse or otherwise of the provisions of Article 6 of the Mandate, Respondent is at the outset faced with certain difficulties of approach. Applicants commence their treatment of this topic by asserting that in Chapter III of the Reply they provided a—

“... demonstration that the ‘sacred trust’ and the legal nature of the ‘tutelage’ principles of Article 22 of the Covenant imported obligations of a legal nature, *compliance with which is an interest of the organized international community*”¹. (Italics added.)

And one of the submissions made by Applicants in their Chapter III was that “[t]he League was to serve as the then existent political organ of the international community . . .”².

It almost appears, therefore, as if Chapter VI of the Reply is not intended to *establish* the “organized international community” theory, but that it proceeds on the assumption that correctness of such theory has already been demonstrated in Chapter III. Some support for this reading emerges from the fact that Chapter VI apparently purports to provide the answers to contentions supposedly advanced by Respondent, rather than to present a new and independent line of argument. Thus immediately after the sentence quoted above dealing with the “demonstration” in Chapter III, Applicants refer to “Respondent’s contention that its obligations were merely contractual with the League of Nations”³, as if the rest of the treatment would provide a reply to this alleged contention. Since, as has already been shown, this contention was not advanced by Respondent³, it would not be necessary to rebut Applicants’ arguments if they are merely designed to demonstrate its incorrectness.

27. Also in other parts of their treatment of this subject in Chapter VI, Applicants give the impression of purportedly contesting fictitious or immaterial issues arising from the Counter-Memorial (or Applicants’ rendering thereof) rather than of providing a new and independent line of argument in support of their “organized international community” theory. Thus they contest Respondent’s statement that—

“[t]he 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”⁴.

Applicants do not, however, contend that the expression was used literally—on the contrary, they submit—

“... that this new international institution [the Mandate System] adapted to its own purposes and needs *analogous concepts* of municipal systems”⁵. (Italics added.)

¹ IV, p. 524.

² *Ibid.*, p. 240.

³ *Vide* para. 11, *supra*.

⁴ II, p. 103. *Vide* IV, pp. 527 and 531.

⁵ IV, pp. 528 and 532.

This alleged issue can therefore be described as "metaphor" versus "analogy".

If the purpose of this aspect of Applicants' argument merely is to establish that the correct word is "analogy" rather than "metaphor", Respondent would gladly concede it to them. However, they go further, and apparently with reference to the same passage from the Counter-Memorial, say:

"*Contrary to Respondent's contention, tutelage was a universally accepted concept, designed for the protection of persons 'not yet able to stand by themselves' ¹.*" (Italics added and footnotes omitted.)

The italicized words, of course, do not give a correct reflection of the passage referred to. Inasmuch as Applicants' object is to establish the validity of the proposition that tutelage was a universally accepted concept, under the mistaken impression (as appears from the italicized words) that such proposition was contested by Respondent, it will only be necessary to say that Respondent does not quarrel therewith at all.

28. Applicants likewise refer to the "fallacy in Respondent's contention . . . that the *mandatum* concept 'could hardly have been known to the Peace Conference as a whole' "². This is again a distortion of what Respondent said. In fact Respondent's statement was:

"*The more detailed and technical aspects of the private law institution [of *mandatum*] could hardly have been known to the Peace Conference as a whole—as distinct possibly from certain of its members . . . ³*" (Italics added.)

Surely there can be no serious dispute about this, or about the corollary that the broad nature of the concept was in all probability generally known. Consequently, this "issue" too comes to nothing. And, indeed, Applicants' discussion of the *mandatum* institution in reply to their above rendering of Respondent's argument, merely leads them to the conclusion that the principle of such institution—

" . . . was used to indicate that a colonial power was not entitled to administer a colonial possession as beneficial owner. Rather, it would receive a commission, or 'mandate', to administer the territory solely for the benefit of the inhabitants. Hence, the term 'mandatory' had come to be synonymous with 'non-annexation' "⁴.

Whether the principles referred to in this quotation (which principles were admittedly incorporated in the mandate institution) derived from the analogy of the institution of *mandatum* or from that of other fiduciary institutions, seems to Respondent to be of no consequence ⁵. Accordingly no space will be devoted to controverting Applicants' treatment of this topic, or their conclusion, which, however, as far as its final sentence is concerned, appears *prima facie* to do violence at least to the laws of semantics.

29. However, despite the apparent premise on which Chapter VI is based, viz., that the legal interest and responsibility of the "organized

¹ IV, p. 531.

² *Ibid.*, p. 527.

³ II, p. 104.

⁴ IV, p. 533.

⁵ *Vide* para. 34, *infra*.

international community" have already been demonstrated in an earlier chapter¹, and despite the indications that it is directed solely or primarily at attempting to controvert contentions supposedly advanced by Respondent, it is nevertheless possible that Applicants do attempt in Chapter VI to state and develop a positive line of argument in support of their "organized international community" theory.

Such argument, it will be recalled, must, in order to be of any relevance to the issues before the Court, be directed at showing that the authors of the Mandate intended the supervisory organs in respect of mandates to consist, not of the organs of the League as such, but of the League organs in their capacities as constituting or representing the "organized international community"². In the succeeding paragraphs, Respondent will attempt to identify any such possible line of argument and to demonstrate its untenability.

Summary of Applicants' Apparent Contention

30. Applicants seem to contend the following:

- (a) The essential feature of the municipal law concepts of trust and tutelage (as well as of other fiduciary relationships) is a splitting between control and benefit³.
- (b) "From this basic division between control and benefit flow two consequences: there must be an accounting concerning the exercise of the control; there must be supervision by a public authority⁴."
- (c) The obligation of a trustee or tutor to account to public authority is "not an obligation resting on contract", but is "founded upon public interest and public policy". The community has an interest in, and responsibility for, the proper execution of such fiduciary relationships⁵.
- (d) For purposes of the mandate system, the institutions of trust and guardianship were adapted to the needs of the international society, and reporting by the Mandatory and supervision by the League were incorporated in paragraphs 7 and 9 respectively of Article 22 of the Covenant as "necessary corollaries of the fiduciary character of the mandates"⁶.
- (e) In Article 22 (1) of the Covenant, "the organized international community" had undertaken a responsibility for, and manifested an interest in, the promotion of the well-being and social progress of the inhabitants of territories under mandate⁷.
- (f) By analogy with the concepts of trust and tutelage in municipal law, "the duty of international accountability" in the case of mandates was imposed in order to protect the public interest and responsibility of the organized international community to which reference is made in sub-para. (e), *supra*⁸.

¹ *Vide* para. 26, *supra*.

² *Vide* para. 12, *supra*.

³ IV, pp. 527-530.

⁴ *Ibid.*, p. 530.

⁵ *Ibid.*, pp. 534-535 and 538.

⁶ *Ibid.*, pp. 531-532 and 538.

⁷ *Ibid.*, pp. 534 and 538-539.

⁸ *Ibid.*, p. 538.

- (g) Consequently, in performing its supervisory functions with respect to Mandates, the League of Nations was acting as, or representing, the "organized international community"¹.
- (h) The United Nations has replaced the League of Nations as such "organized international community" and Respondent's obligation of international accountability is accordingly owed to the United Nations in that capacity².

Since the above argument turns on the analogy between fiduciary institutions in municipal law and the international mandate, it would be convenient to deal with it in two stages, viz.,

- (a) what in municipal law are the nature and sources of public supervision in regard to fiduciary institutions; and
- (b) to what extent, and with what adaptations, was any such supervision taken over into the mandate system.

Fiduciary Institutions in Municipal Law

31. Applicants state, it is submitted correctly, that a fundamental rule of the trust institution is that the trustee is put in a position where he controls the trust, yet must use it not for his own benefit, but for that of another³. Respondent also agrees with Applicants' contention that this division between control and benefit is found in a large number of other institutions in municipal law⁴. Thus Quincy Wright quotes an authority as saying:

"The no-profit-in-trust-administration rule has been applied to agents, executors, administrators, attorneys, directors of corporations, guardians, and others who are not strict trustees but whose functions are like those of the trustee in that they act for others and are entrusted with power over, and title to or possession of, things to be used for the advantage of another. These quasi-trustees have well recognized distinct names and classifications in the law. There are also many transactions, situations and dealings which cannot be tagged or placed in a particular compartment of the law, but which nevertheless show a status of reliance on the integrity and skill of another. The one trusted has received communications and information, rendered services and given advice in a way analogous to the transactions which occur in trusts and agencies. The one trusted in a loose way acts for the other and has the power to affect the latter's financial interests. Equity applies this no-profit rule to all these fiduciaries from the strict trustee down to the most remote quasi-trustee in order to encourage fidelity and loyalty⁵."

When regard is had to the wide class of fiduciary relationships referred to above, all of which involve a division between control and benefit⁶,

¹ IV, pp. 534-535 and 539.

² *Ibid.*, p. 539.

³ *Ibid.*, p. 528; para. 30 (a), *supra*.

⁴ *Ibid.*, pp. 528-530.

⁵ Bogert, G., "Confidential Relations and Unenforceable Express Trusts", *Cornell Law Quarterly*, XIII (Feb. 1928), p. 248 as quoted by Wright, Q., *Mandates under the League of Nations* (1930), p. 388.

⁶ And many others may be added, such as certain types of servants and employees, members of club committees, *negotiorum gestores*, etc.

it immediately becomes obvious that Applicants are wrong in saying that one of the consequences of such division is that "there must be supervision by a public authority"¹, or that reporting to, and supervision by, such authority are "necessary corollaries of the fiduciary character" of such relationships². Such supervision is not as a matter of logic inherent in the division between control and benefit, and, indeed, there must be few, if any, municipal systems which provide for public supervision in respect of *all* such relationships, or even *most* of them.

The true position is that the only obligation with respect to accountability which is normally regarded as incidental in principle to a fiduciary relationship, is the duty to render account *to the beneficiaries*. This duty can of course be enforced by or on behalf of the beneficiaries by recourse to the Court or some other public organ. In the absence of such recourse, however, no Court or other organ normally³ plays any role with respect to this duty to account.

32. In addition to the duty to account to the *beneficiary*, some form of accounting to and/or supervision by a *public authority* has been introduced in many systems, in respect of the performance of fiduciary obligations falling in specified categories. Such introduction, which commonly occurs by way of legislation, has in no case of which Respondent is aware, resulted in a uniform duty falling upon all fiduciaries to account to, or submit to the supervision of, some public authority. Much the reverse is the position—in all probability the majority of fiduciary institutions in the civilized world are not subject to such supervision at all, and where it does exist, it does so by virtue of a special provision made *ad hoc* with respect to a particular category of fiduciary institution. Thus one finds that very large classes of relationships, e.g., those between principals and agents, or masters and servants, are not generally subject to public supervision at all, although particular types of agents or servants may be so subject in certain systems (such as, e.g., certain types of brokers). And even in the fiduciary relationship *par excellence*, namely the Anglo-American trust, public supervision appears to be the exception rather than the rule. Thus in England, the home of the trust, there does not appear to be any provision at all for regular accounting to, or supervision by, a public organ⁴. And in the United States of America, according to an authority quoted by Applicants, a duty to account in court before they are discharged, is imposed on trustees or "at least, trustees acting under a will", "in many states", but not all. Other forms of accounting in court are found only "in some states"⁵.

33. Applicants proceed with a contention that the obligation to account to public authority is "not an obligation resting on contract", but is "founded upon public interest and public policy"⁶.

This statement betrays a cardinal error of logic. "Contract" cannot be compared or contrasted with "public interest and public policy"—the

¹ IV, p. 530.

² *Ibid.*, p. 538; para. 30 (b), *supra*.

³ I.e., in the absence of special provision, as dealt with in para. 32, *infra*.

⁴ *Vide* Earl of Halsbury, *The Laws of England*, 3rd ed. (1962), Vol. 38, pp. 976-977. White, C. M. and Wells, M. M., *Underhill's Law Relating to Trusts and Trustees*, 10th ed. (1950), pp. 384-387.

⁵ IV, p. 530.

⁶ *Vide* para. 30 (c), *supra*.

two concepts are not comparable, the former being an actual source of legal rights and obligations, whereas the latter is not. "Public interest" or "public policy" cannot by itself create legal rights and obligations—for that purpose some form of legislation is required¹. Consequently the true contrast is between contractual obligations, which (in municipal law) are created by the acts of individuals in accordance with what they conceive their private interests to be, and, on the other hand, obligations arising from legislation, which normally gives effect to the legislature's conception of what is demanded by public interest and public policy.

Respondent is prepared to accept that, where imposed, supervision by public authorities in respect of fiduciary institutions falls within the latter category. That by itself does not, however, appear to be of any assistance in the present context. However much public interest may have been considered in imposing a particular provision, the content or effect of such provision can be determined only by ascertaining the intentions of its author, as derived from the provision itself and other permissible material. This basic principle applies also to the matter under consideration. Whether an enactment which imposes a duty to account to a public organ, also provides a substitute for such organ in the event of its falling away, must necessarily turn on the interpretation of the enactment, i.e., the ascertainment of the intention of its author. If it appears that its author did not intend to make provision for such a substitution, then there would exist no supervisory organ after the lapse of the organ initially provided for. In such case, "public policy" or "public interest" or "community interest or responsibility" cannot step in to fill the breach. Only the legislature can remedy the omission if it considers it necessary or desirable.

The highest effect which "public policy", "public interest", etc., could possibly have by themselves, is to raise a general consideration of probability which could, depending on circumstances, serve as an aid in interpreting a particular measure. This consideration would be to the effect that the legislature would probably not wish a provision which serves the public interest to become inoperative. Applied to the subject-matter of supervision in respect of fiduciary relations, this consideration could in an appropriate case be invoked in support of a construction resulting in substitution rather than lapse of a supervisory authority. However, two points have to be borne in mind. The first is that a probability of this nature can, even where the circumstances of a particular case afford it exceptional weight, not be applied to the exclusion of other and more primary aids to interpretation. Secondly, the probability would clearly not arise where the measure to be interpreted was enacted at a stage when the necessity for substitution was not a matter for practical consideration. Since the necessity for substitution would hardly ever exist at the stage of *creation* of the original supervisory authority, but is more likely to arise at the stage of *imminent dissolution* of such authority, it follows that the consideration of probability referred to above would—if applicable

¹ Or, and this possibility is probably theoretical in regard to the subject under consideration, some other recognized source of law, e.g., general acceptance at common law of the existence of a right or obligation, the object and effect of which is to protect or advance public interest and public policy.

at all—normally play a role only when interpreting a measure enacted at the latter stage.

*The Analogy between the International Mandate and Municipal
Fiduciary Institutions*

34. Whether the duty of accountability was introduced into the international mandate by analogy to the municipal institutions of trust and tutelage, as alleged by Applicants¹, or on the broad analogy of the duty to account in the private law *mandatum*², or of all three institutions, seems to Respondent to be of no importance, since Respondent agrees that "[r]eliance was explicitly placed upon accounting and supervision as means of insuring an effective splitting between control and benefit"³. What is important, however, is that the duty to account to a supervisory organ was, as in municipal law, introduced by special provision, viz., by a law-making, multipartite convention which, though resting on agreement between the parties to be bound thereby, was of a class bearing much resemblance to legislation in municipal law and which has, indeed, often been descriptively referred to as "international legislation"⁴.

Respondent is also prepared to assume that, in providing for supervision by the organs of the League, the authors of the mandate system were influenced, *inter alia*, by the view that the proper execution of mandatory responsibilities was a matter of interest to the international community generally. But, as with regard to municipal law, it is important to bear in mind the different natures of the concepts involved in Applicants' submission. Accountability to organs of the League could not have been imposed by the international community as such. Expressions such as "the responsibility and interest of the international community" convey purely philosophical concepts. The "international community" is not an entity capable of creating legal rules or bearing rights and obligations⁵. At most such responsibility or interest motivated the law-making body or bodies (in this case the Paris Peace Conference and the Council of the League) to make appropriate provision for supervision, and the legal effect of such provision derives from the fact of its incorporation in conventional or quasi-legislative instruments (the Covenant and the mandate instrument) and not from its character as giving effect to such responsibility or interest.

35. In order to determine the nature and content of the duty of accountability, it accordingly becomes necessary, as in municipal law, to examine and interpret the relevant law-making instrument. The content of the duty of accountability to be thus determined, must provide the answer to the question whether provision was made for a substitution of supervisory organs. This answer can consequently be obtained only

¹ *Vide* para. 30 (d), *supra*.

² II, pp. 115 (para. 2) and 117 (para. 5).

³ IV, p. 531. Respondent, of course, in this regard stresses, as Applicants do not, that accounting and supervision related to particular, specified organs.

⁴ Thus Hudson (Hudson, M. O., *International Legislation* (1931), Vol. I, p. xiii) speaks of the term "international legislation" as being used to describe "both the process and the product of the conscious effort to make additions to, or changes in, the law of nations". *Vide* also Lord McNair, *The Law of Treaties* (1961), pp. 729-739.

⁵ Applicants apparently contend to the contrary. *Vide* para. 42, *infra*.

by ascertaining the intentions of the authors of the mandate system as expressed or implied in the mandate documents.

Respondent has given its reasons why an intention to make provision for substitution cannot be read into such documents. On analysis, the only proposition which Applicants have adduced to counter Respondent's reasons, is that "accountability" was regarded by the authors of the mandate system as an essential element to protect the public interest in the proper execution of the Mandate. Applicants do not, however, attempt to correlate this proposition with the circumstances relied upon by Respondent (and which they have not disputed or controverted). They do not show why the "essentiality" of "accountability" would have induced the authors of the system, in the circumstances then prevailing, to make provision for the future succession of an undetermined body, in unknown circumstances, to counter the effects of a situation (the dissolution of the League) which they did not expect to arise and which could be dealt with if and when it did arise. In other words, on the assumption that "accountability" was indeed regarded as "essential", Applicants do not demonstrate that the authors of the mandate system agreed to do anything about it, or why the consequence would therefore not be that, in case of dissolution of the League, the Mandate would have to be amended or would lapse. (On the assumption that "accountability" was *not* considered essential, the whole basis of Applicants' contention naturally falls away.) All this becomes the more evident from the fact that Applicants do not show why, if there had been an intention to provide for succession as regards supervisory organs, it was not expressed in the documents themselves, or in any preparatory debate or negotiation, or why it was not referred to in the later discussions on the subject.

Accordingly it is submitted that Applicants have failed to adduce any arguments detracting from the validity of Respondent's submissions in the present regard.

Further Authorities Quoted by Applicants

36. In addition to the authorities referred to by Applicants in Chapter III of their Reply, and discussed above ¹, Applicants quote the following authorities in support of their treatment in Chapter VI of their "organized international community" theory:

(a) A statement by the Acting Secretary-General of the League as follows:

"Co-operating in the fulfilment of their respective tasks, under the searchlight of public opinion, the mandatory administrations and the organs of the League of Nations have, in general, ensured the application of the principles enunciated in favour of the natives and of *the community of nations* ²."

¹ *Vide* paras. 21-23, *supra*.

² *The Mandates System-Origin-Principles-Application* (1945), p. 6, quoted by Applicants in their Reply, IV, p. 535. (Italics added by Applicants.) Applicants' misspelling of "Co-operating", "fulfilment" and "favour" corrected. It is to be noted that this is a quotation from the same publication cited in support of the "organized international community" argument at IV, p. 237 of the Reply. *Vide* para. 21 (e), *supra*.

(b) A statement by Paul Fauchille, as follows:

"Les régions sous mandat n'appartiennent pas au contraire au mandataire, elles lui sont seulement confiées en vue d'une gestion conforme aux intérêts des habitants; en acceptant d'exercer le mandat 'au nom de la Société des Nations', le mandataire s'impose des obligations, pour une mission de civilisation, *vis-à-vis de la communauté internationale*, comme le tuteur en contracte en acceptant la tutelle ¹."

It is hardly necessary to state that neither of these authorities provides any support for Applicants' contention that the "organized international community" was an entity bearing legal responsibilities, that the supervisory organs of the League were appointed subject to the qualification that they would hold the appointment only in a special capacity, viz., as being or representing the "organized international community", and that provision was thereby made for substitution of supervisory organs to whose jurisdiction Mandatories would be obliged to submit.

Conclusion

37. In the preceding paragraphs, Respondent has demonstrated that Applicants' "organized international community" theory amounts to a contention that a particular type of succession of supervisory organs was provided for by implication in the mandate documents ². Respondent has, it is submitted, shown conclusively that no provision of the type contended for can reasonably, let alone necessarily, be read into the relevant documents.

In conclusion it must be noted that Applicants' contention that provision was made for a succession of supervisory organs, is not a fortuitous or incidental part of its argument, but represents an essential element thereof. Nothing less would, in regard to the present issue, have sufficed to constitute a cause of action, i.e., allegations which, upon due proof, would entitle a party to judgment. Thus, for instance, it would not have been sufficient for them to allege that the authors of the Mandate intended to, and did, create an obligation of "international accountability" or one to submit to "international supervision", and that the League organs were specified merely as the means for giving effect to such an obligation. Such a proposition (which Respondent disputes) would, even if accepted, not by itself have entitled Applicants to judgment in respect of the present issue. In this regard a finding of this Court in an analogous set of circumstances, which arose as a result of the dissolution of the Permanent Court, is apposite. A particular adjudication clause which arose for consideration was construed by the Court as follows:

¹ IV, p. 537. (Italics added by Applicants.) The following is a free translation of the quoted passage:

"The territories under mandate, by contrast, do not belong to the mandatory; they are only entrusted to it with a view to an administration conforming to the interests of the inhabitants; in agreeing to exercise the mandate 'in the name of the League of Nations' the mandatory takes upon itself the obligations, for a mission of civilization, towards the international community, as the guardian in contract by acceptance of the guardianship."

² Vide paras. 13-15, *supra*.

"It was not the primary purpose to specify one tribunal rather than another, but to create an obligation of compulsory adjudication. Such an obligation naturally entailed that a forum would be indicated; but this was consequential."

Thereupon the Court proceeded to state:

"If the obligation exists independently of the particular forum . . . then if it subsequently happens that the forum goes out of existence, and no provision is made by the parties, or otherwise, for remedying the deficiency, it will follow that the clause containing the obligation will for the time being become (and perhaps remain indefinitely) inoperative, i.e., without possibility of effective application. But if the obligation remains substantively in existence, though not functionally capable of being implemented, it can always be rendered operative once more, if for instance the parties agree on another tribunal, or if another is supplied by the automatic operation of some other instrument by which both parties are bound ¹."

Applied to the present facts, this finding would entail that even if Respondent should have been under an obligation in terms of the Mandate to submit to "international supervision" (and not, as Respondent contends, to supervision by defined organs of the League), that by itself could not have brought about a substitution or replacement of supervisory organs on the dissolution of the League. Such an obligation would at that stage have become "inoperative, i.e., without possibility of effective application", and could have been rendered operative once more only by the legal substitution of some other supervisory organ, which would have required Respondent's consent—unless, of course, such a substitution had *ab initio* been provided for in the mandate documents. Applicants have not even alleged that Respondent at or after the dissolution of the League consented to such a substitution; nor could they have any prospect of establishing such consent, in the light of the considerations set out in Respondent's treatment of the subject in the Counter-Memorial ².

Hence Applicants make the attempt, by means of the "organized international community" theory, to establish that a substitution was *ab initio* provided for in the mandate documents—an attempt which must, in Respondent's submission, for the reasons herein given, also fail.

In view of the essential nature of Applicants' contention that the implied provision relied upon by them involved a succession of supervisory organs, Respondent has in its argument up to the present confined itself to the *principle* of such a contention, leaving aside Applicants' specific formulation thereof. In the succeeding paragraphs, Respondent will, however, analyse the concept of the "organized international community" as described by Applicants in the Reply, in order to demonstrate that such description provides further reasons why Applicants' contention should be rejected.

¹ *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6 at pp. 38-39. *Vide* also p. 96.

² II, pp. 124-163 and *vide* further paras. 45-51, *infra*.

IV. THE "ORGANIZED INTERNATIONAL COMMUNITY" AS DESCRIBED BY APPLICANTS

The Relationship between the "Organized International Community" and the League of Nations

38. Its relationship with the League of Nations is, in Applicants' expositions, perhaps one of the most enigmatic features of the "organized international community". At times Applicants speak as if the two concepts were one, as if the League of Nations was the "Organized International Community", until the latter, by some process of metamorphosis, changed into the United Nations. Thus a section of the Reply is headed "The League of Nations as the '*organized international community*'" ¹ (italics added), to be followed by "The United Nations as the '*organized international community*'" ². (Italics added.) The same form of words is used at other places ³.

Elsewhere again, Applicants refer to the League as "*an* organized international community", suggesting, by the use of the indefinite article, that there existed, or was room for the existence of, more than one "organized international community". Thus they refer to—

"... Applicants' contention, already sustained by the Court, that the Mandate was a 'new international institution', and that an essential principle thereof was 'the recognition of "a sacred trust of civilization" laid upon the League as *an organized international community*'" ⁴. (Italics in original.)

The problems of international metamorphosis are difficult enough when there is only one "organized international community" at a time. Once the possibility of a number of simultaneously existing "organized international communities" is conceded, the difficulties assume immense proportions. Fortunately, however, as will be shown below ⁵, it is not clear that on Applicants' version the "organized international community" does indeed change its shape from time to time.

The submission that the League of Nations and the United Nations successively *constituted* the organized international community, is, as far as Applicants' argument is concerned, an innovation in the Reply. In their Observations on the Preliminary Objections, Applicants contended consistently that these organizations *represented* the "organized international community" ⁶. The change possibly constitutes an attempt

¹ IV, p. 525.

² *Ibid.*, p. 537.

³ *Vide*, e.g., IV, pp. 533 and 537.

⁴ IV, p. 524. *Vide* also pp. 233 and 539. For Respondent's submissions regarding the true meaning of the italicized words, which appeared in the 1962 Judgment, *vide* para. 22, *supra*.

⁵ *Vide* para. 39, *infra*.

⁶ I, pp. 446-449. Applicants said, for example: "The only question is, which representative of the organized international community does one look to, the League of Nations or the United Nations, the organ in existence when the Mandate was conferred or the organ now in existence?" (p. 446) and, "... the authors of the Covenant endowed the members of the League of Nations, the Organ then representing the international community of civilized nations, with the right to institute the judicial proceedings" (p. 449).

on Applicants' part to associate themselves with the language used by the Court in 1962 to connote something entirely different ¹.

39. The better elaborated portions of the Reply suggest that the "organized international community" did not assume the form of the League of Nations, but that at all times it retained a separate identity. On this theory, the relationship between the two entities or concepts still, however, remains obscure. Thus Applicants state that the League served as "the then existing body politic of the organized international community" ², and as its "then existent political organ" ³; that the "organized international community", was "then represented by the League" ⁴, that the League "served . . . the interest of the organized international community, in seeing to it that [the inhabitants of mandated territories] were adequately protected" ⁵; and that the League acted "*in its capacity* as the only existing institution through which the organized international community at that time could act" ⁶. (Italics added.) The last three quotations suggest that the League acted in some instances as an agent for the "organized international community", but could have acted in other capacities as well. The earlier two point to a closer degree of identification, either as "body politic" (whatever the expression may mean in the context) or as "political organ".

The Powers and Functions of the "Organized International Community"

40. In the absence of a systematic exposition in the Reply of the alleged powers and functions of the "organized international community" Respondent can only point to the specific aspects referred to in Applicants' argument. It appears that, according to Applicants, there was, by the time of the Paris Peace Conference,

" . . . wide support for the principle that the organized international community should be a legal party in interest to the disposition of the colonial issue ⁷".

Consequently, at the Conference (as is apparently submitted), the "organized international community" proceeded to draft the Covenant. According to Applicants, Article 22 contained—

" . . . obligations of a legal nature, in accordance with the expressed objective of the organized international community to afford legal protection to the well-being and social progress of the inhabitants of mandated territories, as a 'sacred trust of civilization' ⁸".

But the "organized international community" did not only impose these obligations of a legal nature on others, e.g., the Mandatories. Applicants submit that this entity itself " . . . assumed responsibility of a

¹ *Vide* para. 22, *supra*.

² IV, p. 534. "Body politic" is defined as "the nation in its corporate character; the state" in Onions, C. T. (Ed.), *The Shorter Oxford English Dictionary*, 3rd ed. (1959), p. 197.

³ IV, p. 240.

⁴ *Ibid.*, p. 534.

⁵ *Ibid.*, p. 535.

⁶ *Ibid.*, p. 538.

⁷ *Ibid.*, p. 237.

⁸ *Ibid.*, p. 238.

legal nature with regard to the tutelage of certain peoples" ¹ in accordance with the principle—

"... that, as a matter of international law, the well-being and social progress of [indigenous peoples in certain areas of Africa and Asia] would be the responsibility of the 'organized international community,' insured by legal, rather than by solely moral, considerations ²".

This responsibility was not shirked by the "organized international community". Straightaway, we are told,

"... mandatories . . . were commissioned to exercise, on behalf of the organized international community, a tutelage of peoples not yet able to stand by themselves ³".

Lest there be any doubt as to who was responsible for appointing the Mandatories, Applicants repeat:

"... the provisions for reporting to the League and supervision by the League were intended . . . as a commission, or mandate, from the organized international community . . . ⁴".

And, as shown above ⁴, the "organized international community" allegedly obtained the services of the League of Nations to perform the duty of supervising mandates.

This duty was transferred by it to the United Nations when the League was dissolved or when the United Nations *became* the "organized international community" ⁵. Since then, the "organized international community" has apparently been expressing its views through the organs of the United Nations ⁶.

The Composition of the "Organized International Community"

41. What the composition of the "organized international community" was (as gathered from the Reply), is closely bound up with the problem concerning its relationship with the League of Nations ⁷. Thus if the "organized international community" actually *was*, successively, the League of Nations and the United Nations, then the only difficulty about ascertaining its composition would be to determine with which organization or association of States it was identified at any particular stage. So, for instance, when drafting the Covenant ⁸, the "organized international community" presumably consisted of the signatories to the Treaty of Versailles; and when it commissioned the Mandatories ⁸, it must have partaken of the form of the Principal Allied and Associated Powers, which appointed the Mandatories, and the Council of the League of Nations, which "defined" the "degree of authority, control or administration" to be exercised by the Mandatories ⁹. A problem might also arise

¹ IV, p. 538

² *Ibid.*, p. 233.

³ *Ibid.*, p. 534.

⁴ *Vide* para. 39, *supra*.

⁵ IV, pp. 537-540.

⁶ *Ibid.*, p. 540.

⁷ *Vide* paras. 38-39, *supra*.

⁸ *Vide* para. 40, *supra*.

⁹ Art. 22 (8) of the Covenant of the League of Nations. *Vide* II, pp. 15-22.

as to its composition during the period of simultaneous existence of the League and the United Nations, but this is probably not of practical importance.

On the other hand, if, as appears more likely, Applicants contend that the "organized international community" merely acted through the agency of these various organizations or groups, the problem becomes more difficult, if not, indeed, insoluble. At any rate, Applicants do not supply any guidance as to the shape, size or composition of this concept or entity which, on their reconstruction of history and law, played (and still plays) such a vital role in international affairs.

Conclusion

42. To sum up, Applicants' "organized international community", on which their whole succession argument depends, is not defined or explained in the Reply, and an analysis of the references to it discloses a complete confusion and lack of clarity as to its most essential attributes—a further indication that the alleged intent which is in this manner sought to be ascribed to the authors of the mandate system, is in truth mere afterthought on the part of the propounders of the argument. It is unthinkable that the authors of the Covenant would have granted legal rights or interests to such an entity, or that the Mandatories would have consented to be subject to supervision thereby.

In fact, Applicants' whole concept of the "organized international community" is in conflict with the most basic principles of international law. In order to argue that the "organized international community" possessed legal rights and interests, and granted legally effective commissions or mandates, Applicants would be constrained to contend that it was a legal *persona*. However, it is still an open question whether even the League of Nations, a specific international body with a constitution and with defined corporate functions, ever possessed legal personality¹. *A fortiori* the "organized international community", an undefined and amorphous concept, could hardly, at any rate at the time of creation of the mandate system, have been accepted as a legal *persona*.

Finally, the picture of an "organized international community" acting as something distinct from the Mandatories and imposing its will on them, is an entirely unrealistic one. In fact, on any conception of the "organized international community" (including that of the Applicants), *the Mandatories largely dictated the policy pursued by it* with respect to mandates. Thus, whether as Allied Powers, or as Members of the Council of the League, or as Mandatories, France, Japan, Belgium and Great Britain and its Dominions played vital roles in the creation and operation of the mandate system.

In this regard Duncan Hall says, referring to the debate in the "Council of Ten" on 30 January 1919, during which, *inter alia*, the British Dominions stated their attitudes on the proposals regarding the future of certain German colonies²:

"It was the governments taking part in this debate that, by their agreement, created the mandate system. It was they that drafted

¹ *Vide II*, pp. 207-208.

² *Ibid.*, pp. 11-12.

the self-imposed limitations of the mandate charters. It was they that put the system into operation, weakened though it was by the absence of the United States¹."

He continues by stating that it was these governments—

"... that sustained it [i.e., the Mandate System] and made it effective by their loyal cooperation with the central organs of the League during the twenty-six years of the League's life¹".

For the whole period of the League's existence, the learned author points out, the relationship between the League and the Mandatory Powers remained as described by Mr. Balfour in the Eighteenth Session of the Council, when he said:

"... 'mandates were not the creation of the League, and they could not in substance be altered by the League'. He further pointed out that 'a Mandate was a self-imposed limitation by the conquerors on the sovereignty which they exercised over the conquered territory. In the general interests of mankind, the Allied and Associated Powers had imposed this limitation upon themselves, and had asked the League to assist them in seeing that this general policy was carried out, but the League was not the author of it...'¹." (Italics added and footnote omitted.)

C. The Events during the Years 1945-1946

43. In regard to the events during the years 1945-1946, Applicants say:

"Consistently with the foregoing [i.e., with the 'organized international community' theory], and as was to be expected in the light of [the overriding purpose of the Mandate to promote 'the well-being and development' of the people of the Territory], the proceedings at the period of the dissolution of the League of Nations and the organization of the United Nations, manifested the clear intention of all concerned to preserve and assure proper discharge by the organized international community with respect to its responsibilities toward the inhabitants of mandated territories²." (Italics added.)

Applicants consequently do not contend that the events of 1945-1946 created any new basis for the succession of supervisory organs in respect of mandates. Such a contention would indeed have been inconsistent with their "organized international community" theory, which involves that the Mandate carried within itself the method of substitution of supervisory organs, thus rendering any special provision in 1945-1946 unnecessary. Applicants therefore rely on the events during those years as merely manifesting an intention to preserve and assure proper discharge of the responsibilities of the "organized international community". Consequently, if, as Respondent submits, Applicants' whole argument based on the asserted legal responsibility of the "organized international community" is unsound, their submissions regarding the effect of the

¹ Hall, H. D., *Mandates, Dependencies and Trusteeship* (1948), p. 117.

² IV, p. 539.

events during 1945-1946, being based on the existence of such responsibility, cannot assist them¹.

44. Applicants do not present any argument in support of their interpretation of the events of 1945-1946. Instead, they rely solely on the Judgment of the Court in 1962, and particularly the following passage:

"... 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". (Italics added.)

As will be noted in the succeeding paragraphs, neither the 1962 Judgment as a whole, nor the above-quoted passage, assists Applicants. On the contrary, they militate against acceptance of Applicants' submissions.

45. In the first place, the purport of the agreement which the Court considered to have been reached in April 1946, was, in the Court's words, to "continue the different Mandates . . . with reference to the obligations of the Mandatory Powers"—the implication therefore being that, but for such agreement, the Mandatories' obligations, or at least some of them, would have lapsed. Consequently, to rely on such an agreement as a basis for keeping supervision alive, would be inconsistent with Applicants' submission, which relies on the implication of a provision in the mandate documents which would, by itself and without further agreement, have ensured the continuation of supervision in respect of mandates.

46. Secondly, Respondent has shown, relying on the italicized portions of the above-quoted passage as well as on other extracts from the Judgment, that the finding of an agreement in 1946 (which relates to the survival of the *compromissory clause*) is inconsistent with a view that a transfer of *supervisory functions* was effected from the League to the United Nations². Applicants refrain from dealing with Respondent's submissions in this regard. Furthermore, they do not indicate how the Court's holding of an "[a]greement . . . among all the Members of the League at the Assembly session in April 1946" (italics added) can constitute authority in support of their contention in so far as it is based on "... the proceedings at the period of . . . the organization of the United Nations . . ." ³. (Italics added.)

The finding in the Judgment of an agreement in 1946 was arrived at by only five of the members of the Court, and from the various opinions on the Preliminary Objections it seems evident that the finding was a matter of sharp controversy between the members of the Court as a

¹ On the other hand, if Applicants' "organized international community" theory were to be correct, it does not seem that there would have been any function of any kind in respect of Mandates left for the League to perform at its final meeting in April 1946, since the United Nations, which at that stage had more Members than the League (*vide* II, p. 33 and Madol, H. R. (Ed.), *The United Nations Association Yearbook 1947*, pp. 291-292) would presumably have replaced the League as "organized international community" even before the latter's dissolution (*vide* para. 15, footnote 1, *supra*).

² *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319 at p. 338 as quoted in IV, p. 539.

³ II, pp. 157-159.

⁴ IV, p. 539.

whole. Whatever the justification might be for finding that such an agreement was arrived at regarding maintenance of "the rights of the Members of the League"¹, to which aspect the finding was carefully confined, the facts pertaining to the deliberations of 1945-1946, and to discussions during the first few years thereafter, make it quite clear that no such or similar agreement could have been entered into relative to administrative supervision in respect of mandates. This topic is fully dealt with in the Counter-Memorial², and Applicants nowhere in the least attempt to controvert or even to deal with the facts and arguments there advanced³.

47. Applicants refer also to other passages from the Judgment⁴. At no stage do they, however, join issue with Respondent's careful analysis of the Judgment as a whole⁵, which led it to the conclusion that—

"... no 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, ... that on balance the reasoning is inconsistent with such succession"⁶.

48. Indeed, Applicants do not even indicate how the passages quoted by them from the Judgment can be said to support their contentions. They merely state:

"No 'new facts', or other relevant evidence, are adduced by Respondent to justify reopening or reconsidering of issues twice previously presented to the Court and twice decided by it"⁷. (Italics added.)

In fact, the issue relating to the lapse of the League's supervisory functions has been decided by the Court only once, viz., in the Advisory Opinion of 1950⁸. In the Preliminary Objections proceedings it was also argued, but, as Respondent has demonstrated⁹, far from the 1962 Judgment standing in Respondent's way in its re-argument of the issue regarding Article 6 of the Mandate, it provides considerable support for Respondent's contentions. In addition, Respondent *has* (despite what is said by Applicants) presented the Court with vital factual information which was not placed before the Court for the purposes of its Advisory Opinion in 1950⁹, and these facts (or at least some of them) have indeed been regarded by some members of the Court as of great importance for the purposes of the issue under consideration¹⁰. Applicants do not make any attempt in their Reply to present argument for the purpose of impugning this factual information or its importance. Instead, as indicated in the next paragraph, they avoid dealing with it.

49. Applicants make the unmotivated statement that "[i]n its *Judg-*

¹ As to which, see Respondent's submissions in II, pp. 240-253—not replied to at all by Applicants.

² II, pp. 124-163.

³ *Vide* also paras. 48 and 49, *infra*.

⁴ II, pp. 156-161.

⁵ *Ibid.*, pp. 160-161.

⁶ IV, p. 539, footnote 6.

⁷ *Vide* paras. 4-6, *supra*.

⁸ II, pp. 152-163, and para. 6, *supra*.

⁹ II, pp. 146-148 and earlier passages there referred to.

¹⁰ *Ibid.*, p. 156 (para. 58).

ment of 21 December 1962, the Court referred to its *Advisory Opinion of 1950*, and rejected Respondent's contentions in all respects"¹.

For the reasons referred to above², this statement is incorrect, particularly as regards Respondent's submission concerning the lapse of supervision by organs of the League.

Applicants, however, repeat this incorrect statement and make use of it to avoid dealing with the additional factual information presented by Respondent.

Thus they say:

"All such assertedly 'new facts' were placed before the Court in the *Preliminary Objections* and in Respondent's Oral Arguments thereon. The Court nonetheless reaffirmed its *Advisory Opinion* and, in the words of the Court:

'All important facts were stated or referred to in the proceedings before the Court in 1950.'

Accordingly, no purpose would be served by showing, as Applicants submit, that Respondent's reiteration of the alleged 'new facts' add (sic) nothing 'new'³." (Footnote omitted.)

50. Indeed, irrespective of whether this factual information was known to the Court in 1950 or not⁴, Respondent submits respectfully that on all the information before this Court, it will hold that the 1950 *Advisory Opinion* was incorrectly decided in respect of the issue under discussion⁵.

51. Finally, Applicants say:

"As has been shown, and *as is obvious from the history of the Mandate since the inception of the United Nations*, that Organization has consistently maintained its right and duty to exercise supervisory authority over the Mandate, and such a position has reflected the virtually unanimous expression of the organized international community⁶." (Italics added and footnote omitted.)

The "as has been shown" refers back, by way of a footnote in the Reply, to the "History of the Dispute since 1960"⁷, and certainly not to "the history of the Mandate since the inception of the United Nations". In fact, Applicants have not sought to contest (except with the above unsubstantiated statement) Respondent's demonstration of the position taken by Members of the United Nations prior to the 1950 *Advisory Opinion*, viz.:

(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 in respect of the Mandate for South West Africa, although 41 Members took part

¹ IV, p. 550.

² *Vide* para. 6, *supra*.

³ IV, p. 552.

⁴ As to which Respondent abides by its above submission.

⁵ Applicants frequently refer to what they call "the law of the Case". (*Vide, e.g.*, IV, pp. 476, 524, 538 and 552.) This is apparently some doctrine associated with the *res judicata* principle. *Vide*, however, Chap. II, para. 2, *supra* as to the attitude adopted by Applicants on the question whether issues decided in the *Advisory Opinion* are in law *res judicata*.

⁶ IV, pp. 539-540.

⁷ *Ibid.*, pp. 222-230.

in debates 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.
- (c) Up to 1949 only five States voiced any contradiction to the proposition aforesaid. These States were Belgium, Brazil, Cuba, India and Uruguay. In the case of the last-mentioned 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 any implications in the mandate documents or a suggested agreement or understanding (other than Article 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 either of the Applicant States, Liberia or Ethiopia ¹.

D. Conclusion

52. In the result, Respondent's argument on the lapse of its Procedural Obligations has in major respects been left unanswered, and it is submitted that the validity of that argument is not affected by anything contained in the Reply.

¹ II, pp. 140-141.

CHAPTER IV
THE LAPSE OF THE MANDATE AS A WHOLE

A. General

I. THE PURPORT OF RESPONDENT'S CONTENTION

1. Before considering any arguments raised in the Reply relative to the question whether the Mandate as a whole has lapsed, it may be convenient to recapitulate briefly Respondent's contention in this regard. It will be recalled that Respondent's basic contention in the Counter-Memorial, as in this Rejoinder, is that the provisions regarding supervision of mandates by organs of the League of Nations lapsed on the dissolution of the League. This contention is based on the provisions of the instruments concerned, read in the light of all relevant circumstances, as well as on an examination of all material facts and legal principles which have been or could be suggested as bearing upon the possibility of succession to the League's supervisory functions by organs of the United Nations¹. Respondent's contention regarding supervision is therefore not dependent on, nor is it qualified by, any contention or argument raised by Respondent in regard to other issues, but falls to be considered by itself and on its own merits. In particular, as has been noted², it is not based on any "premise that 'the Mandate as a whole has lapsed'", as alleged by Applicants.

2. The lapse of the provisions regarding supervision by the League, however, raises the further question whether the Mandate was capable of continued existence to any extent whatever once such provisions became impossible of performance³. In the Counter-Memorial⁴, Respondent commenced its treatment of this question by accepting, with reference to views expressed at the Preliminary Objections stage by certain members of this Court, that there was nothing notionally impossible in the idea of severability or separability of treaties or institutions. The correctness of this attitude has been confirmed by later pronouncements of other members of this Court. Thus Judge Morelli said in the *Barcelona Traction* case:

"If a treaty creates obligations for the contracting States and at the same time provides for the intervention of a certain organ in connection with the performance of those obligations, the obligations may well continue to exist despite the disappearance of the organ which is not necessarily bound to entail more than the extinction of the powers of the organ and of the subjection of the States to it⁵."

¹ *Vide* IV, Counter-Memorial, Book II, Chap. IV and also Chap. III, *supra*.

² *Vide* Chap. III, para. 2, *supra*.

³ II, p. 164.

⁴ *Ibid.*, p. 165.

⁵ *Barcelona Traction, Light and Power Company Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6 at p. 96.

And in the same case, Judge Armand-Ugon stated:

"The separation of international obligations as between clauses that are valid and clauses that are not valid is admitted in the case-law of the Permanent Court."

After referring to examples, he proceeded:

"The idea of the integral character of a convention has its origin in a notion taken from private law. In the Opinion of the Court on *Reservations*, this notion of the absolute integrity of conventions was rejected as not having been transformed into a rule of international law . . . An article which has lapsed may quite properly be separated from other provisions of the treaty which continue to be in force where such provisions can apply quite apart from the provision that has lapsed ¹."

3. In view of the possibility in law of a partial lapse of treaties or institutions, there is no simple or obvious answer to the question whether the Mandate as a whole lapsed when supervision fell away on dissolution of the League. It cannot be said, and Respondent has not contended, that the element of League supervision possessed a quality of such absolute essentiality that the whole Mandate became objectively or mechanically inoperable upon the dissolution of the League. Indeed, most of the obligations under the Mandate are quite capable of existence and performance without any supervision. However, as pointed out in the Counter-Memorial,

"[a]n 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 ²".

Here again it must be conceded that the substantive purposes for which the mandate institution was created can still be advanced, even in the absence of supervision. But be that as it may, the question whether the Mandate as such is to be regarded as still being in force, in such a reduced form, is one the answer to which must depend on the intentions of the authors of the Mandate ³.

However, inasmuch as the future dissolution of the League was in fact not contemplated at the stage of its foundation ⁴, it follows that the authors of the Mandate could not have had any actual intention regarding the continued existence or otherwise of the Mandate in the event of such dissolution. The present enquiry must, therefore, relate to their presumed rather than their actual intentions. And the main guide to the presumed intentions of the authors of the Mandate in the respect under consideration is afforded by an appraisal of the role intended to be played by, and degree of importance attached to, League supervision as an element in the mandate system ⁵.

4. Respondent must concede that the question thus placed before the Court is not an easy one. That the duty to account to, and submit to the

¹ *Barcelona Traction, Light and Power Company Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6 at p. 145.

² II, p. 166.

³ *Ibid.*, p. 165.

⁴ *Vide* Chap. III, para. 16, *supra*.

⁵ II, pp. 166-167.

supervision of, the League, formed an important element of the mandate system, is not open to doubt. On the other hand, whether it was regarded by the authors of the system to be of such importance as to constitute a *sine qua non* of the whole system, must necessarily to a certain extent remain a matter of speculation, evaluation, or judgment, on which no definite proof either way can be produced.

In the Counter-Memorial Respondent showed that opinions have differed on this point. Thus Respondent interprets the 1950 opinions as holding that the Mandatory's duty of report and accountability was severable from other aspects of the mandate institution¹. However, certain views expressed in the Judgment and in the separate opinion of Judge Bustamante on the Preliminary Objections, appear to be in conflict with the 1950 opinions on this aspect². Reference was also made in the Counter-Memorial³ to the importance attached by various States to the duty of report and accountability. In view of Applicants' total rejection of even the possibility that the Mandate may have lapsed *in toto*, it may be useful to have some more detailed regard to the attitudes which emerged on the part of various States, at and shortly after dissolution of the League, on the question whether mandates in general, and the Mandate for South West Africa in particular, were still in force. This is done in the next succeeding paragraphs.

5. At the time of the dissolution of the League, there cannot be said to have been an explicit, uniform statement of opinion on the part of the States concerned regarding this question. Nevertheless certain indications afforded are of considerable significance.

It will be recalled that at the final session of the League Assembly, the various members of the League administering territories under mandate expressed their intentions as to the situation that would apply pending "other arrangements"⁴, and that in the final resolution of the Assembly regarding mandates the general purport of these intentions was described as follows:

". . . to continue to administer them [the territories] for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective mandates . . . 5".

It will also be recalled that in the actual statements, the "expressed intentions" were carefully confined to the *administration* of the territories as above described, and that some of the statements pointedly intimated that there would be no accounting in accordance with the Mandates to a supervisory authority⁶.

The wording of the resolution itself, read against this background, was obviously very carefully chosen. It was equally consistent with two possible points of view. The first of these would be that accountability to a supervisory authority was not an essential for the various mandates, and that the mandates could therefore continue in force without this feature. When regard is had to the wording employed in the actual

¹ II, *vide* also Oral Proceedings, 3 Oct. 1962.

² II, p. 168.

³ *Ibid.*, pp. 167-168.

⁴ *Ibid.*, pp. 46-49.

⁵ *L. of N., O.J., Spec. Suppl.* No. 194, pp. 278-279, as quoted in II, p. 52.

⁶ II, pp. 136-137.

declarations, the following are examples which would *prima facie* seem to indicate adherence to this view:

New Zealand:

"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 . . . 1"

Australia:

"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 2."

South Africa:

"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 . . . 1"

6. The other possible view with which the wording of the League resolution was in consonance, would be that indicated in the following passage in the joint opinion of Judges Spender and Fitzmaurice on the Preliminary Objections:

" . . . all this could be regarded almost as a recognition that, upon this dissolution, the Mandates, as such, would cease to be in force, but that, pending other arrangements, the territories concerned would, in relation to their inhabitants, continue to be administered as if the Mandates were still in force, or on the same basis as that of the Mandates. What the League was concerned with was . . . the interests of the indigenous peoples, and to be assured of 'the continued application of the *principles of the Mandate System*' 3." (Italics in original text.)

In discussing this proposition further, the said two members of the Court spoke of " . . . the basis that the dissolution of the League might be regarded as terminating *the whole Mandates System*" and added: " . . . which is what we think those in Geneva had in mind . . . " 4. (Italics in original text.) Adherence to this point of view would seem to be indicated particularly in the following two statements by Mandatories:

United Kingdom:

" . . . it is the intention of His Majesty's Government in the United

¹ II, p. 47.

² *Ibid.*, p. 48.

³ *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319 at pp. 528-529.

⁴ *Ibid.*, p. 529.

Kingdom to continue to administer these territories in accordance with the general principles of the existing mandates¹”.

France:

“The French Government intends to pursue the execution of the mission entrusted to it by the League of Nations².”

Indeed, when the statements by New Zealand, Australia and South Africa are read as a whole and in their context, then, despite the *prima facie* impact of the extracts referred to above, it is possible to reconcile them also with the second point of view. The accent would for this purpose fall on the word “considers” in the case of New Zealand and “regard” in the case of Australia and South Africa—the significance being that even though the mandates may, as such, cease to be in force, these Mandatories would nevertheless *consider* or *regard* their obligations in respect of the inhabitants of the territories as not being extinguished or diminished.

7. Judges Spender and Fitzmaurice, with reference to the above-mentioned second view of the situation, proceeded to mention a possibility on which they did not consider it necessary to express a decided view, viz.,

“... to imply (on *that* basis) from what was said, an undertaking to continue to apply those provisions of the Mandate which had reference to the inhabitants of the territory, and were not, according to their terms, directly dependent on, or harnessed to, the continued existence of the League or of League Membership³”.

Respondent has already contended in the Counter-Memorial⁴ that the statements by the Mandatories concerned were expressions of intention only, as they were indeed described in the League resolution, and that they could not be regarded as promises or undertakings intended to create rights or obligations vis-à-vis other States. Applicants have in no way attempted to controvert or even to deal with this contention or with the reasoning advanced and authority cited in support thereof, and Respondent abides thereby. In addition, however, Respondent may point out that if the Court should hold to the contrary, viz., that the statements in question resulted in legal obligations regarding administration of the territories and the well-being and development of the peoples concerned, then the practical result would be the same as that of a finding that the Mandate has survived but without accountability to a supervisory authority. Further reference in this part of the Rejoinder to a possible finding that the Mandate has survived without accountability, is therefore to be understood as including the possibility of a survival on the basis of such a special undertaking on the Mandatory's part, except where the context or an express qualification indicates otherwise.

What is of particular importance is that the duality dealt with above, relative to the proceedings regarding Mandates at the last session of the

¹ II, p. 46. *Vide* also p. 136 as to the further light cast on this statement by the report of the United Nations Special Committee on Palestine.

² *Ibid.*, p. 47.

³ *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319 at p. 529.

⁴ II, pp. 246-247.

League Assembly, concerns the choice between the two alternatives contended for by Respondent, viz.,

- (a) lapse of the whole Mandate, or alternatively,
- (b) survival of the Mandate without accountability to a supervisory authority,

to the clear exclusion of the result contended for by Applicants, viz., survival of the Mandate together with accountability to the United Nations as an integral part thereof.

8. In the years following immediately on the dissolution of the League, one finds the same duality as above in attitudes expressed by States in proceedings of the United Nations.

A number of States expressed themselves to the effect either that the Mandate had lapsed or, at least, that it was open to serious question whether it could still be in force. As examples reference may be made to the following:

United States of America :

Statement in 1947 in the Fourth Committee that Respondent—
“... had no legal title to the territory at present, because its only title was a Mandatory under the League of Nations”¹, and a later reference in the Trusteeship Council to “... the present mandate, admitting that it exist”¹.

Soviet Union :

Statement in the General Assembly (Plenary) in 1947 that—
“... the South African Government ... 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’ ... absurd ... now, in 1947, after the League of Nations and the mandate system have ceased to exist”¹.

In 1948 in the Trusteeship Council that—

“... the status of the Territory was at present undetermined ... 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”².

France :

Reference in 1947 in the Trusteeship Council to “... the former mandated Territory of South West Africa ...”³.

And a statement in 1948 in the Fourth Committee 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 ... there remained nothing of the Covenant of the League of Nations except its moral influence ... The South African Government had on several occasions expressed its desire to administer the Territory ... in the

¹ II, p. 281.

² *Ibid.*, p. 283.

³ *Ibid.*, pp. 276-277.

spirit of the Covenant. It accepted the moral obligation of ensuring the well-being and the development of the population . . . ¹."

United Kingdom:

Reference in 1948 in the Trusteeship Council to the fact that "... South West Africa . . . was formerly under mandate" ².

China:

Statement in the General Assembly (Plenary) in 1947 that--

"... 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 [South West Africa] under a living system than under the shadow of a ghost system? ³"

Colombia ⁴, *Iraq* ⁵, *Uruguay* in 1947 ⁶, and *Costa Rica* ⁶, all stated explicitly that in their view the Mandate was no longer in force.

Cuba in 1947 ⁴, and the *Netherlands* in the same year ⁷ implied the same.

The United Nations Special Committee on Palestine, consisting of 11 States ⁸, which reported in 1947, was emphatic on the point that there could no longer be accounting to a supervisory authority in terms of a mandate, and as a result considered that it might "be seriously questioned" whether a mandate could now exist in law ⁹.

Allowing for overlapping in the case of two States (the Netherlands and Uruguay), the above makes a total of 20 States which either considered that the Mandate was no longer in force, or at least seriously questioned whether it could still be in force.

9. On the other hand there were, in the years immediately following the dissolution of the League, also statements and other indications of views that the Mandate was still in force. Particularly in the first two years after the dissolution of the League of Nations, these statements were, however, often not very explicit. In many instances a view that the Mandate was still in force can be deduced only from the unqualified use of expressions such as "the Mandated Territory" or the "present Mandate". Sometimes such expressions were, in the respect under discussion, ambiguous. As will be seen, some of the States were also not consistent in their attitude. As examples of statements to the effect that the Mandate was still in existence, reference may be made to the following:

Pakistan:

Reference was made in 1947 to "the present Mandate system" ¹⁰.

¹ II, p. 283.

² *Ibid.*, p. 284.

³ *Ibid.*, pp. 275-276.

⁴ *Ibid.*, p. 276.

⁵ *Ibid.*, pp. 277-278.

⁶ *Ibid.*, p. 282.

⁷ *Ibid.*, p. 278.

⁸ Australia, Canada, Czechoslovakia, Guatemala, India, Iran, the Netherlands, Peru, Sweden, Uruguay and Yugoslavia.

⁹ II, pp. 69 and 167.

¹⁰ *G.A., O.R., Second Sess., Vol. I, 105th Plenary Meeting, 1 Nov. 1947, p. 618.*

Australia:

Speaking in 1947, an Australian delegate said that control of the Territory by South Africa as a "Mandatory Power" was a "situation which has existed ever since the end of World War I"¹.

Denmark:

Reference was made in 1948 to South West Africa as a "Mandated Territory"².

Dominican Republic:

A delegate said in 1949 that it was "indisputable that the 1920 Mandate was still in force"³.

France:

A statement was made in 1949 that—

"[t]he Territory of South West Africa had not been placed under the Trusteeship System; it therefore remained under the mandate system. The Fourth Committee, however, was not able to take the place of the Permanent Mandates Commission, which had been differently constituted"⁴.

Liberia:

Stated in 1949 that "... South West Africa was a Mandated Territory and it did not form part of the Union of South Africa"⁵.

The above States did not couple their statements regarding the survival of the Mandate with any contention that the United Nations had replaced the League Council as supervisory organ—where they contended that Respondent was under an obligation to render account, such contention was based on an alleged duty to conclude a trusteeship agreement or to furnish information in terms of Article 73 of the Charter. In addition, however, as has been noted⁶, certain States adopted the attitude, but only as from the end of 1948, that the Mandate had continued in existence, and that a succession of supervisory organs had taken place. They were Belgium, Brazil, Cuba, India and Uruguay.

Reference was also made in the Counter-Memorial⁷ to certain inconsistencies in the attitude of some of these States on the question of accountability. It may be instructive to note also the uncertainty displayed by one of them, i.e., Uruguay, regarding the survival of the Mandate. In the 1948 address referred to in the Counter-Memorial⁸, in which it was stated that Article 80 (i) of the Charter "clearly safeguarded the rights of indigenous populations", the distinguished representative later said that—

"... the Union of South Africa no longer possessed any juridical

¹ *G.A., O.R., Second Sess., op cit.*, p. 585. *Vide also* p. 581.

² *G.A., O.R., Third Sess., Part I, Fourth Comm.*, 81st Meeting, 16 Nov. 1948, p. 349.

³ *G.A., O.R., Fourth Sess., Fourth Comm.*, 135th Meeting, 24 Nov. 1949, p. 247.

⁴ *G.A., O.R., Fourth Sess., Fourth Comm.*, 139th Meeting, 28 Nov. 1949, p. 269. It is to be noted that this statement is in apparent conflict with those quoted in para. 8 above.

⁵ *G.A., O.R., Fourth Sess.*, 269th Plenary Meeting, 6 Dec. 1949, p. 532.

⁶ II, pp. 70-71, and passages there quoted.

⁷ *Ibid.*, p. 70.

⁸ *Ibid.*, pp. 70 and 284-285.

rights over South West Africa since it held only the title of Mandatory Power on behalf of the League of Nations¹.

And later in the same debate, another representative of the same State said that "... [the] basic obligation in the Mandate was still in existence ..."².

A general indication of the views of Members of the United Nations may also be gained from the terminology employed in early resolutions regarding South West Africa. Thus in the years 1946 to 1948 expressions such as "the Mandated territory of South West Africa" and "territories now held under mandate" were not infrequently used³. However, the use of such expressions, which became less frequent with the years, was entirely avoided in 1949, when South West Africa was consistently referred to only as "the Territory of South West Africa"⁴, and when an Advisory Opinion was requested, *inter alia*, on the following question:

"Does the Union of South Africa continue to have international obligations under the Mandate for South West Africa and, if so, what are those obligations?"⁵

The impression is consequently created that the wording employed in the earlier resolutions did not necessarily reflect a view (or, at any rate, not a considered and firm view) that the Mandate was still in existence, but was probably only a loose and inaccurate use of language.

10. The above-mentioned differences of opinion emphasize the difficulty of the question whether the dissolution of the League, and the consequent lapse of accountability to supervisory organs, resulted in the whole of the Mandate ceasing to be in force. It may be pertinent to recall that there was quite evidently for a long time no difference of opinion at all on the point that accountability under the Mandate had lapsed. While at least 25 States maintained quite clearly that, outside of trusteeship, there was no accountability to the United Nations or any other body, this view was, for more than two years after dissolution of the League, not contested by any single State, although in 1947 alone 41 States took part in United Nations debates on South West Africa⁶. The difference was therefore confined to the further question whether the Mandate as a whole had lapsed.

On balance, and for the reasons stated in the Counter-Memorial, Respondent submitted "... that the feature of report and accountability to the League was intended to be an integral portion of the Mandate System ..."⁷, and that the lapse of Respondent's obligations in this regard—

"... has resulted in a situation which renders it impossible for a

¹ G.A., O.R., *Third Sess., Part I, Fourth Comm.*, 78th Meeting, 11 Nov. 1948, p. 314.

² *Ibid.*, 82nd Meeting, 17 Nov. 1948, p. 360.

³ *Vide G.A. Resolution 65 (I)*, 14 Dec. 1946, in *U.N. Doc. A/64/Add.1*, p. 123; *G.A. Resolution 141 (II)*, 1 Nov. 1947 in *U.N. Doc. A/519*, pp. 47-48; *G.A. Resolution 227 (III)*, 26 Nov. 1948, in *U.N. Doc. A/810*, pp. 89-91.

⁴ *Vide G.A. Resolution 337 (IV)*, 6 Dec. 1949, in *U.N. Doc. A/1251*, p. 44.

⁵ *G.A. Resolution 338 (IV)*, 6 Dec. 1949, in *U.N. Doc. A/1251*, p. 45.

⁶ *II*, pp. 140-141 (para. 41a and b) read with pp. 68-71. Some States did, however, contend that Respondent was subject to the lesser obligation to transmit information in terms of Art. 73 (e) of the Charter.

⁷ *Ibid.*, p. 169.

Court to presume that the authors of the Mandate would have intended it to continue in existence in such a 'highly truncated form' ¹."

II. APPLICANTS' REPLY TO RESPONDENT'S CONTENTION

II. Applicants do not deal at all with the above contention. In fact, their submissions only impinge thereon at one point, namely as regards so-called "essentiality" of "international accountability" and the effect thereof. Thus they say:

"It is common cause that international accountability is of the essence of the Mandate. Respondent contends that if, as it asserts, the duty of international accountability lapsed with the dissolution of the League, it is 'impossible for a Court to presume that the authors of the Mandate would have intended it to continue in existence . . .'. Applicants, to the contrary, contend that international accountability must survive so long as rights or powers over the Territory are asserted, as the Court has twice made clear ²." (Foot-notes omitted.)

The various aspects of the above passage which call for comment, are dealt with in what follows.

The Averment that "it is common cause that international accountability is of the essence of the Mandate"

12. The above sentence is liable to create a misleading impression, in two respects.

The first of these concerns the use of the expression "international accountability". It will be recalled that Respondent submitted in the Counter-Memorial, with reference to the Mandatories' obligation to report and account to the Council of the League, that—

"[b]y 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 ³." (Italics in original text.)

Applicants contest this submission ⁴, and, as noted above ⁵, they contend that the content of the obligation involved supervision by the "organized international community", a concept or entity either manifesting itself in, or being represented by, successively, the League of Nations and the United Nations.

In these circumstances, a statement to the effect that the parties are in agreement that "international accountability" is of the essence of the

¹ II, p. 170.

² IV, pp. 523-524.

³ II, p. 119.

⁴ *Vide*, e.g., IV, p. 240.

⁵ *Vide* Chap. III, *supra*.

mandate, is clearly apt to be misleading. It may well be that Applicants intended to use the expression "international accountability" in a generic sense, broad enough to cover both the obligations respectively contended for by the Parties. But even on that basis, in view of the wide divergence between the Parties' submissions regarding the content of the obligation, it does not appear to conduce to clarity of thought to lump them together under one descriptive appellation, and then to state that their essentiality is a matter of common cause.

13. Secondly, apart from the difficulty regarding the expression "international accountability", Applicants' statement is inclined to create a misleading impression as regards the very crux thereof, viz., the concept of "common cause" concerning essentiality. Even assuming that "international accountability" is to be understood in a sense which stands neutrally between the conflicting contentions mentioned in the previous paragraph, it still cannot be said, without qualification, that Respondent has identified itself with Applicants' attitude about international accountability being "of the essence" of the Mandate.

The attitude in question on Applicants' part is basic and unqualified—a "major premise" of Applicants' case, which is advanced as one whole without any alternatives, viz., that the Mandate exists intact, i.e., including, as an integral part thereof, an obligation to account to a supervisory body¹. On the other hand, Respondent's submission on the question of essentiality or otherwise of the element of accountability is neither basic nor unqualified. As has been shown above, Respondent's basic and unqualified contention is that the element of accountability to a supervisory body lapsed on dissolution of the League². That contention stands by itself, on its own merits, and is not dependent on, or qualified by, any contention or argument raised by Respondent in regard to other issues². In particular, the conclusion of lapse of accountability is advanced by Respondent as an overriding one, standing independently and irrespectively of the further question whether any other part or parts of the Mandate did or did not survive the dissolution of the League. It follows that the said conclusion is also advanced independently and irrespectively of the question whether the element of accountability is to be regarded as a severable or as an inseverable (essential) part of the mandate institution. The latter question arises only in a secondary manner, following on the premise of lapse of accountability: it provides the key to the *further* question whether any *other* part of the Mandate survived the dissolution, or whether the whole lapsed as a consequence of lapse of accountability³. Consequently, Respondent's contention in this respect is a twofold one, advanced in the alternative, viz.,

- (a) that accountability to the League supervisory organs was intended by the authors of the mandate system to be an essential part of the Mandate, with the result that the whole Mandate lapsed upon dissolution of the League;
- (b) *alternatively*, and on the basis of the Court finding against the proposition of essentiality of the accountability (in other words in favour of severability) that the Mandate continues in existence but

¹ IV, p. 524.

² Para. 1, *supra*, and other passages there referred to.

³ Para. 2, *supra*, and other passages there referred to.

without accountability on the Mandatory's part to any supervisory organization or body¹.

Respondent's argument therefore differs from Applicants' in expressly recognizing the possibility of a finding of severability as opposed to essentiality, and in basing on that possibility an alternative submission which finds no common ground with Applicants' case, viz., of survival of the Mandate *without accountability* to a supervisory body.

14. The distinction between the respective contentions of the Parties can also be put in a different way. In the passage cited from the Reply in para. 11 above, the "common cause" suggestion in the first sentence paves the way for Applicants to represent the rival contentions of the Parties as if they mutually invite the Court to make a choice between two extreme findings only, viz., that the Mandate has lapsed *in toto* or that it survives *in toto*. In truth, although Applicants' argument does involve such an invitation, the representation is wrong of Respondent's argument, which specifically invites consideration by the Court of a third possible finding, lying between the extremes, viz., that the Mandate survives in part, i.e., as regards its substantive provisions but without procedural obligations of report and accountability to a supervisory body. Indeed Respondent respectfully submits that that is the only form in which it can possibly be found that the Mandate still exists.

The conclusion resulting from a postulate that accountability was indeed "of the essence of the Mandate"

15. The next aspect of the above passage from the Reply² which requires consideration, is the question as to the ultimate conclusion which would flow from a finding or postulate that accountability (either to specific League organs or to some international body) is indeed to be regarded as "of the essence of the Mandate". Respondent contends that the ultimate conclusion must be total lapse of the Mandate upon the dissolution of the League, whereas Applicants contend for total survival.

16. First, the concept of "essentiality", or being "of the essence", in this context requires some consideration. Respondent assumes that Applicants thereby mean that the accountability in question *was intended by the authors of the mandate system to be an essential element of the Mandate*, in the sense that *the Mandate was not to exist without it*. This is also the sense in which the concept has been dealt with in the preceding paragraphs.

It is hardly necessary to point out that "essentiality" in any other sense could not in itself have a decisive bearing on the question at issue, which concerns the effect which dissolution of the League had upon the Mandate and/or accountability thereunder to a supervisory organ.

In the first place, the view or contemplation of anybody other than the authors of the mandate system could hardly be of significance—unless it should have led to some legal act which affected the situation. So, for instance, let us assume that the Mandate could, in accordance with the intentions of its founders, continue in existence despite the lapse of accountability to a supervisory body: in that event a view on

¹ *Vide* summary of Respondent's argument, particularly paragraphs (d) and (e) thereof, in II, p. 97 (para. 2) and Chap. III, para. 1, *supra*.

² Para. 11, *supra*.

the part of the founders of the United Nations at the time of its establishment, and/or of the remaining Members of the League at the time of its dissolution, that accountability to some international body was essential for a proper functioning of the Mandate, could not in law bring about a lapse of the Mandate, unless such view led to an agreement to that effect, to which the Mandatory would have had to be a consenting party. Nor could such a view have resulted in an obligation on the part of the Mandatory to account to a new supervisory body—again save by agreement with, or with the consent of, the Mandatory. Respondent has given full reasons showing that no such agreement was entered into nor any such consent given¹, and Applicants do not join issue therewith in the Reply².

Again, a view or contemplation on the part of the authors of the mandate system that accountability to a supervisory body was "essential" or "of the essence" in a sense other than the above, could not be of decisive significance to the question at issue. So, for instance, if the authors merely considered that such accountability was a desirable spur to diligence on the Mandatory's part in the *performance* of its obligations, but not indispensable for the *existence* of the Mandate, it follows that, upon disappearance of the supervisory organs mentioned in the Mandate, such a contemplation could in itself bring about neither the lapse of the Mandate nor the substitution of new supervisory organs.

17. On the basis, therefore, that "essentiality" or being "of the essence" relates to a contemplation or intention on the part of the authors of the mandate system that the Mandate was not to exist without accountability to a supervisory organ, and assuming that such was indeed their intention, what would the effect of dissolution of the League be?

In ordinary logic the answer, in Respondent's submission, presents no difficulty. The dissolution of the League brought to an end the existence of the only supervisory bodies mentioned in the Mandate or the Covenant. Hence accountability to supervisory bodies would terminate, unless there were some provision in law for the substitution of a new supervisory body or bodies. And such termination of accountability would, in accordance with the intention of the authors of the mandate system, mean the end of the Mandate.

Consequently, on the above premises, the question of survival or otherwise of the Mandate would depend on whether or not there was any provision in law for substitution of supervisory bodies. Respondent has already demonstrated, conclusively in its submission, that there was no such provision for substitution³, and that the only proposition by which Applicants attempt to show the contrary, viz., the "organized international community" theory, is without substance³. Indeed, by the mere fact of advancing this theory, Applicants by implication concede that provision for a substitution of supervisory authority was a requisite for the existence of accountability after the dissolution of the League. The absence of provision for substitution therefore means the end of accountability as at dissolution of the League, and, on the above premises, the simultaneous end of the Mandate.

18. The conclusion just stated rests, as has been indicated, on ordi-

¹ II, pp. 124-163.

² Chap. III, para. 46, *supra*.

³ Chap. III, *supra*.

nary considerations of logic. Given the postulates that the supervisory organs lapsed without successors, and that "international accountability" was, in the contemplation of its founders, an essential element in the mandate system, the conclusion is logically inescapable that the Mandate as a whole has lapsed.

This proposition is pertinently supported by a passage from the dissenting opinion of Judge Morelli in the *Barcelona Traction* case¹. The question at issue in that case was whether a compromissory clause in a treaty of 1927 between Belgium and Spain was still in force. In the course of the proceedings, an argument was raised regarding the effect of the alleged inseparability of the compromissory clause. The Court did not find it necessary for the purposes of its Judgment to express an opinion on the merits of this argument². Judge Morelli, however, dealt therewith. After finding that the compromissory clause in the treaty under consideration had lapsed on the dissolution of the Permanent Court, the learned Judge stated:

"This result cannot in my view be set aside by arguing, as does the Belgian Government, the inseparability of the provisions of the 1927 Treaty. *It is difficult to find any reason why this alleged inseparability should have the effect of keeping Article 17 (4) [i.e. the compromissory clause] in force, rather than the contrary effect of entailing the lapse of the entire treaty.*

In my opinion there can be no doubt that Article 17 (4) lapsed, for lack of object, as a result of the dissolution of the Permanent Court. . . . The fate of the other provisions of the 1927 Treaty is of no interest. But if it is desired also to consider the question of the preservation in force of the other provisions of that Treaty, what consequence must be drawn, for the solution of that problem, from the assertion that the Treaty constitutes an inseparable whole? If it is considered, as does the Belgian Government, that 'resort to adjudication is an *essential part* of the economy of the treaty' that 'the various methods of settlement were carefully combined, so that to remove those which concern the Court amounts to dismantling the whole system' and that Article 17 (4) 'was an *essential condition* for the consent of the parties to the treaty as a whole' *the inevitable result, assuming the impossibility, thus affirmed, of separability of the provisions of the Hispano-Belgian Treaty, would simply be that the entire treaty has lapsed*³." (Italics added.)

19. For the reasons aforesaid, Respondent submits that the "essentiality" of "international accountability" resulted in the lapse of the Mandate as a whole, and not in its amendment to provide for fresh supervisory organs.

The contention that "international accountability must survive so long as rights or powers over the Territory are asserted"

20. There remains for consideration the contention advanced by Applicants in the passage from the Reply quoted in paragraph 11 above,

¹ *Barcelona Traction, Light and Power Company Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964, p. 6.*

² *Ibid.*, p. 37.

³ *Ibid.*, pp. 94-95.

viz., "... that international accountability must survive so long as rights or powers over the Territory are asserted, as the Court has twice made clear". This contention appears to correspond to a suggestion made in a negative form earlier in the Reply¹, viz., that there cannot be "... any basis for [Respondent's] disclaimer of international accountability while at the same time maintaining rights of administration and possession over the Territory". In the next succeeding paragraphs Respondent deals with the apparent meaning of the contention, with the suggestion that it has twice received the blessing of the Court, and with its merits.

21. As regards the apparent meaning of the contention, Respondent is confronted with the difficulty that Applicants nowhere develop it, or explain exactly what they mean by it, or indicate on what interpretation or principle of law or logic, it is sought to be based. Applicants do not even say whether the contention is advanced independently of their "organized international community" theory regarding succession in respect of supervisory bodies, or whether it merely states a result arrived at *via* the application of that theory.

That Applicants may well have intended the second of these alternatives, flows, *inter alia*, from the very fact that whereas extensive discussion is offered in an attempt to support the "organized international community" theory, there is in regard to the contention under consideration no presentation at all of that kind, as one would have expected if it were meant to be advanced as an independent, alternative argument, standing by itself and on its own merits.

It will be recalled that Applicants base their "organized international community" theory, *inter alia*, on the premise that "international accountability" was intended to be an essential element of the Mandate². If, as further contended by Applicants, Respondent was *ab initio* obliged to account to "the organized international community" or its appropriate organ, and if the United Nations for this purpose became the "organized international community" or its appropriate organ, then there would, of course, at the dissolution of the League, have been no lapse of the element of accountability, and therefore no consequential problem of lapse of the Mandate as a whole. In other words, the Mandate would, on the hypothesis stated, have continued intact³, with accountability to the United Nations as an integral element thereof. Consequently, still on the hypothesis stated, it would be perfectly correct to state the conclusion arrived at in terms of the contention under discussion, viz., "that international accountability must survive so long as rights or powers over the Territory are asserted", and that there cannot be a basis for "disclaimer" on Respondent's part "of international accountability while at the same time maintaining rights of administration and possession over the Territory". And on this premise the words "as the Court has twice made clear" would also be understandable, as referring merely to a proposition which has indeed twice been stated and which Respondent has never disputed, viz., that "[t]o retain the rights derived

¹ IV, pp. 243-244.

² *Ibid.*, pp. 239-240.

³ I.e., leaving out of account, for present purposes, independent questions regarding survival or otherwise of the compromissory clause.

from the Mandate and to deny the obligations thereunder could not be justified" ¹.

At the same time, however, the contention would of course, on this understanding of its meaning, rest entirely on the soundness or otherwise of the "organized international community" theory regarding succession or substitution of supervisory organs. Consequently it would, in reply thereto, be sufficient to say that the said theory has already, in Respondent's submission, been shown to be entirely without substance ², and also that it has never received endorsement or approval from the Court or from any member thereof ³.

22. Respondent proceeds, however, to consider Applicants' above contention on the supposition that it is advanced independently of the "organized international community" theory, or any other theory of succession, as an alternative argument for coming to the conclusion that the Mandate still exists together with an obligation of "international accountability" as an integral part thereof.

Seen in this light, the contention must apparently be taken to convey the following: from the *premise* that "international accountability" was intended by the authors of the mandate system to be an essential, indispensable part of the Mandate, there follows the *conclusion* that as long as Respondent "asserts" or "maintains" rights or powers of administration and possession over the Territory of South West Africa, it must be under an obligation of "international accountability".

It will immediately be apparent that the contention, thus understood, suffers from two fatal defects, viz.,

- (a) the conclusion is a *non sequitur*: it is not substantiated by the premise, and would only be valid on introduction of an additional premise, viz., that the Mandate is still in existence; and
- (b) no solution is offered to the problem of the supervisory body to which the obligation of accountability would relate after disappearance of the only supervisory bodies mentioned in the formulation of the obligation in the mandate documents.

As will be shown in the succeeding paragraphs, these defects relate to the basic substance of the contention, and not to the mere fortuitous circumstance of the words in which it has been expressed by Applicants.

First, however, Respondent has to point out also that neither the Court, nor any member thereof, has ever expressed a view or finding which endorses a proposition as now under discussion. The Court in 1950 treated the obligation of accountability as being severable from other aspects of the Mandate, and based its judgment regarding survival of accountability on a finding which in effect rested on a tacit agreement considered to have been entered into during 1945-1946 providing for substitution of supervisory organs ⁴. And in 1962 the Court left open the question whether the obligation of accountability had lapsed ⁵. Applicants have made no attempt to answer Respondent's analyses in

¹ *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128 at p. 133 and *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319 at p. 333.

² Chap. III, *supra*.

³ II, p. 122 (para. 14).

⁴ *Ibid.*, pp. 141-146.

⁵ *Ibid.*, pp. 156-161.

the Counter-Memorial of the 1950 Opinion and 1962 Judgment in these respects.

23. To return, then, to the merits of Applicants' contention¹, and the above-mentioned defects in respect thereof, Respondent submits that a cardinal consideration of logic is ignored therein. This consideration is that, as soon as the premise is accepted or assumed that accountability is essential for the existence of the Mandate, then an enquiry whether the Mandate could and did survive the dissolution of the League cannot be divorced from an enquiry whether accountability, as prescribed in the Mandate, could and did survive such dissolution: the two aspects of the enquiry then form one integral whole, and neither aspect can be answered separately from the other.

So, for instance, it would be quite impermissible to enquire *first* whether parts of the Mandate other than accountability, e.g., the sacred trust provisions of Articles 2 to 5, were capable of surviving the dissolution of the League, and, upon reaching an affirmative answer, to conclude *secondly* that the Mandate must therefore still be in existence, and then to add, *thirdly*, that inasmuch as accountability is an essential or inseverable part of the Mandate, therefore accountability must also still exist. Such method of argument would involve the obvious error of a change of premise *en route*. The conclusion reached at the second stage thereof could only be justified on a premise of severability of the sacred trust provisions from the element of accountability, whereas the conclusion at the third stage would require and use as basis the very opposite premise of essentiality, i.e., of inseverability of accountability from the other provisions.

Yet this would seem to be the very defect implicit in Applicants' contention, understood in the sense as now under consideration, resulting in the *non sequitur* mentioned above². It is quite obvious that one cannot say that *administration* of a certain *territory* must be subject to *accountability* merely because accountability is an essential element of a *mandate*. The statement would only make sense upon adding or presupposing that the mandate which requires the accountability, *applies to* the territory and its administration. In the present context this means a presupposition that the Mandate for South West Africa *still exists*. It therefore seems that this presupposition must be underlying Applicants' said contention, as a major premise. The line of reasoning is apparently that the existence of the Mandate is not open to question³, and that given the essentiality of accountability, the obligation of accountability must therefore also be in existence. The cardinal error lies in the combination of the two premises that the Mandate exists and that accountability is essential to its existence. *The only basis upon which it can possibly be said that the existence of the Mandate is not open to question, is that of accepting that its sacred trust provisions can stand by themselves, without accountability. As soon as the premise is introduced that accountability was intended to be essential for the existence of the Mandate, then the question whether the Mandate still exists must depend, inter alia, on the question whether its provisions regarding accountability are still capable of perform-*

¹ I.e., if to be understood in the sense indicated in para. 22, *supra*.

² Numbered (a) in para. 22, *supra*.

³ Applicants never advance any argument in support of the proposition that the Mandate still exists: they merely rest on the Court's decision in that regard.

*ance: if they are, the Mandate would still exist, and if they are not, the Mandate would have lapsed*¹.

For these reasons, Applicants' contention under consideration could be of no value for determining whether the Mandate and accountability under the Mandate still exist, unless it should face up to the question whether the obligation of accountability, as prescribed in the Mandate, is still capable of performance. For reasons repeatedly stated before, this reduces itself to the further question whether a substitution of a new supervisory body or bodies has been provided for by a process legally binding on Respondent.

24. Applicants' contention under consideration does not explicitly address itself to a question of substitution of supervisory organs. It does, however, seek to attach to the fact that Respondent "asserts" or "maintains" rights or powers of administration and possession over South West Africa the legal consequence that "international accountability must survive". It may be that Applicants intend to signify that Respondent has by such "assertion" or "maintenance" of rights or powers voluntarily committed itself to an obligation to account to a new supervisory body, in substitution for those that have disappeared—either by way of actual consent to such an obligation, or by way of conduct which operates in law as an estoppel precluding denial by Respondent of consent to such an obligation. It is therefore necessary to consider whether such a proposition could be sound. In Respondent's submission the answer must clearly be in the negative—for a number of reasons, in fact and in law, of which only some of the most basic are dealt with in the next succeeding paragraphs.

25. Whether Respondent's "assertion" or "maintenance" of rights or powers involved an actual consent on its part to a substitution of supervisory organs, is a question of fact. In the Counter-Memorial Respondent fully considered and analysed the events of the years 1945-1946 and thereafter, and demonstrated, it is submitted conclusively, that they negative the existence of any actual consent to such a substitution². Respondent has also repeatedly pointed out³ that Applicants have in the Reply made no attempt to controvert or even to deal systematically with the facts and arguments advanced by Respondent in this regard. Only two contentions which can be said to be expressly contrary—and then only to a limited extent—are advanced by Applicants, viz., regarding an alleged "clear intention of all concerned" at the last session of the League Assembly⁴, and regarding an alleged consistent maintenance by the United Nations, since its inception, of "its right and duty to exercise supervisory authority over the Mandate"⁵; and both these have been shown to be wholly unsubstantiated⁶. The contention regarding "assertion" or "maintenance" of "rights", however, in its possible sense as now under consideration, necessitates a reversion to the same factual terrain, in which a measure of repetition can unfortunately not be avoided. In addition to the question of actual consent, the enquiry concerns the

¹ *Vide* para. 17, *supra*.

² II, pp. 124-163.

³ E.g., in Chap. III, paras. 4, 46, 48 and 51, *supra*.

⁴ As quoted in Chap. III, para. 12, *supra*.

⁵ *Ibid.*, para. 51.

⁶ *Ibid.*, paras. 43-51.

possible application of the doctrine of preclusion or estoppel—to the principles of which regard is first to be had.

26. The nature of the doctrine of estoppel has been described as follows:

“Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consilium suum in alterius injuriam*). *A fortiori*, the State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it. (*Nullus commodum capere de sua injuria propria.*) Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non valet*)¹.”

The elements of estoppel or preclusion are consequently clear: in order to invoke it, a party must show—

- (a) an attitude previously adopted by the party sought to be precluded;
- (b) the bringing about, as a result of such attitude, of “a change in the relative positions of the parties, worsening that of the one, or improving that of the other, or both”²; and
- (c) a present claim which is “manifestly contrary”³ to the attitude previously adopted.

It will be apparent that the starting point and basis of any application of this doctrine is the attitude adopted by a party, which such party may be precluded from changing subsequently. The manner in which such an attitude was expressed, is not important. In the words of Judge Alfaro,

“... [it] may take the form of an express written agreement, declaration, representation or recognition, or else that of a conduct which implies consent to or agreement with a determined factual or juridical situation”⁴.

In consonance with the terminology of English law, such an expression of attitude is often referred to as a “representation”, although the accuracy of defining estoppel as necessarily involving a representation has been doubted⁵.

27. Whatever term is employed, and in whatever manner a party's prior attitude has been manifested, it is patent that such manifestation

¹ *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6 at p. 40 per Judge Alfaro.

² *Ibid.*, at p. 63 per Sir Gerald Fitzmaurice. (Italics deleted.)

³ *Vide* the above quotation from the opinion of Judge Alfaro.

⁴ *Ibid.*, p. 40.

⁵ *Ibid.*, pp. 63-64 per Sir Gerald Fitzmaurice.

must be *unambiguous* in the respect in which the party is sought to be precluded from denying it. This requirement follows from the very nature of the doctrine—it is impossible to establish an inconsistency between two attitudes if either or both of them are ambiguous in the respect in question, and consequently capable of being reconciled. In addition, however, the requirement that, for the application of estoppel, an attitude must be a clear and unambiguous one, flows from considerations of fairness and equity. A plea of estoppel is, in the words of Sir Gerald Fitzmaurice,

“... essentially a means of excluding a denial that might be *correct*—irrespective of its correctness. It prevents the assertion of what might in fact be *true*”¹.

And the same learned Judge said with reference to circumstances in which a party was alleged to be precluded from denying the existence of a binding undertaking or the acceptance of an obligation thereunder:

“The real field of operation, therefore, of the rule of preclusion or estoppel, *stricto sensu*, in the present context, is where it is possible that the party concerned did not give the undertaking or accept the obligation in question (or there is room for doubt whether it did), but where that party's . . . conduct has been such, and has had such consequences, that it cannot be allowed to deny the existence of an undertaking, or that it is bound”¹.

Clearly a court would not hold that a party is bound to an undertaking to which it did not in fact consent, or may possibly not have consented, except on the strength of the most unequivocal and unambiguous conduct or representations on its part. In the words of Sir Percy Spender,

“... since the principle [of preclusion], when it is applicable to any given set of facts, substitutes relative truth for the judicial search for the truth, it should be applied with caution”².

It has consequently often been stated that the prior representation or attitude to which a party may be bound, must be a clear and unambiguous one. Thus Sir Percy Spender said that the principle of preclusion—

“... operates to prevent a State contesting before the Court a situation contrary to a *clear and unequivocal representation* previously made by it to another State . . .”². (Italics added.)

And another authority stated that, as an essential of estoppel, “the statement of fact must be clear and unambiguous”³.

Where the prior representation or manifestation of attitude is not contained in any document or statement, but is sought to be inferred from “conduct which implies consent to or agreement with a determined factual or juridical situation”⁴, regard must be had also to another factor, namely the basic considerations of logic which require that in reasoning by inference, the conclusion sought to be inferred must be consistent with all the relevant proved facts, and must be a necessary

¹ *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 63.

² *Ibid.*, p. 143.

³ Bowett, D. W., “Estoppel before International Tribunals and its Relation to Acquiescence”, *B.Y.B.I.L.*, Vol. XXXIII (1957), pp. 176-202 at pp. 188-190 and 202.

⁴ *Vide* above quotation from Opinion by Judge Alfaro.

inference in the sense that all other reasonable inferences are excluded ¹.

"If there are a number of reasonable inferences which may be drawn, including one of assent, then the hypothetical reasonable man is not entitled to select the inference of assent and to disregard the others ²."

28. Applying the above principles, Respondent will now examine whether any undertaking, representation or attitude regarding the continuation of "international accountability" can be inferred from its "assertion" or "maintenance" of rights or powers of administration and possession over the Territory. It is to be borne in mind that this enquiry proceeds on the assumption that, but for such "assertion" or "maintenance", "international accountability" would have lapsed on dissolution of the League ³.

At the outset three points call for comment. The first is that the enquiry cannot be confined to a consideration only of the facts, taken *in vacuo*, of assertion or maintenance of rights or powers of administration and possession. The administration and possession of a territory are by themselves essentially neutral facts with reference to the question whether "international accountability" in respect thereof is undertaken, acknowledged or represented, neither advancing nor militating against any inference relative to that question. Only upon considering all circumstances surrounding and attendant upon the administration and possession concerned, could the possibility arise of an inference either in favour of or against an undertaking, acknowledgment or representation of such accountability.

Secondly, it will be noted that in their contention under discussion, Applicants refer only to the vague, abstract concept of "international accountability" rather than to any specific supervisory authority. This, in Respondent's submission, is not merely fortuitous. Administration and possession of a territory are by themselves even more patently and obviously unrelated to any specific supervisory authority than to a vague idea of "international accountability". And yet, of course, Applicants cannot ultimately evade the question of a specific supervisory authority. Indeed, in their conclusion as set forth, *inter alia*, in their Submissions 2, 7 and 8 ⁴, Applicants do not allege the existence of an obligation of "international accountability" *in vacuo*, but contend that Respondent is now obliged to account to the General Assembly of the United Nations. The facts and circumstances surrounding and attendant upon continued administration and possession are therefore to be considered specifically with a view towards determining whether they give rise to any inference regarding accountability to this particular body.

Thirdly, Applicants' said submissions also concern accountability under a mandate in force—which is another point left vague by the contention under consideration. An alternative contention, which has been raised by some States in international politics, but is not relied

¹ II, p. 146.

² Per Judge-President Greenberg, regarding this aspect of application of the doctrine of estoppel, in the Transvaal Provincial Division of the Supreme Court of South Africa: *Van Ryn Wine and Spirit Co. v. Chandos Bar*, 1928 T.P.D. p. 417 at pp. 423-424.

³ *Vide* para. 22, *supra*.

⁴ I, pp. 197 and 198.

upon by Applicants in the present proceedings, is that Respondent is subject to "international accountability" by reason of an obligation to conclude a trusteeship agreement. Such a contention is really irrelevant to the present proceedings. Apart from the fact that the Court in 1950 rejected the contention of an obligation to enter into a trusteeship agreement, and that Applicants do not contest the correctness of the Opinion in that respect, there is the fundamental consideration that the present case is concerned only with interpretation and application of the Mandate, and more particularly, in its aspects under discussion, with Applicants' submissions that the Mandate is in force and that Respondent is by virtue of the provisions thereof under an obligation of accountability to the United Nations. However, it may be useful for the sake of completeness to have regard in the succeeding consideration of the facts to all aspects of the present enquiry, and to examine whether Respondent's continued "assertion" or "maintenance" of rights or powers of administration and possession can give rise to any inference of consent, actual or by estoppel, to "international accountability", either in the sense contended for by Applicants in their above-mentioned submissions, or in the sense of an undertaking to enter into a trusteeship agreement.

29. The relevant aspects of Respondent's conduct in the respect under consideration are all undisputed facts, being for the most part stated and fully substantiated by Respondent in the Counter-Memorial without refutation in the Reply, and in some instances stated by Applicants themselves in the Memorials¹. No more than a very brief summary of the most important features will consequently be presented herein. These features are as follows:

- (a) At the San Francisco Conference in May 1945, as well as during the proceedings of the Preparatory Commission in December 1945, and at the First Part of the First Session of the General Assembly in January-February 1946, Respondent stated clearly and explicitly that it was reserving its position in regard to South West Africa, and did not wish to be understood as agreeing to any commitment to the United Nations in that regard, its intention being to claim, on an appropriate later occasion, that the Mandate should be terminated and the Territory incorporated as part of South Africa².
- (b) At the final session of the League Assembly in April 1946, Respondent announced its intention to seek international recognition for the incorporation of South West Africa. As far as its administration pending such recognition was concerned, Respondent indicated clearly that due to "the disappearance of those organs of the League concerned with the supervision of Mandates", there would be no accounting to a supervisory authority in respect of such administration³.
- (c) Upon rejection by the United Nations of the proposal regarding incorporation, Respondent on several occasions during 1946 and 1947 announced its intention of continuing to administer the Territory in the spirit of the principles laid down in the Mandate⁴. In these statements Respondent made it clear that it was not

¹ *Vide* also para. 25, *supra*.

² II, pp. 33-35 (paras. 31 and 32) and 40-42.

³ *Ibid.*, pp. 46-48 and 136.

⁴ *Ibid.*, pp. 54-60.

thereby consenting to any supervision by the United Nations, or to any obligation to conclude a trusteeship agreement. Respondent did express an intention to transmit voluntarily, for the information of the United Nations, statistical and other information "in accordance with", or "on the basis of", or "of the same type . . . as is required for Non-Self-Governing Territories under", Article 73 (e) of the Charter¹. However, this intention was expressly qualified to a two-fold effect, viz., *firstly* that the information "would not be considered by the Trusteeship Council and would not be dealt with as if a trusteeship agreement had in fact been concluded", and *secondly* that it would be rendered "on the basis that the United Nations has no supervisory jurisdiction", or no "right of control or supervision", with regard to South West Africa².

When the qualifications were not observed by the organs of the United Nations, the transmission of information was discontinued³.

- (d) As from November 1948, Respondent repeatedly and consistently denied that its continued administration of the Territory "in the spirit of the Mandate" involved any undertaking or obligation to submit to United Nations supervision, or to enter into a trusteeship agreement⁴.

The above circumstances are, it is submitted, decisive in themselves. Consent, actual or by estoppel, to an obligation of "accountability"⁵ towards the United Nations, can be established only by showing, as a matter of inference from the circumstances, a clear and unequivocal undertaking, representation or attitude to that effect on Respondent's part. An examination of the circumstances, however, demonstrates the very contrary, viz., that Respondent's attitude was expressed clearly and unequivocally to the opposite effect, i.e., to the effect that its continued administration involved no undertaking or obligation of "accountability". In the result it is strictly unnecessary to go any further, and, for instance, have regard to the attitudes adopted by other States, which might otherwise have been relevant to cast light on a less explicit attitude on Respondent's part, or to show how Respondent's attitude was in fact interpreted by others. However, for the sake of completeness, brief attention will be given to this aspect in the next paragraph.

30. The following circumstances are, in Respondent's submission, relevant as regards the attitude adopted by other States in the respect in question:

- (a) It is not disputed that the Charter imposes no obligation on Respondent to enter into a trusteeship agreement. It is also common cause that no express provision was made therein for the United Nations or its organs to be substituted for the League organs in respect of supervision of mandatory administration. On the contrary, it will be recalled that proposals regarding the transfer of such functions were, on two occasions, not proceeded with or rejected⁶.

¹ II, pp. 54-60.

² *Ibid.*, particularly at pp. 57, 58 and 59.

³ *Ibid.*, pp. 58-62.

⁴ *Ibid.*, pp. 62 and 72-95.

⁵ In either of the two respects mentioned in para. 28, *supra*.

⁶ II, pp. 40, 43 (para. 35g), 47-50, 131-132, 134-135 and 146-147 (paras. 49-50).

- (b) At the dissolution of the League, other Mandatories also indicated that in their view the mandate obligation of accountability would no longer be capable of performance ¹.
- (c) Over the next three years at least 24 members of the United Nations publicly associated themselves with this view, acknowledging in particular, 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 a mandated territory ².
- (d) For more than two years after the dissolution of the League, i.e., until near the end of 1948, not a single State voiced any contradiction to the views stated in (b) and (c), although during 1947 alone 41 States took part in debates on South West Africa at the United Nations ³.
- (e) Some States contended that Respondent was under an obligation to enter into a trusteeship agreement. This was, however, even before the Court's ruling in 1950, a highly contentious issue ⁴, and the States alleging such an obligation did not base it on any consent (save as embodied in the Charter) or representation on Respondent's part.

The above circumstances render it beyond doubt that Respondent's continued administration of the Territory was not understood as involving any consent to, or recognition of, an obligation of accountability towards the United Nations. This by itself, of course, shows the absence of the second essential element of estoppel referred to above ⁵, viz., that the attitude or representation in question must have brought about a change in the relative positions of the parties. However, for present purposes Respondent is more concerned to point out that the views expressed by other States also confirm that in fact no attitude was adopted or representation made by Respondent which could give rise to the estoppel now under discussion. Had the circumstances been different, the attitude of other States might possibly have provided a setting in which an act or attitude on Respondent's part, apparently neutral or ambiguous in itself, could assume special significance. Thus, for instance, if Respondent had without express reservation continued its administration of the Territory in the face of universal insistence that such administration would be taken as consent to an obligation of accountability to the United Nations, a serious question as to a possible estoppel might have arisen. Such a situation does not, however, obtain here, not only by reason of the above-mentioned explicit statements by Respondent regarding the basis upon which its administration of the Territory was continued, but also because there was no universal insistence as postulated in the above example—on the contrary, the general consensus was to the opposite effect.

31. For the reasons set out above, Respondent submits that no inference can be drawn from its "assertion" or "maintenance" of rights

¹ II, pp. 136-137.

² *Vide* summary, with names of the States concerned, in II, p. 141 (para. 41b) and for greater detail *vide* also pp. 65-71 and 138-140.

³ *Vide* summary II, p. 140 (para. 41a) read with pp. 65 (para. 57a), 70 (para. 60) and 139.

⁴ *Ibid.*, p. 65, footnote 1

⁵ *Vide* para. 26, *supra*.

or powers of administration that it has consented, or is to be precluded from denying consent, to an obligation of accountability towards the United Nations, either in the sense contended for by Applicants in their Submissions 2, 7 and 8¹, or in the sense of an obligation to enter into a trusteeship agreement.

There then remain for consideration certain views to the effect that, even in the absence of consent on Respondent's part, real or by estoppel, Respondent can have no right or title to the Territory without international accountability. This matter is dealt with in the succeeding paragraphs.

32. It will be recalled² that some States at the United Nations expressed the view that whether or not Respondent is under a legal obligation to enter into a trusteeship agreement, Respondent has no practical choice in the matter if it wishes to maintain rights of administration and possession in respect of the Territory. Their argument was to the effect, *firstly*, that the Mandate had lapsed, *secondly*, that independently of the Mandate Respondent could have no right or title to administer the Territory, *except, thirdly*, that Respondent could and should put it under trusteeship. It will be quite evident that such a line of argument does not fall within either the permissible or the actual scope of Applicants' submissions in the present case. As regards permissibility, the bounds of "the interpretation or the application of the provisions of the Mandate"³ may not be exceeded. And as regards Applicants' actual case, the first step, and essential premise, of the above line of argument is that the Mandate has lapsed, which is the direct opposite of Applicants' first and basic submission. It is therefore manifest that this line of argument, and particularly the contentious second step therein, *viz.*, that Respondent can have no right or title to administer and possess the Territory independently of mandate or trusteeship, is neither legally nor practically relevant to the present case.

33. By reason of what is stated in the previous paragraph, Respondent in the Counter-Memorial made but brief reference to the point concerned, and stated the obvious fact that it does not "fall to be considered for the purposes of the present case"⁴.

Applicants' reaction in the Reply is to say that Respondent has, in so doing, been "curt" towards the Court⁵; and the manner in which they deal with the matter would seem to suggest that Respondent has also been evasive². They proceed to state:

"Applicants respectfully submit that . . . there is no basis whatever, other than the Mandate itself, for the continued exercise by Respondent of rights of administration, or of any other right, title or interest in or to the Territory⁵."

Respondent, while emphatically rejecting this submission, fails to see what bearing it can have upon, or how it can fit into, Applicants' case as presented to the Court in their formal submissions. If this submission were to be a formal one, in terms of which the Court is being asked to adjudge and declare, the Court would unquestionably have to

¹ *Vide* para. 28, *supra*.

² *Vide* II, Counter-Memorial, Book II, Annex A.

³ Art. 7 of the Mandate for German South-West Africa.

⁴ II, p. 174.

⁵ IV, p. 244.

decline jurisdiction to do so. And how the submission can even indirectly be of assistance in the decision of the case that actually is before the Court, viz., the formal submissions that the Mandate exists and contains an obligation of accountability, is unintelligible. The questions pertaining to the submissions before the Court are wholly different from those that would have to be gone into in order to decide whether, if the Mandate does not exist, Respondent has a legally valid claim to title: and whatever answer may be reached in the latter respect, whether positive or negative, cannot assist towards finding the answers in regard to the former.

34. In pointing out the above, Respondent does not intend, and does not conceive itself, to be either curt or disrespectful towards the Court, or evasive of the merits of the questions raised by Applicants in the above-quoted submission.

As far as the Court is concerned, Applicants speak of a "curt dismissal of questions to which the Court has attached solemn and decisive weight"¹. They do so with reference to a quoted passage in the 1950 Opinion, in which the Court said:

"The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified²."

Respondent has never understood this passage to signify more than that if the Mandate has lapsed, Respondent cannot rely *on the Mandate* for authority to administer the Territory while denying the mandate obligations. Thus understood, the proposition stated by the Court has never been contested by Respondent, least of all in the portion of the Counter-Memorial under consideration. Respondent does not understand the passage to signify that the Court gave consideration to the question whether, if the Mandate had lapsed, Respondent could have any valid claim to a title to administer and possess South West Africa, and that it came to the conclusion that there could be no such valid claim. If this were what the Court had in mind, one would have expected some reasoning in support of such a conclusion: and it would be very difficult to understand what "solemn and decisive weight" the Court could have attached to such a conclusion in support of the findings actually arrived at and recorded in the dispositive of its Opinion.

35. As far as suggested evasion of the merits of the question is concerned, Respondent has, on the contrary, never understood how anyone can, without even any reference to relevant facts, summarily dismiss the possibility of a valid claim to title on its part on the basis that the Mandate has lapsed. Respondent conquered the Territory of South West Africa by force of arms during the First World War, as early as July 1915, and thereupon kept it in occupation, and exercised powers of administration and possession in respect thereof, for several years before even any suggestion was made that the Territory was to be placed under

¹ IV, p. 244.

² *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128 at p. 133 quoted in IV, p. 243.

Mandate¹. At the Peace Conference Respondent eventually agreed, by way of a compromise between conflicting views and interests, to accept a C Mandate in respect of the Territory in lieu of Respondent's claim to an unqualified title of annexation or incorporation². One of the elements of the compromise was indeed that Respondent "would have to be appointed the Mandatory"³. Respondent has ever since remained in peaceful and undisturbed possession of the Territory, and has likewise uninterruptedly governed and administered the Territory, also after dissolution of the League in 1946, which is the time at which it is for present purposes to be assumed that the Mandate lapsed. In the course of this administration of the Territory "as an integral portion of . . . South Africa"—as the Mandate envisaged and prescribed—there has in fact resulted a considerable measure of administrative integration of the Territory into Respondent's system of government, as well as of dependency of the Territory's fortunes, economic and otherwise, upon Respondent's resources.

Having regard, *inter alia*, to these facts, and given further the postulates that the Mandate lapsed on dissolution of the League—i.e., not through fault on Respondent's part but as a result of something done by the general consent of the interested parties—and that no obligation was imposed upon Respondent to place the Territory under trusteeship, it can hardly be said to be a foregone conclusion that Respondent can have no valid claim to a title to continue to administer and possess the Territory. In view of the fact that the Court is not called upon, and has no jurisdiction, to decide such a question in these proceedings, Respondent refrains from submitting a detailed exposition of fact and a systematic legal argument relative thereto; but by the same token Respondent's action in doing so involves neither disrespect for the Court nor any desire to shirk or evade questions as to its title.

III. CONCLUSION

36. For the reasons aforesaid, Respondent's contentions are, *firstly*, that on balance supervision by organs of the League was intended by the authors of the Mandate to be of so essential a nature in the mandate institution, that the institution could not exist without it; *secondly*, that this situation, coupled with the non-provision for substitution of supervisory organs, led to a total lapse of the mandate institution on dissolution of the League, and not, as contended by Applicants, to a keeping alive of the Mandate and supervision through the "assertion" or "maintenance" of rights of administration and possession by Respondent; and *thirdly*, in the alternative to the foregoing, that if the Mandate still exists, it can only be without an obligation of accountability to a supervisory organ.

37. In the rest of this Chapter, Respondent will deal with the question whether the compromissory clause in Article 7 of the Mandate can have any effect on the conclusion reached herein (i.e., particularly the second aspect thereof as stated above).

¹ II, pp. 10-11.

² *Ibid.*, pp. 11-14.

³ *Ibid.*, p. 12.

B. The Compromissory Clause in Article 7 of the Mandate

I. INTRODUCTORY

1. Before dealing with Applicants' arguments relating to the compromissory clause in Article 7 of the Mandate, it is necessary to repeat briefly the context in which this issue again arises for consideration in the present stage of the proceedings. As indicated above¹, Respondent submits that, upon the dissolution of the League, the provisions regarding supervision of mandatory administration by organs of the League lapsed. Respondent's further submission, viz., that this lapse rendered the Mandate incapable of further existence to any extent whatever², necessitates an examination of contentions or views to the effect that the compromissory clause filled the void caused by the lapse of Article 6, and thus kept the Mandate alive³. In this connection Respondent posed the following questions in the Counter-Memorial, each of which would have to be answered in the affirmative for a finding that such views or contentions were correct:

- “(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 it³.”

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. Respondent submitted in a fully reasoned argument that not only one, but all the questions are to be answered in the negative⁴.

In their Reply, Applicants approach this issue as follows: as regards question (c) they rely on the 1950 Advisory Opinion and the 1962 Judgment on the Preliminary Objections without presenting any further argument⁵, and, apparently, without appreciating the relevance of this question to the issue regarding the lapse of the Mandate⁶; as regards question (a) they rely on the said Opinion and the said Judgment, and in

¹ *Vide* Chap. III and Chap. IV A, para. 1, *supra*.

² *Vide* Chap. IV A, *supra*.

³ II, p. 171.

⁴ *Ibid.*, Counter-Memorial, Book II, Chaps. V A and V B.

⁵ *Vide* IV, p. 546.

⁶ *Vide* para. 2, *infra*.

addition present some argument¹; and, finally, regarding question (b) no argument in reply is presented at all². The rest of this Chapter will consequently be devoted to the following topics, viz., *firstly*, the scope and purpose of the compromissory clause, and *secondly*, the effect of the 1950 Advisory Opinion and the 1962 Judgment.

The discussion under the first head will concern mainly question (a) above, although, due to the form taken by one of Applicants' arguments, there will also be some reference to question (c)³. Under the second head the discussion will relate to both questions (a) and (c).

II. THE SCOPE AND PURPOSE OF THE COMPROMISSORY CLAUSE

2. Applicants say:

"Respondent's contention with respect to the assertedly limited scope of the compromissory clause no doubt is essential to its argument that the lapse of Article 6 of the Mandate collapsed the Mandate as a whole. Unless Respondent succeeds in showing that the compromissory clause is so inconsequential in purpose and consequence as, in effect, to be *de minimis* in the scheme of the Mandate, Respondent obviously cannot carry its contention that the Mandate as a whole has lapsed by reason of the asserted lapse of Article 6⁴."

Applicants thus single out only one of Respondent's contentions (i.e., that relating to question (a) above)⁵ and state that it is "essential" to Respondent's argument. This statement is, of course, incorrect. As demonstrated above, Respondent's contentions, with regard to the compromissory clause are not limited to the scope and purpose of the clause, but comprise three broad submissions, each of which would, if accepted, be decisive⁶. Probably because of a mistaken view regarding the importance of the issue concerning the scope and purpose of the compromissory clause (as appears from the above-quoted passage). Applicants have singled it out from the other issues referred to above⁵ for presenting argument on the merits thereof in their Reply. In the succeeding paragraphs, Respondent will deal with this issue.

3. Respondent's contention in the respect under consideration was summed up as follows in the Counter-Memorial:

"... it is submitted that the Permanent Court did not possess any function of judicial supervision in respect of Mandates, since its

¹ *Vide* IV, pp. 540-546. In limiting their argument to this one aspect Applicants apparently labour under the mistaken impression that this represents the only question relevant to the issue regarding the lapse of the Mandate—*vide* para. 2, *infra*.

² This issue was dealt with in II, Book II, pp. 171-173 of the Counter-Memorial where Respondent submitted that, even accepting the views of the majority judges in the 1962 Judgment regarding the scope and purpose of the compromissory clause, the clause could not have been a satisfactory substitute for the provisions of Article 6 of the Mandate.

³ *Vide* para. 5, *infra*.

⁴ IV, p. 540.

⁵ *Vide* para. 1, *supra*.

⁶ *Vide* para. 1, *supra*. Respondent is nevertheless grateful for the correctness of Applicants' statement that Respondent's argument on the lapse of the Mandate was based on the lapse of Article 6, and not vice versa, as is put forth elsewhere in the Reply—*vide* Chap. III, para. 2, *supra*.

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 nationals¹.

Applicants submit that this contention renders "the compromissory clause meaningless"². They then continue:

"In an effort to avoid so patently absurd a result, Respondent suggests that there are, in the Mandate, provisions *which do not deal with the interests of the inhabitants*, and that the compromissory clause has meaning, because it may be deemed applicable to this type of provision³." (Italics added.)

It is denied that any statement to this effect can be found in any pleading filed by Respondent.

In fact, Respondent said:

"It is further evident that certain of the conditions . . . 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)³" (italics added),

and "[e]ach of the mandate instruments contained provisions apparently intended specifically for the benefit of member States and their nationals"⁴. To this there was added in a footnote: "*Although in addition in the interests of the inhabitants of the mandated territories.*" The text continued:

"These were, for example . . . 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 object⁴." (Italics added.)

4. Applicants' incorrect rendering of the above contention as being that "there are, in the Mandate, provisions *which do not deal with the interests of the inhabitants*"⁵, enables them to reply plausibly as follows:

"First, there are no organic provisions in the Mandate that do not deal *in some manner* with the interests of the inhabitants. The prohibition against the building of military bases and fortifications in

¹ II, p. 193.

² IV, p. 541.

³ II, p. 105.

⁴ *Ibid.*, p. 177.

⁵ Italics added.

Article 4, is, *inter alia*, incidental to the general prohibition against the improper use of the inhabitants for military purposes . . . Article 5, assuring entry and travel to foreign missionaries, manifestly is incidental to the Article's general guarantee of freedom of conscience and worship for the natives¹." (Italics added.)

It is interesting to note how Applicants, in answering an argument not used by Respondent, reach basically the same conclusion as that actually submitted by Respondent, and even quote the same examples.

The extent to which various provisions may have been intended to secure the respective interests of League Members and of the inhabitants of mandated territories, is a matter of inference, and it is susceptible of speculation. So, for example, Quincy Wright reflects that—

"[t]hough [provisions against recruiting of natives] assure the natives against military exploitation in the interest of the mandatory, doubtless the interest of third states in the disarmament of the mandated areas was an even more important reason for their inclusion in the Covenant and the mandates²." (Italics added.)

Whether Wright was right or wrong in this view, does not affect Respondent's argument. The important point is that there were a substantial number of provisions in fact serving the interests of *both* League Members *and* the inhabitants.

5. After advancing the argument quoted in the preceding paragraph, Applicants state:

"Secondly, as the Court has already held, the phrase 'any dispute whatever' clearly refers to disputes concerning interpretation or application of any and all provisions of the Mandate.

Applicants submit that the scope of the compromissory clause, thus determined by the Court, makes clear that *it is the international community of States which has a legal responsibility for the protection of inhabitants of the Territory*. Under the scheme of the Mandate, certain States members of the community, such as Applicants herein, accepted the rights and duties of membership in the 'organized body', representing the international community, by becoming members of such organized body—formerly the League of Nations, now the United Nations.

Among the rights and duties thus accepted by Applicants, is that of submitting for adjudication by this Honourable Court a dispute concerning Respondent's conduct of its obligations toward the inhabitants of the Territory³." (Italics added and footnotes omitted.)

The first paragraph of the above-quoted passage, setting out the finding of the Court in 1962 is correct⁴. The inference which Applicants seek to draw from it, is, however, in Respondent's submission, fallacious, and, indeed, contrary to express findings of the Court. Applicants' argument may be rendered as follows:

¹ IV, pp. 541-542.

² Wright, Q., *Mandates under the League of Nations* (1930), p. 472 and *vide* Hall, H. D., *Mandates, Dependencies and Trusteeship* (1948), pp. 68-69.

³ IV, p. 542.

⁴ For Respondent's submissions regarding the effect to be given to the Judgment and Opinions; *vide* para. 14, *infra*.

- (a) "Any dispute whatever" refers to disputes concerning any and all provisions of the Mandate;
- (b) therefore States which are members of the "organized body" representing the international community" (now the United Nations) have *locus standi* to institute contentious proceedings before this Court.

This is, however, a complete *non sequitur*. The nature of the dispute cognizable by the Court (jurisdiction *ratione materiae*) does not *per se* determine which States are entitled to institute proceedings (jurisdiction *ratione personae*). In fact the question of competence to invoke the compromissory clause (i.e., jurisdiction in the latter respect) was examined by the Court in the 1962 proceedings in the light of the words "... if any dispute whatever should arise between the Mandatory and another Member of the League of Nations ..."¹ (Italics added.)

Of the majority judges who held that there still existed States competent to invoke this clause, not one decided in favour of Applicants' submission (which had also been propounded at that stage) that membership of the United Nations had, after the dissolution of the League, replaced membership of the League as the qualifying factor in regard to such *locus standi*². All these judges came to the conclusion that *locus standi* remained vested in States which were Members of the League of Nations at the date of its dissolution³. Respondent does not appreciate on what basis Applicants now seek to deduce support for a proposition apparently rejected by the Court, by drawing inferences from passages in the Judgment dealing with entirely different issues. If Applicants wish to submit that the Judgment and separate opinions were wrongly decided on the issue relating to the present effect of the words "another Member of the League of Nations", or that the findings thereon were inconsistent with the Court's view regarding the nature of disputes cognizable by the Court, it is surely their duty to the Court to do so in an open manner, and to present argument in support of their submissions.

6. At various places in the Reply, Applicants use arguments to the effect that Respondent's construction of the compromissory clause "seeks to transmute the concept of 'sacred trust' into a moral principle, rather than one of legal effectiveness"⁴. These arguments seem to be based on a suggestion that absence of compulsory jurisdiction renders an obligation in international law merely a moral one, or, conversely, that the existence of compulsory jurisdiction is an essential prerequisite to the creation of legal obligations in international law. This proposition, however, need only be stated to be refuted. Compromissory clauses constitute the exception rather than the rule in international treaties and conventions, and international law concedes legal validity and effect to treaties irrespective of whether they contain such clauses. In the mandates, moreover, the absence of compulsory jurisdiction to enforce the interests of the inhabitants of mandated territories would *a fortiori* not have affected the legal nature of the Mandatories' obligations, inasmuch as international organs,

¹ Art. 7 of the Mandate for German South-West Africa.

² *Vide* II, pp. 122, 236.

³ *Vide* analysis in II, pp. 214-256.

⁴ IV, pp. 542 and 544-545. *Vide* also Chap. II, para. 13, *supra* and Part III, sec. C, paras. 5-7, *infra*.

although not of a judicial nature, were specifically charged with the function of ensuring compliance with such obligations.

7. Applicants also seek to derive support for their contentions from the history of the drafting of the mandates¹. Certain basic misconceptions, however, underlie the whole of their argument in this regard. Thus they submit that in respect of the B and C Mandates there were two types of provisions namely:

- (a) those which "dealt with the duties of the Mandatory with respect to the well-being of the inhabitants" and
- (b) those which "gave to nationals of Members of the League of Nations certain rights, including particularly so-called 'open door' rights"².

Of these provisions, according to Applicants, both types were found in B Mandates, but only type (a) in C Mandates².

The fallacy in Applicants' argument is threefold. Firstly, the rights for which provision was made in the mandates concerned, other than in respect of the well-being of the inhabitants, were not confined to *nationals* of Members of the League of Nations, but extended in several respects to League *Members* themselves. This will be further demonstrated below.

Secondly, the method of classification is wrong in another respect also. Each and every provision of the B and C Mandates cannot be classified as being concerned either exclusively with the well-being of inhabitants or exclusively with rights or interests on the part of League Members and their nationals. As has been shown³, a considerable number of provisions have the dual aspect of being concerned with, or being capable of affecting, *both* those matters.

Although Applicants, in making the above classification, disregard this factor, they do not appear to be unaware thereof when they say in cautious terms that "... there are no organic provisions in the Mandate that do not deal *in some manner* with the interests of the inhabitants"⁴. (Italics added.) And elsewhere in the Reply⁵, they themselves quote, apparently with approval, the passage from Quincy Wright cited above, relating to the military clause in the mandates⁶.

The provisions with such a dual aspect were found in both B and C Mandates, and included those relating to military training, fortifications, traffic in arms and ammunition, supply of intoxicating liquor, the slave trade, etc.⁶ The implications of these provisions demonstrate also that Applicants' argument is fallacious in the first respect mentioned above: clearly the provisions were intended, *inter alia*, to confer rights on Members of the League themselves, in their own interest, as distinct from inhabitants' well-being and individual interests of nationals.

The third fallacy in Applicants' contention really flows from the first two. It consists of the suggestion that all the provisions of C Mandates were concerned with the inhabitants' well-being only. In fact there were a number with the dual aspect: in addition to these that have just been mentioned, there were also the provisions regarding entry, travel and

¹ *Vide* IV, pp. 542-544.

² *Ibid.*, p. 542.

³ *Vide* paras. 3 and 4, *supra*.

⁴ IV, p. 541.

⁵ *Ibid.*, p. 565.

⁶ *Vide* para. 4, *supra*.

residence of missionaries, which expressly benefited nationals of League Members, apart from also contemplating inhabitants' well-being.

8. Applicants proceed to say:

"The compromissory clause, which was first introduced by the United States in connection with the drafting of the 'B' Mandates, made clear the legal distinction between the two types of provisions ¹."

They then refer to the two paragraphs in the United States draft which read as follows:

"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 Justice . . .

The subjects or citizens of the States Members of the League of Nations may also refer claims relating to breaches of their rights conferred upon them by Articles 5, 6, 7, 7a and 7b of the Mandate to the Court for decision ²."

Applicants' comment on this draft is:

"Hence, the legal interest of a Member of the League concerning the manner in which the Mandatory was discharging its obligations under the Mandate *toward the inhabitants* was distinguished from the legal interest of a national of a Member of the League with respect to the rights granted to him ³." (Italics added.)

But the italicized words do not give a correct rendering of any concept found expressly or by implication in the terms of the draft compromissory clause. The clause distinguished between possible proceedings by League Members and by nationals of such Members: in this sense it may be said to have distinguished between their interests also. However, the further element which Applicants seek to infer from this distinction, viz., that League Members' justiciable interests would—apparently by a process of elimination—have to relate to ". . . the manner in which the Mandatory was discharging its obligations under the Mandate toward the inhabitants", is derived not from the draft clause itself but from a gloss put by Applicants on the terms thereof. This gloss appears to be based on Applicants' wrong method of classification referred to above ⁴, of the provisions of B and C Mandates, and particularly the first aspect thereof. Applicants' reasoning is presumably to the effect that, since the second paragraph of the draft clause was intended to serve the interests of nationals of Member States, there existed no other class of State interest to be protected by the first paragraph, save a suggested interest in the performance by the Mandatory of its obligations towards the inhabitants of the territory. This argument falls away if it is appreciated that in pursuance of the mandates' provisions Members of the League possessed, as States, interests of their own quite distinct from the individual interests of their nationals—as has been demonstrated above ⁴.

¹ IV, p. 542.

² Translation obtained from joint dissenting opinion of Judges Spender and Fitzmaurice: *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports* 1962, p. 319 at p. 555.

³ IV, p. 543.

⁴ *Vide* para. 7, *supra*.

Provision for such State interests was already made in the United States draft B Mandate. This draft contained, *inter alia*, clauses requiring equal opportunities in commerce and navigation for member States¹, a clause in the nature of a most-favoured-nation provision to operate in favour of member States and their subjects², an undertaking on the part of the Mandatory Power to co-operate in the execution of common measures adopted by the League of Nations with a view to preventing and combating plant and animal diseases³, as well as provisions, similar to those eventually incorporated in the mandate instruments, relating to military training, fortifications, traffic in arms and ammunition, supply of intoxicating liquor, the slave trade, etc.⁴ It is clear, therefore, that the United States draft B Mandate contemplated a substantial number of matters in respect of which Members of the League would as States obtain interests distinct from those of their nationals. The existence of such State interests provides an obvious reason for the manner in which the first paragraph of the draft compromissory clause was formulated.

9. This fallacious assumption regarding the purpose intended to be served by the first paragraph of the United States draft compromissory clause, invalidates the whole argument which Applicants seek to base on the history of the Mandate. Consequently, although their account of historical events is substantially correct, their inferences are, it is submitted, consistently wrong. Thus they point to the approval, on the same days, of a draft B Mandate containing a compromissory clause consisting of *both* the above paragraphs (although in an amended form)⁵ and a draft C Mandate, containing a compromissory clause consisting of only the first paragraph⁶. The only reasonable inferences which can be drawn from these facts would appear to be either—

- (a) that the legal interests of *nationals* of Members (as distinct from the legal interest of Members themselves) were not considered of sufficient significance in C Mandates to warrant special treatment; or perhaps only,
- (b) that the draughtsman of the C Mandate had realized that the second paragraph was redundant, whereas this was appreciated or accepted with respect to B Mandates only at a later stage⁷.

Except on the fallacious basis referred to above, there is no warrant for Applicants' conclusion that in the draft C Mandate—

“. . . the Commission inserted merely the paragraph dealing with the interest of a State Member of the League *concerning the manner in which the Mandatory discharged its obligations toward the inhabitants of the Territory*”⁸. (Italics added and footnote omitted.)

¹ II, p. 16.

² *Ibid.*, p. 17.

³ *Conférence de la Paix 1919-1920, Recueil des Actes de la Conférence, Partie VI, Traités avec les Puissances Ennemies mise en vigueur, A. Préparation de la mise en vigueur, 1^{er} Fasc.*, p. 341.

⁴ *Ibid.*, pp. 340-341.

⁵ In particular, individuals were no longer entitled to move the Court—*vide* II, pp. 17-18.

⁶ IV, pp. 543-544.

⁷ *Vide* II, p. 18.

⁸ IV, p. 544.

Applicants seek to strengthen this conclusion by reference to the deliberations of the Milner Commission during which statements were made to the effect that "the stipulations of the C Mandates [apply] only to the interests of the natives"¹. Taken literally, such statements would of course be absurd—Applicants themselves do not appear to contest that some of the provisions of C Mandates served not only the interests of the inhabitants, but also the interests of other Members of the League². However, when reading the said statements in their context, the seeming absurdity is explained. Japan was pressing for the inclusion in the C Mandates of Open-Door provisions similar to those contained in the B Mandates. Other Members of the Commission, and particularly the Chairman (Lord Milner) and Lord Robert Cecil, representing the British Empire, opposed this demand. The grounds of their opposition were that the institution of C Mandates represented a compromise, and that agreement had been reached, *inter alia*, on the principle that Open-Door provisions should not be incorporated in them³. As the Chairman said:

"... the fundamental reason for the difference between the B and C Mandates is a compromise actually accepted by the Powers; furthermore... there must be a difference between these two types of Mandates considering that agreement was reached only on condition that this distinction be recognised"⁴. (Translation.)

This distinction was expressed in Article 22 of the Covenant as follows: Whereas paragraph 5, dealing with B Mandates, provided for two types of conditions, viz., those imposed mainly for the protection of the inhabitants, and others which would "secure equal opportunities for the trade and commerce of other Members of the League", paragraph 6, dealing with C Mandates, required the imposition only of "the safeguards above mentioned in the interests of the indigenous population".

The statements on which Applicants have seized in purported support of their contention, merely pointed out, as an answer to the Japanese claim for Open-Door privileges in regard to C Mandates, that this difference existed between paragraphs 5 and 6 of Article 22. Thus the full context of Lord Cecil's statement, to which Applicants refer¹, was as follows:

"Lord Robert Cecil (British Empire) draws the attention of the Committee to the fact that Article 22 of the Covenant makes a clear distinction between the two types of Mandate, the stipulations of the C Mandates applying only to the interests of the Natives"⁵. (Translation.)

And the further passage quoted by Applicants¹ is an extract from a statement by Lord Milner during the same discussion and in exactly the same context⁶.

¹ IV, p. 544.

² *Vide* para. 7, *supra*.

³ *Conférence de la Paix 1919-1920, op. cit.*, pp. 335-337 and 353.

⁴ *Ibid.*, p. 353.

⁵ *Ibid.*, p. 336.

⁶ *Ibid.*, pp. 335-336.

Quite clearly therefore, the Milner Commission was not concerned to do any more than to determine the issue regarding Open-Door privileges in C Mandates—in particular, they did not devote any attention to the question whether and to what extent “the safeguards . . . in the interests of the indigenous population” also granted legal interests to States Members of the League of Nations. This appears clearly also from certain remarks following on the above-quoted statement by Lord Robert Cecil. The following is recorded:

“Viscount Chinda [Japan] says that the clause concerning armed forces and fortifications cannot be considered as drawn up only in the interests of the Natives and that it is the same with the clause concerning commerce. With the exception of the fact that the territories to which the C Mandate will be applicable, will become an integral part of the Mandatory State, he considers that no difference is to be made between the B and C Mandates ¹.” (Translation.)

The Chairman’s reaction is significant. He did not dispute that the military clause served interests other than those of the Natives, but is recorded as saying:

“. . . that one cannot go back on the concessions which the Dominions believe to have been made in their favour. Consequently, [I am] opposed to any restriction, except those laid down in the Covenant, being imposed on the Mandatory Power of the C type ¹.”

Indeed, after the implications of the military clause regarding Members’ interests had pointedly been brought to the attention of the Commission, plus the fact that Article 5 of the Mandate expressly imposes on the Mandatory obligations to “all missionaries, nationals of any State Member of the League of Nations”, no Member of the Commission could have considered that the C Mandates literally provided for no interests other than those of the inhabitants.

10. Applicants in the Reply advert only in passing to the most improbable aspect of their argument at present under consideration, namely that provision for a form of “judicial supervision”, should have been introduced into the mandate instruments without discussion or comment by any person, and despite absence of provision therefor in the Covenant. After referring to the minorities treaties, and to the provisions in the Covenant relating to the pacific settlement of disputes likely to lead to a “rupture” between Members of the League ², Applicants state:

“Such a general policy of reliance upon judicial process may explain the absence of any indication in the legislative history of the Mandates System that any of the parties concerned questioned the inclusion of the compromissory clause ².”

In this regard Respondent refers to what was said in the Counter-Memorial relative to the wide differences, for purposes under discussion, between the minorities treaties and the Mandate ³. There also appears to be hardly any similarity at all between the provisions in the Covenant relating to pacific settlement of disputes and the compromissory clause

¹ IV, p. 336.

² *Ibid.*, p. 546.

³ II, p. 187.

as interpreted by Applicants, i.e., as providing for a system of "judicial supervision" in respect of mandates. It is consequently difficult to accept that the two sets of provisions relating respectively to minorities, and to the pacific settlement of disputes, show "such a general policy of reliance upon judicial process" that everybody concerned would have regarded the introduction of "judicial supervision" of mandates as something not calling for any comment.

II. In the Reply, Applicants also refer several times to arguments assertedly used by Respondent "[i]n order to avoid the clear and natural meaning of the text of the compromissory clause"¹. In fact of course, Respondent argued that—

"... the word 'dispute' in the context of the compromissory clause was intended to convey... 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"². (Footnote omitted.)

Applicants do not contest this interpretation, and indeed expend some ingenuity and imagination in an attempt to prove the existence of a—

"... legal interest of a Member of the League concerning the manner in which the Mandatory was discharging its obligations under the Mandate toward the inhabitants..."³,

which clearly indicates that they accept Respondent's interpretation. The question for determination then is—

"... what rights or legal 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"⁴.

The answer to this question cannot be found in the terms of the compromissory clause, however clear they may be. Thus in referring to a jurisdictional clause almost identical to the present one, Sir Percy Spender said:

"Such a clause would normally refer to disputes which relate to rights and obligations between the parties which exist and are to be found *outside the terms of the clause itself*; disputes in which a State claims to be aggrieved by the infraction, on the part of another State, of an existing right or interest otherwise possessed by it.

Such a clause, in short, normally does not confer any additional right or interest upon a State other than a right to have recourse to the tribunal once the conditions imposed by the clause are complied with. A dispute within the meaning of such a clause normally would relate to a legal right or interest in the State claiming to be aggrieved, which resides or is to be found elsewhere than in such a clause itself. It would indeed be unusual to find in a jurisdictional clause a substantive right which itself could be made the subject of a dispute"⁵.

¹ IV, p. 545.

² II, p. 176 (para. 4).

³ IV, p. 543.

⁴ II, pp. 176-177.

⁵ *Northern Cameroons Judgment, I.C.J. Reports 1963*, p. 15 at p. 63.

In the same case, Sir Gerald Fitzmaurice referred to—

“... the universally accepted principle that, whatever the apparent generality of its language (‘any dispute whatever’ relating to ‘the provisions’ of the Agreement), a purely jurisdictional clause... cannot confer *substantive* rights¹”.

The learned Judge then continued:

“The substantive rights it refers to must be sought elsewhere, either in the same instrument or in another one. All a jurisdictional clause can do, is to enable any such rights, whatever they may be (*and if they independently exist*), to be asserted by recourse to the tribunal provided for—this provision being the real purpose of a jurisdictional clause, and all it normally does¹.”

The rights or legal interests which vested in the Members of the League individually so as to have been capable of giving rise to a “dispute”, must therefore be ascertained by an examination of the mandate provisions *other than the compromissory clause*. It is accordingly not clear in what manner Applicants suggest “the clear and natural meaning of the text” (of the compromissory clause)² or “the clear text of the clause”² assists in resolving this question.

12. Four of the points made by Respondent regarding the nature of rights or legal interests which were vested in Members of the League individually, are singled out for reply by Applicants². Respondent does not propose repeating the arguments advanced in this regard in the Counter-Memorial³. Two of Applicants’ statements, however, call for comment:

(a) Applicants say that Respondent advanced the thesis “... that Respondent’s obligations toward the inhabitants are political or technical, rather than legal obligations”².

As has already been shown⁴, this statement is incorrect.

(b) Applicants refer to an argument used by Respondent to the effect that—

“... if its obligations toward the inhabitants were covered by the clause, the Permanent Court would have been in a position to overrule decisions of the Council approving the manner in which the Mandatory performed its obligations; the drafters could not have intended this result²”. (Footnote omitted.)

Applicants’ comment on this argument is as follows:

“This also begs the issue. It assumes that the obligations of the Mandatory were not legal in nature, hence that they were for the Council to decide rather than for the Court⁵.”

Respondent does not understand this line of reasoning.

Do Applicants suggest that if the “obligations of the Mandatory were... legal in nature” the Council could have had no power to take decisions regarding alleged violations of the Mandate? If so, their suggestion is clearly untenable, and indeed in conflict with a contention advanced in

¹ *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 115.

² *IV*, p. 545.

³ *II*, pp. 177-193.

⁴ *Vide* Chap. II, paras. 11-13, *supra*.

⁵ *IV*, pp. 249-254.

another part of the Reply¹, where Applicants submit that the Permanent Mandates Commission—

“... developed and interpreted legal principles, based upon the Mandate instrument and the Covenant, and applied such legal principles to specific situations²”.

Or do Applicants suggest that, if there was no jurisdiction on the part of a Court to overrule the Council's decisions in this respect, then the “obligations of the Mandatory” could not be “legal in nature”? Again the suggestion would be untenable, as has been seen³.

13. For the reasons set out above, it is submitted that Applicants' arguments regarding the scope and purpose of the compromissory clause should be rejected. Further support for Respondent's contentions in this regard is found in some of the opinions in the *Northern Cameroons* case⁴. The Trusteeship Agreement in that case contained a compromissory clause which, as has been noted⁵, was almost identical with the one at present under consideration. Although the majority of the Court found it unnecessary to consider the scope of the clause⁶, some of the separate concurring opinions interpreted it in the same way as contended for by Respondent in the present case. See, in particular, the opinions of Sir Percy Spender⁷, Sir Gerald Fitzmaurice⁸ and Judge Morelli⁹.

III. THE EFFECT OF THE 1950 ADVISORY OPINION AND THE 1962 JUDGMENT ON THE PRELIMINARY OBJECTIONS

14. In the Reply, Applicants place considerable reliance on the Advisory Opinion of 1950, and on the 1962 Judgment on the Preliminary Objections¹⁰. Whilst not disputing the value of the said Judgment as precedent, Respondent has submitted that—

“... 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 therefor¹¹”.

A similar principle was submitted to apply in the case of Advisory Opinions¹².

Although the argument now presented to the Court relating to the compromissory clause is largely the same as that adduced for the purposes of the Preliminary Objections, the issues dealt with and decided by the Court in this respect in 1950 were substantially different¹³.

In regard to the differences between the issues in 1950 and 1962,

¹ IV, pp. 249-254.

² *Ibid.*, p. 253.

³ *Vide* para. 6, *supra*.

⁴ *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 15.

⁵ *Vide* para. 11, *supra*.

⁶ *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 15 at p. 38.

⁷ *Ibid.*, pp. 76-91.

⁸ *Ibid.*, pp. 111-117 and 119-127.

⁹ *Ibid.*, pp. 142-149. *Sed contra* Judge Badawi (p. 152) and Judge Bustamante (pp. 157-162).

¹⁰ IV, pp. 540, 542 and 546.

¹¹ II, p. 103.

¹² *Ibid.*, pp. 98-102. *Vide* also Chap. II, para. 2, *supra*.

¹³ *Vide* I, pp. 368-373, 393-394.

reference may be made to the following passage from the joint dissenting opinion of Judges Spender and Fitzmaurice on the Preliminary Objections:

“Some of the issues now arising (those connected with the third and fourth preliminary objections) did not arise at all, and could not have arisen, in the course of the 1950 proceedings, which were not, as these are, contentious proceedings. As regards one of the central issues arising in 1950, namely that of the status of the Mandate as an international *institution*, the Court in 1950 did little more than find, on various grounds, that the dissolution of the League of Nations had not caused the Mandate to lapse, and that despite this dissolution, the Mandate was still in force. But the Court did not specifically address itself to the question of the basis upon which the Mandate was in force nor, in particular, to whether it was still in force *as a treaty or convention*. In the dispositive of its 1950 Opinion, the Court did no more, in relation to the present context, than state that by reason of Article 37 of the Statute, the present Court was substituted for the former Permanent Court; but both there, and in the very brief references to Article 37, and to Article 7 of the Mandate, made in the body of the Opinion, the Court seems to have assumed the existence of the necessary conditions without going into that matter. The little that was said provides no real assistance, and this was necessarily so since no jurisdictional issue of any kind was before the Court in 1950. Assumptions apparently made without any reasoning as to, or consideration of, the specific underlying issues involved, in an Advisory Opinion directed chiefly to other matters not involving any concrete jurisdictional question, clearly do not constitute a sufficient basis on which to found jurisdiction in subsequent contentious proceedings in which these issues are now directly raised ¹.”

Applicants are consequently wrong in suggesting that the arguments now raised, had all been presented to and decided by the Court in 1950 ². They are also wrong in their specific statement that the issue relating to the scope and purpose of the compromissory clause (which was in substance comprehended in the third Preliminary Objection) —

“. . . raises the question, *twice presented to and adjudged by the Court*: what are the provisions of the Mandate, as to which disputes concerning interpretation or application are properly referable to the Court? ³” (Italics added.)

It should also be recalled that the decision on the Preliminary Objections was reached by a very narrow majority, and, in the words of Judge Tanaka,

“[t]he formal authority of the Court’s decision must not be maintained to the detriment of its substantive authority. Therefore, it is quite inevitable that, from the point of view of the conclusion or reasoning, the minority in one case should become the majority in

¹ *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319 at p. 472.

² *IV*, pp. 522 and 546.

³ *Ibid.*, p. 540.

another case of the same kind within a comparatively short space of time¹."

IV. CONCLUSION

15. As demonstrated above, Respondent's argument regarding the compromissory clause in Article 7 of the Mandate, is in material respects not controverted by Applicants in the Reply. Where Applicants do dispute particular aspects thereof, it is submitted, for the reasons set out above, that their arguments do not detract at all from the validity of Respondent's contentions.

¹ *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6 at p. 65.

PART III

Section A

GENERAL

I. Introductory

1. In the present Part of the Rejoinder, Respondent will deal with Applicants' argument regarding the issues raised by their Submissions 3 and 4, i.e., the issues arising from alleged violations of Article 2, paragraph 2, of the Mandate¹. Respondent's treatment of these issues occupied the major part of the Counter-Memorial, viz., Books IV to VII and Book VIII, section A, all of which are to be read with Book III and the Supplement to the Counter-Memorial. As in the Counter-Memorial², the present issues will be dealt with on the assumption, for purposes of argument, that the Mandate is still in existence.

Before proceeding to a consideration of the merits of matters raised in the Reply relevant to the present issues, it will be necessary to deal with a number of topics of a general or introductory nature. The present section will be devoted to such purpose, commencing, in the next paragraph, with an analysis of the legal basis of Applicants' charges as expounded in the Reply. As will be shown³, the basis of Applicants' charges as set out in the Reply has undergone a substantial change from that contained in the Memorials, and Applicants have in truth sought to introduce a new cause of action regarding their submissions under consideration.

II. The Legal Basis of Applicants' Charges

2. In its Counter-Memorial, Respondent contended that Article 2, paragraph 2, of the Mandate, read in the light of the Covenant, required Respondent to use its powers of administration and legislation for the purpose of promoting to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory. The consequence of this was, in Respondent's submission, that the particular method to be employed towards achieving this purpose was left to Respondent's discretion, and that legislative or administrative action could therefore violate Article 2, paragraph 2, only if actuated by a motive or intent other than one directed to such purpose⁴. An analysis of the Memorials likewise led Respondent to the conclusion that—

“ . . . 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

¹ *Vide* IV, Reply, Chaps. IV and V, read with parts of Chap. III. *Vide* also Part II, Chap. I, para. 2, *supra*.

² *Vide* II, p. 381.

³ *Vide* particularly paras. 2-8, *infra*.

⁴ *Vide* II, pp. 384-392.

pursued actions ostensibly within its powers for a purpose not authorized thereby¹.

3. Applicants, however, in their Reply strenuously contest the correctness of the above conclusion². They say that—

“Respondent’s misinterpretation of the import of the Submissions reflects its fallacious assumptions regarding the nature of the Mandate and of the character of Respondent’s duties thereunder³.”

In so saying they probably have in mind their construction of Respondent’s contention as being that “Article 2, paragraph 2, does not . . . create or embody obligations of a legal nature, but is . . . a merely political or moral exhortation”⁴.

As demonstrated above⁵, what is “fallacious” is not Respondent’s “assumptions regarding the nature of the Mandate”, but rather Applicants’ representations regarding the nature of Respondent’s contention.

4. In fact, Applicants say, their Submissions 3 and 4 are based on the following conclusion of fact set out in the Memorials:

“ . . . By law and by practice, the Union has followed a systematic course of positive action which inhibits the well-being, prevents the social progress and thwarts the development of the overwhelming majority of the people of South West Africa. In pursuit of this systematic course of action, and as a pervasive feature of it, the Union has installed and maintained the policy and practice of *apartheid*.”

Under *apartheid*, the status, rights, duties, opportunities and burdens of the population are determined and allotted arbitrarily on the basis of race, color and tribe, in a pattern which ignores the needs and capacities of the groups and individuals affected, and subordinates the interests and rights of the great majority of the people to the preferences of a minority. Since this section of the Memorial is concerned with the record of fact, it deals with *apartheid* as a fact and not as a word. It deals with *apartheid* in practice, as it actually is and as it actually has been in the life of the people of the Territory, and not as a theoretical abstraction . . .⁶” (Italics added by Applicants.)

On the basis of the above-quoted conclusion of fact, Applicants then reaffirm their Submissions 3 and 4 as meaning—

“ . . . that Respondent’s policies and practices, as set forth in Chapter V of the Memorials and in this Chapter IV of the Reply, characterized and described by the terms ‘*apartheid*’ or ‘separate development’, have violated, and do violate, Respondent’s obligations toward the inhabitants of the Territory in terms of Article 2, paragraph 2 of the Mandate⁷”.

This is not particularly illuminating, since *apartheid* itself is defined in the above-quoted conclusion of fact as a deliberately discriminatory and

¹ *Vide* II, p. 395. The analysis is found at pp. 392-395.

² IV, pp. 255-257.

³ *Ibid.*, p. 255.

⁴ *Ibid.*, p. 477.

⁵ *Vide* Part II, Chap. II, paras. 11-14, *supra*.

⁶ IV, pp. 256-257.

⁷ *Ibid.*, p. 257.

oppressive policy. And Applicants indeed do not abjure their allegations of deliberate and intentional misconduct on the part of Respondent. On the contrary, they say:

"Applicants' characterizations of Respondent's policies and objectives by terms such as 'deliberately', 'knowingly', and the like, clearly are intended as inferences and conclusions reasonably flowing from Respondent's course of conduct, which is set forth explicitly and fully in the *Memorials*. Such characterizations reflect a universally accepted axiom that, in the absence of evidence to the contrary, the predictable consequences of conduct are presumed to be intended¹." (Footnote omitted.)

5. In an argument directed towards showing that Respondent was aware of the nature of their charges, as set out in the quotation immediately above, Applicants state that they used the words "deliberate" and "systematic" interchangeably in their *Memorials*². "Systematic" is defined in the *Shorter Oxford English Dictionary* as follows:

"Arranged or conducted according to a system, plan, or organized method; involving or observing a system . . . Qualifying nouns of unfavourable meaning: Regularly organized (for an evil purpose), or carried on as a regular (and reprehensible) practice³."

The only "system, plan or organized method" referred to by Applicants, was the "*pattern* which ignores the needs and capacities of the groups and individuals affected, and subordinates the interests and rights of the great majority of the people to the preferences of a minority"⁴, to which reference was made in Applicants' definition of apartheid. And immediately after the passage from the *Memorials* quoted above⁵, Applicants said that—

"... *apartheid*, as actually practiced 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 service⁶". (Italics added save for the word "*apartheid*".)

It was this alleged "pattern" or "deliberate and systematic process" to which Applicants referred when they said: "The record as a whole reveals the *deliberate design* that pervades the several parts"⁷ (italics added), and—

"The Union has not only failed to promote '*to the utmost*' the material and moral well-being, the social progress and the development of the people of South West Africa, it has failed to promote such material and moral well-being and social progress in any significant degree whatever. On the contrary, *efforts of the Union*

¹ IV, p. 257. *Vide* also p. 587.

² IV, p. 257.

³ Onions, C. T. (Ed.), *The Shorter Oxford English Dictionary*, 3rd ed. (1959), p. 2116.

⁴ Italics added.

⁵ *Vide* para. 4, *supra*.

⁶ I, p. 109.

⁷ *Ibid.*, p. 161.

*have in fact been directed to the opposite end*¹." (Italics added save for the words "to the utmost".)

In sum, the "system, plan or organized method" to which Applicants referred by the use of the word "systematic", was the policy which they called apartheid and which they defined as involving a "pattern" or "deliberate and systematic process" or "deliberate design" of oppressive discrimination against the majority of the population for the benefit of the minority. Consequently "systematic" could indeed appropriately be used interchangeably with "deliberate". And Respondent, if following a pattern or system directed not at promotion of the interests of the inhabitants of the Territory, but "to the opposite end", would clearly be guilty of "... bad faith ... in the sense that it has pursued actions ostensibly within its powers for a purpose not authorized thereby"².

6. The only point made by Applicants in the passage of the Reply now under consideration³, is consequently that the element of deliberation or intention (or bad faith in the sense aforesaid) which they alleged in their Memorials, was and is sought to be established by inference from Respondent's alleged course of conduct, in accordance with the universally accepted axiom "that, in the absence of evidence to the contrary, the predictable consequences of conduct are presumed to be intended"⁴.

This point was indeed, as Applicants assert⁴, fully appreciated by Respondent. It was by reason of its appreciation of the nature of Applicants' case that Respondent presented the Court with full and accurate information to demonstrate that no inference of the kind alleged by Applicants could be drawn, but that, on the contrary, the Court should conclude that Respondent's policies were, and are, directed at the upliftment and progress of all the inhabitants of the Territory. Or, to apply the terminology of Applicants' "universally accepted axiom", Respondent brought "evidence to the contrary" to demonstrate that its intent was not such as was sought to be presumed—partly in that its conduct was different from what was alleged, and partly in that a different perspective was cast upon consequences, real and prospective, and their predictability, by a fuller knowledge of background, setting and circumstances.

However, in the very next breath, so to speak, Applicants say:

"As is pointed out herein⁵, so much of the evidence as is adduced by Respondent for the purpose of demonstrating its 'good faith', or that it is [not?] 'actuated by an intention ... other than one to promote the interests of the inhabitants', would be immaterial even if it did ... tend to show such 'good faith', or the absence of such 'intention'⁶." (Italics added and footnotes omitted.)

In other words, Applicants now contend that Respondent can commit a violation of Article 2, paragraph 2, of the Mandate even if all its legislative and administrative acts were and are motivated by a bona fide intention to promote the interests of the inhabitants of the Territory. In the next

¹ I, p. 108.

² *Vide* para. 2, *supra*.

³ *Vide* IV, pp. 256-257 and para. 4, *supra*.

⁴ IV, p. 257.

⁵ Referring back, it must be noted, to the very page on which they deal with their "universally accepted axiom".

⁶ IV, p. 260.

succeeding paragraphs Respondent endeavours to ascertain the true purport of Applicants' contention in this respect.

7. As noted above¹, Applicants contend that Respondent's policy of apartheid contravenes Article 2, paragraph 2, of the Mandate. Since, however, they define apartheid as a discriminatory policy deliberately imposed to oppress the Natives for the benefit of the European inhabitants, their contention in this regard still involves an enquiry into Respondent's motives or intentions. And when referring to the policy of apartheid, Applicants usually render it clear that the reference is to apartheid as defined by them².

However, in addition to persisting with these factual charges of deliberate oppression—which constituted the only possible legal foundation for Applicants' case, as advanced in the Memorials, in support of their Submissions 3 and 4³—Applicants introduce a far-reaching innovation in their Reply. This consists of a contention which is apparently to be understood as meaning that a mere differentiation between ethnic groups, without any intention to benefit one group at the expense of another, would constitute a violation of Article 2, paragraph 2, of the Mandate.

Thus they say:

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

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

In a later passage, they refer to—

"... the policy of *apartheid*, which in itself violates Article 2, paragraph 2 of the Mandate, *by reason of the fact that it allots the status, rights, duties, opportunities and burdens of the population on the basis of membership in a 'group', or colour, rather than on the basis of individual quality, capacity or potential*⁵". (Italics added, save for the word "*apartheid*".)

And they state that—

"Applicants... insist that the allotment, by governmental policy and action, of rights and burdens on the basis of membership in a 'group', irrespective of individual quality or capacity, is impermissible discrimination, outlawed by legal norms well established in the international community⁶."

¹ *Vide* para. 4, *supra*.

² *Vide*, e.g., IV, p. 260.

³ *Vide* para. 2, *supra*.

⁴ IV, p. 269.

⁵ *Ibid.*, p. 475.

⁶ *Ibid.*, pp. 492-493. *Vide* also, e.g., pp. 271 and 404.

In spite of referring, in this passage and in others in the Reply, to "legal norms" in the plural, Applicants ascribe a specific content to, and make a real attempt at establishing the existence of, only one norm, which, in their contention, is said to impart a definable minimum content to all the other more vaguely conceived "norms"¹; and so their contention under consideration rests in truth only on this one alleged norm². This is called by Applicants the "generally accepted international human rights norm of non-discrimination or non-separation". Apart from providing the definable minimum content of the other "norms", the existence and "virtually universal acceptance" of this alleged norm is said to give "a concrete and objective content to Article 2, paragraph 2, of the Mandate"³.

As regards the content of the norm, Applicants say:

"... the terms 'non-discrimination' or 'non-separation' are used in their prevalent and customary sense: stated negatively, the terms refer to the absence of governmental policies or actions which allot status, rights, duties, privileges or burdens on the basis of membership in a group, class or race rather than on the basis of individual merit, capacity or potential: stated affirmatively, the terms refer to governmental policies and actions the objective of which is to protect equality of opportunity and equal protection of the laws to individual persons as such"⁴.

Applicants then devote considerable space to an attempt at showing that Article 2 of the Mandate must be interpreted to contain this asserted "norm of non-discrimination or non-separation"⁴, the general acceptance of which, they say, "... is of decisive relevance to the Cases at bar"⁵.

8. It will be manifest that, by advancing their contention and argument, as outlined above, in regard to this alleged "norm of non-discrimination or non-separation", Applicants have in the Reply introduced a new cause of action in attempted support of their Submissions 3 and 4, and have manifested a major shift from the stand taken in that regard in the Memorials. Possibly Applicants have realized, in the light of the exposition given in the Counter-Memorial, that their charges of deliberate oppression are not supported or supportable by the facts. Possibly there is political motivation for an attempt at seeking a ruling from the Court to the effect that any differentiation on the basis of membership in an ethnic group, whether for a purpose of upliftment or for a purpose of oppression, violates the Mandate and "is impermissible discrimination, outlawed by legal norms well established in the international community". Possibly both these factors or more, are at work. Be that as it may, that there has been a major shifting of ground is beyond question.

It is true that by reference to their alleged "norm of non-discrimination or non-separation" Applicants can plausibly contend that evidence tending to show an absence of any intention on Respondent's part other than one to promote the interests of the inhabitants, would be immate-

¹ IV, pp. 511-512.

² The significance, if any, of other undefined "norms and standards" referred to by Applicants is considered below. (Sec. C, paras. 32-39, *infra*.) For present purposes, any such "norms and standards" may, however, be disregarded.

³ IV, p. 493.

⁴ *Ibid.*, pp. 493-512.

⁵ *Ibid.*, p. 510.

rial¹. If indeed Article 2 of the Mandate must be read as containing an absolute prohibition on "the allotment, by governmental policy and action, of rights and burdens on the basis of membership in a 'group'"², Applicants would sufficiently establish a violation of the Article by proving such an allotment, irrespective of whether it was intended to operate, or does in fact operate, for the benefit of the inhabitants of the Territory. The legal position would then be similar to that pertaining, for instance, to the prohibition in Article 3 of the Mandate on the supply of intoxicating spirits and beverages to the Natives. And since Respondent's policy is avowedly based to a considerable extent on an allotment of rights and obligations on the basis of membership of the different population groups in the Territory, there would exist no dispute of fact between the Parties. The position would then indeed be, as stated by Applicants, that "the decisively relevant facts concerning Applicants' Submissions 3 and 4 are undisputed"³.

But all this would be so only with reference to the case now sought to be built by Applicants on the alleged "norm of non-discrimination or non-separation". None of it would be or is true of Applicants' case as advanced in the Memorials.

9. It follows, from what was said in the preceding paragraph, that the only issue between the Parties regarding Applicants' alleged "norm of non-discrimination or non-separation" is a legal one, viz., whether such a norm can be read into Article 2 of the Mandate by a process of interpretation. And since Applicants' Submissions 3 and 4 are both said to be based on the existence of this norm⁴, it might be thought a sufficient answer to these submissions for Respondent to demonstrate the untenability of the reasoning whereby Applicants now seek to introduce this norm into the Mandate. However, the ambiguous and confused formulation in the Reply of the basis (or bases) of Applicants' case, does not make it clear that Applicants have indeed now decided to abandon their charge of bad faith (in the sense of pursuing an unauthorized purpose) which emerged so clearly from the Memorials. In particular the following features militate against such abandonment:

- (a) As has been noted⁵, when first joining issue with Respondent on the legal basis of Submissions 3 and 4, Applicants do not discard their allegations of improper motives on the part of Respondent, but merely advert to the method by which they seek to prove such motives.
- (b) If Applicants base their case solely on the alleged legal norm of non-discrimination or non-separation, then the "decisively relevant facts concerning Applicants' Submissions 3 and 4" would indeed be, as they say, undisputed. However, Applicants have introduced in their Reply a mass of factual discussion and averment, of a most highly controversial content, with a view to supporting their said

¹ *Vide* para. 6, *supra*.

² *Vide* IV, pp. 492-493; and para. 7, *supra*.

³ *Ibid.*, p. 260. *Vide* also pp. 221 and 262-263.

⁴ IV, p. 269, as quoted in para. 7, *supra*, and the statements to the effect that the "decisively relevant facts concerning Applicants' Submissions 3 and 4 are undisputed", to which reference was made in para. 8, *supra*.

⁵ *Vide* paras. 4-6, *supra*.

submissions. This treatment of the facts indeed takes up considerably more space than the whole of the Memorials¹.

It is difficult to imagine the purpose for which this material is introduced unless Applicants consider that there is an issue of fact to be determined between the Parties. And the only basic factual issue in this regard is the one relating to Respondent's motive or state of mind. This consideration gains increased weight when one considers the nature of the deductions sought to be drawn from the tendered material—a matter which will be dealt with in the next subparagraph.

- (c) Applicants themselves describe the purpose of their treatment of the various aspects of Respondent's policy with which they deal², as being to show that—

“... Respondent's policy and practice with respect to each of these aspects of life, is [sic] directed toward the primary end of assuring an adequate 'Native' labour supply in the Territory, particularly in its 'White' Police Zone (comprising more than seventy per cent of the Territory), subject always to the condition that, in the words of Respondent's Prime Minister, 'There is no place for him [i.e. 'the Bantu'] in the European community above the level of certain forms of labour'³”.

Applicants further allege that Respondent has rendered its obligations under the Mandate “subject to the prejudices and attitudes of a small minority”⁴ of the population. They summarize their contentions as follows:

“In sum, under *apartheid*, the accident of birth imposes a mandatory life sentence to discrimination, repression and humiliation. It is, *accordingly*, in violation of Respondent's obligation, as stated in Article 2, paragraph 2, of the Mandate, to promote to the utmost the well-being and social progress of the inhabitants⁵.” (Italics added save for the word “*apartheid*”.)

It appears explicitly from these passages that Applicants still rely on the allegation that Respondent's policy is directed at the unauthorized purpose of oppressing the Natives for the benefit of the European inhabitants of the Territory, and that their factual discussion is introduced for the purpose of establishing such allegation.

10. For the reasons set out in the preceding paragraphs, it would then appear that Applicants' case, as now formulated in the Reply, rests on two bases (apparently invoked in the alternative, although nowhere clearly so stated or explained), viz.,

- (a) the suggested legal norm of non-discrimination or non-separation, in terms of which any differentiation between groups in the allotment of rights and burdens is said to be a contravention of Article 2 of the Mandate, and,

¹ Chapter IV of the Reply, dealing with “Respondent's violations of its obligations towards the inhabitants of the Territory”, comprises 220 pages whereas the Memorials each contain only 170 pages of text.

² I.e., relating to education, the economy, political rights, and security of the person, rights of residence and freedom of movement.

³ IV, p. 272.

⁴ *Ibid.*, p. 273. *Vide* also p. 274.

⁵ *Ibid.*, p. 274.

(b) some basis (the exact nature and source of which are not indicated) which requires proof of the factual allegation that Respondent's policies are actuated by a motive other than one to promote the interests of the inhabitants of the Territory.

Since Applicants' case appears to have this twofold character, Respondent will deal separately with each aspect thereof¹. Before doing so, however, there are some general aspects of Applicants' case to be considered in the next succeeding paragraphs.

III. Applicants' Case regarding the Coloured and Baster Groups

11. Applicants say that Respondent has been guilty of an "unwarranted misinterpretation"² and a "strained construction"³ of their Submissions 3 and 4 "... as excluding certain groups or individuals in the Territory designated ... 'Coloureds' or 'Basters' "⁴.

Accordingly, Applicants now "reaffirm" that "Submissions 3 and 4 do not exclude, and may not reasonably be interpreted as excluding from their ambit any inhabitants whatever of the Territory"⁴.

It will be recalled that both the said submissions incorporated by reference a paragraph of the Memorials⁵ commencing as follows:

"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 whatever⁵." (Italics added save for the words "to the utmost".)

This paragraph concluded:

"The grim past and present reality in the condition of the 'Natives' is unrelieved by promise of future amelioration. The Mandatory offers no horizon of hope to the 'Native' population⁵."

In fact, the whole Chapter V of the Memorials⁶ rendered it abundantly clear that Applicants' entire case was based on the allegation that Respondent had violated its *duty to promote the interests of all the inhabitants* by oppressing *some of them* (i.e., the Natives), for the benefit of others (i.e., the Europeans)⁷.

12. In view of the formulation of Applicants' submissions in the Memorials, as summarized in the immediately preceding paragraph, the attitude now adopted in the Reply amounts to an attempt to alter and extend the nature of their charge, apparently to bring it into conformity with their newly introduced legal norm of non-discrimination or non-

¹ In secs. B and C hereof respectively.

² IV, p. 257.

³ *Ibid.*, p. 258.

⁴ *Ibid.*, pp. 258-259.

⁵ I, p. 162.

⁶ Including the said para. 190, as well as para. 189, which was also incorporated by reference in Submission 3. *Vide* para. 12, *infra*.

⁷ *Vide* II, pp. 382-383.

separation. Possibly this may also be a belated attempt to divert attention from Applicants' very evident pre-occupation with Native interests, in consonance with the general trend of Black African Nationalism. Be that as it may, Applicants try to show that their case, as originally formulated in the Memorials, has not undergone a change in this respect. Their attempts in this direction are, it is submitted, singularly unimpressive.

Thus, in the only explanation they offer for their "numerous explicit references to 'Natives'"¹, they start off by pointing out that the word "Natives", as used by them, was always in quotation marks². The relevance of this is not readily apparent. From the Memorials³ it was quite clear that Applicants used quotation marks for the terms "Natives", "Whites", "Asiatics" and "Coloureds" simply because, as explained by them, these were the terms employed in a census report, "reflecting the standard usage of the Union Government", in referring "to the population as divided into four groups"⁴. What further significance they seek to attach to it, is not understood, particularly since Applicants do not appear to dispute that the Natives constitute a distinct and identifiable population group in South West Africa⁴.

They proceed in their Reply to refer to the fact that the Memorials were said to "... deal with apartheid in practice, as it actually is and as it actually has been in the life of *the people of the Territory*, and not as a theoretical abstraction"⁵. They refrain, however, from quoting the very next sentence in the Memorials, in which there was set out what they alleged apartheid actually to be in the life of the people of the Territory, viz.,

"... 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"⁶. (Italics added save for the word "*apartheid*".)

Applicants further point to the use of the expression "the inhabitants of the Territory" in Submissions 3 and 4, which expression, they say, was employed "without qualification or restriction"¹. However, the alleged breaches of Article 2, paragraph 2, of the Mandate were defined in the said submissions by reference, respectively, to "the respects set forth in Chapter V of this Memorial and summarized in Paragraphs 189 and 190 thereof"⁶, and "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"⁷. Respondent has already pointed out⁸ that Chapter V of the Memorials, including the two paragraphs mentioned, was directed towards showing

¹ IV, p. 258.

² *Ibid.*, p. 257.

³ I, pp. 109-110.

⁴ *Ibid.*, p. 109.

⁵ IV, p. 258 (italics added by Applicants); I, p. 108.

⁶ Submission 3, I, p. 197.

⁷ Submission 4, *ibid.*

⁸ *Vide* para. 11, *supra*.

that Respondent was violating its obligations in so far as the *Natives* were concerned.

13. In a remarkable attempt to show that "Respondent was not in fact misled by Applicants' emphasis on 'Natives' ", Applicants point to Respondent's own formulation of the *duties* sought to be implied by Applicants in the general provisions of Article 2 of the Mandate. Applicants' suggestion in this regard appears to be as follows:

- (a) Respondent was aware of Applicants' contention that Respondent was *under a duty* to promote the interests of *all the inhabitants of the Territory*.
- (b) Consequently when Applicants alleged that this duty had been violated, Respondent must have been aware that they were charging a violation in respect of all the inhabitants, and not only in respect of the Natives to whom the charge was in terms confined ¹.

The lack of logic in this reasoning is so apparent as to require no further comment.

14. After commencing with an averment of "unwarranted misinterpretation" on the part of Respondent, followed by an allegation of "strained construction" and a charge of disingenuousness in pretending to be misled by Applicants' formulation of their charges, Applicants finally conclude with the somewhat naive statement that—

"[i]n the light of Applicants' explicit interpretation and reaffirmation of the meaning of their own submissions, it is respectfully submitted that amendment thereof is unnecessary and unwarranted ²".

15. It remains to consider the effect of Applicants' "explicit interpretation and reaffirmation" of the meaning of Submissions 3 and 4 on the issues as they now appear from the Reply. In view of the twofold basis on which Applicants now present this part of their case ³, regard will be had to both bases. The first basis involves the allegation that any differentiation between groups constitutes, as a matter of law, a contravention of Article 2 of the Mandate. In so far as this newly introduced part of Applicants' case is concerned (as distinct from the case originally alleged in the Memorials), it would be correct to say that Applicants' charge does not allege a contravention in respect of any particular population group.

The second ⁴ part of Applicants' case is, however, still based on an alleged deliberate process of discrimination against the Natives for the benefit of the Europeans ⁵. Although Applicants do in passing refer to some instances of differential measures applying to Coloured people ⁶, they do not, in so far as the Coloureds are concerned, make an attempt to support a charge, as they do in the case of the Natives, of a process of deliberate oppression for the benefit of the Europeans. In regard to this part of their case, Applicants consequently do not appear to have changed their ground to any considerable extent in the Reply. At most the purpose of their "reaffirmation" in this respect appears to be to contend that—

¹ IV, p. 258.

² *Ibid.*, p. 259, footnote 1.

³ *Vide* para. 10, *supra*.

⁴ In effect an alternative, although nowhere so put by Applicants.

⁵ *Vide* paras. 4-6, *supra*.

⁶ *Vide*, e.g., IV, pp. 363 and 417.

"... the policy of *apartheid* is injurious to the genuine interests and welfare of the *entire* population, including those whose benefit and privilege are purported to be served thereby ¹".

In more tangible terms (and in the light of their definition of *apartheid*) ² this submission appears to mean no more than that Respondent's policies which are deliberately oppressive of the Natives, are for that reason also detrimental to other groups. Such limited averment (if any) as may now have been introduced in the Reply regarding the additional element of detriment to groups other than the Natives, however, hardly affects the essence of the dispute between the Parties, inasmuch as Respondent contends, and has always contended, that its policies are designed to be beneficial to the population as a whole (including the Natives), whereas the primary element in the second basis of Applicants' case remains the allegation of deliberateness (or bad faith in the sense of an unauthorized purpose) which is said to underlie Respondent's conduct *towards the Natives* ³.

A good example of the manner in which the present averment of detriment to groups other than Natives is advanced as being dependent entirely on the premise of oppressive conduct towards the Natives, is to be found in the following passage regarding education:

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

This passage in itself will be considered in the portion of this Rejoinder dealing with education. For present purposes it suffices for Respondent to point out that there is no introduction by Applicants at this stage—as could indeed hardly have been permissible—of an *independent new charge* alleging deliberate oppression of groups other than Natives.

In the result it remains unnecessary for Respondent to burden the record with an exposition of its policies, measures and active programmes specifically directed towards the economic and social upliftment and progress, and the political advancement, of the Coloured people and of the Rehoboth Basters. As in the Counter-Memorial ⁵, Respondent will refrain from presenting a systematic or complete survey in regard to them, and references to them will be only for the purpose of explanation or example, or to answer some specific point or allegation made by Applicants.

¹ *Vide e.g.*, IV, p. 258.

² *Vide* para. 4, *supra*.

³ *Vide* paras. 4 and 10, *supra*.

⁴ IV, p. 364.

⁵ II, p. 383.

IV. The Significance To Be Attached to Reports and Resolutions of United Nations Organs and Agencies

16. A further alleged misconstruction of Applicants' Submissions 3 and 4 is said to appear from Respondent's attitude regarding the significance to be attached to reports and resolutions of the United Nations, its agencies and organs, which were referred to in Chapter II of the Memorials. The said Chapter, headed "History and Background of the Dispute", contains a summary of events in the United Nations relative to South West Africa up to the year 1960, and concludes with the words:

"Having concluded after fourteen years of fruitless efforts to obtain compliance on the part of the Union with the Mandate, that its dispute with the Union has not been, and cannot be, settled by negotiation, the Applicant has deemed it necessary to institute the present proceedings, pursuant to Article 7 of the Mandate ¹."

It is to be noted that the account of events is arranged in a chronological order, and not according to subject-matter, although the material relates to various issues in this case, such as the existence or otherwise of accountability towards the United Nations ²; questions as to unilateral incorporation of the Territory or modification of its international status ³; and the general welfare of the inhabitants ⁴.

In view of the heading, contents and method of presentation of the said chapter, it can hardly be surprising that Respondent gained the impression that its purpose was to establish the existence of a dispute between the Parties, and no more (except possibly, the further factor that such dispute could not be settled by negotiation). This view was fortified by the fact that in their specific charges Applicants in many cases relied on specific United Nations reports and resolutions relevant to the particular subject under consideration ⁵, and did not purport to rely on Chapter II of the Memorials in general.

Applicants now say that Respondent's reading of Chapter II of the Memorials, dealing, as has been noted, with a chronological review of events related to a number of the present issues ⁶, reflects a "third misconstruction by Respondent of *Submissions 3 and 4*" ⁷ (italics added), as a result of which the relevancy of the said reports and resolutions was wrongly disputed by Respondent ⁸.

17. Applicants' attitude shows that there is in this respect a matter of substance requiring decision by this Court, viz., the significance to be attached to reports and resolutions of the United Nations, its agencies and organs, particularly with reference to the issues arising from Appli-

¹ I, p. 87.

² *Vide*, e.g., *ibid.*, pp. 58, 59-60, 65 and 75.

³ *Ibid.*, pp. 58, 71 and 74.

⁴ *Ibid.*, pp. 64, 69, 70-71, 73-74, 75-77, 79 and 83-84.

⁵ *Vide* II, p. 3.

⁶ Which would include those arising from Applicants' Submissions 1, 2, 3, 4, 5, 7, 8 and 9—*vide* I, pp. 197-198.

⁷ The first two being as to the charges being based on an allegation of bad faith—paras. 2-10, *supra*—and as to the charges excluding the Coloureds and Basters—paras. 11-15, *supra*.

⁸ IV, p. 259.

cants' Submissions 3 and 4¹. In this regard Respondent's submission was twofold. Firstly, Respondent contended:

"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 it²."

Applicants' reply to this contention is that their Submissions 3 and 4 do not "merely request the Court to adjudge and declare concerning allegations of fact", but "request the Court to adjudge and declare that the policies and practices of which Applicants complain, are, as a matter of law, in violation of Respondent's obligations as stated in Article 2 of the Mandate"³. And since the issues now before the Court are identical with the issues before the United Nations, so it is contended, the reports and resolutions of the said body "are highly relevant to the Court's judicial function in adjudging the legality of Respondent's administration of the Territory, and are entitled to great weight and respect as authority thereon"³.

18. Respondent is not quite clear as to what is meant by Applicants' contention summarized in the previous paragraph. In this connection regard must be had to the dual nature of Applicants' case.

In its first aspect, Applicants rely on an alleged norm of non-discrimination or non-separation. If they must be read as contending that resolutions and reports of United Nations organs and agencies may be invoked to establish the existence of such a norm in the Mandate, such a contention is to be considered in conjunction with Applicants' attempt, in Chapter V of the Reply⁴, to establish such existence, and will be dealt with by Respondent at the appropriate place⁵.

The second leg of Applicants' argument is based on an alleged system of deliberately oppressive conduct on Respondent's part. The legal proposition inherent in this submission (*viz.*, the proposition that policies designed to oppress the Native inhabitants of the Territory for the benefit of the Europeans would constitute violations of the Mandate) is not contested, and if Applicants would like, for some reason of their own, to quote United Nations resolutions in support thereof, Respondent would have no objection. But it rather appears as if Applicants now wish to use these reports and resolutions as authority on the crucial question at issue, namely whether Respondent's policies are indeed deliberately directed at the purpose alleged by Applicants. This is a question involving contested facts and disputed inferences therefrom, on which resolutions of a political body, which has in the nature of things never attempted a judicial enquiry into the matter, cannot be of any assistance to the Court.

Perhaps Applicants wish to rely on these reports and resolutions in an even more general and vague manner, *viz.*, as authority for the views expressed in some of them that Respondent has violated the Mandate,

¹ Although as indicated above, it arises also with respect to other issues.

² II, pp. 3-4.

³ IV, p. 259.

⁴ *Vide* IV, pp. 502-504.

⁵ *Vide* sec. B, *infra*.

whether in relation to the charges actually made by Applicants in the present proceedings or in other respects. If that is so, it is even more difficult to see how such reports and resolutions could be relevant or of assistance. Apart from the obvious irrelevancy of views expressed on charges not made in these proceedings, all views expressed in them must again rest on the authors' judgment and assessment of the law and of facts, and the same considerations therefore apply as above.

It is to be noted that the Special Committee for South West Africa itself apparently did not consider that United Nations reports and resolutions could be of any value to the Court as "authority" or otherwise. Thus on 27 November 1961 the Chairman of the said Committee—

"... pointed out that the Court would consider the matter [i.e. the present proceedings] on a purely juridical level, while the United Nations was called upon to take a decision of a political nature. The General Assembly had already adopted resolutions concerning South West Africa at its previous session, namely, at a time when the International Court of Justice had had before it the complaints of Ethiopia and Liberia. It was his view that whatever decision the General Assembly made would have a political bearing and would not influence the Court in its decisions¹."

19. The second ground on which Respondent denied the usefulness of reports and resolutions of the organs and agencies of the United Nations, was the inaccuracy and unreliability of the factual statements, assumptions or inferences on which they were based². Applicants have not attempted to support the accuracy or reliability of such reports and resolutions, but state instead that Respondent's criticism was "ungenerous" in view of Respondent's "obdurate denial of access of United Nations committees and agencies to the Territory"³. It does not seem material to determine for present purposes whether, as Applicants suggest, the inaccuracy or unreliability in question can be attributed to a lack of opportunity for inspection and investigation *in situ*, or whether (as Respondent contends) there are other or additional reasons therefor. Whatever the reasons, the point of Respondent's criticism remains valid, namely that this Court cannot rely for reasonable accuracy on United Nations reports and resolutions cited by Applicants in support of their case.

20. Finally, Applicants make the rather cryptic statement:

"The sole exception [i.e., to the 'obdurate denial of access'], that of the ill-starred 1962 visit to the Territory of the Chairman and Vice-Chairman of the Special Committee for South West Africa . . . as is shown by the circumstances attending the visit and its aftermath, stands as the exception which proves the rule³."

Respondent is not sure what rule is alleged to be proved by this exception, but would suggest that in view of the circumstances set out above⁴, the moral to be drawn from this "ill-starred visit", and partic-

¹ *G.A., O.R., Sixteenth Sess., Fourth Comm., 1225th Meeting, 27 Nov. 1961, para. 25, p. 429.*

² *II, p. 4.*

³ *IV, p. 259, footnote 2.*

⁴ *Vide Part I, para. 4, and Annex to Part I, supra.*

ularly its "aftermath", is that an objective and impartial assessment of the facts of South West Africa does not fall within the duties which the Special Committee for South West Africa set itself, thus once more emphasizing the impossibility of placing any reliance on the reports of this Committee.

V. References to Other Countries, including the Applicant States and South Africa

21. In the course of the Counter-Memorial Respondent had occasion to refer to laws, measures, policies and circumstances in other countries, including the two Applicant States. Such reference was, as stated by Respondent, purely by way of example, comparison or illustration—to show the similarity of problems found elsewhere in the world, and to compare the various methods designed to solve them, or to show the contrast between conditions in South West Africa and other territories, necessitating differences of approach in the framing of policies of legislation and administration, or to render possible a measure of comparison of standards of achievement in comparable circumstances¹.

In view of the serious charges made by Applicants, one would have thought that they would welcome an opportunity to compare circumstances in the Territory with those pertaining elsewhere on the Continent of Africa. On the contrary, however, one finds their attitude expressed in the following words:

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

It is submitted that this contention, and the reasoning on which it is sought to be based, are untenable, for the reasons set out in the succeeding paragraphs.

22. Although it is true that there is no longer any other African State subject to mandate, Respondent does not appreciate why comparison with other States would thereby be rendered "irrelevant". In Africa one finds (or found) mandated territories, trusteeship territories, non-self-governing territories, and independent States. In respect of the three first-mentioned categories, there exist (or existed) legal obligations in terms of the Covenant, Charter, and relevant mandate or trusteeship instruments requiring a promotion of the interests of the inhabitants of the territories concerned. Although, in some respects, these obligations differ *inter se*, the broad objective surely shows sufficient correspondence to render reference to methods employed in attempting to achieve that objective both relevant and useful for present purposes—particularly in regard to an issue whether Respondent, in adopting similar methods in regard to comparable situations and problems, has acted arbitrarily and with oppressive intent, or in good faith with a view to promoting well-being and progress. As far as independent States, such as the two Applicants, are concerned, Respondent has always assumed that they also, although

¹ II, pp. 382-383.

² IV, p. 364.

not legally obligated thereto, in practice set themselves the objective to "promote to the utmost the material and moral well-being and social progress" of the persons under their sway. For that reason Respondent considered that their problems, and methods adopted towards solving them, might throw light on the issue at present before the Court—again particularly as regards good or bad faith. If Applicants were to assure this Court that they do not in fact set themselves the objective referred to, there would be no further point in referring to circumstances in their countries, save perhaps on the question of the genuineness of their concern for the well-being and progress of the inhabitants of South West Africa. In the absence of such assurance Respondent will not, however, lightly accept that its assumption was wrong as regards Applicants, and in any event cannot believe that it was wrong with respect to other independent States in Africa.

23. Applicants' second reason for contending that practices in other States in Africa are irrelevant, is that no other State practises the policy of apartheid. This attitude would be pertinent in so far as Applicants rely on the existence of an alleged legal norm, which would by itself render Respondent's admitted policies violative of the Mandate. As has been noted¹, Applicants' case based on the alleged existence of such a norm requires no further evidence at all, inasmuch as it entails that any official differentiation on the basis of membership in a group would constitute a contravention of the Mandate.

The position regarding the second basis of Applicants' case is, however, totally different. In this aspect of the case, Applicants request the Court to find by inference from the facts that the policies to which Applicants refer as apartheid are designed to oppress the Native inhabitants of the Territory for the benefit of the Europeans². For the purposes of this submission it would seem highly relevant to compare the problems, attempted solutions, and standards of achievement in comparable territories and States in Africa. And it was, indeed, on this aspect of the case only (which was the only aspect advanced in the Memorials)³ that Respondent introduced the comparisons in the Counter-Memorial. The mere fact that certain aspects of Respondent's policies are not found elsewhere on the Continent of Africa (at least not under the name of apartheid) would appear not to preclude a comparative survey, but, on the contrary, to necessitate it, so that the Court may have a proper setting within which to determine and evaluate the real nature, objectives and implications of such aspects. In fact, Applicants themselves make copious reference in their Reply to circumstances in other territories⁴.

24. Allied to the topic dealt with in the preceding paragraph, is the subject of references to circumstances and policies in South Africa itself. In this regard, Respondent said:

"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

¹ *Vide* para. 8, *supra*.

² *Vide* paras. 4-6, *supra*.

³ I.e., as regards Submissions 3 and 4.

⁴ *Vide*, e.g., IV, pp. 398-403, 426-430 and 451-457.

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 . . . ¹

Applicants do not contest the propriety of this approach, but, on the contrary, appear to agree therewith ².

Any further references in the Rejoinder to policies and actions in South Africa, will therefore be made for the same purposes and on the same limited basis as indicated in the Counter-Memorial.

VI. Summary of Certain General Topics

25. Finally, before proceeding to deal separately with the two bases relied upon by Applicants in this part of their case, it may be useful to note a feature which is common to Applicants' treatment of a number of general topics considered in the previous paragraphs. It has been pointed out that Applicants formulate their charge of bad faith (in the sense of pursuing an unauthorized objective, viz., an oppressive intent) as one to be proved by inference from the circumstances ³. It is instructive to see what circumstances they regard as relevant for this purpose. Firstly they say that—

“ . . . so much of the evidence as is adduced by *Respondent* for the purpose of demonstrating its 'good faith', or that it is [not?] 'actuated by an intention . . . other than one to promote the interests of the inhabitants', would be immaterial even if it did . . . tend to show such 'good faith', or the absence of such 'intention' ⁴”. (Italics added.)

However, when it comes to Applicants' treatment of the subject, evidence is tendered in an attempt to establish that—

“ . . . Respondent's policy and practice . . . is (sic) directed toward the primary end of assuring an adequate 'Native' labour supply in the Territory, particularly in its 'White' Police Zone . . . subject always to the condition that . . . 'There is no place for him [i.e., "the Bantu"] in the European community above the level of certain forms of labour' ⁵”.

Secondly, Applicants say that “ . . . Respondent's frequent references to practices in other African States . . . are wholly irrelevant to the present proceedings . . . ” ⁶.

Nevertheless one finds in the Reply lengthy parts devoted almost exclusively by Applicants to practices in other African States ⁷.

Thirdly, although apparently not prepared to defend the reliability and accuracy of United Nations reports and resolutions ⁸, Applicants nevertheless submit that such reports and resolutions—

¹ II, p. 383. *Vide* also pp. 457, 461, 476 and 487.

² *Vide*, e.g., IV, p. 313 and p. 443, footnote 6.

³ *Vide* paras. 4-6, *supra*.

⁴ IV, p. 260. *Vide* paras. 6 and 8, *supra*.

⁵ *Ibid.*, p. 272. *Vide* para. 9 (c), *supra*.

⁶ *Ibid.*, p. 364. *Vide* para. 21, *supra*.

⁷ *Ibid.*, pp. 398-403, 426-430 and 451-457; *vide* para. 23, *supra* and footnote 1, p. 118.

⁸ *Vide* para. 19, *supra*.

“... are highly relevant to the Court’s judicial function in adjudging the legality of Respondent’s administration of the Territory, and are entitled to great weight and respect as authority thereon¹”.

To summarize, Applicants ask this Court to determine an issue of fact by—

- (a) ignoring all evidence tendered by Respondent in respect of the said issue;
- (b) giving consideration solely to the evidence tendered by Applicants; and
- (c) giving effect to the reports and resolutions of a political body which (apart from any other criticism) admittedly has not attempted or had an opportunity for a judicial enquiry into the facts.

In short, Applicants ask this Court for a complete abdication of its judicial functions.

¹ IV, p. 259. No wonder then that Applicants’ reference to practices in the other African States is also confined to the perspective “as viewed by the United Nations”. *Vide* caption at IV, pp. 398, 426 and 451.

Section B

APPLICANTS' ALLEGED NORM OF NON-DISCRIMINATION OR NON-SEPARATION

1. Reference has been made to the two bases on which Applicants now present their case in support of their Submissions 3 and 4¹. As indicated, Applicants in regard to the first basis rely on the existence in the Mandate of a so-called "international human rights norm of non-discrimination or non-separation"². For convenience, Respondent here repeats the definition of this alleged norm as contained in the Reply:

"... the terms 'non-discrimination' or 'non-separation' are used in their prevalent and customary sense: stated negatively, the terms refer to the absence of governmental policies or actions which allot status, rights, duties, privileges or burdens on the basis of membership in a group, class or race rather than on the basis of individual merit, capacity or potential: stated affirmatively, the terms refer to governmental policies and actions the objective of which is to protect equality of opportunity and equal protection of the laws to individual persons as such"³.

If this alleged norm exists as part of the Mandate, it would have the consequence that Respondent's admitted policies of differentiation would constitute a contravention of the Mandate even if the Court were to hold that such policies were intended to enure, and did in fact enure, to the benefit of the population as a whole⁴. Consequently the sole issue between the Parties on this aspect of the case is a legal one, viz., whether or not the Mandate contains such a norm.

2. Although, as noted, this norm is on occasion said by Applicants to underlie their whole case regarding alleged violations of Article 2, paragraph 2, of the Mandate⁴, it nevertheless first reared its head in the Reply. No reference whatever was made to this alleged norm in the Memorials, in which the charges and their development were based on completely different premises⁵. The fact that this argument is thus raised as an afterthought does not, of course, by itself establish that it must necessarily be devoid of merit. Consequently Respondent will, in the succeeding paragraphs, examine Applicants' "norm of non-discrimination or non-separation" in order to determine what, if any, validity their contention in that regard may be said to have.

3. Applicants' Submissions 3 and 4, with which the present part of the Rejoinder is concerned, allege certain violations of Article 2, paragraph 2, of the Mandate. If the "norm of non-discrimination or non-separation" were to be relevant at all to this subject, it would accordingly have to satisfy both the following basic requirements, viz.,

¹ *Vide* sec. A, para. 10, *supra*.

² *IV*, p. 493.

³ *Vide* sec A, para. 8, *supra*.

⁴ *Ibid.*, para. 9, *supra*.

⁵ *Ibid.*, paras. 2-8, *supra*.

- (a) it would have to be a norm of a legal nature, i.e., it would have to lay down an obligation legally binding on Respondent in international law; and
- (b) it would have to be embodied in the provisions of Article 2, paragraph 2, of the Mandate.

Any norm which fails to comply with both the above requirements cannot be successfully invoked by Applicants in the present proceedings.

That the norm must be a legal one, is obvious. In the words of Rosenne, this Court "... is a court of justice and not of ethics or morals or of political expediency. Its function is to 'declare the law' " ¹.

But equally important is the requirement that no suggested legal norm can be relied upon in the present proceedings unless it is contained in Article 2 of the Mandate. This requirement flows not only from the nature of the charges in fact made by Applicants (i.e., their Submissions 3 and 4 referred to above), but also from the wording of the compromissory clause within which all their complaints must fall in order to be justiciable, and which provides for compulsory jurisdiction only in respect of disputes "... relating to the interpretation or the application of the provisions of the Mandate" ².

4. Applicants appear to recognize the necessity for satisfying the requirements set out in the preceding paragraph. Indeed, their whole case under this head rests on the proposition that Article 2, paragraph 2, of the Mandate is to be *interpreted* as containing, or being subject to, this norm.

Thus they say:

"The existence and virtually universal acceptance of the norm of non-discrimination or non-separation ... gives [sic] a concrete and objective *content* to Article 2, paragraph 2, of the Mandate ³." (Italics added.)

The "sources" which "comprise the generally accepted norm" are said to "... impart specific *content* and objective *meaning* to Article 2, paragraph 2, of the Mandate ... " ³. (Italics added.) Applicants submit that—

"... *by undertaking* a legal commitment to promote the welfare of the inhabitants of South West Africa 'to the utmost', Respondent *has obligated* itself, at the very least, to carry out ... the ... minimum basic norm of non-discrimination ... " ⁴. (Italics added.)

The method employed by Applicants in seeking to establish the existence of the norm is described by them as "applying current standards in *interpreting* obligations, such as those *embodied in* the Mandate" ⁵. (Italics added.)

As will be demonstrated in the succeeding paragraphs, interpretation of the Mandate does not produce the result contended for by Applicants, but the very reverse thereof.

5. In regard to the concept "interpretation", reference may be made

¹ Rosenne, S., *The International Court of Justice* (1957), p. 62.

² Art 7 of the Mandate for German South-West Africa.

³ IV, p. 493.

⁴ *Ibid.*, p. 511.

⁵ *Ibid.*, p. 513. *Vide* also pp. 514 and 516.

to the following pronouncements of eminent former Members of this Court:

"It is the intention of the authors of the legal rule in question—whether it be a contract, a treaty, or a statute—which is the starting-point and the goal of all interpretation. It is the duty of the judge to resort to all available means—including rules of construction—to discover the intention of the parties . . . ¹"

and—

"There is, however, a principle of international law which is truly universal. It is given equal recognition in Lima and in London, in Bogota and in Belgrade, in Rio and in Rome ². It is the principle that, in matters of treaty interpretation, the intention of the parties must prevail ³."

6. The intention which is embodied in a document by its author is a fact which existed at a particular point of time, namely when the document was drawn up or executed: at other times the author's intention may or may not have been the same. Since it is the intention (real or supposed) *as embodied in the document*, which must be ascertained for the purpose of interpretation, it follows as a matter of logic that the document must be interpreted to bear the meaning (and thus express the intention of its author) which it would have borne *as at the stage of its execution*. This rule (called the Principle of Contemporaneity) has been defined as follows:

"The terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded ⁴."

The learned author of the above passage points out that the Principle of Contemporaneity in the interpretation of treaties is really a particular application of a wider doctrine (the doctrine of inter-temporal law) which pertains to cases where the rights of States depend on or derive from a legal situation which existed at some time in the past, or on a treaty concluded at some comparatively remote date ⁵. The effect of this doctrine is stated as follows:

"It can now be regarded as an established principle of international law that in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed at the time, and not as they exist today. In other

¹ Lauterpacht, H., "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", *B.Y.B.I.L.*, Vol. XXVI (1949), pp. 48-85 at p. 83.

² *Sed quaere* whether in Monrovia and in Addis Ababa—*vide* para. 29, *infra*.

³ *Asylum, Judgment, I.C.J. Reports 1950*, p. 266 at p. 320, per Judge Read. For a number of further statements to the same effect by judges of this Court and the Permanent Court, as well as by recognized scholarly authorities on international law, reference may be made to pp. 21-23 of the Oral Proceedings on the Preliminary Objections herein.

⁴ Fitzmaurice, Sir Gerald, "The Law and Procedure of the International Court of Justice, 1951-1954: Treaty Interpretation and other Treaty Points", *B.Y.B.I.L.*, Vol. XXXIII (1957), pp. 203-293 at p. 212.

⁵ *Ibid.*, p. 225 and Fitzmaurice, Sir Gerald, "The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law", *B.Y.B.I.L.*, Vol. XXX (1953), pp. 1-70 at p. 5.

words, it is not permissible to import into the legal evaluation of a previously existing situation, or of an old treaty, doctrines of modern law that did not exist or were not accepted at the time, and only resulted from the subsequent development or evolution of international law ¹." (Footnotes omitted.)

The practical importance of this rule in interpreting relatively old treaties, is expressed as follows:

"Not to take account of contemporary practice and circumstances, and to interpret such treaties according to modern concepts, would often amount to importing into them provisions they never really contained, and imposing on the parties obligations they never actually assumed ²."

The Principle of Contemporaneity is applied by this Court. Thus, in the *Morocco* case, it was said:

"The Treaty of 1836 replaced an earlier treaty between the United States and Morocco which was concluded in 1787. The two treaties were substantially identical in terms and Articles 20 and 21 are the same in both. Accordingly, in construing the provisions of Article 20—and, in particular, the expression 'shall have any dispute with each other'—*it is necessary to take into account the meaning of the word 'dispute' at the times when the two treaties were concluded* ³." (Italics added.)

In the *Minquiers* case, Judge Carneiro stated:

"I do not regard the Treaty of Paris as a treaty of frontiers. To do so would be to fall into the very error which we have been warned against: *an instrument must not be appraised in the light of concepts which are not contemporaneous with it* ⁴." (Italics added.)

More recently the Court said that—

"... the validity of a treaty concluded as long ago as the last quarter of the eighteenth century... should not be judged upon the basis of practices and procedures which have since developed only gradually ⁵."

And in his dissenting opinion in the *Barcelona Traction* case, Judge Armand-Ugon referred to—

"... two elementary rules of international law, namely that concerning the interpretation of clear texts and that concerning the 'historical' interpretation of treaties according to the meaning they had at the time when they were concluded... ⁶."

¹ Fitzmaurice, Sir Gerald, "The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law", *B.Y.B.I.L.*, Vol. XXX (1963), pp. 1-70 at p. 5.

² Fitzmaurice, Sir Gerald, "The Law and Procedure of the International Court of Justice, 1951-1954: Treaty Interpretation and other Treaty Points", *B.Y.B.I.L.*, Vol. XXXIII (1957), pp. 293-293 at p. 226.

³ *Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952*, p. 176 at p. 189.

⁴ *Minquiers and Ecrehos, Judgment, I.C.J. Reports 1953*, p. 47 at p. 91.

⁵ *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 6 at p. 37.

⁶ *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6 at p. 140.

7. The above principles in essence do no more than emphasize certain considerations of ordinary logic in the application of the fundamental principle of consent as the essential condition for creating international treaty obligations. In the light of their significance, Respondent will, in the next paragraphs, consider whether any norm as contended for by Applicants was contained in Article 2 of the Mandate as at the date of its execution, and, if not, whether there was any subsequent insertion of such norm into the Article. At a later stage attention will be given to Applicants' contentions which appear to conflict with the above principles of interpretation¹.

8. The States engaged in settling the issues arising from the First World War were imbued with a philosophy which placed more emphasis on the rights of national groups to self-realization than has been prevalent in certain spheres of the international scene in more recent times, when a right on the part of a majority to impose its values on all minority groups within a more-or-less arbitrarily defined territory is often accepted as inevitable, if not indeed desirable. Immediately after the First World War it was, however, completely contrary to the spirit of the times to sanction any measures directed at destroying national or cultural groups by their forced absorption into larger or stronger groups. This emerges clearly, *inter alia*, from some of the pronouncements of President Wilson. In his celebrated Fourteen Points, he included the following aims:

"A readjustment of the frontiers of Italy 'along clearly recognizable lines of *nationality*' (Point 9). 'The freest opportunity of *autonomous development* to the *peoples* of Austria-Hungary, which it was not intended to destroy' (Point 10) . . . 'undoubted security of life and an absolutely unmolested opportunity of *autonomous development*' to other *nationalities* now under Turkish rule . . . (Point 12) . . . 'A free, open-minded, and absolutely impartial adjustment of all colonial claims . . . the interests of the *populations* concerned must have equal weight with the equitable claims of the Government whose title is to be determined' (Point 5)²." (Italics added.)

These principles were summarized by him as follows:

"An evident principle runs through [the Fourteen Points] . . . It is the principle of justice to all *peoples* and *nationalities*, and *their right* to live on equal terms of liberty and safety with one another, whether they be strong or weak³." (Italics added.)

A propos of the above passages, it may in passing be noted that the word "peoples" means "nations" or "races"⁴ and not, as Applicants aver, ". . . the individual inhabitants comprising the *population*"⁵.

And on 11 February 1918 President Wilson laid down four principles as essential to a permanent peace, the fourth of which reads:

"All *well-defined national elements* shall be accorded the utmost satisfaction that can be accorded them without introducing new or

¹ *Vide* paras. 27-35, *infra*.

² Temperley, H. W. V., *A History of the Peace Conference of Paris* (1920), Vol. I, p. 193.

³ *Ibid.*, p. 399.

⁴ *Vide* Onions, C. T. (Ed.), *Shorter Oxford English Dictionary*, 3rd ed. (1959), p. 1468.

⁵ *IV*, p. 275.

perpetuating old elements of discord and antagonism¹." (Italics added.)

9. The principles mentioned in the previous paragraph underlay much of the work of the Peace Conference. They resulted in the splitting up of the empires of the defeated Central Powers (Germany, Austria-Hungary and the Ottoman Empire) into a number of autonomous States inhabited in the main by people of one nationality only. The creation of purely national States was not, however, always feasible, with the consequence that most of the new States or redelimited defeated powers contained *minorities* of foreign extraction. The solution adopted with regard to these minorities was, in keeping with the times, not to encourage their assimilation with the majority, but rather to *protect their existence as separate groups*. This then was the background to the large number of minorities provisions which were created in the years after the First World War. Apart from protecting the individual members of minorities against oppression or unfair discrimination, the minorities provisions also maintained the rights of members in regard to matters such as the use of their language, the establishment of charitable, religious, social and educational institutions² and the provision of facilities by the State. The provisions regarding the latter aspect have been summarized as follows:

"In any town or district where a considerable number of a linguistic minority was resident, adequate facilities were to be provided by the State to ensure that in primary schools, instruction should be given to the children of such nationals through the medium of their own language. In addition provisions, were included for the equitable appropriation of public funds by the state, municipality or other budget, for the educational, religious or charitable institutions of minorities in towns and districts where a considerable proportion of the residents belonged to racial, religious or linguistic minorities²."

In general, it has been said that the minorities provisions ensured for minorities "... suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics"³.

10. It is obvious that the principle of equality between majority groups and minority groups necessarily involved a *differentiation* in the treatment of these respective groups, or of their individual members, *on the very basis of membership in such a group*. In the words of the Permanent Court:

"... 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"

It is interesting to note the opinion of Sir Hersch Lauterpacht on the

¹ Temperley, *op. cit.*, p. 195.

² Ganji, M., *International Protection of Human Rights* (1962), p. 47.

³ *Minority Schools in Albania, Advisory Opinion, 1935, P.C.I.J. Series A/B, No. 64*, p. 17.

⁴ *Ibid.*, p. 19.

change in philosophy that has occurred in some quarters in regard to the protection of the nationality rights of minorities. He says:

"It was a sign of political and moral retrogression in international relations after the Second World War that that aspect of the protection of minorities received less attention than after the termination of the First World War. That retrogression found expression, among others, in the fact that even in the Universal Declaration of Human Rights—a document which did not impose legal duties upon any State—no room was found for the positive recognition of what must be regarded as a basic human right of the members of national minorities ¹."

II. The principle of protecting the identity of national groups, with differential treatment of various groups where their "situation and requirements are different" ², was also basic to the mandate system, in which it came to be combined with the further vital principle of trusteeship or guardianship for the "peoples" and "communities" concerned, which were considered "not yet able to stand by themselves under the strenuous conditions of the modern world" ³. Thus Article 22 (3) of the Covenant provided that the various mandates should differ, *inter alia*, "according to the stage of development of the people". And the same approach emerges from the specific provisions relative to and contained in the various mandates.

In the case of the A Mandates, where the "communities" concerned had "reached a stage of development where their existence as independent nations [could] be provisionally recognized" ⁴, the protection of the various national groups within the confines of one mandated territory took the form of measures, similar to the minorities provisions, regarding the language, educational, religious and social rights of such groups ⁵.

In the B and C Mandates, the stage of development of the Native peoples was such as to require for them certain elementary precautions which were not considered necessary for the more advanced inhabitants of the territories concerned. Reference was made in the Counter-Memorial to specific instances in the Mandates where special measures *applying only to the Natives* were stipulated, e.g., in regard to intoxicating liquor, militarization, Native land, etc. ⁶ Reference was also made to comments by the Permanent Mandates Commission and some of its members showing their appreciation of the *necessity for differentiating* between various groups ⁷. That these comments represented an expression of the

¹ Lauterpacht, H., *International Law and Human Rights* (1945), p. 353. By way of contrast, it may be instructive to note that Pope John XXIII, in his Encyclical Letter *Pacem in Terris*, 1963, under the heading "The treatment of minorities" (pp. 25-26), stressed the "demands of justice" in the treatment of "these lesser peoples", particularly as regards betterment concerning "their language, the development of their natural gifts, their ancestral customs, and their accomplishments and endeavours in the economic order", while at the same time admonishing such groups against an inclination "to exalt beyond due measure anything proper to their own people".

² *Minority Schools in Albania* case, para. 10, *supra*.

³ Art. 22 of the Covenant of the League of Nations.

⁴ *Ibid.*, Art. 22 (4).

⁵ *The Mandates System—Origin—Principles—Application* (1945), pp. 28-32.

⁶ II, p. 416 (para. 39).

⁷ *Ibid.*, pp. 417-418.

basic approach of the Commission towards the administration of Native groups, appears from the questionnaire drawn up by them in 1921 to assist Mandatories in preparing their annual reports. Article XI of this questionnaire read as follows:

"What are, generally speaking, the measures adopted to ensure the moral, social and material welfare of *the natives*? (Measures to maintain the interests, rights and *customs* of *the natives*, their participation in public service, native tribunals, etc.)¹." (Italics added.)

It was in the nature of things impossible to adopt appropriate "[m]easures to maintain the interests, rights and *customs* of the *natives*" in South West Africa (and in many other mandated territories) without differentiating between the widely divergent groups that inhabited the Territory.

12. It also appears from the facts surrounding the grant of the Mandate to Respondent that the authors of the Mandate must have expected the application of a policy of differentiation in South West Africa. As pointed out in the Counter-Memorial², it was generally known that South Africa applied a policy of differential treatment in respect of the various population groups within its own borders, and that similar problems in South West Africa would probably give rise to similar policies there. Indeed, General Smuts, in an address to the Peace Conference, stressed the desirability of such a course³. This fact did not, however, deter the Powers concerned from granting the Mandate to Respondent. On the contrary, as has been noted⁴, the desirability of applying Respondent's Native policy to the Territory was one of the factors which influenced at least some of the delegates to form the opinion that South West Africa could "be best administered" under the laws of South Africa as an integral portion of its territory⁵. In this regard, reference has been made⁶ to utterances by Dr. G. L. Beer, the alternate United States member of the Commission on Mandates, and at that time chief of the colonial division of the American delegation at the Conference, as well as by President Wilson himself.

13. In accordance with the generally prevalent philosophy of maintaining the identity of separate national, linguistic and cultural groups, and of guardianship and trusteeship of less developed peoples, other Mandatories also applied policies involving various forms and degrees of differentiation. This may be seen for instance in the policy of indirect rule, which has been defined as follows:

"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

¹ *The Mandates System—Origin—Principles—Application* (1945), p. 53.

² II, pp. 414-417.

³ *Ibid.*, p. 415.

⁴ *Ibid.*, p. 416.

⁵ *Vide* Art. 22 (6) of the Covenant of the League of Nations.

⁶ II, p. 416 (para. 38).

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."

It will be apparent that this policy of indirect rule necessarily involved differentiation regarding the various Native groups within a territory, *inter se* as well as in relation to the more developed groups such as Europeans or Asians. As noted in the Counter-Memorial ², one finds that indirect rule was practised in each of the three British mandated territories, Tanganyika, British Cameroons, and British Togoland. And, although not by that name, the principles underlying the policy were applied also in each of the other three African mandated territories, Ruanda-Urundi, French Cameroons and French Togoland. Similarly the policy found application, under its name or by way of its underlying principles, in a large number of other territories. In keeping with this approach, there was up to the Second World War no participation by Africans in the central legislative and executive organs of any of the mandated territories, as was also shown in the Counter-Memorial ³.

14. 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 other mandated territories (and other territories) in Africa in a spirit of guardianship, trusteeship and paternalism, also in regard to legal systems, land tenure, residential facilities, aspects of economic policy, control of population movement, education, and other aspects of government ⁴.

15. To summarize, the mandate system, by its very terms as well as its underlying philosophy, according to the contemplation of its authors, the policy of the Permanent Mandates Commission, and the practical application of the system by Mandatory Powers, permitted and indeed required differentiation among various ethnic, linguistic or cultural groups, and, consequently, among their individual members, on the very basis of membership in such a group.

16. In their Reply Applicants do not attempt to deal with Respondent's Submissions summarized in the preceding paragraph, or with the factual and other material adduced in the Counter-Memorial in support thereof. They do indeed have a section headed "League of Nations Period" ⁵, but the aspects referred to there fall very far short of establishing any norm of non-separation. Indeed, their references to questions or comments by the Permanent Mandates Commission or some of its members, in so far as they are relevant at all, demonstrate that the Commission was concerned to satisfy itself that there was no *unfair*

¹ Lord Hailey, *An African Survey* (1938), p. 432, as quoted in II, p. 436.

² *Ibid.*, p. 436.

³ *Ibid.*, p. 433.

⁴ *Vide* II, p. 436 (para. 10) and, e.g., III, pp. 86-89, 201-209, 218-219 and 257-266, 374-375. This feature also appears clearly from the annual reports submitted by Mandatories to the Permanent Mandates Commission.

⁵ IV, pp. 493-497.

discrimination against Natives, but that *differentiation* was regarded as inevitable and desirable.

For instance, the discussion during the Third Session of the Permanent Mandates Commission which is referred to in the Reply ¹, shows that the members of the Commission were not opposed to the principle of the separation between the races, but were concerned to determine whether Respondent's particular policy was advantageous to the Native population. Applicants quote only the questions asked by members of the Commission but not the answers given thereto, nor the opinion finally expressed by the Commission. That the Commission was satisfied with the replies given to the questions put by it and quoted by Applicants, appears from the special observations made by the Commission on the Administration of South West Africa at the end of the same session. The Commission expressed the 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 ”².

The same applies to other instances of discussions in the Permanent Mandates Commission referred to by Applicants ³. In no instance was there any objection to or questioning of the principle of differentiation, but measures and policies were scrutinized with a view to determining their effect on the interests of the Native population. Respondent may add that the expression “discriminatory and repressive labor legislation”³ is Applicants' own, and was not used by the Commission or any of its members.

The general import of the minorities provisions, which are also relied upon by Applicants ⁴ has been dealt with above ⁵. In particular it has been noted that these provisions were concerned with protecting the group identity of minorities, and that this necessarily involved a measure of differentiation between the majority and minority groups. Article 6 of the Albanian agreement ⁶ was typical of provisions made in this regard ⁷.

Finally, the Declaration of International Rights of Man of the Institut de Droit International was, as stated by an authority quoted by Applicants, “. . . open . . . to the objection that it has no juridical value . . .”⁸ and the same may be said of other matters referred to by Applicants ⁸, thus obviating the necessity for enquiring whether they in truth involved any norm or principle of “non-separation” as defined by Applicants. As has been shown, such a norm was certainly not subscribed to, or applied, in the mandate system.

¹ IV, p. 495.

² *P.M.C., Min.*, IV, p. 154. *Vide* II, p. 418.

³ IV, p. 495, passage covered by footnotes 3-6.

⁴ *Ibid.*, pp. 495-496.

⁵ *Vide* paras. 9-10, *supra*.

⁶ IV, p. 496.

⁷ *Vide* para. 9, *supra*.

⁸ IV, p. 497.

Applicants indeed do not suggest that by the end of the League of Nations period the asserted "norm of non-discrimination or non-separation" had already inhered in the Mandate. On the contrary, they concede that the features referred to by them were "*of insubstantial juridical value*", and contend merely that they were "*forerunners of*" (or "*fore-shadowed*") the "norm of official non-discrimination"¹. (Italics added.)

17. The clear, and apparently admitted, position then is that at all times up to the end of the League of Nations period, the Mandate did not contain, and was not subject to, any "norm of non-discrimination or non-separation". If the Mandate were now to be held to be subject to such a norm, this situation could have come about only by the subsequent insertion of something not originally included in it: in other words, by some process of amendment.

The force of this consideration is rendered the more apparent by the feature, demonstrated above, that the Mandate actually *prescribed* a policy of differentiation in certain respects, and specifically *contemplated* it as desirable or at least permissible in others². In truth, therefore, the introduction of the alleged norm of non-discrimination or non-separation would involve not only the addition of something not initially included, but the reversal of principles and explicit provisions originally contained, in the Mandate—in other words, an extremely far-reaching amendment.

18. In order to establish any amendment to the Mandate, Applicants would have to point to some act which would satisfy the following two basic requirements:

- (a) It must be an act having legal consequences for Respondent, i.e., altering Respondent's legal rights and/or duties. This necessarily involves that Respondent's consent to such act must be proved.

In the words of Judge Read:

"It is a principle of international law that the parties to a multi-lateral treaty, regardless of their number or importance, cannot prejudice the legal rights of other States³."

- (b) It is not, however, sufficient for the act to have such legal consequences. It must in addition affect Respondent's obligations *under the Mandate*. The basic reasons for this requirement have been referred to above⁴. This subject will be considered in more detail at a later stage⁵.

19. The material adduced by Applicants for the purpose of establishing the existence of the alleged norm of "non-discrimination or non-separation" was not avowedly directed at proving an amendment to the Mandate. As noted above⁶, Applicants purport to rely on an "interpretation" of the Mandate, and not an amendment thereof. Applicants have consequently also failed to present any argument with a view to showing that the requirements set out in the previous paragraph have been satisfied. Nevertheless, inasmuch as amendment offers the only method

¹ IV, p. 497.

² *Vide* paras. 11-15, *supra*.

³ *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128 at p. 165.

⁴ *Vide* para. 3, *supra*.

⁵ *Vide* para. 23, *infra*.

⁶ *Vide* para. 4, *supra*.

whereby the content of Respondent's obligation under the Mandate could conceivably have been altered or added to, Respondent will consider in the next succeeding paragraphs whether such material could have had any effect in that regard, deferring treatment of Applicants' "interpretation" argument to a later stage¹.

20. It will be convenient to commence consideration of the material adduced by Applicants by eliminating the items which are clearly irrelevant, whether (a) because they do not purport to have legal force at all, or (b) because they are by their own terms applicable only to territories other than South West Africa, or (c) because they are not binding on Respondent by reason of lack of consent on its part.

One or more of these considerations apply to the following items:

- (i) The Universal Declaration of Human Rights² (no consent by Respondent and, in any event, did not create legal obligations);
- (ii) Draft Declaration of Rights and Duties of States² (only a draft);
- (iii) Trust Territories Agreements³ (not applicable to South West Africa);
- (iv) Resolutions of the General Assembly⁴ (did not create legal obligations and for the most part not applicable to South West Africa);
- (v) Resolutions of the Security Council⁵ (apart from anything else, not applicable to South West Africa);
- (vi) Human Rights Covenants⁶ (only drafts);
- (vii) United Nations Declaration on the Elimination of all forms of Racial Discrimination⁷ (did not create legal obligations);
- (viii) International Convention on the Elimination of all Forms of Racial Discrimination⁸ (only a draft);
- (ix) International Labour Organisation Conventions⁹ (not ratified by Respondent);
- (x) Regional Treaties and Declarations¹⁰ (not applicable to South West Africa).

Inasmuch as all the above items are by their very nature incapable of affecting Respondent's rights or obligations in respect of South West Africa, Respondent will not unnecessarily devote time or space to considering whether they do indeed possess the content ascribed to them by Applicants.

21. After eliminating the items set out in the previous paragraph, there remain for consideration only two legal instruments, to each of which Respondent was a party, and neither of which is in terms inapplicable to South West Africa. These instruments are:

- (i) The United Nations Charter¹¹ and

¹ *Vide paras. 27-35, infra.*

² *IV*, p. 501.

³ *Ibid.*, pp. 501-502.

⁴ *Ibid.*, pp. 502-503.

⁵ *Ibid.*, pp. 503-504.

⁶ *Ibid.*, pp. 504-505.

⁷ *Ibid.*, pp. 505-507.

⁸ *Ibid.*, pp. 507-508.

⁹ *Ibid.*, pp. 508-509.

¹⁰ *Ibid.*, pp. 509-510.

¹¹ *Ibid.*, pp. 497-501.

(ii) The International Labour Organisation Constitution¹.
For convenience, they will be dealt with separately.

The United Nations Charter

22. Applicants say:

"The legal obligation of Member States not to discriminate or distinguish on the basis of membership in a group or race (whatever specific human right or freedom may be involved) is set out in Article 56 of the Charter²."

Article 56 reads:

"All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55."

Article 55 sets forth the purposes to be pursued by the United Nations, amongst which is included the promotion of:

"... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

Respondent is as desirous as any other Member of the United Nations to achieve the above-quoted purpose, but does not agree with the meaning attached to the provision by Applicants. In Respondent's submission it would be entirely anomalous to suggest that any *differentiation* (as distinct from *unfair discrimination*) between races, sexes, language groups or religious denominations would involve conflict or inconsistency with the said Article. Thus, on Applicants' argument, a Member of the United Nations would not be entitled to provide special protection or special public conveniences for women, or would not be entitled to grant separate public holidays for different religious communities on their respective religious days, or to establish different public schools for various language groups or even for the two sexes. In the words of Sir Hersch Lauterpacht (commenting on a provision in a proposed *International Bill of the Rights of Man*)—

"... it must be borne in mind that 'equal treatment in all respects'... does not imply identical treatment... A purely mechanical absence of differentiation may result in inequality and injustice³."

And reference was made above to a similar pronouncement of the Permanent Court⁴. *A fortiori* the concepts of "universal respect for" and "observance of" the rights and freedoms spoken of in Article 55 of the Charter, for everybody without exception, cannot imply a need for an absolute, mechanical absence of differentiation.

It is submitted, therefore, that the Charter did not purport to establish any obligation not to differentiate between members of various groups, but was concerned merely to prevent oppression and unfair discrimination. In so far as Applicants attempt to establish the proposition that any differentiation on the basis of membership in a group (irrespective of whether such differentiation was introduced for the benefit of the group

¹ IV, p. 508.

² *Ibid.*, p. 498.

³ Lauterpacht, H., *An International Bill of the Rights of Man* (1945), p. 116.

⁴ *Vide* para. 10, *supra*.

concerned) is contrary to the Mandate, the Charter, therefore, cannot assist them ¹.

23. But there is a further reason why Articles 55 and 56 of the Charter cannot assist Applicants' contentions. As noted above ², the present proceedings are brought, and can only be brought, in terms of Article 7 of the Mandate, which bestows jurisdiction only in respect of disputes "... relating to the interpretation or application of the provisions of the Mandate".

The consequence of this is that it would not be competent for Applicants to allege and attempt to establish a breach of the Charter—they would have to go further and show that in some way the terms of the Charter fall within the description "the provisions of the Mandate". There is clearly nothing in the Charter which suggests that it purported or was intended to amend, or incorporate something in, the Mandate. On the contrary, the Charter was by its very nature a general instrument creating a new international institution and imposing new obligations on its Members. In this regard, reference may be made to Article 103 of the Charter, which is considered below ³.

24. In another part of the Reply ⁴ Applicants refer also to Article 73 of the Charter concerning non-self-governing territories. They do not, however, suggest that the said Article contains any provision or norm precluding differentiation on the basis of race, colour or ethnic group. Nor could they seriously make such a suggestion, regard being had to the contents of the Article. On the contrary, at least the possible need for such differentiation in particular instances appears to be contemplated in the Article itself, particularly in paragraphs (a) and (b) thereof, which require administering authorities to observe "due respect for the culture of the peoples concerned", and to have regard to "the particular circumstances of each territory and its peoples and their varying stages of advancement" ⁵. (Italics added.) For this reason alone—and quite apart from the questions whether Article 73 was intended to apply to mandated territories at all, and, if so, whether it was intended to amend any of the provisions of the relevant mandate instruments—Applicants' arguments regarding Article 73 need not be considered in the present context. Further reference will be made to these arguments below, in dealing with the confusion on Applicants' part regarding "interpretation" of Article 2 (2) of the Mandate ⁶.

The Constitution of the International Labour Organisation

25. The only part of the Constitution of the I.L.O. which remotely approaches relevance in the present regard, is a sentence in the Declaration Concerning the Aims and Purposes of the International Labour Organisation. This sentence reads (in so far as material):

¹ Indeed, *vide* para. 24, *infra*, as to Art. 73 of the same Charter, which indicates a positive contemplation of at least the possible need for such differentiation in particular instances.

² *Vide* para. 3, *supra*.

³ *Vide* para. 32, *infra*.

⁴ IV, pp. 516-518.

⁵ This is indeed a further reason why Art. 55 of the same Charter could not have been intended to have the meaning contended for by Applicants; *vide* para. 22, *supra*.

⁶ *Vide* paras. 30-35, *infra*.

"... all human beings, irrespective of race, creed, or sex, have the right to pursue both their material well-being and their spiritual development in conditions of . . . equal opportunity . . ."¹.

Even by itself, the expression "equal opportunity" could hardly be read as "identical opportunity". It is a matter of impossibility to provide anything remotely approaching identical opportunities for material well-being and spiritual development of all inhabitants of a State—and, in any event, such identical opportunities would give rise to great inequality².

But the Declaration itself goes further, and shows an awareness of the necessity for differential treatment between various groups. Thus it provides:

"The Conference affirms that the principles set forth in this Declaration are fully applicable to all peoples everywhere and that, *while the manner of their application must be determined with due regard to the stage of social and economic development reached by each people*, their progressive application to peoples who are still dependent, as well as to those who have already achieved self-government, is a matter of concern to the whole civilised world³." (Italics added.)

In any event, even if Applicants were to be correct in their construction of the Declaration, it is quite clear that it does not purport, and was not intended, to effect an amendment to the Mandate.

26. For the reasons set out in the preceding paragraphs, Respondent submits that none of the material relied upon by Applicants effected any amendment to the terms of the Mandate. Indeed, Applicants do not rely on any amendment, but contend that there exists a legal norm which is to be introduced into the Mandate by a process of "interpretation". How a provision in an instrument which, when it came into existence, not only *contemplated* but also *prescribed* differentiation between different racial groups, can now, without amendment, be "interpreted" as *prohibiting* all such differentiation, is not comprehensible to Respondent.

Applicants' contention, if taken to its logical conclusion, must have the effect that even those provisions of the Mandate which specifically provided for differential treatment of the population groups, must now be regarded either as *pro non scripto* or as having become adapted in such a manner that they do not involve differential treatment of any of the population groups. Thus the prohibition against "the supply of intoxicating spirits and beverages to the natives"⁴ must now either be disregarded, so that such spirits and beverages may be supplied to Natives, or must be regarded as extended to all groups, so that such spirits and beverages may not be supplied to Europeans, Natives or Coloured persons; and how the interpreter must choose between these two possibilities, is not explained. The position would be the same with regard to the military clause in Article 4 of the Mandate in so far as it distinguishes between the training which is permitted respectively for Natives and non-Natives. In this regard it is, however, instructive to note that Applicants apply their "norm of non-discrimination or non-separation" only when it suits them. Thus, for example, they interpret

¹ *Vide* IV, p. 508.

² *Vide* para. 22, *supra*.

³ United Nations *Treaty Series*, Vol. 15 (1948), p. 112.

⁴ Art. 3 of the Mandate for German South-West Africa.

Article 4 of the Mandate as permitting the training only of Native troops and as prohibiting the training of non-Native troops¹. Respondent will demonstrate the untenability of such an interpretation of Article 4 in a later part of this Rejoinder. For the present Respondent is concerned solely with demonstrating the inconsistency with which Applicants apply their so-called norm, and the anomalies which inhere in the contention that such a norm forms part of the Mandate.

In regard to a similar, but more limited contention, i.e., that the provisions of the Charter may be invoked to interpret the Mandate, Respondent said in the Counter-Memorial:

"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 consideration²."

Applicants contest this proposition³, and have now produced a mass of additional material which came into existence subsequent to the grant of the Mandate, but on which they nevertheless rely for its "interpretation". In the process they betray such confusion of thought regarding basic concepts of law, that Respondent is compelled to devote some space to elementary principles.

27. Respondent has indicated what it understands by the term "interpretation"⁴, and has demonstrated, with reference to authority, that the meaning of a document remains immutable (save for possible amendment) from creation to extinction⁵.

However, and this is where Applicants' confusion sets in, interpretation is only one of the steps in considering the practical effect of a legal document. After having ascertained the meaning of a document, it is still necessary to determine what bearing such meaning has on the facts or circumstances to which it relates. This process is called application. And although the *meaning* of a document never changes, its application to different circumstances might give rise to widely divergent results. As an example one might posit a commercial treaty concluded in 1800 and granting certain rights in respect of "all British colonies and possessions". Although the meaning or interpretation of the treaty would not have changed in the years between 1800 and 1964, its application to the facts would have produced widely different results in, say, 1800, 1900 and 1960.

The distinction between interpretation and application of broadly formulated provisions of the kind under consideration, may be further illustrated by reference to a separate opinion of Sir Percy Spender concerning certain provisions of the United Nations Charter⁶. The learned Judge said:

"A general rule is that words used in a treaty should be read as having the meaning they bore therein when it came into existence. But this meaning must be consistent with the purposes sought to

¹ IV, pp. 553-554 and 565-567.

² II, p. 395.

³ *Vide* IV, p. 512.

⁴ *Vide* para. 5, *supra*.

⁵ *Vide* para. 6, *supra*.

⁶ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion*, I.C.J. Reports 1962, p. 151 at p. 182.

be achieved. Where, as in the case of the Charter, the purposes are directed to saving succeeding generations in an indefinite future from the scourge of war, to advancing the welfare and dignity of man, and establishing and maintaining peace under international justice for all time, the general rule above stated does not mean that the words in the Charter can only comprehend such situations and contingencies and manifestations of subject-matter as were within the minds of the framers of the Charter . . . No comparable human instrument in 1945 or today could provide against all the contingencies that the future should hold. All that the framers of the Charter reasonably could do was to set forth the purposes the organization set up should seek to achieve, establish the organs to accomplish these purposes and confer upon these organs powers in general terms. Yet these general terms, unfettered by man's incapacity to foretell the future, may be sufficient to meet the thrusts of a changing world.

The nature of the authority granted by the Charter to each of its organs does not change with time. The ambit or scope of the authority conferred may nonetheless comprehend ever changing circumstances and conditions and embrace, as history unfolds itself, new problems and situations which were not and could not have been envisaged when the Charter came into being. The Charter must accordingly be interpreted, whilst in no way deforming or dislocating its language, so that the authority conferred upon the Organization and its various organs may attach itself to new and unanticipated situations and events . . . The question whether an unforeseen, or extraordinary, or abnormal development or situation, or matter relating thereto, falls within the authority accorded to any of the organs of the Organization finds its answer in discharging the essential task of all interpretation—ascertaining the meaning of the relevant Charter provision in its context. The meaning of the text will be illuminated by the stated purposes to achieve which the terms of the Charter were drafted¹. (Italics added.)

28. Applying these elementary principles to the Mandate, one finds on interpretation that the Mandatory was always obliged to promote the development of the Territory and its inhabitants². This obligation was immutably fixed (save for possible amendment) when Respondent assumed the Mandate. But the nature of the obligation thus interpreted is such that Respondent must necessarily have regard to changed or changing circumstances in carrying out the said obligation². In other words, in the application of the terms of the Mandate to the circumstances of 1960, a different practical effect may be reached than would have resulted from a similar application in 1920. Failure to adapt to new circumstances might result in a factual set-back or impediment of that which Respondent is obliged to promote; and this might in a given case conceivably be so indisputable and obvious as to give rise to an inference of an arbitrary or *mala fide* attitude on the part of the Mandatory. Such a conclusion would, however, result, not from a changed interpretation of the Mandate, but from the fact that the Mandate, whenever interpreted, involves a duty on the Mandatory's part to give consideration to all relevant circum-

¹ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, pp. 186-187.*

² This is self-evident, but *vide* authorities quoted by Applicants at IV, pp. 514-516.

stances when determining policy, as a necessary component of its obligation to pursue the prescribed objectives in good faith. Amongst the circumstances to be thus considered, are the general philosophical views prevalent in the world, and their impact on the inhabitants of the Territory. Respondent has demonstrated the consideration which has been given to these factors¹, and says that it has in no way failed in its duty in this respect. The issues in that regard, however, fall to be considered under the second branch of the case, where Applicants allege that Respondent's policy is in fact a deliberately oppressive one. For present purposes it is sufficient to emphasize that current views, standards or norms, whether of a moral or even of a legal nature, cannot by any process of interpretation alter, add to, or vary Respondent's obligations under the Mandate. For that purpose, amendment would be required.

29. It will be seen that a confusion between the concepts of interpretation and application underlies and invalidates Applicants' whole argument relating to the topic under discussion. On occasion they seem to appreciate the distinction. Thus they say:

"The Mandate instrument shares, in common with all typical charters, constitutions and basic ordinances, generality in *formulation* and dynamic flexibility in *application* ²." (Italics added.)

The distinction between *formulation* and *application* in this passage seems to Respondent to be sound, as also the statement that where powers and functions are defined in general terms, the application thereof would be characterized by "dynamic flexibility"³.

However, in the very next sentence Applicants say:

"The obligations created by Article 22 of the Covenant and the Mandate must, accordingly, be *construed* in the light of current standards, as determined by contemporary knowledge, conditions and requirements ⁴." (Italics added.)

And later they refer to the—

"... necessity to *interpret* broadly-formulated, constitutional-type obligations, on the basis of current standards, rather than on the basis of the presumed 'intentions of the parties' at the time the obligations were conferred and accepted ⁵". (Italics added.)

The authorities relied upon by them for the proposition regarding *interpretation* do not, however, go beyond showing that the *application* of broadly formulated provisions to different circumstances gives rise to different results. This is illustrated, *inter alia*, by the quotation from *Brown v. Board of Education* in the Reply:

"We must consider public education *in the light of its full development* and its *present place* in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws ⁴."

This is a self-evident proposition. But the italicized words demonstrate

¹ In a part of the Counter-Memorial, viz., II, pp. 457-488, the exact significance of which is apparently misunderstood by Applicants—*vide* IV, pp. 512-515.

² IV, pp. 515-516.

³ Indeed, this proposition might be quoted in support of Respondent's argument regarding the interpretation of Article 2—*vide* Part III, sec. C, paras. 20-24, *infra*.

⁴ IV, p. 514.

⁵ *Ibid.*, p. 515.

clearly that what may have changed, in the Court's contemplation, since the previous ruling on the subject, were circumstances concerning "public education" in America, i.e., the subject-matter to which the constitutional provision in question was to be *applied*, and not the content or interpretation of the constitutional provision itself, requiring "equal protection of the laws". Consequently, in accordance with the reasons set out above, the proposition does not assist Applicants in their attempt to alter the meaning of Article 2 of the Mandate.

30. Applicants' confusion between the concepts of interpretation, application and amendment, is further illustrated by their contention that Article 2 of the Mandate should be interpreted in the light of Article 73 of the Charter¹. At the outset it must be noted in this regard that, apart from its logical defects, which will be pointed out hereafter, Applicants' said contention appears *prima facie* to represent an exercise in utter futility, in that Applicants do not indicate in what way reference to Article 73 assists in interpreting Article 2, or what effect reference to Article 73 has in ascribing a meaning to Article 2. They say in this regard:

"It is not necessary, for the purposes of the present Proceedings, to consider in detail the scope of Respondent's obligations under Article 73 of the Charter, inasmuch as Applicants' Submissions do not allege violations by Respondent of such obligations²."

Consequently Applicants merely associate themselves with a suggestion by Respondent that the obligations under Article 73 "*may be in advance of what was current thought in 1920*"³ (italics added) without making any submissions regarding the specific respects in which, or the extent to which, such obligations are alleged to be in advance of what was current thought in 1920. It is to be noted, however, that in their attempt to replace "1920 standards" with undefined "Charter (Article 73) standards"², Applicants are concerned not so much with the Article as framed, but with the Article read—

"... in the light of the frequent application and interpretation [thereof] by United Nations resolutions and actions since the inception of the Organization"³. (Footnotes omitted.)

In the result, the impression is gained that by a spurious attempt to introduce unnamed standards into the Mandate "in so far as the provisions of Article 73 of the Charter may be in advance of what was current thought in 1920"², Applicants in truth seek to establish some basis of relevance in the present proceedings for United Nations resolutions and actions regarding non-self-governing territories, which resolutions and actions were themselves often based on very questionable interpretations and applications of Article 73. Applicants' argument would then amount to a contention that questionable interpretations by some States, of a convention concluded in 1945 among other States, must be given decisive weight in interpreting (i.e., ascertaining the intentions of the authors of) instruments executed in 1920 by yet a still different group of States. This argument is even more palpably absurd than that propounded in the Memorials with reference to the *in pari materia* rule⁴. However, since it

¹ IV, pp. 516-518.

² *Ibid.*, p. 517.

³ *Ibid.*, p. 516.

⁴ *Vide* II, p. 395 and IV, p. 512.

appears that Applicants are advancing this contention in earnest, Respondent will in the succeeding paragraphs analyse it in some more detail.

31. Applicants' argument regarding Article 73 may be rendered as follows:

- (a) Article 73 of the Charter embodies standards higher than those which applied under the Mandate¹.
- (b) If Article 73 is in law applicable to mandated territories, its provisions would, in terms of Article 103 of the Charter, prevail over the provisions of the Mandate².
- (c) If Article 73 is not in law applicable to mandated territories, it must nevertheless be deemed to be applicable, because:
 - (i) in its resolution of 18 April 1946, the League of Nations Assembly noted that Chapter XI of the Charter (of which Article 73 forms a part) embodied principles "corresponding to those declared in Article 22 of the Covenant of the League"²;
 - (ii) if Article 73 were not deemed applicable, "[a]pplication of the standards of 1920 to the interpretation of the Mandate, could, in principle, result in a finding that the standards of Article 73 had not been met"². Such a result would be "anomalous and intolerable"³. It is accordingly "logically imperative" to read the Mandate as if incorporating the standards laid down by Article 73⁴.

32. The first basis for consideration of these arguments is the assumption that Article 73 applies to mandated territories not placed under trusteeship.

Article 103 of the Charter reads as follows:

"In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

The effect of this Article would be that Article 73, if applicable to mandated territories, would prevail over any inconsistent provisions of the Covenant, or the Mandate (that is, assuming that the Mandate is an "international agreement"). Such inconsistent provisions of the Covenant or the Mandate would then fall away, leaving Article 73 of full force and effect. Article 103 would, however, not have the effect of amending the Mandate by substituting the provisions of Article 73 for any inconsistent provisions in the Mandate.

Since the present action is brought in terms of the compromissory clause in Article 7 of the Mandate, it would accordingly not avail Applicants to show that Article 73 of the Charter (which is not covered by the compromissory clause) is applicable, and not Article 2 of the Mandate (which, it is assumed for present purposes, is so covered).

33. It then remains to consider the arguments presented by Applicants on the assumption that Article 73 is not applicable to mandated territories. On this basis they rely firstly on the League resolution of 18 April 1946.

¹ IV, p. 496.

² *Ibid.*, p. 517.

³ *Ibid.*, p. 516.

⁴ *Ibid.*, p. 518.

This resolution noted:

“. . . that Chapters XI, XII, and XIII of the Charter . . . embody *principles corresponding* to those declared in Article 22 of the Covenant of the League . . .”¹ (Italics added.)

The word “principles” is not synonymous with “detailed provisions”² and “corresponding” does not mean “identical”. The League resolution consequently did not purport to convey that Article 22 must be interpreted as containing all the provisions of Chapters XI, XII and XIII of the Charter, and such a suggestion would indeed have been absurd. The resolution did not purport to “note” any more than that the basic principles underlying the said Chapters of the Charter are similar to those found in Article 22 of the Covenant. There is consequently also no basis for suggesting that the resolution was intended to effect an *amendment* to the Mandate to bring it into accord with Chapters XI, XII and XIII of the Charter, or even with the “principles” of such Chapters.

34. Applicants’ next argument is that, even if Article 73 is not in law applicable to mandates, it would nevertheless be “anomalous and intolerable” not to interpret the Mandate as containing the same standards as those set out in Article 73³. Respondent does not, however, appreciate why it is “logically imperative”³ to avoid a conclusion that two instruments executed a quarter of a century apart, and relating to different types of territories, prescribe different standards. The mere fact that Applicants consider such a result to be undesirable, would not entitle this Court to disregard the most basic principles of law with a view to remedying such a situation. In this regard, reference may be made to the major principle of law enunciated by Judges Spender and Fitzmaurice:

“The principle that a Court of law cannot correct the past errors or omissions of the parties, and that it is not the province of a Court to place some of the parties in the same position as they would have been in if they had taken action they could have taken, but did not take, and even deliberately avoided taking”⁴.

35. The above discussion regarding Article 73 is offered merely in further demonstration of Applicants’ confusion between interpretation and application. In truth the standards set by Article 73 (i.e., as far as its relevant paragraphs (a) and (b) are concerned) are in Respondent’s contention not substantially different from those laid down by the Mandate, as will be evident from the qualifications inherent in them, referred to and emphasized by Respondent in the Counter-Memorial⁵. Applicants have not directly replied to Respondent’s reference to the significance of the qualifications and have in fact evaded this point in the manner indicated above⁶. Respondent also contended that its policies, as expounded in the Counter-Memorial, were in no way in conflict with, but were indeed aimed at the attainment of objectives as are set out in the relevant paragraphs (a) and (b) of Article 73, due regard being had to

¹ IV, p. 517.

² As Applicants appear to concede—*vide* IV, p. 518: “Even if Article 73 were not applicable in all its particulars to mandated territories . . .”

³ *Vide* para. 31 (c) (ii), *supra*.

⁴ *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319 at p. 468.

⁵ *Vide*, e.g., II, p. 396.

⁶ *Vide* para. 30, *supra*, and sec. C, paras. 26, 30 and 42, *infra*.

the aforesaid qualifications¹, and Respondent abides by this contention. Applicants have not attempted to controvert this contention *per se*². This aspect of the matter is, however, concerned with the second part of Applicants' case regarding Submissions 3 and 4, and is therefore not further discussed here.

36. The only basis upon which *interpretation* of the relevant texts could produce a result whereby current norms govern the content of the Mandate, would be if Article 2 was *ab initio* subject to some qualification such as:

"The Mandatory shall, when exercising its full power of administration and legislation, give effect to such standards or norms as may at the time of such exercise be generally applied by other States."

Inasmuch as no such qualification was included in the express terms of the mandate instrument, Applicants would then have to contend that it must be read into the Mandate as a necessary implication. It is, however, unthinkable that the authors of the Mandate (which included several Mandatories³) would have decided upon, and that the Mandatories would have consented to, the imposition of an obligation of such uncertain content, posing so many difficulties of application and giving rise to the possibility of interminable dispute. Since Applicants do not rely on such an implication, and no material has been adduced to suggest the existence thereof, Respondent will not devote any further consideration thereto.

37. In addition to relying on the introduction of the alleged norm into the Mandate by a process of interpretation, Applicants suggest somewhat tentatively that such a norm may by itself have legal validity as "a rule of customary international law", or as being one of "the general principles of law recognized by civilized nations"⁴.

The question whether this is so or not, really falls outside the purview of the present case, as this Court does not possess jurisdiction to determine whether Respondent has contravened objective principles of international law existing independently of the provisions of the Mandate⁵. In any event, however, Respondent submits that neither of the said sources of law has given rise to any "norm of non-discrimination or non-separation" as defined by Applicants, which would entail that *any* differentiation on the basis of group membership, however beneficial such differentiation might be in intent or application, would be illegal⁶. And furthermore, even if it might be possible to say that such a norm has evolved over the past years in international society generally or as between certain States, it would not be binding on Respondent inasmuch as the basic principles of international law involve an effect which has been summarized as follows:

"... if (i) at some time in the past... any other 'dissenting' State had in fact, under international law as it then stood, enjoyed rights

¹ *Vide* Counter-Memorial, loc. cit., also II, pp. 459-460 (paras. 5-7).

² I.e., as distinct from raising issues regarding factual aspects of Respondent's policies. *Vide* sec. C, paras. 26, 30 and 42, *infra*.

³ *Vide* Part II, Chap. III, para. 42, *supra*.

⁴ IV, pp. 510 and 519.

⁵ *Vide* para. 3, *supra*.

⁶ *Vide* sec. A, para. 8, *supra*.

wider than those conferred by international law in its present form, and (ii) on the emergence of a new and more restrictive rule, had openly and consistently made known its dissent, at the time when the new rule came, or was in process of coming, into otherwise general acceptance, then the dissenting State could claim exemption from the rule even though it was binding on the community generally and had become a general rule of international law¹."

This principle was applied in the *Fisheries* case, where the Court said:

"In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast²."

It is quite clear from the record herein that Respondent has openly and consistently rejected any suggestion that any rule of international law prohibits the application of a policy of differentiation in South West Africa or South Africa itself.

Conclusion

38. For the reasons set out herein, it is submitted that Applicants have failed to establish that their alleged norm satisfies either of the two requirements which are essential for present purposes³: i.e., they have not shown—

- (a) that any norm prohibiting a policy of differentiation exists in international law, either generally, or as legally binding on Respondent; or, in any event,
- (b) that any such norm is embodied in Article 2 of the Mandate.

On the contrary, Respondent respectfully submits that differentiation on the basis of ethnic group is legally permissible in terms of the Mandate, and does not *per se* constitute a violation of the provisions thereof.

¹ Fitzmaurice, Sir Gerald, "The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law", *B.Y.B.I.L.*, Vol. XXX (1953), pp. 1-70 at p. 25.

² *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116 at p. 131. *Vide* also Fitzmaurice, Sir Gerald, *op. cit.*, p. 26.

³ *Vide* para. 3, *supra*.

Section C

THE LEGAL BASIS OF APPLICANTS' CHARGE THAT RESPONDENT'S POLICIES AND CONDUCT IN FACT FAIL TO PROMOTE WELL-BEING AND PROGRESS

A. Introductory

1. In section B, *supra*, Respondent has demonstrated, it is submitted conclusively, that no "norm of non-discrimination or non-separation", as formulated by Applicants, can be read into the provisions of the Mandate or is otherwise binding on Respondent. If, as is stated in some parts of the Reply, Applicants' Submissions 3 and 4 are *both* based on the existence of this norm¹, then the conclusion reached in the said section B would by itself dispose of this part of the case. However, as has been noted¹, it is not quite clear that Applicants' said statements are to be taken at their face value, particularly since Applicants still repeatedly advance the contention that Respondent's policy is directed at the unauthorized object of oppressing the Native inhabitants of the Territory for the benefit of the Europeans, and they enter into lengthy discussion and present a mass of material in attempted substantiation thereof.

In the result Respondent is obliged to give consideration also to the question whether any legal basis, other than the alleged "norm of non-discrimination or non-separation", exists for a judicial determination of alleged breaches of Article 2, paragraph 2, of the Mandate, and, if so, what its nature is. The present Chapter will be devoted to this purpose.

2. In the Counter-Memorial, Respondent's attitude to the question posed in the preceding paragraph was a twofold one. In the first place, Respondent contended that there existed no basis for a judicial determination of an alleged breach of Article 2, paragraph 2, of the Mandate, inasmuch as the Permanent Court of International Justice was not intended to have jurisdiction to entertain such matters, which fell to be considered by the administrative supervisory organs, *viz.*, the Council of the League assisted by the Permanent Mandates Commission². If this contention is upheld then it puts an end to Applicants' charges regarding violations by Respondent of its obligations under Article 2, paragraph 2, of the Mandate. Only if this contention is rejected will it be necessary to give consideration to Respondent's second contention which is restated as follows: Article 2, paragraph 2, read in the light of the Covenant, required Respondent to use its "full power of administration and legislation" for the purpose of promoting to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory. The consequence of this was, in Respondent's submission, that the particular method to be employed towards achieving this purpose was left to Respondent's discretion, and that legislative or administrative action could therefore violate Article 2, paragraph 2, only if actuated by a motive or intent other than one to achieve such purpose³.

¹ *Vide* sec. A, para. 9, *supra*.

² *Vide* Part II, Chap. II, para. 13, *supra*.

³ *Ibid.*, para. 14, *supra*, II, pp. 384-392.

3. Although the arguments summarized in the preceding paragraph were, it is submitted, advanced with clarity and precision in the Counter-Memorial, Applicants do not deal pertinently with them in the Reply. Instead, Applicants commence by saying:

"As Applicants understand these arguments and their underlying premises, both explicit and implicit, they may fairly be summarized for clarity of reply, by the six following propositions . . . ¹",

and they then set out certain propositions which either do not reflect arguments ever propounded by Respondent, or else deal in a disjointed and unco-ordinated way with certain limited aspects of Respondent's case. As in some previous parts of this Rejoinder, it will consequently be more convenient to adhere to the arrangement employed in the Counter-Memorial. This approach has the advantage of providing a clear demonstration of which of Respondent's contentions are contested by Applicants and, if so, on what grounds—matters which tend to become lost in obscurity as a result of Applicants' method of replying to propositions formulated by themselves rather than to Respondent's arguments.

It is proposed therefore to consider the material adduced by Applicants in two stages, dealing first with the question whether the authors of the Mandate intended to bestow jurisdiction on the Permanent Court in respect of alleged violations of Article 2, paragraph 2, of the Mandate, and thereafter with the legal basis on which such jurisdiction, if it exists, could be exercised.

B. Were the Obligations under Article 2, Paragraph 2, Intended to Be Justiciable?

4. At the risk of being regarded unnecessarily repetitive, but by reason of certain apparent misapprehensions or misrepresentations on Applicants' part, Respondent wishes once more to emphasize the true nature of its contention in the present regard. In the Counter-Memorial, this contention was clearly and explicitly formulated, e.g., in the following passage:

" . . . 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. . . . For the reasons set out, 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 ²." (Italics added and footnotes omitted.)

And in another part of the Counter-Memorial, to which reference was made in the above passage, Respondent said:

"Respondent is mindful of the fact that legal questions are often

¹ IV, p. 477.

² II, pp. 384-385.

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 effect¹. (Italics added and footnotes omitted.)

However, in the six "propositions" formulated by Applicants "for clarity of reply", the above contention shines by its absence. The "propositions" which do deal with the consequences of, or inferences to be drawn from, the nature of the obligations embodied in Article 2, paragraph 2, of the Mandate, do not cover Respondent's true contention, as will be shown in the succeeding paragraphs.

5. The first proposition formulated by Applicants which may be relevant for present purposes, is their Proposition No. 1, which attributes to Respondent the following contention:

"The Mandate assertedly creates no legal obligations justiciable as between Applicants and Respondent, in terms of the compromissory clause contained in Article 7 of the Mandate²."

Although obscurely worded, this passage apparently refers to Respondent's contention that this Court does not possess jurisdiction in respect of the *present proceedings*³—as distinct from the alleged violation of Article 2, paragraph 2, only—a contention which was raised in the Preliminary Objections, and certain aspects of which were re-argued in the Counter-Memorial⁴. Respondent's contention in this regard turned largely on the interpretation of the compromissory clause in Article 7, and on the question whether it had survived the dissolution of the League of Nations and the Permanent Court⁵. It is not clear whether Applicants' Proposition No. 1 is intended to encompass the whole of this argument. Their reference to the "effectiveness and scope of the compromissory clause"⁶, and their cross reference to IV, pages 520-546⁶ suggest that they do. If that is so, it is completely erroneous to represent the argument as being that "the Mandate assertedly creates no legal obligations justiciable as between Applicants and Respondent". Firstly, Respondent never contended that any of the obligations prescribed in the Mandate were not *legal* obligations⁷. Secondly, Respondent did not contend that *none* of the Mandate obligations was rendered justiciable between Applicants and Respondent: the contention was confined to such obligations as did not affect the interests of the Applicant States or their nationals⁸. Thirdly, Respondent's argument in question was not concerned only with the situation as at the *creation* of the Mandate obliga-

¹ II, p. 184.

² IV, p. 477.

³ *Vide* IV, p. 478. This is of course not the same as saying that the Mandate created "no legal obligations justiciable between Applicants and Respondent".

⁴ *Vide* II, Book II, Chap. V B.

⁵ *Ibid.*, para. 1, p. 175.

⁶ IV, p. 478. (Italics added.)

⁷ *Vide* Part II, Chap. II, paras. 11-14, *supra*, and para. 6, *infra*.

⁸ *Vide* II, pp. 175-193.

tions, but also with the question whether any jurisdiction which may have been created, survived the events of 1945-1946. Furthermore, it is difficult to see what relevance these topics have to the present argument, which is concerned with the interpretation and effect only of Article 2, paragraph 2, of the Mandate—matters which are dealt with by Applicants in purported reply to Propositions Nos. 2 and 3, as attributed by them to Respondent¹. It will therefore suffice to say that the questions relating to the scope, purpose and continuing effect (if any) of the compromissory clause have already been dealt with².

6. Proposition No. 1 having thus been eliminated, the rest of the present argument will be devoted largely to contentions raised by Applicants in reply to Propositions Nos. 2 and 3. The first point to be noted is that neither of these Propositions correctly reflects Respondent's contention now under consideration.

In Proposition No. 2 the following contention is attributed to Respondent:

"Article 2, paragraph 2, does not . . . create or embody obligations of a legal nature, but is assertedly a merely political or moral exhortation; this argument Respondent seeks to reinforce by reference to the generality of the terms of the Article¹."

As has been shown³, this proposition is a complete perversion of Respondent's argument. In fact, Respondent has never said, and does not now say, that Article 2, paragraph 2, of the Mandate did not create or embody obligations of a legal nature³.

The part of Applicants' Proposition No. 3 which is relevant for present purposes⁴, attributes to Respondent a contention that any legal obligation embodied in Article 2, is ". . . of a political character *which should be left for determination by a political body rather than by a Court . . .*"¹. (Italics added.) The italicized portion in this quotation does not merely reflect an inaccurate use of words: Applicants seriously contend that an argument in that form was propounded by Respondent. Thus they refer to Respondent's ". . . proposition that *the Court should leave to a 'political body' determination of the obligation stated in Article 2, paragraph 2, of the Mandate . . .*"⁵ (italics added), to Respondent's ". . . contention that the obligations of Article 2, paragraph 2, . . . are not appropriate for judicial decision, but *should be remitted to 'political' bodies . . .*"⁶ (italics added), and to its ". . . contention that the Court *should leave to a political body determination of the 'social, ethnological, economic and political considerations' underlying Article 2, paragraph 2 . . .*"⁷. (Italics added and footnotes omitted.)

¹ IV, p. 477.

² Vide Part II, Chap. IV B, *supra*.

³ *Ibid.*, Chap. II, paras. 11-14, *supra*.

⁴ I.e., the first part: the second part concerns Respondent's alternative contention regarding good faith as the criterion for adjudication, as is considered in paras. 20 *et seq.*, *infra*.

⁵ IV, p. 485.

⁶ *Ibid.*, p. 490.

⁷ *Ibid.*, p. 491.

It need hardly be stated that no contention to this effect was ever advanced by Respondent ¹.

7. In the result, the above-mentioned Propositions "which Applicants have sought to formulate, in aid of a clear reply to Respondent's legal analysis of Article 2, paragraph 2" ², do not only include contentions in fact not advanced by Respondent, but they leave out the submission actually made. Thus Proposition No. 2 ascribes to Respondent an argument only that the obligations under Article 2, paragraph 2, were not of a legal nature, whereas Proposition No. 3 is based on the premise that such obligations were *justiciable*. Somewhere in between the two Propositions Applicants seem to have mislaid Respondent's true contention, viz., that although the obligations under the Article were of a legal nature, the Court was not intended to possess jurisdiction in regard to alleged breaches thereof.

This failure even to mention Respondent's actual contention is reflected in the positive averments made by Applicants in answer to the above Propositions. Thus in answer to Proposition No. 2 they seek to show—

"[t]hat the Mandates, including the Mandate for South West Africa, were conceived and executed as legally binding instruments—as a whole and in each of their parts . . . ³".

This is, of course, undisputed ⁴.

As regards Proposition No. 3, their argument is directed at demonstrating that—

" . . . a court . . . ventures onto [economic, political or sociological] terrains whenever the judicial duty is engaged to adjudicate upon legal rights and interests of litigants with standing to invoke the competence of the Court ²",

and that "Courts . . . do not shun the judicial duty in the face of technical, political or other complexities" ⁵.

Once more, this may be conceded and is not in issue ⁶; but it assumes what has to be established, viz., that the authors of the Mandate intended to provide, and consequently did provide, for "competence of the Court" or a "judicial duty" in regard to alleged violations of Article 2, paragraph 2, of the Mandate. No argument is specifically directed by Applicants to this, the vital aspect of the present enquiry. However, some of the arguments used by them in respect of Propositions Nos. 2 and 3 may nevertheless be relevant also to the real question at issue, and will accordingly be dealt with on that basis.

8. Whether the Court possessed jurisdiction in respect of alleged breaches of Article 2, paragraph 2, of the Mandate, depends on the correct interpretation of the Mandate, and thus ultimately on the intentions of its authors ⁷. This intention is to be determined in the light of circumstances existing, and conceptions prevalent, as at the time of creation of

¹ For the contention actually advanced by Respondent, *vide* para. 4, *supra*.

² *IV*, p. 491.

³ *Ibid.*, p. 480.

⁴ *Vide* Part II, Chap. II, para. 11, *supra*.

⁵ *Ibid.*, p. 492.

⁶ *Vide* second passage from Counter-Memorial, quoted in para. 4, *supra*.

⁷ *Vide* sec. B, para. 5, *supra*.

the Mandate¹. For the reasons summarized above², Respondent submitted in its Counter-Memorial that the authors of the Mandate did not intend to bestow such jurisdiction on the Permanent Court. By reason of the nature of the argument presented in the Reply³, Applicants do not devote any consideration to the intentions of the authors of the Mandate, but set themselves the more restricted target of showing that in practice courts (including international courts) are on occasion required to apply broadly formulated provisions as well as provisions requiring an examination of technical and political matters. This was of course never disputed by Respondent—Respondent is well aware that in the course of their normal duties courts are on occasion called upon to enquire into matters which have political or technical aspects. What Respondent did contend was that it could never have been the intention of the authors of the Mandate to vest the Court with jurisdiction relative to matters of a purely political nature arising under Article 2, paragraph 2, of the Mandate, particularly in view of the existence of supervision by the Council and the Permanent Mandates Commission.

Examples of instruments which granted (or were held to have granted) jurisdiction in such matters, could consequently be of relevance only to the extent to which they might bear on the intentions of the authors of the Mandate. Applying this test, the examples quoted by Applicants may be graded into the following three categories, on the basis of the degree of their relevance to the issues in dispute:

- (a) the provisions of the various mandates;
- (b) other instruments prior to or roughly contemporaneous with the mandates, and dealing with a more or less analogous subject-matter;
- (c) instruments concluded a considerable period after the Mandate, or which for other reasons cannot have any bearing on the intentions of the authors of the Mandate.

These various categories will be dealt with in the next succeeding paragraphs.

9. As regards category (a), Applicants rely on four cases relating to mandates⁴. It may be convenient to preface consideration of these cases by briefly stating the sense in which they may be relevant to the present issue. Applicants rely on them to establish the proposition, noted above⁵, that the mandates "were conceived and executed as legally binding instruments—as a whole and in each of their parts"⁶. This is, however, not disputed by Respondent⁷, and the present treatment will accordingly be devoted to ascertaining whether they may also be relevant to what Respondent submits is the true issue between the parties, viz., whether it was the intention of the authors of the Mandate that the Permanent

¹ *Vide* sec. B, para. 6, *supra*.

² *Vide* para. 4, *supra*.

³ *Vide* paras. 6 and 7, *supra*.

⁴ *Vide* IV, pp. 480-481. These cases are: *Jerusalem-Jaffa District Governor and Another v. Suleiman Murra and Others*, 1926 A.C. 321; *Attorney-General v. Abraham Alshuler* as quoted in McNair, A.D. and Lauterpacht, H. (Eds.), *Annual Digest of Public International Law Cases, 1927-1928* (1931), pp. 55-56; *Winter v. Minister of Defence and Others*, 1940 A.D. 194 and *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*.

⁵ *Vide* para. 7, *supra*.

⁶ IV, p. 480.

⁷ *Vide* para. 6, *supra*.

Court should adjudicate on alleged violations of Article 2 of the Mandate for South West Africa ¹. As will be shown, none of the cases cited provides direct authority on this point.

Only the *Mavrommatis* case dealt with the jurisdiction of the Permanent Court, but there the dispute was concerned with certain specific provisions of Article 11 of the Palestine Mandate ², which provisions are not analogous, and are indeed not alleged to be analogous ³, to the broadly stated objective embodied in Article 2, paragraph 2, of the Mandate for South West Africa.

The other three cases were tried before municipal courts, and consequently do not deal with the jurisdiction exercisable by the Permanent Court. Their authority on the point at issue could therefore at most be of a relative nature; in other words, they could be relevant only to the extent that they might contain views on the question whether alleged violations of a provision as contained in Article 2, paragraph 2, of the Mandate were intended to be justiciable in any court of law at all, and if so, on what basis. However, neither of the two Palestine cases ⁴ can be of assistance in this regard, inasmuch as the provisions dealt with in them were, as in the *Mavrommatis* case, not analogous to Article 2, paragraph 2, of the Mandate.

Allshuler's case applied Article 15 of the Palestine Mandate, which provided that "... no discrimination of any kind shall be made between the inhabitants of Palestine on the ground of race, religion or language" ⁵.

Murra's case was concerned with Article 2 of the Palestine Mandate, which prescribed that "... the Mandatory [shall be] responsible for 'safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion'" ⁶. Inasmuch as the Ordinance then in dispute did not discriminate in favour of persons of any one religion or race, it was held to be *intra vires* ⁷. As has been noted ⁸, the Court in *Murra's* case expressly disavowed any general power to pronounce upon the merits of the legislative and administrative acts of the Mandatory Administration, or to test them against its view as to "the requirements of natural justice".

It will be apparent, therefore, that neither of the above two cases can be of any authority for present purposes. The only remaining case, i.e., *Winter v. Minister of Defence*, on the other hand, did give attention specifically to Article 2, paragraph 2, of the Mandate for South West

¹ Consequently Respondent will not deal specifically with the passage quoted from Wright, Q., *Mandates under the League of Nations* (1930), at IV, p. 480 which does not appear to have relevance to any actual issue between the Parties.

² *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, pp. 17-19.

³ *IV*, p. 481.

⁴ *Jerusalem-Jaffa District Governor and Another v. Suleiman Murra and Others*, 1926 A.C. 321 and *Attorney-General v. Abraham Allshuler* as quoted in McNair, A.D. and Lauterpacht, H. (Eds.), *Annual Digest of Public International Law Cases, 1927-1928* (1931), pp. 55-56.

⁵ McNair, A.D. and Lauterpacht, H. (Eds.), *Annual Digest of Public International Law Cases, 1927-1928* (1931), p. 56.

⁶ *Jerusalem-Jaffa District Governor and Another v. Suleiman Murra and Others*, 1926 A.C. 321 at p. 327.

⁷ *Ibid.*, p. 328.

⁸ *II*, p. 184.

Africa. It will consequently be dealt with in some detail in the next paragraph.

10. In *Winter's* case, the question at issue was whether certain war-time emergency regulations were invalid as being contrary to the terms of the Mandate for South West Africa. The South African Appellate Division held that they were not contrary to such terms, and that—

"[t]he question whether the Courts in S.W.A. would have jurisdiction to declare *ultra vires* any legislation in conflict with the provisions of the Mandate *does not therefore arise* in the present case". (Italics added.)

It is to be noted in passing that *Winter's* case consequently provides no authority for Applicants' proposition that—

"Courts in the Mandated and Mandatory areas have frequently held that legislation within the Mandated Territories must be consistent with the obligations of the Mandate charters. The theme runs throughout these cases that the Mandate charter is the basic ordinance for the Mandated Territory . . .".²

However, the important aspect for present purposes is the grounds upon which the Court held that the emergency regulations were not contrary to the Mandate. In this regard the Court said, referring to the consideration given in a previous case³ to the nature and effect of the Mandate:

"The conclusions arrived at are that full power of administration and legislation is vested in the mandatory, that the plenary authority to make laws and enforce them covers the whole sphere of government and that in taking such measures as are calculated to maintain public order the mandatory acts as any other sovereign authority would act in like circumstances. It is true that this power of administration and legislation is given subject to the terms of the Mandate, which in Articles 3, 4 and 5 sets forth certain prohibitions and safeguards to be observed by the mandatory, but none of these prohibitions or safeguards are relevant to the present inquiry. The appellant maintains, however, that the provisions of the Proclamation are in conflict with the provision in Article 2 of the Mandate that the mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory. As I have pointed out above this Court has laid down that, in taking measures to maintain public order, the mandatory acts with full sovereign authority. The Proclamation in question is such a measure, issued by the legislative authority duly constituted by the mandatory, and in its preamble it recites as one of the reasons for its issue that, under the circumstances therein set out, the ordinary law of the land is inadequate to enable the Government to fulfil its duty in safeguarding the welfare of the inhabitants and in ensuring the security of the State. That being so, it cannot in my opinion be said that it is in conflict with the duty to promote the well-being of the inhabitants of the territory".⁴ (Italics added.)

¹ *Winter v. Minister of Defence and Others*, 1940 A.D. 194 at p. 198.

² IV, p. 480.

³ *Re v. Christian*, 1924 A.D. 101.

⁴ *Winter v. Minister of Defence and Others*, 1940 A.D. 194 at pp. 197-198.

On the strength of the above decision, Applicants say:

"Thus, the Court had no difficulty in deciding whether or not legislation was consistent with the broadly formulated obligations of Article 2, paragraph 2, of the Mandate¹."

Inasmuch as the Court held that the Mandatory possessed "full sovereign authority" in the respect in question, it was indeed not difficult to find that such authority was not exceeded. In keeping with this approach, the Court's reference in the above passage to one of the recitals in the Preamble of the Proclamation under which the regulations were promulgated, is instructive. The recital was to the effect that "... the ordinary law of the land [was] inadequate to enable the Government to fulfil its duty in safeguarding the welfare of the inhabitants..." Although the Court referred to this reason given by the law-giver for the issue of the Proclamation, it did not conduct any enquiry of its own into the question of the soundness or justifiability thereof—quite evidently on the basis that the function to do so was entrusted not to the Court but to the Mandatory exercising the "sovereign authority" in question.

11. The second category of instruments referred to by Applicants are those which were concluded prior to or roughly contemporaneously with the Mandate, and may conceivably have exercised some influence on the intentions of its authors, or may throw some light on the meaning of its provisions. The only international instruments mentioned by Applicants which could be placed in this category, are the minority provisions, and the Constitution of the International Labour Organisation². These instruments were dealt with by Respondent in the Counter-Memorial³, and, for reasons there set out, it was submitted that an examination of the relevant provisions strengthened the conclusion that the authors of the Mandate could not have intended to grant justiciable legal rights or interests to individual Members of the League, relative to the obligation imposed upon the Mandatory by Article 2, paragraph 2 (save possibly in so far as their material interests could be affected by a breach thereof), and consequently (save in the respect stated) did not intend the Court to possess jurisdiction in respect of alleged breaches thereof. Applicants have not sought to controvert Respondent's argument in this regard⁴.

Applicants in the Reply also refer to the testing power exercised by the Supreme Court of the United States of America in determining the legality or otherwise of measures alleged to contravene the provisions of the Constitution⁵. There is, however, no reason to think that the authors of the mandate system intended to bestow a similar power on the Permanent Court. On the contrary, the circumstances referred to in the extracts from the works of Sir Hersch Lauterpacht which are quoted

¹ IV, p. 481.

² *Ibid.*, p. 482.

³ II, pp. 187-189.

⁴ Save to a limited extent in a different context—*vide* IV, p. 546 and see Part II, Chap. IV B, para. 10, *supra*. For purposes of the present discussion Applicants rely on these instruments only as authority for the proposition that they contain "generally formulated obligations or sets of obligations which provide for, or have actually been the subject of judicial interpretation" (IV, p. 482), as to which proposition, *vide* para. 8, *supra*.

⁵ IV, pp. 483, 487.

below¹, would render such an intention most unlikely, and would at least seem to exclude the possibility that such a power would have been granted without making express provision therefor, and without any specific references thereto in the preliminary discussions.

12. The last category of instruments referred to by Applicants are those which cannot have any bearing on the intentions of the authors of the Mandate inasmuch as they are remote from the Mandate in point of time or subject-matter. This category includes most of Applicants' examples². Some of these examples may show that courts are sometimes called upon to exercise functions corresponding in some respects with those contended by Applicants to have vested in the Permanent Court in respect of mandates; but they almost invariably also reveal important aspects of difference, and in any event they do not show that the grant of such functions is so common as to be presumed even where there exist strong contra-indications.

In the case of virtually all the examples quoted by Applicants, it is to be noted that specific criteria are prescribed for the exercise of the Court's jurisdiction, though in some instances of a wide nature. Thus, in the case of the *Customs Régime between Germany and Austria*³ the Court decided that the customs régime then under consideration was inconsistent with an obligation expressed as follows:

"... [Austria] shall not violate her economic independence by granting to any State a special régime or exclusive advantages calculated to threaten this independence"⁴.

The Court's Opinion was not based, as asserted by Applicants, on "an assessment of future political contingencies"⁵, but purely on the contents of the régime created by the Austro-German Protocol of 19 March 1931⁶.

In the European Convention for the Protection of Human Rights and Fundamental Freedoms⁷, the rights and freedoms in question are not defined *simpliciter* with reference to such broad formulations as "right to life", "right to liberty and security of persons", etc., as suggested by Applicants⁸. The Convention contains numerous detailed provisions, some positively prescribing what is to be regarded as included in the concepts concerned, others negatively stipulating exclusions, exceptions and qualifications, and yet others combining the positive and negative aspects. The total result is that in each instance, to a greater or lesser extent, the content and limits of the obligation undertaken are defined with reasonable exactness⁹. Indeed, a recent commentator states that the rights protected by the Convention "... were rights which States were

¹ *Vide* paras. 14-17, *infra*.

² *Vide*, e.g., IV, pp. 482-483, 485-487.

³ *Customs Régime between Germany and Austria, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 41, p. 37*.

⁴ *Ibid.*, p. 43.

⁵ IV, p. 486.

⁶ *Customs Régime between Germany and Austria, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 41, p. 37 at pp. 49-52*.

⁷ Referred to in IV, pp. 482-483 and 486.

⁸ *Ibid.*, p. 483.

⁹ *Vide* Convention, Article 2 (right to life); Article 5 (right to liberty and security of person); Article 8 (right to respect for family life); Article 9 (right to freedom of thought, conscience and religion); set out in Weil, G. L., *The European Convention on Human Rights: Background, Development and Prospects* (1963), pp. 229-232.

willing to enforce because of their precise definition"¹. (Footnote omitted.) Applicants' statement that these rights—

"... include such broadly formulated rights as the right to life, the right to liberty and security of persons, the right to respect for family life, the right to freedom of thought, conscience and religion, and many others"²,

is consequently misleading, to say the least.

Furthermore, it is to be noted that the Convention created a unique and elaborate system of enforcement requiring prior exhaustion of domestic remedies, and involving a number of organs, viz., the European Commission of Human Rights, the Committee of Ministers, and the specially created European Court of Human Rights³. It is also to be noted that the role played by the Court is limited and circumscribed by a number of conditions which include the requirement that "[t]he Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement . . ."⁴.

An examination of the involved system created by the Convention, the closely related States which are parties thereto, and the history of its drafting⁵, cannot but bring home to one how extremely far-fetched Applicants' contention is that a much more extensive and much less well-defined system of "judicial supervision" was created in the atmosphere prevailing in 1920, without even any discussion or debate on the subject⁶.

The case of the *Diversion of the Water from the Meuse*⁷ involved the interpretation and application of a treaty between the Netherlands and Belgium, which, therefore, prescribed the criteria for determining, and adjudicating upon, the legal rights and obligations of the parties. Inasmuch as the subject-matter was a technical one, the Court naturally required assistance from the realm of the natural sciences with a view to a proper understanding and application of the prescribed criteria; but that does not mean that natural sciences by themselves supplied the criteria, as would seem to be suggested by Applicants' statement that "[t]he International Court has similarly applied concepts derived from the natural sciences . . ."⁸.

Applicants say, with reference to the concepts of *abus de droit*, *bonnes moeurs* and *ordre public* in French Law, that—

"[J]udicial process in civil law systems similarly draws upon humane, moral and political standards as sources of law, and does so particularly where legal rights or duties are not explicitly defined"⁹.

¹ Weil, G. L., *op. cit.*, p. 194.

² IV, p. 483.

³ Weil, G. L., *op. cit.*, pp. 81-166.

⁴ Article 47 of the Convention (Weil, G. L., *op. cit.*, p. 156). Regarding enforcement generally, *vide* also pp. 153-162.

⁵ On all these topics, *vide* Weil, G. L., *op. cit.*, *passim*.

⁶ In this connection it is relevant to note that, according to Applicants, "... Mandates were regarded, first and foremost, as what would be described in the universally accepted current terminology, as 'human rights documents' ". IV, p. 494.

⁷ *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70. Vide* IV, p. 486.

⁸ *Vide* IV, p. 486.

⁹ *Ibid.*, p. 487.

It is true that many municipal systems require judges to apply concepts such as those mentioned above; but such concepts, whether found in common law or in customary law, or whether formally embodied in a code, normally possess well-recognized contents and spheres of application in the legal system concerned. Although a judge might in a particular situation, depending on the nature of the case before him and the degree of development of the doctrine to be applied, have to exercise a value judgment regarding humane or moral considerations (but seldom political ones), he would in the context of municipal law (otherwise than in international law) be influenced and guided by the factors referred to by Sir Hersch Lauterpacht in a passage quoted below¹, as well as normally being subject to appeal. The existence in private law systems of wide principles of an equitable nature but of a recognized content, therefore provides no reason for supposing that the authors of the Mandate would have intended to bestow on the Permanent Court, an international tribunal, jurisdiction to apply a formula which does not involve only matters of morals or ethics (on which judges of different nationalities may well hold different views) but technical and political aspects of good government, which normally fall completely outside the purview of judicial determination.

Respondent does not wish to multiply examples, since none of the instances referred to by Applicants and now under consideration could bear directly upon the intentions of the authors of the Mandate (which is the material issue for present purposes)², and none of them is so closely analogous to the Mandate as to render the interpretation contended for by Applicants other than extremely improbable and unlikely to have been intended by the said authors. In Respondent's submission the examples on the whole tend to confirm the extreme improbability of an intention to require a court of law to exercise a task of judicial review in respect of so wide and essentially political a function as the government of a territory, with no more precise formulation or criteria than the broad and general one, inherent in all enlightened systems, that the powers of legislation and government are to be exercised with a view to promoting to the utmost the well-being and progress of the inhabitants.

13. After quoting the examples considered in the previous paragraphs, Applicants say in regard to Respondent's argument:

"The . . . fallacy is that, for reasons unexplained, Respondent appears to assume that it is not as difficult for a political body to deal with a generally stated obligation, or with one based upon economic, social or political considerations, as it (*sic*) for a Court. Human experience, both in respect of national and international parliamentary bodies, belies such an assumption³."

Respondent was under the impression that it had provided its reasons for this "assumption". They are, firstly that a technical body, such as the Permanent Mandates Commission, possessed the expert knowledge and experience to collaborate in giving effect to provisions such as those in the Mandate which are now under consideration, whereas a court consists of people versed in the law, who may not necessarily possess any expert

¹ *Vide* the second passage quoted in para. 14, *infra*.

² *Vide* para. 8, *supra*.

³ IV, p. 491.

knowledge of ethnology, sociology, economics, administration, etc.¹ Secondly, the Permanent Mandates Commission and the Council were more pliable in their procedure and functions than a court, and could therefore be of much greater assistance in the pursuance of the objectives of the sacred trust². The Commission or the Council could express opinions on a wide variety of practical matters, whereas a court would be limited to adjudicating alleged breaches of the Mandate. A judgment of the Court would be binding on the parties, whereas practices recommended by the Commission or the Council could be applied, and if unsuccessful, modified or abandoned.

14. In regard to the suggested functions of the Permanent Court in respect of mandates, it is instructive to refer to some of the works of Sir Hersch Lauterpacht. In two of his works³ he considered the possibilities and problems involved in international protection of certain basic human rights. Some of his observations illustrate the reasons why an international court is in many ways an unsuitable body to review the exercise of administrative and legislative powers by organs or officials of a State, and why it is most unlikely that the authors of the Mandate intended the Permanent Court to perform such a function with respect to mandatory administration.

In discussing the enforcement of, and guarantees for, an International Bill of the Rights of Man, the learned author states:

“To the unsophisticated it would appear . . . that these imply the setting up of an international machinery of judicial review, through an appropriate tribunal, having jurisdiction to nullify executive action, decisions of courts, and the legislation of States as does, for instance, the Supreme Court of the United States. It is proper to refer to that court by way of example. For it is a court which, more widely than any tribunal in the world, has been called upon to protect the rights of the individual as guaranteed by the Constitution. Yet the very mention of the Supreme Court of the United States as an organ acting in that capacity reveals instantaneously the extreme complexity of the problem involved. For although no court has performed this task with greater authority, none has incurred more intense criticism on that account. No tribunal of similar standing has drawn upon itself to a comparable extent the charge that its activity has tended to produce a government of judges, not of law⁴.”

After mentioning some criticisms of the United States Supreme Court which have been voiced in the past, Judge Lauterpacht continues:

“These criticisms and difficulties with which that august tribunal of the United States has had to contend are almost trifling when compared with the situations with which an international tribunal, endowed with similar powers, would be confronted. The powers of any court, national or international, are, in theory, rigidly circumscribed by the duty to apply existing law. But that law is indefinite and elastic in proportion to the generality of its content—such as is

¹ *Vide* II, para. 16, p. 183.

² *Ibid.*, and *vide* also *ibid.*, p. 389.

³ Lauterpacht, H., *An International Bill of the Rights of Man* (1945) and *International Law and Human Rights* (1950).

⁴ Lauterpacht, H., *An International Bill of the Rights of Man* (1945), p. 12.

implicit in the guarantee of the inherent rights of man against the State. In relation to such matters it is of special significance that the judicial duty of applying the law must be fulfilled by human beings with their own philosophies and prejudices. There is no means of excluding the operation of that human element. Within the same national group there exist restraints upon the unavoidable power of judges: these are the community of national tradition, the overwhelming sentiment (from which judges are not immune) of national solidarity and of the higher national interest, the corrective and deterrent influence of public opinion, and, in case of a clear abuse of judicial discretion, the relatively speedy operation of political checks and remedies. None of these safeguards exist, to any comparable extent, in the international sphere. All these difficulties reveal the implications of the proposal to confer such powers, in relation to the very basis of the national life of sovereign and independent States, upon a tribunal of foreign judges¹."

15. In a later part of his book, the learned author advances a further reason why international judicial review would probably not be acceptable to many States:

"The latter [i.e., judicial review within the State] has been subjected to widespread and emphatic criticism in the United States, the principal country which has adopted judicial review, and elsewhere as constituting a denial of the sovereignty of the legislature and of the people. Can it be expected that countries in which opinion is sharply divided as to the merits of review of their legislation by their own tribunals will acquiesce in such review by an international tribunal in matters touching practically all manifestations of their national life? Can it be expected that countries which have no judicial review within their borders and in which legal opinion and legal tradition have resisted it vigorously and successfully, will entrust it to an international tribunal? This is not a matter of the desirability or otherwise of surrender of sovereignty on a large and unprecedented scale. It is a question of the inherent merits of the system of judicial review both in the national and in the international sphere²." (Footnote omitted.)

In regard to the point made in the last passage, it is interesting to note the legal position in some of the States which were prominent in the creation of the mandate system. The Belgian Constitution of 1921 and the Italian Constitution of 1848 (still in force at the time of the Peace Conference) specifically excluded the interpretation of laws—and *a fortiori* any declaration of their invalidity—from the purview of the judiciary³. And, in the words of the same learned author: "Judicial review of legislation is contrary to the constitutional doctrine of France and, above all, of Great Britain, where the supremacy of Parliament is absolute⁴."

16. Judge Lauterpacht points out that some powers of the nature referred to in the preceding paragraph have occasionally been exercised by international and quasi-international tribunals, and he refers, *inter*

¹ Lauterpacht, H., *An International Bill of the Rights of Man* (1945), pp. 12-13.

² *Ibid.*, pp. 174-175.

³ *Ibid.*, p. 187.

⁴ *Ibid.*, pp. 187-188.

alia, to an Advisory Opinion relating to the Constitution of the Free City of Danzig¹. The learned author then continues:

"However, it must be borne in mind that, normally, the Constitution of Danzig was placed under the guarantee, not of the Court, but of the Council of the League, a flexible political organ. Neither is it without importance that the State in question was a small semi-independent community set up to meet a complex political situation. The position is different when it is proposed to confer jurisdiction of that nature upon an international court with regard to Great Powers . . ."²

And after referring to some further instances, he concludes: "But there is little persuasive power in these examples²."

17. The reference in the passage, cited in the preceding paragraph, to "a flexible political organ" becomes clearer when regard is had to a quotation from the author's later work on this subject, in which he says:

"A court must, as a rule, confine itself to the ascertainment of the legality or otherwise of the action complained of. *Tertium non datur*. It cannot propose a course of action which would render a formal finding unnecessary. This can properly be done by an organ which, although not disregarding the legal aspects of the complaint and although empowered to pronounce on both facts and law and to make a binding recommendation, can avail itself of the more elastic procedure of conciliation and attempts at a compromise . . ."³

And he concludes:

"Finally, the creation of a non-judicial organ is necessitated by the fact that social and economic rights . . . are not such as to lend themselves to enforcement by judicial process. At the same time they cannot be permitted to remain a mere declaration of principle. For that reason they seem to be the proper subject matter for a general guarantee and supervision by a body of the kind here contemplated operating through a procedure more elastic and informal than is permissible in the case of a court³."

18. Respondent has quoted at some length from the works of Sir Hersch Lauterpacht, because of the similarity between the problems with which he was dealing, and those that would have confronted the authors of the mandate system had they contemplated the introduction of a system of judicial review⁴. In this respect the changes in popular attitudes towards such matters must also be kept in mind. It seems that in more recent times the concept of international judicial review of internal policies is not generally regarded as being quite as startling as formerly. It is interesting to note in this regard that between 1945 and 1950 Judge Lauterpacht's own views regarding the merit and practicability of international judicial review, softened somewhat⁵.

In the circumstances existing at the time of the foundation of the mandate system, it seems unthinkable that the authors of the system

¹ Lauterpacht, H., *An International Bill of the Rights of Man* (1945), p. 13.

² *Ibid.*, p. 14.

³ Lauterpacht, H., *International Law and Human Rights* (1950), p. 377.

⁴ As noted, Applicants refer to the Mandate as a "human rights document"—IV, p. 494.

⁵ Lauterpacht, H., *International Law and Human Rights* (1950), p. 383.

would have been prepared to allow the Permanent Court to deliver judgment on issues such as those arising from alleged contraventions of Article 2, paragraph 2, of the Mandate. It must not be forgotten that the authors of the system included the prospective Mandatories, and that some of them even had difficulty about accepting supervision by the Council of the League, which was a flexible political body on which they were strongly represented and in which the principle of unanimity—so firmly insisted upon at the time—applied. Having regard to the difficulties and disadvantages inherent in judicial review, which seemed so decisive to Judge Lauterpacht in 1945 and even in 1950, and further to the fact that the Court could arrive at its decisions by a bare majority, submission to such review must in 1920 have represented to the States concerned an alarming and unprecedented surrender of their rights of administration and legislation. Consequently one cannot imagine that they would have accepted it in 1920, not only without objection, but even without discussion.

19. For the reasons set out above, Respondent's submission that no jurisdiction was intended to be bestowed on the Permanent Court to adjudge alleged infringements by the Mandatory of Article 2, paragraph 2, of the Mandate, is not affected by anything said in the Reply, which, in fact, does not deal therewith directly at all.

C. On what Legal Basis Could a Court Determine Alleged Violations of Article 2, Paragraph 2, of the Mandate?

20. Respondent's alternative argument, which would require consideration only on the basis that the Court does possess jurisdiction to adjudge alleged infringements of Article 2, paragraph 2, is founded on the following simple propositions¹:

- (a) Respondent was granted "full power of legislation and administration". Such grant necessarily entailed that Respondent was required and entitled to use its discretion as to the need for and the manner of the exercise of its powers.
- (b) It is of the essence of a discretionary power that an act purported to be in exercise thereof is not illegal unless it is contrary to some legal provision regulating such exercise, or exceeds the limits expressly or by implication placed upon the power. No *regulatory* provisions were imposed in respect of Respondent's powers under the Mandate², thus leaving only the question as to the nature of the *limitation* imposed by Article 2, paragraph 2.
- (c) The only limitation placed by Article 2, paragraph 2, on the discretionary power vested in Respondent was that such power should be exercised for the purpose of promoting to the utmost the well-being and progress of the inhabitants of the Territory.
- (d) Consequently the Court can determine whether a legislative or administrative act or policy constitutes an infringement of Article 2, paragraph 2, only by examining whether or not the exercise of discretion involved in such act or policy, was directed at the purpose of promoting to the utmost the well-being and progress of the

¹ II, pp. 384-392.

² For present purposes the limitations expressed in Articles 3, 4 and 5 of the Mandate for German South-West Africa are not relevant and are therefore not mentioned.

- inhabitants. Such an examination would, in the circumstances, involve an enquiry as to the good or bad faith of the Mandatory.
- (e) The conclusion set out in subparagraph (d) is strengthened by the consideration that, whenever there is scope for honest difference of opinion (as there often must be) on the question whether a particular legislative or administrative measure or policy *does or does not, or will or will not, in fact promote well-being and progress to the utmost*, there are no legal norms—as distinct from political or social views or theories—which a Court can apply for giving preference to any of the conflicting opinions to the exclusion of the others. Consequently, the only legally prescribed basis upon which the Court can determine whether the Article has been violated, is to enquire whether such measure or policy was *intended to promote well-being and progress to the utmost* ¹.

21. The starting point of Respondent's above argument is the demonstration that its powers in terms of Article 2 of the Mandate were of a discretionary nature. This was established in the Counter-Memorial by interpretation of the mandate documents, and with reference to strong authority ². To the authorities there cited may be added the following statement by Bentwich:

"No attempt is made in the Mandate documents or by the Mandates Commission to lay down any particular system of government applicable in these territories. The Mandatory in this respect has a free hand, and may introduce such measures of autonomy as he thinks fit. The *guiding principle* is that the Government *must have in view* the interests of the native inhabitants. Great variety in the system of administration, in fact, exists, even within a single country under mandate, and some of the mandated territories have indeed been divided by the Mandatory for legislative and administrative purposes ³." (Italics added.)

Given the premise that Respondent's power of administration and legislation in terms of Article 2 of the Mandate was of a discretionary nature, the rest of Respondent's argument follows purely as a matter of logic. Thus, as Respondent pointed out in the Counter-Memorial, it is logically inherent in all cases where courts have to decide on the legality or otherwise of the exercise of a discretionary power, that the court is not entitled to substitute its own discretion for that of the authority in which the discretion has been confided ⁴. As authority, Respondent referred to an English work, which dealt with the attitude consistently adopted by British courts ⁵. However, the principle, being one of logic, is universally applicable. Thus one finds the identical concept expressed

¹ It is conceivable that a court could, exceptionally, come to a factual conclusion that a particular measure or policy is so manifestly detrimental to well-being, or not conducive to progress, as to leave no room for honest difference of opinion that it does not and will not promote well-being and progress, either to the utmost or at all. This would, however, amount exactly to a finding, by inference, that the measure or policy could not bona fide have been intended to bring about such promotion, to the utmost or at all. *Vide paras. 27 and 39, infra.*

² *Vide II*, pp. 387-389.

³ Bentwich, N., *The Mandates System* (1930), p. 98.

⁴ *II*, p. 392.

⁵ De Smith, S. A., *Judicial Review of Administrative Action* (1959), p. 167.

in continental systems. In a recent edition of an authoritative French work it is said:

"... au cas de pouvoir discrétionnaire le choix fait par l'administrateur de la mesure prise, c'est-à-dire l'objet de l'acte ne pourra pas être illégal (à condition bien entendu que la mesure prise ne fût pas *en elle-même* interdite par la loi); le contrôle du juge ne pourra pas, de ce point de vue, s'exercer, sinon le juge se substituerait à l'administrateur pour apprécier l'opportunité de la mesure, appréciation que la loi avait précisément entendu laisser à l'administrateur"¹.

Similar principles are applicable in Germany², Italy³ and other continental systems⁴.

22. If it is not the function of a court to express an opinion on the merits of a particular discretionary decision, nor to enforce such opinion on the authority exercising the discretion, what basis for interference then exists? Logic dictates that a court can do no more than enforce compliance by such authority with the provisions governing the exercise of the discretionary power. This may take a number of different forms, but essentially it amounts to this, namely that the court may enjoin action which is required by the provisions relating to the discretionary power, or that it may prohibit or annul action which is contrary to or in excess of the provisions relating to the discretionary power. As a matter of logic, no other action by a court would follow from being required, in the ordinary course of its judicial duties, to pronounce upon the legality or otherwise of the exercise of a discretionary power. It is true that municipal courts sometimes exercise more extensive powers of review, and may in pursuance thereof apply other criteria, such as for example unreasonableness; but that is so by virtue of a specific grant of such powers, which may be exercised only in the particular instances in respect of which the said powers were granted and in accordance with the provisions of the grant. Since no such criterion has, however, been laid down with respect to possible review of Respondent's powers under Article 2 of the Mandate, such departures from the ordinary rule may be left out of account for present purposes.

23. In the present proceedings, Applicants ask for orders declaring that certain conduct or policies are in violation of Article 2 of the Man-

¹ De Laubère, A., *Traité Élémentaire de Droit Administratif* (1963), p. 214. The following is a free translation of the quoted passage:

"... in the case of discretionary power, the administrator's choice regarding the measure to be adopted, that is to say, the content of the act, cannot be illegal (on condition, it should be understood, that the measure adopted is not *in itself* prohibited by law); judicial control cannot be exercised from this point of view without the judge substituting himself for the administrator in determining the expediency of the measure, a determination which the law meant to leave precisely to the administrator."

Vide also Venezia, J., *Le Pouvoir Discrétionnaire* (1959), p. 137.

² Forsthoft, E., *Lehrbuch des Verwaltungsrechts* (1961), Vol. 1, p. 84.

³ Galeotti, S., *The Judicial Control of Public Authorities in England and in Italy* (1954), pp. 102-162.

⁴ For a convenient comparison of the laws of France, Belgium, Luxembourg, the Netherlands, Italy and Germany in respect of *détournement de pouvoir*, *vide* Lagrange, M., "Chronique Européenne: Cour de Justice de la Communauté Européenne du charbon et de l'acier", *Revue du Droit public et de la Science Politique en France et à l'Étranger*, No. 3 (juillet-septembre 1955), pp. 570-631 at pp. 583-593.

date, and should therefore cease. It follows from the logical principles inherent in the nature of discretionary powers, that the Court can accede to this request only if it be shown that Respondent has, in engaging upon such conduct or adopting such policies, acted contrary to, or has exceeded, the provisions of, or relating to, the discretionary power. Respondent is not limited in the exercise of its discretion by any requirements of form or procedure, nor are there any subject-matters which are beyond its competence¹. Once it is conceded that Respondent's acts were, as far as form and procedure were concerned, valid, and that they related to subjects falling within its competence, what other basis for possible illegality remains? All that remain are the provisions of Article 2, paragraph 2, of the Mandate. Respondent has submitted that Article 2, paragraph 2, from its very nature, and its inter-relationship with Article 2, paragraph 1, does not contain an exact formulation of an objective standard to be complied with by the Mandatory, but a broad expression of the purpose to be pursued by it². This submission was based on an interpretation of the relevant texts, as well as on sound authority³.

It will be apparent that the provisions of Article 2, paragraph 2, in prescribing a purpose to be pursued, do not thereby neutralize or eliminate the discretionary element in Respondent's powers of government. The question of *method* to achieve such a broad purpose as to "promote to the utmost the material and moral well-being and social progress" of the inhabitants of mandated territories, is from its very nature one on which informed and honest opinion could differ. The Mandate could have prescribed a method or methods, but did not. Similarly it could have prescribed precise and readily applicable norms or standards for measuring whether the Mandatory was complying with its duties, but again it did not⁴. The only reasonable construction therefore is that the Mandatory, to which full powers of government were granted, should in its discretion determine questions of method—the contemplation being, of course, that it would be aided and guided, *inter alia*, by the prescribed supervisory organs.

It follows necessarily that Respondent's administrative and legislative acts can be declared illegal only if such acts were not directed at the purpose prescribed in Article 2, paragraph 2, of the Mandate, viz., to "promote to the utmost the material and moral well-being and social progress of the inhabitants of the territory". In the words of the Chief Justice of Australia:

"If a power is conferred in terms which require it to be used only for a particular purpose, then the use of that power for any other purpose cannot be justified. When a legislative power is defined by reference to purpose, legislation not directed to that purpose will be invalid . . ."⁵

¹ Apart again, from the limitations, not relevant for present purposes, in Articles 3-5 of the Mandate for German South-West Africa.

² II, pp. 385-389.

³ *Ibid.*; vide also Part II, Chap. II, para. 11, *supra* (references to *The Mandates System—Origin—Principles—Application* (1945)); and to the Hymans Report, *L. of N., O. J.*, 1920 (No. 6), pp. 334-341, and the reference to Bentwich in para. 21, *supra*.

⁴ Save again for Articles 3-5 of the Mandate for German South-West Africa.

⁵ *Arthur Yates and Company Proprietary Limited v. The Vegetable Seeds Committee and Others*, 1945-1946, 72 C.L.R. 37 at pp. 67-68.

Since this principle follows as a matter of logic from the nature of discretionary powers limited by reference to purpose, it is not present only in common law systems, but is also found in civil law systems. Indeed, it is basic to the whole concept of *détournement de pouvoir*, which plays such a large role in administrative law on the continent of Europe ¹.

24. The only possible test to be applied by this Court is, accordingly, whether Respondent has, or has not, exercised its discretion for the purpose of promoting the interests of the inhabitants of the Territory. This is equivalent to saying that the test is whether Respondent has acted in good or bad faith—i.e., in the circumstances of a case like the present, where there is no realistic scope for a genuine misunderstanding on Respondent's part of the nature and extent of the power conferred and of the purpose for which it is to be exercised.

Thus, for instance, an eminent English judge said:

"When, however, it is said that the court must not interfere with the exercise of that discretion by the statutory body which has the power vested in it unless the statutory body is using the power vested in it otherwise than in good faith, I think that means, otherwise than for the purpose for which those powers are vested in it ²."

And a learned British Law Lord expressed himself as follows:

"I take it to be clear that there is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used bona fide for the purposes for which they are conferred ³."

25. Although Applicants purport to present argument in reply to Respondent's proposition that "... compliance with [Article 2] could be judged by the Court only upon the basis of Respondent's good or bad faith" ⁴, they do not deal specifically with the above argument, nor do they indicate clearly on which points they join issue with Respondent.

Save for their attempt to introduce "norms and standards" into the Mandate ⁵, they do not even try to meet Respondent's demonstration that its powers under Article 2 were of a discretionary nature, but appear to content themselves with comments such as the following, viz.,

"... there is at best a tenuous distinction between a contention that the administration of the Mandate is 'left to the discretion of the Mandatory', *free of international supervision and accountability* and a contention that the Mandate created a relationship between Respondent and the Territory 'close to annexation' ⁶". (Italics added and footnotes omitted.)

Respondent does not appreciate the relevance of this consideration, and particularly not of the italicized words. Respondent's view that the Mandate created a situation which, in the day-to-day administration of the Territory, was not far removed from annexation, was obviously

¹ *Vide* Lagrange, *ubi supra*.

² Vaughan Williams, L.J. in *Rex v. Brighton Corporation; Ex parte Shoosmith*, 1907, Vol. XCVI, L.T.R. 762 at p. 763.

³ Lord Lindley in *General Assembly of Free Church of Scotland and Others v. Lord Overtoun and Others*, 1904 A.C. 515 at p. 695.

⁴ IV, p. 477.

⁵ As to which, *vide* paras. 26, 29-38, *infra*.

⁶ IV, p. 256. A similar statement appears at p. 254.

based on its interpretation of the extent of the Mandatory's powers of administration and legislation¹. That was, however, the position which existed from the beginning, also during the life-time of the League. The interpretation of Article 2 can hardly be different now that international supervision and accountability have fallen away. It is consequently assumed that Applicants merely wish to point to the consequences of the lapse of supervision by the League if Respondent's submission regarding its discretionary powers were to be accepted. However, this Court cannot alter such consequences by giving to Article 2 a construction different from that which it would have had prior to the dissolution of the League.

Without pin-pointing (and possibly even without appreciating) the nature of their problem, Applicants nevertheless experience grave difficulty in formulating an argument which can plausibly be said to cope with the consequences of the discretionary element inherent in Article 2 of the Mandate. In the succeeding paragraphs Respondent will show how they have grappled with this problem from the commencement of the present proceedings, only to be forced on each occasion to a conclusion which is in substance the same as that reached by Respondent.

26. In their Memorials Applicants, at the outset of their treatment of alleged violations of Article 2 of the Mandate, confessed that—

“... differences of opinion could arise as to close or doubtful issues concerning the application of the terms of Article 22 of the Covenant and Article 2 of the Mandate”;

but they contended that—

“[i]n the present case, however, the issues of fact and law, and of the application of law to fact, do not involve conjecture. The violation of the duty to promote ‘material and moral well-being and social progress’ is beyond argument”.

How did they seek, in their Memorials, to get out of the conjectural sphere, where “differences of opinion could arise”?

In the first place, they immediately proceeded to say that “[a]ny doubt . . . is resolved in the light of currently accepted standards as reflected in Chapters XI, XII and XIII of the Charter of the United Nations”².

In these provisions of the Charter, Applicants sought to find certain “clear and meaningful norms marking the duties of the Mandatory”³, which they formulated and listed in the Memorials⁴. These “norms” did not, however, assist Applicants in their attempt to remove this case from the discretionary or conjectural sphere. As demonstrated by Respondent, the “norms”⁵ amounted to no more than matters to which it could (with some qualifications) be said that the Mandatory should have regard as *ultimate aims* in exercising its discretionary function under Article 2 of the Mandate⁶. They did not indicate *methods* to be applied by the Mandatory in realizing the aims, and consequently did not provide any objective

¹ *Vide* Part II, Chap. II, para. 5, *supra*.

² I, p. 104.

³ *Ibid.*, p. 107.

⁴ *Ibid.*, pp. 107-108.

⁵ Even if they could be read into the Mandate, which Respondent disputed—*vide* para. 42, *infra*.

⁶ *Vide* II, pp. 397-398.

criterion for assessing the legality of Respondent's policies and practices. Consequently, since Respondent could in dealing with the facts, demonstrate that its policies were directed at pursuing such aims, these "clear and meaningful norms" brought Applicants no nearer to the result of "beyond argument".

27. But a second method was employed by Applicants in the Memorials in an attempt to escape the conjectural sphere, where "differences of opinion could arise", and thus to bring them to the point of "beyond argument". Their contention was that Respondent "... has not only failed to promote 'to the utmost'..." but "... has failed to promote ... *in any significant degree whatever*"¹. (Italics added.)

This was also rendered as "... has not even made any substantial effort to do so"², or "... has made no notable effort to do so"³. On the contrary, said Applicants, Respondent's "... efforts ... have in fact been directed to the opposite end"⁴, in that it has deliberately and systematically oppressed the Natives for the benefit of the Europeans⁵.

By these means, Applicants reached their conclusion that there was a "polar disparity" between Respondent's duties under Article 2 of the Mandate and its conduct in the administration thereof⁶, as opposed to "close or doubtful issues"⁷ which might otherwise have arisen.

It will be patent that all this amounts exactly to allegations of bad faith in the sense under discussion. Failure to make "any substantial effort" or "notable effort" to achieve the prescribed purpose, and in fact directing "efforts ... to the opposite end", can only mean that there has been no bona fide exercise of the discretionary function, but inaction and action in an unauthorized sphere, with an unauthorized purpose in mind, known to be such and therefore *malu fide*.

28. In the result, Applicants' attitude in the Memorials regarding the discretionary element in Article 2, did not appear to differ substantially from that adopted by Respondent. Their "clear and meaningful norms" related merely to the *purpose* to be pursued by Respondent, and did not prescribe any objective rules regarding *methods* to be adopted in that regard. As regards the *methods* employed by Respondent, Applicants' allegations amounted to a charge of bad faith in the sense aforesaid. And they made no suggestion whatever as to any basis for juridical determination of the "close or doubtful issues" which could arise if they should fail to establish the charge of bad faith. This then was the position as it appeared from the Memorials, and in the Counter-Memorial Respondent answered Applicants' charges on that basis.

29. In the Reply, as has been seen⁸, Applicants commence their treatment of this subject by denying that the dispute between the Parties "hinges on the issue of Respondent's 'good or bad faith', rather than upon an *objective evaluation* of its conduct"⁹. And they state that "Respond-

¹ I, pp. 108 and 162.

² *Ibid.*, p. 130.

³ *Ibid.*, p. 143.

⁴ *Ibid.*, p. 108.

⁵ *Vide* II, pp. 392-394.

⁶ I, p. 166.

⁷ *Ibid.*, p. 104.

⁸ *Vide* sec. A, paras. 2-4, *supra*.

⁹ IV, p. 257. (Italics added.)

ent's policy and practice of *apartheid fails to promote* the well-being and social progress of the inhabitants of the Territory" ¹.

Their problem, however, remains, namely how to establish by means of an "objective evaluation" that a particular policy or practice does not promote well-being and progress to the utmost—a matter which is essentially one of opinion and evaluation incapable of objective proof: and it is perhaps symptomatic thereof that, apparently in order to avoid "close or doubtful issues" and the problems inherent therein, their proposition as above-cited is directed not at failure to promote "*to the utmost*", but, so it seems, at failure to promote *at all* ². As will be shown their basic approach to this problem remains the same as in the Memorials.

Thus Applicants in the Reply, too, in the first place, attempt to find some criterion which could, by objective application to Respondent's policies, provide a conclusion of violation of the Article in question. In this regard they say that Respondent's policy—

"... violates Respondent's obligations, as stated in Article 22 of the Covenant of the League of Nations and in Article 2, paragraph 2, of the Mandate, *as measured by the relevant and generally accepted legal norms and standards* described in the Memorials and in this Reply ³" (italics added);

and that certain (factual) "assumptions" underlying Respondent's policy are, *inter alia*,

"... violative of norms, as accepted by international custom and as reflected in the general principles of law universally recognized by civilized nations ⁴". (Footnote omitted.)

They refer to their analysis in the Reply of "... the normative and objective legal standards governing the interpretation and application of Article 2, paragraph 2, of the Mandate..." ⁵, and they contest the contention which they attribute to Respondent as their Proposition No. 4, that "... there exist... no legal norms or standards for judging the actions which Applicants contend to be in violation [of Article 2 of the Mandate]" ⁶.

30. Applicants' attempt to find some objective legal norm or standard by which to measure Respondent's policy, is, as has been seen, nothing new. As regards the contents and sources of the suggested norms, however the Reply seeks to make out an entirely new case. It will be recalled that in the Memorials Applicants relied upon a series of "clear and meaningful norms" which they sought to derive from certain provisions of the United Nations Charter ⁷. Respondent's demonstration that these so-called norms, even if they existed, did not materially affect the discretionary nature of Respondent's powers ⁷, seems to have sounded their death-knell. No attempt is made in the Reply to refute Respondent's argument in this regard. No further reliance is placed on Article 76 of the Charter.

¹ IV, p. 277. (Italics added save for the word "*apartheid*".)

² *Vide* para. 27, *supra*, and para. 39, *infra*.

³ IV, p. 519.

⁴ *Ibid.*, p. 271.

⁵ *Ibid.*, p. 261.

⁶ *Ibid.*, p. 477.

⁷ *Vide* para. 26, *supra*.

which was one of the sources of these "clear and meaningful norms"¹. And in regard to the other Article relied upon, viz., Article 73, Applicants say:

"It is not necessary, for the purposes of the present Proceedings, to consider in detail the scope of Respondent's obligations under Article 73 of the Charter, inasmuch as Applicants' Submissions do not allege violations by Respondent of such obligations²."

Reference will be made below to the role now alleged to be played by this Article³. Where Applicants in their Reply still refer to their "clear and meaningful norms", they do so only by way of formal reaffirmation⁴. For all practical purposes, these "norms" may consequently now be disregarded.

31. In their Reply Applicants now introduce a new norm, namely their so-called "norm of non-discrimination or non-separation". This suggested norm, unlike those relied upon in the Memorials, would, if it existed, provide an objective criterion for measuring Respondent's policies. However, for the reason stated above⁵, Respondent submits that the "norm of non-discrimination or non-separation" does not exist, certainly not as a part of the Mandate.

32. The question then arises whether the "norm of non-discrimination or non-separation" represents Applicants' only attempt at introducing a fresh objective norm or standard in their Reply. It is remarkably difficult to answer this question. Reference has been made to Applicants' purported reliance on the existence of (in the plural) "legal norms and standards", or "normative and objective legal standards", which are allegedly set out in the Reply⁶. In various parts of the Reply there are further suggestions that there exist, apart from or in addition to the alleged "norm of non-discrimination or non-separation", standards which can be applied by a court in determining whether or not particular policies "promote to the utmost". Applicants say, for instance, that, "in dealing with political, economic or humanitarian issues",

"... courts—both international and national—customarily apply knowledge extracted from experience, from social, physical and political sciences, and from all other sources from which man derives guidance in the conduct of his life and relationships with others"⁷;

that courts "... draw upon humane, moral and political standards in deriving the sources of law"⁸; and that—

"[j]udicial process ... draws upon humane, moral and political standards as sources of law, and does so particularly where legal rights or duties are not explicitly defined"⁹.

It is to be noted that the above contentions are advanced by Applicants in purported answer to Proposition No. 3 as formulated by them, which

¹ *Vide* I, p. 107. Art. 76 (c) is referred to at IV, p. 501, but purely with reference to the contents of trust territories agreements.

² IV, p. 517.

³ *Vide* para. 35, *infra*.

⁴ *Vide*, e.g., IV, pp. 404 and 519.

⁵ *Vide* Part III, sec. B, *supra*.

⁶ *Vide* para. 29, *supra*.

⁷ IV, p. 485.

⁸ *Ibid.*, p. 487.

includes Respondent's argument that "compliance with [Article 2] could be judged by the Court only upon the basis of Respondent's good or bad faith"¹.

Furthermore, in seeking to show that "Respondent's policy and practice of *apartheid* fails to promote the well-being and social progress of the inhabitants of the Territory", Applicants rely, *inter alia*, on the following "relevant evidence", viz., "[j]udgments of qualified persons", "[o]fficial views of Governments" and "[o]verwhelming weight of contemporary authority in the political and social sciences"².

In a particular sphere, i.e., regarding security of the person, rights of residence and freedom of movement, Applicants contend that findings and conclusions of the Committee on South West Africa and of the I.L.O. *Ad Hoc* Committee on Forced Labour "... confirm a generally accepted current international norm or standard, according to which Respondent's obligations should be measured..."³.

To summarize, it would appear that Applicants are relying, in addition to the "norm of non-discrimination or non-separation", also on further undefined "norms and standards".

33. Like the "norm of non-discrimination or non-separation", the above-mentioned undefined "norms and standards" are said to have arisen subsequently to the creation of the Mandate. Thus Applicants say:

"The obligations created by Article 22 of the Covenant and the Mandate must, accordingly, be construed in the light of current standards, as determined by contemporary knowledge, conditions and requirements"⁴;

they refer to the "... practical necessity and wisdom of applying current standards in interpreting obligations, such as those embodied in the Mandate..."⁵; and they say that—

"[t]he relevance of the evolving practice and views of States, growth of experience and increasing knowledge in the political and social sciences, to the determination of obligations bearing the nature and purpose of the Mandate in general, and Article 2, paragraph 2, thereof in particular ... is of the very essence of the obligation itself"⁶.

34. In considering the relevance or significance to be attached to the undefined "norms and standards", Respondent is at the outset faced with the problem that their alleged juridical nature, like their alleged content, is not specifically examined or dealt with in the Reply. In the absence of any specific contentions on Applicants' part, Respondent therefore has no option but to examine this matter purely on principle in the light of the broad purpose for which Applicants rely on the undefined "norms and standards".

In order to have any relevance at all to Applicants' case, these "norms and standards" must in some way define, explain or give content to Respondent's obligations under Article 2, paragraph 2, of the Mandate. It would appear, however, that the expression "norms and standards" in

¹ *IV*, p. 477.

² *Ibid.*, p. 277.

³ *Ibid.*, p. 475. *Vide* also pp. 413-414 and 417-418.

⁴ *Ibid.*, p. 514.

⁵ *Ibid.*, p. 513.

⁶ *Ibid.*, p. 512.

this context embraces two essentially different concepts. In the first place, the expression "norms and standards" may be used to signify legal rules which in objective terms define Respondent's obligations under the Mandate. For convenience Respondent will refer to such "norms and standards" as "legal norms", or just "norms". The specific provisions of Articles 3 to 5 of the Mandate would then comprise legal norms in this sense. It is apparently in this sense also that Applicants use the expression "norm of non-discrimination or non-separation". And it is only a legal norm in this sense that could provide a criterion which could, by objective application to Respondent's policies, determine whether or not a violation of Article 2, paragraph 2, has been committed.

However, the expression "norms and standards" may be used also to connote an entirely different concept. It may refer only to practices, policies or theories of government applied by States, or advanced or propagated by politicians, experts, authorities, scientists, moralists, etc. For convenience, and in order to distinguish this concept from that expressed by the term legal norm, Respondent will refer to such practices, policies or theories as "standards"¹.

It is apparently in this sense that Applicants refer to "the most minimal standards universally accepted (except by Respondent) as governing the relations between a State and its subjects"², and to "the generally accepted political and moral standards of the international community"³.

35. It will be apparent that it is in their legal effect rather than their possible content that legal norms differ from standards. By definition, standards are not legal rules objectively enforceable against Respondent, inasmuch as the acceptance of particular standards even by a large number of scientists, politicians, authorities or States, cannot, *per se* and in the absence of consent on Respondent's part, render such standards legally binding upon Respondent. Since the present discussion concerns contentions advanced by Applicants in an attempt at finding objective criteria for evaluating Respondent's policies, it follows that standards do not call for consideration here; these will, however, be dealt with later⁴. At present, it is only as regards possible objective legal norms that Applicants' expression "norms and standards" calls for comment.

Before seeking to apply any such norm, Applicants would of course have to establish that it is of a legal nature. In addition, however, no such norm can be invoked in these proceedings unless it formed a part of the provisions of the Mandate⁵. Since Applicants' undefined "norms", like their alleged "norm of non-discrimination or non-separation", clearly and admittedly were not included in the provisions of the Mandate as originally framed, they could subsequently have inherited therein only by virtue of some process of amendment of the Mandate. For the reasons already given, it is submitted that no such process of amendment occurred in respect of the "norm of non-discrimination or non-separation".

¹ The result is that Respondent has separated the concepts comprehended in the expression "norms and standards" and called them "norms" and "standards" respectively. Respondent must not, however, be understood as suggesting that Applicants have in any way clearly distinguished either between the terms or between the concepts expressed by them.

² IV, p. 512.

³ *Ibid.*, p. 271.

⁴ *Vide* para. 39, *infra*.

⁵ *Vide* sec. B, para. 3, *supra*.

The same considerations apply *a fortiori* to Applicants' undefined "norms". In the first place, there is the very important circumstance that they are undefined. One cannot conceive of an amendment of the Mandate consisting of the introduction of "norms", the content of which is not stated. Secondly, Applicants have not produced any evidence that Respondent has consented to the introduction of undefined "norms" into the Mandate. Their only attempt in this direction consists of a contention that certain unformulated "standards" (apparently not used in the restricted sense applied to this expression by Respondent) which may have been laid down by Article 73 of the United Nations Charter, "in so far as the provisions of Article 73 . . . may be in advance of what was current thought in 1920"¹, should be read into the Mandate². This contention has already been dealt with³, and for the reasons there set forth Respondent submits that it is without substance.

Thirdly, the "evidence" adduced by Applicants, consisting largely of the views of "qualified persons", "governments", and "contemporary authority in the political and social sciences"⁴, does not even purport to establish the existence of any "norms" (or, for that matter, "standards"). This evidence frequently consists merely of condemnation of Respondent's policies, or certain aspects thereof (including aspects not applied in South West Africa) no matter on what grounds—the grounds being very often mere wrong appreciation of the facts, as will be shown.

36. It may be convenient to refer at this stage to a further alleged source of "norms", namely the Permanent Mandates Commission. Applicants say that, as a consequence of the Commission's functions of supervision in respect of Mandatory administration,

" . . . there evolved perennially what may be described as a 'concrete content' of Mandates, the substance and form of which are embodied in the Commission's minutes"⁵.

This "concrete content" was allegedly reflected in pronouncements of general principles, but was more frequently, according to Applicants, ". . . developed through continuous application of general criteria to concrete factual situations"⁵.

In this manner, it is contended, the Commission—

" . . . developed and interpreted legal principles, based upon the Mandate instrument and the Covenant, and applied such legal principles to specific situations"⁶,

and developed—

" . . . a body of practice and doctrine which furnish the basis, *inter alia*, for judicial determination concerning the scope and nature of Respondent's legal obligations under the terms of the Mandate for South West Africa"⁶.

Quite clearly the Permanent Mandates Commission never performed a function of the sort contended for by Applicants in the above passages. Applicants seek to justify their contention by repeatedly asserting that

¹ IV, p. 517.

² *Ibid.*, pp. 516-518.

³ *Vide* sec. B, paras. 30-35, *supra*.

⁴ *Vide* para. 32, *supra*.

⁵ IV, p. 251.

⁶ *Ibid.*, p. 253.

the Commission was a "quasi-judicial body"¹, which, in a sense, it of course was. However, in order to justify their contention that the Commission gave a "concrete content" to mandates, Applicants would have to go further, and show not only that the Commission was a quasi-judicial body, but also that it was a legislative or quasi-legislative body—at least in the sense that, with prior consent of the interested parties, including the Mandatories, it could alter or amend the contents of the mandates. This Applicants have not sought to do.

In fact, the task of the Commission was, as Applicants point out², a twofold one of "supervision and co-operation". The nature of the two aspects of the task was summed up and contrasted by Quincy Wright as follows:

"In supervising the mandates the Commission has felt obliged to limit its criticism by law. It does not censure the mandatory unless the latter's orders or their application are in definite conflict with the mandate or other authoritative text, but if such a conflict is reported by the Commission and the report is adopted by the Council the mandatory is bound to recognize it. It becomes an authoritative interpretation of the latter's obligations . . .

In co-operating with the mandatories, however, though the League's powers are more limited, the scope of its suggestions is infinitely wider. It has not considered itself limited by authoritative documents but has formulated standards of good administration from the widest sources, and suggested whatever practical steps it deems expedient to give them effect. Such suggestions, however, even when indorsed by the Council, never have more than the character of advice. The mandatory is free to differ from them, though if based on an adequate understanding of the situation he will do well to consider them³."

The former task (supervising of Mandates) was a quasi-judicial one, whereas the latter (co-operation with the Mandatories) was not. A recommendation made by the Commission in performing its task of supervision may, if adopted by the Council (and perhaps even if not), be regarded as an authoritative interpretation or application of the provisions of the Mandate. As such it may have had precedential value in later proceedings before the organs of the League or even the Court, but it would of course not be binding on any of them. In practice such interpretations normally related to the specific duties incumbent upon the Mandatories under the various mandates. The Commission did not attempt to give a specific content to the general provisions such as Article 2, paragraph 2, of the Mandate for South West Africa—indeed, they expressly recognized their inability in this regard, acknowledging that widely different policies could be encompassed by the terms of the Article⁴.

In regard to the Mandatories' duties under Article 2, paragraph 2, of the Mandate for South West Africa and similar provisions in other mandates the Commission was normally called upon only to give practical

¹ IV, pp. 247, 248, 249, 251 and 253.

² *Ibid.*, p. 250.

³ Wright, Q., *Mandates under the League of Nations* (1930), p. 197.

⁴ *Vide* authorities quoted in II, pp. 387-388 and particularly the statement by M. Orts read in the context of the debate as a whole (*P.M.C., Min.*, IX, p. 134). *Vide* also the reference to Bentwich, para. 21, *supra*.

advice pursuant to its functions of co-operating with the Mandatories. Such practical advice, although of great weight as the expression of opinion of an expert and eminent body, was clearly not binding on the Mandatory to whom it was addressed, and *a fortiori* did not lay down legal rules to be applied in future by all Mandatories. At most it set forth "standards" (in the sense used by Respondent) to which the Mandatories may have been obliged to have regard in accordance with the principles considered below ¹.

It will be apparent, therefore, that neither of the two functions performed by the Permanent Mandates Commission served to give a "concrete content" to the provisions of the Mandate, and in particular not to Article 2, paragraph 2, thereof.

Applicants suggest, to the contrary, that *every* comment of the Commission must be taken as the application of a rule of law (apparently created *ad hoc* by the Commission itself).

Thus they say: "The Commission . . . considered itself a quasi-judicial, non-political body, the function of which was to apply standards of a legal nature to specific policies and acts" ², and "The Commission, as a quasi-judicial body, gave expression to objectively determined conclusions of a legal nature . . ." ³.

It is true that the Commission did apply the express provisions of the Mandate (which may perhaps be described as embodying "standards of a legal nature") to specific policies and acts. It is wrong, however, to suggest that this was the *only* function of the Commission, to the exclusion of its task of co-operation with the Mandatories. It is consequently equally wrong to suggest that every utterance of the Commission amounted to an expression of an "objectively determined conclusion of a legal nature". And finally, as noted above, it is wrong to suggest that anything done by the Commission served to give the mandates a "concrete content" which they had not possessed before.

37. It follows from the above considerations that the "evidence" tendered by Applicants cannot serve to establish an amendment to the Mandate consisting of the introduction therein of objective "norms" governing the exercise of Respondent's powers. The true relevance (if any) of such "evidence", and of Applicants' suggestions regarding "standards" in that regard, will be considered below ¹.

38. For the reasons aforesaid, any attempt in the Reply to establish the existence of undefined "norms" governing Respondent's duties under the Mandate, must be held to have failed. Since, in Respondent's submission, the "clear and meaningful norms" originally raised in the Memorials, and the "norm of non-discrimination or non-separation" newly raised in the Reply, also do not assist Applicants to overcome their problem arising from the discretionary nature of Respondent's powers ⁴, the question remains whether any further method of escaping the discretionary sphere is essayed in the Reply.

The answer is that Applicants abide by their allegations which, on analysis, amount to a charge of bad faith. Thus although they prefer to

¹ *Vide* para. 39, *infra*.

² IV, p. 249.

³ *Ibid.*, p. 253.

⁴ For the reasons dealt with in sec. B and para. 26, *supra*.

say that they arrive at a result of "fails to promote" by a process of "objective evaluation", and although they disdain "good or bad faith" as basis of their case, their charge in truth still rests on this basis, as has been demonstrated above¹.

In regard to this aspect of their case Applicants say that questions of intention or bad faith may be decided by inference from other facts². This may be conceded. However, all the rules for reasoning by inference would then apply, and particularly the two quoted in the Counter-Memorial, viz.,

"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 correct³."

Applicants' attempt to restrict the facts to be considered by the Court⁴, obviously conflicts with these principles, and must therefore be rejected.

39. It is only on the above basis—i.e., of enquiring into good or bad faith by a process of inference—that the unformulated modern "standards"⁵, and the "evidence" relied upon as establishing their existence, including in such "evidence" the views of political and scientific authorities, could be relevant. So for instance, if the evidence in this respect should establish that Respondent's policies are so unreasonable, inhumane or unscientific, or fail so lamentably to measure up to universally accepted standards, that no governmental authority honestly applying its mind to the problems of the Territory could come to the conclusion that they are the most suitable method for "promoting to the utmost", then an inference of *mala fides* in the sense under discussion might be justified. But anything falling short thereof would not be sufficient. In considering the type of enquiry that would be necessary to establish bad faith in an analogous situation (the nature of which appears from the passage quoted), Sir Hersch Lauterpacht said:

"Any attempt to embark upon the examination of the question whether a Government has acted in bad faith in determining that a matter is essentially within its domestic jurisdiction may involve an exacting enquiry into the merits of the dispute—an enquiry so exacting that it could claim to determine, with full assurance, that the juridical view advanced by a Government *is so demonstrably and palpably wrong and so arbitrary as to amount to an assertion made in bad faith*. Only an enquiry into the merits can determine that *although an assertion made by the defendant Government is not legally well-founded it is nevertheless reasonable; or that although it is not reasonable, it is not wholly arbitrary*."⁶ (Italics added.)

¹ Vide sec. A, paras. 4-6, *supra*.

² IV, p. 257 and sec. A, paras. 4 and 6, *supra*.

³ *Rex v. Blom*, 1939 A.D. 188 at pp. 202-203 as quoted in II, p. 145. Vide also *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, I.C.J. Reports 1962, p. 151 at p. 191 per Sir Percy Spender.

⁴ Vide sec. A, para. 25, *supra*.

⁵ As distinct from "norms"—vide para. 34, *supra*.

⁶ *Certain Norwegian Loans, Judgment*, I.C.J. Reports 1957, p. 9, at p. 54.

It would consequently not assist Applicants to demonstrate merely that some modern commentators in the fields of science and politics differ from Respondent on the question of the best method for promoting well-being and progress, even if the adverse views should be voiced by large majorities in political bodies and should be extreme and vehement in their content. The crucial question remains—*is there scope for honest difference of opinion?*

Applicants seem to show an awareness of the nature of the onus resting on them when they contend:

“... a policy so extreme in its discriminatory and repressive character as *apartheid*, must be found to violate even the *most minimal standards universally accepted*... as governing the relations between a State and its subjects ¹”. (Italics added, save for the word “apartheid”.)

If “apartheid” or separate development were in truth the policy of deliberate oppression alleged by Applicants, it seems to Respondent that this statement would, as a vague generality, be true ². But it serves at the same time to emphasize the necessity for Applicants to prove as a fact the deliberate oppression alleged by them. For this purpose “evidence” in the form of views expressed by political bodies and other commentators who have never properly investigated the specifically relevant facts, cannot be of real assistance to Applicants’ cause. They can hardly serve to refute Respondent’s demonstration, in the Counter-Memorial and herein, based on careful exposition and analysis of all the specifically relevant facts, that its policies are in truth aimed at promotion to the utmost of the well-being and progress of *all* the inhabitants of South West Africa, and that oppression is as contrary to Respondent’s own standards as to those of any other government. In so far as the “evidence” tendered by Applicants is directed at showing that premises from which Respondent proceeds, or methods employed by it, are fallacious, wrong, or contrary to “the overwhelming weight of authority” ³, Respondent submits that the treatment of the facts in the Counter-Memorial and further herein, amply demonstrates that there is considerable room for, and *de facto* existence of, serious and extensive difference of opinion on the merits of the various political, social, economic and other theories so categorically propounded by Applicants. Indeed, despite their above-quoted contention, Applicants do not seriously try to establish that any of these various theories is in truth “universally accepted”. Consequently the evidence concerned, in Respondent’s submission, wholly fails to establish a violation of the discretionary obligation imposed by Article 2, paragraph 2, of the Mandate.

40. Before proceeding to a systematic consideration of Applicants’ factual averments in support of their charge as analysed above, there remain two of the Propositions formulated by Applicants which have not been dealt with specifically by Respondent. They will be considered in the next succeeding paragraphs.

41. Proposition No. 5 reads:

¹ IV, pp. 511-512.

² Taking due account of the fact that standards universally “accepted” are not necessarily *applied*.

³ *Vide, e.g., IV, pp. 271 and 302-312.*

"If any [legal] norms or standards [for judging the action which Applicants contend to be in violation of Article 2] were applicable, they would, Respondent implies, be those governing as of the time the Mandate was entrusted to Respondent ¹."

This proposition does not accurately reflect Respondent's argument. Respondent certainly suggested that the Mandate falls to be interpreted in the light of circumstances existing as at the time of its creation—a suggestion which, it is submitted, is of indubitable validity ². If Proposition No. 5 seeks to convey no more than the said suggestion, it will suffice to say that Respondent has already dealt with Applicants' argument in reply to such proposition ³. If it does seek to convey something more, then it goes beyond what was argued in the Counter-Memorial. In particular, Respondent does not concede the possibility that legal norms may exist (or may have existed) which would enable a court to pass a judgment on whether a particular policy does or does not "promote to the utmost" in terms of the Mandate. An enquiry as to the point of time at which any such norm must have existed in order to be applicable, is consequently of a purely hypothetical nature, and no such enquiry was undertaken in the Counter-Memorial. The "standards" now sought to be relied upon by Applicants, in the sense as Respondent above understands them ⁴, would naturally come into consideration as they exist at the time of their application—provided that the application is confined to the limits and purposes above indicated ⁵, and is not sought to be extended to "interpretation" of, and giving a "content" to, provisions of instruments entered into some 40 years earlier.

42. Proposition No. 6 reads:

"Even if current standards existed and were deemed applicable, Respondent's policy with respect to the inhabitants of the Territory is asserted to be in compliance with them ⁶."

Respondent did not make a general assertion of the nature set out in this proposition. Both the Memorials and the Counter-Memorial were, in regard to the matter under discussion, only concerned with the question whether certain specific provisions of the United Nations Charter could be invoked to interpret the Mandate. Applicants said yes ⁷: Respondent no ⁸. The matter of "current standards" (as distinct from specific provisions of the Charter) had not yet arisen: that was only raised in the Reply. Consequently Respondent was not called upon to, and did not, formulate an attitude on the hypotheses that "current standards existed and were deemed applicable". In any event such formulation could not be made purely on principle: Respondent would first have to know what the specific content is of any alleged standard relied upon by Applicants before making any submission on whether its policy is in compliance therewith or not.

With reference to the specific provisions of the Charter relied upon in

¹ *Vide*, e.g., IV, pp. 477-478.

² *Vide* sec. B, para. 6, *supra*.

³ *Ibid.*, paras. 26-36, *supra*.

⁴ *Vide* para. 34, *supra*.

⁵ *Vide* para. 39, *supra*.

⁶ IV, p. 478.

⁷ I, pp. 104-108.

⁸ II, p. 395.

the Memorials¹, Respondent contended that its policies had "in fact been designed to give effect to the principles underlying" such provisions². Applicants have not attempted specifically to controvert this contention.

Instead, their argument in reply to Proposition No. 6 as formulated by them, amounts to a contention that Respondent's policy is contrary to the alleged "norm of non-discrimination or non-separation" as defined by Applicants³, and that it violates their undefined "norms and standards"³. As regards the first-mentioned norm, Respondent has never contested that, if it should exist, Respondent's policies would be contrary thereto⁴. As regards the undefined "norms and standards", it is impossible for Respondent to deal with any of them individually, for the very reason that they are undefined and unformulated. Respondent can only say in general, for the reasons indicated above⁵, that in its submission Applicants have not established the existence of any norms or standards which are in truth universally accepted and with which Respondent's policies, as they actually exist, are in conflict.

In this regard it may further be recalled that in the Counter-Memorial Respondent did state the following:

"It is . . . 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 another⁶."

Respondent abides by this statement, which falls to be considered in regard to the factual aspects dealt with hereinafter. The only purpose of referring to it now, is to stress once more the distinction between, on the one hand, the conceptions themselves as matters of general principle or idealistic objective, and, on the other hand, methods designed to realize them in practice in given situations. Indeed the whole paragraph in the Counter-Memorial of which the above statement forms a part, is devoted to drawing this distinction⁷. In so far as some recent formulations in resolutions of political bodies, or even in international agreements, prospective or real, may be read as seeking to lay down that methods found appropriate in some countries are to be applied universally and under all circumstances, including those pertaining to South West Africa and South Africa, Respondent has made no secret of its disagreement with such notions, or of the fact that its policies do not comply therewith. In truth, however, as will later be demonstrated, most formulations contain explicit or implicit qualifications which, in their underlying ratio, find common ground with the approach inherent in Respondent's policies.

¹ Arts. 73 (a) and (b), 76 (b) and (c), of the Charter of the United Nations.

² II, p. 397.

³ IV, pp. 518-519.

⁴ *Vide* sec. A, paras. 8 and 9, *supra*.

⁵ *Vide* para. 39, *supra*.

⁶ II, p. 467.

⁷ *Vide* particularly the very next sentence at p. 467.

Section D

INTRODUCTION TO THE TREATMENT OF THE FACTUAL ASPECTS OF APPLICANTS' CHARGE

1. In the preceding sections Respondent analysed and dealt with the legal basis of Applicants' charges relating to alleged violations of Article 2, paragraph 2, of the Mandate. As was seen¹ Applicants' case now embraces two aspects. In the first place, they rely on an alleged "norm of non-discrimination or non-separation". The issue in regard to this alleged norm is a purely legal one, i.e., whether the "norm" exists or not. If it possesses the content ascribed to it by Applicants, and if it can be regarded as embodied in the Mandate, Respondent's admitted policies of differentiation would be in contravention thereof, leaving no further dispute between the Parties as regards Applicants' Submissions Nos. 3 and 4². In regard to this aspect of Applicants' case, Respondent consequently confines itself to the contention, developed in section B above, that no "norm of non-discrimination or non-separation" as defined by Applicants is embodied in the Mandate, or is otherwise binding on Respondent.

2. Applicants, however, in addition to relying on the alleged norm of "non-discrimination or non-separation", still make the allegation that Respondent's policies in fact fail to promote well-being and progress, and present a mass of material in attempted substantiation thereof. The legal basis of this allegation was considered in section C above, and the factual aspects thereof still require consideration. The present section serves as an introduction to Respondent's treatment of the said factual aspects, which will be dealt with in more detail in the succeeding sections of this Part of the Rejoinder. However, before proceeding to a discussion thereof, Respondent wishes to draw attention in the following paragraphs to some matters of a general nature concerning this part of the case.

3. Applicants' expositions in the Reply of the facts relied upon by them contain a great deal of repetition. To some extent this is unavoidable. Thus, they present their case on the facts by dealing first with the general principles of Respondent's policy and thereafter with specific measures applied in implementation thereof. The same course was adopted in the Counter-Memorial. This method of treatment necessarily involves a measure of repetition as between the general part and the parts dealing with the various aspects of implementation. A further source of repetition arises from Applicants' allegations regarding the existence of a "norm of non-discrimination or non-separation". This "norm" is repeatedly mentioned by Applicants, specifically or by reference, in their treatment of the general principles as well as in the different sections of the Reply dealing with the various specific aspects of government.

Repetition is also caused by the manner in which the Reply has been drafted, and in particular by the incorporation therein, by reference, of

¹ *Vide* sec. A, para. 10, *supra*.

² *Ibid.*, paras. 7-8, *supra*.

various reports, articles, comments, etc. This often results in the same point being dealt with at various places and from various angles (sometimes inconsistent ones).

Respondent's endeavour will be to avoid, as far as practicable, any corresponding repetition, and to deal comprehensively only once with each point raised by Applicants, even if it appears more than once in the Reply. However, some repetition in the Rejoinder will be inevitable, both as a result of the form taken by the Reply, and by reason of the general arrangement of material, which arrangement will follow that employed in the Counter-Memorial to which reference is made above.

4. It is also to be noted that Applicants in the Reply to a large extent change the ground of their complaints. Respondent has already drawn attention to the fact that, for instance, the "norm of non-discrimination or non-separation", on which Applicants now rely so heavily, is an innovation in the Reply¹. Further specific instances of the introduction of new complaints will be pointed out as and when they are encountered in Respondent's treatment of the facts. Although Respondent submits that it is not obliged in law to deal with charges thus raised for the first time in the Reply, it will, however, in view of the importance of this case, and the demonstrable untenability of Applicants' charges, including those newly introduced, not adopt a technical attitude of refusing to deal with such charges. Nevertheless, Respondent wishes to point out that its treatment of such charges can in the nature of things not be as complete or comprehensive as it would have been had they been raised properly and timeously, and Respondent respectfully asks the Court to bear this circumstance in mind.

5. One further instance of a shifting of ground by Applicants is evidenced by the attitude adopted in the Reply towards the Coloured and Baster groups. This matter has been dealt with above², and for the reasons there set out Respondent will, in the following discussion of the facts, refrain from presenting a systematic or complete survey in regard to such groups. References to them will accordingly be only for the purpose of explanation or example, or to answer some specific point or allegation made by Applicants.

6. In the course of Respondent's treatment of the facts, reference will again, as in the Counter-Memorial, be made to practices, policies and events in other countries, including the Applicant States and South Africa. Respondent has already³ dealt with the attitude which Applicants adopt in the Reply in regard to these matters. Briefly, Applicants seem to accept that reference to circumstances in South Africa is permissible for purposes of explanation or illustration, or to answer some specific point raised by Applicants. On this aspect the Parties may consequently be taken to be *ad idem*, and further references to South Africa in the following sections will be on the same limited basis as heretofore⁴.

As regards events in other countries, however, Applicants contend that any reference to such events is irrelevant in the present proceedings. For

¹ *Vide* sec. A, para. 8, *supra*.

² *Ibid.*, paras. 11-15, *supra*.

³ *Ibid.*, paras. 21-24, *supra*.

⁴ *Ibid.*, para. 24, *supra*.

the reasons set out elsewhere in this Rejoinder ¹, Respondent submits that Applicants' contention in this regard is untenable. Further reference will consequently be made below to laws, policies, measures and circumstances in other countries. As before, this will be done only by way of example, comparison or illustration—to show the similarity of problems found elsewhere in the world, and to compare the various methods designed to solve them, or to show the contrast between conditions in South West Africa and other territories, necessitating differences of approach in the framing of policies of legislation and administration, or to render possible a measure of comparison of standards of achievement in comparable circumstances ².

7. Reference was made above ³ to Respondent's intention to deal separately in this Rejoinder with the general principles of its policies, and the detailed application thereof in the spheres to which Applicants' complaints relate. In pursuance of such intention, the next section hereof (section E) will be devoted to the general principles of policy. The specific aspects of implementation will be dealt with as follows:

Section F: Government and Citizenship.

Section G: Education.

Section H: The Economic Aspect.

Section I: Security of the Person, Rights of Residence and Freedom of Movement.

¹ Sec. A. paras. 21-23, *supra*.

² *Ibid.*, para. 21, *supra*.

³ *Vide* para. 3, *supra*.

Section E

CHAPTER I

ANALYSIS OF THE ISSUES

1. In accordance with the scheme explained above¹, the present section relates to the broad principles of Respondent's policies, as distinct from the application thereof in particular spheres, which is dealt with in sections F to I below. The separate treatment of, on the one hand, the principles of policy and, on the other, the application thereof, arises from the following circumstances.

As has been seen, the case sought to be made against Respondent in the Memorials in regard to the alleged breach of Article 2 of the Mandate was one of bad faith in the exercise of its powers in terms of the said Article, in the sense that it had assertedly pursued actions ostensibly within its powers for a purpose not authorized thereby. Since bad faith is by its very nature a fact of which no direct evidence can normally be produced, and the proof of which must therefore almost necessarily be a matter of inference from the circumstances, Respondent's case in the Counter-Memorial was directed at establishing not only that the formulations of policy by Respondent's political leaders belied any suggestion of bad faith, but also that there was no justification for an inference such as was sought to be drawn by Applicants. The method employed to this end by Respondent was broadly the following. In the first place, Respondent furnished general ethnological and historical information regarding the Territory and its peoples so as to provide a setting and context for determination of the issues raised by Applicants². In Book IV of the Counter-Memorial Respondent set forth the broad lines of its policy, with its historical development and future aims, and placed it in its global perspective by referring also to policies and developments in other States in Africa and throughout the world. This then paved the way for a consideration of Applicants' specific points of complaint. In regard to these, Respondent's first task was to set the record straight by pointing out, and correcting, instances of incomplete or inaccurate presentation of the facts by Applicants. For the rest, Respondent filled in the picture by providing information omitted by Applicants. In the result, Respondent submitted that, when regard was had to the complete and correct set of facts, against the background of the history and ethnology of the Territory, and in the light of the general principles of policy formulated by Respondent, no inference of bad faith on Respondent's part could be drawn, but that, on the contrary, the Court should conclude that Respondent had not in any way departed from the aim of promoting to the utmost the material and moral well-being and social progress of all the inhabitants of South West Africa.

Whereas Applicants did not in the Memorials deal separately with the general principles of Respondent's policy, on the one hand³, and the

¹ Sec. D, *supra*.

² Counter-Memorial, Book III (II).

³ Save for some broad generalizations at I, pp. 108-109 and 161-162.

methods of their application in particular spheres, on the other, they now in the Reply follow Respondent's lead by devoting a separate section to "Respondent's policy with respect to the inhabitants of the Territory"¹. Indeed, the said section of the Reply forms the very core of Applicants' case on the facts as it now stands. The nature of their case is dealt with in the next paragraph.

2. In the Reply, as has been seen², Applicants deny that their dispute with Respondent "... hinges on the issue of Respondent's 'good or bad faith'"³, and they insist that their case rests on "an objective evaluation of [Respondent's] conduct"³.

In order to substantiate this contention, Applicants now introduce their alleged "norm of non-discrimination or non-separation". For the reasons advanced above⁴, Respondent submits that no such norm can be read into the Mandate, or is otherwise binding on Respondent.

However, in addition to, or apart from, relying on the "norm of non-discrimination or non-separation", Applicants still make the factual allegation that "Respondent's policy and practice of *apartheid* fails [sic] to promote the well-being and social progress of the inhabitants of the Territory"⁵. In so doing, they appear to rely, *inter alia*, on certain unformulated "norms and standards"⁶. Respondent has demonstrated that the case sought to be built by Applicants on this factual basis, in truth still involves a charge of bad faith, although Applicants seek to avoid this label⁷. Indeed, Applicants themselves summarize the factual allegation which they seek to prove as follows:

"As will be shown, Respondent's policy and practice with respect to each of these aspects of life, is [sic] directed toward the primary end of assuring an adequate 'Native' labour supply in the Territory, particularly in its 'White' Police Zone (comprising more than seventy per cent of the Territory) subject always to the condition that, in the words of Respondent's Prime Minister, 'There is no place for him [i.e., 'the Bantu'] in the European community above the level of certain forms of labour'⁸."

Furthermore, after setting forth the general purport of their allegations regarding specific aspects of Respondent's policy, viz., those relating to education, the economic aspect, political rights, and rights of security, residence and movement⁹, Applicants say:

"In sum, under *apartheid*, the accident of birth imposes a mandatory life sentence to discrimination, repression and humiliation. It is, accordingly, in violation of Respondent's obligation, as stated in Article 2, paragraph 2 of the Mandate, to promote to the utmost the well-being and social progress of the inhabitants"¹⁰.

It is clear, therefore, that Applicants have in no way abjured their

¹ IV, pp. 260-361.

² *Vide* sec. A, paras. 2-6 and sec. C, para. 29, *supra*.

³ IV, p. 257.

⁴ Sec. B, *supra*.

⁵ IV, p. 277.

⁶ *Vide* sec. C, para. 32, *supra*.

⁷ *Vide* sec. A, paras. 2-10 and sec. C, paras 32-39, *supra*.

⁸ IV, p. 272.

⁹ *Ibid.*, pp. 272-274.

¹⁰ *Ibid.*, p. 274.

charges of deliberately oppressive conduct and bad faith on Respondent's part.

3. The purpose of the present section is consequently to refute Applicants' factual allegations, which, on analysis, amount to a charge of bad faith, in so far as such allegations relate to the broad principles of Respondent's policy of separate development. To establish a case in this regard, Applicants rely on:

- (a) inferences from facts, the decisive aspects of which are said by them to be undisputed¹;
- (b) "Relevant evidence" falling under the following heads:
 - (i) "judgments of qualified persons with first-hand knowledge of South Africa and South West Africa"²;
 - (ii) "official views of governments in all parts of the world, expressed, *inter alia*, through the United Nations as well as through findings and resolutions of the United Nations itself"³;
 - (iii) "overwhelming weight of contemporary authority in the political and social sciences"⁴;
 - (iv) "history and character of the system of 'homelands' or 'territorial *apartheid*'"⁵.

It is also particularly through the first three of the above classes of "evidence" that Applicants seek to establish the existence of the undefined "norms and standards", which constitute the first link in their contention that Respondent must be held to be guilty of a breach of the Mandate by reason of alleged violation of the "most minimal standards universally accepted"⁶. As noted above⁷, this contention is but a particular method whereby Applicants attempt to establish a case on the basis of a charge of bad faith on Respondent's part—the basis to which Applicants, despite their every endeavour, remain confined.

4. In the next succeeding chapters Respondent will deal with the material referred to in the previous paragraph, and will demonstrate that nothing contained in the Reply in any way casts doubt on the validity of the contentions advanced in the Counter-Memorial. In this regard, much the same method will be employed as in the Counter-Memorial: Respondent will correct the errors and supply the deficiencies in Applicants' exposition, and will place the facts thus corrected in their proper perspective and context. For this purpose, Respondent will consider the allegations of fact referred to in paragraph 3 (a), *supra*, in conjunction with the allegations and contentions regarding the system of homelands⁸. Respondent's exposition will show that although certain decisive facts are indeed, as alleged by Applicants, "common cause", others are decidedly not. In addition, Respondent will demonstrate that many decisive facts and contentions are not effectively controverted, or even disputed, by Applicants. In the result, Respondent will, it is submitted, refute Applicants' contention of bad faith on Respondent's part.

¹ IV, pp. 262-277.

² *Ibid.*, pp. 277-293 and 593-599.

³ *Ibid.*, pp. 222-230, 277, 293-302, 502-503.

⁴ *Ibid.*, pp. 277, 302-312 and 600-602.

⁵ *Ibid.*, pp. 277 and 312-326.

⁶ IV, p. 512.

⁷ *Vide* Part III, sec. C, para. 39, *supra*.

⁸ Referred to in para. 3 (b) (iv), *supra*.

5. The treatment of the three other aspects of evidence, consisting of judgments or views of various types of persons or bodies, will be appropriate to the nature of their relevance. In this regard it has been shown¹ that such views or judgments could be of assistance to Applicants only if they should establish that Respondent's policies are so unreasonable, inhumane or unscientific, or fail so lamentably to measure up to universally accepted standards, that no governmental authority honestly applying its mind to the problems of the Territory could come to the conclusion that the policies are the most suitable method for "promoting to the utmost". This amounts to saying that Applicants bear the onus of establishing not only that some authorities are critical of Respondent's policies, but that condemnation of such policies is so universal as to leave no room for honest and informed differences of opinion regarding their demerits. In the appropriate chapters, Respondent will demonstrate that Applicants have signally failed to discharge this onus. This will be done by showing not only that there in fact exist wide differences of opinion as to the validity of the various theories on which Applicants rely in their attempt to discredit Respondent's policies, but also that many of the authorities quoted by them do not themselves even support Applicants' contentions.

6. The arrangement of Respondent's argument which has been adumbrated in the preceding paragraph, will take much the same form as that employed in the Counter-Memorial. The next chapter (Chapter II) will be devoted to the origins and early development of Respondent's policies. Chapter III will deal with relevant indications afforded by developments in other territories and States. The said chapter will serve, *inter alia*, to show that the political theories propounded by Applicants have come nowhere near to being so successful in practice that Respondent could be accused of bad faith, or even unreasonableness, in disputing their soundness or universal applicability. In Chapter IV, Respondent will briefly sketch the post-war adjustments to its policies, and will deal in more detail in Chapter V with the isolated points raised in this connection by Applicants in the Reply. This leaves as a final topic the views and theories of various persons and bodies², which will be discussed in Chapters VI to XI hereof.

¹ Sec. C, para. 39, *supra*.

² *Vide* para. 3 (b) (i)-(iii), *supra*.

CHAPTER II

RESPONDENT'S POLICIES: ORIGINS AND EARLY DEVELOPMENT

1. It is self-evident that no system of government can be properly evaluated without regard being had to the setting within and the background against which it operates. Since Applicants did not in their Memorials furnish the necessary information in this regard, Respondent remedied the omission by providing a brief exposition of the Territory's geography and history, and the ethnic characteristics of its population¹. In the Reply, Applicants make hardly any reference to this exposition. The history and ethnology of the Territory, Applicants say, "may be taken as substantially accurate for the present purpose"². The only reservation made by them with regard to history³ does not relate to South West Africa, but to South Africa itself, and will be dealt with elsewhere in this Rejoinder⁴. As regards ethnology, Applicants go further and make the following concession, viz.: "It is indisputable that in the Territory there do exist groups differing in language, custom and economy"². This is followed by an argument concerning alleged "fostering" of such differences². This argument will receive attention at an appropriate juncture⁵—at present Respondent points out merely that the background information furnished in the Counter-Memorial stands uncontested.

2. In the Counter-Memorial Respondent also contended that, to a large extent, the objective facts of the situation in South West Africa in 1920 dictated the policies initially applied in the Territory⁶. Thus the two basic features in Respondent's policy in the early stages, viz., development of the Territory primarily by means of European initiative, and differentiation between the various population groups in the Territory, were, as has been shown⁶, almost inevitable results of the circumstances in the Territory rather than a positive application of some philosophy of government. Also on this aspect Applicants have failed to join issue with Respondent.

3. Many of the circumstances which shaped Respondent's policies in South West Africa also obtained in other parts of Africa, and, as Respondent demonstrated⁷, such circumstances called forth policies and practices which showed a great deal of correspondence with those applied by Respondent. Once again, Applicants do not dispute the facts—indeed, they concede, *arguendo*, the accuracy thereof⁸, save for alleging that the "interpretation given by Respondent to the policy of 'indirect rule' " is "fallacious"⁸. Applicants do not, however, state or explain where the

¹ *Vide II, Counter-Memorial, Book III.*

² *IV, p. 261.*

³ As set out in footnote 6 at *IV, p. 261.*

⁴ *Vide Chap. V and Annex A, infra.*

⁵ *Vide Chap. V, paras. 85-101, infra.*

⁶ *Vide II, pp. 404-410.*

⁷ *II, pp. 430-440.*

⁸ *IV, p. 444.*

fallacy in Respondent's interpretation is alleged to lie. In these circumstances Respondent submits that the whole of its exposition of policies applied in other States in Africa, including its "interpretation" of "indirect rule", must be held to be uncontroverted.

4. Applicants do say, however, that "Respondent's references to policies alleged to have been followed in other areas have no relevance to the issues in these Proceedings"¹. The reasons advanced by them for this contention, viz., that in none of the areas in question did the governing Power apply the policy of apartheid, and that none of the areas is at present administered under Mandate¹, have already been analysed and shown to be untenable². In the course of furnishing their said reasons, however, Applicants say:

"... in none of the areas in question did the governing Power apply the policy of *apartheid*, on the basis of which the status, rights, duties, opportunities and burdens of the population were... systematically allotted on the basis of race, color or tribe"³.

It is incomprehensible that Applicants can, without any attempt at substantiation, make a statement like this in the face of Respondent's clear demonstration in the Counter-Memorial³ that systematic differentiation was in fact applied throughout Africa prior to the Second World War, and, indeed, for some time thereafter.

5. Respondent has shown⁴ that not only the authors of the Mandate, but also the Permanent Mandates Commission, regarded a policy of differentiation as desirable or at least inevitable. In this regard, also, Applicants fail to refute Respondent's contention⁵.

6. In the result, nothing advanced by Applicants in the least affects Respondent's demonstration that its policies—and, in particular, the differentiation involved in them as between various ethnic groups or peoples living in South West Africa, including the White group which had in part become settled there prior to Respondent's régime, and had in part been encouraged to settle there afterwards, as a necessary means for developing the Territory—grew naturally from the circumstances encountered by Respondent on assumption of the Mandate, and that the broad trends of such policies were during the whole period of the League's existence in entire accord with the conceptions of the times, including the views and practices of the League supervisory organs and of Mandatory and Colonial administrations in other parts of Africa.

Indeed, the whole trend of Applicants' Reply is an implied admission of the correctness of Respondent's attitude. This appears not only from their failure to deal with the material adduced by Respondent, to which reference is made above, but more particularly from their basic legal submissions. As has been seen, Applicants do not rely on the strict terms of the Mandate, or the intentions of its authors, or its interpretation and application during the lifetime of the League of Nations. On the contrary, Applicants present a case based upon "current standards, as determined

¹ IV, p. 444.

² *Vide* sec. A, paras. 21-23, *supra*.

³ *Vide* II, pp. 431-437, *vide* also sec. B, paras. 13 and 14, *supra*.

⁴ *Vide* sec. B, paras. 11-12, *supra*.

⁵ *Ibid.*, para. 16, *supra*.

by contemporary knowledge, conditions and requirements”¹, or on an “interpretation” of the Mandate—

“... on the basis of current standards, rather than on the basis of the presumed ‘intentions of the parties’ at the time the obligations were conferred and accepted”².

Respondent has already demonstrated the untenability in law of Applicants’ said contentions³. At present Respondent merely points out that Applicants’ preoccupation with “current standards” clearly implies a recognition on their part not only that earlier standards differed from the alleged “standards” now invoked by them, but also that Respondent has in fact complied with such earlier standards. For the reasons set out above, the latter statement is, indeed, incontestable.

7. It follows from the above that the problems which have resulted in the present proceedings, arise essentially from the need to adapt to changes of circumstances which have occurred since the Second World War, and from different desires, ideas and views as to the manner in which such adaptations are to be made. The changes in question involve not only the abilities, needs and aspirations of the population of South West Africa, but also widely held conceptions regarding the proper aims and methods of government. The crucial issue in these proceedings relates to the question whether adaptations of policies in the light of changed circumstances should consist of ignoring the actually existing diversity and differences among the various population groups, abandoning differentiation, and attempting to create an integrated population in which a majority vote is to decide the future destiny of all concerned, or of continuing to recognize such diversity and differences, and to provide for the separate development of the peoples concerned towards eventual self-determination by each of them, accompanied by such mutual co-operation as they themselves may decide upon. This issue, in its various aspects, will be considered in the remaining chapters of this section of the Rejoinder—on the basis, of course, of the question whether Respondent is motivated by bad faith in preferring the course of separate development to that of attempted integration.

¹ IV, p. 514.

² *Ibid.*, p. 515.

³ *Vide* sec. B and sec. C, para. 35, *supra*.

CHAPTER III

RESPONDENT'S POLICIES: COMPARISON WITH OTHER COUNTRIES AND TERRITORIES

1. In the previous chapter Respondent pointed out that the problems which have resulted in the present proceedings arise from different desires, ideas and views as to the manner in which adjustments to policies in South West Africa are to be made in the light of post-war developments. In this connection Applicants' attitude with regard to political rights is that—

“ . . . relevant and generally accepted norms by which the obligations stated in Article 2, paragraph 2, of the Mandate should be measured, have been established by the United Nations. *These include the institution of universal adult suffrage and the promotion of participation on the part of all qualified individuals in all levels of government and administration within the framework of a single territorial unit*”¹.
(Italics added.)

This appears to be no more than a specific application of the alleged “norm of non-discrimination or non-separation” which Applicants have now introduced². Respondent has given its reasons for submitting that no such norm can be read into the Mandate or is otherwise binding on Respondent³. However, in so far as Applicants advance an independent argument in an attempt to establish the specific “norms” mentioned in the above quotation, Respondent will deal with it in the present Chapter.

2. Whilst admitting that the Mandate cannot in law be construed as if it were a trusteeship agreement, and that the Territory is not subject to the jurisdiction of the Trusteeship Council⁴, Applicants nevertheless say:

“The practice of the Trusteeship Council, approved by the General Assembly, is adduced as evidence in support of the proposition: that there exist established principles and processes pertaining to problems and objectives analogous in all respects to those involved in Article 2, paragraph 2, of the Mandate; that such principles and processes are generally accepted by States comprising the Trusteeship Council and members of the organized international community; that these established principles and processes constitute norms by which the obligations stated in Article 2, paragraph 2, of the Mandate, and Article 22 of the Covenant of the League of Nations, should be measured . . .”⁴

It is accordingly on the practice of the Trusteeship Council, approved by the General Assembly, that Applicants rely for proof of their alleged “norms” by which Respondent's obligations should assertedly be

¹ IV, p. 441.

² *Vide* sec. A, paras. 2-10.

³ *Vide* sec. B, *supra*.

⁴ IV, pp. 441-442.

measured. Information regarding such practice is set out in Annex 7 to the Reply ¹ in three sections relating respectively to—

- (a) establishment of universal adult suffrage ²;
- (b) treatment of a territory as an integrated unit ³; and
- (c) encouragement of meaningful Native participation in government and administration ⁴.

3. It will be apparent, however, that the material set out in Annex 7 of the Reply could not possibly establish the existence of a "norm" in the sense in which Respondent used the term, i.e., as denoting a legal rule which in objective terms defines Respondent's obligations under the Mandate ⁵. The legal basis of the activities of the Trusteeship Council is provided by Article 76 of the Charter and relevant trusteeship agreements. The function of the Council is to apply the provisions of these documents, and to co-operate in carrying them out. The Trusteeship Council is not empowered to amend, modify or amplify them. *A fortiori* a pronouncement of the Council in respect of one trust territory does not have any legally binding force on the Administering Authority in respect of any other territory. These considerations have even greater strength when applied to the present circumstances—nothing gives the Trusteeship Council power to amend, modify or amplify the provisions of the Mandate, which fall outside its province altogether. It follows therefore that Applicants' attempt to distil from pronouncements or practice of the Trusteeship Council legal norms binding on Respondent in these proceedings, must be held to have failed ⁶.

4. At the most, therefore, the pronouncement of the Trusteeship Council may be regarded as standards as defined by Respondent, i.e., practices, policies or theories of government which are not *per se* legally binding on Respondent ⁷. As has been seen, such standards can be of relevance only as material from which an inference of bad faith on Respondent's part may be drawn ⁸. The first step in such an enquiry would of course be to determine whether or not Respondent's policies in fact comply with the standards pronounced by the Trusteeship Council. In this regard Respondent will show that the "norms" relied upon by Applicants for the most part do not consist of objective *criteria* against which Respondent's policies could be measured, but, on the contrary, only constitute *objectives* to be pursued. Inasmuch as Respondent is for the most part in full agreement with these objectives, and has always attempted to attain them, its conduct has not been in conflict with such "norms".

In so far as the Trusteeship Council has however, in some instances, recommended *methods* to be employed in attaining the said objectives, or the *tempo* at which development should take place, it is important to bear in mind that such recommendations related to specific trust territories. If they are to play any role at all in the determination of Respondent's good or bad faith, it would at least be necessary to establish

¹ IV, pp. 451-457.

² *Ibid.*, pp. 451-452.

³ *Ibid.*, pp. 452-455.

⁴ *Ibid.*, pp. 455-457.

⁵ Sec. C, para. 34, *supra*.

⁶ *Vide* sec. B, para. 3, *supra*.

⁷ Sec. C, paras. 34-35.

⁸ *Ibid.*, para. 39, *supra*.

that the circumstances are such that Respondent should, in the exercise of its discretion, have had regard to such recommendations. This implies, firstly, that the relevant circumstances in South West Africa must for all practical purposes be identical with, or closely analogous to, those in the trust territory to which the recommendations related. As will be seen, Applicants make no serious attempt to provide this necessary link between the recommendations on which they rely, and the circumstances in South West Africa.

Even assuming, however, that a reasonable observer may feel that circumstances are sufficiently analogous to render such recommendations applicable also to South West Africa, the further question would arise whether a failure by Respondent to have regard to the recommendations could give rise to an inference of bad faith, or, to put the question in another form, whether such failure would be inexplicable save upon an assumption of an improper motive. Many factors are involved in this enquiry, *inter alia*, the question to what extent the recommendation concerned reflects an opinion held by all thinking people. But, for present purposes, Respondent would wish to emphasize one factor in particular, viz, the extent to which application of the recommendation in question did in fact have beneficial results. Clearly no inference of bad faith can be drawn against Respondent for not following recommendations which had disastrous, or even doubtful, results in the territories in which they were applied. For the purposes of this aspect reference will be made not only to trusteeship territories, but also to other formerly dependent territories to which Applicants' suggested "norms" have been applied in recent years.

In the succeeding paragraphs Respondent deals with the contents of Annex 7 to the Reply, but will, for convenience, not follow the sequence of Applicants' treatment. Respondent will first deal with the subject-matter referred to in paragraph 2 (c) above, then with that mentioned in paragraph 2 (a), and finally with that stated in paragraph 2 (b).

A. Encouragement of Meaningful Native Participation in Government and Administration

5. Applicants state that—

"[t]he Trusteeship Council has constantly urged greater participation of indigenous inhabitants in the government and administration of the Territory in which they live¹".

Respondent is in full agreement with the objective of promoting participation in government and administration on the part of indigenous inhabitants. However, the particular method by which, and the tempo at which, this objective can best be promoted must of necessity depend on, and be adapted to, the specific circumstances obtaining in the territory. It seems, however, as if Applicants wish to stress the "importance of training" and "opportunities for experience"¹. Applicants further associate themselves with arguments that "qualifications and experience" should not be a "prerequisite to public office", and that the administering authority—

"... should not be *too reluctant* to take a certain amount of risk in

¹ IV, p. 455.

placing [members of the indigenous population] in positions where they can obtain the necessary experience ¹". (*Italics added.*)

It is at once apparent that no objective standard emerges from the above quotations, and they hardly advance Applicants' case in any other way. Respondent fully agrees that training and opportunities for experience should be promoted as far as practicable in the specific circumstances of the Territory, and has indicated the progress made in this regard in the past, and that expected to be made *in the future* ².

6. Applicants set out ¹ particulars of a variety of steps taken in various territories in order to promote participation in government and administration by the indigenous inhabitants. These particulars furnish no evidence of the recognition, or application, of any objective standards, but merely of particular practical steps taken to improve the condition of the indigenous inhabitants of the territories concerned. Respondent does not propose dealing with any of these steps: the fact that they were considered advisable in the circumstances obtaining in the said territories is of no relevance to the issues in the present case. No attempt has been made by Applicants to show that conditions and problems in such territories were, or are, in so far as they may be relevant to the particular steps, closely analogous to those in South West Africa.

Applicants, however, do attempt to create the impression that "indigenization" of the administration of trust territories has proved an unmixed blessing in all cases—even on a basis "reject[ing] the question-begging argument that experience is a prerequisite to public office" ³—and has contributed materially to the achievement of independence in such territories. Respondent demonstrated in the Counter-Memorial, *inter alia*, with reference to United Nation's sources, that Africanization of the public service, i.e., the replacement of European and Indian personnel by Africans, has resulted in a reduced standard of efficiency throughout Africa ⁴. Apart from quoting authorities with a more general application, Respondent also referred specifically, amongst others, to the former trust territory of Tanganyika as an example of a State where Africanization affected the standard of the civil service ⁵.

Another case in point is the former Cameroun Republic, a State held up by Applicants as an example to Respondent ⁶. Victor T. Le Vine comments in respect of this State that—

"... the government has recruited a large number of individuals who seem ill prepared for their tasks and more concerned with the status of their positions than the performance of their duties.

It is therefore not surprising that many Camerounians have been keenly disappointed in the performance of their officials. If President Ahidjo is to be believed, the East Cameroun civil service can be charged with nearly the entire catalogue of bureaucratic shortcomings. In March 1962, he excoriated East Cameroun officialdom in a well-publicized memorandum, parts of which deserve to be quoted at length:

¹ IV, p. 456.

² *Vide* III, Counter-Memorial, Book V, sec. E; *vide* also sec. F, *infra*.

³ IV, p. 455.

⁴ II, pp. 455-456 and III, pp. 158-163.

⁵ II, p. 455.

⁶ IV, p. 456.

A marked laxity among nearly the quasi totality of the civil servants is becoming more and more apparent . . . In the majority of the administrative offices, even up to the central services and the different ministries, there reigns such carelessness and such anarchy that even the least informed and least aware are alarmed and sorely troubled over the future of our civil service . . .

. . . among these failings are intemperance, dishonesty, and lack of courtesy; poorly done work, lateness and absenteeism, lack of discipline and insubordination . . . inflated remunerations, and the simultaneous holding of several jobs . . . Furthermore, civil servants should refrain from overt criticism of and insults to the Government or its policies ¹."

Attention is also invited to a view expressed by Mr. Patrick Wall, a British Member of Parliament, United Nations representative and commentator on African affairs, who wrote:

"It is becoming increasingly clear that though the white man can work in independent Africa he cannot have his home there as he finds the new standards of justice, education, and agricultural development intolerable ²."

7. To sum up: Respondent is in full agreement with the objective advocated by Applicants, viz., the promotion of participation in the government and administration of the Territory by members of the Native population. Applicants have not, however, it is submitted, established any objectively applicable criterion as to tempo or method of promoting such participation. In so far as they rely on examples of other States, they do not establish that circumstances in such States are analogous to those in South West Africa, or that the methods employed there did in fact promote well-being and progress. In the result, it is submitted that Applicants' whole argument is entirely unfounded.

B. Establishment of Universal Suffrage

8. Applicants state that the "introduction of methods of suffrage leading eventually to elections by universal adult suffrage" is a "clear standard from which substantial deviation is illegal under the practice of the United Nations" ³, and continue:

"The Trusteeship Council has consistently recommended 'such democratic reforms as will eventually give the indigenous inhabitants of the Trust Territory the right of suffrage and an increasing degree of participation in the executive, legislative and judicial organs of government' ³."

In this instance also, no objective legal "norm" is proved by Applicants in this respect. In fact, Applicants do not even attempt to give any definition of what is meant by words such as "introduction of methods of suffrage", "democratic reforms" and "the right of suffrage". They state that "[t]he principle of universality of suffrage has never been in doubt" ⁴,

¹ Carter, G. M. (Ed.), *Five African States: Responses to Diversity* (1963) pp. 338-339.

² *Vide* Chap. VII, para. 8, *infra*.

³ IV, p. 451.

⁴ *Ibid.*, p. 452.

but adduce no argument, based on legal grounds, or even state what exact meaning they ascribe to this "principle". Do Applicants suggest that the grant of male adult suffrage is prohibited, in terms of the Mandate, because women are excluded? Or do Applicants contend that the grant of rights of suffrage, based on merit qualifications of individuals, is prohibited in terms of the Mandate, because such rights are not "universal"? And what significance do Applicants attach to the appreciation by the Trusteeship Council of "the difficulty of introducing at once a modern system of suffrage"¹? It is not surprising that Applicants, in these circumstances, are apparently embarrassed by the "norm" which they contend for, since they immediately qualify their "clear standard" by submitting that "substantial deviation" therefrom is "illegal under the practice of the United Nations"¹, thereby implying that lesser deviations, of an uncircumscribed nature, are not prohibited.

9. The remainder of Applicants' discussion of this topic contains particulars of the extension of rights of suffrage in various territories. The practicability and advisability of such steps in the said territories have not been correlated in any way to circumstances obtaining in South West Africa, and are therefore of doubtful relevance. Applicants have made no attempt to show that the conditions and problems in such territories are, in so far as is relevant to the particular steps taken, the same as, or analogous to, those in South West Africa.

Applicants do, however, advance the contention that—

"[a]chievement of independence of all the Trust Territories in Africa by 1962 demonstrates the peaceful transition from the status of administered territory to one of democratic majority rule with full franchise by adult indigenous inhabitants"²,

suggesting that no serious problems, closely related to the exercise and substance of the rights of suffrage granted, have arisen in such territories. It is surprising that any person professing to be informed about events in Africa can make such a suggestion. In the Counter-Memorial Respondent had occasion to discuss the tendency throughout Africa to adopt one-party systems of government³. In the course of this discussion Respondent mentioned a suggested definition of African democracy which read "one man, one vote, once"³. Both the tendency and the definition have in the meanwhile become commonplaces among commentators on African affairs. The methods employed in eliminating opposition parties, have been described as follows:

"A majority party that is the legal successor to a departing colonial régime inherits, or by default acquires, almost unparalleled power and freedom of action once it becomes the government of the day . . . When the power of deprivation of services and patronage is insufficient to persuade opposition elements to cease activity and to join the governing party in a vast *parti unifié*, or united front, then the more classical forms of persuasion or neutralization—imprisonment of opposition leaders, harassment by contrived allegations, censorship, and curtailment of political liberties—can be.

¹ IV, p. 451.

² *Ibid.*, p. 452.

³ II, p. 455.

and in several instances have been, employed. . . . Endowed with such comparatively unfettered power, the leaders of dominant parties have moved progressively toward the one-party system, in response to a variety of factors and pressures¹."

Other commentators explained the tendency towards one-party States as follows:

"The governing party in many sovereign underdeveloped States, and those intellectuals who make it up or are associated with it, tend to believe that those who are in opposition *are separated from them by fundamental and irreconcilable differences*. (Italics added.) They feel that they *are* the State and the nation, and that those who do not go along with them are not just political rivals but *total enemies* ²."

And—

"The dilemma of responsible African leaders is how to keep their following without making promises they know cannot be kept. They may find there is only one solution—to scrap most of the democratic machinery by which they have won freedom from colonial rule, and set up one-party dictator[i]al rule, with no quarter for political rivals. This has already happened in more than one of the new States. *The end of colonial rule has brought about the end of personal and political freedom for the tribesmen, who may find themselves worse off than before* ³." (Italics added.)

In the Annexes to this Chapter Respondent gives a brief exposition of the recent political history of various States in Africa. This exposition contains a number of illustrative examples of the reasons for creating one-party States, and the methods applied to that end. In this regard attention is invited to the following random examples, viz., Ghana⁴, Zanzibar⁵, Kenya⁶ and Algeria⁷.

10. However, the apparently irresistible spread of one-party States in Africa is not the only fact which refutes Applicants' contentions. It passes all understanding how Applicants can say that, in the case of all the trust territories in Africa, the "transition from the status of administered territory to one of democratic majority rule with full franchise by adult indigenous inhabitants"⁸ was a "peaceful" one.

The whole world is aware of the bloodshed and chaos which accompanied the independence of the Trust Territory of Ruanda-Urundi (now Rwanda and Burundi). As is shown below⁹ the number of refugees from Rwanda had, according to the latest *Annual Report of the United Nations High Commissioner for Refugees*, by March 1964, reached a total of 153,000. Tens of thousands of persons, mainly Tutsi, were slaughtered

¹ Goldschmidt, W. (Ed.), *The United States and Africa* (1963), p. 64.

² Shils, E., "The Intellectuals in the Political Development of the New States", *World Politics* (Apr. 1960), pp. 353-354.

³ McAllister, B., "Tribal Challenge in the New Africa", *African World* (Sep. 1963), p. 6.

⁴ *Vide* Annex IV, *infra*.

⁵ *Vide* Annex XI, *infra*.

⁶ *Vide* Annex V, *infra*.

⁷ *Vide* Annex I, *infra*.

⁸ IV, p. 452.

⁹ *Vide* Annex VII, para. 7, *infra*.

during the period of Rwanda's transition to independence¹. The former French Cameroon, another trust territory, was in the grip of what has been described as "latent or active terrorism"² for some years before, during² and after its transition to independence in 1960, and peace has not yet been restored. The Trust Territory of Tanganyika was peaceful for three years after independence, which was granted in 1961. In 1964, however, there was a serious mutiny of Tanganyikan soldiers which could only be quelled with the assistance of foreign troops³. Togo, another former Trust Territory, became an independent republic in 1960 and a one-party State in 1961⁴. In 1963 its president was assassinated and the government overthrown⁴. In April 1963, a plot to overthrow the new government was discovered⁴.

The above States, quoted as examples by Respondent, are all former trust territories, to which Applicants' exposition specifically refers. In addition there are of course, a number of other States—not previously trust territories—where the transition from dependent territory to independent sovereignty was accompanied with as much or more bloodshed. In this regard thoughts turn involuntarily to States such as Algeria⁵, the Congo⁶ and the Sudan⁷. These instances should suffice to demonstrate that the introduction of universal adult suffrage, which Applicants seek to impose on South West Africa, has not been such an unqualified success in Africa that Respondent could be accused of bad faith or even unreasonableness if it resists undue expedition in this regard.

11. Respondent emphasizes and reiterates its attitude, expressed in the Counter-Memorial⁸, that it is in no way opposed to rights of suffrage for all or any of the peoples of South West Africa in appropriate circumstances, provided that the introduction of such rights is carefully adapted to the circumstances of all the peoples concerned. Respondent is convinced that, when regard is had to the present stage of development of the indigenous population groups in South West Africa, it would be unwise entirely to discard their traditional political systems. On the contrary, Respondent is of opinion that future development in their case will be most beneficial if it is based on the roots of their own traditional systems⁹. This principle was applied with great success in South Africa, where tribal systems of government are being adapted by an evolutionary system of development to present-day needs, *inter alia*, by the introduction, initially on a fairly restricted basis, of an elective element¹⁰. The same method of introducing suffrage rights has also been proposed by the Odendaal Commission for the indigenous groups of South West Africa in their future development¹¹. For reasons which are known,

¹ *Vide* Annex VII, *infra*.

² *Vide* Annex II, para. 1, *infra*.

³ *Vide* Annex IX, para. 1, *infra*.

⁴ *Vide* Annex X, *infra*.

⁵ *Vide* Annex IX, *infra*.

⁶ *Vide* Annex III, *infra*.

⁷ *Vide* Annex VIII, *infra*.

⁸ II, p. 398 (para. 27).

⁹ *Ibid.*, p. 477.

¹⁰ *Ibid.*, pp. 478-483.

¹¹ *Vide R.P.* 12/64, pp. 81-107; e.g. *re* Ovamboland, p. 83 (paras. 301 and 307).

Respondent, while indicating its agreement in broad principle, has not yet taken any decisions on the recommendations of the Odendaal Commission in this regard¹.

C. The Treatment of a Territory as an Integrated Unit

12. As was seen, Respondent is in general agreement with the two propositions considered above, viz., that it would be sound policy to increase progressively the rights of suffrage of the Native peoples of South West Africa, and that Native participation in government and administration should be encouraged². The differences between Applicants and Respondent in those respects relate more to matters of emphasis and tempo than of principle. Respondent's attitude is that it would be calamitous to lower the standards of government and administration by a too precipitate advance in either of the mentioned spheres. Applicants, on the other hand, seem to adopt the attitude either that there is no substantial risk of such lowering, or else that high standards of government and administration are luxuries which should not stand in the way of advancement of Native interests or aspirations in these spheres.

However, as regards Applicants' suggested norm or standard which is said to impose an obligation on Respondent to treat the Territory as a single integrated unit with one centralized government, the issue between the Parties is more basic, and involves the very existence of the rule on which Applicants seek to rely.

13. Applicants contend that there exists a legal "norm" which in all cases, and in all circumstances, obliges administering authorities of trust territories (and, by a process of extension, also Respondent in its capacity as administering Power in respect of South West Africa) to develop a "sense of territorial unity or national consciousness"³ and to institute a "unified political structure for each territory in which all inhabitants would have equal rights in the government and before the law"⁴. They contend further that the "requirement" of the Trusteeship Council is "a totally integrated political unit for each Territory"⁴.

As noted above⁵ the Trusteeship Council possesses no power to lay down legally binding norms, and its pronouncements could at most constitute material from which an inference of bad faith on Respondent's part may be drawn. The first step in an enquiry as to whether such an inference would be justified, would be to ascertain the content and effect of the pronouncements relied upon as laying down methods to be employed in the administration of dependent territories. Even in this regard it is clear that Applicants have seriously misrepresented the position. It is true that in general the Trusteeship Council has advocated the development of a "territorial consciousness" among the inhabitants of trust territories. This attitude was never, however, divorced from the circumstances of the particular territories, and in some cases trust

¹ *Vide* IV, pp. 198 and 213.

² Although Respondent of course denies that such principles amount to legal norms by which its obligations should be measured—*vide* para. 1, *supra*.

³ IV, p. 452.

⁴ *Ibid.*, p. 453.

⁵ *Vide* paras. 3-4, *supra*.

territories were eventually, with the approval of the United Nations, separated into different components, or amalgamated with neighbouring territories. In this regard Respondent has referred to the Trust Territory of Ruanda-Urundi, which was divided into two separate States, viz., Rwanda and Burundi¹; British Cameroons, the northern part of which joined the Federation of Nigeria and the southern part of which entered into a political association with the Republic of Cameroon², and the Trust Territory of British Togoland, which was integrated with Ghana³.

14. It is obvious, therefore, that United Nations organs have not attempted to formulate any universally applicable principle of preservation of "territorial integrity"⁴, or of development of "territorial consciousness"⁴, as alleged by Applicants. Consequently it does not avail Applicants to quote certain specific cases where the Trusteeship Council did make recommendations to such effect unless Applicants go further and demonstrate that the territories to which the recommendations related are, in all relevant respects, closely analogous to South West Africa. This they *signally* fail to do—in fact, they make no serious attempt to do so.

15. But Respondent goes further. In so far as Applicants' suggested "norm" has been applied in African territories where conditions are analogous to those in South West Africa, particularly as regards ethnic diversity, the results have often been calamitous. As has been shown, the forced preservation of "territorial integrity" has frequently resulted in bloodshed, disorder and chaos⁵. Further examples are given in the Annexes to this Chapter. The reasons for these manifestations may be found in the generally observable fact that *there are peoples and groups (nations or embryo nations) which are for all practical purposes not assimilable, the one by the other, because of unwillingness to become assimilated.* The same psychological, emotional or cultural attributes which prevent assimilation, frequently result in a situation in which the groups concerned *cannot govern one country jointly in a manner which is fair and acceptable to both or all of them—the underlying reason being not that one is superior and the other(s) inferior, but simply that the differences between them are too great.*

16. Events throughout world history have provided many examples of the truth of the above propositions, and have shown that they apply not only across colour and racial lines but also within them, e.g., as between White and White, Oriental and Oriental, and African Native and African Native.

Some instances which occurred outside Africa may be mentioned briefly. The partition between India and Pakistan is today almost ancient history, and nobody would suggest that the inhabitants of these two States could have governed the whole area "as an integrated unit"⁶. It is worth recalling, however, that such an attempt was indeed made at the time, but that such serious difficulties, including rioting with widespread loss of life, were encountered, that the final decision fell on par-

¹ *Vide* II, p. 452.

² *Ibid.*, pp. 452-453.

³ *Ibid.*, p. 453.

⁴ IV, p. 453.

⁵ II, pp. 450-451.

⁶ IV, p. 452.

tion as the only practicable solution ¹. Another instance of inassimilability of two Asian groups *inter se* may be found in the presence of a million Tamils of Indian extraction in Ceylon, which situation has given rise to well-nigh insoluble conflicts. According to recent reports, an agreement has now been concluded between India and Ceylon which makes provision for the drastic remedy of large-scale repatriation of the Tamils, the overwhelming majority of whom were born in Ceylon ².

The situation between the Greek and Turkish communities in Cyprus is so well-known as to require little comment, but for the sake of convenience Respondent annexes hereto a brief account of the inter-group relations on that island ³. As at present no mutually acceptable solution for their problems appears in sight—whether one will eventually emerge, only time can tell.

Even in the United States of America, where it would seem from the outside that possible integration between White and Negro is favoured by circumstances to a much greater extent than in most other countries, extremely serious difficulties are encountered in all spheres of the application of a policy of compulsory integration, as is shown elsewhere in this Rejoinder ⁴, and the questions whether such policy will in fact lead to eventual harmonious relations, and if so, over what period of time and at what cost, seem to remain as open as ever ⁵. Not much general publicity has been given to the situation in British Guiana, in respect of which the following has been said:

“A racial division of the worst kind has taken hold in British Guiana. East Indians, the predominant race, and Negroes, who are smaller in numbers but physically superior, have allowed themselves to be drawn into a conflict which many appear unable to understand ⁶.”

And—

“[t]here is yet another ‘solution’—partition. It is a measure which horrifies most Guianese but one which is nevertheless coming to the minds of many as the apparent racial impasse looms larger every day. Any way out of the morass of racial hatred and political bitterness must be considered ⁷.”

17. The difficulties attendant upon the presence of widely different groups, in appreciable numbers, in one integrated political entity—of which the above were some random examples—arise from human behaviour which manifests itself generally, and they are accordingly not restricted in their application to certain times or places. This may be further illustrated by the fact that many States throughout the world have given recognition to the existence of such problems, and to the need for taking realistic account of them in the formulation of government policies, by devising their immigration laws in such a way as to preserve their national homogeneity and to prevent the immigration of inassimilable elements. Thus the “White Australia Policy” in the field of

¹ *Vide* Annex XIII, *infra*.

² *Neue Zürcher Zeitung* (evening edition), 3 Nov. 1964.

³ *Vide* Annex XIV, *infra*.

⁴ *Vide* Chap. XI, *infra*.

⁵ *Ibid.* (*Vide* Conclusion, para. 47.)

⁶ Taylor, F., “Race Madness in the Sugar Belt”, *Daily Telegraph*, 2 June 1964.

⁷ Taylor, *op. cit.*

immigration severely restricts the immigration of non-Whites. The purpose of this policy has been officially stated to be—

“... to maintain homogeneity of Australian people in order to avoid insoluble problems which arise from inability of Europeans and non-Europeans in any one country to merge successfully into a single harmonious community. In such an attitude there is not the slightest suggestion that Europeans are the superior race ¹.”

A similar policy applies in New Zealand, where, in 1960, the then Prime Minister expressed himself as follows with respect to uncontrolled admission of non-Whites into New Zealand: “If we did decide to do that, I believe we would lose our standards and our right to this country within a generation” ².

In Great Britain legislation was passed in 1962 to control the influx of immigrants, particularly from the newer Commonwealth countries ³. At the time the British Government Information Office in Johannesburg issued a comment on the measure which contained the following passages:

“... in spite of the strong racial tolerance that is the trait of Britain, strains could easily develop into clashes between immigrants and the local population . . .

Taking everything into consideration it became obvious to Her Majesty's Government that some form of control was essential, *both to reduce the risk of a social and economic strain inherent in the existence of unassimilated communities* and to provide itself with powers to regulate the flow of immigrant labour as future economic conditions might require ⁴.” (Italics added.)

As is noted below ⁵, immigration which has in fact taken place, prior to or despite this statute, has indeed led to the creation in Great Britain of unassimilated communities, and to attendant social and economic strain, which is beginning to make itself felt also in the political sphere.

Also in Canada there exists a provision entitling the Government to prohibit or limit in number for a stated period or permanently the landing in Canada of immigrants belonging to any nationality or race for a number of reasons, including, *inter alia*; “because such immigrants are deemed undesirable owing to their peculiar customs, habits, modes of life and methods of holding property, and because of their probable inability to become readily assimilated” ⁶.

The above examples (which are, needless to say, not offered in any sense of criticism of the policies concerned) all serve to establish the existence of the observable fact referred to above ⁷. However, the present proceedings are more particularly concerned with conditions and policies in Africa, and in the succeeding paragraphs the emphasis will fall on events, policies and occurrences in that continent.

18. The existence of differences in Africa of the type discussed in the

¹ *The Times*, 18 Apr. 1962.

² *Rand Daily Mail*, 25 Aug. 1960.

³ *Vide Annex XV, infra*.

⁴ *Vide Annex XV, para. 5, infra*.

⁵ *Vide Annex XV*.

⁶ The Immigration Act, 1910 (9-10 Edward VII, Chap. 27) as amended in 1919 (9-10 George V, Chap. 25), sec. 38 (c).

⁷ *Vide para. 15, supra*.

previous paragraph was emphasized in the Counter-Memorial¹. Whilst not meeting Respondent's exposition of facts, Applicants primarily content themselves with relying on the "norms" said to have been established by organs of the United Nations². Furthermore, they describe as being contrary to the "overwhelming weight of authority in the political and social sciences"³, Respondent's contention that there are group reactions which "exist as facts, independently of any governmental policy"⁴. Elsewhere Applicants particularly indicate that they offer this discussion in response to Respondent's attempt "to justify its policy on the basis of comparisons with human behaviour at all times and in all places"⁵.

Applicants' answer to Respondent is consequently purely theoretical—they do not venture to join issue on the actual results of the policy propagated by them as it affects real people in a real world, but pin their faith on theories propounded by politicians and academicians (which, as will be shown, do not even assist them)⁶. For the rest they contend that Respondent's references to events in other parts of Africa are not relevant—a contention which has been demonstrated to be clearly untenable⁷. Indeed, by resorting to such an obviously unfounded contention, Applicants indicate the extent of their embarrassment over the intractability of facts which obstinately refuse to fall into the places pre-determined for them by Applicants and majorities in the United Nations. Respondent is unable to oblige Applicants by disregarding unpleasant realities and restricting reference in this case to attitudes expressed by academicians and United Nations representatives: its responsibilities demand that it pay attention also to the results of the theories propounded by the said persons, and that it be guided, *inter alia*, by deductions drawn from such results. To this end, a short discussion of African realities will be presented in the next succeeding paragraphs. This discussion is offered in the same spirit as in the Counter-Memorial⁸, i.e., not of criticizing or finding fault with the governments of African territories or policies adopted by former colonial or administrative Powers in situations of great complexity, but of learning objectively from the facts—including manifested reactions and tendencies—with a view to better consideration and evaluation of Respondent's own policies.

19. The primary political reality in Africa has been expressed as follows:

"... differences based on tribal characteristics are not as amenable to modification as the relatively compressed demographic differences which serve as indications of power in our own society.

I wish we had a good answer to this, but I think that this is the crux of the problem confronting the African leader⁹."

¹ II, pp. 450-455.

² *Vide* para. 2, *supra*.

³ IV, pp. 273 and 305.

⁴ *Ibid.*, pp. 302-303.

⁵ *Ibid.*, p. 305.

⁶ *Vide* Chaps. VI-XI, *infra*.

⁷ *Vide* sec. A, paras. 21-23, *supra*.

⁸ *Vide* II, pp. 383 (para. 5) and 449-450 (paras. 35 and 36).

⁹ Ashford, D. E., "The Last Revolution: Community and Nation in Africa", *The Annals of the American Academy of Political and Social Science*, Vol. 354 (July 1964), p. 45.

This confirms another general statement of the same purport quoted in the Counter-Memorial ¹ to which attention is invited.

Where deep-seated tribal, racial or ethnic differences have been ignored in African States, the result has frequently been bloodshed and chaos. In so saying, Respondent must not be understood as suggesting that every difference between groups must necessarily be an impediment to political integration. Each case must be determined on its own merits. It sometimes occurs that differences which appear to an outsider as unsubstantial or even insignificant, nevertheless result in complete unassimilability, whereas apparently major differences may, by the pressure of circumstances, not constitute an insurmountable obstacle in the way of integration. As a rule of general probability, however, experience has shown that major ethnic differences need much more delicate handling than the crude principle of one man one vote in an integrated society which is proposed by Applicants. Examples where this approach has failed disastrously may be found in the Annexes to this Chapter. Thus there is the case of Rwanda, the very existence of which, as noted above ², reflects a departure from the "norm" which Applicants seek to distil from United Nations practice. It is clear, moreover, that the division between Rwanda and Burundi was not a drastic enough remedy for the ills of Ruanda-Urundi—within Rwanda itself the differences and antagonisms between the Hutu and the Tutsi were too severe to be contained within one State. In that case efforts at integration resulted in the virtual extermination or expulsion of the Tutsi ³. Despite these well-known facts, Applicants refer with approval to recommendations regarding "sweeping although gradual change in local government *without reference to the wishes of the inhabitants*" of Ruanda-Urundi, and to "the *importance attached by the Council to a unified political structure*" ⁴ for the same territory. The impression is created that Applicants are completely unaware that the results of Trusteeship Council policy in Rwanda can be measured in tens of thousands of deaths and hundreds of thousands of refugees.

Another example is the Congo (Leopoldville). A short resumé of the events in that unhappy State is given below ⁵. For present purposes it is sufficient, firstly, to quote the following words of the Secretary-General of the United Nations:

"The current difficulties in that country reflect conflicts of an internal political nature with their main origins found in the absence of a genuine and sufficiently widespread sense of national identity among the various ethnic groups composing the population of the Congo ⁶."

Secondly, it may be noted that, in the midst of a spate of newspaper reporting from the Congo on the recent bloodshed and atrocities in that territory, the following appeared: "The consensus here appears to be

¹ II, p. 450 (para. 37).

² *Vide* para. 13, *supra*.

³ *Vide* Annex VII, *infra*.

⁴ IV, p. 453. (Italics added.)

⁵ Annex III, *infra*.

⁶ *Ibid.*, para. 4, *infra*.

that partition of the Congo is inevitable, and the only hope of solving the crisis, the New York Times reports"¹.

In the Sudan, attempts at creating an integrated State between Arabs and Negroes have led to massacres and flight, as is demonstrated below². Here the death toll runs into thousands and the number of refugees into tens of thousands³. A recent news report on a demonstration at Khartoum by 5,000 Africans, which erupted into violence, stated, *inter alia*:

"At first held in check by the organisers . . . the crowd chanted slogans, calling for the separation of the Sudan's southern provinces from the rest of the Arab-dominated country"⁴.

The same two groups, Arabs and Negroes, clashed in Zanzibar where it was the Arabs who bore the brunt of violence and were forced to flee⁵.

20. Respondent does not wish to suggest that ethnic differences in Africa have necessarily led to bloodshed. In certain States some success seems to have been achieved in containing the disruptive forces inherent in ethnic differentiation. Respondent wishes to emphasize, however, that the problem of ethnic diversity is something which has to be squarely faced—it will not disappear conveniently once the formula of one man one vote in an integrated society is applied. It is significant, therefore, that in African nations with wide ethnic differences among the population, the greatest degree of stability has been attained where the system of government takes account of such differences. It will be seen that in Nigeria, for instance, a solution was sought by way of a relatively loose federation⁶. Although this did not eliminate group frictions⁷, it at least seems to have controlled them to some extent. It is instructive that a new fourth region known as the Mid-West state, has recently been created with the support of all political parties in Nigeria in an attempt at relieving some of the strains still caused by ethnic diversity⁸. Whether Nigeria has found the complete solution for its problems, only time will tell. Some observers have suggested that a further partitioning of the country would be necessary⁹.

21. Another State with ethnic problems is Ghana. In that country the problem was brought within manageable proportions by the establishment of a very strong dictatorial type of government. It may be noted in passing that one of the reasons for the creation of dictatorial single-party systems of government in a number of African territories may well be the necessity of curbing inter-group frictions. Thus it has been said:

" . . . perhaps the majority of cases of successful regional integration, if hardly ideal models for Africa, have been based around the *subjugation of the surrounding areas by force, or the domination of them by other means*"¹⁰ (italics added),

and—

¹ *The Star*, 30 Nov. 1964.

² *Vide* Annex VIII, *infra*.

³ *The Pretoria News*, 7 Dec. 1964.

⁴ *Vide* Annex XI, *infra*.

⁵ *Vide* Annex VI, *infra*.

⁶ *Ibid.*, para. 5.

⁷ *Ibid.*, para. 6.

⁸ Kilson, M. L., "Authoritarian and Single-Party Tendencies in African Politics", *World Politics* (Jan. 1963), p. 273.

"... both Ghana and Guinea have experienced significant tribal-centered political conflict; and since it is a major source of political instability in societies in process of forming coherent nation-state communities, some of the single-party tendencies in the two countries may be attributable to an attempt to overcome this conflict ¹".

Reference may also be made to the following prophetic utterance, made as long ago as 1955:

"The Europeanized Gold Coast is not in any true sense building up democracy, and it will not remain a political unit, despite the ability and magnetism of Mr. Nkrumah, its pseudo-Parliamentary Premier, because tribal Ashanti chiefs will not allow a Europeanized coastal upstart to lord it over them . . . Such States have *no hope of survival in Africa unless held together by ruthless despotisms* ²." (Italics added.)

It seems clear that Kenya's development into a one-party State, which is sketched below ³, was also influenced to some extent by the ethnic diversity of its population.

22. A particular manifestation of ethnic conflict occurs where a substantial portion of the population is of European origin. In the Counter-Memorial ⁴ Respondent demonstrated that, 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. References were there made to the Central African Federation ⁵, Kenya ⁶, and the former Belgian Congo ⁶. Since the filing of the Counter-Memorial the facts in respect of these three territories have become even starker. As regards both the Federation and Kenya which are dealt with briefly below ⁷, the words of Elspeth Huxley are particularly apposite, viz.:

"Alas, multiracialism is dead beyond hope of revival and there can be no sharing of power, only seizure of it. If the whites relinquish their grip then the black majority will take it, as in Kenya—and as blacks, African racialists, not as so-called 'civilized men' measuring up to some common non-racial standard politically expressed in a qualified franchise ⁸."

The expulsion of Europeans from Algeria is also a well-known facet of modern history, and is dealt with below ⁹. Apart from instances where Europeans were forced out of newly independent States by reason of violence and disorder, the general lowering of standards and development of black despotisms, to which reference was made above ¹⁰, have induced many White people to depart.

23. Respondent commenced this discussion by quoting as an example

¹ Kilson, M. L., "Authoritarian and Single-Party Tendencies in African Politics", *World Politics* (Jan. 1963), p. 275.

² Lord Altrincham, *Kenya's Opportunity* (1955), p. 59.

³ *Vide Annex V, infra.*

⁴ II, pp. 454 and 468-471.

⁵ *Ibid.*, pp. 454 and 469-470.

⁶ *Ibid.*, pp. 454 and 469.

⁷ *Vide* as regards Kenya, Annex V, *infra*, as regards the Federation, Annex XII.

⁸ *The Times*, 24 Sep. 1963.

⁹ *Vide Annex I, infra.*

¹⁰ *Vide para. 6, supra.*

a State referred to by Applicants as one in which the policies of the Trusteeship Council were applied, viz., Rwanda¹. The two other examples referred to by Applicants also constitute a poor advertisement for such a policy. They are the former French Cameroons² and Tanganyika³. Reference has been made to the "latent or active terrorism" suffered by the French Cameroons⁴. The recent history of Tanganyika, as dealt with below⁵, also does not inspire a great deal of confidence in the merits of Applicants' suggested "norms". As will be seen, this country attained independence in 1961, became a one-party State in 1963, and suffered a serious mutiny in 1964, which could only be quelled with the assistance of foreign troops. Political repression is rife⁶. Thereafter it formed a political association with Zanzibar, adopting the name Tanzania. According to a recent report by Associated Press, the general attitude of the Native inhabitants of Tanganyika is one of opposition to the resident Europeans⁶. The report continues:

"... with Africanisation proceeding, the position of Whites has become steadily more insecure . . . Many Britons drive to work in the morning and wonder if they will have been replaced by an African by 4.30 p.m."⁶

It would seem that the "peaceful and harmonious atmosphere of good will"⁷ which so impressed the 1960 Visiting Mission was not strong enough to survive the application of the "norm" which Applicants are now wishing to impose on South West Africa.

24. To sum up, Respondent disputes that the Trusteeship Council has laid down any generally applicable rule that trusteeship territories should be administered as single integrated units with single centralized governments. Furthermore, events in Africa, including former trust territories and elsewhere, have conclusively established that the indiscriminate application of such a rule, particularly where there exists an ethnically differentiated population, is likely to have calamitous results, whether by reason of rebellion or disorder, or through the imposition of control by authoritarian means or even from both. Consequently Respondent contends that Applicants have signally failed to establish any basis for contending even that an integrated administration with universal franchise would be a desirable form of government in South West Africa. *A fortiori* of course, there can be no suggestion of any bad faith on Respondent's part in resisting Applicants' claims to impose such a system.

¹ *Vide* para. 19, *supra*.

² Referred to at IV, p. 454.

³ IV, pp. 452, 453 and 454.

⁴ *Vide* para. 10, *supra*, and Annex II, *infra*.

⁵ *Vide* Annex IX, *infra*.

⁶ *Rand Daily Mail*, 14 Dec. 1964.

⁷ IV, p. 454.

Annexes to Chapter III

Annex I

ALGERIA

Before independence was conferred on Algeria in 1962, there were approximately 1 million Europeans living in the country; they constituted roughly 10 per cent. of the total population¹. The history of violence and bloodshed in Algeria, which marked the struggle between the French forces, the White settlers and the Algerian nationalists in the years before independence, is well known. In the eight years from 1954 to 1961, according to one report, some 2,348 Europeans and 15,674 Moslems were killed in the fighting, while 23,405 French soldiers died in Algeria during the same period². Immediately after Algeria became independent there was a massive exodus of the White population—about 800,000 Europeans fled from the country³. During 1963 still more Whites left the country⁴. The departure of the Europeans, together with their capital, technical know-how and purchasing power, has had a markedly adverse effect on Algeria's economy⁵. In October 1963 it was reported that the President had announced the confiscation of about 2½ million acres of land still remaining in French ownership⁶. Shortly before, the friction between rural Moslem groups which had already been apparent on the eve of independence⁷, flared up in the form of a revolt by the Berber people of the Kabylie region⁸, who represent about one-fifth of the total population of Algeria and who have been traditionally distinct from the rest of the Algerians⁹.

¹ Africa Institute: *Maps and Statistics*, No. 1 (July 1962), p. 11.

² *The Star*, 27 Aug. 1962.

³ *Africa Institute Bulletin*, Vol. 11, No. 17 (1 Oct. 1962), p. 503.

⁴ *The Daily Telegraph*, 1 July 1963.

⁵ *The Atlantic Report*, Apr. 1964, p. 14.

⁶ *The Guardian*, 2 Oct. 1963.

⁷ Vide G. Mansell, *Tragedy in Algeria*, pp. 30-32.

⁸ *The Times*, 1 Oct. 1963; *The Star*, 2 July 1962, 3 July 1962, 11 July 1962, 26 July 1962, 30 Aug. 1962 and 4 Sep. 1962.

⁹ *The Star*, 30 Sep. 1963.

Annex II

CAMEROON FEDERAL REPUBLIC

1. After the inclusion of the French Camerouns in the French Union in 1956¹, and the introduction of universal adult suffrage¹, serious political unrest continued unabated in the country. In May 1960 the conditions were described as follows:

"For over four years the French Camerouns has suffered latent or active terrorism. From June 1959, violence reached the pitch of the Mau Mau in Kenya; first 20 Europeans were shot or hacked to death, and then an average of 50 African civilians have been murdered every month. Visitors to the Bamiléké province travel under military escort, passing areas of destruction and neglect: shattered, blazing lorries, trenches slashed across the roads and intensely cultivated plantations of bananas and cocoa smouldering in untended desolation . . . On January 1st this year [1960], with 11 out of 21 departments in a state of emergency, with Premier Ahmadou Ahidjo, an inarticulate but tough little Moslem ruling by decree, the Cameroun Republic achieved its independence of French trusteeship . . . In February Premier Ahidjo submitted a new constitution to a referendum. One of the opposition leaders, Myi Matip, called for its rejection and the terrorist emigré leader Felix-Roland Moumié for a total boycott. Only 45 per cent. voted in the Bamiléké province, but intimidation may have accounted for some of the abstentions; 57 women and children were murdered the night before the referendum . . . Two months later on April 10th, the first general elections were held in an atmosphere of continued violence . . ."²

2. The Cameroon Republic, born on 1 January 1960, joined with the British Southern Camerouns to form the Cameroon Federal Republic under a Constitution which became effective on 1 October 1961³. The constituent states are loosely bound, preserving a large measure of internal autonomy. The former Cameroon Republic, now the Eastern Cameroon in the federal Republic, has continued on its unsettled political path, rapidly developing towards a one-party state.

This was achieved by dissolution of an opposition party congress—according to Victor T. Le Vine, "at bayonet point"⁴—and the arrest, trial and conviction of four opposition leaders on a charge of "inciting hatred against the Government and public authority, inciting conflict between ethnic and religious communities and disseminating news prejudicial to public authorities"⁵. And the same author concludes that—

¹ *Vide II*, p. 522.

² *After Terrorism, Peace for the Cameroun?, Africa*, 6 May 1960.

³ *Vide II*, p. 519 (para. 47); and Le Vine, V. T., *Five African States*, edited by Carter, M., p. 308.

⁴ Le Vine, *op. cit.*, p. 323.

⁵ *Ibid.*, p. 321.

"[w]hatever the truth or falsity of the government's charges against the opposition and however one interprets the refusal of the opposition parties to join in the *parti unifié*, there is no question that by July 1962 the East Cameroon had become, to all intents and purposes, a one-party state ¹".

3. After the practical nullification of parliamentary opposition, opposition to the Government has continued in the form of terrorist activity. Le Vine comments that—

"[d]espite the repeated avowals of the East Cameroons government that terrorism has definitely declined and indeed altogether disappeared in some sections of the country, reports continue to come from the Cameroon that guerilla activity is still very much of a problem. The terrorists apparently continue to find their main support among disgruntled Bamiléké and within the *nouveaux arrivées* of the towns. Two sorts of maquis groups must be distinguished. One type includes the groups led by highly politicized UPC leaders, some of whom were trained abroad in guerilla tactics. These groups often possess weapons apparently smuggled in from Guinea or Ghana. The second type seems to consist of bands taking advantage of confusion and unrest to pillage, kill, and steal; they generally operate under *ad hoc* leadership and without specific political motivation ²."

4. "Cameroonization" of the civil services has also created serious difficulties and retrogression in standards of administration.

Le Vine comments, in a passage already quoted above, that—

"... the government has recruited a large number of individuals who seem ill prepared for their tasks and more concerned with the status of their positions than the performance of their duties.

It is therefore not surprising that many Cameroonians have been keenly disappointed in the performance of their officials. If President Ahidjo is to be believed, the East Cameroon civil service can be charged with nearly the entire catalogue of bureaucratic shortcomings. In March 1962 he excoriated East Cameroon officialdom in a well-publicized memorandum, parts of which deserve to be quoted at length:

A marked laxity among nearly the quasi totality of the civil servants is becoming more and more apparent . . . In the majority of the administrative offices, even up to the central services and the different ministries, there reigns such carelessness and such anarchy that even the least informed and least aware are alarmed and sorely troubled over the future of our civil service . . .

. . . among these failings are intemperance, dishonesty, and lack of courtesy; poorly done work, lateness and absenteeism, lack of discipline and insubordination . . . inflated remunerations, and the simultaneous holding of several jobs . . . Furthermore, civil servants should refrain from overt criticism of and insults to the Government or its policies ³."

¹ Le Vine, *op. cit.*, p. 324.

² *Ibid.*, pp. 332-333.

³ *Ibid.*, pp. 338-339.

Annex III

CONGO (LEOPOLDVILLE)

1. The tragic and chaotic events in the former Belgian Congo after it became independent, the intervention of the United Nations to restore order there, and the still continuing fighting, violence and atrocities in the territory, are all matters too well known to be recounted here. The important point for Respondent's purposes is that the difficulties encountered in the Congo were due in large measure to the differences between the various ethnic and cultural groups in the country.

As elsewhere in Africa, tribal and group loyalties in the Congo have proved to be stronger than a feeling for national unity¹. The surprisingly rapid political changes in the territory have not destroyed the continuity of African cultures: even in the violence which followed Belgium's sudden withdrawal from the Congo, the importance of ethnic bonds and traditional hostilities remained clearly apparent². Political parties were organized along tribal lines³; thus political representation and organization stimulated tribal rivalries and intensified ethnic separatism⁴. Self-government has legitimized or encouraged territorial divisions⁵.

2. It has been said that it must be expected that no lasting peace and friendship could be achieved in the two Congos or indeed in Central Africa until the aspirations of ethnic groups are met⁶. But apparently the Belgian authorities at the time of independence did not explore the possibilities of a federal or regional solution to the problems of the Congo; instead, independence conferred full powers on the Central Government at Leopoldville. In the result, the fear of domination of one ethnic or tribal group by another has tended to accelerate the trend toward the "balkanization" of the territory⁵. Various ethnic groups have repeatedly demanded regional autonomy for themselves and have threatened to set up independent states⁷.

3. The pattern of separatism which is evident in the Congo and elsewhere in Africa⁸ has given rise to the following recent comment:

"Events in East Africa, the Congo and West Africa clearly portray that our continent is fast becoming, as it were, an *aggregation of atoms, disorganised, discontented and antagonistic*. How can it be possible for *states composed of clusters of nationalities* simmering

¹ Carter, G. M., *Independence for Africa* (1961), p. 8; Rothchild, S., *Journal of International Affairs*, Spring 1961, pp. 25-26.

² Bascom, W. R. and Herskovits, M. J., *Continuity and Change in Africa*, p. (vii).

³ Sutton, F. X., "Authority and Authoritarianism in The New Africa", *Journal of International Affairs*, Spring 1961, p. 16.

⁴ Carter, *op. cit.*, p. 8.

⁵ Lemarchand, R., *American Political Science Review*, June 1962, at pp. 404-405.

⁶ Osinowo, T., *New Africa*, Apr. 1964, p. 10.

⁷ Panikkar, K. M., *Revolution in Africa* (1961), pp. 17-18; *Bulletin of the Africa Institute*, Pretoria, Vol. II, No. 17 (1 Oct. 1962), pp. 496-503; *ibid.*

⁸ Rothchild, D. S., "The Politics of African Separatism", *Journal of International Affairs*, Spring 1961, p. 18.

with race consciousness to develop national attitudes which are necessary for progress ¹?"

Moreover, it must be stated that the Congolese are not a people, but a collection of large ethnic groups, each of which is a people. It is not surprising, therefore, to find that it has been argued that it is unwise to talk of the objective in the Congo as being "unity", when the best that could be hoped for was a loose federation of tribal satrapies, and "unity" imposed by an iron authoritarian régime ²; and also that it might be better to allow the country to fragment into smaller, more manageable units which could be aided and organized one by one ³. Ethnic differences have prevented the development of the Congo as a unitary State on a voluntary basis and it seems that the peoples of the Congo cannot be welded into a unit otherwise than by the use of force, such as was used in Ghana in respect of the Ashanti ⁴.

4. There seems to be little doubt that the inter-group fighting that has occurred in the Congo after independence is in large measure directly attributable to the fact that the constitutional arrangements for the country failed to give adequate recognition to the separate identities and aspirations of the various ethnic groups. In the early days of the crisis it was observed that Congolese displayed a very sharp concept of ethnic differences within the African tribes; men were beaten to death for no other crime than that of belonging to an alien tribe; the Baluba and Lulua slaughtered and mutilated in the Kasai will never be counted ⁵. Later, hostilities and bloodshed resulted from the secessionist movement in Katanga. Recently, reports on the still continuing civil war in the territory indicate that the rebellion is essentially tribal and motivated partly by purely local considerations ⁶.

The United Nations Secretary-General in his report on the withdrawal of the United Nations Force in the Congo stated that:

"Four years have been gained in which the Government and the people of the Congo have had the opportunity to come to grips with their vast problems and to be assisted in meeting some of the worst of them. Four years have been gained in which Congolese public administrators, doctors, professional people, experts of all kinds, and technicians could at least begin their training and begin to gain experience under the guidance and with the expert help of personnel of the United Nations and its specialized agencies. These long-term efforts are now commencing to bear fruit, and they give cause for hope for the future of the Congo ⁷."

¹ Osinowo, T., *New Africa*, p. 9. (Italics added.)

² *The Saturday Evening Post*, Vol. 234, No. 7, 18 Feb. 1961.

³ *New Daily*, 23 Apr. 1964.

⁴ Cf. Mazrui, Ali Al'amin: "Edmund Burke and Reflections on the Revolution in the Congo", *Comparative Studies in Society and History* (Jan. 1963), p. 124; Bretton, H. L., "Political Problems of Poly-Ethnic Societies in West Africa", *Fifth World Congress, International Political Science Association*, Paris, 26-30 Sep. 1961, p. 15.

⁵ Munger, S., *African Field Reports, 1952-1961*, Part I, pp. 180-181.

⁶ *The New York Times*, 5 Aug. 1964, p. 8.

⁷ *U.N. Doc. S/5784*, p. 38.

The Secretary-General concluded his report by stating that—

“ . . . a further extension of the stay of the Force in the Congo would provide no solution to the remaining problems of the Congo. The current difficulties in that country *reflect conflicts of an internal political nature with their main origins found in the absence of a genuine and sufficiently wide-spread sense of national identity among the various ethnic groups composing the population of the Congo . . .* The United Nations cannot permanently protect the Congo, or any other country, from the internal tensions and disturbances created by its own organic growth toward unity and nationhood¹.” (Italics added.)

That this position was clearly understood by the Congolese Government is evidenced by the fact that the Congolese Prime Minister wants to regulate local administration according to traditional tribal lines. In fact the Congolese Prime Minister is reported to have stated:

“The [tribal] system was devised by our ancestors for the maintenance of law and order. So much of the trouble today is attributable to the breakup of a time-tested system².”

¹ *U.N. Doc. S/5784*, p. 42.

² *Newsweek*, Vol. LXIV, No. 16 (19 Oct. 1964), p. 33.

Annex IV

GHANA

1. The people of Ghana may be roughly divided into two broad groups: those of the south, who are Negroes, and those of the north, who are of the Negroid type¹. Two of the main groups in the country are the Fanti of the coastal region and the Ashanti of the interior. There was a history of conflict between them even before the advent of colonial administration². Before Ghana became independent there were grave doubts as to whether the Ashanti in the north and the Ga and Fanti in the south could keep together³. After independence, tribal or ethnic parochialism persisted in Ghana⁴, and even now many Ghanaians still have a stronger allegiance to their local tribes than to the nation of Ghana⁵. Like other large groups in Nigeria and in the Belgian Congo, the Ashanti in Ghana have demanded regional autonomy to the largest extent possible, feeling that to be the only way in which they can preserve their own special virtues⁶. Similarly, party loyalties in Ghana were based on ethnic considerations, until the formation of parties along such lines was forbidden by law, after which all the main parties in opposition to the dominant ruling party regrouped to form one United Party⁷.

"What is happening is that large groups all over West Africa support the parties not because they approve of their policies but *tribal considerations force these parties into a posture of defiance*. Thus the government belongs to one ethnic group and the opposition is led by another group, *which certainly would not be healthy either for democracy or for political development*"⁸. (Italics added.)

2. In Ghana, unlike Nigeria, no real attempt has been made since independence to respect the ethnic divisions of the population. Thus, the Government of Ghana has refused to take into consideration the separateness of the Ashanti and the Northern Territories⁸. Instead, the governing party has by various means ensconced itself in the position where it rules with practically absolute powers⁹. There can be little doubt that conflicts between ethnic groups have contributed materially to the development of Ghana into an authoritarian State, and that the aspirations of the various groups for recognition as separate entities could not have been kept in check except through the dictatorial and repressive methods applied by the ruling party. It has been observed that nearly all single-party situations in African States, political instability stemming

¹ Bourret, F. M., *Ghana—The Road to Independence, 1919-1957* (1960), pp. 8-9.

² Buell, R. L., *The Native Problem in Africa*, Vol. I (1928), pp. 788-789.

³ Sampson, A., *Common Sense About Africa* (1960), p. 33.

⁴ Apter, D. E., "The Role of Traditionalism in the Political Modernization of Ghana and Uganda", *World Politics*, Vol. XIII, No. 1 (Oct. 1961), p. 65.

⁵ "Nkrumah Tightens the Reins", *Senior Scholastic*, Vol. 84, No. 8 (20 Mar. 1964), p. 34.

⁶ Panikkar, K. M., *Revolution in Africa* (1961), pp. 79-80.

⁷ Steinberg, S. H. (Ed.), *Statesman's Year-Book 1963*, p. 513.

⁸ Panikkar, *op. cit.*, p. 17.

⁹ *Vide* para. 3, *infra*.

from tribal conflict or unrest has contributed in some measure to one-party government. Thus,

"... both Ghana and Guinea have experienced significant tribal-centered political conflict; and since it is a major source of political instability in societies in process of forming coherent nation-state communities, some of the single-party tendency in the two countries may be attributable to an attempt to overcome this conflict ¹".

Other authorities have commented on the situation in Ghana as follows:

"Countries like Ghana that have taken strong measures have pointed to the ruthlessness of their opponents as justification—and with much plausibility. There seems little doubt that African governments have graver problems of security than the colonial governments had—they are more intimately involved in *potentially explosive African differences*. These, one ventures to think, are some of the realities behind the ideology of national unity and one-party systems which Western observers often find so disquieting ²." (Italics added.)

"Violence tends to breed violence, and monopoly of political expression tends to breed conspiracy and extra-constitutional resistance. Ghana and Guinea have both announced in their brief periods of independent statehood two or three major conspiracies to overthrow the government by force, to assassinate the presidents of the republics, to subvert the army and so on. And both have alleged a score of minor conspiracies to lesser but in authoritarian context serious ends . . . Both have generally explained their actions on the basis of *putting down dissident elements* threatening the success of the nation-building program of the government by *emphasizing tribalism and sectarianism of one kind or another* ³." (Italics added.)

"The Europeanized Gold Coast is not in any true sense building up democracy, and it will not remain a political unit, despite the ability and magnetism of Mr. Nkrumah, its pseudo-Parliamentary Premier, because tribal Ashanti chiefs will not allow a Europeanized coastal upstart to lord it over them . . . Such States have *no hope of survival in Africa unless held together by ruthless despotism* ⁴." (Italics added.)

3. The measures taken by the dominant party in Ghana to suppress criticism of and opposition to the Government are well-known matters of recent history. A brief reference to the more important measures will suffice: the deportation of certain leaders of the northern region in 1957, after a special Act of Parliament had been passed, reversing a decision of the Supreme Court ⁵; the passage in the same year of the notorious "Emergency Powers Act" and an Act prohibiting the electoral formation

¹ Kilson, M. L., "Authoritarian and Single-Party Tendencies in African Politics", *World Politics*, Jan. 1963, p. 275.

² Sutton, F. X., "Authority and Authoritarianism in the New Africa", *Journal of International Affairs*, Spring 1961, p. 16.

³ Rivkin, A., "The Politics of Nation-Building: Problems and Preconditions", *Journal of International Affairs*, Vol. XVI, No. 2 (1962), p. 139.

⁴ Lord Altrincham, *Kenya's Opportunity* (1955), p. 59.

⁵ "Consolidation of the Dictatorship of Dr. Nkrumah in Ghana", *Africa Institute Bulletin*, Vol. I, No. 17 (1 Nov. 1961), p. 10.

of parties of a tribal, ethnic, religious, or regional character¹; the adoption in 1958 of the "Preventive Detention Act"¹; the wholesale arrest of opposition party supporters in 1961²; and the "nationalization" in 1962 of the last independent press organ in the country, which had been strongly opposing the policies of the governing party³. The Government has the power to expel any non-citizen without giving cause and to confine any citizen to a certain area, from which he cannot move⁴; "[o]pposition to the President can result in detention for an indefinite period"⁵, and numbers of people opposing the Government have in fact been detained⁶.

4. Generally it has been said that—

"[t]he insistence on uniformity and conformity as the manifestations of national coherence and national unity has led the radical nationalist states in Africa—primarily Ghana, Guinea and Mali—to internal regimes in which the single or dominant party is superior to the state and manipulates state power in the interest of party doctrine. The party tends to be monolithic and all-encompassing... The parties tend also to have corps of party militants to exercise overt pressure and force where needed without interference from the police or military, which in turn are available for use to the same end when required⁷."

In such circumstances, violence tends to breed violence⁸; subversion is the only way in which opposition to the governing party can be expressed⁵; and in the last two years there have been three attempts to assassinate the President⁵, coupled with major conspiracies to overthrow the government by force⁹.

5. The dictatorial character of the régime in Ghana has been confirmed by recent events⁵. In the beginning of 1964 a referendum was held to seek approval for constitutional amendments making Ghana formally a one-party State and giving the President the right to dismiss judges of the Supreme Court and High Court at any time¹⁰. The result of the referendum was overwhelmingly in favour of the proposed amendments; but irregularities in voting procedures, such as the removal or sealing of "No" boxes and the ticking off of voters' names before any voters had arrived to cast their votes, and the announcement of results in certain areas long before all the ballot boxes could possibly have been brought in⁵, have given rise to the description of the voting as a "mockery" and of the referendum as "farical"⁵. Before the referendum the governing party had warned: "Those who think they can hide under the so-called 'secrecy' of

¹ "Consolidation of the Dictatorship of Dr. Nkrumah", *op cit.*, p. 11.

² *Ibid.*, p. 13.

³ "Ghana: Nationalization of a Newspaper", *Africa Institute Bulletin*, Vol. II, No. 19 (1 Nov. 1962), p. 548.

⁴ Carter, G. M., *Independence for Africa* (1961), p. 138.

⁵ "Ghana", *Atlantic Report*, May 1964, p. 28.

⁶ "Ghana Extends Preventive Detention", *West Africa*, 9 Nov. 1963, p. 1275.

⁷ Rivkin, A., "The Politics of Nation-Building: Problems and Preconditions", *Journal of International Affairs*, Vol. XVI, No. 2 (1962), pp. 138-139.

⁸ *Ibid.*, p. 139.

⁹ Rivkin, A., "The Politics of Nation-Building: Problems and Preconditions", *Journal of International Affairs*, Vol. XVI, No. 2 (1962), p. 139.

¹⁰ *Africa Digest*, Feb. 1964, p. 117.

the polling booth ¹ to fool us must know that the days when we could be fooled are gone" ². It has been said that the results of the referendum reveal the extent not of the Government's popularity but of the fear of persecution Ghanaians now live in ².

¹ In fact each ballot paper had the voter's name and serial number on it: *National Review*, 18 Feb. 1964.

² "Ghana", *Atlantic Report*, May 1964, p. 28.

Annex V

KENYA

1. The population of approximately 6,254,000 is heterogeneous, consisting of different racial and tribal groups. In 1957 it was estimated that the population included approximately five-and-a-half million Africans, 62,000 Europeans, 161,000 Indians and 34,000 Arabs. The Africans are divided into a considerable number of tribes, amongst which the Kikuyu represent close to 20 per cent. of the total African population, the Luo approximately 14 per cent., the Baluhya 12.5 per cent. and the Kamba approximately 11.7 per cent. Remaining tribes range between 2 per cent. and 6 per cent. of the total of the African population.

2. Despite the British ideal of a peaceful multi-racial State, intergroup relations have in the past been, and still are, strained, and have had a profound effect on the development of events in Kenya. As early as 1920 there was a Young Kikuyu Association the main object of which was—

“... to stimulate enmity between black and white and to get the people to consider that they are in a state of slavery which has been imposed on them by Europeans”¹.

The Mau Mau movement, Kikuyu dominated and led, *inter alia*, by the present Prime Minister of Kenya, Jomo Kenyatta, which included in its aims “... the elimination of European and Indian influences in Kenya and the setting up of an all-African state”², placed Kenya in a state of *emergency from October 1952 to January 1956, during which time numerous atrocities were committed and thousands of people lost their lives*³.

3. With regard to the relationship between Whites and non-Whites Elspeth Huxley and Margery Perham commented that—

“[t]here are plenty of Europeans who will not, and will never, willingly sit down to a meal with an African and there are plenty of Africans (even more, I suspect, in proportion), who will never abandon their dream of getting rid of the Europeans altogether, forever”⁴.

African feeling against Whites is illustrated by the remarks of a senior member of the African government. Louis E. Lomax⁵, American Negro and protagonist of integration, comments as follows on a speech by Tom Mboya, Kenya Minister of Justice:

“Then the Europeans want to know if they can stay on in Kenya. I tell them “sure””, Mboya said, almost doubling up with laughter. The audience knew what he meant. ‘But if they stay they must get out of politics. We are going to have an all-black Parliament, and an all-black government. We are going to divide the land among our people. If the Europeans want to stay they can stay on as squatters. If they want to work they can work for us, and they must work on

¹ *Cmd.*, No. 1030, p. 39.

² *Ibid.*, p. 51.

³ *Ibid.*, p. 316.

⁴ Huxley, E. and Perham, M., *Race and Politics in Kenya*, pp. 252-253.

⁵ Lomax, L. E., *The Reluctant African* (1960), pp. 82-84.

contract. They will come when we say come and go when we say go!

The Africans applauded and screamed with glee. Tom Mboya was on the stump. He was hustling votes, keynoting a political campaign eight months before the election date. His platform was crystal-clear: he promised to submit the Europeans to every indignity and deprivation they have visited upon the Africans for a century . . .

As we drove away I asked Mboya if he really meant it. He said he did."

It is not surprising that over the last three years Kenya has lost nearly a third of its White population ¹.

Colin M. Turnbull, Assistant Curator of African Ethnology at the American Museum of Natural History and a recognized social anthropologist, states:

"Where two peoples found themselves to be completely incompatible, as did the pastoral Masai and the Kikuyu cultivators, then they established separate though neighboring zones. They found a relatively peaceful settlement through avoidance, and this enabled each to retain its own highly distinctive way of life with its associated system of beliefs and values ²."

4. The relationships between Africans and Asians are also tense. Relhana Sadikot wrote in April 1963:

"A large-scale trade boycott, enhanced by intimidation, attempted by Africans against Asians in 1960-1961, has led to an Exodus of Asians from Kenya . . .

This discriminatory treatment is a bitter blow to the Asian community . . . [who] have been profound believers in the social rise of the Africans and have never looked upon them as future competitors ³."

Louis Lomax reports: "But beneath the politics . . . there is simmering hatred and bitterness in African-Indian relationships ⁴." And during May 1964, it was reported that "Kenya is facing a new exodus of Indians. Ships from Mombasa to Bombay are booked solidly until the middle of next year . . ." ⁵.

5. With regard to the African population, tribal affiliations are still strong, despite vigorous condemnation by the Government, and inter-tribal fears and hostilities have posed serious problems. Political organization developed on a tribal basis, and A. J. Hughes ⁶, who in 1963 became Press Liaison Officer of Jomo Kenyatta's ruling K.A.N.U. party, comments that—

" . . . tribalism was entrenched as the basis of political organization and thinking. An uncoordinated plethora of tribal and sub-tribal parties and groups emerged."

One party followed another, until the centralistic Kenya African

¹ *Die Vaderland*, 6 Oct. 1964, p. 3.

² *The Annals of the American Academy of Political Social Science*, Vol. 354, July 1964, p. 28.

³ "Equal rights for Asians", in *New Africa*, Apr. 1963, p. 12.

⁴ Lomax, L. E., *The Reluctant African* (1960), p. 70.

⁵ *Rhodesia Herald*, 8 May 1964.

⁶ Hughes, A. J., *East Africa: The Search for Unity*, p. 123.

National Union (K.A.N.U.) was formed in 1960, dominated by the large Kikuyu and Luo tribes ¹.

In the same year the Kenya African Democratic Union was formed, bringing together several groups fearful of Kikuyu and Luo domination, and emphasizing regionalism, which was, according to Hughes,

“... no more than the transformation of tribal fears and animosities into an ideology which could be given constitutional form. K.A.D.U. proposed the division of Kenya into a number of areas, similar to—but not entirely corresponding with—those of the main tribal groupings... [which] policy gave articulate expression to K.A.D.U.'s very genuine tribal fears of the Kikuyu and the Luo ²”.

6. At the Kenya Constitutional Conference, 1962, an attempt was made to recognize the basic ethnic differences in the country, and to hold together the centrifugal forces by devising a Constitution on regional lines and granting different groups a measure of regional autonomy. Six regions were to be delimited by an independent Boundaries Commission. The report of the Regional Boundaries Commission, 1962, abounds with examples of tribal animosity and fears, e.g.,

“A combined Kamba delegation was unanimous in saying that the Kamba people did not wish to be placed in a region with the Kikuyu or to be associated in the same region as the Masai.

A combined Masai delegation was also unanimous in expressing the wish to be included in a region with peoples other than the Kamba.

A representative cross section of the Meru people... expressed the wish... in no circumstances to be included in the same region as the Kikuyu ³.”

The Embu delegations insisted—

“... that if they were to be associated with the Kikuyu in the same region they would require guarantees that they would be given the right to determine ownership and control of land in the Embu District, the right to have an effective local government in the district, equitable representation in Central and Local Government and a fair share of developments monies ⁴”.

“The Abaluhya were most emphatic in their desire to be associated together in a region separate from the Luo. The Kipsigis left us in no doubt that their unanimous desire was to be associated in a region with the Nandi and other Kalenjin tribes; they were equally unanimous in not wishing to be left in a region with the Luo ⁵.”

The Somali of the Northern Frontier Districts unanimously objected against inclusion in any region of Kenya, wishing to join the Somali Republic ⁶. The Somali in these districts have been in a constant state of revolt and the member of the Legislative Council for Northern Province East is reported to have said that secessionists living in the area were

¹ Hughes, A. J., *East Africa: The Search for Unity*, pp. 131-132.

² *Ibid.*, p. 144; *vide also African World*, July 1963, p. 7.

³ *Cmnd.*, No. 1899, p. 9.

⁴ *Ibid.*, p. 10.

⁵ *Ibid.*, p. 14.

⁶ *Ibid.*, p. 8.

prepared to die for their cause¹. Also among the Luo fear of the Kikuyu exists. In August 1962, a Luo meeting attended by 4,000 Luo resolved that—

“[w]hereas hitherto good relations have existed between the Luo community and members of the Kikuyu tribe, as is evident in our association in K.A.N.U., we as a community have viewed with great concern the widespread intimidation, oathing, secret meetings, and gun manufacturing by members of the Kikuyu tribe, apparently aimed at dominating other tribes in Kenya²”.

The report of the Regional Boundaries Commission concluded that—

“... it is clearly established that there is a compelling and sincere desire on the part of many of the peoples of Kenya to be associated in a region with some and not with others. That is the truth, and it could only be by a process of wishful thinking that a contrary conclusion could be reached³”.

7. The deep group loyalties in Kenya have resulted in the flaring up of tribal animosities and bloodshed⁴. Revolt in the Northern Frontier Districts is chronic. The Somalis there boycotted the Kenya elections to show their unwavering determination to secede from Kenya⁵.

K.A.N.U., dedicated to centralism (which is close to Kikuyism)⁶, accepted the regional Constitution in 1962 under pressure. Since coming into power, and since independence which was achieved in December 1963, the Government has progressively refused to take into consideration the desires of minority groups to preserve a measure of autonomy. Prime Minister Kenyatta hinted soon after independence that Kenya needed to become a one-party State, and that K.A.N.U. would be the only party⁷. And within a year after independence Kenya officially became a one-party State and legislation was passed to curb regional autonomy.

8. There can be little doubt that conflicts between ethnic groups have contributed materially to the development of Kenya towards an authoritarian one-party régime, capable of keeping in check the aspirations of minority groups for recognition as separate entities only by the imposition of strong measures.

¹ *East African Standard*, quoted in the *Africa Digest*, Oct. 1962, p. 57.

² *The Times*, 20 Aug. 1962, quoted in *Africa Digest*, Oct. 1962, pp. 25-53.

³ *Cmnd.*, No. 1899, p. 5 (para. 29).

⁴ *Vide, e.g., The Times*, 1 Sep. 1962, quoted in *Africa Digest*, Oct. 1962, p. 53; *The Guardian*, 25 May 1963, quoted in *Africa Digest*, Aug. 1963, p. 11.

⁵ *The Guardian*, 25 May 1963, quoted in *Africa Digest*, Aug. 1963, p. 11.

⁶ *Vide African World*, July 1963, p. 7.

⁷ *Die Transvaler*, 27 July 1964.

Annex VI

NIGERIA

1. The general observation that "[t]here are notoriously great differences among the African peoples who were swept into one political entity by the colonial partition of Africa"¹, is nowhere better illustrated than in Nigeria. In a United Nations publication it was said:

"One of the most striking examples of diversity is provided by Nigeria where, in particular, the Yuruba of the Western Region, the Ibo of the Eastern Region and Hausa and Fulani of the Northern Region, are distinctive ethnic groups differing in custom, tradition, religion and language²."

The groups mentioned are the predominating sections of the population; in actual fact there are not less than ten, and possibly 12, main ethnic groups³. The main ethnic groups are distinguished by decided structural, cultural and religious divergencies⁴; for example, the people of the northern region, which is Moslem, conservative and under-developed educationally, have little in common with the Negro peoples of the southern half of the country⁵. Each of the ethnic groups, it has been said, is a nation by itself, containing many tribes and clans; there is as much difference between these main groups as there is between Germans, English, Russians and Turks, for instance⁶. Accordingly, it has been observed that Nigeria as a whole is an artificial unit and not a nation in the true sense of the word⁷.

2. An attempt has been made in Nigeria to recognize and respect the fundamental differences between the various ethnic groups in the country. Thus, the Constitution under which the country gained independence in 1960, acknowledging the fears of minorities⁸, contained safeguards protecting religious and ethnic groups from discrimination⁹, while the Federal type of Constitution⁹ was in itself an acceptance of diversity and pluralism¹⁰. With regard to the Federal Constitution, two prominent Nigerians have commented as follows:

¹ Sutton, F. X., "Authority and Authoritarianism in the New Africa", *Journal of International Affairs*, Spring 1961, p. 15.

² *U.N.Doc.*, ST/TRI/SER. A/15/Vol. 3, *Progress of the Non-Self-Governing Territories under the Charter* (1961), p. 18.

³ Awolowo, O., *Path to Nigerian Freedom* (1947), p. 48; Bretton, L., *Power and Stability in Nigeria* (1962), pp. 127-128.

⁴ Bretton, L., *Power and Stability in Nigeria* (1962), pp. 127-128.

⁵ Kimble, G. H. T., *Tropical Africa*, Vol. II (1960), p. 242.

⁶ Awolowo, O., *Path to Nigerian Freedom* (1947), p. 48.

⁷ Hailey, *An African Survey*, Revised 1956 (1957), p. 307; Keuning, J., "Nigeria's Politieke Problemen", *Afrika, Maandblad van het Afrika-Instituut*, Dec. 1962, p. 427.

⁸ A commission appointed in 1957 to inquire into the fears of minorities recommended the insertion of specific safeguarding provisions in the constitution: *U.N.Doc.*, ST/TRI/SER. A/15/Vol. 3, *Progress of the Non-Self-Governing Territories under the Charter* (1961), p. 22.

⁹ *Ibid.* II, p. 518 (para. 39).

¹⁰ Rivkin, A., "The Politics of Nation-Building; Problems and Preconditions", *Journal of International Affairs*, Vol. XVI, No. 2 (1962), p. 139.

"All these incompatibilities among the various peoples in the country militate against unification. For one thing they are bound to slow down progress in certain sections, and on the other hand they tend to engender unfriendly feelings among the diverse elements thus forced together. . . . Those who place these groups under the same Constitution ignore them at their peril. More so, as it appears that these incompatibilities tend to grow in size as those concerned become more educated and civilized. . . ."

Experts can propound learned theories as to why people having different languages and cultural backgrounds are unable to live together under a democratic unitary Constitution. But the empirical facts of history are enough to guide us. It has been shown beyond all doubt that the best constitution for such diverse peoples is a federal Constitution. . . .¹

"Far from marking the triumph of 'tribalism', or regional nationalisms, the adoption of federal government in this country was a constructive step towards a durable society based on a multiplicity of ethnic groups. Since the ethnic groups cannot be wished away, wisdom dictates that they be recognized for what they are—the raw materials out of which the Nigerian nation has to be fashioned—and that a constitutional formula be found for reconciling diversities with overall unity. This is precisely what a federal framework is designed to do. . . ."²

3. Nigeria's acknowledgement of the diversity of her peoples in her attempt to build a nation has not been without constructive effect. Considering the vast size of the country and its population, and the extent of the ethnic diversity, the Nigerian record concerning internal stability appeared for some time to be amongst the more favourable of the newly independent States of Africa. However, evidence has lately been mounting that the actual constitutional arrangements have not gone far enough in the direction of decentralization in order to enable Nigeria to escape "the quickening pace of separatist activities"³, which have been manifest elsewhere in Africa. In fact, the group divisions which were instrumental in bringing about the federal structure have tended to push the three regions of the country even further apart⁴; the divergences amongst the various groups have been a source of friction, "a negative force of disequilibrium and disintegration"⁵. The task of building a nation and forging the various groups into a homogeneous community has thus far proved incapable of attainment, because, although there are no fundamental differences of race or colour between the ethnic groups, there are nevertheless important diversities of culture and religion⁶. These have resulted in the emergence of "tribal particularisms"⁷, in an increasing

¹ Awolowo, O., *Path to Nigerian Freedom* (1947), pp. 49-50.

² Ogunshayo, A., "Nigeria's Political Prospects", quoted in *Bulletin of the Africa Institute*, Vol. 1, No. 13, 1 Sep. 1961, pp. 4-5, from an article published in *Ibadan*, the Journal of the University College of Ibadan.

³ Rothchild, D. S., "The Politics of African Separatism", *Journal of International Affairs*, Spring 1961, p. 18.

⁴ Cowan, L. G., *Local Government in West Africa* (1959), p. 168.

⁵ Bretton, H. L., *Power and Stability in Nigeria* (1962), p. 127.

⁶ Elias, T. O., *Government and Politics in Africa* (1963), p. 64.

⁷ *Ibid.*, p. 60.

awareness of cultural and linguistic identity¹; even educated Nigerians have retained the basic loyalties to their particular communities, providing the leadership of the local or "tribal" unions¹. The desire of each group to preserve its own cultural, economic and political solidarity has given rise to tribal animosities², to conflict between ethnic groups and to a government composed of totally different groups³.

4. Group loyalties have resulted in the flaring up of old divisions, tensions and friction in local authorities such as county councils and municipalities throughout the country⁴. One authority has noted that at least one county in the Eastern region, which had been formed by forcibly combining three distinct groups, has "fallen apart" as a result of tribal and linguistic differences⁵. More broadly, the competition for political power which has arisen between the hitherto quiescent groups has been organized around tribal ties and sentiments⁶; the various groups support separate political parties⁷, tribal feelings being the main influence in determining party allegiance⁸. According to one authority, political tribalism has been introduced where only social and relatively small-scale tribalism had been known before⁹. Two of the three major political parties came into existence partly in response to the threat of a mass party to seize power nationally on behalf of one ethnic group¹⁰. Each of the main parties, in the struggle to gain power at the centre at the expense of the other parties¹¹, has become regionally entrenched¹²; there is a tendency for the perpetuation of the rule of the particular groups which form the majority in a particular party¹³, and the larger groups are thus bound to dominate the smaller groups¹⁴. The minority groups are at a disadvantage when they are forced to be in the midst of other peoples who differ from them in language, culture and historical background¹⁵. These minorities are beset with fears of discrimination, oppression and even destruction¹⁶. Thus ethnic considerations have become major sources of conflict¹⁶.

5. The fears of dissatisfied ethnic minorities in Nigeria have given rise to repeated demands for the status of new regions or provinces to be

¹ Post, K. W. J., *The Nigerian Federal Election* (1963), p. 14.

² Elias, T. O., *Government and Politics in Africa* (1963), p. 61.

³ Osinowo, T., "Essentials of African Unity", *New Africa*, Apr. 1964, p. 9; *vide* also Hodgkin, T., *Nationalism in Colonial Africa* (1956), pp. 189-190.

⁴ Cowan, L. G., *Local Government in West Africa* (1959), pp. 170-171; Carter, G. M. and Brown, W. O., *Transition in Africa* (1958), pp. 58-59.

⁵ Carter, G. M. and Brown, W. O., *Transition in Africa* (1958), p. 58.

⁶ Hodgkin, T., *Nationalism in Colonial Africa* (1956), pp. 189-190.

⁷ Post, K. W. J., *The Nigerian Federal Election* (1963), p. 13.

⁸ Mackenzie, W. J. M. and Robinson, K., *Five Elections in Africa* (1960), p. 95.

⁹ Bretton, H. L., "Political Problems of Poly-Ethnic Societies in West Africa", address delivered at the *Fifth World Congress of the International Political Science Association*, Paris, 26-30 Sep. 1961, p. 5.

¹⁰ Bretton, H. L., *Power and Stability in Nigeria* (1962), p. 122.

¹¹ *Ibid.*, p. 120.

¹² *West Africa*, 8 Feb. 1964, p. 141.

¹³ Gyasi-Twum, K., "West Africa's Prospects for Democratic Rule", *Africa—Special Report*, June 1959, p. 12.

¹⁴ Mackenzie, W. J. M. and Robinson, K., *Five Elections in Africa* (1960), p. 484.

¹⁵ Awolowo, O., *Path to Nigerian Freedom* (1947), pp. 53-54.

¹⁶ Bretton, H. L., *Power and Stability in Nigeria* (1962), pp. 128-129.

accorded to their own specialized cultures¹, and for the formation of new States². There have also been frequent threats of secession³. Already these fissiparous tendencies⁴ have resulted in the establishment, recently, of a new, fourth region in Nigeria, known as the Mid-West state⁵. The creation of the new state within the Federation followed upon a crisis, during which a state of emergency was imposed in the Western Region, providing for rule by decree of the Federal Government; and Chief Awolowo, whose Action Group formed the majority in the Western Regional Parliament while being a minority in the country as a whole⁶, was put on trial and sentenced for treason⁷. These developments have to a certain extent confirmed the doubts that had been expressed by some authorities as to whether stability could be maintained in an independent Nigeria⁸, whether the three regions could be stopped from disintegrating under the stresses of their own internal antagonisms⁹, and whether the various ethnic groups would stay together longer than expediency required⁹.

6. It is significant that when the new Mid-West state was created, all the political parties in Nigeria not only supported that development, but in fact encouraged the formation of still further small states. In July 1963 the New York Times Service reported from Lagos as follows on the formation of the new region:

"Its creation reflects the intensity of tribal and regional feeling that still pervades Nigeria's political life . . .

While most African nationalists decry any tendency to split Africa into tribal groups, the creation of the Mid-West State had the broad support of all Nigerian political parties.

They reasoned that because tribal feeling is still so strong in Nigeria a truly national political party cutting across tribal lines is not yet possible.

Thus the only way to achieve national unity is to encourage small tribal states. With each tribe secure in its own area there will be far more willingness to form truly national unity without fear of any one group being strong enough to dominate another¹⁰." (Italics added.)

Other observers have also advocated the further partitioning of the country as a means of resolving the conflicts between the various ethnic

¹ Adam, T. R., *Government and Politics in Africa South of the Sahara* (1962), pp. 108-109.

² Post, K. W. J., *The Nigerian Federal Election* (1963), p. 13.

³ Carter, G. M. and Brown, W. O., *Transition in Africa* (1958), p. 58; Rothchild, D. S., "The Politics of African Separatism", *Journal of International Affairs*, Spring 1961, p. 58.

⁴ Hodgkin, T., *Nationalism in Colonial Africa* (1956), pp. 189-190.

⁵ Abernethy, D. B., "Nigeria Creates a New Region", *Africa Report*, Mar. 1964, pp. 8-10.

⁶ *The Star* (African News Service), 29 May 1962; 4 June 1962 and 25 June 1962.

⁷ *Keesing's Contemporary Archives*, 28 Dec. 1963-4 Jan. 1964, p. 19818, and 13 to 22 Aug. 1964, p. 20236.

⁸ Mackenzie, W. J. H. and Robinson, K., *Five Elections in Africa* (1960), pp. 484-485.

⁹ Kimble, G. H. T., *Tropical Africa*, Vol. II (1961), p. 243.

¹⁰ As quoted in *The Star*, 16 July 1963.

groups: thus, there have been serious suggestions that Nigeria should be split up into 13 autonomous regions¹; it has been argued that each group must be autonomous in regard to its internal affairs, and that even as many as 30 to 40 Regional Houses of Assembly would not be too many in the future United States of Nigeria²; the suggestion is that since the opposition to the Government is regional, and not political, there is no reason to believe that the recognition of separate entities by the creation of a large number of units with limited powers would weaken the country³.

7. Nigeria's attempt at alleviating group frictions by recognizing and respecting ethnic divisions can hardly be described as a "pandering to tribal parochialism", the phrase used by Philip Mason⁴. No-one would suggest that the country should be divided into "more than a hundred linguistic groups"⁴. As has been pointed out, the large number of linguistic groups are mostly comprised in the 10 or 12 major ethnic groups: in other words the position within these groups is similar to that obtaining amongst, e.g., the Ovambo and the Okavango peoples in South West Africa⁵ and there is a widely held view that more states should be established within the Federation to make provision for the main group.

The presence of members of different groups in the various governmental bodies, which is inevitable under the present arrangement, has given rise to much tension and friction, as pointed out above⁶. Sometimes this tension has erupted into violence, as in the Tiv Division of North-Eastern Nigeria. In February 1964 it was reported that riots had broken out there during which 11 people were killed; later ten members of a minority political party were sentenced to various terms of imprisonment⁷. The President of this party blamed the disturbances "on district and clan heads interfering with local politics"⁷. On 2 August 1964 *The New York Times* reported:

"Months of tribal clashes in north-eastern Nigeria may have cost as many as 1,000 lives, the police said today.

Bloodshed increased sharply several months ago, spurred by tribal jealousies and political bickering.

The Tivs *resent being ruled by the Moslem Fulani tribe* from the Northern Region's capital of Kaduna⁸." (Italics added.)

¹ Sampson, A., *Common Sense About Africa* (1960), p. 33.

² Awolowo, O., *Path to Nigerian Freedom* (1947), pp. 53-54.

³ Panikkar, K. M., *Revolution in Africa* (1961), pp. 17-18.

⁴ IV, p. 335.

⁵ *Ibid.* II, pp. 323 (para. 42) and 318 (para. 28).

⁶ *Ibid.*, and paras. 3-5, *supra*.

⁷ "Nigeria's Population Explosion", *West Africa*, 29 Feb. 1964, p. 226.

⁸ *The New York Times*, 2 Aug. 1964, p. 8.

Annex VII

RWANDA

1. The two population groups, which differ racially and culturally, viz., the Hutu (85 per cent. of the population in 1956) and the Tutsi (slightly less than 15 per cent. of the population in 1956) have maintained their separate identity over a contact period of at least four centuries ¹.

2. During the late 1950s, with the introduction of the principle of suffrage—coming in the place of indirect rule which previously had not drastically changed the Tutsi-dominated feudal type of society—direct competition and tension between the groups built up rapidly. Political parties were formed on a tribal group basis, the Tutsi dominating the UNAR (Union Nationale du Ruanda) Party, and the Hutu rallying behind PARMEHUTU (*Parti d'Emancipation des Hutus*) ².

3. In 1959 large-scale racial and political violence broke out, when PARMEHUTU organized a popular uprising against the appointment of a new Mwami as monarchical ruler. Thousands of refugees fled the country, including the newly appointed Mwami ³.

4. As a result of elections held in 1960 PARMEHUTU was swept into power, and early in 1961 a political *coup d'état* followed when the PARMEHUTU government organized a mass meeting of communal councillors and burgomasters which voted Rwanda a Republic, elected a new provisional National Assembly, and a provisional president ⁴.

5. Elections for a National Assembly, under United Nations supervision, together with a referendum on the principle of the monarchy, were held in September 1961. Widespread terrorism and intimidation accompanied the election campaign ⁵. PARMEHUTU won 80 per cent. of the vote. Following the election there was a new burst of terrorism and thousands of Tutsi fled the country ⁵. Prior to independence well over 100,000 Tutsi fled Rwanda. Over 250,000 still remained ⁶.

6. Tutsi refugees formed a secret terrorist organization, the Inyenzi, dedicated to secure the return of Tutsi refugees and the restoration of the monarchy in Rwanda ⁷. Incursions into Rwanda by Rwanda refugees were made during November and December, 1963 ⁸, but were repulsed. Mass reprisals by Hutu against Tutsi still living in the country then swept Rwanda. The Hutu population ran amok and thousands of Tutsi

¹ *Ruanda-Urundi, Geography and History*, Belgian Congo and Ruanda/Urundi Public Relations Office (Brussels, 1960), p. 23; *vide* also Segal, A., *Massacre in Rwanda* (1964), p. 4.

² Segal, *op. cit.*, pp. 7-9.

³ *Ibid.*, p. 9. *Vide* also *G.A., O.R., Sixteenth Sess., Suppl. No. 4 (A/4818)*, p. 29 (para. 6).

⁴ *G.A., O.R., Sixteenth Sess., Suppl. No. 4 (A/4818)*, p. 30 (paras. 28 and 29); Segal, *op. cit.*, p. 10.

⁵ Segal, *op. cit.*, p. 10.

⁶ *Ibid.*, p. 11.

⁷ *Ibid.*, p. 13. *Vide* also Matheson, A., "Massacre in the Mountains", *Rand Daily Mail*, 11 Feb. 1964.

⁸ Segal, *op. cit.*, p. 13; *U.N. Doc. E/3935*, p. 47.

men, women and children were slaughtered¹. The exact number killed will never be known. Segal states that "[t]he most reliable estimates are between 10,000 and 14,000 slaughtered"². Mass reprisals only came to an end by mid-January 1964, but arrests and executions of Tutsi continued³. A further wave of Tutsi refugees fled the country⁴.

7. The number of Tutsi remaining in Rwanda is unknown. Segal estimates that since 1956—

"... probably upwards of 250,000 have fled the country, including 50,000 during the latest massacres. The remaining 120,000-140,000 are not allowed to leave the country since the Rwanda government fears that once out they will be recruited by the Inyenzi"⁵.

According to the latest *Annual Report of the United Nations High Commissioner for Refugees* the number of refugees from Rwanda had reached a total of 153,000 by March 1964 creating a critical problem⁶. Segal states that the—

"Tutsi remaining within Rwanda are in an impossible position. Although still heavily reliant on Tutsi officials for administration and education, the Rwanda government has no confidence in their loyalty. Even under the most stable conditions their prospects for promotion in the civil service would be severely limited. As it is they are branded as traitors and are subject to intimidation by the Inyenzi for supporting the régime. Only a handful manage to leave the country secretly . . ."⁷

The upheavals in Rwanda have brought economic disaster to the country⁸.

Segal concludes that—

"Rwanda is today one of the world's most unfortunate countries, besodden with tragedy which may erupt again at any time. The country lives in a constant garrison state of military alert, its economy has been shattered to the point of near paralysis, and the standard of living of its population reduced to the barest of subsistence levels. Its borders are thronged with thousands of refugees who are kept alive on the most meagre rations only through the grace of external aid"⁹.

8. The Administering Authority and the United Nations have found it impossible to develop a joint sense of territorial consciousness on the basis of universal adult suffrage of the population viewed as one. It has also proved impossible for the two groups to govern jointly and peacefully on such a basis, in a manner fair and acceptable to all.

9. It appears from a recent report⁸ that the position of the exiled Tutsi in East Africa and the Congo, estimated at more than 130,000,

¹ Segal, *op. cit.*, pp. 14-15.

² *Ibid.*, p. 13.

³ *Ibid.*, p. 16.

⁴ *Ibid.*, p. 18.

⁵ *U.N. Doc. E/3935*, p. 42.

⁶ Segal, *op. cit.*, p. 19; *vide* also "Rwanda: The Tutsis Brood", *The Economist*.

⁷ Mar. 1964, pp. 1197-1198.

⁸ Segal, *op. cit.*, p. 3.

⁹ *The Star*, 1 Oct. 1964.

continues to be critical and that they have obstinately refused United Nations offers to resettle them in Tanganyika, being engaged "... in planning what they believe will be a more successful attempt to regain their old dominion and restore their Mwami"¹.

¹ *The Star*, 1 Oct. 1964.

Annex VIII

SUDAN

1. The population of 12,109,000 is not homogeneous, and consists of partly Arabs, partly Negroes, and partly Nubians of mixed Arab-Negro blood, with a small foreign element, including some 8,000 Europeans (1961 estimates) ¹.

The Arab and Nubian population groups are concentrated in the north, the Negroes in the south. The population of the Southern Sudan is approximately 3,500,000. The Arabs and Nubians are all Moslems. The Negroes are generally pagan, but some have been converted to Christianity, and some to Islam ².

2. The fact that these differing population groups found themselves within the boundaries of a single State was due to their fortuitous union under the control of the Anglo-Egyptian condominium, under British administration, since 1899.

3. The Arab and Negro population groups are markedly different. J. Cameron says:

"The Sudanese of the north and those of the south not only seem to be, but consider themselves a wholly distinct people. The Arabic-speaking Muslims of the north have little affinity with the Negroid dwellers of the Equatorial south . . . between the sophisticates of Khartoum and the arid north, and the black Nilotic people of the swamps and the forests few things exist in common, ethnically, linguistically, culturally. The Northerners tend to regard the southern Negroes with contempt; the Southerners cherish dark memories of the Arab incursions among them in the days, long remote, of the slave trade ³."

"The most serious internal problem now facing the . . . government is the discontent festering in the Sudan's three southern provinces . . . which are ethnically, culturally, and linguistically more akin to middle Africa than to the Sudan's Moslem, Arabized north ²."

4. During the period of British administration the Milner Mission recommended in 1920 that—

"[h]aving regard to its vast extent and the varied character of its inhabitants, the administration of its different parts should be left as far as possible in the hands of the native authorities, wherever they exist, under British supervision . . . ⁴".

This policy of indirect rule was progressively carried out. The years during which this policy was applied were relatively free from internal upheaval. No population group felt itself seriously threatened by domination of other groups.

¹ *Whitaker's Almanac* (1964), p. 926.

² Kitchen, H. (Ed.), *A Handbook of African Affairs* (1964), p. 158.

³ Cameron, J., *The African Revolution* (1961), p. 231.

⁴ Mair, L. P., *Native Policies in Africa* (1936), p. 181.

In 1953 an Anglo-Egyptian Agreement guaranteed to the Sudanese the right to determine their own future. The first Sudanese general elections were held at the end of 1953. On 1 January 1956 the Republic was proclaimed ¹.

5. Independence, according to L. D. Makuei, brought "... an accentuation of the underlying difficulties, namely, racial, economic and social gulf between the North and the South" ². And, in the words of Cameron, "[t]roubles descended on the Sudan in full and harassing measure; riots came and went; ministers were deposed; crisis followed crisis. For four years the ... Sudan wrestled with its difficulties, fighting to impose a sense of national unity and purpose on a divided and disparate nation through the processes of Parliamentary democracy. It was a brave but hopeless effort. The parliamentary groups could achieve neither a national majority nor a system of co-operation.

In November 1958 ... [the] tottering parliamentary system was overthrown ... A military coup led by General Abboud abolished Parliament and took over the administration of the country, claiming that only thus could the integrity of the Sudan as a national unit be preserved ³."

As a result of the military coup d'état the Constitution was suspended, Parliament and political parties being dissolved. A Supreme Council of the Armed Forces and a Council of Ministers were set up ⁴.

6. No more success has been achieved under the new régime. The basic differences and attitudes of north versus south have persisted. Indeed, good relations between the groups have become progressively worse correlative to attempts on the part of the dominant northern Government to assimilate and acculturate the southern groups ⁵. Revolt of the southern groups against the pro-northern régime has been the staple diet of the Sudan. The full facts are obscured, as the three southern provinces were declared closed districts, thereby eliminating visitors and effective observation.

The southern Negroes have struggled to secede, alternatively, to obtain a large measure of autonomy under a federal constitution. Their demands have been refused and large-scale military operations have been conducted, 6,000 northern troops were moved into the southern area in March 1963. Makuei stated that at the time of writing 600 southerners had been killed, a considerable number of southern officials, chiefs and civilians had been arrested, and more than 35 villages (not less than 5,000 huts) had been razed ⁶. Large numbers of refugees have fled to bordering territories. In January 1963 it was reported that there were 25,000 southern Sudanese refugees in Uganda, 10,000 in the Congo, 7,000

¹ Steinberg, S. H. (Ed.), *Statesman's Year-Book* (1955), p. 341. *Vide also* Steinberg, S. H. (Ed.), *Statesman's Year-Book* (1963), p. 1437.

² Makuei, L. D., "Southern Sudan, a test case in afro-arab cooperation", *New Africa*, Apr. 1964, p. 11. *Vide also* Oduho, J. and Deng, W., *The Problem of the Southern Sudan* (1963), pp. 1-3 and 28-29.

³ Cameron, J., *The African Revolution* (1961), pp. 233-234.

⁴ Steinberg, S. H. (Ed.), *Statesman's Year-Book* (1963), p. 1437.

⁵ "Revolt in the Sudan", *America*, 14 Dec. 1963, p. 758.

⁶ Makuei, L. D., "Southern Sudan, a test case in afro-arab cooperation", *New Africa*, Apr. 1964, p. 12.

in the Central African Republic and 500 in Kenya¹. Emergency grants were made by the United Nations to resettle refugees². A secessionist movement named [N]Anyā [A]Nya, committed to violence to achieve self-determination for Negro southerners, came into being and has carried on terrorist activities². Its circulars state, *inter alia*: "Wherever we find a Northerner we shall kill him . . . Death to the Arabs, Freedom for the South"³.

The southern Sudanese secessionist movement is another instance where a distinct race wishes to escape the oppression of a dominant majority. Thus the Southern Sudanese Union claimed that in recent months the Sudanese Government had killed 700 southern Sudanese, burned 500 villages and had made 2,000 homeless⁴. The United Nations High Commissioner for Refugees had initiated a £175,000 programme for settling 1,200 refugees from southern Sudan⁵. Ian Wright, who had spent some time in southern Sudan, wrote:

"Even Southerners who are loyal—and there are a lot of them—know that a political solution, a recognition of southern separatism even, will be necessary in the end⁶."

7. In sum, Makuei states:

"The core of the southern problem lies in the northern rejection to the Sudan becoming a multi-racial State. This is shown by the northern determination to obliterate African identity by the imposition of the Arabic language, of Islam, and by the subjugation of the African group economically, politically and socially . . . The ruthless and indiscriminate maltreatment of southerners by the military government only crowns an already obvious failure of the Sudan as an Afro-Arab State⁷."

8. A spread of the revolt occurred during October 1964. Serious rioting took place in the northern capital city of Khartoum. There has been a practically complete news black-out, but on the radio President Abboud has stated that he would revive the 1956 Constitution and appoint a commission of enquiry. However, President Abboud was overthrown by a civilian coup d'état at Khartoum on or about 17 November 1964, shortly after he had dissolved his military junta⁸. Subsequently there were reports from the southern Sudan indicating "that the tempo of spreading rebellion there has increased in spite of the military régime's ruthless efforts to stamp it out", that the "insurrection . . . has a bitterness and brutality reminiscent of the Mau-Mau rebellion in Kenya" and that it "has pitted African against Arab, reviving the deep racial hatreds that were engendered among the African peoples of southern Sudan a century ago by the Arab slave trade"⁹.

¹ "Secessionist Southern Sudan", *Africa* 1963, 18 Jan. 1963, pp. 6-7.

² "Sudan: Southern Strife", *Quarterly Economic Review*, June 1964, p. 10.

³ "Sudan", *Africa Digest*, Vol. XI, No. 3, Dec. 1963, p. 74.

⁴ *Daily Telegraph*, 24 Aug. 1964.

⁵ *The Times*, 28 May 1964.

⁶ *The Manchester Guardian*, 28 May 1964.

⁷ Makuei, *op. cit.*, p. 12.

⁸ *Vide Africa Institute Bulletin*, Dec. 1964, p. 334; "In the Sudan; Democracy", *The Star*, Johannesburg, 17 Nov. 1964.

⁹ *Vide* report by the New York Times News Service from Khartoum, quoted in *The Star*, Johannesburg, 23 Nov. 1964.

Annex IX

TANGANYIKA

Although Tanganyika gained its independence in 1961 under a constitutional structure designed for a two-party or multi-party system, and had been regarded as the most promising experiment in multi-racial government, it soon became a one-party State in fact ¹, and it still remains so. In 1963 President Julius Nyerere declared that Tanganyika should become a one-party State statutorily ²; that year produced a crop of deportations of people who voiced criticism of the one-party Government, and the formation of opposition parties was quashed ³. In the beginning of 1964 there was a serious mutiny of Tanganyika soldiers, when the mutineers took over the key points in Dar-es-Salaam. The mutiny was followed by considerable looting of Asian shops ⁴, 17 people died and more than 100 were injured ⁵. Reasons advanced for the mutiny were dissatisfaction with the presence of British officers, and insufficient pay ⁴. All European officers were dismissed ⁵. The mutiny was suppressed only with the help of British soldiers ⁶. The Government appointed a Commission to examine what kind of one-party system was most suitable for Tanganyika; there could be a danger of further measures of repression against those critical of the Government ⁶. The Government had already decided to merge all the 11 trade unions affiliated to the Tanganyika Federation of Labour into one big union; it appointed all the officials from top to bottom without any consultation with the members ⁶. This was done while an estimated 200 trade union leaders out of a total of more than 500 civilians were being imprisoned ⁶. A former High Commissioner for Tanganyika in London, who resigned his post and returned to Tanganyika to form an opposition party, was detained without trial ⁶. Tribal animosities are still alive. In April 1963, a clash between thousands of Waarusha and Masai tribesmen was only prevented by firm police action ⁷. More recently Tanganyika entered into a political association with Zanzibar under the name Tanzania. According to a recent report from Associated Press, the Native inhabitants of Tanzania would prefer the European residents to leave the country ⁸. The report continues:

"... with Africanisation proceeding, the position of Whites has become steadily more insecure... Many Britons drive to work in the morning, and wonder if they will have been replaced by an African by 4.30 p.m." ⁸

¹ Carter, G. M. (Ed.), *African One-Party States* (1962), p. 450.

² Macadam, I. (Ed.), *The Annual Register of World Events: A Review of the Year 1963* (1964), p. 110.

³ *Ibid.*, pp. 110-112.

⁴ *The Manchester Guardian*, 21 Jan. 1964.

⁵ *The Times*, 22 Jan. 1964.

⁶ Cox, I., "Tension in Tanganyika", in *New Africa*, April 1964, pp. 12-14.

⁷ *The Times*, 15 Apr. 1963.

⁸ *Rand Daily Mail*, 14 Dec. 1964.

Annex X

Togo

The former mandated territory of Togoland under French administration was placed under a trusteeship agreement after the Second World War. In 1956 the territory became part of the French Union and universal adult suffrage was introduced ¹. In 1960 it became an independent Republic. By 1961 the Comité de l'Unité Togolaise (CUT) was elected to all seats, the nominations of the opposition party, the Juvento, not being allowed to go forward. The former leader of the opposition was arrested in December 1961 ². Togo thus in effect became a one-party State. The one-party Government of CUT under President Sylvanus Olympio ended abruptly in January 1963 when President Olympio was assassinated and CUT overthrown. A military committee took over and M. Grunitsky, a former prime minister during the period of French administration, returned from exile in Dahomey and was appointed President. The National Assembly was dissolved and the Constitution abrogated ³.

In April 1963 a plot to overthrow the new Government was discovered and a number of the CUT opposition leaders were arrested ⁴. A new Constitution was agreed upon in May 1963—elections were held on a single list of candidates for the Assembly ⁴.

¹ *Vide II*, pp. 519-520.

² "The Opposition in Tropical Africa", *Bulletin of the International Commission of Jurists*, No. 14, Oct. 1962, p. 5.

³ Steinberg, S. H. (Ed.), *Statesman's Year-Book* (1963), p. 1044.

⁴ *Keesing's Contemporary Archives*, 1 to 8 June 1963, p. 19449.

Annex XI

ZANZIBAR

1. The population is heterogeneous, consisting of groups which differ racially, culturally and linguistically. In 1958 there were 228,815 Africans (sub-divided in different groups), 46,989 Arabs, 18,334 Indians, and small numbers of others ¹.

2. After the first elections on a common roll were held in 1957 considerable racial tension between Arabs and Africans became apparent ², and during the mid-1961 elections serious racial rioting broke out after the Afro-Shirazi Party (ASP) had appealed to Africans on a racial basis ³, 68 persons (practically all Arabs) were killed and 381 injured ⁴.

3. On 10 December 1963 Zanzibar became independent after the United Nations General Assembly had requested the administering Power to grant Zanzibar independence "... on the basis of universal adult suffrage" ⁵.

4. Immediately prior to independence the African-dominated Afro-Shirazi Party, although polling more than 50 per cent. of the votes, was defeated by a coalition between the Arab-dominated ZNP (Zanzibar Nationalist Party) and ZNPP (Zanzibar and Pemba Peoples Party) ⁶.

5. African dissatisfaction and racial feeling were so close to the surface ⁶ that just over a month after independence, on 12 January 1964, the Government was overthrown in a military coup d'état, which was African led by John Okello ⁷. The revolution was accompanied by many acts of violence, large-scale looting of shops belonging to Arabs and Asians, and a large number of persons were killed ⁸. Okello claimed that 11,995 people had died ⁹. The Sultan, who was the constitutional Head of State, fled the country, a Republic was proclaimed, and the leader of the Afro-Shirazi Party installed as the new President ¹⁰.

The former elected governing coalition parties, the ZNP and the ZNPP, were declared illegal, all their property was seized, and the Sultan was banned from Zanzibar for life ¹¹. The revolutionary President announced

¹ *Zanzibar*, Reference Division, Central Office of Information, London, Oct. 1963, pp. 3-5.

² *Colonial Office Report on Zanzibar for the years 1957 and 1958*, p. 1. *Vide* also Dunn, C., "Where Arabs and Africans Part?", *Observer*, 21 July 1957; "Zanzibar", *African Digest*, July/Aug. 1958.

³ *Zanzibar*, Reference Division, Central Office of Information, London, Oct. 1961, pp. 25-26.

⁴ *Britannica Book of the Year*, 1962, p. 551. Rotberg, R., "The Political Outlook in Zanzibar", *Africa Report*, Oct. 1961, p. 5.

⁵ *G.A., O.R., Seventeenth Sess., Suppl. No. 17 (A/5217)*, p. 73.

⁶ *Keesing's Contemporary Archives*, 7-14 Dec. 1963, p. 19778.

⁷ "Zanzibar", *Commonwealth Survey*, 21 Jan. 1964, pp. 72-73.

⁸ *Keesing's Contemporary Archives*, 14-21 March 1964, p. 19951. Sulzberger, C. L., "Zanzibar I—Behind the Clove Curtain", *New York Times*, 25 Mar. 1964.

⁹ *Ibid.* This figure is probably exaggerated.

¹⁰ *Commonwealth Survey*, 21 Jan. 1964, pp. 72-73.

¹¹ *Keesing's Contemporary Archives*, 14 to 21 Mar. 1964, p. 19951.

that Zanzibar was to be a one-party State under the Afro-Shirazi Party. Wide powers of detention were decreed ¹.

6. From statements by the President, Ministers, and Okello, the nature of the revolution was unmistakable—it was a racial revolution to put the Africans in control of the Government which they felt was in the hands of a racial minority ². Immediately after the revolution Okello said that he thought it would be “unlikely” that Arabs, Asians and Europeans would be allowed to become Zanzibari citizens under the new régime ³.

7. Since the coup d'état, and despite the fact that a ban on the entry of press correspondents was imposed by the new régime ⁴ reports concerning the desperate situation of the Arab and Asian minority have abounded. It was reported on 23 April 1964 that about 1,500 Arabs had fled the islands under destitute circumstances ⁵.

The economy of the island is in a chaotic state with the flight and expulsion of Arab landowners and merchants ⁶.

The Times Special Correspondent describing the situation after the 1964 revolution estimated that “there could not have been fewer than 500 casualties” and 2,500 persons in prison, detention and refugee camps ⁷. Arab and Asian refugees are leaving the islands under wretched conditions packed like sardines on dhows ⁸. The Red Cross International committee has started a programme to evacuate the Arab minority, as the only solution to the problem ⁹.

8. Zanzibar has now been incorporated with Tanganyika to form the United Republic of Tanganyika and Zanzibar or Tanzania, under President Nyerere with the Zanzibar leader Abeid Karume as second Vice-President. On 9 November 1964 it was reported from Nairobi that “Zanzibar’s leftist revolutionary régime has launched a new campaign of terror following the discovery of a plot to overthrow President (sic) Abeid’s government” ¹⁰.

¹ *Keesing's Contemporary Archives*, 14 to 21 Mar. 1964, p. 19951.

² “Zanzibar after the Coup”, *Africa Digest*, 16 Mar. 1964, p. 141; Sulzberger, C. L., “Zanzibar I—Behind the Clove Curtain”, *New York Times*, 25 Mar. 1964.

³ “Zanzibar—Life Returning to Normal”, *Africa South of the Sahara*, 23 Jan. 1964, p. 16.

⁴ *Keesing's Contemporary Archives*, 14 to 21 Mar. 1964, p. 19952.

⁵ *Rand Daily Mail*, 23 Apr. 1964; *vide also Keesing's Contemporary Archives*, 9 to 16 May 1964, p. 20052.

⁶ *Rand Daily Mail*, 23 Apr. 1964. *Vide also The Star*, 30 Dec. 1963.

⁷ “Zanzibar after the Coup”, *Africa Digest*, 16 Mar. 1964, p. 141.

⁸ *Rand Daily Mail*, 23 Apr. 1964; *The Star*, 3 June 1964.

⁹ *Ibid.*, 24 July 1964.

¹⁰ *The Star*, 9 Nov. 1964.

Annex XII

CENTRAL AFRICAN FEDERATION OF THE RHODESIAS AND NYASALAND

1. The Federation between Southern Rhodesia, Northern Rhodesia and Nyasaland came into being on 4 September 1953. The Federation was conceived as a progressive experiment in multi-racial co-operation, built on the cornerstone of "partnership" between Black and White¹. The Constitution contained in its Preamble the promise that the emergent nation would "conduce to the security, advancement and welfare of all . . . inhabitants, and in particular would foster partnership and co-operation between [the] inhabitants . . ."². Thus Sir Roy Welensky, Federal Prime Minister, said: "Our aim is to achieve a non-racial society in which a man's ability, not the colour of his skin, will count"³.

2. As far as participation in government was concerned, the basic idea was that no differentiation was to be made on a racial or group basis. Participation in government was to be granted to all members of the population on a basis of education, civilization and responsibility alone, i.e., solely on a basis of individual merit. In the words of John Graunt, member of the Federal Parliament, "[t]he only thing we want is to have rule by those capable of ruling, an aristocracy of capability, not of colour and not of race . . ."⁴. Due to the overwhelming majority of Natives, it was realized that they would ultimately be in the majority as far as participation in government was concerned. Sir Roy Welensky stated: "I believe that the African will eventually dominate the voting, but at that stage I hope he will be an educated and civilized person"⁵. And Sir Malcolm Barrow stated: "We accept the fact that Africans must eventually govern and we regard it as part of White trusteeship to train them for that responsibility . . ."⁶. The basic principle of the policy of partnership was accordingly controlled integration, which, in the sphere of government, involved the creation of a single political unit, with rights of suffrage granted to all inhabitants, irrespective of race, on reaching the required standards of civilization.

3. This idea of controlled and gradual evolution was totally unacceptable to the African Nationalist leaders. The strict voting qualifications were regarded as a mere subterfuge, and the demand "for one man, one vote", immediately, was advanced without any hope of compromise⁷.

4. Thomas M. Franck, an American observer who is decidedly not unsympathetic towards the African point of view, comments:

¹ *Vide II*, p. 454 (para. 45).

² Franck, T. M., *Race and Nationalism: The Struggle for Power in Rhodesia—Nyasaland* (1960), p. 2.

³ Duffy, J., and Manner, R. A., *Africa Speaks* (1961), p. 128.

⁴ *Federation of Rhodesia and Nyasaland, Debates of the Federal Assembly, Second Sess., Second Parliament*, 28 Mar. to 19 July 1960, Vol. 12, Col. 362.

⁵ Allighan, G., *The Welensky Story* (1962), p. 259; *vide also* Welensky, R., *Welensky 4000 Days*, p. 324.

⁶ Allighan, *op. cit.*, p. 259.

⁷ *Vide II*, pp. 454 and 469-470.

"The greatest fear of the radical Congress leaders is that a multi-racial political party or movement could some day really succeed in capturing the imagination of the races. They keep these movements under constant attack, for they see them as 'cooling chambers' designed to pacify without rectifying, as attempts to rob black nationalism of its intelligentsia, its leaders and its bankers . . . [They] thrive in an atmosphere of racial struggle and social discord which is also frequently in part of their own making. When Garfield Todd announced . . . that he would stake his political career on broadening the franchise for Africans, he was heckled and jeered by Congress agitators.

The strategy of Congress radicals is to demonstrate to the mass of the Africans that European liberals are ineffectual, that they are repudiated by their own race; that only Africans can wrest concessions from the Whites, and only by 'direct action'—demonstrations, strikes, riots, threats of violence.

Towards those Africans who reject this strategy, radical methods of persuasion are frequently directed. Boycotts against the shops of Africans who co-operate with Europeans, social ostracism, and even magic spells are used as methods of coercion by Congress radicals. Hut-burnings, stonings and other forms of physical violence . . . are also employed ¹."

It is not surprising that a moderate African Minister of the Federal Cabinet, Mr. C. A. W. Lewanika, should have stated in 1960: "These African Nationalists hate multi-racial societies or multi-racial Government. What they want is only a black Government ²."

In keeping with the above-mentioned approach on the part of Black nationalist leaders, civil unrest and rioting became commonplace. States of emergency were declared in the three constituent territories in 1959, and there was large-scale rioting and unrest ³.

5. White support of real multi-racial partnership was in the circumstances also faltering or lacking. In 1957 an attitude survey was conducted by Thomas Franck which indicated clearly that unwillingness to assimilate and fear were widespread ⁴.

In the face of militant demands by extremist Black nationalist leaders, the position was reached where reaction set in amongst the White population. In Southern Rhodesia, for example, Prime Minister Garfield Todd in 1957 staked his political future on a campaign for the extension of suffrage rights to Africans on lower qualifications than previously ⁵. Early in 1958 there was a revolt in his own party, and he was forced out. Sir Edgar Whitehead took over the Prime Ministership, and Todd reformed his old United Rhodesia Party.

In the June 1958 elections Todd's party was totally eliminated. The Dominion Party, under makeshift leadership, on a conservative platform,

¹ Franck, *op. cit.*, pp. 256-257.

² *Federation of Rhodesia and Nyasaland, Debates of the Federal Assembly, Second Sess., Second Parliament*, 28 Mar. to 19 July 1960, Vol. 12, Col. 887.

³ *Vide Welensky, op. cit.*, pp. 98-99; 114-115; 118-119; 121-123; 127-128; 308-309; Franck, *op. cit.*, pp. 62 and 263; Allighan, *op. cit.*, pp. 321-332.

⁴ *Vide Franck, op. cit.*, pp. 236-247.

⁵ *Vide para. 3, supra.*

nearly toppled the ruling United Federal Party, dedicated to the development of "partnership", from power ¹.

Franck remarks: "The results of the election came as something of a shock even to the most pessimistic of Rhodesian liberals ¹."

During the next few years Sir Edgar Whitehead, under strenuous pressure, attempted to speed up the process of integration implied by the "partnership" idea ², and predicted that on the 1961 Constitution and franchise arrangements there would probably be an African majority in the Legislative Assembly within about 15 years' time ³.

The intransigent attitude of Black nationalist leaders ⁴, however, resulted in a considerable hardening of opinion amongst the White population. The ruling United Federal Party of Sir Edgar Whitehead was defeated in the December 1962 elections by the more conservative Rhodesia Front Party, and since then insistent claims for independence on the basis of the present Constitution have been advanced. The hardening of White opinion is clearly evidenced by the statements of the present Prime Minister, Ian Smith:

"We believe you can't force integration on people who don't want it ⁵."

"You have to make up your minds whether you are going to maintain standards or are prepared to compromise. I say if you are prepared to compromise it is the end. If we give in we have no option but to get out.

I can tell you, as far as I am concerned—and I am speaking for the Government—we have made up our minds. Neither will we give in, neither will we get out.

We have to stand firm. We have to maintain the standards of civilization we brought here and we have to insist as far as Southern Rhodesia is concerned that decisions shall be made by Southern Rhodesians ⁶."

"As far as we are concerned, if anybody thinks they can interfere in our affairs and tell us how to run our country and how to lower our standards to appease outside opinion in the afro-Asian bloc, then I say to them that will be the bloody day ⁷."

And he has been reported on several occasions to have said that the hand-over of political power to the Africans would not take place in his lifetime.

It has been commented that the growing pressure to hand over power to the African nationalists will be contested by the Rhodesian Whites to the end, and that after "the throwing overboard of 'partnership' by both the Africans and the Whites" the alternative of a voluntary hand-over of power to the Africans can be dismissed ⁸.

It is manifest that an impasse has been reached in the attempted integration of the different population groups in Southern Rhodesia into a single integrated political unit. Instead of bringing the population

¹ *Vide* Franck, *op. cit.*, pp. 193-194.

² For Constitutional developments *vide* II, pp. 509-510.

³ *Ibid.*, p. 470.

⁴ *Ibid.*, pp. 469-470.

⁵ *The Star*, 17 July 1964.

⁶ *Ibid.*, 20 July 1964.

⁷ *Windhoek Advertiser*, 8 June 1964.

⁸ *Sunday Times*, 6 Dec. 1964.

groups closer together, as had been hoped, the method of political development advocated by Applicants is now producing the opposite result. It would appear as if creation of a single integrated political unit, in the African context, often leads to an eventual choice between only two alternatives—to dominate, or to be dominated.

6. In the meantime opposition to the Federation on the part of Nyasaland and North Rhodesian Black nationalists became extreme. The Monckton Commission found that “[t]he dislike of Federation among Africans in the two Northern territories is widespread . . . It is almost pathological¹”. The United Kingdom Government in December 1962 accepted in principle that Nyasaland should be allowed to withdraw from the Federation, and on 31 December 1963 the Federation was dissolved.

This “partnership” was dead, and with it all idea of “showing of power”—as was commented by Elspeth Huxley in 1963 and by Patrick Wall, Conservative British M.P., in January 1964².

7. Nyasaland became the independent State of Malawi on 6 July 1964 under the Prime Ministership of Dr. Banda. Within a few months after independence there was a serious revolt in the Cabinet, and six of the Ministers were forced out. The refusal of Dr. Banda to rush Africanization was reported to be a major reason for the revolt³. Assaults and intimidation were widespread, and it was reported that “democratic rule is being replaced by dictatorial power and political intimidation”³. It was further reported:

“Political intimidation is an old practice in Malawi, but it came into the limelight earlier this month when Dr. Banda began to use it against some European residents who, ironically, had been among his most enthusiastic supporters before independence⁴.”

¹ Report of the Advisory Commission on the Reviews of the Constitution of Rhodesia and Nyasaland, *Cmnd. Paper* 1148, para. 27.

² *Vide* Chap. VII, paras. 8-9, *infra*.

³ *Sunday Times*, 15 Nov. 1964.

⁴ *Ibid.* *Vide* also *Sunday Times*, 8 Nov. 1964; *The Star*, 11 Nov. 1964.

Annex XIII

INDIA AND PAKISTAN

1. Partition between India and Pakistan came about after a long period of agitation, rioting and civil unrest.

In March 1940, 100,000 members of the All-India Muslim League met in Lahore and passed a resolution which committed them to the attainment of their own land of Pakistan. No constitutional plan for India would work, they declared, unless those areas in which the Muslims were in a majority, as in the north-western and eastern parts of the country, were grouped into independent states of which the constituent units would be autonomous and sovereign.

This "Lahore Resolution", backed by the majority of the leaders of British India's 80 million Muslims, was an absolute indication that they would never agree to belong to a free united India which, because of the religious divisions among the population, would be predominantly Hindu in character and government ¹.

2. The demand for the independent State of Pakistan was based on the fact that the Muslims and Hindus could not successfully live side-by-side in a single political organism. Callard comments:

"With the history of Western Europe in mind, it is easy to maintain that in a modern democratic state all citizens should be equal without regard to colour, creed or race. But in Pakistan the history of more than one generation had emphasized the incompatibility of Muslim and Hindu ²."

"The two-nation theory, however, is essentially a modification of the Western political theory of the right of national self-determination. As a political movement, the 100,000,000 Muslims of India asserted their nationhood and demanded an independent state. Before 1947 this idea of a state had no specific boundaries. Pakistan was in no sense the product of sentiments of Punjabi or Bengali separatism. The Muslim homeland was an area, any viable territory, which could support the majority of true believers ³."

3. All efforts were made to keep the country together. In late 1946, representatives of the Muslim League were induced to enter the Interim Government, but no true co-operation followed.

Mellor comments hereon:

"This executive union of two parties which had opposed each other for a generation was achieved during fearful and unprecedented communal riots which occurred in Bengal and Bihar during the autumn, but it proved rather an illusory step forward for the Viceroy soon found himself faced with an apparently insoluble dilemma. Though the Muslim League had joined the Government it refused to

¹ Mellor, A., *India since Partition* (1951), p. 1.

² Callard, K., *Pakistan: A Political Study* (1957), p. 233.

³ *Ibid.*, p. 236.

send its representatives to the Constituent Assembly which . . . had rejected the idea of Pakistan ¹."

4. Rioting became intense. Mellor remarks that—

"[t]he dividing line between non-violent agitation and open violence in India is indistinct . . . a chance blow from a policeman's stave, a hurled brick or a particularly vicious epithet can quickly transform the most peaceful meeting into a riot, especially when communal passions are aroused. This kind of change now took place in the Punjab ²."

"The riots spread quickly. Lahore, Amritsar, Multan, Rawalpindi and many other Punjab towns and villages were seriously affected by pitched battles in which the rival communities fought with sticks, stones, knives, swords and firearms. At least 4,000 people were killed and much property destroyed by fire ³,"

and says that ". . . the riots had, perhaps, created the first rough frontier of a new land" ³.

5. The conflict potential was so great that separation was inevitable. The Viceroy said in a broadcast:

"For more than a hundred years 400 million of you have lived together and the country has been administered as a single entity. This has resulted in unified communications, defence, postal services and currency; an absence of tariffs and customs barriers; and the basis for an integrated political economy. My great hope was that communal differences would not destroy this . . . But there can be no question of coercing any large areas in which one community has a majority to live against their will under a Government in which another community has a majority. And the only alternative to coercion is partition ⁴."

6. The principle of partition was then accepted by all parties. After a number of referendums a Boundary Commission's members could not agree, and the final lines between the two countries were drawn by the independent Chairman, and came to be known as the Radcliffe award ⁵. Both the areas delimited contained substantial religious minorities; violent rioting followed. Mellor remarks:

"It is known now that altogether some 12,000,000 people moved between the two countries; over 6,000,000 fleeing from India and 6,000,000 from Pakistan. The number killed cannot be accurately estimated but it is unlikely that it was less than 200,000 and it may well have been far more ⁶."

¹ Mellor, A., *India since Partition* (1951), p. 8.

² *Ibid.*, p. 11.

³ *Ibid.*, p. 12.

⁴ *Ibid.*, p. 26.

⁵ *Ibid.*, p. 38.

⁶ *Ibid.*, p. 45.

Annex XIV

CYPRUS

1. The two groups on the island are the Greek Cypriots (81 per cent. of the population, preponderantly adhering to the Christian faith) and the Turkish Cypriots (19 per cent. of the population, preponderantly adhering to Islam) ¹.

2. The differences between the two groups, who have lived together for centuries without extensive intermingling, are concerned mainly with religion and with conflicting national aspirations. The Greek community has been inspired by the idea of *enosis*, or union with Greece ². The Turkish Cypriots have vehemently opposed this idea, and have propagated separation, or alternatively a loose federal type of state granting them a measure of autonomy ³.

3. The 1960 Constitution under which Cyprus became independent ⁴ is based on the conception of a unitary state, to be governed on a partnership basis by the two communities. The Constitution rigidly divides the population into the two communities ⁵, provides for a Greek Cypriot President ⁶, a Turkish Cypriot Vice-President ⁶, rigid percentages in which the two groups are to participate in the civil service, the armed forces, the police force, etc. ⁷, and prescribed methods of separate voting by the members of each community ⁸.

4. Due to the basic differences mentioned above, the two groups have been unable to assimilate, and tensions vastly increased during the campaign for independence, reaching fever pitch in December 1963, and through the first months of 1964 ⁹. Terrorism has been and remains widespread since 1955, the constitutional system of government has apparently proved completely unworkable, and conditions amounting to civil war have prevailed ¹⁰. The Turkish Cypriots occupy a number of enclaves and certain portions of the large cities, the Greeks the rest ¹¹. Access by members of the one group to an area occupied by the other is dangerous ¹¹, the ordinary business of government has been disrupted ¹², thousands are

¹ *Vide* Cyprus, *A Handbook on the Island of Aphrodite*, issued by the Publications Department of the Greek Communal Chamber, Cyprus (1964), p. 7; Kingsbury, R. C., *An Atlas of Middle Eastern Affairs* (1963), p. 58.

² *Cyprus, the Facts*, Central Office of Information, London, p. 3; Spyridakis, C., *A Brief History of Cyprus*, pp. 66-67.

³ *Look*, 2 June 1964, p. 37.

⁴ *Vide The Europa Year Book 1963*, p. 374.

⁵ *Ibid.* (Articles 2-5 of the Constitution).

⁶ *Ibid.* (Article 1 of the Constitution).

⁷ *Ibid.*, p. 375 (Articles 122-125 and 129-132 of the Constitution).

⁸ *Ibid.* (Articles 61-111 of the Constitution).

⁹ *The Annual Register of World Events 1963*, pp. 128-129; *Report by the Secretary General on the United Nations Operations in Cyprus, U.N. Doc. S/5959* of 10 Sep. 1964, paras. 45-87.

¹⁰ *U.N. Doc. S/5950*, of 10 Sep. 1964, paras. 45-87.

¹¹ *Ibid.*, paras. 103-105.

¹² *Ibid.*, paras. 106-140 and 145-155.

suffering chaos and misery and many have died¹. The United Nations organized a peace force of more than 6,000 men² on the island to bring an end to military and terrorist operations and bloodshed, but despite its presence, a solution seems as far away as ever.

The Secretary-General states in his latest report³ that—

“... even at its lowest level, the tension in Cyprus is dangerously high. Between the two communities which make up the local population, there is deep-rooted suspicion and mistrust. Each side is constantly in fear of being attacked by the other.”

5. The solution of this problem of inability and unwillingness to assimilate has not yet materialized. Some observers have proposed separation, others have suggested that the only satisfactory method would be to repatriate the Turkish Cypriots to Turkey, leaving the island to the Greek Cypriots⁴. Only time can tell what the best solution would be.

¹ *The Annual Register of World Events 1963*, p. 129; *U.N. Doc. S/5950*, paras. 47-48 and 87.

² *Ibid.*, para. 3.

³ *Ibid.*, para. 46.

⁴ Kelly, E. F., "Preventing a Holocaust", *Cyprus Bulletin* (7 July 1964).

Annex XV

GREAT BRITAIN

1. Over the last ten years great numbers of immigrants, mostly non-White, have been pouring into Great Britain. The flow of immigrants from the older Commonwealth countries has remained fairly static, but the stream from the newer members grew rapidly until 1962¹, when an Act was passed to control the influx of immigrants². It is estimated that the total net immigration from the Commonwealth between 1946 and 1962 was 659,250, including 263,200 from the West Indies, 150,900 from India and Pakistan, 20,400 from West Africa and 8,900 from East Africa³. By the beginning of 1964 there were some 720,000 Commonwealth immigrants settled in Britain (excluding children born there), of whom roughly 275,000 were West Indians and 200,000 Indians or Pakistanis⁴. In September 1964 the *London Times* reported that according to the most reliable estimates there were 1 million or nearly 1 million coloured people living in Britain, including children⁵. Commenting on this fact, the newspaper said:

“Thus Britain today, with a coloured population nearing two per cent. of the whole, must rank as a plural society with a race problem of its own. Particularly is this so because the coloured population tends to congregate in certain places, and in these manifestations of colour feelings are increasing because of the *creation of tensions in all the important social areas*, particularly housing, health and schools⁶.”

2. The process of integrating the new immigrants into Britain's society has given rise to many difficult problems. In the field of housing, for instance, the coloured immigrants have encountered a great deal of colour prejudice and discrimination against them: as a result they have found it extremely difficult to obtain accommodation, whether in rooms, flats or hotels, or to lease or buy houses, irrespective of their social status⁷; in one suburb of London the White residents' association entered into an agreement with a local estate agent to prevent coloured people

¹ *Commentary from Britain: Why Britain is Introducing Immigration Rules*, issued by the U.K. Information Services in Johannesburg on 2 Nov. 1961.

² *Vide*, para. 5, *infra*.

³ Deakin, N. (Assistant Director of the Survey of Race Relations in Britain being undertaken by the Institute of Race Relations), “Residential Segregation in Britain: A Comparative Note”, in *Race*, Vol. VI, No. 1, July 1964, at p. 19.

⁴ *Ibid.*, at p. 18.

⁵ *The Times*, 17 Sep. 1964.

⁶ *Ibid.* (Italics added.)

⁷ *Coloured Immigrants in Britain. An Investigation carried out by the Institute of Race Relations*, by J. A. G. Griffith, Judith Henderson, Margaret Osborne, Donald Wood, at p. 21; “Recent Research on Racial Relations: Britain”, by Anthony H. Richmond, in *International Social Science Bulletin*, Vol. X, 1958, Part I, at p. 363; “When Your Face is the Wrong Colour”, in *20th Century*, Vol. 172, No. 1017, Spring 1963, at pp. 38-39; “Race Trouble in Birmingham, England, Too”, in *U.S. News and World Report*, Vol. LVI, No. 12, 23 Mar. 1964, at pp. 103 and 104.

from buying or renting homes in the district¹; sometimes, when coloured people move into a neighbourhood, many White residents move out². In employment, too, coloured people have encountered racial discrimination: they experience difficulty in finding jobs at anything except menial labour, regardless of their qualifications³; they have met with hostility from White workers⁴; in some areas a quota system appears to be in operation, restricting coloured employees to a certain percentage of the total number of employees⁵, and some employers refuse to employ a mixed labour force⁶. Socially, Negroes in general occupy the lowest rating in the scale of social distance of different types of immigrant⁷.

3. According to an American report, the coloured immigrants of Birmingham in England (75,000 out of a total of about 1 million) are running into colour prejudice almost everywhere that they come into contact with Whites: a survey revealed "a picture of racial antagonism and discrimination familiar to many U.S. cities"⁸. The *London Times* recently published an article titled "Intense Passions over Colour", in which the following comments appeared:

"The leaders of opinion in Britain are generally unfamiliar with the *practical awkwardnesses which rise where different cultures are thrown together in competition for the necessary things of life . . .* the sudden impact of large numbers of coloured workers on inland towns unused to them has in many cases *produced hostility, leading even on occasion to violence* ⁹."

4. The Conservative Government did not feel that legislation would solve the problem of racial discrimination¹⁰; a considerable and respectable body of opinion believes that social and personal attitudes to coloured persons and the discrimination which flows from them are not amenable to legal control or ought not to be controlled by law, *inter alia*, because legislative and administrative intervention (as opposed to education) would, far from reducing discrimination, tend to increase it by causing further resentment and creating more publicity¹¹. In the recent British election, the colour problem in Britain was not overtly a political issue; but the *London Times* commented that covertly, it was one of the few issues, possibly the only issue, which was really capable of arousing deep-seated political passions of old-fashioned intensity¹², and it is generally accepted to have played a role in the results. Thus one defeated candidate, in explaining his lack of success, said:

"I am afraid my friends overseas will find the answer disturbing.

¹ *Daily Telegraph*, 30 June 1964; *The Daily Herald*, 29 June 1964; *The Sunday Times*, 18 Aug. 1963.

² *U.S. News and World Report*, *loc. cit.*, at p. 103.

³ *Ibid.*, at p. 104.

⁴ *International Social Science Bulletin*, *loc. cit.*, at p. 361.

⁵ *Coloured Immigrants in Britain*, *op. cit.*, at pp. 30 and 145.

⁶ *The Daily Herald*, 1 May 1963; *Daily Telegraph*, 31 May 1963.

⁷ *Coloured Immigrants in Britain*, *op. cit.*, at p. 108.

⁸ *U.S. News and World Report*, pp. 102-103.

⁹ *The Times*, 17 Sep. 1964. Racial issues have flared in cities such as Bristol, Doncaster, Walsall, Bradford, Bolton and Warwick, and there have been sporadic outbursts of violence in London: *U.S. News and World Report*, *loc. cit.*, p. 104.

¹⁰ *Coloured Immigrants in Britain*, *op. cit.*, at p. 174.

¹¹ *Ibid.*, at p. 173.

¹² *The Times*, 17 Sep. 1964.

I was defeated because the electorate identified me with the 'coloured peoples'. I was rejected as a 'nigger-lover' ¹."

And a commentator wrote recently:

"Coloured immigration and the racial problems it involves became General Election issues for the first time this year. It is unlikely to be the last time ²."

5. At the time when the British Act to control immigration was being introduced, the United Kingdom Information Services in Johannesburg issued a comment on the measure which contained the following passages:

"The heavy influx has already led to some acute local problems in various parts of Britain. For instance, migrants have tended to concentrate in certain districts in London and in industrial areas elsewhere in the country; *in spite of the strong racial tolerance that is the trait of Britain, strains could easily develop into clashes between immigrants and the local population.*

The proposed legislation, while certainly not designed to discriminate on grounds of race, will in practice mainly affect immigrants from the newer Commonwealth countries because it is the increase in the number of these immigrants which has led Her Majesty's Government to take this action.

Taking everything into consideration it became obvious to Her Majesty's Government that some form of control was essential, both to *reduce the risk of a social and economic strain inherent in the existence of unassimilated communities and to provide itself with powers to regulate the flow of immigrant labour as future economic conditions might require* ³." (Italics added.)

Despite a reduction in the numbers of immigrants entering Britain as a result of the application of the Act, there have recently been numerous demands for further restrictions on immigrants ⁴.

¹ *The Tribune*, 23 Oct. 1964.

² Sherman, A., "Immigration after Smethwick", *Daily Telegraph*, 28 Oct. 1964.

³ *Commentary from Britain, op. cit.*, footnote 1, p. 270, *supra*.

⁴ *The Sunday Times*, 18 Aug. 1963.

CHAPTER IV

RESPONDENT'S POLICIES: POST-WAR ADJUSTMENTS

1. Respondent demonstrated in the foregoing Chapter that the results of applying the "norm" of universal adult franchise in a centralized administration have often been calamitous, or at least undesirable, particularly where there existed well-defined ethnic differences within the population of the State concerned. The existence of such differences in South West Africa has presented Respondent also with intractable problems in framing its policy. In the Counter-Memorial¹ Respondent indicated the difficulties that must be faced in complying under present day circumstances with the obligations of the sacred trust. Basically the problem concerns methods of enabling the ultimate exercise of self-determination by the members of certain groups without at the same time in effect depriving the members of other groups permanently of the self-same right. In South Africa itself Respondent endeavours to solve this problem by a policy of separate development, which is a culmination of policies of segregation or apartheid deeply rooted in South African history². The purpose of the policy of separate development is to eliminate all forms of racial friction by the creation of separate homelands for the various indigenous groups, in which they will be able to develop to their full capacities and exercise complete self-determination³.

Having regard to the specific problem of the future of South West Africa and its peoples, Respondent, as has been noted⁴, could 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. For this reason, and also to accelerate developments in all spheres, Respondent appointed the Odendaal Commission, the composition and terms of reference of which are set forth in the Counter-Memorial⁵. The report of the Commission has confirmed Respondent's view that separate development has indeed represented the only general trend of policy which can provide adequately for the needs, the accelerated advancement and the ultimate self-realization of all the inhabitants of South West Africa⁶.

For reasons set out in the Counter-Memorial⁷, Respondent has not yet taken a decision on certain recommendations of the Commission, although the report was accepted in broad principle. Respondent has made it clear, however, that such acceptance—

“... *inter alia*, involves agreement with the Commission's finding that the objective of self-determination for the various population groups will, in the circumstances prevailing in the Territory, not be

¹ II, pp. 458-460.

² *Ibid.*, pp. 461-466.

³ *Ibid.*, pp. 466-472.

⁴ *Ibid.*, pp. 472-476.

⁵ *Ibid.*, pp. 476-477.

⁶ *Vide R.P.* No. 12/1964.

⁷ IV, pp. 213-216.

promoted by the establishment of a single multiracial central authority in which the whole population could potentially be represented, but in which some groups would in fact dominate others. . . . The Government also endorses the view that it should be the aim, as far as practicable, to develop for each population group its own Homeland, in which it can attain self-determination and self-realization ¹."

By way of illustration of the development possibilities inherent in the policy of separate development, Respondent also gave a brief survey in the Counter-Memorial of certain of the fruits of that policy in South Africa ².

2. The systematic explanation in the Counter-Memorial of the background content, implications and results of the policy of separate development as summarized above, did not elicit any comparably systematic or comprehensive reply from Applicants. On the contrary, Applicants in the Reply largely ignore Respondent's exposition, but nevertheless proceed to present assertions in conflict therewith, without, however, attempting to show why their assertions are to be preferred to Respondent's reasoning. It will be best, therefore, to deal with Applicants' argument in the Reply with reference to the various points (isolated though they are) on which their averments and contentions meet, or conflict with, Respondent's expositions.

3. The first, and fundamental, issue between the Parties relates to the method whereby political advancement of the inhabitants of the Territory is to be secured. Respondent was at pains in the Counter-Memorial to demonstrate that the only realistic alternative to separate development was domination of the whole Territory by majority Native groups (or, possibly, by a despotic régime derived from them). Respondent emphasized particularly that there was *no middle course*—all expedients and manipulations intended to achieve such a course really being just slightly more extended ways of arriving at majority rule by Natives ³. The correctness of this assessment not only has been borne out by further events in Africa ⁴ but is confirmed by the attitude adopted by Applicants in the Reply. They urge, without any qualification abolition of all differentiation between groups, treatment of the whole population as a unit, and universal adult suffrage ⁵—claims which have also been pressed by majority groups at the United Nations in recent years.

4. The implications of Applicants' attitude are of great importance. A policy or system of government cannot be properly evaluated by weighing it against theoretical standards of perfection, and, if found to have some adverse consequences in some respects or under some circumstances for some people, be condemned as a policy which does not promote well-being and progress to the utmost. This applies particularly to the policy of separate development, which was designed to strike a balance between extremely complicated human interests and needs, and therefore cannot possibly be expected to serve the advantage, short-term

¹ IV, p. 213.

² II, pp. 477-483.

³ *Ibid.*, pp. 468-471 and 473 (para. 27).

⁴ *Vide* Chap. III, *supra*.

⁵ *Vide* IV, p. 441.

and long-term, of all persons at all times and under all circumstances. The mere fact, therefore, that it may have some disadvantages, in particular respects, cannot serve to condemn it as violative of Article 2, paragraph 2, of the Mandate. For a proper evaluation of its merits, it must be weighed against possible alternatives. And, as noted above, the only real alternative, and the one suggested by Applicants, is attempted integration, which must inevitably lead to domination by a majority Native group or groups, or a dictatorial clique derived from them. Clearly, this alternative would also have unavoidable disadvantages, in addition to such advantages as it might have. Therefore, anyone attempting to choose, on merit, a policy best calculated to promote to the utmost, can do so only after placing in the scales all the respective advantages and disadvantages of *each* of the only two real alternatives.

5. At no stage in their pleadings do Applicants approach the fundamental issues in this case in the manner indicated in the preceding paragraph. They never attempt any serious assessment of the advantages and disadvantages of the policy advocated by them: they virtually content themselves with the fact that United Nations organs have advocated such approach in regard to South West Africa and other territories. For the rest, they concentrate on pointing out the disadvantages, real and imaginary, of Respondent's policy of separate development, or its application. Their allegations in this regard are of two kinds. Some are directed towards showing that separate development is an intentionally oppressive policy. Others, however, fall short of this extreme, and are advanced merely in order to show that separate development has adverse effects in certain respects. Evidence of the latter type can clearly not assist Applicants. Even in an evaluation purely on merit, the existence of disadvantages can have no material significance—they have, as shown above, to be brought into account in the total picture. But the matter does not end there. As has been shown, it is not the function of this Court to found its decision on an evaluation purely on merit, but on the basis whether a Mandatory which makes such an evaluation, can *bona fide*, in the exercise of its discretion, come to the conclusion that separate development is the policy best calculated to promote well-being and progress to the utmost¹. It is patent that, in such an enquiry, the mere demonstration of disadvantages or defects in the policy chosen by the Mandatory, cannot in itself justify condemnation of such policy as being violative of the Mandatory's obligation.

6. When considering Applicants' detailed points of criticism, the Court should, it is respectfully submitted, bear in mind the above considerations, the cogency of which is increased in the present case by the fact that Applicants do not seriously attempt to meet Respondent's case regarding the advantages of separate development as compared with attempted integration as a possible policy for South West Africa. These advantages were discussed in the Counter-Memorial² and may be summarized as follows:

- (a) Separate development is not a policy of domination, but the very antithesis thereof—it contemplates evolutionary termination of

¹ *Vide* Part III, sec. C, para. 39, *supra*.

² II, pp. 466-473.

guardianship in a manner calculated to lead to peaceful co-existence. Attempted integration, on the other hand, must, in the circumstance prevailing in South West Africa, inevitably lead, at least, to domination of some groups by others.

- (b) The aim of separate development is justice for all, not only for some. It seeks to avoid a situation where the exercise of self-determination by some of the inhabitants would involve the denial of self-determination to others.
- (c) Separate development seeks to prevent a situation in which the more developed groups, which are at present responsible for the economic progress and high standards of administration and prosperity in the Territory, may be swamped and probably forced out of the Territory by much less advanced groups with entirely different values and outlooks.
- (d) Moreover, separate development would not involve, as attempted integration would, the abdication of the sacred trust regarding the least developed groups, which would under the latter policy be left at the mercy of a new majority government with competing interests and possible hostile inclinations or intentions, as was the position in the past.
- (e) Separate development avoids the deleterious results of ignoring ethnic differences, loyalties and reactions which manifest themselves strongly when one people feels its existence or basic interests threatened by another. Such results, as noted above¹, have often included tension, unrest, hostilities and bloodshed, and, in some cases, the imposition of ruthless dictatorial rule in order to suppress the tensions in question.
- (f) Avoidance of tension and group reactions of self-preservation is secured by separate development not only in the political sphere, but also in the economic life of the country. This policy provides parallel, protected spheres of economic interest for the various groups, in which their members can advance without constituting or being regarded as a threat to other groups, as compared with well-known forms of discrimination and resistance almost invariably encountered where integration between differing groups is sought to be attained against the wishes of one or more of such groups.
- (g) Separate development renders possible constructive co-operation between White and non-White groups, on a basis of equality, to their mutual benefit—in contrast with the fate which has befallen White minorities, in other African countries handed over to Native rule—to the detriment of all.
- (h) Separate development renders possible the achievement of self-determination by various groups at different points of time. This implication avoids unnecessary delay in the attainment of self-determination by more advanced groups merely because of lack of advancement and maturity on the part of other groups. Conversely, it involves for the latter groups the safeguard of retention by Respondent of the sacred trust obligations towards them even after

¹ *Vide* Chap. III, *supra*.

other groups may have chosen independence in the exercise of their right of self-determination.

- (i) Finally, separate development leaves to the free will of the groups concerned the ultimate decision whether, and in what form and to what extent, they will link up or co-operate with others, *inter se*, politically, economically and otherwise—as opposed to forcing upon them a pre-determined system whether unitary or federal, which some may feel to constitute a threat to their existence, interests or identity.

In short, separate development is intended and calculated, negatively, to avoid the human tragedies which have occurred, and are occurring, in African territories such as the Congo, the Sudan, Rwanda¹, and others, as well as in the systems of ruthless dictatorship found necessary in so many other territories with a view to maintaining even a semblance of order¹. Positively, separate development envisages the establishment of a system of peaceful and friendly co-existence, based on mutual respect for one another's identity, culture, right to existence and human dignity, coupled with fruitful co-operation in matters of common concern. Attempted integration, on the other hand, involves inevitable injustice to minority groups—the highest and the least developed ones—inevitable retrogression in standards of economy and administration, and a very high degree of probability of a repetition of the human tragedies of other territories, or ruthless dictatorial rule, or both.

7. Naturally the advantages of separate development, as outlined above, can only be obtained at a price. Boundary lines have to be drawn, politically, territorially, and in the economic sphere. Unpopular control measures require to be maintained during the period of evolutionary transition towards peaceful attainment of the ideals. In all such regulatory processes individual interests sometimes have to be abated for the benefit of the larger cause of the whole community, and whole communities may have to pay some price for an overriding advantage. Such contributions and sacrifices would, however, in the further application of the policy of separate development in South West Africa, not be demanded only of some groups, to the exclusion of others. As will be demonstrated in the more detailed treatment below, members of all groups would be affected by reciprocal restrictions on political and economic opportunities and other facilities in the homelands of other groups. Transitional steps, e.g., moving to a new home, would affect at least some members of all the groups. Specifically as regards the White group, alleged by Applicants to be specially favoured, it will be noted, e.g., that not only would a large number of them have to give up farms owned and developed by them, but the group as a whole would, through the public revenues, have to make very substantial economic contributions to the accelerated and large-scale development of the non-White homelands and the upliftment of the non-White peoples.

That some members of the non-White peoples would also be adversely affected in some respects, or would have to make special contributions or sacrifices, cannot be denied. But in Respondent's view the extent thereof is very minor as compared with the over-all benefits involved for their

¹ *Vide* Chap. III, *supra*.

respective peoples, and indeed for all the inhabitants of the Territory, as a whole. This aspect is further considered in the next Chapter, where various points of attack and criticism advanced by Applicants against the policy of separate development are dealt with against the background of what has been stated above. These concern both Respondent's motives regarding the policy, and alleged aspects of adverse effects¹.

¹ *Vide* para. 5, *supra*.

CHAPTER V

RESPONDENT'S GENERAL POLICY: ATTACKS THEREON BY APPLICANTS

A. The Charge of Mala Fides as now Formulated

1. For convenience, Respondent here repeats the basic charge which Applicants now formulate, and which Respondent has demonstrated¹ is clearly still based on an allegation of bad faith on its part. The charge reads as follows:

"... Respondent's policy and practice... is (sic) directed toward the primary end of assuring an adequate 'Native' labour supply in the Territory, particularly in its 'White' Police Zone (comprising more than seventy per cent of the Territory), subject always to the condition that, in the words of Respondent's Prime Minister, 'There is no place for him [i.e., the Bantu] in the European community above the level of certain forms of labour'²."

This statement is introduced by the words "as will be shown", and is followed by a number of unsubstantiated assertions regarding each of the aspects of "educational *apartheid*"², "economic *apartheid*"², "political *apartheid*"³, and "policies... in respect of rights of security of the person, residence and movement"⁴. As noted⁵, these assertions lead up to the following conclusion: "In sum, under *apartheid*, the accident of birth imposes a mandatory life sentence to discrimination, repression and humiliation"⁴.

The question for determination in the present Chapter is in how far the above charge, assertions and conclusion are supported by anything contained in the discussion of general principles in Chapter IV B of the Reply. As Respondent has already indicated⁶, consideration will be given in later sections to Applicants' specific charges relating to education, political rights, the economic aspect, etc., and it is consequently unnecessary at this stage to deal with the general assertions made by Applicants in the present context with reference to these aspects.

2. Before proceeding to consideration of more detailed criticisms of its policies, Respondent proposes to deal generally with the three crucial aspects of the charge, viz., that—

- (a) the "primary end" of Respondent's policy is that of "assuring an adequate 'Native' labour supply... in its 'White' Police Zone";
- (b) the "'White' Police Zone" comprises "more than 70 per cent. of the Territory";
- (c) Respondent's policy envisages that there will be "no place for him

¹ *Vide* Chap. I, para. 2, *supra*; sec. A, paras. 2-10, *supra*; Part C, paras. 32-39, *supra*.

² IV, p. 272.

³ *Ibid.*, p. 273.

⁴ *Ibid.*, p. 274.

⁵ *Vide* Chap. I, para. 2, *supra*.

⁶ *Ibid.*, para. 1, *supra*.

[i.e., the Bantu] in the European community above the level of certain forms of labour”.

As will be shown, the contentions stated in (a) and (b) are totally untrue, and the quotation referred to in (c) is cited out of context, creating a wrong impression. Moreover, the whole charge obviously ignores altogether the Odendaal Commission report, and Respondent's reaction thereto.

3. *As regards para. 2 (a)*: Not a jot of evidence is offered in the whole of Chapter IV B in support of Applicants' contention in this regard. In particular, they make no attempt to indicate how this assertion can be reconciled with the recommendations of the Odendaal Commission regarding the extension and intensive development of homelands. It is consequently impossible for Respondent to deal with this accusation, save to say that it is unsubstantiated and unwarranted.

4. *As regards para. 2 (b)*: By referring to the “‘White’ Police Zone (comprising more than 70 per cent. of the Territory)”¹, Applicants seek to convey the impression that an area comprising 70 per cent. of the Territory has been set aside or reserved by Respondent for occupation by Whites. Elsewhere in the Reply they refer to “the 70 per cent. of the Territory set aside as the ‘real home’ of the ‘European’ inhabitants”², and to the “pre-emption of 70 per cent. of the Territory for a small minority of the population”³.

Applicants do not, however, quote any source for the statement that 70 per cent. of the Territory has been pre-empted or set aside for members of the White group. The statement is not supported by the figures given by Philip Mason in Annex 1 to the Reply⁴; Mason apparently assumes that the whole area of the Police Zone has been set aside for the White group. This assumption, which presumably also forms the basis of Applicants' above-quoted assertion, is quite clearly incorrect. Within the Police Zone there are a number of reserves occupied by non-Whites; there are large tracts of land which have been set aside as Diamond Areas, to which access is forbidden to everyone save those concerned with the diamond industry; there are game reserves and the Namib desert; and there are large areas of unalienated state lands which have not yet been allocated for occupation by any population group.

The allegation that 70 per cent. of the Territory has been set aside for European occupation is in fact untrue; so is the statement by Mason⁴ that after acceptance of the recommendations of the Odendaal Commission the division of land in the Territory would leave five-eighths thereof to the Whites. The true position is that, when the Odendaal Commission made its recommendations, only 47.92 per cent.⁵ of the land in the Territory was owned or leased by members of the White group⁶. Should effect be given to the Commission's recommendations, a White area will be established in the Territory, the extent of which will be still

¹ IV, p. 272.

² *Ibid.*, pp. 466-467.

³ *Ibid.*, p. 458. *Vide* in this regard also p. 405 and p. 460, footnote 3.

⁴ *Ibid.*, p. 336.

⁵ Made up of farms (47.34 per cent.) and land in towns and townships (0.58 per cent.).

⁶ *Vide* sec. H, Chap. III, para. 27, *infra* (table).

less than the percentage of 47.92 already mentioned, since a total of 3,406,181 hectares of land presently owned or leased by Whites are to be added to the areas of the non-White homelands. According to those recommendations the extent of the various areas comprising the Territory will be ¹:

White area Farms	43.22 per cent.
Towns and townships	0.58 per cent.
Natives reserves	40.07 per cent.
Diamond areas, game reserves, and unalienated state lands	13.55 per cent.
Farms owned by non-Whites	2.58 per cent.

5. *As regards para. 2 (c):* Applicants' quotation of Dr. Verwoerd as saying "there is no place for him [i.e., the Bantu] in the European community above the level of certain forms of labour" is apt to be misleading. It formed part of a speech on Bantu education, which is dealt with more fully below ². In the first place, it is to be noted, Dr. Verwoerd indicated clearly that in their homelands the Bantu would be enabled to reach the highest rungs of the ladder. Indeed, he expressly stated that one of the aims of Bantu education would be to provide training for "... those who would develop to the higher professions by means of which they will be able to serve their own community" ².

Not only in the homelands, but also in the Native urban areas within the Police Zone, Respondent's policy has been to encourage Natives to rise above the level of labourers, and to assist Native tradesmen and professional men ³.

But the expression "certain forms of labour" may be misleading even in relation to the European economy proper. As will be shown below ³ the levels of employment which Natives have attained in South West Africa are by no means confined to the unskilled categories, as may be suggested by the context in which Applicants quote the above phrase.

B. Certain Facts Said To Be "Decisive and Undisputed"

6. Applicants say:

"The decisively relevant facts concerning Respondent's policies and objectives, relied upon by Applicants in support of their Submissions with regard to Article 2, paragraph 2, of the Mandate, are undisputed ⁴."

Respondent has demonstrated that this contention is correct only in so far as it relates to that part of Applicants' case which is based upon the alleged "norm of non-discrimination or non-separation" ⁵, inasmuch as there is no dispute about the fact that Respondent's policy differentiates on the basis of membership of a group. As regards Applicants' further charge (which is apparently advanced in the alternative, although Applicants do not expressly say so) that Respondent's policy is a deliberately oppressive one, the above statement is, of course, completely

¹ *Vide* sec. H, Chap. III, para. 27, *infra* (table).

² *Vide* sec. G, Chap. II, para. 17, *infra*.

³ *Vide* sec. H, Chap. II, para. 6, *infra*.

⁴ IV, p. 262.

⁵ *Vide* sec. H, *Vide* sec. A, para. 8, *supra*.

wrong. The latter part of Applicants' case is based on facts and inferences which are strenuously contested, as witness the bulk of the pleadings in these proceedings.

7. Despite what was said in the preceding paragraph, Applicants appear to contend that, even in regard to their charge that the policy of separate development is an intentionally oppressive one, the crucial facts are not disputed. In this connection they rely on "Respondent's own formulations of that policy, as set out in excerpts drawn . . . from the Counter-Memorial . . . as well as from public statements of Respondent's highest officials"¹, and on "Respondent's measures for implementation of its policy"¹, the existence and nature of which are, according to Applicants, "undisputed as facts"¹. The "measures for implementation" are dealt with separately by Applicants², and Respondent will reply thereto at the appropriate juncture³. The treatment in the succeeding paragraphs will accordingly be restricted to the formulations of policy relied upon by Applicants.

8. Although Applicants profess to have "endeavored to avoid quotation out of context or other distortion of Respondent's intended signification"⁴, their actions do not appear to measure up to their laudable intentions. Thus in the part of the Reply now under discussion, they suggest, by quoting in juxtaposition two sets of extracts from speeches by Dr. Verwoerd⁵, that there have been inconsistencies in the formulation of Respondent's policy; and the same charge is expressly made elsewhere⁶ on the strength of the same extracts. However, as will be shown, Applicants' accusations in this regard indeed depend on quotations out of context. Thus they quote the following statement by Dr. Verwoerd, Respondent's Prime Minister:

"Reduced to its simplest form the problem is nothing else than this: We want to keep South Africa White . . . 'Keeping it White' can only mean one thing, namely White domination, not 'leadership', not 'guidance', but 'control', 'supremacy'. If we are agreed that it is the desire of the people that the White man should be able to continue to protect himself by retaining White domination . . . we say that it can be achieved by separate development⁴."

However, the context of Dr. Verwoerd's speech leaves no doubt at all that by the words "South Africa" he meant, and would obviously have been so understood, that part of the country which would, in terms of the policy of separate development, remain available for White occupation, and that he did not intend to depart from the often expressed objective of providing homelands for the Bantu in which they would be able to develop to the full extent of their capacities. Indeed, in the course of the very same speech, Dr. Verwoerd said, *inter alia*:

"I quote from the speech I made when addressing the Natives' Representative Council . . .

'The only possible way out . . . is . . . that both, *i.e.*, the White

¹ IV, p. 263.

² *I.e.*, in IV, Chapter IV B 3.c. of the Reply.

³ Part F *et seq.*, *infra*.

⁴ IV, p. 264.

⁵ *Ibid.*, pp. 264-265.

⁶ *Ibid.*, pp. 275, 315-317

man and the Bantu, accept a development separate from each other. The present Government believes in the domination (baasskap) of the White man in his own area, *but it equally believes in the domination (baasskap) of the Bantu in his area*¹. (Italics added.)

On 27 January 1959 I said in this House—

'South Africa is at the crossroads. It must be decided whether it will go in the direction of a multi-racial society with a common political life or whether it will bring about total separation in the political sphere . . .

I also see to it that I choose a course by which on the one hand I retain for the White man alone full rights of government in his area, but *according to which I give to the Bantu, under our care as their guardians, a full opportunity in their own areas to put their feet on the road of development along which they can make progress in accordance with their capabilities*. And if it so happens that in future they progress to a very high level, the people living at that time will have to consider how further to re-organize those relations . . .' (Italics added.)

I further stated, on 20 May 1959—

'I would rather eventually have *a smaller State in a South Africa which is White* and which will control its own army, its own fleet, its own police and its own defence force, and which will stand as a bulwark for White civilization in the world; in other words, I would rather have a White nation here which can fight for its existence than a larger State which has already been handed over to Bantu domination . . .'² (Italics added.)

' . . . The standpoint of the National Party is one of striving for a permanently White South Africa, whatever dangers may threaten it, *but which is prepared to develop areas in which Bantu control may increase under the guidance of the Whites as guardians*, and with the understanding that *even though this should lead to Bantu independence* we will try by our statesmanship to ensure that this development takes place in such a spirit and in such a way that friendship will remain possible, but without the White man ever finding himself under any form of Bantu control . . .'³ (Italics added.)

*There was no doubt whatsoever as to the attitude of the National Party: The White man will govern his country and the Bantu will govern his people, his areas . . .'*⁴ (Italics added.)

9. It is clear, therefore, that Dr. Verwoerd has never recanted his promise to provide separate homelands for the Bantu groups, and that Applicants' accusation of inconsistency has some superficial plausibility only because Applicants have, contrary to their protestations, quoted a single extract from Dr. Verwoerd's speech completely out of context.

10. A different form of quotation out of context affords the explanation for the inconsistency suggested by two further quotations from speeches

¹ *R. of S.A. Parl. Deb., House of Assembly, Vol. V, 2nd Sess., Second Parliament, (Jan. 1963), Col. 225.*

² *Ibid.*, Col. 228.

³ *Ibid.*, Cols. 228-229.

⁴ *Ibid.*, Col. 230.

by Dr. Verwoerd¹. The context which Applicants ignore is not that of content, as in the case considered above, but that of the time when the two speeches were respectively delivered. It will be noted that ten years separate the two addresses, the earlier having been delivered in 1951, and the later in 1961. Respondent explained in the Counter-Memorial² that post-war circumstances and events resulted in widespread changes of government policies throughout Africa. Respondent has never disputed that its policy has also undergone development and adjustment during the past years—indeed, one chapter of the Counter-Memorial³, was devoted solely to such development and adjustment. In the course thereof Respondent particularly stressed the fact that public announcement on its behalf of the possibility of independent Bantu states, as an attainable end result, first occurred in 1959, and explained the reasons therefor, as well as commenting on implications thereof⁴. One development since 1951 has been that the political advancement of the Bantu has proceeded at a faster rate than was anticipated or announced at the time. In this regard, there can be but few, if any, policy statements made in 1951 on behalf of any government with interests in Africa which were still of unqualified application ten years later. It is consequently difficult to see what inference Applicants seek to draw from the fact that in 1961 Respondent's Prime Minister spoke of a greater degree of ultimate independence for Bantu homelands than he had mentioned a decade earlier.

The further statements of Dr. Verwoerd quoted by Applicants¹ are dealt with elsewhere and do not require any comment at this stage.

II. The only further source quoted by Applicants in support of their contention that "the decisively relevant facts concerning Respondent's policies . . . are undisputed"⁵, is the Counter-Memorial, from which long extracts are cited. These extracts exclusively concern certain facets of the economic aspects of Respondent's policies, and related questions regarding educational policy. As noted, these are presented as being "decisive"—thus paving the way for the later assertions that such economic aspects (and especially the negative parts thereof) constitute the "primary end" of Respondent's policies⁶. This is a major distortion. The primary question at issue is political—the form which self-rule and self-determination must take in order to avoid strife and struggle for domination and preservation, and to ensure harmonious relations. In order to secure justice and sound relations in these respects, which are of overriding importance, separate development is desirable. As a consequence, boundary lines become necessary also in the economic sphere, otherwise attempts at political separatism would be rendered nugatory. The system of separate development in the economic sphere in itself has outstanding advantages for the Native peoples, as has been shown in the Counter-Memorial⁷ and will be further demonstrated herein⁸. That it

¹ IV, p. 265.

² II, Book IV, Chaps. VI and VII.

³ *Ibid.*, Chap. VII.

⁴ II, pp. 464-466 (paras. 14-17) and 487-488 (para. 62).

⁵ IV, p. 262.

⁶ *Vide* para. 1, *supra*.

⁷ *Vide* III, Book V, secs. A-D: in particular, e.g., pp. 101-103.

⁸ *Vide* sec. H, *infra*.

must in some respects or circumstances have adverse effects for certain individuals is inevitable—but, as will be shown, the extent thereof is very limited and the compensations more than adequate. To speak of such adverse or limitative aspects as being in themselves part of the “primary end” of separate development, is, it is submitted, ridiculous.

12. Certain major points of attack advanced by Applicants as regards the general principles and approach of the policy of separate development, particularly the so-called “homeland policy”, occur repeatedly in the Reply—e.g., in the text thereof, sometimes more than once, and again in the various Annexes, especially Nos. 1-4. Respondent will in the following sections deal with such points with reference to *all* the various places at which they occur in the Reply, and thereafter deal *serialim* with remaining points in the text and Annexes.

C. Historical Background in South Africa Itself

13. In the section of the Reply, dealing with rights of residence, security of the person and freedom of movement, Applicants allege that “. . . Respondent relies upon its version of history as justifying pre-emption of 70 per cent. of the Territory for a small minority of the population”¹. And they say further:

“Although Respondent’s historical survey deals with South Africa itself, thus raising a question of relevance in respect of the international obligations assumed with respect to the Mandate, Applicants are constrained to set straight the historic record, inasmuch as Respondent places so heavy an emphasis upon its own version¹.”

Applicants thus create the impression that Respondent relies heavily upon its version of *South African* history as justifying “pre-emption” of a large portion² of South West Africa for the White minority of the population of that Territory. In this regard Applicants refer to Chapter VII of Book IV of the Counter-Memorial where Respondent explained in two short paragraphs that in South Africa the policy generally known as segregation was founded on the basis of the historical circumstance that the European and Bantu groups tended to settle in separate and distinct parts of the country³. Before referring to this circumstance Respondent made it perfectly clear, however, that the policies and practices adopted and applied in South West Africa had always been moulded with reference to circumstances as they existed in the Territory, and that, while Respondent was frequently influenced, *inter alia*, by experience gained in South Africa itself in regard to comparable problems and policies aimed at their solution, any translation of such experience into action in South West Africa occurred solely on the basis of due adaptation to the needs, interests and circumstances of that Territory, and of the principles and objectives of the Mandate⁴. Respondent was also at pains to explain that, while it would be instructive to make brief reference to certain aspects of policies relating to group relations in South Africa,

¹ IV, p. 458.

² There is no question of 70 per cent. of the Territory having been set aside or reserved for the White group. *Vide* para. 4. *supra*.

³ *Vide* II, pp. 461-462.

⁴ *Ibid.*, p. 457.

Respondent did not propose to attempt anything approaching even a full sketch of the development of such policies¹. It is consequently not clear to Respondent how Applicants could have been brought under the impression that Respondent relies heavily on South African history as justification for its policies in South West Africa.

14. In what they term a "Relevant Historical Resumé"², Applicants in the Reply purport to—

"... correct the fundamentally false impression Respondent creates of a kind of historic 'separateness' or *apartheid*, which it asserts as an explanation and justification for its present policies . . ."³.

In this "Resumé", apart from referring to the 1960 census figures pertaining to the Territory⁴, Applicants deal only with events in South Africa itself, and, as has already been shown⁵, they do not seek to contradict Respondent's expositions⁶ of the historical and socio-economic circumstances in South West Africa which compelled Respondent to adopt a policy of differentiation in the Territory, but expressly admit the substantial accuracy thereof. It is, therefore, highly surprising to find that at the end of their said "Resumé" Applicants refer to the contents thereof as a "correct version of developments in South Africa *and in the Territory* . . ."⁷.

15. It appears on analysis, that Applicants, in the said "Resumé", purport to show:

- (a) that South Africa was already effectively occupied by non-Whites before Europeans began to settle in the country;
- (b) that the Europeans proceeded to take occupation of non-White land;
- (c) that the Voortrekkers, being "an exceptionally colour-conscious people", established "a caste system"⁴ which was maintained at and after the unification of South Africa; and
- (d) that as a result of the influx through the years of Natives into White areas, a multi-racial society in South Africa, as in South West Africa, is a fact.

The last aspect, which appears to have little, if any, relation to history in the true sense of the word, is dealt with in the next succeeding paragraphs of this Rejoinder. Although, in view of what has been stated above, the rest of Applicants' "Resumé" has very little, if any, relevance to the issues in these proceedings, Respondent deems it desirable to deal briefly with Applicants' version of history. However, inasmuch as Respondent does not wish to interrupt its discussion of Applicants' attack on its general principles of policy with an exposition of purely historical facts, Respondent will deal with the matters referred to in sub-paragraphs (a) to (c) above in an Annex to this section of the Rejoinder—Annex A. In the said Annex Respondent will also deal with matters of history raised in the 1963 report of the *United Nations Special Committee on the Policies of*

¹ II, p. 461.

² IV, p. 459.

³ *Ibid.*, pp. 458-459.

⁴ *Ibid.*, p. 460.

⁵ *Vide* Chap. II, para. 1, *supra*.

⁶ *Vide*, e.g., III, pp. 238 ff.

⁷ IV, p. 464. (*Italics added.*)

Apartheid of the Government of the Republic of South Africa, an extract from which report is contained in Annex 3 to the Reply ¹.

Respondent will in its treatment in Annex A hereto show that, far from "set[ting] straight the historic record", Applicants and the said United Nations Special Committee create an entirely misleading image of historical events in South Africa; that they make several allegations without reference to any authorities whatsoever, and that, even when they quote sources, these for the most part do not bear out their allegations.

D. The Allegation that in South West Africa, as in South Africa Itself, "A Plural or Multi-racial Society Is a Fact"

16. As has been pointed out above ², Applicants in the Reply, under the heading "Relevant Historical Resume", purport to show that—

"[i]n South West Africa, as in the Republic itself, a plural or multi-racial society is a fact; policies based upon a contrary premise rest upon a fiction ³".

This theme, emphasizing to what extent, in both countries, Natives live outside the reserves and have allegedly become "detrribalized", also occurs in several other parts of the Reply ⁴. In the succeeding paragraphs Respondent will deal first with the relevant allegations pertaining to South Africa, and then with those relating to the Territory. Since, however, conditions in South Africa are not in themselves in issue in these proceedings, Respondent does not propose to discuss the former allegations fully, but will merely point to some facts in order to show that Applicants' conclusion, quoted above, is without substance.

17. On analysis, the contentions advanced in the Reply in support of the said theme with regard to South Africa, appear to be the following:

- (a) that the Bantu reserves could not in the past, and cannot at present, support their inhabitants "even at the subsistence level" ⁵;
- (b) that as a result of pressure on the land in the reserves, the Bantu inhabitants are economically obliged to resort to wage-earning in the White areas to such an extent that at present less than 40 per cent. of the indigenous inhabitants of South Africa are living in the reserves, while the Bantu population of the White areas, especially the urban areas, is increasing rapidly ⁶;
- (c) that as a result of the aforestated developments Bantu have been present for several generations in the White areas, and have become a permanent part of the population of such areas ⁷; and
- (d) that many of the Bantu living in the White areas have become "largely detrribalized and have little attachment to the reserves" ⁸.

18. In the Counter-Memorial ⁹ Respondent pointed out that before Union the then governing powers of what are at present the four Provinces

¹ IV, pp. 349-358.

² *Vide* para. 15, *supra*.

³ IV, p. 460.

⁴ *Ibid.*, pp. 317-318, 332, 351, 357.

⁵ *Ibid.*, p. 351.

⁶ *Ibid.*, pp. 317, 351, 459 and 462.

⁷ *Ibid.*, pp. 332 and 459.

⁸ *Ibid.*, p. 459.

⁹ III, p. 236.

took concrete steps to provide for the Bantu groups and tribes protected possession of lands of their own, and that 9,976,290 morgen had been set aside in South Africa for the exclusive use of Bantu. Respondent further stated that after Union the Native Lands Act of 1913 had clearly demarcated the Bantu reserves, and that the South African Native Trust, established in terms of the Native Trust and Land Act of 1936, had during the period 31 August 1936 to 31 March 1953, acquired further areas to the extent of 4,121,020 morgen for the sole use and occupation of Bantu¹. More land has since been acquired, and as at 30 September 1964, the position was that only 1,856,270 morgen of the quota of 7,250,000 morgen provided for in the last-mentioned Act still had to be acquired by the Trust².

19. In passing it may be pointed out that there is no substance in the allegation that "[t]he delay in the acquisition of the land" by the Trust "is due to the resistance of European farmers and the inadequacy of funds appropriated for the purpose", and that, in contrast, "[t]he 'Black Spots'—African-owned land in European areas—are . . . being rapidly eliminated"³.

Although it is true that some White farmers have been unwilling to sell their land to the Trust, greater resistance has been experienced in the case of Bantu to whom larger and better areas than their own have been offered in exchange for their land situated in the White areas. In the words of the Prime Minister of South Africa:

"Our problem . . . in regard to matters pertaining to land is the psychology of the Native. If a Black spot is bought out, and even if a more expensive, larger and better White area adjoining this Bantu area is given gratis to the inhabitants of this Black spot, generally there is the greatest difficulty in getting them to move. Then there is a lot of unjustifiable talk about oppression and coercion . . . Therefore it is essential that this process should rather take place through proper co-operation between the Bantu Government and the White Government⁴."

The Prime Minister mentioned:

"I want to add this also. In the Transkei there is a very special problem, namely the White spot problem. In terms of what I have just said, those areas will in the meantime remain White spots, and therefore under the control of the Republic, but the process, as I have announced earlier, of the gradual and, if possible, rapid darkening particularly of the smaller White spots, will have to take place. In other words, portions of the White spots will continually pass over into the territory of the Transkeian Government. In the case of Umtata, because it is big, the problem is consequently also greater, and it will take longer to solve, but I do not think anyone can escape the fact that just as a city like Nairobi and large White areas in Kenya fall under that Government, so in the course of time also a city like Umtata will become part of the territory of the Transkeian Government⁵."

¹ III, pp. 236-238.

² Departmental information.

³ IV, p. 351, footnote 1.

⁴ *R. of S.A. Parl. Deb., House of Assembly*, Vol. 2 (1962), Col. 87.

⁵ *Ibid.*, Col. 88.

Most, if not all, of the so-called "black spots" are overcrowded, without proper water supplies or adequate roads. They are tiny islands in the White areas offering no scope for expansion to meet the needs of their ever-increasing population. Experience has shown again and again that the ultimate advantages to the Bantu concerned of the elimination of these spots, and the provision of new land adjacent to existing Bantu reserves, far outweigh any possible initial disadvantage and inconvenience.

It may be pointed out that only 90,349 morgen (i.e., less than 13 per cent.) of the total of 728,537 morgen which were initially regarded as "black spots", have so far been cleared¹, while more than 70 per cent. of the land intended for acquisition by the Native Trust in terms of the Native Trust and Land Act has already been acquired for the sole use of Bantu². The sweeping assertion that there has been undue delay in the acquisition of land for Natives by the Trust, in contrast to the rapid elimination of "black spots", is consequently devoid of substance.

20. In the Reply and its Annexes repeated reference is made to the fact that the Bantu areas comprise only approximately one-seventh of the total area of South Africa³. Respondent has to point out, however, that an arithmetical comparison of the land held by Europeans and Bantu respectively is quite unrealistic, since the Bantu reserves have a much higher agricultural potential per unit or area than the White farming areas. This matter will be further dealt with below⁴.

21. In support of its allegation that the reserves cannot support their inhabitants "even at the subsistence level", the United Nations Special Committee, in Annex 3 to the Reply, refers to the report of the Tomlinson Commission in which it was allegedly stated that "the Reserves can decently support only half of their population"⁵. What the Commission in fact said, was that the reserves could support about 51 per cent. of their population in a subsistence agriculture⁶. The Commission further estimated that when the full quota of land provided for in terms of the Native Trust and Land Act has been acquired, the reserves would be able to carry 50,000 more farming families, i.e., altogether 357,000 such families⁷.

It should be observed that the 1955 finding of the Tomlinson Commission was based on the state of affairs which then existed in the reserves, and which was largely a legacy of past neglect and policies of *laissez-faire*⁸. The same Commission stated, however, that—

"... from the present backwardness ... flows simultaneously the realisation of the great increase in carrying capacity which could be

¹ Departmental information.

² *Vide* para. 18, *supra*.

³ *Vide* IV, pp. 331, 351 and 359.

⁴ *Vide* para. 48, *infra*.

⁵ IV, p. 351.

⁶ U.G. 61—1955, Chap. 28, p. 114 (para. 20).

⁷ *Ibid.*, para. 21. As regards the allegation that "[t]he most optimistic estimates place the agricultural potential of the reserves at nearly 20 per cent. of that of the Republic", *vide* IV, p. 351 it should be noted that the Tomlinson Commission found that after the addition of land still to be acquired under the Native Trust and Land Act "the Bantu areas will ... contain 23.2 per cent. of the Union's agricultural potential"—U.G. 61—1955, Chap. 28, p. 117 (para. 41).

⁸ *Vide* para. 25, *infra*.

brought about if the present backwardness were removed by a programme of intensive development.

The development programme aims at building up a diversified economy in the Bantu Areas, in other words, at building up the other occupational sectors alongside agriculture. If this is not done, the carrying capacity of these areas will be limited to that of a one-sided agricultural economy. Planning in the primary sector, will make possible a collective carrying capacity of about 2.4 million persons—agriculture 2.14 million, forestry 0.16 million, and mining 0.1 million. With this fact as basis, the total population which can be expected to result from the application of a complete development programme in all sectors of the national economy, may now be calculated.

With a population of 2.3 million engaged in agriculture and forestry, the total carrying capacity based on the *opportunities of employment provided by the Bantu Areas themselves*, would amount to a population of about 8 million. The attainment of this figure will depend upon the intensity of the development effort. To arrive at the residential carrying capacity, an addition must be made in respect of the number of people who can be maintained there by breadwinners working elsewhere in the Union. In the light of the numbers of those working in other parts of the country at present, the Commission puts the possible addition at 1.5 million dependents and retired persons. In this manner, a potential residential carrying capacity totalling 9.5 million is in prospect. If migratory labourers are added, the *de jure* population will amount to about 10 million¹.

22. Shortly after publication of the report of the Tomlinson Commission the then Minister of Native Affairs (the present Prime Minister) summarized the recommendations of the Commission as follows:

"Firstly, steps should be taken to see that improved use is made of the soil and its riches by the Bantu himself, and not only agriculturally; secondly, there should be a suitable distribution of population in the rural parts of the Bantu areas and in their towns and urban areas. Furthermore, there should be the placing of future White industries in such a way as to assist the Bantu population, at least to the greatest possible extent, having their home in the Bantu areas. And finally, the separate opportunities for development should be reserved and extended to the Bantu in every sphere²."

The Minister continued:

"This basic reply is accepted by the Government, and it cannot do otherwise but to accept it, because that is its policy; it is the traditional policy of South Africa . . .²"

The principles of development of the reserves recommended by the Commission, or modified versions thereof adopted by Respondent as a result of practical experience in the nine years that have elapsed since the Commission reported, are in the process of being implemented in the Bantu homelands under the current five-year plan of the Department

¹ U.G. 61—1955, pp. 178-179.

² U. of S.A. Parl. Deb., House of Assembly, Vol. 91 (1956), Col. 5297.

of Bantu Administration and Development, while other government agencies are actively promoting industrial development in areas bordering on these homelands¹.

It follows that in the future there will be no question of the Bantu homelands not being able to support their present populations, and even increased populations. In fact, the comparatively recent industrial revolution in South Africa has made it possible to create economic growth points in and on the borders of the homelands to such an extent that their carrying capacity will, for practical purposes, be almost unlimited.

23. Respondent concedes, however, that at an earlier stage in the evolution of the South African economy from a mainly pastoral-agricultural to an industrial one, Bantu who wished or were compelled by economic pressures to earn cash wages, had little real choice but to leave the reserves and enter the White areas in order to find employment. One of the main reasons why the reserves could not in the past support all their inhabitants, was that the Bantu were not soil conservation-minded farmers, but semi-nomadic, shifting cultivators who persisted in their wasteful agricultural and pastoral practices—even when the possibility of trekking further afield in search of fresh soil and pasture, rather than to cultivate or graze reasonably, had ceased. The reserves, therefore, became over-populated only in terms of the particular type of uneconomic non-industrial utilization of resources which had prevailed there in the past.

In this regard it should be kept in mind that during the entire period between 1910 and 1948 the National Party was in power for less than ten years (1924-1933), and that practical circumstances—especially the depression of the 1930s—prevented the successive governments from accomplishing much in initiating economic rehabilitation of the Bantu areas during the decade preceding the Second World War. That war, and its aftermath, prevented effective progress for many years, and the present Government consequently inherited the relatively serious situation in the reserves depicted by the Tomlinson Commission.

It would be wrong, however, to assume that economic pressure in the reserves was the only reason that gave rise to the influx of Bantu into the White areas. Traditionally the Bantu male regarded himself as the hunter, the warrior and the stock farmer, soil cultivation being left to the woman. Consequently, as he found less opportunity of exercising his traditional calling, he did not turn to the land, but preferred to do a "man's job" by selling his labour in the White areas. Others went in search of adventure, and while some returned, others stayed in the cities and on the farms in the said areas.

24. Applicants point out that at the time of the 1960 census only about 39 per cent. of the Bantu in South Africa were in their homelands², while the Bantu urban population in the White areas had by then increased to 3,444,000³. These figures are substantially correct⁴, but it should be

¹ *Vide* para. 52, *infra*. It is clear, therefore, that there is no substance in the assertion of the Hon. O. D. Schreiner that Respondent's "Bantustan policy" does not seek "the physical development of the Reserves"—*vide* IV, p. 318.

² IV, pp. 459 and 351.

³ *Ibid.*, p. 317.

⁴ If Bantu born outside South Africa are excluded, the number of Bantu living in the homelands amount to 40 per cent. of the total Bantu population of South Africa.

kept in mind that it was only during the last 30 years that the number of Bantu in urban areas started to increase significantly. Thus the total Bantu urban population in 1921 was 587,000 (or 12.64 per cent. of the total Bantu population), and in 1936 it was 1,245,682 (or 18.89 per cent. of the total population)¹. There is consequently little substance in the suggestion that substantial numbers of Bantu "have been present for several generations" in the White areas².

It should also be observed that large numbers of the Bantu living and working in the White areas are not South Africans, but come from the British High Commission Territories, or territories to the north.

Nevertheless, Respondent concedes that substantial numbers of South African Bantu are at present living in the White areas, and that this fact constitutes a very real problem. As will be shown³, however, the problem is in Respondent's view by no means insoluble.

25. The significant increase in the numbers of Bantu in the White areas since approximately 1930 was partly the result of circumstances beyond any government's control (a period of prolonged depression, followed by a world war and economic readjustment), but partly also of a *laissez-faire* policy, especially during the period in which the United Party was in power. The effects of this policy have been thus stated in a memorandum explaining the background and objects of the Promotion of Bantu Self-Government Bill of 1959:

"The Bantu areas have consistently been preserved as living space solely for the Bantu. No European may settle in a Bantu area without the permission of the Bantu community and the Union Government, and when permission is granted it is restricted to a specific purpose, for example the rendering of a particular service. Similarly, it was the intention that the Bantu should not enter the European area without the consent of the European community, and then, too, only for the purpose of rendering a specific service.

The last-mentioned purpose was, however, gradually lost sight of with the result that the Bantu, for whose sole use certain living space had been set aside, was allowed to occupy the living space of the European, while the European was and still is prohibited from occupying or entering the living space of the Bantu for any other purpose than the rendering of service to the Bantu in the spiritual, economic and administrative fields.

The issue was further clouded in that permission was granted to Bantu, at first tacitly and later even by legislation, to settle on a family basis in the European area and thereafter to obtain residential rights on the ground of birth in that area, while the granting of corresponding rights to Europeans in Bantu areas was, and is to this day, not tolerated. In this way the living space of the European was invaded not only by Union Bantu but also by Bantu from the three Protectorates and even Bantu from numerous other territories in Africa.

Contrary to the stated basic aims the Bantu has been allowed to make his home wherever he elects in the whole of South Africa and

¹ Departmental information.

² *IV*, p. 332. (Italics added.)

³ *Vide* para. 25, *infra*.

this practice has necessarily created the impression that, in addition to exclusive rights in the Bantu areas, the Bantu can also lay claim to the same rights as a European in the European areas, which have been set aside solely for the Europeans.

The fact that Bantu from the three Protectorates enter the Union in great numbers on precisely the same basis as Bantu from the Union's reserves enter the European area, clearly illustrates how untenable this view is. It stands to reason that no Bantu from the Protectorates can lay claim to civil rights in the Union. The Transkei, for example, is economically less dependent than Basutoland upon the labour market of the European area and it is, therefore, illogical to grant rights in the European area to the Xhosa, which are denied to the Basuto, merely because the former's country was formally set aside only after Union and not three years previously at the time of Union¹.

In returning to the basic aims, mentioned in the above passage, the present Government realized that the solution of the problems created by partial deviation from the said aims in the past, lay in the intensive economic development of the Bantu homelands. As has been pointed out², Respondent has embarked upon a programme of such development, and it is estimated that the tide will turn by about 1978 when it is expected that emigration of Bantu from the White areas will exceed immigration of Bantu to such areas³.

26. Applicants quote passages from the reports of the Holloway Commission, the Social and Economic Planning Council and the Fagan Commission⁴ with a view to demonstrating that these bodies were of the opinion that a policy of separate development did not provide a solution to the race problem in South Africa. It should be observed, however, that these bodies reported before the present Government came into power, and during a period when, as a result of the above-mentioned policy of *laissez-faire*, virtually nothing was done to develop the Bantu homelands and to stem the influx of Bantu into the White areas. What is even more important is the fact that the major industrial revolution in South Africa, which has made sufficient capital available for extensive economic development of the homelands, only occurred after the said bodies had reported. The views expressed before 1950 by the Social and Economic Planning Council and the two Commissions consequently have little relevance to the prospects of the present Government's policy being successfully implemented in the South Africa of the 1960s⁵.

¹ W.P. 3-59, pp. 4-5.

² *Vide* para. 22, *supra*.

³ R. of S.A. Parl. Deb., House of Assembly, Vol. 7 (1963), Col. 6930.

⁴ It may be pointed out Applicants have left out a phrase in the extract from the report of the Fagan Commission quoted by them at IV, pp. 462-463. The Commission stated that "the movement from country to town . . . may . . . be guided and regulated, and may perhaps also be limited, but that it cannot be stopped . . ." (Italics added.)—U.G. 28—1948, p. 19, para. 28. The italicized phrase does not occur in the Reply, although no indication is given that it is left out.

⁵ The same is *a fortiori* true of the opinions expressed by Prof. de Kiewiet in 1941, and in 1956, when he no longer had any direct contact with South Africa—*vide* IV, pp. 463-464. As regards the general unreliability of the views of Prof. de Kiewiet, *vide* sec. H, Chap. II, paras. 9-10 and 93, and Chap. V, para. 3, *infra*.

27. As regards the last contention mentioned above¹, viz., that many of the Bantu living in the White areas have become "largely detribalized and have little attachment to the reserves"², it should be observed that no authority whatsoever is quoted in support of this contention, which clearly is not based on facts. In this regard reference may be made to the following statement of the present Minister of Bantu Administration and Development:

"... I want to make this statement that the vast majority of those people [Bantu living in the White areas] have never lost their links with their own territories. I personally made some pilot surveys and the Tomlinson Commission made a large number of pilot surveys over the whole country, and it was found that easily 80 per cent., if not more, of those Bantu had always retained some link or other with the Bantu areas. We are not faced here with a problem of displaced persons. Our practical experience has been that although a Bantu has been in the city for years, for perhaps two or three generations, he still knows where his tribe is, and you will be surprised to know, sir, how readily he is absorbed again into his tribe³."

Commenting on the assumption that Natives who have lived in the urban areas of Africa for some time have necessarily lost affinity with their tribes, Melville J. Herskovits, Professor of African Studies in the North-Western University (U.S.A.), has stated:

"An outstanding example of this kind of reasoning is to be seen in the concept of detribalization, which has had considerable vogue among students of contemporary Africa. It was especially employed in analysing African life in the new cities that came to dot the Sub-Saharan continent, especially in the Union of South Africa, where the twin forces of urbanization and industrialization have been more powerful than anywhere else. Again, in its formal aspect, modes of African city-life seemed so different from indigenous patterns that it was *prima facie* impossible to continue antecedent conventions, and that adjustment in terms of earlier orientations was inconceivable.

It is significant that one of the first attempts to correct perspective was that of an African scholar, Z. K. Matthews⁴. Writing some years before the concept of reinterpretation had been advanced, he clearly saw the power of aboriginal custom in shaping the life of the urban dweller in the Union. Anticipating by at least two decades *the swing toward greater balance in the study of the urbanized African whereby the concept of 'detribalization' came to be rejected*, he stated: "It seems altogether unwise to attempt to drive a wedge between this urban group and the so-called purely tribal native by refusing to *recognize what they have in common and the contribution which the former can make and are making to native life and thought by their synthesis of*

¹ *Vide* para. 17 (d), *supra*.

² IV, p. 357 and *vide* also p. 462 where Applicants state that many Bantu have become "permanent residents of the 'White areas' *completely divorced from the reserves and from the tribal structures*". (Italics added.)

³ U. of S.A. Parl. Deb., House of Assembly, Vol. 101 (1959), Col. 6021.

⁴ Prof. Matthews is a South African Bantu; cited by Applicants; *vide* IV, p. 290.

*Western and Native conceptions wherever they are complementary and not contradictory*¹." (Italics added.)

But even in so far as some Bantu may have lost most affiliations with their tribes and the homelands of their origin, it would be wrong to assume that they have adopted the culture and concepts of the White group. On the contrary, in South Africa, as in other parts of Africa, even *Bantu intellectuals do not become absorbed in European culture or customs*. In the words of Edward Shills:

"Most intellectuals in underdeveloped countries are not as 'cut off' from their own culture as they and their detractors suggest. They live in the middle of it, their wives and mothers are its constant representatives in their midst, they retain close contact with their families, which are normally steeped in traditional beliefs and practices. The possession of a modern intellectual culture does remove them, to some extent, from the culture of their ancestors, but much of the latter remains and lives on in them"². (Italics added.)

In sum: the various population groups in South Africa have retained their own separate cultures and identities, and have never formed an integrated society.

28. In view of what has been stated above, Respondent submits that there is no substance in the assertion that in South Africa "a plural or multi-racial society is a fact".

29. It is significant that Applicants go to much greater length in the case of South Africa than in the case of South West Africa in their attempt at substantiating their basic contention under consideration. In fact, Applicants, in respect of South West Africa, merely quote some of the 1960 census figures reported by the Odendaal Commission and then proceed to make the sweeping and unsubstantiated statement that in South West Africa "a plural or multi-racial society is a fact"³.

30. As regards the census figures relied upon by Applicants³, it is true that at the time of the census 10 per cent. of the population of the northern territories were working in the Police Zone. Applicants fail to mention, however, that this 10 per cent. were working on a temporary basis, i.e., for periods ranging from one to two and a half years, that the approximately 28,500 Ovambos and Okavangos concerned were in fact permanently domiciled in the northern territories, and that they had their families, cultural, social and political connections and affiliations in those territories. Applicants also fail to mention that, according to the same census figures, 54.46 per cent. of the total population of South West Africa (and 98.3 per cent. of the groups involved), was permanently domiciled in the northern territories, which are exclusively reserved for Natives⁴.

With regard to the Police Zone, Applicants create the impression that the quoted census percentages relate only to Natives. This is not the case. The report of the Odendaal Commission clearly shows that of *the total population of the Police Zone* (inclusive of Europeans, Coloureds, Basters and Natives) 47 per cent. were in urban areas, 37 per cent. in the rural

¹ "The Role of Culture-Pattern in the African Acculturative Experience", *Présence Africaine* (Africa's Own Literary Review), Vols. 6-7, Nos. 34-35, p. 14.

² Shills, E., "The Intellectuals in the Political Development", *World Politics*, p. 349.

³ IV, p. 460.

⁴ R.P. 12—1964, p. 41.

areas and 16 per cent. in the reserves¹. Moreover, a percentage of the Natives residing in both urban and rural areas were doing so on a completely temporary basis, being in fact permanently domiciled in the reserves.

Furthermore, even those Natives apparently settled in areas occupied by the White group usually maintain strong ties of family, kinship and culture with members of their respective groups in the reserves, and often work in such White areas for the specific purpose of saving money to go back to a more peaceful existence in the reserves. Within the White areas they maintain their group identity, and socially and culturally mix almost exclusively with members of their own group. Numerous examples of this fact are on record, such as that the Ovambo requested the erection of a separate school for their children in the new Katutura residential area for Bantu in Windhoek; that the Herero traditionally resort to separate dwelling areas and even refuse to have their dead interred in the same cemetery with the dead of other ethnic groups; and that even on farms Native employees usually maintain a strict code of separateness by living apart and not integrating socially with different ethnic groups².

31. It is true that, as in the case of South Africa, the substantial number of Natives at present living in the White areas constitutes a real problem. For the following reasons, however, this problem admits of a relatively easy solution in the case of the Territory:

- (a) As pointed out above, 98.3 per cent. of the groups for which the reserves in the northern areas were set aside, are ordinarily resident in those reserves.
- (b) It is possible to add substantially to the reserves in the Police Zone so that they can become proper homelands for the groups concerned. As is shown in another section of this Rejoinder³, implementation of the proposals of the Odendaal Commission will bring about an increase of more than 110 per cent. in the size of the reserves in the Police Zone. The percentage gain will be the highest in the case of the groups which at present largely live outside their reserves, viz., approximately 94 per cent. for the Nama, and nearly 700 per cent. for the Damar³.
- (c) Due to the fact that significant contact between the Native groups and the Europeans goes back little more than half a century, and that the influx of Natives into urban areas has not assumed serious proportions, virtually all the indigenous inhabitants of the Territory living in the White areas still retain very strong tribal affiliations.

32. As in the case of South Africa, Respondent sees the solution of the existing problem in the economic development of the proposed homelands. Implementation of the recommendations of the Odendaal Commission will, in Respondent's view, in the long run create conditions in the homelands which will induce Natives now living in the White areas to return of their own free will to the areas of their respective groups.

33. An analysis of the Annexes to the Reply shows that the only assertions on which Applicants might conceivably rely in support of their contention under consideration are that—

¹ R.P. 12—1964, p. 41.

² Departmental information.

³ *Vide* sec. I, Chap. III, para. 7, *infra*.

"Africans from the homelands temporarily employed in the White zone are variously estimated at from 27,000 to 40,000, and altogether some 160,000 live there—about one-third of the non-White population¹";

that—

"[a] total of 13,709 Damaras, Hereros and Namas and 8,893 Basters are settled in Native reserves and the Rehoboth Gebiet which will be included in their respective 'homelands'; this total represents less than 10 per cent. of the Non-European population permanently settled in the southern section of the Territory²,"

and that, on the basis of the recommendations of the Odendaal Commission,

"... the proposed 'White area' would initially have a *de facto* population of 73,106 Europeans and 116,383 Non-Europeans, as well as an additional 28,621 Non-European migrant labourers recruited from the 'homelands' on the northern border of the Territory. A majority of the Non-Europeans in the southern portion of the Territory would thus live in the 'White' area rather than in their 'homelands'³."

34. It is admitted that a relatively small percentage of the Native population of the Police Zone, consisting of the Herero, Nama and Dama, at present live in the reserves in the Zone. The assertion in Annex 2 that the total number of non-Whites living in the reserves in the Police Zone represents less than 10 per cent. of the total non-White population of the Zone, is, however, clearly wrong. A total number of 38,648 non-Whites (not 22,602 as stated in the said Annex), representing 23.27 per cent. of the non-White population of the southern sector, in fact live in reserves in the Police Zone⁴.

The suggestion in Annex 1 that the number of Natives living in "the White Zone" represents "about one-third of the non-White population", is also not founded on fact. The total number of Natives living in the Police Zone outside the reserves is 117,168, i.e., approximately 26 per cent. of the total non-White population of the Territory (452,540)⁴.

The assertion in Annex 2 that on the basis of the recommendations of the Odendaal Commission the proposed White area would initially have "a *de facto* population of 73,106 Europeans and 116,383 Non-Europeans", is in broad substance correct, but the further allegation that—

"[u]nless continued European immigration alters the position, Non-Europeans would also continue to form the majority of the population in the 'White' area⁵",

may not remain true for the future. The United Nations Secretariat obviously ignored the fact that the reserves in the Police Zone are to be increased by over 110 per cent.⁵ and that, as a result of that fact, as well as of the various development projects envisaged for such reserves, they will be able to support many more Natives than at present.

¹ IV, p. 336.

² *Ibid.*, p. 342.

³ *Ibid.*, p. 343.

⁴ R.P. No. 12—1964, p. 41.

⁵ *Vide* para. 31, *supra*.

35. In the result Respondent submits that there is no substance in Applicants' contention that "[i]n South West Africa . . . a plural or multi-racial society is a fact".

E. The Alleged Unfairness of the Allocation of Land Proposed by the Odendaal Commission

36. Applicants' allegation that the allocation of land proposed by the Odendaal Commission would be unfair towards some of the inhabitants of the Territory involves, upon analysis, five different grounds of complaint. These will now be mentioned and dealt with in turn.

37. In the first place, Applicants are opposed to the principle of separation as such: they contend that Respondent's aim should be "the institution of universal adult suffrage and the promotion of participation on the part of all qualified individuals in all levels of government and administration, *within the framework of a single territorial unit*"¹. (Italics added.)

Applicants contend that this is the policy which Respondent should adopt for the Territory, but they have not made any systematic attempt to show *why* such a policy is to be preferred in principle to the one applied by Respondent, or to weigh up the advantages or disadvantages of the two alternatives².

The principle of having a partition at all is inextricably bound up with Respondent's policy of separate development, and therefore falls to be considered within the broad framework of that policy. Respondent has already dealt with the necessity of applying such a policy in South West Africa³, and does not propose to repeat what has been stated in this regard.

38. In the present context, Respondent would merely draw attention to the fact that Philip Mason, whose views are reproduced in Annex I of the Reply⁴, does not appear to support Applicants' outright condemnation of any form of differentiation or separation between groups. For the Republic, he is apparently prepared to accept partition as a solution, provided only that there should be "a far more equitable division of resources"⁵. As to South West Africa, he recognizes the existence of a special problem, saying:

"It would be quite wrong to suggest that the problem of dealing with a more developed and a less developed population within the same nation-state is anywhere easy. India is finding the Nagas a problem and the United States have not found a wholly satisfactory answer for their Amerindians, let alone the Negroes. Both these countries have the great advantage that the less advanced groups are minorities and thus that if any assimilation takes place it is likely to be the *more advanced culture* that prevails. South Africa's problems are far more intractable.

The Odendaal Commission has rightly pointed out that in such circumstances the less developed culture needs both protection and

¹ IV, p. 441.

² *Vide* Chap. IV, paras. 3 and 5, *supra*.

³ *Ibid.*, para. 1, and references therein to the Counter-Memorial.

⁴ IV, pp. 328 ff.

⁵ *Ibid.*, p. 335.

development. It is not easy to strike a right balance between them¹. In the political sphere, the solution which Mason advocates for South West Africa's special problem is—

“ . . . a steady preparation of the non-White groups for a share, perhaps, in a federal system, certainly in *one in which all the groups could play a part* ”². (Italics added.)

Inasmuch as Applicants proceed from the so-called “decisive major premise” that all “‘distinctions and differentiations’ . . . based upon membership in a group” are repugnant to Article 2, paragraph 2, of the Mandate³, and on this basis advocate “universal adult suffrage . . . within the framework of a single territorial unit”⁴, their attitude is in clear conflict with the goal set by Mason.

Mason is consequently no authority for the view advanced by Applicants on this aspect of the case; indeed, his approach appears to be an attempt at softening the obvious disadvantages of the system favoured by Applicants. Mason goes part of the way with Respondent, by acknowledging that *each group* should be afforded the opportunity of self-expression. He differs from Respondent's approach, however, in this respect, that he would presumably impose a federal system on the inhabitants of the Territory, whereas Respondent envisages the development of a free association of separate independent states in which the various groups could ultimately decide for themselves on the form of political co-operation desired⁵. This aspect of the matter is further dealt with below⁶.

39. In the second place, Applicants also contend, relying on the view of a “Group of Experts” expressed in a report relating to conditions in the Republic of South Africa, that “[p]artition would not solve, but would intensify and aggravate racial conflict”⁷. This contention is also bound up with the wider aspect of Respondent's separate development policy as such. It has already been explained in detail why it is Respondent's firm conviction that its policy, including as it does the principle of allocating separate areas to the different population groups, is the only realistic method by which the conflicts between such different ethnic groups, so manifest elsewhere in the world, can be avoided⁸. Applicants have not advanced any evidence in support of the contrary contention contained in the *aforesaid report of the “Group of Experts”*; nor does the report itself even presume to analyse or to controvert Respondent's motivation of its policy. There is accordingly no need for Respondent to deal further with this aspect of Applicants' complaint against the principle of separation as such.

40. In the third place, Applicants complain that, contrary to the principle “that an essential prerequisite of a valid and viable political system is consent of the governed”, Respondent's policy “is predeter-

¹ IV, p. 336. The position of the Negro in American Society is more fully referred to later in this Rejoinder, Chap. XI, *infra*.

² *Ibid.*, p. 337.

³ *Ibid.*, p. 440.

⁴ *Ibid.*, p. 441.

⁵ *Vide* Chap. IV, para. 6 (i), *supra*.

⁶ *Vide* paras. 42-44, *infra*.

⁷ IV, p. 319.

⁸ Chaps. III and IV, *supra*.

mined and the method of its application is pre-fabricated" ¹. In this connection the extract from the Report of the United Nations Special Committee reproduced in Annex 3 of the Reply ² contains the allegation, with reference to the Republic, that "the 'Bantustans' were not demanded by African leaders, but were imposed against their wishes" ³, while Philip Mason says that in South Africa the solution of partition "is being imposed by one party" ⁴.

41. Applicants' insistence that the consent of all groups in South West Africa must be obtained as a prerequisite to partition is unrealistic, and proceeds from fallacious premises. It loses sight of the basic fact of the situation, which is that the relationship between Respondent and the inhabitants of the Territory is that of a guardian towards its wards, a relationship which arose because of the latter's need of guardianship and upliftment. It is inherent in that relationship that the guardian must be able, in its discretion, to determine the best methods by which the welfare of all the wards could be promoted to the utmost. Applicants' contention presupposes, however, that, while the relationship of guardian vis-à-vis wards still subsists, the wards must be given the opportunity of nullifying the policy conceived by the guardian, after careful consideration, as being the most beneficial in the circumstances. Indeed, Applicants' contention, taken to its logical outcome, goes much further: it is tantamount to a demand that a particular section of the inhabitants must be afforded the opportunity, simply by virtue of their superior numbers, of choosing not only emancipation and control of their own affairs, but also control over the other smaller groups in the Territory and their affairs and possessions—including control over the most advanced group, which has been largely instrumental in developing the larger groups to the stage where they are capable of controlling their own affairs. With reference to the Republic, Applicants' contention involves the claim that the wards must even be able to demand control over the guardian's own affairs and possessions. Such a claim, Respondent submits, demonstrates the fallacy underlying Applicants' complaint. It is surely inherent in the situation that the guardian must be entitled to say to each group of its wards: you may rule yourselves in your part of the land, but you may not rule the other groups in their territories—at least not without their consent.

42. Applicants' argument furthermore ignores two important features of the factual situation in South West Africa.

The first is that historically the various ethnic groups in the Territory have always to a large extent occupied separate parts of the country. Respondent's policy, therefore, accepts an existing state of affairs, and seeks to further the development of the various groups on that basis. By contrast, the policy of integration of the groups, advocated by Applicants, would effect a major change in conditions in the Territory.

Secondly, while alleging that Respondent's policy lacks the "consent of the governed", Applicants conveniently ignore the fact that their own favoured policy of integration suffers from precisely the same defect. There can be no doubt that the White group is opposed to integration

¹ IV, p. 320; *vide* also p. 325.

² *Ibid.*, pp. 349 ff.

³ *Ibid.*, p. 357 (para. 147).

⁴ *Ibid.*, p. 331.

and that a policy of integration¹ would have to be enforced against White resistance. The attitudes of the Native groups in this connection are dealt with hereinafter². Similarly, a federal system, such as that suggested by Philip Mason³, could only be established by forcing it on to objecting groups.

In so far as the "consent of the governed" is concerned, therefore, Applicants' theories for the political development of the Territory do not disclose any virtue that is allegedly lacking in Respondent's policy.

The above-mentioned twofold fallacy of Applicants' approach is demonstrated by the following extract from a speech of the Prime Minister in the House of Assembly during the discussion of the Odendaal Commission's report:

"I have already referred to that, right at the outset, but now wish to state in more detail that what the report suggests is not to introduce apartheid to South West Africa but to take into consideration the historical facts of South West Africa. They are that there have always been in South West Africa quite separate ethnic groups, groups which in the course of history often clashed with one another. Therefore one would not be forcing them apart now if you were to continue the development of each group's territory. One should indeed rather not allow oneself to force together those who never did belong together. There is no question of extending apartheid to South West Africa, there is no forcing apart of groups. What is suggested is to refrain from forcing together, against the whole trend of their history, peoples who are separate. Therefore I wish to emphasize that the basic idea with which we are dealing is not the creation of homelands. It is the preserving of homelands. In some cases these homelands have already almost fallen apart. There it is a question of taking the kernel which still exists and, by an extension of territory and by bringing scattered groups together, with their co-operation (those who belong together), to re-establish the valued former conditions that they have always known about and continually have asked for. I, as a former Minister of Bantu Affairs, can state categorically that I visited each of these various groups and have always been asked for the further proper development of their own ethnic groups and areas⁴."

43. In the preceding two paragraphs Respondent, merely for the sake of demonstrating the fallacies underlying Applicants' argument, dealt therewith on principle, i.e., independently of the factual allegation involved therein, viz., that the policy of separate development is being imposed against the wishes of the non-White groups. In fact, however, that contention is incorrect with respect both to South West Africa and to the Republic itself. Since the factual aspect of the alleged lack of consent to partition is bound up with Applicants' more general charge that Respondent has failed to consult with the non-White groups or to pay

¹ Not only in South West Africa, but also in the Republic. *Vide* the Report of the Tomlinson Commission, U.G. 61/1955, Chap. 2, p. 10 (para. 55); Chap. 25, pp. 103-105 (paras. 20 and 28).

² *Vide* paras. 67-84, *infra*.

³ IV, p. 337; *vide* further para. 38, *supra*.

⁴ U. of S.A. *Parl. Deb., House of Assembly*, Weekly Edition, No. 15 (4 May to 8 May 1964), Cols. 5452 and 5453.

any attention to their wishes, it will be more convenient to deal with this aspect of the matter separately at a later stage of this Rejoinder¹.

44. The desirability of allowing different groups to develop to maturity separately, rather than forcing them to integrate, is reflected in the following comment on the situation in African States:

"With the sudden end of empire, too much may be attempted too hastily. This applies as much to federation-making as to anything else. In the last resort, *there is a lot to be said for the view that only free peoples can really debate the issue of a federation on its merits.* This was the way the classical federations were formed. The whole experiment in colonial federation-building is a colossal gamble in the sense that, with the best of motives, the colonial power *may be wanting to join together the wrong peoples.* As an interested third party, it has powers of persuasion, direction, control or even force at its disposal. But tempting as it may be to use such powers, as indeed they have been used in Central Africa, *they can never in themselves get people to live together who have no desire to live together.* Nationalism today is a heady and captivating doctrine, no matter how small or poor the nation may be. It is no good talking about the virtues of the economies of scale to 'nationalists' whose political horizons are still bounded by those of the tribe. Colonial empires in Africa *may have to be balkanized before their peoples—both African and European—can discover for themselves with which of their neighbours they can afford to form close and congenial political associations*²."

Respondent cannot ignore, as Applicants do, the absence of consent on the part of all the groups in South West Africa to merge into one integrated society. In the result Respondent is obliged to proceed with the policy which recognizes the separate identities of the groups with their separate homelands as the basic pattern within which progress and development must take place. In their own areas the groups are free to move towards the type of self-government they desire for their homelands, and eventually to make those homelands entirely independent states in which they can adopt whatever policies they choose, whether in regard to the form of co-operation with other states, or otherwise. Thus, the Prime Minister explained during the debate on the Odendaal Commission report in the House of Assembly:

"Then I come to a second point as far as Government policy is concerned. As I have already indicated, the picture painted here by the United Party of a compulsory shifting of population groups is a false one. These homelands will in fact be made available for their own political development. There will be more and more opportunities for them to occupy higher posts in their own homelands . . . They will also have the right of self-determination. These are the demands which are being made by the outside world. The outside world demands emancipation, better opportunities and the right of self-determination; the trustee is expected to look after the nation under its care until it reaches that stage, and eventually there must be no domination of one group by another. Inherently the

¹ *Vide paras. 67-84, infra.*

² Carnell, F. G., "Political Implications of Federalism in New States", *Federalism and Economic Growth in Underdeveloped Countries*. A Symposium (1961), p. 59.

solution that we put forward satisfies all those demands which have been formulated in the council chambers of the world.

Further, we have adopted the standpoint that there must be economic co-operation, but in addition we make provision in our policy for the possibility of political co-operation. However, we do not seek this by means of a federation in which there will be a dominant group and in which a majority group will rule a minority group. Our principle is that in the highest body there should be a consultative body, that for political co-operation with one another there must be consultation in regard to common interests on an equal footing, as in a commonwealth. Therefore there is inherent in our policy the principle of developing the possibility for economic co-operation and the possibility for political co-operation, in accordance with what is being attempted in present-day Europe. After having said all this, it must be clear that this is not an inflexible policy. In fact, it is a policy which indicates a direction and formulates certain basic principles which allow much scope for movement . . . I therefore lay it down as a principle that we envisage the eventual right of self-determination for each of the smaller and larger social groups in South West Africa. Secondly, we offer protection for every group in their development towards the highest functions within each group, including self-administration in all spheres. The report proves this very clearly, and the education envisaged is directed towards that object. Thirdly . . . the limitations imposed on the freedoms of people (as we find practically over the whole world where anybody lives in the territory of somebody else) fall away as soon as everybody can enjoy his own freedom in his own territory . . . Human rights will have more opportunity to develop to the full in terms of our policy when separation takes place and the nations exist alongside each other . . .¹

45. Respondent turns next to Applicants' fourth ground of complaint against the proposed partition of the Territory. They allege unfairness, quantitatively and qualitatively, in the proposed allocation of land. They do this in the first place by representing the division of land as being one under which 70 per cent. of the Territory is reserved for Whites², and by alleging that "non-White" inhabitants are confined to the poorest areas of the Territory"³ and that the area set aside for Whites "contains most of the wealth of the Territory and a highly developed economy"⁴. They also refer to the position in South Africa, alleging a "manifestly false equivalence of its asserted balancing of rights and interests as between 'Natives' and 'Whites' in South Africa as well as in the Territory"⁵. With reference to South Africa, Mason furthermore alleges that the proposed division of land is unfair, quantitatively and qualitatively⁶, and the allegation of unfairness is also contained in the extract from the

¹ *U. of S.A. Parl. Deb., House of Assembly, Weekly Edition* (4 May to 8 May 1964), Cols. 5640 and 5641.

² *Vide* para. 4, *supra*.

³ *IV*, p. 464.

⁴ *Ibid.*, p. 467.

⁵ *Ibid.*, p. 317.

⁶ *Ibid.*, pp. 331-332 for the details of his charge.

Report of the United Nations Special Committee contained in Annex 3 to the Reply ¹.

46. Respondent has already demonstrated that Applicants' allegation that 70 per cent. of the land of the Territory is reserved for White occupation is untrue ². But Applicants' allegation of unfairness contains a further major distortion in respect of both South Africa and South West Africa. By merely comparing land areas, Applicants assume the homogeneity of the natural potential of all the land areas concerned. This assumption is false, and the impression sought to be conveyed by Applicants of non-Whites being unfairly treated is accordingly equally false. In order to demonstrate this, Respondent will first refer briefly to the position in the Republic and thereafter deal with the position in South West Africa.

47. In regard to South Africa, Applicants have ignored the significant differences in the natural resource endowment of the respective areas. An indication of the importance of this factor is contained in the following comment of L. E. Neame:

"The Natives complain that the Reserves are too small and point out that together with the 'released areas' they amount to only 13 per cent. of the surface of the Union while the Whites are left with 87 per cent.

But the Reserves are chiefly in what are called the 'productive areas' where the rainfall ranges from 15 to 40 inches a year, while much of the land left for the Whites falls in country with a very low rainfall.

Visitors to the Reserves deplore the evidence of soil erosion, the destruction of the vegetal covering and the consequent impoverishment of the inhabitants. But the deterioration is not due simply to overcrowding. The Reserves are what the Natives have made them. Were they doubled or trebled in size they would, under present methods of cultivation, sink to the level of the areas now occupied ³."

48. Since the fairness of the division of land in the Republic of South Africa is not in issue in these proceedings, Respondent does not propose to give a systematic exposition of such division. Respondent will merely mention some figures and quote some comments to illustrate that Applicants have failed to substantiate their charge of unfairness.

As far as the agricultural potential of the different areas of land is concerned, an arithmetical comparison of the acreage held by Whites and non-Whites is quite unrealistic. The Bantu reserves have a much higher agricultural potential per unit of area than the White farming areas ⁴; in fact, they are situated in the agricultural heart of South Africa ⁵. For example: while 56.6 per cent. of White farming land lies within the regions suited only for extensive cattle and sheep farming, only 37.6 per cent. of the Bantu areas lies within the extensive cattle farming area and there is no Bantu land in the extensive sheep farming region; while 23.8 per cent. of the Bantu areas falls within an agro-economic region with a

¹ IV, pp. 349-358.

² *Vide* para. 4, *supra*.

³ Neame, L. E., *White Man's Africa* (1953), pp. 44-45 and 46.

⁴ U.G. 61-1955, p. 117 (para. 41).

⁵ Neame, *op. cit.*, quoting the 1936 *Native Affairs Commission Report*, p. 43.

high cropping potential, only 4.9 per cent. of the White areas falls within the same region¹. In this regard Paul Giniewski states:

"A large part of the area is situated in the warmest and most fertile part of the Republic and has the highest rainfall. Seventy-six per cent. of these Bantustans receive more than 20 inches of rain a year. The remaining 24 per cent. receive more than 15 inches. Of the whole of South Africa, 22.7 million acres have an arid climate and only 211,000 acres of the Bantu lands fall in this category. A rainy, temperate climate is considered to be most propitious for farming. Of the 24 million acres in the whole of the Republic benefiting from this climate, 12 million are situated in the Reserves. The experts consider that, on an average, 100 acres of the Bantu lands have a similar agricultural *potential* as 147 acres of the White holdings, that these lands, utilized properly, could consequently be one-and-a-half times as productive as the White lands²."

49. In connection with the foregoing comment, and in order to view the quantitative aspect of the division of land in the Republic in proper perspective, it may be useful to draw some comparisons with land areas and population figures in European countries. The Transkei covers an area of 12,975 sq. miles, which is about 80 per cent. of the area of Denmark (16,619 sq. miles); in 1960, the population of the Transkei was 1,379,000 as against 4,585,000 in Denmark. In Natal, the areas set aside for Bantu cover 13,995 sq. miles, and in 1960 were inhabited by about 1,174,000 people; these areas are larger than the area of the Netherlands, with a population in 1962 of about 11.7 million (total area 12,616 sq. miles). The total surface of the Bantu areas covers about 53,685 sq. miles, which is about one-quarter the size of France (212,822 sq. miles); in 1960, the total Bantu population of all Bantu areas numbered 4,069,000, as compared with the 1962 population in France of approximately 46.3 million. In 1960 the population density of all the Bantu areas in the Republic was 78 persons per square mile (Transkei, 105; Natal Bantu areas, 103; Tswana Bantu areas, 31). This may be compared with the corresponding figures in the following countries: Netherlands, 929.1; West Germany (excluding West Berlin), 586.7; Italy, 431.9; Denmark, 275.9; France, 217.6³.

50. In regard to mineral potential, it is not true to say that the Bantu areas "have few known mineral resources"⁴. It is true that gold and diamonds, which are the mainstay of Respondent's mining industry in the Republic, have not so far been discovered on a significant scale in Bantu areas; but it should be remembered that the areas where these minerals are at present being mined were not inhabited by non-Whites at the time of the original discoveries. The process of exploring the mineral resources of the present Bantu areas has by no means been completed yet, but already mineral deposits of considerable value and diversity have been discovered or are already being mined. Obviously no detailed survey can be given here; a few examples will suffice. A rich platinum reef falls

¹ U.G. 61—1955, p. 117 (para. 40).

² Giniewski, P., *Bantustans: A Trek towards the Future* (1961), pp. 120-121.

³ All data on overseas countries taken from *Information Please: Almanac Atlas and Yearbook 1964*, at pp. 615 and 676 ff. South African data: Departmental information.

⁴ IV, p. 357 (para. 150).

largely within the North-Eastern Transvaal Bantu areas; in the same area there is a phenomenal quantity of titaniferous magnetite (estimated to exceed 2,000 million tons), and plans for a steel-works based thereon are under consideration; a large part of the central Transvaal chromite deposits, believed to be the largest in the world, falls within Bantu areas; large portions of the Cape Crocidolite (asbestos) field fall within the Tswana Bantu areas, where there are also coal deposits estimated at a little under 1,000 million short tons. In 1952 the value of sales of all minerals mined in Bantu areas already amounted to R9.45 million ¹.

51. In regard to industrial potential, Respondent disputes Mason's statement that the Bantu homelands in the Republic are "badly placed for industrial development" ². Again some examples will suffice. So, for instance, it is widely accepted that the Tugela Basin, with its large Bantu areas, is one of the principal regions of the Republic's future industrial growth; it is endowed with ample water supplies, well served by the power network of the Electricity Supply Commission, and it lies in the vicinity of the Republic's largest coal mines, as well as being one of its foremost agricultural and forest areas. Similarly, the rich water resources of the Transkei present great possibilities of industrialization ³. Large-scale afforestation schemes and the introduction of new agricultural crops, especially fibres, are laying the foundation for a large number of processing and manufacturing plants, which, in turn, will stimulate further developments in auxiliary industries and services, while the creation of urban areas in the homelands will increasingly bring in their train service and trade establishments ⁴. In Bantu areas Bantu already own 135 grain mills, 42 bakeries, 28 other manufacturing or processing enterprises, 2,375 general dealers' shops, 503 butcheries, 566 cafés and restaurants, and 465 other commercial enterprises, and it is clear that these numbers are bound to rise considerably in the near future, bearing in mind the credit and educational facilities provided by Respondent.

52. The Bantu Investment Corporation, referred to in Annex 3 of Applicants' Reply ⁵, has sufficient funds to meet the demands of the Bantu in their own areas, and substantial progress has been made to assist the Bantu in building up their own commercial and industrial enterprises. Already the Corporation has given financial aid in about 740 cases for the furthering of the interests of traders and small industrialists; direct business loans have amounted to R1,465,000 and some 250 Bantu traders have been assisted to acquire stock-in-trade on a credit basis from wholesale concerns controlled by the Corporation. In addition, businessmen who have received financial aid are visited regularly by officers of the Corporation in an effort to train them in the proper conduct of their affairs; non-borrowers are also making considerable use of these facilities free of charge. As the demand for capital increases, further provision will be made therefor. Of necessity, on account of the as yet limited absorptive capacity for capital on the part of the Bantu, their economic

¹ Vide also Giniewski, P., *Bantustans: A Trek towards the Future* (1961), p. 149.

² IV, p. 332.

³ Vide also Fair, T. J. D. and Green, L. P., "Development of the Bantu Homelands", *Optima*, Vol. 12, No. 1 (Mar. 1962), pp. 7-19.

⁴ Vide further, as to the industrial potential of the Bantu homelands, Giniewski, P., *Bantustans: A Trek towards the Future* (1961), pp. 148-151.

⁵ IV, p. 358 (para. 152).

progress will initially be slow, but Respondent has every reason to believe that, with the educational opportunities provided by it and the experience gained by the Bantu in the White areas, the tempo of progress will soon be increased, with the result that more and more employment opportunities will be created for the Bantu in their own areas.

Because the Bantu are unable to respond quickly to the requirements of economic growth in their own areas, White-controlled industries will necessarily have to create opportunities for some time to come. It is for this reason that Respondent has encouraged and concentrated on the establishment of border industries¹, which will in the meantime bring together White capital and technical knowledge and the labour resources of the Bantu, to the mutual advantage of both. Respondent is averse to allowing White private persons to establish industries in Bantu areas¹, as this will only lead in the long run to Whites controlling industry and commerce in the Bantu homelands, thus preventing the Bantu from making progress in this sphere, as he would be faced with the superior capital resources and technical skill and experience of the Whites. The protection of the Bantu in their own areas against superior competition is an essential facet of Respondent's policy of separate development. The border industries, moreover, give the maximum benefit to the Bantu, in that they are provided with employment opportunities² near their permanent homes—which obviates the need for migrant labour—while being enabled to gain the experience necessary for establishing their own industries. Thus, the border industries, far from exploiting the Bantu for the benefit of the Whites, are designed to enable the Bantu to build up their own industries in their own areas as quickly as possible.

53. Respondent now proceeds to deal with the division of land in South West Africa itself. In this regard, too, Applicants have simply disregarded the differences in the natural potential of the various areas concerned.

In fact, the areas reserved in South West Africa for the exclusive occupation of non-Whites are on the whole far more favourably endowed by nature, and hence offer much greater potentialities, than the areas to which White settlement is confined. This is conclusively proved by the information supplied in the Counter-Memorial³, as well as by further details which will be more conveniently given later in this Rejoinder⁴. For present purposes, Respondent will mention only some facts and figures in order to illustrate the fallacy inherent in comparing only the extent of the different areas.

54. As far as agricultural resources are concerned, 70 per cent. of the total non-White population of South West Africa, and only 20 per cent. of the White population, are to be found in the most favourable rainfall region—the only region suitable for dry-land agriculture—while 85 per

¹ *Vide* IV, pp. 357-358 (paras. 151 and 152).

² The figures quoted in the last sentence of IV, p. 358, para. 152, are disputed. According to the 1959/1960 industrial census, 55,000 Bantu workers were employed in private secondary industry in the Bantu homelands and border areas, apart from a further 25,000 in the Durban-Pinetown area, which is also a border area. In the past four years, and mainly in the past year, the development of border areas has resulted in the employment of an additional 28,000 Bantu in these areas.

³ II, pp. 295-298.

⁴ Sec. H, Chap. III, paras. 18-21, *infra*.

cent. of the area to which Whites are confined falls within the lowest rainfall areas¹. The area of land in non-White homelands receiving an annual average rainfall exceeding 500 mm. (the lower limit for marginal dry-land farming) is nearly two-and-a-half times larger than similar land in the White farmland area¹. Similarly, the livestock carrying capacity of the northern and north-eastern non-White regions on the whole far exceeds that of the White region¹; these non-White regions are also in a far more favourable position with respect to seasonal distribution, effectiveness and variability of the rainfall, evaporation, vegetation, water resources, cropping potential and forestry reserves¹.

55. Presumably Applicants' charge that the White area of the Territory "contains most of the wealth of the Territory"² rests on the fact that the bulk of mining operations is conducted in the southern sector. In this connection it should be borne in mind, however, that the diamond mines are situated on unallocated government land. Apart from this, the situation of the mines in the southern sector cannot be interpreted as proof of unfair treatment of the non-Whites. Firstly, all mineral rights are vested in Respondent as the Government of the Territory—the owners of land on which mining is carried on are only entitled to certain owners' dues, which are of minor importance. Secondly, in the historical position existing in 1920, Respondent was obliged to allow the continued exploitation of the mines by foreign entrepreneurs who had in any event already obtained vested interests, in order to make the expansion of the economy possible³. Thirdly, Respondent has utilized the income derived from mining for the benefit of the Territory as a whole. In this connection, the necessity of establishing growth points in certain areas, and the existence of "a highly developed economy"² in the southern region of the Territory, are explained in a later part of this Rejoinder⁴.

56. The manner in which the areas of land occupied by non-Whites have been extended in the past—of which details will be supplied later in this Rejoinder⁵—as also Respondent's attitude in regard to the further enlargement of these areas by over 50 per cent. as proposed by the Odendaal Commission⁶, prove that Respondent has always been prepared to extend the non-White areas in accordance with the needs of the different population groups. Respondent is convinced, bearing in mind the circumstances, particularly the productive potential of the different areas concerned, that the division of land envisaged in the Odendaal Commission's report is fair and equitable with respect to all the population groups in the Territory.

57. Respondent now proceeds to deal with Applicants' fifth and final ground of complaint against the allocation of land recommended by the Commission. Applicants contend that the homelands in the Territory would be neither "politically viable as 'independent' entities, or otherwise", nor "economically viable as entities 'interdependent' with Respond-

¹ Sec. H, Chap. III, paras. 18-21, *infra*.

² IV, p. 467.

³ *Vide* II, p. 410.

⁴ *Vide* sec. H, Chap. II, paras. 16-17, *infra*.

⁵ *Ibid.*, paras. 15-16.

⁶ *Ibid.*, paras. 27-28.

ent, or otherwise''¹. Again, reference is also made to the position of the Bantu homelands in South Africa².

58. Dealing first with the economic aspect, it is not clear what exactly Applicants intend to convey by the expression "economically viable", and whether the reference to the possibility of "interdependence" with Respondent contains an implied criticism of such a state of affairs. If Applicants' charge is that the homelands would not be economically *independent*, then Respondent submits that the charge is meaningless, since economic independence is to be found nowhere in the world except in subsistence economies; all countries, whether in the early stages of development or highly industrialized, are dependent on trade and other international economic relations.

Respondent's policy in fact envisages a close economic co-operation between Respondent and the various future independent homelands³. The economic interdependence of these future states with Respondent would be no different in principle from the economic relationships between other countries. In other parts of Africa the need of increased economic co-operation between different States has been recognized⁴, flowing from "the formidable obstacles that make it difficult for many countries to build viable economies within the strict confines of their boundaries"⁵. Indeed, the non-White areas, both in the Republic and in South West Africa, may be regarded as being in the exceptionally fortunate position of being interdependent with Respondent's economy, the most broadly based and prosperous on the African continent. Even the High Commission Territories, which do not constitutionally form part of South Africa, enjoy this advantage.

If, on the other hand, "viability" is understood in the sense of "the capacity of an economy to maintain a customary or expected level of income, or to increase it"⁶, or the "attainment of a healthful existence and a steadily improving quality of life for the people of the territories"⁷, then Respondent states that its policy, both in the Republic and in South West Africa, has been and still is one of systematic and vigorous development of the Bantu homelands towards economic viability. With regard to South West Africa, the various methods applied by Respondent in this respect have been detailed in the Counter-Memorial⁸. As to the Republic, Respondent does not consider that it would be warranted to burden the record with more detailed information than the brief indications of past and future development contained in the Counter-Memorial⁹, which have not been contested by Applicants.

In general, Respondent states that its policy has conformed to the requirement laid down in the following passage:

¹ IV, p. 318; *vide* also p. 325.

² *Ibid.*, pp. 319, 320 and 349-358.

³ *Vide* para. 10, *supra*.

⁴ Annual Report of the Economic Commission for Africa to the Economic and Social Council at its Fourth Session (E/CN.14/168), para. 265.

⁵ *Industrial Growth in Africa* (E/CN.14/INR/1/Rev.1), 1963, pp. 76-77.

⁶ Berg, E. J., in *The United States and Africa*, edited by Walter Goldschmidt (revised edition, F. A. Praeger) (1963), p. 129.

⁷ *Basutoland, Bechuanaland Protectorate and Swaziland*. Report of an Economic Survey Mission (1960), p. 12.

⁸ *Vide* III, pp. 1-103.

⁹ II, pp. 481-482.

"It is essential that the utilization of the resources of the Non-Self-Governing Territories should be in the best interests of their inhabitants and should lead to the attainment of a maximum degree of self-reliance and to the establishment of a sound and stable economy ¹."

59. If the rate of progress of the Bantu homelands towards economic viability appears to have been slow, the reason therefor is not a lack of interest or an ulterior motive on the part of Respondent, but rather the low absorptive capacity of the Bantu themselves. In this connection it is relevant to compare the promising prospects of the South African Bantu homelands with the following assessment made by an official commission of enquiry into the future prospects of the three British High Commission Territories:

"We have approached our task with the question whether there are any development projects which could be started promptly and carried through within the next decade or so—projects which would carry each Territory well on the way to becoming a viable economic unit. While unable to specify the time likely to be required, we believe that our recommendations . . . make the attainment of this goal a near certainty in the case of Swaziland, a reasonable probability in the case of the Bechuanaland Protectorate, and a possibility in the case of Basutoland. It should be emphasized, however, that 'viable' does not mean economically independent, or even independent of allocations from Colonial Development and Welfare funds or other sources; it does mean independent of annual budgetary assistance and it implies attainment of a healthful existence and a steadily improving quality of life for the people of the Territories. In our conception of this approach to viability we . . . have not anticipated . . . a reversal—for any reason other than improved economic conditions in the Territories—of the tendency for labour to migrate ²."

60. In regard to the political aspect, it is also not clear what is meant by Applicants' assertion that the homelands would not be "viable" politically. Applicants have not advanced any factual grounds in support of their assertion, except, perhaps, for the contention that all the inhabitants of the homelands have not consented to the partition of the Territory—a contention which has already been dealt with above ³.

61. In the political sphere Respondent's policy, both in the Republic and in South West Africa, envisages the development of the Bantu homelands to the stage where they are capable of attaining independence within the framework of a free association of states similar to that of a commonwealth. Respondent's policy ensures that the various groups of the population are enabled first to develop a sense of unity and nationhood, before they are given political independence. It is precisely those qualities that have been lacking in several newly independent States in Africa—with resultant doubts as to their "viability". Respondent's

¹ *G.A., O.R., Twelfth Sess., Suppl. No. 15 (A/3647), II, p. 15 (para. 22).*

² *Basutoland, Bechuanaland Protectorate and Swaziland. Report of an Economic Survey Mission (1960), p. 12.*

³ *Vide paras. 40-44, supra.*

policy furthermore avoids the possibility of the domination of some groups by others—a phenomenon which has also been manifest in many of the new African States.

It is not true, therefore, as Philip Mason¹ alleges, that Respondent's policy is to ensure survival for the White group, or any portion of the White group—Respondent's policy seeks to ensure the survival of *all* groups.

62. Equally unfounded is Mr. Mason's statement that the creation of Bantu homelands in South Africa is proposed "partly to satisfy a logical principle and partly to perpetuate White hegemony when White supremacy has to go"². The only reasoning on which this allegation is based is to the effect that a consistent application of the principle of creating separate homelands for different "tribal groups" (to use Mr. Mason's phrase) would result in a situation whereby Kenya would have to be divided into 23 states, and Nigeria into more than 100, many of which in both territories would still contain minorities².

The basic fallacy in the above reasoning lies in elevating a practical consideration relating to political stability into a universally applicable rule of logic. Respondent does not propound any policy or dogma to the effect that "Africans of different tribal origins cannot live together"². Whether or not different tribes can live together is a question for determination in each particular case. For instance, Respondent has every reason to think that the eight tribes of Ovamboland could develop into a stable political unit, and even possibly later join up with the five tribes of the Okavango.

The features which render different human groups either capable or incapable of peaceful co-operation within a single state or society, are many and complex, and science has not spoken the last word on this topic. What is clear, however, is that *ethnic* differences (not *tribal* ones, as stated by Mr. Mason) between groups would suggest a strong probability that many such groups are not so capable. The correctness of this proposition has been established by the whole course of human history, and the high price paid for disregarding it in recent times has been noted³. However, even where there exists ethnic differentiation, Respondent does not state categorically that different groups "cannot live together". In some instances there may be features tending towards co-operation which are stronger than the disruptive forces involved in ethnic differentiation. Unless such features are manifest, however, Respondent does not consider it wise or practicable to force different ethnic groups together into a mixed social or political entity. If, upon reaching a sufficient stage of development to exercise a mature judgment, some or all of the ethnic groups in South West Africa were to decide to amalgamate, they would receive Respondent's blessing, but in the absence thereof Respondent will resist any attempt at creating a mixed society which Respondent knows, from experience and historical example, will probably end up in chaos, bloodshed and disorder.

Mr. Mason refers also to the existence of minorities within the area of particular "tribal groups" (as he calls them) in Nigeria and Kenya. The position of minorities is, of course, always difficult. One would like

¹ IV, p. 337.

² *Ibid.*, p. 335.

³ *Vide* Chap. III, *supra*.

to provide self-determination even for small groups, if they are inassimilable with the majority in a particular State. In practice this would, however, in many cases be impossible. Although minority status would probably be most unpleasant for the members of the group concerned, the existence of such groups would not necessarily affect the political stability or effectiveness of the State. The latter would depend not so much on the existence of a minority, but on its relative size, power, resources, allies, relationship with the majority, etc., or, in other words, its political effectiveness.

Applying the above principles to Nigeria and Kenya, it becomes apparent that no valid opinion could be expressed as to the most favourable political division in those countries without a careful examination of the local situation. It is clear that mere tribal or dialectic differences between sections of the same ethnic group would not *prima facie* suggest any need for separate political institutions, and, as noted above, even among different ethnic groups cohesive forces may be greater than disruptive ones. To what extent the systems in Nigeria and Kenya have indeed made sufficient allowance for the centrifugal forces of ethnic differentiation only time can tell. It is nevertheless already clear that both these States are faced with considerable problems in this regard, and contain a substantial body of opinion in favour of greater recognition of ethnic affiliations¹.

F. Consultations with, and Real Wishes of, the Native Groups

63. Applicants, in various passages of the Reply², charge Respondent with failure to consult with, or obtain the consent of, the inhabitants of South Africa and South West Africa before applying a system of homelands to these territories. In many of these passages Applicants formulate and repeat the charge in general terms; in others reference is made to specific aspects of Respondent's policy, viz., the creation of Bantu authorities, the establishment of the Transkei Bantustan, the recommendations of the Odendaal Commission, and the endorsement by Respondent of the principles of those recommendations.

Respondent will deal firstly with the general charge and thereafter with the specific aspects mentioned by Applicants.

64. In general, Applicants allege that, contrary to the "principle . . . that an essential prerequisite of a valid and viable political system is consent of the governed"³, "Respondent's self-styled policy of 'territorial apartheid' is predetermined and the method of its application is prefabricated". They charge Respondent with "predetermination to implement its policy of *apartheid* without consultation, other than of an illusory and perfunctory nature"⁴; with "disregard of all attempts to achieve consultation"⁵; and they refer to "[t]he history of Respondent's rejection of consultation"⁵; "Respondent's policy of rejecting consultation with

¹ *Vide* Chap. III, *supra*.

² *Vide* IV, pp. 320-325.

³ *Ibid.*, p. 320; this passage has already been referred to, *vide* para. 40, *supra*.

⁴ *Ibid.*, p. 320; *vide* also p. 323.

⁵ *Ibid.*, p. 321.

the 'Native' electorate"¹; and Respondent's "practice of no-consultation [sic] in South Africa"².

65. As has already been indicated³, Applicants' charge of non-consultation rests on a false premise: it presupposes that Respondent's homelands policy is directed at changing an existing state of affairs, by creating homelands where there had been none before, or by creating a partition which had previously been non-existent; it suggests by implication that a fully integrated multi-racial society exists in South Africa and in South West Africa, in fact; that Respondent's policy seeks to change such society by dividing it into separate racial groups and separating these groups, and that the consent of these groups must therefore first be obtained. Applicants' approach to the question of consultation ignores, and is in conflict with, the actual facts of the situation.

Historically the various ethnic groups inhabiting the Territory to a large extent always occupied different and separate areas of land, and each group retained its own identity.

In South Africa the position is the same. Respondent did not create homelands for the various groups, nor did Respondent bring about the fact that through the years each group retained its own identity; these are simply the results of historical development. The situation is reflected in the following comments by the Tomlinson Commission:

"During the course of time the areas which were effectively occupied by the Bantu were regarded as reservations for their use and occupation . . ."⁴

"The pattern of land occupation of the races was woven during the formative period of the history of the settlement of South Africa . . ."⁵

"Territorial segregation has been the accepted policy of South Africa since earliest times."⁶

And it was succinctly described by the Prime Minister in the following remark in the House of Assembly: ". . . we are not now dividing up South Africa; history divided it up long ago and we are just accepting the . . . consequences."⁷

66. Respondent's policy recognizes the factual situation existing in South Africa and South West Africa; it accepts the separate identity of the groups with their traditional homelands as the basic pattern within which progress and development must take place. For this purpose, it is submitted, Respondent does not require the consent of the groups.

In so far as Respondent's policy involves changes in the existing state of affairs, i.e., by the extension of the home areas, or the furtherance of political and other development of the groups within their areas, or the adaptations required in the political structure of the groups, within the framework of the general policy, Respondent has always accepted, and given effect to, the need to consult with and to obtain the co-operation

¹ *Vide* IV, p. 323.

² *Ibid.*, p. 324.

³ *Vide* paras. 41-42, *supra*.

⁴ *U.G.* 61-1955, p. 42 (para. 2).

⁵ *Ibid.*, p. 46 (para. 44).

⁶ *Ibid.*, p. 101 (para. 4).

⁷ *R. of S.A. Parl. Deb., House of Assembly*, Vol. 2 (1962), Col. 89.

and consent of the groups concerned, as will be demonstrated below ¹.

In those areas of South Africa and South West Africa which are set aside for occupation by the White group, and in which numbers of non-Whites became settled, it was never contemplated by any group that the non-White group would acquire political rights within such areas. Respondent's policy does not seek to alter this position, except to the extent that members of the non-White group are to be afforded the opportunity of exercising political rights in respect of their homelands.

In fact, it is the policy advocated by Applicants that would seek to bring about a major change in the existing situation, for Applicants propagate "the institution of universal adult suffrage . . . within the framework of a single territorial unit" ². Such a fundamental change can obviously not be contemplated without obtaining the consent of all the groups concerned. In particular, the extension of the franchise to non-Whites within the White areas is inconceivable in the absence of the consent of the Whites themselves. But there is no doubt that it would not be possible for any governing authority to obtain such consent, either in South Africa or in South West Africa. Thus, the Tomlinson Commission reported:

" . . . there is a greater determination on the part of the European to maintain his identity . . . This determination expresses itself in resistance to everything leading in the direction of assimilation ³.

That the European people will not be prepared willingly to sacrifice their right of existence as a separate national and racial entity must be accepted as a dominant [sic] fact in the South African situation ⁴.

On the part of the European population there is an unshakeable resolve to maintain their right of self-determination as a national and racial entity . . . ⁵"

In regard to support generally given to Respondent's policy of separate development, attention is invited to what is stated hereinafter ⁶.

67. Turning now to the particular incidents of non-consultation alleged by Applicants, the first of these relates to the establishment of Bantu authorities. Applicants stigmatize as an "untenable contention" ⁷ Respondent's statement that "the majority of Bantu have welcomed the creation of the Bantu-authorities and have afforded Respondent an increasing measure of co-operation in developing and extending them" ⁸.

In further proof of the correctness of Respondent's above-quoted statement, Respondent points out, in the first place, that in terms of existing legislation it is impossible for Respondent to establish any Bantu authority without having first consulted with the Bantu concerned. In terms of section 2 (1) of Act 68 of 1951, "consultation with every tribe and community concerned" is made a prerequisite for the establishment

¹ *Vide* paras. 67-84, *infra*.

² IV, p. 441.

³ *U.G.* 61—1955, p. 10 (para. 85) and IV, p. 229 (para. 55).

⁴ IV, p. 103 (para. 20).

⁵ *Ibid.*, p. 105 (para. 28).

⁶ *Vide* Chap. VI, *infra*.

⁷ IV, p. 320, footnote 1.

⁸ II, p. 480.

of a Bantu tribal authority, while the establishment of a regional or territorial authority is subject to the following proviso:

“Provided that no regional or territorial authority shall be established, except after the Minister has consulted the natives in every area in respect of which such authority is to be established.”

In practice, a procedure has been adopted whereby Bantu authorities are established only on the initiative of the groups concerned, i.e., only on a request therefor. In fact, no Bantu authorities have ever been established except upon special request. In the few instances in which the establishment of an authority was opposed, the opposition emanated from small dissident minorities. In this regard Applicants refer to a statement made by the Minister of Bantu Administration and Development in the South African Parliament in 1963 that the Government was not at that stage planning to grant powers of self-government in any additional South African areas. As Respondent has indicated, self-government for Bantu areas is not a matter that is planned independently of the wishes of the people concerned; and developments in this regard must therefore await the initiative of the Bantu people themselves.

68. In regard to the Transkei, Applicants quote an extract from a statement of the then Chairman of the Territorial Authority of the Transkei, Chief Kaiser Matanzima, in which, according to Applicants, he set out the ground upon which he “defended his support of Respondent’s proclaimed intention to establish the Transkei ‘Bantustan’”¹. In order to view the Chief’s remarks in their proper perspective, reference must be made to the portions of the statement preceding and following the quoted extract. For the sake of convenience, Respondent reproduces the whole of the latter part of the statement, including the passage quoted by Applicants:

“There are two roads leading to freedom, namely (a) by peaceful means and (2) (sic) by revolution. The people who oppose the attainment of self-government under the proposed Transkeian Constitution are the protagonists of a revolution on communistic lines. White South Africa is one hundred per cent agreed on the maintenance of white control of the white Parliament. Only their defeat on the battlefield will divest them of this resolution. Will those people who oppose the peaceful road taken by the Transkei come out and advocate a revolution? They will not do so. They will only put the ignorant Bantu with their resounding, meaningless phrases of ‘Freedom in our time’, ‘Inkululeko . . . , etc.’ into trouble after collecting all the money they can get from these poor people for their comfort.

The Transkei people, with the exception of the mental patients who are easily misled, will not be duped into a situation which will ruin their country. The Whites who advocate a multi racial Parliament for the Transkei are not sincere. They are hypocrites of the worst kind. They know that if this cheat is accepted by the Bantu and (sic) whites will always control the affairs of the Transkei under their old policy of ‘time is not ripe’. The Transkei people want to take control of every department of the Transkei state. They want

¹ IV, p. 320.

to hold executive positions in their government in order that they may direct the economy of their country in the interests of the Bantu of the Transkei; but this must be done gradually and successfully in order to avoid the chaos which characterised the lives of the people in the so-called free African States. The people of the Transkei will not object to their kinsmen doing the same in other Bantu areas of the Republic. The Transkei people would like to have the monopoly of trade in their areas. They would like to own industries and control their system of education in the same way as whites do in their own areas. In this way only will the Bantu live peacefully with their white neighbours. The people of the Transkei are opposed to white domination. That is why they advocate a division of the land—the only practical policy towards the solution of racial conflicts in the land¹.”

69. The same Chief, now in his capacity as Chief Minister of the Transkei Government, subscribed to the policy of separate development in the following terms when he delivered a policy speech to the Transkei Legislative Assembly:

“We wholeheartedly endorse the policy of separate development as being the only policy whereby the different races in South Africa can live side by side in peace and harmony. For this policy ensures to each racial (sic) full political rights and the maximum possible development and progress in his own part of our common fatherland².”

70. Applicants allege further that “Respondent’s pre-determination to create ‘homelands’ . . . was made manifest, in explicit terms, long prior to the events” mentioned in the Reply³, being the events which immediately preceded the granting of self-government to the Transkei⁴. Applicants’ allegation discloses the fallacious assumption which has already been exposed above, viz., that Respondent’s policy is to “create” homelands⁵. The sources quoted by Applicants in support of their allegation⁶ do not in fact warrant any such assumption⁷; they merely show that it was the extension of political rights to the Bantu in their existing homelands which had long been foreshadowed⁷.

In fact, as has been shown in the Counter-Memorial⁸, the initiative and driving force behind the establishment of self-government in the Transkei came from the inhabitants of the Territory themselves.

71. Finally, Applicants relate their charge of non-consultation specifically to the Odendaal Commission report and its endorsement, in principle, by Respondent⁹. They assert that “Respondent attaches so

¹ Text of statement sent to the Press.

² *Debates of the Transkei Legislative Assembly, 2nd Session, First Assembly, 5 May to 19 June 1964*, p. 67.

³ IV, p. 324.

⁴ As described in II, pp. 478-479 and referred to in IV, p. 324.

⁵ *Vide* paras. 42 and 65, *supra*.

⁶ IV, p. 324, footnote 3. The person referred to in this footnote in connection with the programme announced in 1950 (Dr. Eiselen) was not a member of Respondent’s Government, nor in its service at that time.

⁷ *Vide* II, pp. 464-465.

⁸ II, pp. 478-479.

⁹ IV, pp. 324-325.

little significance to consultation with the 'Natives' in the Territory, that the *Memorandum nowhere refers to such consultation as having taken place prior to the release of the Commission's report or of its endorsement, in principle, by Respondent*". Similarly, it is alleged that "no mention is made of consultation, either in the terms of reference of the Commission, or in the *Report of the Commission itself*"¹. With reference to an extract from the report, quoted by Applicants², they allege:

"Apart from attributing recommendations for establishment of 'territorial *apartheid*' in the Mandate to a mere 'impression', based upon undisclosed 'evidence', the Commission does not refer to the fact—which consultation with the inhabitants would have made inescapably clear—that the inhabitants would 'prefer' to 'have and retain residential rights' and 'political say' in the White area . . ."³

Respondent will show that the charge of non-consultation in connection with the recommendations of the Odendaal Commission is untrue. Attention will first be given to consultations held by the Commission itself before it brought out its report; thereafter consultations subsequent to the publication of the report will be dealt with.

72. In support of their averment that no mention is made of consultation in the terms of reference of the Odendaal Commission, Applicants refer to an extract from the terms of reference which was quoted in Respondent's Counter-Memorial⁴. Respondent submits that it is implicit in the extract quoted from the terms of reference that the Commission would consult with the inhabitants of the Territory; without such consultation the Commission could not have carried out its task "to enquire thoroughly into" the various matters mentioned in the terms of reference.

Moreover, it appears from the Commission's full terms of reference, reproduced in its report (which Respondent has introduced as a relevant document in these proceedings)⁵, that the Commission was granted the following power:

"And in order that the Commission may be better able to carry out this Commission, it is granted full power and authority to interrogate at its discretion all persons who in its opinion are able to furnish information on the subjects mentioned in its terms of reference or on matters relating thereto"⁶.

73. The Commission in fact made every attempt to consult with and to obtain the views of as large a section of the inhabitants as possible. This is amply proved by the following extracts from the Commission's report:

"2. *Procedure.*

In carrying out its terms of reference your Commission—

- (a) held meetings where necessary;
- (d) heard evidence at various centres, geographically so planned as

¹ IV, p. 324 (italics in original, footnotes omitted).

² *Ibid.*, pp. 324-325.

³ *Ibid.*, p. 325.

⁴ II, p. 476; IV, p. 324, footnote 6.

⁵ IV, p. 197 (para. 2).

⁶ R.P. No. 12/1964, p. 3 (para. 1 (iii)).

to be within reach of each person, body and authority in South West Africa . . .

(e) publicized the enquiry by—

- (i) notification in *Government Gazette*, Vol. V, No. 336 of the 21st September, 1962, Government Notice No. 1535, in both official languages;
- (ii) notification in *Official Gazette Extraordinary* of the Administration of South West Africa, No. 2430 of the 21st September, 1962, in Afrikaans, English and German;
- (iii) notices in the press, both in the Republic of South Africa and in South West Africa, announcing the terms of reference, as well as by invitations to persons and bodies to make relevant contributions;
- (iv) furnishing particulars to the inhabitants of the Territory through the officials concerned where necessary;
- (v) news broadcasts on Radio South Africa.

3. Your Commission did everything in its power to publicize this matter as widely as possible. Persons and bodies were invited to submit evidence, either in writing and/or orally, on any matter of any nature whatsoever which could contribute to the development of South West Africa and its population. If they so desired, witnesses were allowed to give evidence *in camera* before the Commission¹."

In regard to paragraph 2 (e) (iv) of the report, quoted above, the particulars were made known to the inhabitants by means of circular letters which were distributed by officials in the various Native areas, and also by oral intimations by such officials to the recognized leaders, organizations and other individuals in such areas.

In connection with paragraph 2 (d) of the report, quoted above, a list of the places visited by the Commission is set out elsewhere in the report²; from this it is apparent that the whole of the Territory was fully covered and that ample opportunity was afforded to all persons in the Territory to attend the meetings and to make representations to the Commission.

74. The Commission succeeded in making widely known its desire to consult persons and organizations on the matters covered by its terms of reference. In consequence of the steps taken to that end, as described above, a large number of persons and bodies gave oral evidence before the Commission and/or submitted written memoranda to it. A list of these persons and bodies is supplied in the Commission's report³. By far the majority of them were members of, or represented, the non-White groups of the Territory. From the said list it would seem that 1,267 representatives of the Bantu groups in the Territory, 346 Nama representatives, 6 Damara representatives, and 14 Coloured persons, making a total of 1,633 non-Whites, appeared and gave evidence before the Commission, while 20 individual Natives and a number of non-White bodies submitted written memoranda.

The Commission gave all the persons and bodies appearing before it every opportunity to air their views. In particular, the Commission by means of questions endeavoured to ascertain the wishes of the various

¹ R.P. No. 12/1964, p. 3 (para. 1 (iii)).

² *Ibid.*, pp. 533 and 535.

³ *Ibid.*, pp. 537, 539, 541, 543, 545, 547, 549 and 551.

groups of the population as to their further development. As will appear from statements in its report, the Commission, in formulating many of its recommendations, gave due consideration to the representations made to it on behalf of the various groups.

Apart from the Bushmen, there were only two groups whose members failed to make any representations to the Commission. These were the Herero in the Police Zone and the Rehoboth Bastards, numbering 35,354 and 11,257, respectively. But it was certainly not the fault of the Commission that they did not appear before it. They were in fact specially invited to meet the Commission, but declined the invitation.

75. In their above-quoted comment ¹ on the report of the Commission, Applicants refer to the fact that the evidence mentioned in the report was "undisclosed". The Commission decided to treat all the evidence given before it as confidential. The fact that the evidence was not published does not, of course, in any way detract from the Commission's statement that its impression ² was supported by the evidence.

By the tenor of their reference to "a mere 'impression', based upon undisclosed 'evidence'", Applicants, however, imply that there was in fact no evidence to support the Commission's recommendations. Respondent deprecates the suggestion of dishonesty on the part of the members of the Commission, particularly in view of the fact that Applicants have made no attempt to substantiate their suggestion. The members of the Commission are well-known men of high standing and integrity, and Respondent proposes to treat the suggestion with the contempt it deserves.

76. Applicants have not adduced any proof of the alleged "fact" that "the inhabitants would 'prefer' to 'have and retain residential rights' and 'political say' in the White area" ³. Their statement of the "fact" amounts to no more than conjecture as to what views would have been advanced by the inhabitants, had they been consulted, based on the false premise that they were not consulted. As Respondent has shown, the Commission in fact did consult the inhabitants, and its findings were based on the evidence received by it.

77. Although it is correct that Respondent's Memorandum ⁴ does not refer to "consultation as having taken place prior to the release of the Commission's Report or of its endorsement, in principle, by Respondent" ⁵, Respondent denies the inference which Applicants seek to draw therefrom, viz., that "Respondent attaches so little significance to consultation with the 'Natives' in the Territory" ⁵. The incorrectness of Applicants' assertion will be demonstrated by a brief reference, in the following paragraphs, to the consultations which were in fact held

¹ *Vide* para. 71, *supra*.

² It may be noted that the report was drawn up in Afrikaans, and that the English version of the extract from the Commission's report quoted in IV, pp. 324-325, is not an exact translation of the Afrikaans text. In the Afrikaans text the phrase used is "*beslis* onder die indruk gekom, gestaaf deur getuienis", the equivalent of which, in the English language, is "formed the *definite* (or *clear*) impression, supported by evidence".

³ IV, p. 325.

⁴ *Ibid.*, pp. 201-217.

⁵ *Ibid.*, p. 324.

after the Report of the Odendaal Commission had been drawn up.

78. Shortly after the report of the Commission had been tabled in Parliament, the Minister of Bantu Administration and Development visited South West Africa and held meetings with the different Native groups in the Territory. Between 18 and 25 February 1964 the Minister addressed meetings at Runtu, Ondangua, Ohanguena, Ongandjera, Ohopoho, Okombahe and Okakarara. The fact that the meetings would be held and the purpose thereof had been made known as widely as possible in advance to the various groups by the officials stationed in Ovamboland, the Okavango and the Kaokoveld, and also amongst the Damara and Herero groups.

At each of these meetings the Minister explained the most important recommendations of the Commission relating to the particular area. He described the area of land which the Commission recommended should be set aside as a homeland for the group concerned, and detailed the Commission's proposals for such homeland with regard to the creation of legislative councils, executive committees, community authorities, and courts, the institution of citizenship and the franchise, the extension of health services, the expansion of educational facilities, the improvement of agricultural methods, economic development, and so forth. At each meeting the Minister presented copies of the Commission's report to the leaders of the groups attending the meetings to enable them to study the contents and to convey information to their followers, and at every meeting the leaders and members of the groups attending were encouraged to put questions to the Minister, and to express their attitudes.

These consultations took the form of meetings, which is the traditional method of communicating or dealing with the Native groups and tribes, and it has been in vogue since the inception of the Mandate. In this regard Respondent finds it apposite to quote the following remarks of General Smuts in his statement to the Fourth Committee of the United Nations General Assembly on 4 November 1946:

"The wishes of the Natives were expressed in an equally democratic but rather different form, having regard to their differing tribal customs. The Committee will appreciate that in the less advanced communities such as comprise the Natives of South West Africa, the tribe is the recognized political unit. It provides in effect the whole basis of administration and government. Any form of consultation therefore which did not have proper regard to Native tribal customs and susceptibilities, which was not in accord with the form in which the Natives are consulted in the course of normal administration and government by their chiefs and councils, would not have resulted in a valid or free expression of their wishes. Hence it would be mistaken to regard the consultation which was carried out as a referendum of individuals. Such a notion is entirely alien to the mind of the tribal native. Rather was it a consultation of the wishes of tribal units, the views of the individuals being ascertained by the tribal authority in the recognized traditional and customary fashion ¹."

¹ *Government White Paper*, containing the Documents relating to the consideration by the United Nations General Assembly at the 2nd Part of its 1st Session on the question of the future status of South West Africa, p. 33.

79. All the meetings addressed by the Minister, referred to above, were well attended by members of all the groups, with the exception of the meeting at Okakarara (Waterberg Reserve), where not many Herero were present. The minority section, which was represented, expressed its agreement with the Commission's recommendations relating to the Herero. At Runtu (Okavango territory), Ondangua and Ohanguena (both Ovamboland), spokesmen of the groups expressed their agreement with the recommendations of the Commission as explained to them by the Minister. At Ongandjera (Ovamboland) one speaker raised objections to the Commission's recommendations, but the reaction of the leaders and the people present was generally very favourable to the Commission's recommendations. At Ohopoho (Kaokoveld) the reaction of the audience was neutral, the attitude of the headmen being that they could not speak if Hosea Kutako had not spoken. At Okombahe three of the Damara leaders expressed agreement with the recommendations, while one, who was supported by only a small section of the gathering, opposed them.

Thus, excepting the meeting in the Kaokoveld, and except for the majority of the Herero group in the Police Zone (who refused to attend the consultations), the reaction of all the Native leaders, i.e., the Chiefs and Headmen who were consulted, and the majority of their followers, was overwhelmingly in favour of the Commission's recommendations.

80. Consultations were also held with the other non-White groups in the Territory. On 17 and 18 February 1964 the Minister of Coloured Affairs addressed meetings of the Coloured people at Windhoek, of the Rehoboth Basters at Rehoboth, and of the Nama people at Tses and Karasburg. At each meeting the appropriate recommendations of the Commission were explained and a copy of the report handed to the representatives of the people present. The Coloured group enthusiastically supported the recommendations, but small minorities of the Nama and Damara, and the majority of the Rehoboth Basters, were opposed to them.

During March 1964 a meeting was held with the Bushmen at Tsumkwe, in the proposed Bushmanland, at which the Commissioner-General for the Native population of South West Africa explained the appropriate recommendations of the Commission.

81. The Deputy Minister of Bantu Administration and Development addressed meetings of the Location Advisory Boards of Walvis Bay and Windhoek on 21 and 22 February 1964, at which meetings the recommendations of the Commission were summarized, with special reference to the proposed homelands for each population group and the recommendations regarding Natives in the urban areas. Each Advisory Board was handed a copy of the report, and questions were asked and answered. The Board members intimated that they could not accept or reject the report on behalf of their people but said that they would inform their people of the contents and implications thereof.

82. The Prime Minister addressed a large gathering of the White inhabitants of the Territory—some non-Whites were also present—at Windhoek on 15 February 1964. He explained in detail the main recommendations of the report. Subsequently, the Legislative Assembly of South West Africa resolved unanimously to adopt the Commission's report and to approve of the decisions of the Government as contained

in the Memorandum in connection with the Commission's recommendations¹.

83. More recently, further consultations have been held with the non-White groups in the Territory.

During October 1964 the Commissioner-General for South West Africa addressed well-attended meetings of all the Ovambo tribes in their own areas. He referred to the main recommendations of the Odendaal Commission and fully explained Respondent's decisions as contained in its Memorandum. At all the gatherings, after the Commissioner-General had spoken, representatives of the tribes expressed their sincere thanks for the measures already taken to implement the Commission's recommendations and asked that the remaining recommendations should be carried out as quickly as possible.

Later, the whole Ovambo nation through its tribal leaders submitted a written petition to the Prime Minister requesting, *inter alia*, the implementation of the Commission's recommendations, and particularly the recommendation relating to the creation of a central governing body for Ovamboland².

In the Okavango territory, the Bantu Affairs Commissioner held meetings during September 1964 with all the tribes in their own areas. The meetings were well attended and a keen interest was displayed in the discussion of the recommendations of the Commission relating to the Okavango territory and Respondent's decisions thereon. The Okavango people were pleased with what had already been done to give effect to some of the proposals and expressed the hope that the remaining recommendations would be implemented without delay.

The Administrative Officer in charge of the Kaokoveld also presided at similar meetings in that area. All those present at the said meetings declared themselves in favour of the recommendations of the Commission, especially the proposal that a homeland should be recognized for each group.

In the Police Zone further steps have been taken to acquaint the non-Whites in the reserves and in the urban locations with the Commission's proposals and Respondent's decisions thereon. With the exception of members of the Herero and Rehoboth Baster groups, who have adopted an attitude of aloofness towards anything connected with the Odendaal Commission, the information has been received with great interest. Many requests have been received that the recommendations should be implemented as soon as possible, and co-operation in carrying out this task has been promised.

84. In the premises aforesaid Respondent denies Applicants' various allegations regarding lack of consultation with the inhabitants of South Africa and South West Africa.

G. Applicants' Allegations regarding "Fostering" of Tribalism

85. Throughout the Reply Applicants repeatedly refer to what they

¹ IV, pp. 201-217.

² *Vide* Petition to the Honourable Dr. H. F. Verwoerd dated 24 October 1964 from Chiefs and Headmen of Ovamboland.

term Respondent's "policy of fostering [the] differences"¹ between the various population groups in South West Africa and of "encourag[ing] separateness among the 'groups'"². At times this policy is also described as one of "encouraging"³ or "fostering tribalism"⁴.

This alleged policy, as well as the measures which are allegedly applied in implementation thereof, is not only repeatedly criticized in the Reply, but Applicants also venture to comment that "Respondent . . . stops short of an attempt to justify its . . . policy of fostering such differences"⁵. The charge is a strange one, for nowhere in the Counter-Memorial did Respondent say, or in any way intend to suggest, that its policy involved the fostering of differences. Respondent admittedly stated that its policy was based on the *existence* of differences between the various population groups, differences which were of such magnitude and permanence that Respondent thought it necessary that its policy should have due regard thereto. Respondent also dealt with the wishes of the different groups in this regard, and with what it considered to be the advantages of a system of differentiation and separate development. The fact that Respondent in framing its policies gives due consideration to the existence of material differences between the population groups is, however, no justification for a charge that Respondent fosters such differences.

86. It would appear, however, that Applicants' complaints in the present context are founded on the premise that any differentiation on the basis of membership in a group, class or tribe is violative of Respondent's obligations under the Mandate and cannot be justified in law. Thus they state generally that Respondent's "policy of *fostering*" the differences between the various population groups are "precisely [the] aspect, *inter alia*, of Respondent's conduct toward the inhabitants of the Territory upon which Applicants ground Submissions 3 and 4"⁶.

And with regard to particular aspects of government, Applicants make allegations which can only be consistent with a proposition that the Mandate did not permit the fostering of tribal institutions or affiliations⁷.

87. Respondent has already demonstrated that the authors of the Mandate could never have intended to impose a prohibition against differentiation on a group basis, and in fact themselves made express provision for such differentiation in respect of certain particular matters⁸. If Applicants' contention relative to tribalism (i.e., as understood in the preceding paragraph) were to be correct, it would be surprising that Respondent was permitted throughout the lifetime of the League of Nations to apply the policies on which it regularly reported to the Council of the League. In pursuance of the said policies Respondent, while taking steps to eliminate tribal customs and practices which were regarded as being in conflict with civilized concepts and standards, and while

¹ *Vide*, e.g., IV, pp. 261, 262 and 271.

² *Ibid.*, p. 316.

³ *Ibid.*, p. 375.

⁴ *Ibid.*, p. 413 and *vide* also p. 469.

⁵ *Ibid.*, p. 261 and *vide* also p. 271.

⁶ *Ibid.*, pp. 261-262. As to the premise underlying Applicants' Submissions 3 and 4, *ibid.*, pp. 269 and 493.

⁷ *Ibid.*, pp. 375 and 412-413.

⁸ *Vide* sec. B, paras. 8-11, *supra*.

seeking to introduce to the Natives modern methods and to lead them on a path from a traditional society to a modern one, at the same time recognized their indigenous social and political institutions and adopted a system of "indirect rule", in which the said institutions could, and did, play a meaningful part¹, as they still do today. But not only was Respondent permitted to recognize and make use of the existing tribal systems and institutions, it was indeed commended by the Permanent Mandates Commission for doing so. In this connection the following statements in the Counter-Memorial relative to the attitude of the Commission, being strikingly apposite, are for convenience repeated here:

"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'²."

"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 organization of the tribes, and of recognising the power of the chiefs up to a certain point'²."

88. As Respondent has further demonstrated³, until the Second World War, and to some extent even for some years thereafter, the position was substantially the same in all the colonial and mandated territories in Africa south of the Sahara, in that the indigenous population groups, while not participating in the processes of central government, were allowed a measure of self-government of a traditional or localized nature through their indigenous or tribal institutions.

It may be apposite also to give an illustration of the views expressed in meetings of the Permanent Mandates Commission by members of the Commission and representatives of the respective Mandatories relative to such practices in particular mandated territories. This will be done by quoting extracts from the Minutes of the Commission which relate to certain territories.

(a) *Tanganyika*

(i) *Mr. Ormsby-Gore (Representative of the Mandatory Power) in 1925*⁴:

"Where the tribal organisation was fully alive, the best system of administration was to work through the Native organisation.

It was the policy of the British Government to retain the tribal organisation, and, where possible, this would be the policy in Tanganyika.

It was the policy in regard to Tanganyika to rebuild the tribal system, where it has been destroyed and to maintain and extend it where it existed."

¹ II, pp. 422-424.

² *Ibid.*, p. 417.

³ *Ibid.*, pp. 430-431.

⁴ *P.M.C., Min.*, VI, p. 126.

- (ii) *Mr. Scott (Representative of the Mandatory Power) in 1926*¹:
 "The idea of the Government of Tanganyika was that a 'good African' should be an African from the bottom, and that meant that he should not be cut away from his roots, which were in the country and in the traditions in which he was born and in which he lived.

The Government did not wish to deny to the African Native the benefits of Western civilisation, but wanted him to assimilate gradually the most suitable and best elements of that civilisation grafting them on to his old and original African ideas and traditions. He should be improved and trained by the influence of Western civilisation, but in such a manner that the ingrained native feeling should not run counter to or smother it."

- (iii) *Sir Donald Cameron (Representative of the Mandatory Power) in 1927 quoting from the Mandatory's Report for the year 1926*:

"Being convinced that it is neither just nor possible to deny permanently to the natives of the territory any part in the government of the country, the Government of this territory has adopted the policy of native administration, a policy which aims at the elimination of race-friction by the provision within the limits of their own native administrations of legitimate scope for the political interests and aspirations of Africans both educated and uneducated, so making it possible for them to evolve, in accordance with their traditions and their most deeply-rooted instincts, as an organised and disciplined community within the State, which, by reason of the widely divergent degrees of civilisation and wealth of its component races, does not admit of political evolution analogous to that of homogeneous nations in Europe and elsewhere in the world.

We have supported this system of native administration principally for the reasons which I have given—that is, to find for the native a place in the body politic, giving him a position which is founded on his own inherited rights and duties, which is based on his own native laws, customs and traditions. It is a system which he understands, and for that reason we are not inventing it nor have we invented it, as some of the critics have inferred who have no knowledge or experience of the administration of countries with a population of primitive Africans. We have not invented the system; it is a system which the native has inherited.

Apart from the political reason, the second reason why we have adopted this system is in order to preserve the discipline and authority which the native knows, in order that the whole social fabric of the native may not fall to pieces, as it has done in certain parts of Africa where the native has become detri-
 balized²."

¹ *P.M.C., Min.*, IX, p. 140.

² *Ibid.*, XI, pp. 61-62.

(b) *Togoland (under British Mandate)*

Mr. Thomas (Representative of the Mandatory Power) in 1931:

"With regard to general administration, the system of indirect rule has for some time been encouraged in the northern territories and the northern section of the British sphere. Political officers have given study and thought to native customs, laws and institutions, which will assist in paving the way for re-establishment of the native authority, and the introduction of indirect administration in Dagomba ¹."

(c) *Cameroons (under British Mandate)*

(i) *Mr. Ormsby-Gore (Representative of the Mandatory Power) in 1926:*

"In West Africa, the Administration was endeavouring to develop the system of indirect rule through the indigenous native institutions. The policy was not to appoint individual natives who would be in the service of the British Government but to work through the emirs and chiefs and the tribal organisations ²."

(ii) *M. Orts (Acting Chairman of the Commission) in 1936, referring to the Mandatory's report for 1935:*

"This system, which was based on native institutions and customs and on the local conditions of each administrative unit, varied considerably in different districts. The only essential consideration which was everywhere applicable was, according to the report, the principle that the native authority, whether represented by a single chief or a more or less numerous council of natives, should be able to command and receive the obedience of the community. It was stated . . . that the system was popular and was working satisfactorily ³."

(d) *Ruanda-Urundi*

M. Halewyck de Heusch (Representative of the Mandatory Power) in 1928:

"... the Belgian Government still adhered to the system of indirect Government, which had given excellent results ⁴".

(e) *New Guinea*

(i) *Sir Joseph Cook (Representative of the Mandatory Power) in 1922:*

"The Policy of the Commonwealth Government was to preserve native customs, interests and rights wherever such customs, interests and rights could usefully be retained. Among the new Ordinances there was an Ordinance for the special purpose of protecting native customs ⁵."

(ii) *Sir Joseph Cook (Representative of the Mandatory Power) in 1924:*

"... it was clear from the report that the policy of the Administration was to educate the native with a view to enabling him

¹ *P.M.C., Min.*, XXI, p. 41.

² *Ibid.*, X, p. 95.

³ *Ibid.*, XXX, p. 53.

⁴ *Ibid.*, XIV, p. 117.

⁵ *Ibid.*, II, p. 34.

to control his own destinies under the supervision of the mandatory. Native leaders were set over tribes and left as far as possible to look after their affairs.

... The intention was to give the native as much local government as he was fit to receive. Reference had been made in the report of last year (paragraph 165) to the fact that the German Government had established a system of indirect administration and that this system was being continued and extended ¹."

89. In the circumstances Respondent finds it strange, to say the least, that, while Applicants have avoided any attempt at controverting the facts stated in the Counter-Memorial relative to the practices which were permitted during the lifetime of the League, and the conclusions drawn by Respondent therefrom, they now advance a charge that Respondent has violated its obligations under the Mandate because its policies "foster tribalism".

Perhaps an explanation of Applicants' attitude in this regard is that they do not deny that "fostering" of "tribalism", in the sense of making use of tribal institutions, was permissible during the lifetime of the League of Nations and even commended by the Permanent Mandates Commission ², but that they contend it is not permissible today.

In this regard Respondent draws attention to the fact that in dealing with what they refer to as Respondent's "policy of *laissez-faire* with respect to tribalism", Applicants speak of "abdication" by Respondent of "the positive and *progressive* obligations of the Mandate" ³, and that they say that "Respondent's policy may fairly be characterized as a *headlong advance into the past*" ⁴. It would therefore seem that Applicants' attitude is that, inasmuch as Respondent's obligations in this regard are "progressive", Respondent must adapt its policies to conform to modern views and should not perpetuate practices which, though permissible in the past, are in conflict with views generally held at present. Such an attitude would be in conformity with Applicants' basic proposition regarding the existence of a so-called *current* norm of "non-discrimination or non-separation", in respect of which their argument runs along the following lines:

"The relevance of the *evolving* practice and views of States, growth of experience and increasing knowledge in the political and social sciences, to the determination of obligations bearing the nature and purpose of the Mandate in general, and Article 2, paragraph 2, thereof in particular ... is of the very essence of the obligation itself ⁵." (italics added),

an argument which is developed towards a conclusion that Respondent's obligations under Article 2 of the Mandate are to be adjudged in accordance with—

"... the relevant norms *currently* and generally *accepted, rather than* standards or criteria which may have been deemed applicable or

¹ *P.M.C., Min.*, XIX, p. 131.

² *Vide* paras. 3 and 4, *supra*.

³ *IV*, p. 412 (italics added): *vide* in this regard sec. H, Chap. II, para. 93, *infra*.

⁴ *IV*, p. 413 (italics added).

⁵ *Ibid.*, p. 512.

acceptable *at the time the Mandate was conferred and undertaken*.¹
(Italics added.)

If, as would seem to be the case, Applicants' argument relative to tribalism is intended to rest on the same line of reasoning as that in the foregoing quotations, viz., that there is a legal norm, formulated on current standards, which prohibits differentiation on, *inter alia*, a group basis, and that Respondent's policy is violative of this norm because it is based on tribal consideration, i.e., because it distinguishes between tribal groups, then Respondent refers to what it has already stated in refuting the proposition that the Mandate must be interpreted in the light of current views and currently accepted norms or standards².

In their treatment of the economic aspect Applicants charge Respondent with "abdication of the positive and progressive obligations of the Mandate by its policy of '*laissez-faire*' with respect to tribalism"³, and they say that—

"... tribalism, which was one of the reasons why 'Native' inhabitants were 'not yet able to stand by themselves under the strenuous conditions of the modern world', has been deliberately fostered through *apartheid*"⁴.

So also, with regard to the education of the Native inhabitants of South West Africa, Applicants aver that Respondent, by "its policy of 'mother-tongue instruction'", is "encouraging tribalism and thus rendering [the Natives] ever less 'able to stand by themselves under the strenuous conditions of the modern world'"⁵.

90. Applicants also refer to criticism of Respondent's policy by others, such as, for example, Philip Mason who has commented as follows:

"Can it really be thought that pandering to tribal parochialism would make for peace or happiness, let alone the development of any civilization or artistic achievement?... the argument for White separation, which is based on the need for White national survival, is being applied to the other people of Africa, partly to satisfy a logical principle and partly to perpetuate White hegemony when White supremacy has to go"⁶.

Another example is their reliance on statements to the following effect in the 1963 report of the United Nations Special Committee on the Policies of *Apartheid* of the Government of the Republic of South Africa, viz., "Fourth, the scheme aims at reinforcing tribalism and utilizing the tribal system against African aspirations for equality"⁷, and

"The creation of Bantustans may, therefore, be regarded as designed to reinforce White supremacy in the Republic by strengthening the position of tribal chiefs, dividing the African people through the offer of opportunities for a limited number of Africans, and deceiving public opinion"⁸.

¹ IV, p. 518.

² *Vide* sec. B, *supra*.

³ IV, pp. 412-413.

⁴ *Ibid.*, p. 413.

⁵ *Ibid.*, p. 375.

⁶ *Ibid.*, p. 335.

⁷ *Ibid.*, p. 357 (para. 149).

⁸ *Ibid.*, p. 358 (para. 153).

Respondent denies these unmotivated accusations. That its policy of separate development is not inspired by motives as alleged in the foregoing statements, but is indeed directed at the upliftment and advancement of the indigenous groups in South West Africa, as well as in South Africa, to self-respecting communities with the aim of ultimate self-realization for each group, is evidenced not only by what has been stated in the Counter-Memorial and in other parts of this Rejoinder, but also by what is said in the following paragraphs.

91. As Respondent has already stated¹, the tribal institutions and systems which play a part in its policy of separate development are not considered to constitute the limit to which political development of the Native peoples could take place, but are seen as a part of a progressive system of evolutionary growth. The traditional institutions and tribal systems are regarded as, and in Respondent's policy serve as, a basis for further political advancement which, combined with progress in the fields of education and economic development, is intended to lead towards separate self-realization for the different Native population groups.

In this pattern of development the use of tribal institutions must not be viewed as a permanent, but as a transitional phenomenon. Respondent anticipates that in the process of socio-economic development, the tribal system will undergo gradual changes and may eventually disappear once it has served the purpose of facilitating the transition from a tradition-bound to a modern society.

In this regard attention is drawn to the recommendations of the Odendaal Commission relative to the constitution of homelands for the different population groups in South West Africa and the establishment of political institutions for such groups, in which institutions democratic principles are to be grafted onto the traditional tribal systems². Also in the economic and social spheres, the development of the homelands will bring about changes and adaptations which will, in the course of time, materially affect and change tribal attitudes and values. In fact, up to the present, considerable changes in this regard have already taken place. For example, the changed attitudes of the Natives to regular work; their willingness to dispose of stock; their willingness to send their children to school; their adoption of improved methods of farming and marketing of their products; their change of attitude towards hygiene and health matters; their development of a sense of thrift and the gradual recognition of the advantages of storing surplus crops to tide them over periods of drought and scarcity.

Further proof that Respondent's policy, far from limiting the progress of the Native groups, is a vigorous and progressive one, will be found in the report of the Odendaal Commission relative to such matters as health³, education⁴, agriculture⁵, land tenure⁶ and, economic and industrial development⁷, and in Respondent's reaction to the commission's proposals⁸.

¹ II, p. 478.

² R.P. No. 12/1964, pp. 81-107 and *vide* sec. F, para. 3, *infra*.

³ R.P. No. 12/1964, pp. 123-205.

⁴ *Ibid.*, pp. 219-263.

⁵ *Ibid.*, pp. 267-311.

⁶ *Ibid.*, pp. 85 (para. 310), 87 (para. 323) and 89 (para. 336 ff.)

⁷ *Ibid.*, pp. 315-489.

⁸ *Supplement to the Counter-Memorial*.

That Respondent's policy of recognizing the stabilizing influence of tribal institutions and customs, and of building thereon with the object of bringing about a gradual process of evolutionary growth, is a wise one, can be demonstrated not only by reference to Respondent's experience gained in the application of such a policy in South Africa¹, but also by reference to the views of other persons who can speak with authority on the subject. This is a matter to be dealt with in the following paragraphs.

92. A notable authority on tribal institutions and customs, Colin M. Turnbull, who has held the position of Assistant Curator of African Ethnology at the American Museum of Natural History since 1959, states:

"An impartial examination of the details of tribal systems reveals the falsity of many popular misconceptions, and, although it is not suggested that such systems can or should be deliberately perpetuated, it is suggested that there is within them much of very real value²."

One of the popular misconceptions referred to by the author as held among many Africans, Europeans and Americans, is that—

"... tribalism is something backward; incompatible in the modern world to say the least—and that is leaving a great deal unsaid, for tribalism is a source of shame to some Africans and a subject to ridicule and scorn among other peoples³".

He states as his personal belief that—

"... there are in tribal systems many values, institutional and personal, that could play a significant role in the developing of new political and social systems and, indeed, might prove a major contribution in the realm of international relations³".

He says further that "... the desire to divorce tribalism from the modern, contemporary Africa with which we have to deal is both unrealistic and misconceived"³. And he expresses the view that—

"[i]f tribalism is destroyed, so, in those areas, is all morality, and in its place can only come, for a time that might be an eternity, the morality of expediency. Far from being incompatible with any modern process of social evolution, tribalism, properly understood, could help it on and, at the same time, bring to it all the richness of the past⁴."

A similar view is reported in a recent issue of the publication *West Africa* to have been expressed by Dr. Azikiwe, President of Nigeria. In an article in the said publication dealing with a lecture delivered by Dr. Azikiwe under the title "Tribalism—A Pragmatic Instrument for National Unity", he is reported to have said that—

"... the word tribe is employed currently in a derogatory manner to identify the peoples of Africa and Asia, who are invariably described

¹ II, pp. 477-483.

² Turnbull, C. M., "Tribalism and Social Evolution in Africa", *The Annals of the American Academy of Political and Social Science*, Vol. 354 (July 1964), p. 22.

³ *Ibid.*, p. 23.

⁴ *Ibid.*, p. 30.

as 'primitive' or 'under-developed' or 'developing' or 'backward' or what most writers in the nineteenth century used to identify as 'barbarian societies'".

And he is further reported to have added, "I hope that the new generation of students of anthropology and history will put things right"¹.

Another authority, Brian McAllister, has expressed the view that—

"[i]t would be a tragedy for Africa if tribalism were to be so weakened as to leave the mass of people with no feeling of unity, of security, of belonging to a group. If tribalism is to go—and it will be a long time before this happens—the great need is for something better to put in its place, some real spiritual belief and stable organisation. Otherwise the destructive forces which lie very close beneath the surface will bring down all the hopes of those who have put their faith in African freedom"².

93. Many authorities also testify to the fact that tribal affiliations are still common and potent factors in the lives of most African peoples. Thus Rupert Emerson, in dealing with American interests in Africa, states:

"The social reality of Africa has been and largely continues to be tribal in nature, dividing the continent into a multiplicity of distinct and often warring communities marked off from each other by language, custom, and structure. As both caste and language affiliations are still of great political importance in India, so in Africa the tribal attachments that many had thought anachronistic have shown their vitality by their resurgence within the orbit of the new political parties and institutions"³.

Writing on the character and stability of African political systems, James S. Coleman remarks, *inter alia*:

"... it would be incorrect to conclude that genuine tribalism is an unimportant factor in African politics. The general trend for national leaders to condemn any manifestation of tribalism—which, following the loose language of non-Africans, they also use to denote ethnic differences—is fair evidence that it must still be a relevant factor"⁴.

And A. L. Epstein, in a work entitled *Politics in an Urban African Community*, states as follows on the subject on tribalism:

"In a recent discussion of the question, Professor Harlow refers to a widely held view that tribalism in Africa is on the way out, and asks whether this assumption is valid. 'We may be misled', he remarks, 'if we mistake revolutionary changes in tribal custom for decay.' The potency of 'resurgent tribalism' should not be underestimated, he argues. On the contrary, 'its dynamic power should be harnessed to the task of nation building'⁵."

Significant in this regard is the role which tribal institutions and

¹ "Hatching Dr. Azikiwe's Egg", *West Africa*, 30 May 1964, p. 593.

² McAllister, B., "Tribal Challenge in The New Africa: Resistance to Change Among Primitive Communities", *African World*, Sep. 1963, p. 6.

³ Goldschmidt, W. (Ed.), *The United States and Africa: Revised Edition* (1963), p. 21.

⁴ *Ibid.*, p. 50.

⁵ Epstein, A. L., *Politics in an Urban African Community*, p. 228.

customs still play in the Applicant States, a matter to which consideration is given in the succeeding paragraphs.

94. Liberia is an outstanding example of a State in which constitutional arrangements and governmental policies are largely based on tribal considerations. Not only is this the position in the Hinterland, which is inhabited by different tribes on a regional basis, but tribal affiliations also play an important role within the more developed and modern sector of the country along the coast.

According to a publication of the United States Department of Commerce, Liberia is divided for political and administrative purposes into—

“ . . . five counties [the Coastal area], 4 territories . . . and 3 hinterland Provinces (Western, Central and Eastern). Districts within Provinces contain local government units that are organized into chiefdoms administered by paramount, clan, and town chiefs. Until World War II, the National Government exercised only a tenuous control over the tribal organization of the hinterland Provinces, and people from the Provinces took very little part in the administration of the National Government ¹.”

In commenting on this situation, W. A. Hance wrote:

“Although a Negro republic, Liberia is in the paradoxical position of having a native policy very similar to that of a colonial power, with district commissioners operating under a system of indirect rule ².”

95. Another authority, G. H. T. Kimble, has given the following description of the administration of the Hinterland areas in Liberia:

“Government in the tribal areas—the Hinterland Jurisdiction—is by clan and paramount chiefs under the direct supervision of district and Provincial commissioners. In theory these chiefs owe their authority to the Monrovia government; but the real basis of it is usually their status, derived either by inheritance or by election, in the tribal group. Any departure from the established tribal customs in the selection of chiefs is apt to cause trouble, as the government has discovered in various instances ³.”

In regard to participation in the Central Government, Respondent has already mentioned that it was not until 1945 that the tribal people in the provinces of the Hinterland received representation in the legislature of Liberia for the first time and that representation is still largely based on tribal lines; one-third of the members of the House of Representatives represent the tribes, which constitute by far the majority of the population, whereas two-thirds of the members represent the small minority of Americo-Liberians ⁴.

96. In Liberia tribal considerations have also shaped the judicial system, which is of a dual nature in the sense that there are, in addition to the ordinary courts, also tribal courts, presided over by tribal chiefs in the

¹ U.S. Department of Commerce, “Basic Data on the Economy of Liberia”, 1959.

P. 4.

² Hance, W. A., *African Economic Development* (1958), p. 237.

³ Kimble, G. H. T., *Tropical Africa*, Vol. II (1960), p. 351.

⁴ II, pp. 507-508 and 527.

country districts of the coastal area, and paramount chiefs in the Hinterland provinces ¹.

This system has been described as follows:

"Side by side with the Anglo-American system of jurisprudence exists a second system of an entirely different nature and derivation. This is composed of the laws and customs of the many tribes inhabiting Liberia and the courts established to hear cases involving aborigines or persons residing in the Hinterland. It is the announced policy of the government to administer tribal affairs according to tribal law and custom to the extent that they do not conflict with statutes or administrative regulations . . . ²"

In this regard it is instructive to note how future developments are seen by the Liberian Government. President Tubman is recorded to have—

" . . . stressed the uneven cultural development of the Liberian people. He pointed to the necessity of having two sets of laws—civil law (taken from the West) and tribal law . . . and cited arguments heard elsewhere in Africa (including South African reserves) concerning the benefit to all of this dual code. But he agreed that tribalism was a temporary phenomenon and said he planned that the Western civil law be gradually extended from the forty-mile belt along the coast into the interior until it covered the whole country . . . Asked again, President Tubman said he thought tribal law and administration would be replaced throughout Liberia in about fifty years ³."

97. In Ethiopia the position with respect to tribalism is somewhat different from that witnessed in Liberia, and can perhaps best be described as paradoxical.

The following is a description by G. A. Lipsky of the population complex in Ethiopia:

"Ethiopia has been called an Ethnic Museum, and this is in many ways an apt description. An estimated total of seventy languages and over two hundred dialects are spoken. The peoples of Ethiopia profess two major faiths and subscribe to a multitude of widely differing local religious systems. The peoples are further distinguished by separate origins, histories and political organization; by variations in physical appearance, dress, and customs; and by diverse sources of self-identification and loyalty ⁴."

The same authority has outlined the attitude of the Central Government to the population situation as follows:

"Despite the manifest ethnic complexity of the country, the central government has not formulated any explicit ethnic policy. With few exceptions (notably in the portion of the 1957 Penal Code dealing with polygamy), it has avoided giving any positive suggestion that it recognizes Ethiopia to be a multinational state with many languages, religions, and cultures ⁵."

¹ Fraenkel, M., *Tribes and Class in Monrovia* (1964), pp. 94-95.

² Allott, A. N., *Judicial and Legal System in Africa* (1962), pp. 83-84.

³ Munger, E. S., *African Field Reports 1952-1961*, p. 119.

⁴ Lipsky, G. A., *Ethiopia: Its People, Its Society, Its Culture* (1962), p. 34.

⁵ *Ibid.*, pp. 37-38.

Over recent years it would seem that the Government has been desirous of bringing about nationalization of the Ethiopian peoples.

Thus the same author has stated:

"Since the return of the Emperor in 1941, the Ethiopian government has taken a number of steps that clearly indicate it is attempting to prevent the development of strong ethnic loyalties where they do not already exist, and to supplement ethnic, local, and regional identification with allegiance to a central Ethiopian government and Ethiopian traditions¹."

In this regard Respondent has already drawn attention to the constitutional developments in the country, particularly to the position which obtained after 1931 when the Monarchy became a constitutional one in which the members of the Chamber of Deputies were, as a temporary measure, chosen by dignitaries and local chiefs², and to the changes brought about by the new constitution in 1955, which provided for universal suffrage³.

98. Although outwardly it may, therefore, appear that ethnic and tribal affiliations are no longer important considerations in the government and administration of Ethiopia, the opposite is in fact the case.

Indeed, the 1955 Constitution has been described as being—

"... more a blueprint for the future than a full and accurate description of the present system. Some provisions restate in Western-style legal language aspects of the traditional system of the country. Others, as yet only theoretical, foreshadow institutions and procedures the Emperor views as desirable for the future. Nowhere is there a break with the basic assumptions of the traditional system⁴."

Paradoxical in this regard are the provisions directed at the promotion of national sentiment in the new constitution, when compared with the views expressed by Emperor Haile Selassie in a speech to Parliament in November 1955. The Emperor said:

"No single document, however profound and comprehensive, can, of itself, bring about far-reaching and fundamental constitutional progress. No constitutional progress can take effect unless it is rooted in the fundamental traditions, customs, habits, and predilections, as well as the legal customs, of the society upon which it is based⁴."

It is no wonder that the situation has been commented upon as follows:

"The Emperor was clearly aware of the difficult problems involved in making this new constitution a living document.

If the 1955 constitution is not to remain a dead letter like its predecessor, it will have to be accompanied by a veritable revolution of thought and action on the part of both its administrators and its beneficiaries. For it can by no stretch of the imagination be maintained that this semidemocratic, semimonarchical document is 'rooted in the fundamental traditions' of Ethiopian society. It is, if

¹ Lipsky, *op. cit.*, p. 38.

² II, p. 507.

³ *Ibid.*, p. 527.

⁴ Lipsky, *op. cit.*, p. 170.

anything, so foreign to those traditions in some respects as to be scarcely recognizable as deriving from them . . . At all events, its meaning seems to be lost on the vast majority of Ethiopians, if, indeed, they so much as know of its existence . . . The promulgation of the new constitution . . . was probably calculated to impress foreign observers of the Ethiopian scene and to enhance the prestige of the Ethiopian government abroad ¹."

That the new constitution, in so far as its objective was to bring about nationalization of the people of Ethiopia, has had little effect in that direction is clear from the factual situation.

Thus it has been stated:

"It will be a long time . . . before ethnic identities will be diluted in any way or supplanted by an Ethiopian nationalism. Even among Amharas [the dominant group] and certainly in relations between Amharas and Tigras such nationalism has not developed ²."

99. That constitutional arrangements and policies which either disregard the existence of tribes within a population complex or are directed at the elimination of tribalism, are not only unrealistic but dangerous, is perhaps best evidenced by developments in the new independent African States, a matter which has already been dealt with ³.

100. In the light of the foregoing, criticism of the wisdom of Respondent's policy on the ground that it is orientated to tribal considerations, i.e., in the sense that it is directed towards separate development of the different population groups, seems misplaced. And it is surprising that such criticism should come from the Applicants when regard is had to the conditions and practices in their own countries, and particularly in Liberia ⁴.

101. In the premises Respondent repeats its denial of the charge that in "fostering" differences between the population groups in South West Africa and in "foster[ing] tribalism"—i.e., if these expressions can be regarded as appropriate descriptions of Respondent's policy—it is inspired with any improper motives relative to the Native groups, or any other groups, in the Territory.

H. Migratory Labour—as an Alleged Consequence of the Homeland System, and the Evils thereof

102. Allied to Applicants' central theme that Respondent's "policy and practice . . . is directed toward the primary end of assuring an adequate 'Native' labour supply in the Territory" ⁵, are their allegations in the Reply relative to the system of migratory labour which operates in the Territory.

Applicants' contention in this regard is that Respondent's policy of separate development, which "involves creation of so-called 'Bantustans', 'Homelands', or 'Reserves' ",

" . . . presupposes, *inter alia*, a system of migratory labor in which

¹ Luther, E. W., *Ethiopia Today* (1958), p. 42.

² Lipsky, *op. cit.*, p. 38.

³ *Vide* Chap. III, *supra*.

⁴ *Vide* paras. 94-96, *supra*.

⁵ IV, p. 272.

men whose homes are in such areas spend long periods of labor in distant urban centers or on farms in so-called 'White areas' ¹.

They draw attention to the fact that in the operation of such a system the workmen are separated from their families for substantial periods ¹, and they contend that the system is the "true cause" of social evils such as "prostitution, venereal disease, alcoholism, crime and the like" ². In support of this contention they quote adverse comment from several sources regarding alleged "disintegrating effects of migrant labour on African life" ³, and the "economic ills" and "evil social consequences particularly the disruption of family life" ², alleged to be attendant on the system.

103. Upon the case thus presented in the Reply Applicants advance the following comment:

"Respondent, nevertheless, regards this implicit result of its admitted policies as so irrelevant to the central issue as to warrant no discussion whatever, among the voluminous details with which the Counter-Memorial is concerned ⁴."

In Respondent's submission there is no substance whatsoever in this allegation. It is true that the Counter-Memorial did not deal in particular with the implications or consequences of the system of migratory labour in the Territory, save for referring to the fact that the Natives in the northern territories are not permitted to remain permanently in the Police Zone but have to return to their reserves at the expiration of their contract periods. The reason for this lack of treatment of the subject in the Counter-Memorial was precisely because Applicants themselves, while referring in the Memorials to the fact that migrant labour is recruited in the northern territories ⁵, made no complaints relative to alleged social evils attendant on the system, nor did they then contend that Respondent's policy of separate development "presupposes . . . a system of migratory labor" ⁶.

104. In view of the allegations now made by Applicants in the Reply relative to the role of migratory labour in the policy of separate development and to the evil consequences of the system, Respondent includes in this Rejoinder, in its treatment of the Economic Aspect, an exposition of the system and the implications thereof ⁷. In the present context Respondent, in order to refute Applicants' aforementioned charges, wishes to draw attention only to the following deductions from its more detailed treatment of the subject:

(a) although the system of migratory labour admittedly has certain adverse effects and contributes to the social evils mentioned by Applicants, the undesirable phenomena often attributed to the system are to a large extent caused by the difficulties which are

¹ IV, p. 262.

² *Ibid.*, p. 467.

³ *Ibid.*, p. 284.

⁴ *Ibid.*, p. 262: *vide* also footnote 4 on the said page for the peculiar comment that Respondent's silence in the Counter-Memorial is all the more surprising in the light of "widespread criticism of precisely this aspect of [the] separate development policy" by persons quoted in the Reply.

⁵ I, pp. 123-124.

⁶ *Vide* para. 1, *supra*.

⁷ *Vide* sec. H, Chap. II, paras. 15-42, *infra*.

experienced, independently of migratory labour, by members of traditional societies, such as those in South West Africa, in adapting themselves to the conditions of modern economies and the ways of modern civilization;

- (b) that the system has decided advantages both for the migrant worker and for the economy of the Territory as a whole, and that it is generally recognized that in countries such as South West Africa, where a dualistic economy is a fact, i.e., an economy composed of a modern sector and a traditional sector, the advantages of the system far outweigh the disadvantages. Indeed, in the present circumstances of the Territory, as is also the position in many territories in Africa having as yet underdeveloped economies and largely underdeveloped population groups, a system of migratory labour appears to be the most practical method of utilizing the available economic resources and fostering economic development¹;
- (c) that, for the very reasons aforesaid, the system of migratory labour is a common phenomenon in most countries in Africa as well as in other countries of the world where expanding industries, mining enterprises and agricultural development offer employment opportunities to workers who are prepared to migrate temporarily in search of higher wages²;
- (d) that, far from Respondent's policy of separate development "pre-suppos[ing] . . . a system of migratory labor" and being directed at creating conditions which give rise to migrations of labour, it aims at the opposite end, viz., the economic development of the Native areas and proposed homelands, so that ever-increasing employment opportunities will be created in such areas in consequence of which the incidence of labour migrations to the European areas in the Police Zone is expected to diminish³;
- (e) that the suggestions made by Applicants that the present migratory labour force of the northern territories should be permitted to settle in the Police Zone, and should be permanently absorbed in the modern economy of that Zone, are not only economically unsound and impracticable, but also unrealistic if regard is had to the interests of the Native inhabitants of the Territory as a whole⁴.

In the premises Respondent submits that Applicants' allegations, both in regard to its motives in permitting a system of migratory labour to operate in the Territory, and in regard to the implications and consequences of the system, are without substance.

I. Philip Mason's Suggestion of Perpetuation of Measures of Discrimination

105. The third basic difference between separate development and partition, according to Mr. Philip Mason, is summed up by him as follows:

"India and Pakistan, Ulster and Eire, face each other as equals; a citizen of one when in the other is in a position similar to that of an Englishman in France. The Bantu homelands have not of course

¹ Sec. H, Chap. II, paras.⁵ 15-22.

² *Ibid.*, paras. 23-28.

³ *Ibid.*, paras. 29-31.

⁴ *Ibid.*, paras. 32-42.

yet reached the projected stage of independence, but it does not appear to be contemplated that a similar equality should ever arise¹."

This alleged difference is considered by Mr. Mason as even more important than the two other reasons advanced by him for distinguishing between separate development and partition, viz., that "there is . . . no agreement that there shall be partition and the partition proposed cannot be regarded as fair¹."

106. This argument by Mr. Mason is fallacious, because it rests on the entirely unwarranted assumption that the present legal provisions in South Africa are to remain unchanged for ever.

These provisions were designed to meet specific situations and conditions, and will necessarily be subject to amendment and adaptation as circumstances change. Many of them were introduced in the early, paternalistic stage of group relations, and some have already been adapted to the needs of the present times. As Mr. Mason himself recognized in an earlier work,

" . . . there can be little doubt that in the paternal stage barriers are needed and it may be that some barriers are necessary during the difficult period of transition from a static to a dynamic society . . ."²

No doubt these provisions will be further adapted to meet changing circumstances. In regard to all measures which may be considered hurtful to the dignity of any person, it is Respondent's policy to repeal them as and when the need for them falls away. The position at any stage in the future will consequently depend on the circumstances then existing, and in particular on matters such as the stage of educational, social and economic advancement of the Bantu population generally, and the extent to which the risk and fear of domination by one group over another has been eliminated. In this regard, Dr. Verwoerd said recently:

" . . . the limitations imposed on the freedoms of people (as we find practically over the whole world where anybody lives in the territory of somebody else) fall away as soon as everybody can enjoy his own freedom in his territory. Even the type of rules which one applies to protect oneself in one's own territory . . . will then be seen in a more realistic and constructive light. Human rights will have more opportunity to develop to the full in terms of our policy when separation takes place and the nations exist alongside each other, than in terms of the United Party policy, according to which attempts will be made to maintain the position of the Whites for as long as possible in a mixed community . . ."³

And the end result sought to be attained was expressed by him as "head-
ing for racial peace. *It is only the National Party's policy that will eventually lead to an absence of racial discrimination because it is only when the races are separated and live like neighbours that discrimination will be able to disappear*"⁴.

¹ IV, p. 332.

² Mason, P., *An Essay on Racial Tension* (1954), p. 133.

³ *R. of S.A. Parl. Deb., House of Assembly, Weekly Edition* (4 to 8 May 1964), Cols. 5641-5642.

⁴ *R. of S.A. Parl. Deb., op. cit.* (25 Jan. 1963), Col. 230.

107. As the pattern of group relations changes, it may well happen that the provisions objected to by Mr. Mason will disappear completely, or that only vestigial traces of them will remain in the type of immigration regulations which are found throughout the world. That these are not far-fetched possibilities is shown, *inter alia*, by the fact that even at present many distinguished non-European persons from foreign States visit the Republic and are received with hospitality on a basis befitting their dignity and status¹. And on their attainment of independence, the Bantu states themselves may, in co-operating with Respondent on a consultative basis, be able to play a role in shaping the relations between the various states and their citizens.

108. The possibilities discussed in the preceding paragraph are, by their very nature, bordering on speculation. Whether the developments there set out will eventuate or not, only the future can tell. What is certain, however, is that no person is justified in assuming, as Mr. Mason does, that the situation will remain static. Indeed, the probabilities point in the opposite direction. If the policy of separate development towards independent homelands is carried out to its completion, the whole situation in South Africa will be so radically different from that obtaining at present that there will in all probability also come about far-reaching changes of various kinds in the relationships between Black and White and in the legislation pertaining thereto. In Respondent's submission, it is completely unrealistic, when considering the merits of a political system which is sought to be established in the future, to condemn it on the assumption that present legislation will continue in existence although such legislation was motivated largely by the circumstances which the future political system is designed to eliminate.

J. Mason's Suggestion that the White Population in South West Africa Is To Be Taken into Account for a Transitional Period only

109. In discussing the role of Europeans, and, in particular, White farmers, in South West Africa, Mr. Mason commences by saying that the White population at the inception of the Mandate was less than 20,000 and that it hardly amounted to a vested interest at that stage². He then continues:

"It would show a lack of historical understanding however to blame the Government of South Africa at that time for failing to perceive how rapidly world opinion and African aspirations would develop . . . It was believed that the prosperity of South West Africa, and indeed of all African territories, would depend on development by Europeans, and European farmers were encouraged to come into the Territory³."

At present, says Mr. Mason, the Europeans are "a considerable vested interest"⁴ and "contribute substantially to the economy of the Territory"⁴. The question then arises: what policy should Respondent adopt towards the Europeans?

Mr. Mason's answer to this question is as follows:

¹ *Vide*, e.g., the statements by one of them in Chap. VII, para. 37, *infra*.

² *IV*, p. 335.

³ *Ibid.*, pp. 335-336.

⁴ *Ibid.*, p. 336.

"... the argument for giving the Whites special treatment is that they make a special contribution to the economy. *As a transitional measure this is a sound argument*, but it can hardly justify giving the Whites a privileged position permanently ¹". (Italics added.)

This proposition appears incontestable, but it is clear that differences of opinion could arise on the question as to what constitutes a "privileged position". In particular Respondent does not consider that ultimate self-determination for the Europeans is a "privilege" any more than for the various non-European peoples. Once the "vested interest" of the Europeans is conceded, as Mr. Mason does, Respondent accepts that they have a *right* in the ultimate analysis to take the vital decisions on their own future.

It is on this point that Mr. Mason joins issue with Respondent. He advocates, *inter alia*, the removal "with all deliberate speed" of racial distinctions in the Police Zone and preparation of the non-White groups for a share in political life, perhaps in a federal system. Regarding the practical effect of the numerical preponderance of the Ovambo, he says:

"It is either disingenuous or naïve to claim that 'one man, one vote' would mean domination of other groups by the Ovambo and instead to recommend a system whereby domination is in fact preserved by the much smaller White group ¹."

The fallacies in this argument are threefold. Firstly, "domination by the much smaller White group" never existed, inasmuch as the Territory, and particularly Native Affairs, was always under the ultimate control of the South African Government and in important respects under the immediate control of the Native authorities themselves ². This situation resulted from the grant of the Mandate to Respondent, and neither Applicants nor Mr. Mason can reasonably complain about it. Consequently, there exists no "domination" which can be "preserved". Secondly, the system proposed by Respondent will not involve any domination by the White inhabitants of the Territory. Eventually the homelands will become independent, and in the interim it is proposed that ultimate control should continue to vest in Respondent's Government, not in the European population of the Territory ³. Indeed, the Commission recommended explicitly that "only the proposed White area should be administered by an Administrator, Executive Committee and Legislative Assembly" ³. And, thirdly, even the control which it is proposed Respondent would exercise in respect of homelands is destined to fall away. The intention is that the end result will be a situation in which no group will dominate any other.

110. In the result it is submitted that Mr. Mason must be held guilty of the naïveté or disingenuousness of which he accuses Respondent. Everybody, including Respondent, will agree with him that the present position, in which the European section of the population of South West Africa exercises greater political rights than other sections, can be justified only on a transitory basis, and that the goal should be equality among the various groups. Respondent does not, however, agree that this goal can be achieved by reversing the present position and subjecting the

¹ IV, p. 337.

² *Vide* III, sec. E, pp. 105-131.

³ *Vide* R.P. No. 12/1964, pp. 61-62.

White inhabitants to political control by the largest group of non-Europeans. That would be going beyond abolishing the "privileged position" of the Europeans, and would in fact amount to depriving them of their right of self-determination. And, despite what Mr. Mason says, he cannot seriously suggest that any government controlled by any of the non-European groups in South West Africa could, within the relatively near future, maintain the present high standard of administration, order and prosperity in the Territory.

K. Incidental Matters Referred to in the Reply

111. In the course of the treatment of the policy of separate development in the Reply and in the various Annexes thereto reference is made to, or comments passed on, a number of points of incidental importance, or matters which are fully dealt with elsewhere in this Rejoinder. In so far as Respondent deems it necessary to deal with such questions at all, they will be considered seriatim in the next succeeding paragraphs.

112. Applicants say:

"... a highly relevant question is Respondent's maintenance, *up to the present*, of a subsistence economy in the Reserves. No evidence is adduced by Respondent to justify its policy in this respect¹."

This matter is dealt with fully in the section of this Rejoinder which is devoted to a treatment of the economic aspect². In view of what is stated there Respondent denies the allegation of "maintenance up to the present of a subsistence economy in the Reserves".

113. Applicants say that—

"... during an indeterminate, and probably permanent, 'transition stage', Respondent describes its objective, with respect to the inhabitants of the Territory, as well as of South Africa, as that of serving as 'guardian' in order to—

'... keep the ward in hand and teach *him* and guide *him* and check *him* where necessary'³."

Respondent concedes that the transitional stage to complete territorial separation is indeterminate, but it is absurd to call it permanent. It is Respondent's policy to grant independence to the various groups as and when each group becomes ripe therefor. In particular, with regard to South West Africa Respondent draws attention to its acceptance in principle of the recommendations of the Odendaal Commission in this regard⁴. The exercise of Respondent's guardianship during the transitional period will therefore have to be adapted to the individual needs of the different groups at various stages of advancement. And, as regards Natives within the White areas, Respondent has already shown that their position also will probably undergo an evolutionary development⁵. It is completely wrong, however, to describe these matters as constituting Respondent's "objective with respect to the inhabitants of the Territory"—Respondent's objective is and remains that of advancing the various

¹ IV, p. 262.

² *Vide* sec. H, Chap. III, paras. 2-13, *infra*.

³ IV, pp. 315-316.

⁴ *Ibid.*, p. 203.

⁵ *Vide* paras. 106-108, *supra*.

Native groups towards eventual independence. The interim measures referred to are purely incidental to this objective, and serve only to provide for circumstances and problems which are entailed in the situation existing before all homelands have achieved full independence, and are consequently by their very nature subject to continuous revision and adaptation. It also stands to reason that the nearer the ward develops to maturity, the less need there will be for teaching, guiding and checking.

114. In Mr. Mason's article (*Annex 1 to the Reply*) there appears a suggestion that the financial contribution of the South African Government towards the development plans recommended by the Odendaal Commission would not be generous "if South West Africa is regarded as a province of the Republic"¹. The exact significance of the suggestion evades Respondent. South West Africa is not at present a province of the Republic, and the future development envisaged for it by the Commission is in the direction of autonomous homelands—in other words, not in the direction of constituting the Territory a province of the Republic. The possibility of South West Africa as a whole ever becoming part of the Republic would consequently appear to be remote, and Mr. Mason's suggestion correspondingly pointless.

115. Applicants also state:

"... the one and one-half million 'Coloureds' and half million 'Asiatics' in 'White South Africa' are denied the franchise and other civil rights, without any pretension on Respondent's part that they have, or will be assigned, 'reserves' or 'homelands' 2".

Reference to the position of the Indians and Coloureds is made also by Mr. Mason³. Inasmuch as there are no Asiatics in South West Africa, their position need not be considered herein. As far as the Coloureds are concerned, Respondent has analysed the relevant portions of the Memorials and the Reply, and has shown that Applicants' charges relating to the Coloureds rest on an alleged "norm of non-discrimination or non-separation", and possibly also on an allegation that detriment is caused to the Coloured people as a result of Respondent's alleged oppressive policies towards the Natives⁴. Applicants do not, however, in so far as the Coloureds are concerned, make an attempt to support a charge, as they do in the case of the Natives, of a process of deliberate oppression for the benefit of the Europeans⁵. It would therefore unnecessarily burden the record to give a systematic review of the programmes contemplated or already implemented for the economic, social and political upliftment of the Coloured population of South Africa and the Territory. Suffice it to say that the Coloured population in South West Africa is found in the southern area of the Territory, and mainly in the towns; that suitable provision has been, and is being, made within the European area for their development in all the spheres mentioned above, and that although no separate homeland is envisaged for them, an appropriate system of political representation has been devised to assist them towards their end destination which will provide full recognition of their rights to dignity, justice and self-government.

¹ IV, p. 330.

² *Ibid.*, p. 317.

³ *Ibid.*, p. 333.

⁴ *Vide* sec. A, paras. 11-15, *supra*.

⁵ *Ibid.*, para. 15.

116. In the course of his article¹ Mr. Philip Mason refers to "certain laws and penalties of a more serious nature"² which, he suggests, are relevant to a proper assessment "of the relationship between the Government and the majority of the people in South Africa"². After a discussion of certain provisions, he concludes:

"... to fall back on such legislation indicates that something is seriously wrong, and a Government in any way responsible, or even responsive, to public opinion will try to put it right. If such legislation is steadily intensified over a number of years, it surely indicates that something is radically wrong in the relationship between the Government and a large section of the people and in the policy which the Government wishes to follow³."

The first point to be noted, which Mr. Mason seems to have overlooked, is that some of the more extreme measures to which he refers are only temporary in nature. Thus, although it is true that the Minister of Justice may, if he is satisfied that a person serving a sentence which was imposed for certain acts committed against the safety of the State, is likely to advocate, advise, defend or encourage the achievement of any of the objects of Communism, cause that person to be further detained⁴. This provision came into force in 1963 and lapsed on 30 June 1964. It was then further extended by Act of Parliament to 30 June 1965. It is, therefore, essentially a temporary measure. Furthermore, it has in fact been applied to one person only.

117. The provision authorizing a commissioned police officer to detain certain persons for interrogation⁵ was also intended as a temporary measure to meet a particular emergency, and has in fact been withdrawn by proclamation as from 11 January 1965⁶. Furthermore Mr. Mason errs in saying, that "[n]o one may have access to [a person detained in terms of the said provision] without permission of the Police or Minister"². In fact the section itself provided that the magistrate or an additional or assistant magistrate of the district in which a person was detained, was obliged to visit such person in private at least once a week, *inter alia*, to hear any complaints or grievances⁷.

118. Mr. Mason refers further to a provision to the effect that—

"... a person who obtains from outside the Republic any information which 'could be of use in furthering the achievement of any of the objects of Communism' and who fails to prove beyond a reasonable doubt that he did not obtain such information for such a purpose, may be sentenced to death²".

¹ IV, Annex 1, pp. 328-340.

² *Ibid.*, p. 333.

³ *Ibid.*, p. 334.

⁴ *Vide* sec. 4 (a) of Act No. 37 of 1963. In so far as Mr. Mason's paraphrase of the section suggests that it could be applied in respect of a person serving a sentence for any offence whatsoever, it is inaccurate.

⁵ Sec. 17 of the General Law Amendment Act No. 37 of 1963.

⁶ *Vide Proc.* No. R320 in *Government Gazette* (Extraordinary No. 960), dd. 30 Nov. 1964.

⁷ Sec. 17 (2) of Act No. 37 of 1963.

The provision in question ¹ in truth provides that a person to whom it is of application, shall be guilty of the crime of sabotage. A number of other acts or forms of conduct, of varying seriousness, are likewise prescribed as constituting such crime. Thereupon penalties are prescribed in respect of the crime of sabotage generally. As prescribed, they can also vary from less serious to more serious. The penalty of death is a maximum, which may be imposed by a court in a fit case, in its discretion. The suggestion that a court might impose the maximum penalty on a person convicted of one of the less serious prescribed acts of sabotage (such as that referred to by Mr. Mason), is consequently quite absurd, and is an unwarranted slur on the South African judiciary. In fact no person has been sentenced to death purely on the ground of a contravention of any of the provisions of the General Laws Amendment Acts—where such a sentence was passed, the accused had also been convicted, after proof beyond reasonable doubt, of murder.

119. Another incorrect statement in Mr. Mason's article is contained in a passage by Mr. Gardiner, who states that—

“... if anybody protests against that law [i.e., a law which discriminates against non-Europeans] in a manner which causes disorder, that is ‘communism’ ²”.

It is clear that Mr. Gardiner (and, for that matter, Mr. Mason) has not taken the trouble to investigate the legal position. As early as 1950 the South African Supreme Court held as follows:

“The Court granted an application by a Communist... for the setting aside of a prohibition... of a certain political pamphlet... where it found that though certain passages were calculated *inter alia* to arouse resistance to the police in the administration of the pass and liquor laws or to engender feelings of hostility against the Government or its legislation, they were not calculated to engender feelings of hostility between the European section of the population on the one hand and the non-European sections, or one of them, on the other ³.”

This is, of course, not to say that incitement to public violence ⁴ is not a crime in South Africa, as anywhere else. But the suggestion that it must necessarily be “communism” is absurd.

120. A further gross error on Mr. Mason's part appears from the following words:

“... it is not easy to see how the Ovambo could really improve on the General Laws Amendment Act as an instrument for perpetuating their rule ⁵”.

The suggestion that Respondent's rule in South West Africa is perpetuated by the General Laws Amendment Act, is entirely fallacious. In fact the major provisions of the two General Laws Amendment Acts referred to by Mr. Mason ⁶ do not apply to South West Africa.

¹ Sec. 11 (b) (*ter*) of the Suppression of Communism Act No. 44 of 1950, as amended by sec. 5 of Act No. 37 of 1963.

² IV, p. 334.

³ *Vide du Plessis v. Minister of Justice*, 1950 (3) S.A. 579.

⁴ Mr. Gardiner speaks of “in a manner which causes disorder”.

⁵ IV, p. 337.

⁶ No. 76 of 1962 and No. 37 of 1963.

121. However, even paying due regard to inaccuracies, omissions and exaggerations in Mr. Mason's article, Respondent readily acknowledges that the legislation to which he refers is of a very drastic nature. The immediate reason for its promulgation can be found in the activities of certain terrorist organizations, to which some reference is made below¹. Mr. Mason states that the recourse to such legislation "indicates that something is seriously wrong"². That may indeed be conceded, but the assumption that it is Respondent's policy that is wrong does not, of course, follow. The simple fact is that the whole of Africa is in a turmoil politically, socially and economically. The indigenous peoples have been compelled by circumstances to adapt themselves within a bewilderingly short while to the most radical changes in their traditional conceptions and values. Philosophies, often not properly understood or formulated, such as those of communism, liberalism, nationalism, and anti-colonialism, have swept the continent. Savagery and bloodshed are never far from the surface.

South Africa has not been immune either to the loss of traditional values by a number of Bantu, or to the philosophical or emotional substitutes which in many cases replaced them. In particular there have been sections of the population in which feelings of nationalism have degenerated into an anti-White and anti-Indian terrorism, or which have fallen under the domination of the Communist philosophy. In many instances these people have been instigated from abroad, and reinforced by saboteurs trained in other countries. Terrorist movements of this type, even if small in numbers as in South Africa, can do incalculable harm, unless nipped in the bud. In these circumstances drastic measures were applied with such success that, as noted, Respondent has been able to withdraw some of the legislation objected to by Mr. Mason.

122. Respondent fully realizes that in the long run drastic penal provisions cannot secure peace unless the majority of the population is reasonably satisfied. In so far as any existing conditions may be a legitimate cause for dissatisfaction, Respondent's policy is exactly what Mr. Mason propagates, viz., to "try to put it right"². And Respondent makes bold to say that despite all efforts to the contrary by foreign instigators and agitators, its policies are achieving ever-increasing success in this regard, and bringing satisfaction to the overwhelming majority of all concerned. Indeed, the lack of success of movements like *Umkonto we Sizwe* and *Pogo*³ bears eloquent testimony to the fact that they represented only a very small section of the population.

In a sparsely populated country like South Africa, with long and vulnerable lines of communication and power, and a large Bantu population, many of whom are acquainted with the use of explosives by working in the mines, a terrorist movement enjoying wide support could only with great difficulty, if at all, be put down, particularly since many States in Africa have expressed their willingness and, indeed, enthusiasm, to support such movements. Respondent is convinced, however, that such a situation will never arise, exactly because the Bantu population as a whole is contented, and is adapting itself to the exigencies of the modern world without undue dislocation. This Respondent ascribes in no small

¹ *Vide* sec. E, Chap. VI, paras. 61-63.

² **IV**, p. 334.

³ *Vide* Chap. VI, para. 61, *infra*.

measure to its policies which seek to retain as much as possible of the traditional life of the Bantu whilst gradually initiating them into the principles of modern political and economic life. The policy of separate development provides an opportunity for political self-realization without a complete break with their customs, in other words by evolution as opposed to revolution. At the same time Respondent's policies in the economic, educational and social spheres have resulted in a standard of well-being far exceeding that in any other State in Africa.

123. The circumstances which have called forth the measures referred to by Mr. Mason will, however, probably continue to exert their influence for some time to come, at least until the current political and social revolution in Africa has abated and made way for greater stability. Until such time the whole of Africa will probably continue to present the picture of governments applying severe measures in order to curb revolutionary movements, which, if any were to arise in South Africa, Respondent confidently expects to be small and unrepresentative ones. In this context it is worth remembering that there exist many infringements on personal liberty in other States in Africa which are of a far more extensive nature and longer duration than those in South Africa, but which have nevertheless often been less successful¹.

124. In the course of his article, Mr. Mason seeks to explain the reasons for "the offensiveness to much of the world of the policy of separate development"². In keeping with the nature of his subject he seems to have given vent to feelings of indignation, to the detriment of logic and accuracy. Thus he commences by saying that in the White area—

"... which is much the greater part of the country and the area of chief opportunity, the two principal races should continue to exist but that in that area the White race, although even there a minority, should be by law permanently superior and the other permanently inferior—and that every individual belonging to the latter should be reminded of the inferiority by constant humiliation"³.

This passage contains a number of wrong assumptions or assertions. Firstly, why should Mr. Mason imagine that the White population will always remain a minority in the White area? If the recommendations of the Odendaal Commission were to be implemented, there would not only be an appreciable increase of land for the non-White groups at present living in the Police Zone, but various development plans would enable a far greater portion of them to earn a living in their own homelands. Secondly, Respondent disputes that non-Whites in the Police Zone are by law inferior—the provisions that apply only to non-Europeans are necessary in the interests of all the inhabitants, including particularly the non-Europeans themselves, and do not connote inferiority or any constant humiliation. Thirdly, as has been seen, Mr. Mason is not entitled to assume that these provisions will remain unaltered for ever³. Fourthly, why should he assume that, despite the various ambitious plans for development of the homelands, opportunities for non-Europeans would not in due course there become as great as, or greater than in the European area?

¹ *Vide* Chap. III, *supra*.

² IV, p. 338.

³ *Vide* paras. 106-108, *supra*.

125. Mr. Mason then proceeds to consider further alleged deficiencies in the policy of separate development, and suggests that this policy prevents the inhabitants of South West Africa from "belonging to a group big enough to exercise sovereignty and to be represented abroad"¹. The reasoning in support of this allegation is as follows:

"To split up half a million people into twelve groups and encourage them in separatism is in the long run the surest way to bar them from the self-realisation that they seek¹."

The basic fallacy underlying this passage has repeatedly been refuted by Respondent. It does not split up the people into 12 groups, but merely refrains from forcing the 12 existing groups together. At the same time Respondent does not place any impediment in the way of any of these groups eventually amalgamating or federating should they so wish.

Perhaps realizing that the above argument is not particularly convincing, Mr. Mason immediately jumps back to the note on which he started. Thus he says that separate development involves keeping the non-Europeans "... at arm's length in remote parts of the country and only [admitting them] to the area of progress under a cloud of humiliating restrictions"¹.

If one disregards the tendentious language it becomes clear that this is pure repetition. It suffices to say therefore that Respondent does not appreciate the significance of the expression "at arm's length in remote parts of the country"; that most of the proposed homelands have greater development potential than the greater part of the European area, and that the restrictions are neither humiliating nor necessarily permanent.

126. Mr. Mason then proceeds to consider the effect of the admitted differences in the stages of development reached by the various groups in the Territory. With reference hereto he says:

"... the aspect of South African thought which is widely questioned elsewhere is the assumption that an individual is permanently limited by the limitations of his group¹."

It is difficult to understand where Mr. Mason received the impression that such an assumption exists. Respondent is fully aware that even at present there are many individuals among the various Native groups in the Territory who stand out above others by reason of higher ability, education or the like, and that the general standards both of the groups as a whole and of the exceptional individuals will continue to rise. One of the reasons for the policy of separate development is that it will provide opportunities for such people to realize their full capacities. Indeed, the whole homelands scheme as well as various development projects will require the services of a considerable number of educated Native men and women who possess qualities of ability and leadership. It is the realization that such persons are or will become available that has, *inter alia*, influenced Respondent in its view that the time is ripe for accelerated development of the Territory. Consequently the dispute between Applicants and Mr. Mason on the one hand, and Respondent on the other, relates not to the question whether there exist individuals who transcend the average standards of their groups, but to the totally different enquiry as to what type of opportunities should be created for such individ-

¹ IV, p. 339.

uals, i.e., whether such opportunities should be within a potentially integrated society, or, on the other hand, within the individuals' own group. As has been seen, acceptance of the latter view in no way implies a denial of the existence of exceptionally advanced individuals, but indeed results in the creation of special openings for them.

127. Proceeding from the premise that South African thought rests on the assumption that an individual is permanently limited by the limitations of his group, Mr. Mason continues:

“ . . . to say that by law people of one group must mix with no others can really only proceed from a conviction not only that the other groups are inferior but that every member of each of the other groups is permanently and irremediably inferior ¹”.

Respondent is at a loss to know what law is referred to which allegedly prohibits people of one group from mixing with any others ². Indeed, this passage seems to Respondent to contain a somewhat reckless indulgence in loose and exaggerated language, apparently with a view to creating a greater emotional impact.

128. Mr. Mason then proceeds to refer to the “separate but equal” doctrine ³. This is a doctrine which arose in the United States of America as a result of the legal and social position existing there, in particular as a means of reconciling separate or segregated facilities for Negroes and Whites with the requirement of “equal protection of the laws” laid down by the 15th Amendment to the Constitution ³. As is the position with most theories, principles or policies regarding race relations in the United States, the vastly different circumstances in South West Africa require the greatest caution in applying it to the Territory. In the first place, there is no constitutional requirement of “equal protection of the laws”. Secondly, the factual situation differs vitally. As regards the legal situation, the Mandatory was in some respects required, and in others expected, to differentiate in its treatment of different population groups and their members ⁴. In such a context there could hardly be room for a technical concept of “legal equality”. In the light of the Mandatory's obligation to promote the well-being and progress of *all*, it could probably be said to be obliged to apply a broad, factual concept of equality, in the sense that there was to be no unfair discrimination against or in favour of any group, or its members: but a more exact kind of equality, at all times and under all circumstances, was not, and could not realistically have been, imposed as a requirement. Nor could it be capable of achievement as far as the factual situation was concerned. In particular, the important differences amongst the inhabitants of the Territory as regards type and level of civilization, and the resultant different needs and capacities of the various groups, have inevitably resulted in certain things pertaining to some groups in fact not being equal. The same considerations resulted in separation necessarily being imposed by the most advanced group rather than happening by agreement. In this regard Respondent would recall that Mr. Mason himself in an earlier work recognized the need for barriers

¹ IV, p. 339.

² *Vide* Chap. IX, para. 4, *infra*, where this matter is further considered.

³ *Vide* Chap. XI, para. 11, *infra*.

⁴ *Vide* Part C, sec. 11, *supra*.

between relatively advanced and relatively undeveloped groups¹. Separation between groups does not, however, mean that individuals are not able, on due advancement, to be the equals of the best in any other group. Indeed, separate development may expedite the advancement of individuals by protecting them not only against social phenomena such as racial prejudice, but also against competition by members of the more advanced groups. Examples of individuals among the non-Europeans in South Africa or South West Africa who have attained the highest ranks would include the Transkei Cabinet, who control a substantial civil service, including high European officials; professors at university institutions such as Fort Hare or Turfloop, etc.

129. In the preceding paragraphs Respondent has analysed the reasons set forth by Mr. Mason for "the offensiveness . . . of the policy of separate development"². Respondent has, it is submitted, shown that the reasons adduced by Mr. Mason are either imaginary or insubstantial. In conclusion Respondent would suggest that an attack of this sort would carry greater conviction if solidly based on realities rather than on a combination of phantasy and emotionally charged language.

130. After stating his reasons for regarding separate development as offensive, Mr. Mason concludes:

"These are some reasons why it will be hard to find natives of Africa who believe that to extend the policy of separate development to South West Africa even more completely than at present is in the interest of any but the White inhabitants³."

What Natives of Africa will or will not believe, is clearly an irrelevant issue in the present proceedings. This Court, it is respectfully submitted, is concerned only with the judicial duty of ascertaining the facts and determining their legal consequences. The incredulity, suspicion or antagonism of Natives of Africa has no bearing on judicial proceedings, as distinct, possibly, from international political activity.

131. In the Working Paper, Annex 2 to the Reply, it is said that "[t]he Odendaal Commission recommended a five-year development plan at an estimated cost of R114,512,485 . . .".

The United Nations Secretariat must either be very slipshod in their work, or else they deliberately attempt to minimize the extent of the five-year plan. In fact the figure mentioned by them reflects only the estimated amount of loan funds to be provided directly or indirectly by the South African Government⁴. In the very same paragraph in which the Odendaal Commission mentioned the above figure, it continued:

"In addition thereto the . . . net shortfall of R41,401,119 will also have to be funded from South African sources. Therefore the total commitment of the Government of the Republic of South Africa and other State undertakings such as the South African Railways and Harbours for the five-year period will amount to R156,401,119⁴."

Consequently, the total amount to be provided by the South African Government towards the five-year plan will alone amount to over

¹ *Vide* para. 106, *supra*.

² IV, p. 338.

³ *Ibid.*, p. 339.

⁴ R.P. No. 12/1964, p. 481 (para. 1509).

R156 million¹. However, even this figure does not represent the "cost" of the five-year plan, but merely Respondent's contribution thereto. To this must consequently be added amounts to be made available from the revenue of South West Africa itself².

132. Annex 3 to the Reply (an extract from the 1963 report of the United Nations Special Committee on the Policies of *Apartheid* of the Government of the Republic of South Africa) contains a number of misrepresentations or errors. Some of these have already been dealt with, and others do not merit refutation. The remaining ones will be considered in this and the succeeding paragraphs.

The Committee refers to "a series of laws to outlaw all social intercourse between the racial groups"³. This is a completely incorrect statement. No such laws exist.

Referring to provisions such as the Bantu Authorities Act of 1951 and the Bantu Education Act of 1953, the Committee says: "Each of these measures increased tension in the country and could only be imposed by force"⁴.

The Committee states further that the establishment of Bantu authorities "was 'accompanied by Government threats, by murder, violence, arson, tribal revolt and severe police action'"⁵, and that "the Government has resorted to threats to cut off financial assistance and discontinue necessary social services, has deported leaders, and imposed chiefs and headmen who are willing to go along with the Government in return for promotions"⁶. More particularly Applicants allege dissatisfaction in Tembuland, Sekhukhuneland and East Pondoland⁷.

The picture thus painted by the Committee is completely untrue. Before the establishment of Bantu authorities the fullest explanation and consultation takes place with the people concerned. Respondent refers to what has already been stated in this regard⁸. In the Transkei (which includes two of the areas specifically mentioned by the Committee, viz., Tembuland and East Pondoland) the introduction of Bantu authorities took a different course than elsewhere. The Bantu Authorities Act did not originally apply to this territory, but the General Council representing the Bantu of the area unanimously decided in 1955 to ask for the introduction of the system of Bantu authorities. This request was acceded to. Under its present constitution the Transkei possesses full power to disestablish or abolish Bantu authorities, but it has taken no steps in that direction. It is apparent therefore that the Bantu generally are in favour of the Bantu authorities. Respondent emphatically denies that it has ever made use of any type of threat, or violence, or has imposed the system on any section of the Bantu.

133. Although it is true that there was some dissatisfaction or violence in Tembuland, Sekhukhuneland and East Pondoland, the reason was not the introduction of Bantu authorities as such. The division of Tembuland has a long history and Respondent does not propose detailing it here, save to deny that the people objected thereto. In the other areas, one

¹ *Vide* also article by Philip Mason in IV, p. 330.

² *Vide* IV, p. 216.

³ *Ibid.*, p. 352.

⁴ *Ibid.*, p. 353.

⁵ *Ibid.*, pp. 352-353. *Vide* in this regard also Annex 4, IV, p. 361.

⁶ *Vide* para. 67, *supra*.

reason for dissension was that trouble-makers misrepresented the system of Bantu authorities as necessarily being a precursor of Government schemes for agrarian reform. These schemes, which involve the erection of grazing camps for rotational grazing, contour ploughing, stock culling, etc., are unpopular with some tradition-bound tribal agriculturists, and are for that reason not introduced except upon a voluntary basis. In some of the above areas agitators took advantage of the ignorance of the unsophisticated farmers to provoke rioting and disorder. In one or two areas there was also dissatisfaction as a result of mistakes in regard to the membership and constitution of the tribal authorities. When the misunderstandings and errors were rectified, dissatisfaction died down. Respondent wishes to emphasize that the type of trouble referred to above affected a small proportion of the population in a few areas, and that despite the activities of agitators, the establishment of the overwhelming majority of the more than 500 Bantu authorities was accompanied by general satisfaction and co-operation.

134. In dealing with the Promotion of Bantu Self-Government Act, the Committee states:

"During the debates in Parliament, Dr. Verwoerd said that the Government's scheme would lead to a permanent White South Africa, and that unless it was accepted, the only other choice was a common multi-racial country where the Whites would be outnumbered by the Blacks three or four to one ¹."

As has been noted in connection with similar statements made by Applicants ², this paraphrase is apt to be misleading. The "White South Africa" to which reference is made, is of course the European areas of the country. Reading the Prime Minister's speech renders it clear that he did not, as appears to be suggested by the Committee, convey that South Africa as a whole would be under the permanent domination of the White group, but merely that the policy of separate development would provide a homeland for each of the groups, including the White group ³. Indeed, the passage which is apparently the one referred to by the Committee, reads as follows:

"... if the possibility of having separate territories as an eventual settlement of political aims is not possible ... Nothing else is possible but a common South Africa, a multi-racial country, although numerically the Bantu will outnumber the Whites three or four times. Then I say again that ... I choose an assured White state in South Africa whatever happens to the other areas, rather than to have my people absorbed in one integrated state in which the Bantu must eventually dominate ⁴."

135. The Committee proceeds to say: "African leaders opposed this measure as a further denial of their rights ¹." The only "leader" quoted is ex-Chief Albert Luthuli ⁵. Respondent is fully aware that Mr. Luthuli opposed the measure, but does not accept that he is qualified to speak on

¹ IV, p. 353.

² *Vide* para. 8, *supra*.

³ *Vide U. of S.A. Parl. Deb., House of Assembly*, Vol. 101 (1959), Cols. 6214-6241.

⁴ *Ibid.*, Col. 6223.

⁵ *Vide* Chap. VI, para. 61, *infra*, for further information about Mr. Luthuli.

behalf of the Bantu people of South Africa. Elsewhere in this Rejoinder ¹ Respondent shows the nature and extent of Mr. Luthuli's influence, as also the substantial support which Respondent's policies enjoy among the Bantu people.

136. The Committee's discussion of the Transkei Constitution Act also bristles with misrepresentations and inaccuracies. Thus it is said:

"During the discussions which followed between the Government and the representative [sic] of the Bunga it was reported that the Government had indicated that it could not entertain any requests for greater powers than had been offered . . . 2"

This is completely false. Verbatim reports exist of the discussions in connection with the report of the Recess Committee of the Transkei Territorial Authority (the body which drafted the constitution) ³, and nowhere was any such indication given by the Government. On the contrary, before the Recess Committee commenced its deliberations, many of the leaders who were members of the Committee saw the South African Prime Minister, and he suggested greater powers for the Transkei than they in fact proposed to ask for. The leaders gladly accepted this suggestion and the recommendations of the Recess Committee included these greater powers. It can also be stated that there was complete agreement between the Recess Committee and the Government officials as to what functions and powers should be handed over to the Transkeian Government in the beginning, and also that further powers should be handed over progressively "as the organization of each Department becomes sufficiently developed to carry the additional burdens" ⁴. Indeed, a comparison of the Recess Committee report with the Transkei Constitution Act ⁵ will confirm the fact that all the powers and functions asked for by the Recess Committee were in fact granted to the Transkeian Government.

137. The said Committee states that it was also reported that the Government had indicated "that the Transkei Parliament should consist of Chiefs as well as elected representatives" ².

In fact the true position is that the Government insisted from the beginning on the inclusion of elected members ⁶. The Recess Committee then drafted a constitution making provision for a parliament of 64 chiefs and 30 elected representatives. During an interview between the Recess Committee and the Prime Minister, *the latter suggested that larger representation should be given to representatives elected by the people*. This suggestion was adopted, the Recess Committee resolving that the number of elected members should be increased to 45 ⁷. At no stage did the Government insist on the inclusion of any Chiefs in the Transkei Parliament.

138. The Committee also states as follows:

¹ *Vide* Chap. VI, para. 61, *et seq.*

² IV, p. 354.

³ II, pp. 478-479.

⁴ *Transkeian Territorial Authority: Proceedings and Reports of Select Committees at the Session of 1962*, p. lviii.

⁵ Act No. 48 of 1963, First Schedule.

⁶ *Vide* II, p. 480.

⁷ *R. of S.A. Parl. Deb., House of Assembly*, Vol. 3 (1962), Col. 5264.

"Serious differences among the Chiefs and people of the area were soon reported in the press. A number of cases of violence in the territory during 1962-1963 were attributed to opponents of the Government's scheme ¹."

These allegations are completely unfounded. Probably much to the apartheid committee's disappointment, the whole Transkei was calm and peaceful throughout the period since negotiations were started in connection with self-government, during the passing of the Act, the voters' registration and election campaigns, the election of the Cabinet, the establishment of the Government and right up to the present. As will be shown, the people of the Transkei participated in all these events with enthusiasm.

139. Regarding the powers of the Transkei Parliament, the Committee states, *inter alia*:

"The powers and functions of paramount chiefs, chiefs and headmen are not superseded by the establishment of the Legislative Assembly, however. The latter is not entirely competent in the restricted area of its jurisdiction because tribal authorities retain their original powers in certain areas ²."

This statement also is not correct. The Constitution Act ³ provides that the powers, authorities and functions of Bantu authorities shall be and remain in force *until varied or withdrawn by the Legislative Assembly*.

140. The Committee says: "Umtata, the largest town in the Transkei, will be the seat of government. The State will have no capital as Umtata is a White area ⁴."

It is in the hands of the Transkeian Government to determine which town is to become the capital of the territory. Its choice may well fall on Umtata, which is the present seat of the Government. In this regard it is to be noted that it is government policy that all towns in the Transkei should eventually be in the possession of the Bantu population and that this process is already under way.

141. The Committee concludes its report with a number of wild and exaggerated criticisms ⁵. In so far as these points warrant any discussion at all, they are dealt with in earlier Parts of this Rejoinder. The criticism includes the irresponsible statement that "the 'Bantustans' were not demanded by African leaders but were imposed against their wishes" ⁶. As has been shown ⁷, this statement is completely false. No authority therefor is quoted, and its inclusion in the Committee's report once more demonstrates that no reliance can be placed on any allegation contained therein.

142. In its next report, i.e., that of 1964, extracts from which appear in Annex 4 to the Reply, the Committee maintained the same low standard of accuracy and impartiality. Almost at the very outset the report commences by saying that in the Transkeian elections "political

¹ IV, p. 354.

² *Ibid.*, p. 355.

³ Sec. 46.

⁴ IV, p. 356.

⁵ *Ibid.*, pp. 356-358.

⁶ *Ibid.*, p. 357.

⁷ *Vide paras. 67-84, supra.*

parties were not allowed"¹. This is a complete fabrication. Repeated reference is also made in the report to Paramount Chief Victor Poto's alleged multi-racial ideals. Attention is, however, invited to a later discussion in this Rejoinder² of some of his pronouncements, and, *inter alia*, his statement in the Legislative Assembly that—

"... the white people who should come here are those who will be willing to be under the government we propose to set up in the Transkei, *a government* that will always be in the hands of the black man"³. (Italics added.)

143. The picture painted by the Committee³ of the course of the elections in the Transkei is so completely distorted as hardly to warrant any reply. The Committee refers to a Liberal Party publication⁴. This party exerted every effort to render the Transkeian elections a failure, employing methods which are not relevant to the issues in these proceedings.

In fact, the people of the Territory took enthusiastically to the experiment of the elections. In this regard it is necessary merely to quote the judgment of a person who is certainly not well-disposed either to Respondent or to its Transkei policy, viz., Mr. Christopher R. Hill, Deputy Director of the Institute of Race Relations, London. He writes:

"In the Transkei, the election campaign seems to have gone smoothly though the circumstances were extraordinary in that most of the emergency regulations imposed during the Pondoland disturbances of 1960 were still in force. These measures forbid, *inter alia*, meetings of more than ten Africans without permission, but in fact permission was freely given"⁵. (Footnote omitted.)

The South African Institute of Race Relations published an estimate that 90 per cent. or more of those eligible to vote, both within the Transkei and outside, registered as voters⁶. A total of 606,322 votes were cast in the elections representing 68.8 per cent. of those registered, whereas a further 28,966 votes (3.3 per cent. of those registered) were spoilt.

Considering the difficulties involved in holding elections for the first time in an area with a considerable proportion of illiterate voters, it is submitted that these results dispel any suggestion of lack of interest among the Bantu⁷.

144. Another statement by the Committee is the following:

"Despite the clear evidence of the Government's support for Chief Matanzima, nearly thirty-five of the forty-five elected seats were

¹ IV, p. 359.

² *Vide* Chap. VI, para. 64, *infra*.

³ IV, pp. 360-361.

⁴ *Ibid.*, p. 360.

⁵ Hill, C. R., *Bantustans: The Fragmentation of South Africa* (1964), pp. 71-72.

⁶ South African Institute of Race Relations, *A Survey of Race Relations in South Africa 1963* (1964), compiled by Muriel Horrell, p. 96.

⁷ It also belies the suggestion that persons of the type mentioned in the Liberal Party publication, at IV, p. 364, were leaders or "cream" with any substantial support. Their activities were of the nature mentioned in para. 121, *supra*, and, three of them (Mandela, Sisulu and Mbeki) were convicted in the Rivonia trial: *vide* Chap. VI, para. 61, *infra*.

won by supporters of Paramount Chief Poto. This was widely interpreted as a repudiation of *apartheid* by the Xhosa people ¹."

Firstly, there was no "evidence of the Government's support for Chief Matanzima". The Government remained completely impartial in the elections. Secondly, it is impossible to determine to what extent the voters were influenced by political programmes (which were in any event not clearly formulated as at the stage of the elections) and to what extent by parochial or personal considerations. Only time can tell which of the parties in fact enjoys the greater popular support, and even then it would be erroneous to contend that Chief Poto is "against *apartheid*" or Chief Matanzima "for *apartheid*". An examination of their policies shows that both to a greater or lesser extent cut across the issues on which European political parties take sides. Chief Matanzima does support the major lines of the policy of separate development, but Chief Poto also is not entirely opposed to them.

¹ IV, p. 36r.

CHAPTER VI

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

A. Introductory

1. As has been noted above¹, one of the categories of "relevant evidence" introduced by Applicants in an attempt at showing "that Respondent's policy and practice of apartheid fails to promote the well-being and social progress of the inhabitants of the Territory"², consists of what Applicants call "Judgments of qualified persons with first-hand knowledge of South Africa and South West Africa"³. The material advanced by them under this head predominantly comprises opinions expressed by persons who, it is alleged, "by reason of South African origin or long residence there, indubitably possess 'first-hand knowledge of the situation' there, as well as in South West Africa"³.

Respondent is not quite sure what point is sought to be made by the introduction of such "evidence". In the first place, much of this evidence has no bearing on the basic principles of the policy of separate development or apartheid, but consists merely of criticism of particular actions or measures which are, if relevant at all, only incidental to fundamental aspects of policy. In some cases, such criticism in fact derives from staunch supporters of the principle of separate development, who merely express dissatisfaction at some aspect of its application, or some aspect of policy unrelated to such principle. In many instances the criticism relates to measures or aspects of policy which do not apply to South West Africa at all. In other instances it relates to circumstances or measures which have in the meantime altered fundamentally, or it is based on wrong facts or assumptions.

2. But even in so far as such "evidence" relates to basic principles of the policy of "separate development" as applied in South West Africa, Respondent does not appreciate its significance. Respondent has indicated above⁴ that "evidence" can be of no assistance to Applicants if it demonstrates only that some modern commentators differ from Respondent on the question of the best method for promoting well-being and progress, since Applicants can succeed only by establishing that there is no scope for honest difference of opinion regarding the alleged demerits of Respondent's policy. In this regard, Respondent has already indicated in the Counter-Memorial that there is considerable scope for difference of opinion, and in so far as Applicants attempt to establish the contrary by means of this "evidence", the matter is further dealt with herein.

3. It must immediately be obvious that Applicants cannot hope to establish the existence of a general consensus of opinion amongst South

¹ *Vide* Chap. I, para. 3, *supra*.

² *IV*, p. 277.

³ *Ibid.*, pp. 277-278. The two "authorities cited by Respondent" (*ibid.*, pp. 278-280) will be dealt with in Chap. VII, paras. 40-41, *infra*.

⁴ *Vide* sec. C, para. 39, *supra*.

Africans that the policy of their Government is wrong, particularly not where the Government, as will be shown¹, has emerged from every general election since 1948 with increased strength. Nevertheless it almost appears as if Applicants do essay some such attempt. They make the bold claim that their quotations (which are, without exception, critical of some or other aspect of government policy) represent "a fairly selected cross-section of evaluations of apartheid"². That this claim is false to the point of dishonesty will be demonstrated in the following exposition of the main currents of thought in South Africa regarding relations between the various ethnic groups in the country, an exposition that will disclose a wide variety of views, a great body of which is favourable to Respondent.

This divergence of views is a natural result of the facts that the problems inherent in group relations are not only extremely complicated, but also affect the future of every man, woman and child in the country. Consequently these problems have aroused much thought, deep soul-searching and vigorous debate amongst all sections and classes of the population. However, in every sphere of life touched upon by Applicants in presenting their "Judgments of qualified persons" there exists support varying between substantial and overwhelming, for the policy of separate development, which point of view is nevertheless not represented at all in Applicants' "cross-section of evaluations". A further important aspect which will appear from the exposition below is that the opponents of separate development are themselves completely divided on the issue as to what would constitute a preferable policy. It is beyond doubt, as will be seen, that many opponents of government policy would nevertheless far prefer this policy to the alternatives proposed by some of their fellow-opponents (and in particular, the alternative proposed by Applicants)³.

4. The following discussion of trends of thought in South Africa, and the parties, organizations and persons propagating them, will also serve as a setting within which to evaluate the persons and passages quoted in the Reply⁴. Respondent does not propose to deal separately with every person and every point of criticism raised in this part of Applicants' argument. After the general survey of currents of opinion, which will serve to place Applicants' authorities in their proper perspective, Respondent will, however, devote very brief attention to the substance of the criticism voiced by them.

B. Political Parties and Policies in South Africa

5. Since 1948 the governing party in South Africa has been the National Party. Its policy of separate development has been described in broad outline in the Counter-Memorial⁵ and certain aspects thereof have been elaborated herein⁶. It will consequently not be necessary to give a further exposition of its policies here.

The major opposition party in Parliament is the United Party. The number of seats held in the House of Assembly (i.e., the elected, Lower

¹ *Vide* para. 5, *infra*.

² IV, p. 277.

³ *Ibid.*, p. 441.

⁴ *Ibid.*, pp. 280 ff. and 493 ff.

⁵ II, pp. 457-488.

⁶ *Vide* Chaps. IV and V, *supra*.

House of Parliament) by each of these parties in the years since 1948 is indicated in the following table ¹:

<i>Year of election</i>	<i>Number of seats held by the United Party</i>	<i>Number of seats held by the National Party</i>
1948	65	70
1953	57	94
1958	53	103
1961	49	105

A similar pattern is noticeable in South West Africa where the United South West Africa Party (U.N.S.W.P., with a similar policy to the United Party in South Africa) and the National Party (with the same policy as the National Party in South Africa) are the two major parties. Since 1948 the U.N.S.W.P. has lost ground rapidly whilst the National Party's support has increased considerably, as is clear from the following table:

SEATS HELD IN LEGISLATIVE ASSEMBLY

	<i>U.N.S.W.P.</i>	<i>N.P.</i>
1948	15	3
1950	3	15
1955	2	16
1961	2	16
1964 (by-election)	1	17

If it is further taken into account that the six elected representatives of South West Africa in the House of Assembly of the Republic of South Africa have ever since the first elections (1950), been supporters of the present Government, it is clear that the vast majority of the voters in South West Africa as in South Africa support the policy of separate development.

6. The United Party policy, which has undergone a number of successive adaptations since the party went into opposition in 1948, was set out comprehensively in a recent article by the leader of the Party, Sir de Villiers Graaff ². He commenced by defining the essence of the problem as follows:

"How can several races at different stages of development, with the most advanced of them a minority, live together in one State so that justice is done to all, and so that they can all share in the processes of democracy?"

How can that be done so that civilised standards, and that set of values known as the Western way of life, are not swamped by primitive majorities and lost to all of us?"

The United Party solution for these problems is, as regards political rights, founded on a concept of "Race Federation", the basic elements of which were stated as follows:

¹ *State of South Africa Year Book 1962*: Economic, Financial and Statistical Year-Book for the Republic of South Africa, pp. 43 and 46-47.

² *Sunday Times*, 7 Apr. 1963.

“The race groups which make up the population of the Republic will have the widest possible measure of communal government, especially in such matters as education, cultural affairs, local government and certain matters of public health.

A communal council for each race will control those affairs, some of which I have already mentioned, which intimately affect that race. Communal councils will also be established for areas like the Transkei or for a grouping of smaller Native Reserves.

Matters which cannot be separately controlled by each race, such as making roads and bridges, or the supply of electricity and water resources, will be the responsibility of a joint board representative of the communal councils concerned, or directly of the Federal Government.

The powers given to each communal council would not necessarily all be the same. They will depend on the stage of development reached by each race¹.”

The representatives of the various groups in the federal parliament would be Europeans, and the European group would have a majority of representatives. One of the five fundamental principles of the Party is that—

“[i]n the interests of both our White and our non-White peoples, the leadership of the Whites is needed in South Africa for the well-being and the advancement of all¹”.

Influx control would be maintained but reformed, and a permanently settled Bantu population established in their own townships adjacent to the cities.

7. One more opposition party is represented in Parliament, viz., the Progressive Party. This party came into existence in 1959 after a schism in the United Party, and was then represented in the House of Assembly by 11 former United Party members². In a general election in 1961, the Progressive Party retained only one of its seats. In 1962 it failed to defeat a single one of the 15 United Party candidates it opposed in the Johannesburg municipal elections.

8. The Progressive Party advocates a non-racial franchise with a double roll, each being subject to different educational, income or property qualifications. Its reasons for opposing the one man, one vote, cry have been officially stated as follows:

“The Progressive Party rejected the principle of universal franchise because the three conditions necessary to make it work were absent in South Africa.

These conditions were: an integrated or homogeneous community, a certain degree of political maturity among the people and universal or near universal education.

In a country where these three conditions were fulfilled, universal franchise was an ideal system.

In South Africa we have anything but an integrated or homogeneous society—there are very strong communal feelings which must be taken into account, whether we like it or not.

¹ *Sunday Times*, 7 April 1963.

² The year 1955 at IV, p. 286 is wrong—it should be 1959.

Further, a large percentage of the population, through no fault of its own, was politically immature and there was no system of universal education.

The Progressive Party's qualified franchise and double roll was the best way of making democracy succeed with an immature electorate¹.

The Progressive Party also proposes protecting minority rights by way of certain constitutional provisions and safeguards².

9. Reference should be made to one other political party, viz., the Liberal Party. It was founded in 1953, also after a split in the United Party, and at first advocated a non-racial qualified franchise. In the course of time it became more radical, and at present propagates the immediate introduction of universal adult franchise. No Liberal Party candidate has ever succeeded in a White constituency, and frequently candidates have lost their electoral deposits by polling less than one-fifth of the total of votes cast for all candidates in the constituency concerned. It is difficult to assess the extent of support enjoyed by the party among non-Whites, since membership figures are not kept by race. At its 1961 Congress, a majority of delegates and observers was Bantu. Although the leading positions in 1962 were still held by Whites, one of the three vice-presidents and the national treasurer were Bantu³.

10. To summarize, the following general observations may be made:

- (a) Both the major political parties in South Africa, viz., the National Party and the United Party, recognize the necessity of differentiating between the various population groups in the country. Whereas the National Party policy for separate development envisages ultimate self-determination for the various Bantu groups in their own areas, the United Party contemplates a federation between the races within one geographical area.
- (b) The only one of the above four parties which advocates the immediate introduction of universal adult suffrage, is the Liberal Party, which has made no mentionable impact on the electorate.
- (c) The Progressive Party, with its policy of a qualified non-racial suffrage and constitutional guarantees for minorities, appears to be losing such limited support as it formerly had.

11. It is important to note the extent to which the political climate in South Africa has been affected by the development in government policy announced by the Prime Minister in 1959 when he stated unequivocally the acceptance of independence for the separate Bantu states as an attainable end result⁴. Later in the same year there occurred the split in the United Party which heralded the birth of the Progressives. It is significant that the immediate cause of the split was an issue (the desirability of purchasing further land for reserves) which had gained increased importance by reason of the Prime Minister's announcement. The reaction of the United Party came in the form of its Race Federation policy. And

¹ Quoted in Marais, B., *The two faces of Africa* (1964), pp. 60-61.

² *Safeguarding Your Future: The Principles and Policies of the Progressive Party of South Africa*, pp. 5-13.

³ Carter, G. M. (Ed.), *Five African States: Responses to Diversity* (1964), p. 533.

⁴ II, pp. 465-466.

reference was made above to the recent changes of policy and emphasis in the Liberal Party ¹.

12. It is against the above background that the significance of the "fairly selected cross-section of evaluations of apartheid" ² by "political leaders" ³ of the "White South Africans" ⁴ can be assessed. The "political leaders" quoted by Applicants are Mr. Donald Moltano, Q.C. ⁵, Dr. Bernard Friedman ⁶, Mr. J. D. du P. Basson ⁶, Mrs. Helen Suzman ⁷ and Mrs. Margaret Ballinger ⁸. This list contains no member or supporter of the governing National Party, only one member (Mr. Basson) of the major opposition party, viz., the United Party, three members of the Progressive Party (Dr. Friedman, Mrs. Suzman and Mr. Moltano) including its one and only representative in Parliament (Mrs. Suzman), and one member of the Liberal Party (Mrs. Ballinger). Applicants' cross-section of political leaders is therefore confined to members of opposition parties, with an excessive loading of small splinter parties which lie to the extreme left of the political spectrum and do not possess any substantial support from the electorate.

In passing it may be noted that in no case have Applicants even quoted the leader of the particular party in question (at least not under the heading "Political Leaders").

13. As appears from the above exposition, not only do the "Political Leaders" represent a minority of the electorate, but the main (if not the only) feature common to the policies advocated by them, is their opposition to the National Party. At most therefore they establish that there exist currents of opinion in South Africa which are vigorously critical of National Party policy, and which openly and strenuously propagate a number of widely different policies, each of which is considered by its adherents to be preferable to the one adopted by the Government ⁹. This is admittedly a situation which, although unusual in the rest of Africa, where the one-party State tends to be the rule ¹⁰, obtains in South Africa. It is submitted, however, that such differences of opinion do not establish either that Respondent's policy fails to promote well-being and progress in South Africa or in South West Africa, or that its policy is not bona fide directed towards such promotion.

14. It is also interesting to note that all the "political leaders" quoted by Applicants have changed their political affiliations in the course of their careers. This is obvious in the case of the members of the Progressive or Liberal Parties, who were all active in politics long before their present parties came into existence. It is, however, also true of Mr. Basson, the single representative of the United Party quoted by Applicants. He was formerly an organizer for the U.N.S.W.P. ¹¹ in South West Africa. There-

¹ *Vide* para. 9, *supra*.

² *IV*, p. 277.

³ Heading at *IV*, p. 286.

⁴ Heading at *ibid.*, p. 280.

⁵ *IV*, p. 286.

⁶ *Ibid.*, p. 287.

⁷ *Ibid.*, p. 496.

⁸ *Ibid.*, p. 497.

⁹ Only one of which accords with the policy suggested for South West Africa by Applicants.

¹⁰ *Vide* Chap. III, paras. 9-10, *supra*.

¹¹ As to which, *vide* para. 5, *supra*.

after he joined the National Party, which he represented in Parliament. In 1961 he founded, with the retired Chief Justice, Mr. Justice Fagan (quoted by Applicants as a "Jurist")¹ a small splinter group called the National Union, which made little, if any, impact on the electorate. Before the 1961 general elections the National Union entered into an electoral pact with the United Party, pursuant to which, *inter alia*, Mr. Basson contested and won (with United Party support) a former United Party seat. The Hon. Mr. Fagan was promoted to the Senate, and shortly after the election the National Union merged with the United Party.

15. Mr. Fagan is not, however, the only authority quoted by Applicants from spheres other than the political who in actual fact has been very active in politics. Thus, for example, Mr. Alan Paton (quoted under the heading "Authors")² has been National President of the Liberal Party since 1962³. Professor Leo Kuper (quoted under the heading "Scholarly Authorities")⁴ was appointed to represent the same party on the so-called South African Freedom Committee set up in terms of the following resolution adopted at a meeting in Fordsburg on 3 February 1954:

- "1. This meeting of the representatives of the N.E.U.M., S.A. Indian Congress, S.A. Indian Youth Congress, African National Congress and Liberal Party totally disregard the Nationalist Government's oppressive Legislation and therefore whole-heartedly expects to defy all oppressive Laws of the Government.
2. This meeting calls for the formation of the South African Freedom Committee consisting of two members of each party represented; to find ways and means to defy whatever oppressive laws the Government made.
3. This meeting calls upon any member of the proposed Committee to pledge that no matter what happens they must never reveal the plan or personnel of the Committee.
4. This meeting also resolves that the Committee must not be made public. The masses must be told that each party only sympathises with the struggle but takes no active part⁵."

The former Chief Justice, the Hon. Mr. Centlivres (quoted under the heading "Jurists")⁶ served on the Molteno Commission which was appointed by the Progressive party to draft constitutional proposals for insertion in the party's programme of principles. The policies of the same party are vigorously propagated in the press by Professor P. V. Pistorius, a member of its National Executive, who is quoted by Applicants under the heading "Scholarly Authorities"⁷.

C. Intellectual Societies Interested in Race Relations

16. On the more intellectual level, there are two societies in South Africa which are devoted to the scientific study of matters affecting the

¹ IV, p. 285.

² *Ibid.*, p. 287.

³ Carter, G. M. (Ed.), *Five African States: Responses to Diversity* (1964), p. 533.

⁴ IV, p. 494.

⁵ Departmental information.

⁶ IV, p. 286.

⁷ *Ibid.*, pp. 494-495.

relationship between the various population groups in South Africa. The first to be established was the Institute of Race Relations, which had its origin towards the end of the 1920s largely as a result of European-Bantu conferences convened by the Federal Council of the Dutch Reformed Churches¹. Its membership was shown as 3,853 according to its annual report for 1962-1963. Its object has been stated as follows:

"The object of the Institute is to encourage, work for, and foster peace, goodwill, and practical co-operation between the various sections and races of the population of Southern Africa. It is tied to no political creed, respectful regard is paid to the traditions and usages of the various national and racial groups, and due account is taken of opposing views earnestly and sincerely held²."

17. Despite the above-quoted statement of its object, the Institute has in the course of time developed, if not a creed or policy, then at least a well-defined political philosophy. The basic premises of this philosophy were expressed as being—

"... belief in the value of the individual human being and his right, by virtue of his humanity, to the fullest expression and development compatible with similar rights of other individuals within the pattern of a democratic state;
belief in the values of democratic society with its accepted freedoms, rights and duties;
acceptance of the brotherhood of man in its Christian interpretation³."

Regarding the application of these principles, the Institute's attitude is as follows:

"The Institute has consistently recognized that this concept of democracy has seldom, if ever, been applied in a multi-racial society with peoples of varying cultures and at different stages of development or, indeed, in any society. Nevertheless, it has always accepted that the full measure of such democracy must ultimately be applied to South Africa . . .

The principles mentioned above do not predicate for South Africa either a policy of total segregation or a policy of total integration. While the late Professor Hoernlé, President of the Institute for many years and largely responsible for the philosophy underlying its work, pointed out most clearly that a policy of complete territorial segregation was as compatible with these principles as a policy of complete assimilation, yet, after an exhaustive analysis of the position at the time that he wrote, he came to the conclusion that complete territorial segregation was in fact impossible. He himself could proffer no complete solution for South Africa's difficulties while racial attitudes remain as they are . . .

The Institute also considers that the adoption of a policy aimed at total (physical, political, economic, social) assimilation as analysed

¹ Hellmann, E. (Ed.), *Handbook on Race Relations in South Africa* (1949), pp. 653-655.

² *Ibid.*, p. 654.

³ *Go Forward in Faith: A statement of the Fundamental Beliefs and Attitudes of the South African Institute of Race Relations* (pamphlet issued by the South African Institute of Race Relations).

by the late Professor Hoernlé is not acceptable and is equally impracticable. The Institute, however, holds that basic cultural assimilation is possible and desirable. Physical assimilation . . . is an entirely different matter . . .

. . . It also considers that, while fundamental human rights must be granted to all South Africans and positive steps taken towards that end, the great majority are not in a position at present to undertake the full responsibilities inherent in such rights . . .

In our present form of democratic society, political equality involves fundamental equality and, with the predominance of Africans in South Africa, it means ultimately the numerical preponderance in the political sphere of Africans. The Institute adopts three approaches to this:

The first is that, given the assumption of a society which is integrated in various degrees, the Institute considers that to deny any racial group participation in some form or other in the central and local governing bodies is to condemn that group to perpetual subordination which no self-respecting people will accept. The Institute accordingly believes that Africans must be represented in our central legislature . . .

The Institute's third approach is that when one civilization claims the rights and the duties inherent in the assumption of power in another civilization the members of the former must qualify for such rights. Whether such qualification should take the form of a common but loaded franchise or some other form has not yet been formulated by the Institute, but it believes that whatever form political representation may take immediately, in the long run such representation can be no less than that held by Europeans. The road to such common citizenship must be by evolution ¹.

18. The above philosophy, which is vigorously propagated by its adherents in political, as well as academic and religious circles in South Africa, is based on the following premises which have, in particular, been the subject of dispute, viz.,

- (a) that complete territorial segregation is not practicable,
- (b) that complete political and economic integration is practicable although, as the Institute recognizes, it "has seldom, if ever, been applied in a multi-racial society with peoples of varying cultures and at different stages of development" ², and
- (c) that it is possible in present-day circumstances to achieve complete political and economic integration by a gradual process ³.

The very name of the pamphlet in which the above philosophy is set out ("Go Forward in Faith"), indicates that at least some (and Respondent would suggest particularly the last-mentioned two) of the above beliefs are matters of faith rather than of intellect or science.

19. Although the Institute of Race Relations claims not to be tied to any party political doctrine, it is patent that the premises and beliefs underlying its philosophy find a great deal of common ground with the

¹ *Go Forward in Faith, op. cit.*

² *Vide para. 17, supra.*

³ *Vide Chap. III, supra.*

policies of the Progressive Party¹. Like the Progressive Party, its support appears to be declining. According to its latest annual report (that for 1962-1963) the Institute's "membership . . . has now decreased and now stands at 3,853"². The same report states that "the 1961 membership campaign was only very partially successful"³.

20. It is striking how many of the "White South Africans" quoted by Applicants from intellectual spheres, are associated with the Institute of Race Relations in one way or another, and subscribe to its basic political philosophy. Thus its President is the Hon. Mr. O. D. Schreiner, former Judge of Appeal⁴. Professor Edgar H. Brookes⁵, is a past President and has long been a regular contributor to its publications. Indeed, the passage quoted under his name in the Reply⁵ was derived from an article in the *Race Relations Journal*, the organ of the Institute of Race Relations, as is the case with the passages quoted from articles by Professor Monica Wilson⁶ and Professor L. M. Thompson⁷. Other former Presidents of the Institute are Mr. (not Dr.) Leo Marquard⁸ and Mr. Donald Moltano⁹. A prominent member is Dr. Bernard Friedman⁹. The passage by Professor D. V. Cowen¹⁰ forms part of a lecture delivered under the auspices of the Institute, as do those by Archbishop Dennis Hurley¹¹ and by Dr. B. B. Keet¹².

21. The decline in the fortunes of the Institute may possibly be ascribed, *inter alia*, to many of its adherents recently taking a new look at facts and policies in South Africa. An example of these is Professor D. V. Cowen, quoted as a "Scholarly Authority"¹³. In a recent series of articles, he stated, *inter alia*:

"Among the essential factors frequently overlooked by critics abroad, I mentioned that no blue print for South Africa has any chance of sticking unless the Whites as well as the non-Whites want it and willingly accept it.

However much one may deplore the fact, it remains a very hard and real fact that the overwhelming majority of South African Whites, in the present stage of their development, just cannot face the prospect of living together with the non-Whites on a footing of complete equality in one undivided country. One man, one vote—or even a qualified franchise which may lead to it—are not acceptable to the Whites.

It seemed to me that some of South Africa's critics, well meaning though they may be, tend to overlook the magnitude and frightful difficulty of the human situation with which we are concerned.

¹ As to which, *vide* para. 8, *supra*.

² *South African Institute of Race Relations (Inc.)*: 34th Annual Report 1962-1963, p. 19.

³ *Ibid.*, p. 17.

⁴ Quoted by Applicants under the heading "Jurists", IV, p. 285.

⁵ Quoted by Applicants under the heading "Scholarly Authorities", *ibid.*, p. 281.

⁶ *Ibid.*, p. 282.

⁷ *Ibid.*, p. 283.

⁸ Quoted as "Scholarly Authority", *ibid.*, p. 493.

⁹ Quoted as "Political Leader", *ibid.*, p. 286.

¹⁰ Quoted as "Scholarly Authority", *ibid.*, p. 281.

¹¹ Quoted as "Religious Leader", *ibid.*, p. 496.

¹² *Ibid.*, p. 284.

¹³ *Ibid.*, p. 281, *vide* also pp. 321-323.

We speak of a colour 'problem', but colour is only an element, albeit a very important one, in an evolving social and economic process rather than a problem itself. We are faced with a process of development that has to be lived with, rather than with an intellectual problem which can be solved and disposed of.

Yet, while the White man in South Africa backs away from any deliberate or articulated policy of living in a politically and socially integrated society, increasingly he is beginning to recognize that he cannot continue to survive as a dominating and privileged minority.

Steadily, remorselessly, the pangs of conscience and the pressure of public opinion take effect.

Whether the trend was foreseen, or whether it has become unavoidable, 'baasskap' [domination] has tended to give way to 'separate development'; even 'separate development' is coming to be replaced in some influential quarters by the concept of 'separate freedom'; and, meanwhile, quietly, industry and commerce effect a revolution in White policies.

Non-White standards of living are, of course, manifestly lower than White standards, but they are steadily rising, and have long been sufficiently attractive to draw migrant labourers (though admittedly only a small proportion of the whole) from independent countries which are out of sympathy with South Africa's policies; for example, Uganda and Tanganyika¹.

Barely three years ago, in my book 'The Foundations of Freedom', I criticized the Bantustan experiment in the Transkei on the score that it was retrograde and undemocratic, more particularly because the idea of popular voting was entirely excluded, as being alien to the Bantu mentality².

The Government's policy has since changed radically; under the revised Transkeian constitution voting is now allowed to take place on a substantial scale—a definite step, in my view, in the right direction; and so this particular piece of criticism largely falls away.

Indeed, I have been much impressed by an article which appeared in *The Star* on July 27 by an African, Mr. D. T. Moerane, in which he argues that the Government's Bantustan policy might, in the long run, prove to be the most effective—as it is now the only practicable—method of giving Africans in this country a voice in the emerging pattern of race relations³.

I have, in the past, seen the 'separate homeland plans' as affording nothing more than a temporary respite, a lessening of pressure, so to speak; but in the long run only a stage along the road to eventual South African integration. And I have tended to write down their significance because of the more immediate impact of anomalies and injustices in the so-called 'White areas'.

However, it would seem wiser not to spurn the value of any lessening pressure in a dangerously emotional situation, especially where it is just not possible, in the short run, to press for one undivided society on terms of full equality . . .

Evidence of change for the better is manifest to anyone who is

¹ *The Star*, 21 Sep. 1964.

² *Vide IV*, pp. 322-323, where Prof. Cowen's criticism in this regard is quoted.

³ *Vide para. 65, infra*, for extracts from this article.

honest enough to keep his eyes open, and humble enough not to expect the immediate advent of the millenium.

This is especially true in South Africa's industrial life; African minimum wages are rising steadily; last February the Minister of Labour stated in the Senate that there would be no ceiling to the skills Africans would be allowed to acquire in the border areas (a change in policy which has enormous possibilities); and, in the big cities, the wastefulness and inequity of 'job reservation' is beginning to break down in the face of economic realities¹."

22. After the Second World War, a number of scientists, religious leaders, educationists and others, who were interested in the scientific study and examination of matters relating to race and group attitudes, but who did not accept the political philosophy of the Institute of Race Relations, founded the South African Bureau of Racial Affairs (SABRA). The aims of the Bureau are:

"(1) To promote and exert itself for the separate development of, on the one hand, the European and, on the other, the various non-European groups of the population of South Africa, and to protect and safeguard the interests of these groups.

(2) To encourage and work for peace, goodwill and co-operation between the various sections and races of the population of South Africa.

(3) To devote itself to the accomplishment of a just and equitable regulation of racial affairs in South Africa, and to promote the general welfare of the European, Coloured and Native inhabitants.

(4) To afford and distribute information regarding all aspects of race relations in South Africa and to create, here and elsewhere, an enlightened public opinion in this connection, also as to the implications and application of a policy of separation.

(5) To do research work and to make a thorough and scientific study of all the important aspects of our race problems.

(6) To exert itself for the proper development of the Native Reserves²."

The Bureau has provided the following information regarding its membership and sources of funds:

"Amongst its founder members were prominent leaders from all walks of life, not only from the Afrikaans group, but also from among the English-speaking section. There were religious leaders like prof. G. B. A. Gerdener, jurists like Dr. C. G. Hall³, prominent scholars like prof. H. B. Thom and Dr. W. W. M. Eiselen and also businessmen like Mr. Hugh Solomon and Col. C. F. Stallard⁴, etc.

Sabra's membership rose from 500 in 1949 to nearly 2,000 in 1964 and its membership is still growing.

Affiliated to the organization are a number of universities, church bodies, financial and business institutions and a large number of municipalities and other local authorities. In no way whatsoever does Sabra receive any financial support from the government."

¹ *The Star*, 22 Sep. 1964.

² *South African Bureau of Racial Affairs (SABRA)*: "Aims, Favourable Reception."

³ Later Judge of Appeal.

⁴ During the Second World War a member of General Smuts' Cabinet.

23. At the fourth annual Congress of SABRA in 1953 the following resolutions were passed:

“(a) This Congress is of the opinion that a policy of differentiation between (as distinct from discrimination against) the various racial groups is not only just and Christian, but also the only one which will ensure an equitable treatment of these various groups, and which is absolutely indispensable if the particular outlook and pattern of life of each of them are to be acknowledged and respected; and furthermore that a policy of assimilation necessarily involves a negation of the particular outlook and pattern of life, and is bound to lead to frustration and injustice.

(b) that Western Culture, having been brought by the Providence of God to South Africa, must retain in any future developments its fundamentally Christian outlook.

(c) that certain fundamental patterns of Bantu culture are of the utmost importance to that culture and may not be threatened by a process of belittlement of that culture nor of overemphasis upon the externals of Western Culture.

(d) that if some new and peculiarly S.A. Culture should arise in S.A. it can only be a spontaneous growth in the spirit of our two present cultures¹”.

In 1952 SABRA issued the following statement of policy:

“By a policy of free and separate development, we must understand the territorial separation of European and Bantu, and the provision of areas which must serve as national and political homes for the different Bantu communities and as permanent residential areas for the Bantu population or the major portion of it . . .

Only a separation policy, which accepts the organic unity of the Bantu communities as a basis, can create conditions under which the Bantu can determine the rate of their own progress, and which can safeguard the European population against continual accusations of discrimination and neglect²”.

24. Many individual members of SABRA, as well as other scientists and scholars, have expressed favourable opinions on Respondent's policies or certain aspects thereof. Some quotations from such authorities are set out below³. Although these authorities represent a very substantial and important section of academic and spiritual life, Applicants have completely ignored them in making their alleged “fairly selected cross-section of evaluations of apartheid”⁴.

25. In an address entitled “The Case in Favour of Apartheid” delivered in London in 1957, Professor L. J. du Plessis of the Faculty of Law at Potchefstroom said, *inter alia*:

“But there is a strong difference of opinion about the proper course to pursue to attain their complete emancipation [of non-

¹ *Die Naturel in die Suid-Afrikaanse Landbou*: Referate gelewer op die Vyfde Jaarvergadering van die Suid-Afrikaanse Buro vir Rasseaangeleenthede (SABRA), Jan. (1954), p. 168.

² *Integration or Separate Development?* Issued by the South African Bureau of Racial Affairs (SABRA), Stellenbosch, 1952, pp. 18 and 30.

³ *Vide paras. 25 et seq., infra.*

⁴ IV, p. 277.

European nations], namely whether it should be sought in one or two integrated multi-racial societies, which has not yet been nearly accomplished; or whether the solution should be sought in developing a number of racially fairly homogeneous national communities according to so-called ethnic affiliations, for which the basis still exists in the various British Protectorates and the native areas of the Union of South Africa and South West Africa, which together cover nearly half of the best land in Southern Africa. The first policy is called that of integration or partnership, the latter is that of apartheid or separate development and is, in the main, the policy of the present South African government.

The difficulty we feel in further developing an integrated multi-racial society, can hardly be realized by foreign Europeans or even Americans. Simply because they themselves do not face any national crisis in this respect. They are safe and secure in their own homogeneous national societies, and even the developing West-European union would respect the national diversities of its several and diverse component parts. And in the United States, even if the negroes were completely integrated, Americans would not lose their own nationality and the character of that great nation would be hardly affected. In South Africa, however, a similar integration would certainly wipe out the fully established South African nation of Afrikanerdom, whether Afrikaans or English-speaking, and would immerse the developing non-European nations in inter-tribal chaos. This would mean at least the suicide of a young and virile nation, a nation Christian in religion and European in racial composition, a very successful and indeed, as we believe, a necessary bulwark of the Western way of life in Southern Africa . . .¹

26. Professor H. J. J. M. van der Merwe, Dean of the Faculty of Afrikaans in the University of South Africa, wrote as follows in the course of a thorough analysis and discussion of the relevant problems:

"I look forward to the day when we will experience equanimity, peace and the prospect of a secure future and can live in harmony as a South African people, united in will and purpose, next to free black states which can live together with the White states in a greater whole of a United States of South Africa. With Segregation this is possible²." (Translation.)

27. Dr. A. L. Geyer, former newspaper editor, High Commissioner in London, and Chairman of SABRA, said in his Presidential address to the 11th annual congress of SABRA in July 1960:

"Last year the congress welcomed the Prime Minister's announcement of policy regarding Bantu homelands and expressed its wholehearted support thereof.

Sabra does not only endorse the policy because in our opinion it presents the only method of safeguarding the continued existence of the one White nation in this black continent. We also do so

¹ Du Plessis, L. J., "The Case in Favour of Apartheid", *Science and Freedom*, No. 10 (Feb. 1958) (Apartheid and the World's Universities: Report on a meeting held in London, Nov. 1957), pp. 32-40 at pp. 37-38.

² Van der Merwe, H. J. J. M., *Segregeer of Sterf* (1961), p. 149.

because we believe that it is morally right and that in the long run it is in the best interests of our Bantu¹." (Translation.)

28. Dr. G. Cronje, Professor since 1937 at the University of Pretoria, and now Dean of the Faculty of Philosophy, said in a recent work:

"The ideal solution for South Africa's racial problems is the effectuation of territorial separation between the various racial groups, the socio-economic development of each community, and the creation of its own form of government²." (Translation.)

29. In a recent article entitled "In Defense of Apartheid", Professor C. A. W. Manning, a born South African who was personal assistant to the Secretary-General of the League of Nations, Professor of International Law and Diplomacy in the University of Oxford, and is at present Professor Emeritus of International Relations in the University of London, wrote the following:

"That very self-determination which his fathers fought for is what the Afrikaner now envisages for each of the African peoples still subject to the white man's rule. The philosophy of separate development implies a rejection of the fallacy that wherever a single system of government is in operation, there do the governed compose a single people. Were the critics of South Africa to accept squarely the fact that South Africa comprises more communities than one, their admonitions would be more persuasive and their proposals more to the point. As it is, what many of them keep calling for is something which they might well know to be impossible—the inauguration, namely, of a system in which South Africa's many peoples would resolve themselves unreluctantly into one³."

30. Dr. J. E. Holloway, formerly Professor of Economics, Transvaal University College, Dean of the Faculty of Commerce, University of South Africa, Director of the Office of Census and Statistics, Economic Adviser to the Treasury, Secretary for Finance, and High Commissioner for the Union of South Africa in London, recently wrote a monograph entitled "Apartheid—A Challenge", in which he points out, *inter alia*, that—

"[b]asic to all problems of group relationships there is a common factor which no statesmanship is ever at liberty to disregard. This is the almost universal phenomenon that there is always a strong tendency to friction when groups, which differ from each other in important aspects, are thrown together in large numbers in the same community⁴."

After referring to the unique combination of possible sources of friction in South Africa, Dr. Holloway continues:

"The first task of statesmanship is that of sorting out the pieces of varying size, shape, colour, context and quality in this giant jigsaw puzzle. A satisfactory process of sorting out is a pre-condition

¹ South African Bureau of Racial Affairs, *Journal of Racial Affairs*, Vol. II, No. 4 (July 1960), p. 188.

² Cronje, G., *Regverdige Rasse-apartheid* (1947), pp. 155-156.

³ Manning, C. A. W., "South Africa and the World: In Defense of Apartheid", *Foreign Affairs: An American Quarterly Review*, Vol. 43, No. 1 (Oct. 1964), at p. 148.

⁴ Holloway, J. E., *Apartheid—A Challenge* (1964), p. 28.

for the success of any future policy. The frictional ingredients must be reduced to manageable proportions¹."

Dr. Holloway then illustrates his point by referring to historical examples, which he sums up as follows:

"Polarisation has been the consistent factor in group relationships throughout the ages. Apartheid has been the only principle which has worked through the ages, when these basic sources of friction have been present²."

31. Professor N. J. J. Olivier, a former Vice-Chairman of the Technical Advisory Committee of the Western Cape Committee on Local Native Administration, a member of the International Conference on Race Relations in World Perspective (Hawaii 1954), and former Vice-Chairman of SABRA who is at present Professor of Bantu Law and Administration at the University of Stellenbosch, wrote in an article first published in 1953 in the *Journal of International Affairs*:

"Politically, the policy of separate development envisages the creation of a number of Bantu territorial units with an increasing measure of self-government. The basic principles to be applied in this connection is (*sic*) that Europeans living in the native areas will be citizens of the European state; natives living in the European area will be integrated into the political machinery of the various native areas. What the eventual form of collaboration between the European sector and the various native sectors will be is difficult to foretell, but it is quite possible that it may develop along federal lines, eventually resulting in a United States of Southern Africa or a Southern Africa Confederation. Only an arrangement of this sort can do justice to the political and economic aspirations of the native peoples, and still guarantee the Europeans' continued political existence. Such a policy aims at forestalling the race conflict that is inherent in the present situation by removing the root cause of the problem—the intermixture of the races. The same solution was put in force in the former British India by its partition into the two separate states of India and Pakistan³."

D. The Churches

32. Just as in the political and intellectual life of South Africa, so also in religious circles have the problems of race relations aroused much thought, debate and, indeed, controversy. Under the heading "Religious Leaders" Applicants quote extracts from statements of members of the Anglican Church (Archbishop de Blank⁴ and the Reverend Trevor Huddleston⁵), the *Nederduitse Gereformeerde Kerk* (Dr. B. B. Keet⁶), (the *Gereformeerde Kerk* (Dr. Hugo du Plessis⁶), the Catholic Church (Archbishop Dennis E. Hurley⁷), and certain resolutions of the Cottesloe

¹ Holloway, J. E., *Apartheid—A Challenge* (1964), p. 29.

² *Ibid.*, p. 30.

³ Olivier, N. J. J., "Apartheid—A Slogan or a Solution?", *Journal of International Affairs*, Vol. VII, No. 2 (1953), p. 141.

⁴ IV, p. 283.

⁵ *Ibid.*, p. 595.

⁶ *Ibid.*, p. 284.

⁷ *Ibid.*, p. 596.

Consultation of the World Council of Churches¹. Once again, however, Applicants' "fairly selected cross-section of evaluations of apartheid" excludes the substantial body of support found for the policy of separate development in all the above churches, and the overwhelming support found in some of them.

In referring to such support, Respondent does not wish to be understood as signifying that views expressed by churches or their leaders are fit matters for introduction into the merits of political debates. The questions whether church leaders should make public pronouncements at all about matters which form the subject of practical political controversy, and, if so, to what extent and within what limits, are in themselves controversial, not the least amongst churchmen themselves. For their part the Respondent Government and its representatives have, as far as possible, refrained from drawing the views of churches and their leaders into political debates, whether in the national or international sphere, and have not taken sides in controversies between churches or their members. The exposition which follows is not intended to deviate from this approach. It is not directed at justification of Respondent's policies by the quotation of favourable pronouncements, or by the refutation of unfavourable pronouncements: the merits of Respondent's policies are dealt with elsewhere. The sole purpose of the exposition is to refute Applicants' one-sided representation, and to indicate the wide variety of views that have in fact been expressed, and are no doubt sincerely held, by various churches, and particularly *within* the various churches, by their leaders, members and adherents. As will be shown, Applicants' "cross-section" is in fact extremely unrepresentative of the major trends of thought among and within the churches.

In particular, although quoting two of its members, Applicants have entirely failed to reflect the major currents of thought in the churches which are in English commonly called the Dutch Reformed Churches². Unfortunately the views of these Churches are often not very well known to outsiders—as stated by Dr. W. A. Visser 't Hooft, General Secretary of the World Council of Churches:

"Owing to the regrettable fact that so little of the relevant literature has been translated into other languages, one finds that other Churches in South Africa or in any other countries know very little about the theological development in the Dutch Reformed Churches. Thus one can hear it said that their position with regard to race is still based on the conviction that the Bantu belongs to the descendants of Ham and must, therefore, be considered as permanently destined to the role of servant. But that is not true. The present thought in the Dutch Reformed Churches is by no means on that primitive level. The searching theological discussion which goes on in these Churches deserves to be taken very seriously³."

¹ IV, pp. 284-285.

² There are three of these Churches, viz., the *Nederduitse Gereformeerde Kerk*, the *Nederduitse Hervormde Kerk van Afrika*, and the *Gereformeerde Kerk*. The *Nederduitsch Gereformeerde Kerk* is separately organized in various provinces, the oldest or mother Synod being that of the Cape, known as the *Nederduitse Gereformeerde Kerk in Suid-Afrika* (Dutch Reformed Church in South Africa).

³ Visser 't Hooft, W. A., *Visit to the South African Churches: A report to the Central Committee of the World Council of Churches on a visit to the South African Churches in April and May 1952*, p. 14.

In the succeeding paragraphs, Respondent will give brief consideration to the trends of thought in these Churches.

33. The largest of the Dutch Reformed Churches is the *Nederduitse Gereformeerde Kerk*. Through its mission work, this Church has a long history of contact with various non-White groups in the Republic of South Africa as well as in other parts of Africa. Recently a high office bearer of the Church gave the following resumé of its missionary activities:

"... since the middle of the previous century this church has entered mission fields in various parts of Africa. Actually the sphere of her missionary labour includes 14 territories in Africa with 17 language and racial groups.

The Dutch Reformed Church has rendered extensive service in the fields of medical work, education and the provision of literature. At present she has 34 mission hospitals where nearly half a million patients receive medical treatment annually. At our mission hospital at Morgenster in Southern Rhodesia, we receive patients from over the whole of Southern Rhodesia as well as from the adjoining territories of Nyasaland, Northern Rhodesia, Bechuanaland, P. E. Africa and the Union of South Africa. The Dutch Reformed Church has also undertaken pioneer work amongst the lepers in Southern Rhodesia, Northern Rhodesia, and Northern Nigeria. At present she still runs leper hospitals and settlements in Northern Nigeria and Northern Rhodesia with 17,000 and more leper patients. In three parts of Africa, the Dutch Reformed Church by the grace of God was the first to stoop and serve these former outcasts of African society, formerly buried alive.

Pioneer work was done amongst the African blind in Southern Rhodesia, Northern Rhodesia and Nyasaland. This work is still being continued. Likewise schools for African Deaf are to be found in Southern Rhodesia, Northern Rhodesia, Johannesburg and the Transkei.

At present this Church has undertaken the editing of religious magazines in African languages, in English and in Afrikaans. No less than four printing presses of this church are daily printing literature for Africans. At present a fund of three million pounds is being raised for the distribution of Christian literature in Africa.

To carry on its extensive missionary program the Dutch Reformed Church (European) with 720,000 full members annually contributes £2,033,000—an average of more than £2 17s. *per capita*¹."

34. In consequence of its missionary activities, the *Nederduitse Gereformeerde Kerk* enjoys considerable support from non-White groups in Africa. The official records of the Church reveal the following membership figures²:

¹ Address by the Rev. W. A. Landman, Scriba-Sinodi and Director of Information of the Dutch Reformed Church in South Africa; copy of text obtained from his official records and marked: "Address: Rev. W. A. Landman", pp. 11-13.

² Save where otherwise indicated all information obtained from Rev. W. A. Landman (referred to in footnote 1, para. 33, *supra*).

(i) *Whites:*

(In South Africa, South West Africa and Central Africa, 1963)

Congregations.	917
Members	719,884

According to a sample tabulation of the South African Bureau of Statistics (based on the 1960 population census) the number of White adherents within the Republic of South Africa of the above Church is 1,326,344¹.

There are 1,470 White ministers and missionaries.

(ii) *Coloureds:*

Congregations.	166
Local units (as yet not with the status of a congregation)	16
Members	104,031

According to the Bureau of Statistics (based on the 1960 census) the number of adherents is 442,944².

There are 30 Coloured ministers and 41 evangelists.

(iii) *Bantu within the Republic:*

Congregations.	308
Members	123,536

According to the Bureau of Statistics the number of Bantu adherents of the *Three Dutch Reformed Churches* was 556,898 in 1960³. The number of adherents of the other two Dutch Reformed Churches is relatively small. The figure for the *Nederduitse Gereformeerde Kerk*, after making allowance for the other two Churches, could be between 400,000 and 500,000.

A comparison with earlier census figures shows that the influence of the Dutch Reformed Churches has increased steadily. The total figures of adherents were: 1921: 109,888; 1936: 154,080⁴; 1946: 266,734; 1951: 326,290⁵. Increased as a percentage of the total Bantu population, these figures represent: 1921: 2.34 per cent.; 1936: 2.34 per cent.; 1946: 3.41 per cent.; 1951: 3.81 per cent.; 1960: 5.10 per cent.

There are 87 Bantu ministers and 581 evangelists.

(iv) *Bantu outside the Republic:*

(Rhodesia, Zambia, Malawi, Northern Nigeria, etc.)

Congregations and outposts (preaching posts at schools in rural areas).	2,511
Members	134,912
Adherents	400,000
Mission Schools	2,073
Scholars	130,000
Teachers	3,800
Catechumen	50,000

¹ Population Census 1960: *Sample Tabulation, No. 6—Religion, All Races*, p. 2.

² *Ibid.*, p. 16.

³ *Ibid.*, p. 29.

⁴ Population Census 8 May 1951, Vol. III, *U.G. No. 62/1954*, p. 66.

⁵ *Ibid.*, Vol. VII, *U.G. No. 38/1959*, p. 76.

There are 68 Bantu ministers and 65 evangelists. Here also there are signs of healthy growth—in 1955 the membership was only 108,205 as against the above figure of 134,912 in 1963¹.

35. By reason of their close identification, as indigenous African churches, with the peoples of South Africa, the Dutch Reformed Churches have traditionally been much concerned with the problem of relations between various population groups.

In regard to a conference held in 1950, Dr. W. A. Visser 't Hooft writes as follows:

"In April 1950, the Federal Mission Council which represents the four federated Dutch Reformed Churches² as well as the three Dutch Reformed Mission Churches, held its conference at Bloemfontein. This conference was an attempt to define a constructive policy concerning the Bantu. The basic principle which permeated all discussions and resolutions was that of *apartheid*, but of *apartheid* in a very specific sense, namely as a 'process of development which seeks to lead each section of the people in the clearest and quickest way to its own destination under the gracious providence of God'. It was emphasised that the rights of every man were to be repeated and that permanent subordination of one group to another should not exist in any realm of life. The only way in which these aims could ultimately be realised was by total separation, which would mean the conversion of the native areas into true homelands of the Bantu with full opportunity for development and self-government and the replacing of the Bantu in . . . the present economic structure, which would entail great sacrifice on the part of the European. But a reorganisation which seemed to the conference quite inevitable for, as it was put in one of the documents: 'no people in the world worth their salt will be content indefinitely with no say, or only an indirect say, in the affairs of the State or in the socio-economic organisation of the country in which decisions are taken about their interests and future'³." (Italics added.)

It may be noted in passing that although Dr. Visser 't Hooft doubted the practicality of the 1950 resolutions⁴, he did not question them on ethical or religious grounds.

36. In 1956 a National Congress on the Future of the Bantu was held at Bloemfontein under the joint auspices of the South African Bureau of Racial Affairs, the Federation of Afrikaans Cultural Societies and the three Dutch Reformed Churches to discuss the subject in the light of the then recently released findings and recommendations of the Commission for the Socio-Economic Development of the Bantu Areas in South Africa, usually referred to as the Tomlinson Commission.

The following resolutions were, *inter alia*, adopted:

¹ The 1955 figure has been furnished by the Information Bureau of the Dutch Reformed Church, Johannesburg.

² This refers to the federal organization between the four provincial Synods of the *Nederduitse Gereformeerde Kerk*: vide footnote 2 in para. 32, *supra*, p. 341.

³ Visser 't Hooft, W. A., *Visit to the South African Churches: A report to the Central Committee of the World Council of Churches on a visit to the South African Churches in April and May, 1952*, p. 17.

⁴ *Ibid.*, p. 18.

- “6. (a) This Congress is convinced that in South Africa no possibility exists of a peaceful evolutionary integration of Whites and Bantu into a unitary society. A policy of integration will necessarily lead to increasing racial tension and conflict and eventually to the destruction of the national existence of one or both the groups; for this reason this Congress unambiguously rejects the policy of integration as a possible way in which a solution for this problem may be found.
- (b) On the contrary the Congress is convinced that the only acceptable policy which is also practicable, is that based on the principle of separate development whereby provision is made for the existence of separate communities in their own territories where each community will have the opportunity for a full life and development, and be assured of an unimpeded existence and right to self-determination; and furthermore the Congress expresses it as its decided opinion that for the Whites and the Bantu there can be no other acceptable policy leading to a satisfactory solution.
7. This Congress regards it as a necessary foundation and consequence of the policy of separate development that the Bantu should progressively be afforded opportunities in their own areas of participation in their own administrative affairs and for political self-expression, and wishes in this connection:
- (i) to express its appreciation of the introduction and successful application of the system of Bantu Authorities;
- (ii) to make a friendly appeal to the Government to pay particular attention to the training of Bantu chiefs and the further development of the Bantu Authorities system¹.” (Translation.)

37. In March 1960 a number of prominent leaders of the *Nederduitse Gereformeerde Kerk* (including the moderators of the different synods) published a statement in Cape Town which included the following passages:

“The Nederduitse Gereformeerde Kerk has in the past demonstrated clearly by its own policy and by pronouncements of its synods that it can justify and approve the policy of independent, autogenous development, provided that it is applied in a fair and honourable way, without affecting or injuring the dignity of the person.

The Church has also accepted that the policy will, particularly in its early stages, necessarily give rise to a certain amount of disruption and personal inconvenience and deprivation, as for instance in the case of slum clearance. The whole pass system should be seen in this light².”

Further statements by or on behalf of the *Nederduitse Gereformeerde Kerk* are considered below with reference to the Cottesloe Consultation³.

¹ *Volkshongres oor die Toekoms van die Bantoe*: Referate en besluite: Volkskongres, Bloemfontein, 28-30 Junie 1956, pp. 137-138.

² Information supplied by Dr. F. E. O'Brien Geldenhuys, Moderator of the Northern Transvaal Synod of the *Nederduitse Gereformeerde Kerk*, from his official records.

³ *Vide* particularly paras. 46 and 49, *infra*.

38. It will be apparent from the above that Dr. B. B. Keet¹ represents a minority point of view in the *Nederduitse Gereformeerde Kerk*. His work, *The Ethics of Apartheid*, from which an extract is quoted in the Reply¹ has indeed been the subject of detailed criticism by a fellow theologian, Dr. A. B. du Preez, Professor of Christian Ethics in the Theological Faculty of the University of Pretoria², who states in general:

"In his most recent work *The Ethics of Apartheid* Prof. Keet presents nothing else than a caricature of the idea of apartheid, without taking into account the connotation of the term as indicated in the history and association of his people with the Non-Whites³."

39. The smallest of the Dutch Reformed Churches is the *Gereformeerde Kerk*⁴. Applicants quote Dr. Hugo du Plessis, a member of the theological faculty of this Church, as one of the "religious leaders" relied upon by them⁵. In January 1961 the General Synod of this Church adopted the following resolution:

"From the fact that God gives each people its place (Acts 17:26), it follows that if two peoples or races live in the same territory and each wishes to preserve its own identity, inexpressible tensions arise. Territorial separation of peoples is one of the material factors in counteracting undesirable intermixture and threats to the national existence. Where this cannot be achieved, the conditions lead to absorption of the one by the other through miscegenation or violent destruction of the national identity. From this it follows that a people which wishes to preserve its identity, must make the sacrifices demanded for the acquisition and preservation of its own fatherland, *inter alia*, by recognising the rightful claims of other peoples to their own fatherland. The idea of a 'multi-racial people in a single territory' must be rejected on Scriptural grounds⁶." (Translation.)

40. Applicants' quotations from an article by Dr. Hugo du Plessis⁵ may give the impression that the author is in disagreement with the above view of his Church. Such is, however, by no means the case. Indeed, his complaint is that separate development is not being implemented fully and speedily enough. Immediately after the passage quoted by Applicants the author says:

"We must learn to adopt a more altruistic attitude, namely, to promote differentiation in the interests of the Bantu themselves. Integration is not to their advantage and for this reason we advocate autochthonous development. This is quite in order, but, we must add, permanent white domination and retarding of the freedom and advancement of the non-White are not to their advantage and not in order. We must be inspired with the ideal of helping them to develop towards a happy and prosperous independent national

¹ Quoted by Applicants at IV, p. 284.

² *Vide* du Preez, A. B., *Inside the South African Crucible* (1959).

³ *Ibid.*, p. 221.

⁴ Its total membership in 1963 was 57,223 Whites, 637 Coloureds and 8,578 Bantu according to Cawood, L., *The Churches and Race Relations in South Africa* (1964), p. 40.

⁵ IV, p. 284.

⁶ "*Uit Een Bloed . . .*": 'n Rapport aan en 'n Besluit van Die Algemene Sinode van die Gereformeerde Kerk in Suid-Afrika oor Rasseverhoudinge" (1961), p. 74.

existence. Healthy relations are only possible if the Bantu's racial dignity, identity and right to their own country is acknowledged.

For this reason we reject the utopian ideal of unity in a diversity, White and Bantu diversity, in a common fatherland and under the same government as pleaded for by Mrs. M. Ballinger, among others, in *'South Africa the Road Ahead'*. Even if it was possible, it would lead to something more than the crossing of barriers¹.

In a more recent work, Dr. du Plessis said the following:

- (a) "On Scriptural grounds we can fully associate ourselves with a just policy of autogenous development and we even prefer it to a policy of integration which implies that the soul of the Bantu must be killed and his identity eliminated²."
- (b) "The only righteous policy which will benefit both us and the Bantu, is total segregation which must be implemented gradually but as fast as possible . . .³"
- (c) "If, however, the ideal of a great future of independent states, which will be accompanied by complete segregation, is the objective and all energies are enlisted to this end, the present segregation measures may be temporarily approved provided that, as regards the permanent Bantu inhabitants in the White areas, they are gradually removed, until a state of balance and stability is achieved, when all discriminatory apartheid against such Bantu must fall away, although they can still live in separate residential areas and the industrial labourers among them be employed in parallel industries, while migrant labourers are only allowed in for brief periods. In the interval, as the Government proposes, all Bantu who live in the White territories, may be linked with the political organization of the Bantu homelands⁴." (Translation.)

41. The third Church commonly included in the description Dutch Reformed Churches is the *Nederduitsch Hervormde Kerk van Afrika*. This Church also supports the principles of separate development, as will appear from its statement at the Cottesloe Consultation⁵.

42. The Anglican Church has on the whole adopted a critical attitude towards the policy of separate development, at least as far as its clergy are concerned⁶. It must be borne in mind, however, that Anglican clergymen are, for the most part, immigrants who sometimes spend relatively few years in South Africa before leaving again, as was the case with Archbishop de Blank and the Reverend Mr. Huddleston, quoted by

¹ Geyser, A. S. *et al.*, *Delayed Action: An Ecumenical Witness from the Afrikaans Speaking Church*, p. 68.

² Du Plessis, H., *'n Nuwe Deurbraak* (1963), p. 26.

³ *Ibid.*, p. 29.

⁴ *Ibid.*, p. 30.

⁵ *Vide para. 48, infra.*

⁶ In a recent publication (Cawood, L., *The Churches and Race Relations in South Africa* (1964), p. 5) it is said that "there are many ordinary church members who hold racial views diametrically opposed to those expressed in official statements by their churches. A prominent Anglican leader recently acknowledged in a press statement that there was "a great gulf between our profession and our practice in the matter of race relations".

Applicants¹. Their knowledge of the country, its peoples and languages is often very inadequate, or one-sided, leading to judgments which are faulty. It is symptomatic of this situation that Archbishop de Blank felt constrained to issue the following apology at the end of the Cottesloe Consultation².

"In our conviction that acquiescence in a policy of discriminatory segregation gravely jeopardizes the future of the Christian Faith in South Africa, we believed—and still believe—that it was right to speak urgently, clearly and uncompromisingly. But in the light of what we have learnt here and the information now put at our disposal, we confess with regret that in the heat of the moment we have at times spoken heatedly and, through ignorance (for which ignorance we cannot be altogether held responsible), have cast doubt on the sincerity of those who did not accept the wisdom of such public action.

Nevertheless the delegates of the N.G.K. [Nederduitse Gereformeerde Kerk] have met with us in the fullest fellowship and we have been deeply moved by this spirit of brotherly goodwill. Where, in the past, we have at any time unnecessarily wounded our brethren, we now ask their forgiveness in Christ³."

43. As will be noted below⁴, at the Cottesloe Consultation the opponents of government policy appeared to be critical of the application rather than the principle of separate development. This seems to have been the attitude also of Archbishop de Blank.

At a meeting of the B.B.C. Brains Trust on 6 July 1958, Archbishop de Blank is recorded as having confirmed that the following statement attributed to him was correct:

"I don't feel that apartheid, in the sense that it means a separate development of the races, is wrong in itself⁵."

And during a visit to the United States of America in 1958, he stated: "My chief quarrel with apartheid is in the way legislation is formulated and implemented." He added that for himself he thought the races preferred to be independent of each other rather than integrated⁶.

44. Although the attitudes expressed by Archbishop de Blank are commonly found amongst Anglican clergy (although usually not in such an extreme form), some prominent members of the Anglican hierarchy in South Africa nevertheless support the policy of separate development. Thus, for example, Bishop B. W. Peacey, who worked for many years in East Africa as well as South Africa, wrote in 1953:

"An examination of the *prima facie* evidence for a policy of differentiation has led to a confirmation both of its Christian Spirit

¹ IV, pp. 283-284 and 595-596.

² As to which, *vide* paras. 42-45, *infra*.

³ *Cottesloe Consultation: The Report of the Consultation among South African Member Churches of the World Council of Churches, 7-14 Dec. 1960 at Cottesloe, Johannesburg*, pp. 81-82.

⁴ *Vide* para. 47, *infra*.

⁵ Steward, A., *The Challenge of Change* (1962), pp. 43-44.

⁶ Segal, R., *Political Africa: A Who's Who of Personalities and Parties* (1961), p. 69.

and of its justice to all races concerned. What then? It would seem to be necessary to have laws to implement it ¹."

And:

"[i]t is not only the European culture that we have to consider, the attempt must be made, under every consideration of justice, to give to Bantu culture its opportunity to develop to meet a new situation: neither of those cultures is static, develop they must, and in justice to both I can see no reason why either should lose the many splendid characteristics which both cultures have. A policy of assimilation seems to me a policy which goes forward in fatalism, not in faith. A policy of differentiation seems to me to express what is common to all cultures, to learn to survive in the face of new circumstances ²."

45. In 1960 the World Council of Churches arranged a consultation, generally known as the Cottesloe Consultation, with leaders of the eight South African Churches which were then members of the Council, viz., the Bantu Presbyterian Church of South Africa; the Church of the Province of South Africa (Anglican); the Congregational Union of South Africa; the Methodist Church of South Africa; the *Nederduitse Gereformeerde Kerk of the Cape Province and the Transvaal*; the *Nederduitsch Hervormde Kerk van Afrika* and the Presbyterian Church of Southern Africa. Applicants refer to some extracts from the Consultation Statement issued at the close of the Conference ³. They refrain, however, from citing other passages and contemporary statements which demonstrate that the participants in the Consultation by no means rejected the policy of separate development. In fact, the opening paragraphs of the Statement included the following:

"The general theme of our seven days together has been the Christian attitude towards race relations. We are united in rejecting all unjust discrimination. Nevertheless, widely divergent convictions have been expressed on the basic issues of *apartheid*. They range on the one hand from the judgment that it is unacceptable in principle, contrary to the Christian calling and unworkable in practice, to the conviction on the other hand that a policy of differentiation can be defended from the Christian point of view, that it provides the only realistic solution to the problems of race relations and is therefore in the best interests of the various population groups.

Although proceeding from these divergent views, we are nevertheless able to make the following affirmations concerning human need and justice, as they affect relations among the races of this country. In the nature of the case the agreements here recorded do not—and we do not pretend that they do—represent in full the convictions of the member churches ⁴."

46. It is clear therefore that the passages quoted by Applicants do not imply any condemnation of the policy of separate development as such.

¹ Peacey, B. W., "Race Relations in South Africa: Principles and Policies", *Journal of Racial Affairs* (SABRA), Vol. 4, No. 3, Apr. 1953, p. 12.

² *Ibid.*, p. 16.

³ IV, pp. 284-285.

⁴ *Cottesloe Consultation*: Report of the Consultation among South African Member Churches of the World Council of Churches, 7-14 Dec. 1960 at Cottesloe, Johannesburg (1961), p. 73.

This was emphasized at the time by the representatives of the *Nederduitse Gereformeerde Kerk* in the following statement:

"The delegations of the Nederduitse Gereformeerde Kerke of the Cape and Transvaal wish to state that we have come to consult with other churches under the Word of God and with deep concern for the various and complicated problems of race relations in the country. We realise with deep Christian concern the needs of all the various population groups and that the Church has a word to speak to them.

We wish to confirm that, as stated in the preamble to the Consultation Statement, a policy of differentiation can be defended from the Christian point of view, that it provides the only realistic solution to the problems of race relations and is therefore in the best interests of the various population groups.

We do not consider the resolutions adopted by the Consultation as in principle incompatible with the above statement. In voting on Resolution 15¹ the delegations of the two churches recorded their views as follows:

'The undersigned voted in favour of Point 15, provided it be clearly understood that participation in the government of this country refers in the case of White areas to the Bantu who are domiciled in the declared White areas in the sense that they have no other homeland'²."

47. It is interesting to note in more detail the differences in approach to the principles of apartheid (as it was referred to) which emerged from the Consultation. The following is an extract from the discussions on this aspect:

"The most serious objection which may be raised against the *apartheid* policy is that it implies a concealed form of discrimination based on colour or race. It is just here that the difference between differentiation and discrimination was stressed.

Where there are real and natural differences between groups, or profoundly different needs and circumstances—the kind of situation which arises spontaneously in society—it is reasonable that these different groups should be provided for differently, and treated differently. This recognition in practice of natural differences may be described as *differentiation*.

Where, however, groups which differ in race or colour have nevertheless equal needs and similar circumstances—the kind of situation that is developing in our urban, industrial society—it is wrong to exclude some groups, by degrading, uncharitable and slighting deprivations, from provisions and treatment enjoyed by one group. This denial in practice, on the grounds of race and colour, of equal needs and similar circumstances may be described as *discrimination*.

So understood, differentiation may be defended as a matter of principle, but not discrimination. It was readily admitted that differentiation has in some cases degenerated into discrimination; but it was urged that discrimination could not be eliminated by abolishing differentiation. Further, it was pointed out that differentiation

¹ Quoted by Applicants at IV, p. 285.

² *Cottesloe Consultation: op. cit.*, p. 80.

in our society is not the product of the policy of the present government. The government has given its own statutory expression to a situation which has existed for a long time and which has been the result of an historical process.

This discussion, while serving a useful purpose in the exchange of ideas, did not issue in any generally agreed statement. People as deeply involved as we are in a human situation find excessive difficulty in terms rather than in ideas, are naturally averse to words which have become shibboleths, and which have acquired dangerous connotations in contemporary usage. There is an impoverishment in language in words which we no longer dare to use.

In one sense, *apartheid* means the ideal of optimum independent development based on the recognition in practice of natural differences; in another sense, the words mean the embodiment of this policy in the legislative programme of the present government; in yet another sense, the same word means the application of this legislation by individuals to individuals. Some of us were prepared to defend the ideal, and the intention of the government in its legislation as a sincere attempt to embody this ideal; others felt that *apartheid* must be judged by its application in our society; and when understood as the segregation of racial groups by statutory compulsion, carried through without effective consultation, and involving discrimination against the groups affected, it was felt by these, must be condemned¹.

It is to be noted that the objections raised by the opponents of separate development related not to the principle thereof but to certain alleged defects in its application.

48. At the conclusion of the Consultation, the following statement was made by the delegation of the *Nederduitsch Hervormde Kerk van Afrika*:

"We as delegates of the *Nederduitsch Hervormde Kerk* are grateful for the opportunity we had to listen to, and partake in, the witness of the different churches.

We wish, however, to state quite clearly that it is our conviction that separate development is the only just solution of our racial problems. We therefore reject integration in any form as a solution of the problem. The agreement that has been reached contains such far-reaching declarations that we cannot subscribe to it. We can therefore not identify ourselves with it.

We further wish to place on record our gratefulness to the Government for all the positive steps it has taken to solve the problem, and to promote the welfare of the different groups.

The *Nederduitsch Hervormde Kerk* will in future as in the past accept its responsibility to witness to the government and people in accordance with the Word of God²."

49. Applicants also refrain from informing the Court that the Cottesloe Consultation gave rise to further debate within the synods of the Cape and Transvaal *Nederduitse Gereformeerde Kerk*. The Cape Church expressly reaffirmed its attitude regarding the policy of separate development and—

¹ *Cottesloe Consultation*: *op. cit.*, pp. 23-24.

² *Ibid.*, p. 79.

"[declared] emphatically that a policy of differentiation is well-founded scripturally, offers the only realistic solution for the problems of race relations in our country, and therefore best serves the interests of all population groups ¹". (Translation.)

Regarding the specific resolutions of the Consultation, the Synod declared:

"Although some of the resolutions . . . would not *per se* be unacceptable, if differently formulated, the meeting cannot associate itself with the findings for the following reasons:

- (a) The effect of the whole and the combined witness of the resolutions is such as to affect and undermine the policy of separate development;
- (b) some of the findings are pertinently in conflict with the principle and policy of differentiation, e.g., points . . . in which political integration is advocated, and points . . . in which, by an impermissible application of Scripture, social and ecclesiastic integration is advocated;
- (c) a large number of the resolutions deal with matters of practical politics on which the Church as institution should not express any opinion unless one or other clear Scriptural principle is involved ²."

The Transvaal Church decided at a meeting of its General Synodal Commission on 2 March 1961 that an *ad hoc* Commission should consider the merits of the Cottesloe resolutions. At the same time the Synodal Commission reaffirmed that the Church—

" . . . has also as regards the political sphere always been in favour of a policy of differentiation or separate development which is based on the principle of Christian trusteeship ³". (Translation.)

After the *ad hoc* Commission had reported, the Synod resolved generally that any of the Cottesloe resolutions which were in conflict with the formulated policy of the Church, were not acceptable to the Synod ⁴. It also expressly resolved as follows:

"The Synod reaffirms the Church's acceptance that it is a part of its vocation to promote the highest interests also of the non-European population groups and is convinced that this can best be achieved by following the historic policy of differentiation ⁵." (Translation.)

From the facts set out above, it is clear that the discussions at the Cottesloe Consultation, as well as its aftermath, clearly belie any suggestion that the Churches participating therein were united in opposing the policy of separate development.

¹ Handeling van die Vier-en-Dertigste Vergadering van die Hoogerwaarde Sinode van die Nederduitse Gereformeerde Kerk in Suid-Afrika: Gehou in Kaapstad op Donderdag, 19 Oktober 1961 en volgende dae (Sinodale Handeling—Acta Synodi), p. 50.

² *Ibid.*, pp. 50-51.

³ Handeling (Acta) van die Vyf-en-Twintigste Sinode van die Ned. Geref. Kerk van Transvaal: 1961, p. 350.

⁴ *Ibid.*, pp. 382-383.

⁵ *Ibid.*, p. 382.

50. As far as the Catholic Church is concerned, Applicants are correct in saying that certain archbishops have been critical of Respondent's attitude¹. Applicants do not, however, mention that other prominent men in the Church find no objection to the principles of Respondent's policies. On 18 February 1964 Archbishop W. P. Whelan, Director of Press, Radio and Cinema of the Administrative Board of the South African Catholic Bishops' Conference, issued a statement in question-answer form of which the following are extracts:

"Q. *Are you disturbed by the situation in South Africa?*

A. Yes, and no. Yes, in so far as South Africa has been made the object of criticism that is largely prejudiced or, to say the least, uninformed.

Also because all the fair promises concerning other parts in Africa have proved to be such a grievous disappointment. No—because it is clear that the South African situation, in spite of its defects, is stable, secure, and full of prospects for future development.

I believe that when one considers a country's socio-political future it must always be against the background of its economic possibilities.

In this respect South Africa offers unrivalled possibilities, unequalled anywhere in Africa.

For this reason I foresee a happy issue out of our current social and political difficulties, including those arising from the multi-racial character of our society.

Q. *Will this necessarily involve the abandoning of the apartheid policy?*

A. Not necessarily.

Q. *But is apartheid not an injustice which must go?*

A. It all depends on what you mean by apartheid.

Q. *What do you mean?*

A. It is crucial in any discussion on this subject to distinguish clearly between the idea of *apartheid* or separate development, or whatever else it may be called, on the one hand, and, on the other, the actual laws and regulations which the public authorities may make to implement the theory.

The question to be asked is whether or not injustice is inherently involved in the policy of separate development as it is being currently pursued.

Q. *Is the theory of apartheid or separate development not in itself vicious?*

A. There is no teaching of the Church in opposition to the idea of a state composed of a number of national or racial groups, maintained in their separate and distinct identity by the state of which they form a part. This is clear from the Church's attitude concerning the rights of national minorities, so hotly debated during the first 50 years of this century.

This was reiterated recently in Pope John's encyclical *Peace on Earth*. The Church has often declared that public authorities

¹ IV, p. 596.

have an obligation to assist the cultural and racial groups in a pluralistic state in their distinctive development.

Q. *Can it be said that the Church does not regard the destruction of such groups as a matter of indifference?*

A. That is correct. The Church regards as immoral any policy aimed at levelling such ethnic groups into an amorphous cosmopolitan mass.

The Bishops of the United States have even gone so far as to say that these heterogeneous racial and cultural groups have an innate right to exist.

This is also the attitude taken up by the United Nations in 1948-49 when it condemned genocide, which was extended in meaning to include the physical destruction or enforced integration not only of racial groups, but of national and religious groups as well.

Q. *Has South African 'apartheid' been officially condemned by the Church?*

A. In 1958, Catholics were informed by the chairman of the administrative board of the South African Catholic bishops' conference that they were perfectly free to vote for any of the parties contesting the general election.

This response could not have been given if any party had been judged to be advocating a policy which, considered as a whole, was immoral.

Q. *But does not the policy of separate development, which involves extensive Government interference in the lives of so many individuals bring with it necessarily an undue infringement of human rights?*

A. It is difficult to know with certainty.

The highly complex structure of modern society has forced governments everywhere to interfere more and more in the lives of their subjects.

This is especially true of the welfare state, where virtually every aspect of life is regulated by public authorities of different kinds.

Exactly where the boundary line lies, beyond which a governing body may not legitimately go, is impossible to discern in general.

It has to be judged in each particular case. So we read in Pope John's encyclical *Peace on Earth*: 'Indeed the whole reason for the existence of civil authorities is the realization of the common good, it is clearly necessary that in pursuing this objective they should respect its essential elements, and at the same time conform their laws to the needs of a given historical situation.'

Q. *Surely 'apartheid', which denies the democratic principle of one man, one vote by excluding 80 per cent. of the population of the electorate, cannot be reconciled with Christianity?*

A. The first point to make clear is that the Church has never considered democracy to be the only form of government compatible with Christianity.

In *Peace on Earth*, Pope John wrote: 'It is impossible to determine once and for all, what is the most suitable form of government, or how civil authorities can most effectively fulfil their respective function . . .

In determining the structure and operation of government which a state is to have, great weight has to be given to the historical background and circumstances of given political communities, circumstances which will vary at different times and in different places.'

Even in a State which is democratic in structure, the one man, one vote principle is not always desirable.

Thus the Pope goes on: 'It is in keeping with their dignity as persons that human beings should take an active part in government, although the manner in which they share in it will depend on the level of development of the political community to which they belong.'

We know, for instance, how restricted the electorate was in ancient Athens: the home of democracy; and even to-day it is not considered a grave injustice that women in Switzerland have no vote.

In recent times we have seen too many cases of the one man, one vote slogan being used as a pretext by demagogues to seize power which they exploit for their own ends.

A democracy based on a wide electorate seems to secure the common good only in highly developed and homogeneous societies. This is freely acknowledged in Africa.

This, too, was in the minds of the South African bishops in 1952 when they declared that 'the great majority of non-Europeans, and particularly the Africans, have not yet reached a stage of development that would justify their integration into a homogeneous society with the European.

The association of men, coming together in societies, gives rise to other rights which can be termed secondary, derivative or contingent. They vary greatly according to the type of society evolved, the recognition accorded them and the qualifications necessary to possess them.

'Among such are to be included the right to vote in the election of legislative bodies.'

In South Africa there is a growing tendency to accord to non-Europeans an active participation in the affairs of the country.

That these differ for different groups is in keeping with Pope John's statement quoted above.

In the Cape, the Coloured people have elected representatives in Parliament. The recent establishment of the Transkeian Parliament, with its considerable power of local government, and the formation of the National Indian Council, are further new beginnings¹."

51. Archbishop Whelan's statement gave rise to considerable comment and discussion. It was welcomed, *inter alios*, by a regular contributor to a Catholic monthly who wrote:

¹ *The Cape Times*, 19 Feb. 1964.

"As I see the matter, the National Party has, since Dr. Verwoerd attained control, changed radically as regards its racial policies. The exaggerated segregation policy under permanent European domination of the past has changed completely to a policy of dividing up South Africa into a number of sovereign independent Bantustans and one European State. I am glad that the National Party has turned a somersault. It means that all idealistic objections from 'moralistic' circles fall away, and that the whole matter can be discussed on a purely technical level. I find it difficult to understand how even the most serious idealists can condemn the Government when it wishes to grant fatherlands to specified population groups. To provide a people with a fatherland is certainly no moral transgression¹."

"Millions of us—perhaps all of us—are of the opinion that the racial situation in our country cannot remain as it is at the present moment. Most of us are also aware that whatever change is brought about it cannot occur with one clap of thunder. Before us we have a clear choice of three ways: unconditional complete integration in the social, economic and political spheres, of all our racial groups ('Shake the Bottle'), conditional and partial integration, or: Separate Development. Every citizen—also every Catholic—is completely at liberty to make his own choice.

In my particular circumstances it is almost self-evident that I am acquainted with the political convictions of many of my co-religionists. I am fully aware of the fact that *all* the political parties in the Republic have Catholic supporters. It is not in the least my intention to sail under false colours. I personally do certainly not support the National Party, but the assumption that Catholics must by reason of their faith oppose the present Government is the most complete nonsense. To be completely candid, the most fiery Nationalists I know are Catholics. In passing, I cannot help thinking of my highly respected friend, a priest living somewhere in Natal. He sometimes gives me a very formal scolding if I criticise the National Party in public²." (Translation.)

52. Respondent will conclude this discussion of trends of thought among churches in South Africa by quoting a Jewish religious leader. Rabbi Singer of Johannesburg said in an address at the Adas Congregation Synagogue, Connecticut Avenue and Porter Street, Washington, D.C., on 8 November 1957:

"Many of you might have gained the impression that some of the laws enacted in South Africa have a repressive or discriminating effect; but I want to impress on you—and I say this from a pulpit of the House of God—that no single Act has been passed in South Africa which is not wholly intended to protect people who are unable to protect themselves³."

¹ *Die Brug Tussen Protestant en Katoliek*, Jaargang 13, Nr. 4, Apr. 1964, p. 4.

² *Ibid.*, p. 5.

³ *South Africa Today* (newsletter issued by the South African Information Adviser, Ottawa), 31 Dec. 1957, p. 10.

53. The present discussion relates to trends of thought amongst South Africans, and for that reason views expressed by foreign churchmen¹ are not referred to herein. Respondent nevertheless wishes to point out that acknowledgement of the justice and equity of the policy of separate development is found to an increasing extent also among religious leaders in other parts of the world, as will be shown in due course².

E. Authors and Journalists

54. From what has been said heretofore, it will already be obvious that the same divergence of political views would be found among authors and journalists as among other sections of the population. Applicants quote, in this category, Mr. Alan Paton³, Mr. Stanley Uys⁴, Mr. Patrick van Rensburg⁵, Mr. Colin Legum⁶ and an editorial from *The Star*⁷.

Reference has already been made to the active political career of Mr. Paton⁸. *The Star* is a newspaper published in Johannesburg. Politically it supports the opposition, and many of its leading articles are critical of government policy, or at least certain aspects thereof. Needless to say *The Star* is not the only newspaper in the country which supports the opposition parties—in a country in which freedom of speech operates, and which is faced with complex and contentious problems, one would expect a certain amount of newspaper criticism⁹. By the same token, one would also expect newspaper support for government policies, and this expectation would also not be disappointed. Great newspapers such as *Die Burger*, *Dagbreek*, *Die Vaderland*, and others support the principles of government policy and normally also the detailed application thereof. All these newspapers employ journalists and columnists who have written in favour of government policies. Had Applicants really attempted a "fairly selected cross-section of evaluations of apartheid"¹⁰ by authors and journalists, they would have been compelled to devote a considerable part thereof to views of writers who advocate or propagate the policy of separate development. Instead, they limit themselves to opponents of government policy, and even there they show poor discrimination in their choice of persons. Thus they under-represent the category of responsible and influential critics, and concentrate on nonentities like Patrick van Rensburg and persons such as Stanley Uys and Colin Legum who have attained a certain measure of notoriety from the very irresponsibility of some of their writings, or their extreme views on political conditions in South Africa. It is, for example, interesting to compare the extracts from

¹ Save those who hold or have held office in South Africa for some length of time. *Vide*, e.g., para. 42, *supra*.

² *Vide* Chap. VII, paras. 29-31, 33-35, *infra*.

³ IV, p. 287.

⁴ *Ibid.*, pp. 287-288.

⁵ *Ibid.*, p. 288.

⁶ *Ibid.*, pp. 288-289.

⁷ *Ibid.*, pp. 597-598.

⁸ *Vide* para. 15, *supra*.

⁹ Indeed, had Applicants wished, they might easily have culled much more unbridled criticism of government policies from the editorial pages of certain South African newspapers.

¹⁰ IV, p. 277.

the writings of Uys and Van Rensburg¹ with the following quotation from a leading article in *The Star*, also one of Applicants' "authorities":

"The success of Transkei self-rule has now become as important to Africans everywhere as it is to the Government . . .

What matters now is that both [the Government and the Bantu] want it to work, and so, now, does a large part of the White population which does not share the Nationalist belief in separate development as a final solution . . .

Self-government for overwhelmingly African areas is thus seen to be a worth-while objective for its own sake. Economic development is even more so²."

55. Although the pro-Government press is predominantly in the Afrikaans language, the policy of separate development has often been defended also by English-speaking journalists. Among the latter, reference may be made to A. W. Steward, who wrote recently:

"We who support apartheid have searched our hearts and we firmly believe that separate national development is the only solution to our problem—that it is the only policy that will avoid disaster and safeguard for both black and white their political rights. And now may I just quote a few words from General Smuts. These are the words: 'It is useless to try to govern black and white in the same system'³."

56. Another English-speaking commentator is H. Maclear Bate, who, in a book entitled *South Africa without Prejudice*, wrote, *inter alia*, as follows:

"To sum up apartheid: the main points are that it is not a new policy but traditional and has the backing of the overwhelming majority of South Africans. The South Africans, because the ratio between black and white is something like four to one (aggravated by four hundred thousand Indians and one million coloured people), believe that intermingled living would inevitably lead to their submersion, which they are naturally not prepared to accept. They are equally aware that a policy of oppression is as immoral as it is impossible. They are adamant that a policy of integration or assimilation is unthinkable and repulsive to black and white . . . Having had three centuries of the closest association with the Bantu the South Africans assert that they are better able to understand their own problems than any other race and that the only equitable solution to the racial problem in South Africa is apartheid which ensures to both black and white the means of continued existence with increasing prosperity and in an atmosphere of goodwill⁴."

57. The views of Afrikaans-speaking journalists have unfortunately only seldom been expressed in the English language. One such instance is the article by W. van Heerden, to which reference has been made⁵. In this article the author commences by stating the following fundamental consideration:

¹ IV, pp. 287-288.

² *The Star*, 31 July 1964.

³ Steward, A., *The Challenge of Change* (1962), p. 48.

⁴ Bate, H. Maclear, *South Africa without Prejudice* (1956), pp. 122-123.

⁵ II, p. 469.

"The basic viewpoint underlying the concept of separate White and non-White states in South Africa is the belief that, whatever theories may be held to the contrary, it will never in practice be possible for Europeans and Africans to govern a common homeland together to the satisfaction of both. Either the one or the other will always consider himself at the wrong end of the stick, and racial injustice, whether imaginary or real, has right through history proved to be the most instant agent to set human emotions aflame as well as the most powerful force to keep racial consciousness alive¹."

After considering the background of, and justification for, separate development, he expresses the following optimistic view:

"There can be little doubt that, should the Black and White races of this country succeed in sharing a subcontinent on the lines indicated by the Transkeian agreement, Southern Africa can develop into one of the great commonwealths of the world. With the White man's contribution of know-how, of organizing ability and enterprise and of human values, and with the virility, youthful ambition and manpower that the Black man can add, there is hardly a limit to the possibilities ahead. With world confidence assured and with natural resources practically limitless, we have a future to share which only our own denseness can deprive us of²."

58. As a random example of pro-government editorial writing, reference may be had to the following translation from a leading article in *Die Burger*:

"The Government's policy of Bantu homelands is finding increasing acceptance, also outside the ranks of the National Party, as at least a contribution towards a solution of the South African racial problem. This acceptance is found in foreign countries. It is found in South Africa among large numbers of Bantu both within and outside the Bantu homelands. It is found in a newspaper like the Johannesburg "Star", whose attitude is not condemned by its readers. It is also encountered in intellectual circles which could never yet have been accused of supporting the Government.

Briefly, a new outlook on the Bantu homelands policy and consequently a new outlook on the nature of the South African problem has been a striking feature of the South African political pattern during recent years³. (Translation.)

59. Further examples from the writings of South African journalists and authors, both Afrikaans- and English-speaking, who have expressed support for the policy of separate development, or certain aspects thereof, could be given *ad infinitum*. However, the information and quotations set out above should suffice to establish beyond doubt that Applicants' claim of providing a "fairly selected cross-section of evaluations of apartheid" by South African authors and journalists, is entirely unfounded.

¹ van Heerden, W., "Why Bantu States?", *Optima*, Vol. 12, No. 2 (June 1962), p. 59.

² *Ibid.*, pp. 64-65.

³ *Die Burger*, 20 Oct. 1964.

F. South African Bantu

60. It will be convenient at the outset to give a short exposition of the various political trends amongst the South African Bantu. To a certain extent these trends correspond with political movements amongst the Europeans. Thus, for example, both the Progressive Party¹ and the Liberal Party² are multi-racial, although the extent of their support among the Bantu population is probably not large.

61. In addition there exist certain all-Bantu organizations. The first is the African National Congress (A.N.C.) which was established in 1912 with the object of promoting the advancement of the Bantu people politically, economically, socially, educationally and industrially. In recent years this organization has become more militant and has increasingly been subject to Communist influence. In 1960 it was declared an unlawful organization. Ex-chief Albert Luthuli³ was at that stage its leader and Nelson Mandela⁴ its deputy leader. After its banning, the A.N.C. established a military section called the *Umkonto we Ziswe* (Spear of the Nation) the leaders of which (including the said Mandela) were subsequently charged with and convicted of various offences arising from a plan to foment rebellion in South Africa. In his judgment at the trial of these persons⁵, Mr. Justice de Wet (Judge-President of the Transvaal Provincial Division of the Supreme Court) described the creation of *Umkonto we Ziswe* as follows:

“According to the evidence of No. 4 Accused [Govan Mbeki], which in this respect appears to me to be true, it was decided at the meeting of the Executive or Central Committee of the A.N.C. in June of 1961 to ‘allow’ its members to form a body to engineer and direct acts of sabotage against targets described as ‘symbols of apartheid’ which included buildings belonging to the Government and to the Bantu Affairs Department and communications including electric, telephone and railway signal installations. It is also clear from his evidence, considered in relation to the statement of No. 1 Accused [Nelson Mandela] and in relation to the documentary evidence, that the latter was the prime mover in forming the organization. The latter had been deputy leader of the A.N.C. prior to its being banned in 1960, but had continued his activities. It appears to me from the evidence and documents that the leader of the A.N.C., Luthuli, was informed about the activities of the *Umkonto* and consulted from time to time but kept in the background⁶.” (Footnotes omitted.)

The nature of the conspiracy with which the accused were charged, was summed up by the learned Judge as follows:

“According to the evidence Exhibit ‘R71’ entitled ‘Operation Mayibuye’ (Operation come back) was lying open on the table in Room 1 when the accused were arrested. This document is a lengthy

¹ *Vide* para. 7, *supra*.

² *Vide* para. 9, *supra*.

³ Quoted by Applicants at IV, pp. 289-290.

⁴ Quoted by Applicants at IV, p. 291.

⁵ Often referred to as the Rivonia trial after the Johannesburg suburb in which the conspirators were arrested.

⁶ *Rivonia Judgment* in the Supreme Court of South Africa (Transvaal Provincial Division), unpublished, p. 19.

one and contains a detailed plan for the waging of guerilla warfare and thereafter a full scale rebellion against the Government of this country. Part I sets out that it is clear that 'White supremacy' cannot be overthrown otherwise than by a revolution, that the ingredients of a revolutionary struggle are present. I quote only a few passages from this part 'The objective military conditions in which the Movement finds itself makes the possibility of a general uprising leading to direct military struggle an unlikely one. Rather, as in Cuba, the general uprising must be sparked off by organized and well prepared guerilla operations during the course of which the masses of the people will be drawn in and armed' . . . Part 4 deals with internal organization and I quote only two passages from this part, 'Our target is that on arrival the external force should find at least 7,000 men in the four main areas ready to join the guerilla army in the initial onslaught. These will be allocated as follows: Eastern Cape to the Transkei 2,000; Natal to Zululand 2,000; North-Western Transvaal 2,000; North-Western Cape 1,000'. 'In order to draw in the masses of the population the political wing should arouse the people to participate in the struggles that are designed to create an upheaval throughout the country' ¹."

That *Umkonto we Ziswe*, or, at any rate, its author, Nelson Mandela, was under Communist domination, appeared clearly during the said trial. In this regard the learned trial Judge stated:

"[The witness 'X'] said that when he addressed the Natal Regional Command Accused No. 1 [Nelson Mandela] said that persons of the A.N.C. and Umkonto who visited other African countries should be careful not to admit that they were Communists or sympathised with the Communists and instanced the case of one Mtchali who was cold-shouldered because he said he was a Communist. Accused No. 1 [Mandela] was at great pains to deny that he was a Communist, had Communist sympathy or that he had said this, but it is interesting to compare what he writes in his report on the Pafmeca Conference under the heading 'Political Climate' namely 'Clear that in this area there are great reservations about our policy and there is a widespread feeling that the A.N.C. is a Communist dominated organization'. I may add that I share this feeling after hearing all the evidence in the present case. In addition there is a lengthy exhibit in the writing of Accused No. 1 [Mandela] entitled 'How to be a good Communist'. I have no doubt that the evidence of the witness 'X' is correct ²."

62. Another Bantu terrorist organization which is of relevance for present purposes is the Pan-Africanist Congress (P.A.C.). This organization was established in 1959 after a split in the A.N.C. The founders of the P.A.C. were reputedly opposed to the A.N.C. policy of co-operating with organizations of Indian, Coloured and European persons, as well as to its Communist affiliations. Despite the protestations of some of its leaders, it seems clear that the P.A.C. is an extremist and exclusive Black nationalist organization, with strong anti-White and anti-Indian policies.

¹ *Rivonia Judgment* in the Supreme Court of South Africa (Transvaal Provincial Division), unpublished, pp. 23-24.

² *Ibid.*, pp. 38-39.

The latter aspect appears even from the article from which Applicants' quotation of Robert Sobukwe, the ex-President of the P.A.C., is derived. The author of the said article states:

"The few important gaps in the theory of the Pan-Africanists had been provided in an earlier address by Mr. Zack Mthopong, later to be elected to the organization's national executive. He said there could be no co-operation at this stage between the Africanists and Whites until the contradictions between the national groups had been resolved by the Africans. The Africanists, he said, wanted a non-racial democracy in which the African majority would rule. They did not believe in race, only in humanity.

.....

And herein perhaps lies the Africanist's greatest responsibility: to resist the temptation to manipulate language and encourage words like 'African' to mean all things to all men. If they are sincere in their refutation of 'race', then they should encourage Africans of Indian, English, Dutch and other extractions to join them, instead of vigorously discouraging them as they are doing now. It is disquieting that there are men in their ranks like Madzunya, who is on record as saying 'no White man is sincere'.

.....

The Africanist line implies somehow first- and second-class Africans, with skin-colour being a factor in classification. In other words: 'All who give their allegiance to Africa are Africans, but some Africans are more African than others' ¹."

63. The racial exclusiveness of the P.A.C. appears also from a document written in 1960 by the said Sobukwe while in gaol and which was discovered by the authorities before it could be smuggled out. Extracts from the document are cited solely to indicate the unabashed attempts at stirring up hostile feelings against other groups. Regarding the Indians, he wrote:

"Their present day politics consist of (chasing with the hound and running with the hare).

They will bribe the oppressor for favours and dole hundreds of pounds to any seemingly powerful organisation of the oppressed people so as to avoid disturbing occurrences that may affect them adversely.

A common practice among them is that of claiming to be of pure Indian blood. Here also you begin to see the influence of their culture. Because of the fact that Indian women must at all times be either expectant or having babies, and because Indian women must always stay indoors, particularly after sunset, the bulls [go] to the market to satisfy their sexual needs on the African women. This is one of the factors that led to the Durban riots of 1949.

Indians seduce and render pregnant African women and then disappear leaving the poor women to face the insult. That is how they keep their so-called purity ²."

¹ Rodda, P., "The Africanists Cut Loose", *Africa South*, Vol. 3, No. 4, July-Sep. 1959, pp. 25-26.

² Sobukwe, R., Unpublished manuscript, 1960, p. 3. (Errors not corrected.)

And regarding Coloureds:

"... the 'Coloureds' in particular adopt a hostile attitude towards Africans. The majority of these are in the Cape and they regard themselves as superior to the African. Many of them tend to play white, and wish to be regarded as 'Amper Bosses'. [Nearly bosses.] Their culture of course is that of the *Afrikaner*—a very backward white tribe.

They know no politics other than *Brandewyn*. [Brandy.] They will put up a new organisation whenever they entertain a political grievance which is more else a request that a additional light be put up in one of the dimly lit streets. They will do anything to be in the good books of any *Government* 1."

His views on Europeans are equally uncomplimentary. Thus he wrote:

"Europeans are ruled by fear that once they lose their positions as oppressors, the revenge of the African people who have for many years been subjected to ruthless tortures of body, mind and soul, may be uncontrollable. They will therefore actively try and maintain the status quo, especially because they benefit from it. The strongest group in this type of Europeans are those who still believe that they can maintain their position in this country indefinitely if only their machinery is in order . . .

There are a few of the European minority who realise that it is later than Verwoerd and Graaf think. They realise that the forces of African Nationalism will soon overpower the clay God known as 'White Domination'. To them the solution lies in making allowances to certain Africans so that once these privileged Africans exist, they will then act as the buffers, if not the shock absorbers. There will then be a deviation in the liberatory front. This will then remove the eyes of the African from the genuine issues involved to such frivolous matters. This is the attitude of parties like Progressives and Liberals 2."

In the same document, Sobukwe also took a passing swipe at the leader of his main opposition group in extremist African politics, ex-Chief Albert Luthuli, leader of the A.N.C.³ Luthuli, according to Sobukwe was one of the Chiefs "... who praise the Government for its abundant offers to the so-called Bantu people" 4.

In pursuance of its political objectives, the P.A.C. (or, as it is also known, Poqo) has been responsible for a number of particularly savage murders, for the most part of Bantu who do not support its aims 5.

64. To conclude this brief survey of organized political movements among the Bantu, reference should be made to the Transkei where the Transkei National Independence Party under Mr. Matanzima, the Chief Minister, advocates a policy of developing the Transkei purely for the benefit of its Bantu inhabitants, whereas the opposition Democratic Party under the leadership of Chief Victor Poto, professes to be in favour

¹ Sobukwe, *op. cit.*, p. 3.

² *Ibid.*, p. 5.

³ *Vide* para. 61, *supra*.

⁴ Sobukwe, *op. cit.*, p. 6.

⁵ *Vide R.P.* 51/1963, p. 7 (paras. 86 and 87).

of "multi-racialism". This is, however, a strange brand of "multi-racialism", of which Chief Poto himself recently said:

"We must realise that the white people who should come here are those who will be willing to be under the government we propose to set up in the Transkei, a government that will always be in the hands of the black man ¹."

And when confronted with the accusation that they would have to invite all races to be citizens of the Transkei, the Democratic Party declared through Mr. Rajuili, one of its front benchers, that "nobody said we are going to invite all races" ².

65. It is significant that Applicants' "cross-section" of opinions expressed by "South African 'Natives'", likewise as in the case of their other "cross-sections", is completely one-sided. It is not only entirely devoted to opponents of Respondent's policy, but is weighted with extremist politicians representing a small section of militant revolutionaries, to the virtual exclusion of responsible critics of government policies or certain aspects thereof, not even to mention the substantial and increasing number of supporters, to a greater or lesser extent, of the policy of separate development. The existence of such support appears even from statements by persons who are certainly no protagonists of government policy generally. An example of such a person is Mr. M. T. Moerane, a Bantu who is editor of the newspaper *World* published in Johannesburg. He writes:

"Everywhere I meet friends they ask me: 'Is the Transkei getting anywhere?' I, too, was asking that question a few weeks ago. My answer today is: Yes! The Transkei has nothing to lose from self-government; and it stands to gain.

The Transkei has already achieved one thing—a stable government with a determined cabinet and a challenging, powerful opposition.

These are not amateurish clowns mimicking government.

In debate, programme and responsibility, this Government compares favourably with any parliament, Cape Town and other African independent states included. I have seen many of these in action.

Many people have called him a stooge but Matanzima's Government has been able to gain important concessions and advances.

Matanzima is taking the Republic Government at their word.

He realises that his position of dependency is not ideal and he is set on a course to full independence soon.

Mr. B. S. Rajuili, one of Chief Poto's whips in the D.P. [Democratic Party], would like Bantustans on the pattern of the Transkei established quickly.

Not so long ago, many would have thought such a suggestion preposterous.

Many sons of the Transkei have refused to have anything to do with this experiment, on principle. They regard it as a mischievous diversion from the true cause of African freedom . . .

¹ *Debates of the Transkei Legislative Assembly*, 2nd Session—1st Assembly, 5 May to 9 June 1964, p. 13.

² *Ibid.*, p. 33.

While the struggle for ultimate solutions is going on, however, Bantustans may have some contributions to make.

A Parliament like the Transkei does, for the first time, give Africans a voice in their affairs and some executive power, some recognition of citizenship rights.

Suppose all the planned Bantustans—in Zululand, Northern Transvaal, Ciskei, etc.—were established, these areas would also have a voice, and an education and these parliaments could make a powerful voice with a sizeable population behind it.

All that would be necessary for a truly African voice would be to give urban Africans their version of political freedom.

At this point the Africans could at least express their views unitedly. They would have some representation, unlike now. Dr. Verwoerd could bring about his "Commonwealth of Africa" government. There would be parties with which to negotiate¹.

66. In a recent work, Dr. Ben Marais, Professor of History of Christianity at the University of Pretoria and a well-known commentator on South African questions (and, incidentally, also a person with strong reservations on certain aspects of Government policy), wrote as follows:

"There is not the least doubt that the Bantustan angle of apartheid or self-development has gained considerable support from the African groups themselves and from many foreign quarters . . .

It gave many Africans the feeling that the whites really mean to give them freedom and independence. The fact that they will have their own parliament and that African administrators are trained has resulted in a great measure of co-operation and enthusiasm. It has also greatly strengthened the moral basis of the philosophy of apartheid or separate development. Many Africans have accepted it as proof of the white man's or Government honesty²."

67. Reference has been made to certain views expressed by *The Star* (a Johannesburg newspaper quoted as an authority by Respondent), regarding the desirability of the Bantustan policy³. An earlier article by a Bantu contributor to the same newspaper exemplifies the extent of support for some vital aspects of Respondent's policies even among people who profess to be opposed thereto.

During 1959, Mr. Makgona Tsotlhe wrote:

" . . . I can recall no thinking African who would condemn residential apartheid. It is this particular segment of apartheid that has been and still is, a blessing in disguise.

Prior to the enforcement of the Group Areas Act of 1952, many African families in Johannesburg lived in the backyards of their White landlords. They led an aimless life. And the few who showed signs of striving for an idealistic way of life, soon had their aspirations woefully bedevilled by the concomitants of the freedom they enjoyed in the backyards.

In contrast today, the African in his present townships, where he has been allowed to trade among his people as he pleases without

¹ *The Star*, 27 July 1964.

² Marais, B., *The Two Faces of Africa* (1964), p. 34.

³ *Vide* para. 54, *supra*.

any fear of foreign competition, is achieving an epoch of economic self-realization.

Not only has he been given the privilege of renting a house indefinitely in the townships, but is also authorized to build a house of his dreams in some areas.

Perhaps few, particularly among the Whites, realize that places like the Dube township are miniature cities where the people have come to realize their real selves in practically all walks of life—something to which they could not have attained were they left indefinitely in the backyards of the White landlords in White areas. That is the advantage residential apartheid has brought. But I must not be taken as favouring apartheid in general—it is simply that we should face reality as it presents itself¹."

68. Among the Bantu supporters of the policy of separate development, the most influential at the moment is probably Chief Minister Matanzima himself. Many of his speeches and statements are available, but it will suffice to refer to a recent address by him, a report of which reads as follows:

"Since the present Transkei Government had taken over there had been unprecedented peace in the territory, the Chief Minister, Chief Kaizer Matanzima, said in Umtata last night, adding: 'This goes to the credit of the policy which has received unwarranted attacks from people ignorant of the South African set-up.'

He said that the people of the Transkei accepted the policy of separate development and requested that it be applied.

'The Republican Government never imposed it on us', he said. 'We asked for it because it is the only realistic way of bringing about equality among all races in South Africa on the basis of parallel development'²."

Attention is invited to other statements by Mr. Matanzima quoted above³.

69. Another prominent Transkeian personality, to whom reference may be made by way of example, is Chief Botha Sigcau. In 1959 he said in a speech before the Transkei Territorial Authority:

"We have accepted as our own the policy of Separate Development with its Bantu Authorities, Bantu Education and other cognate administrative measures. We have accepted this policy not by compulsion, but voluntarily because it accords full recognition to Bantu cultural institutions; to that which is our own and which we endear—our customs, our laws and our language. We are deeply impressed with the many and important benefits which you have made possible for us, under this policy. It is our wish and endeavour to live in peace and friendship with our fathers, the Europeans of South Africa. The only way to bring about this harmonious settlement between the two cultural groups is that of separate development.

.....
 We can assure the non-european leaders in Africa and the Bantu

¹ *The Star*, 25 Nov. 1959.

² *Ibid.*, 15 Oct. 1964.

³ *Vide* Chap. V, paras. 68-69, *supra*.

organisations in South Africa who attack the policy of separate development, that we are not in sympathy with their actions. Separate Development is also our policy and consequently they attack us as well ¹."

And, addressing the same body in 1961, he said:

"Now, the question might be asked: Is it not time that this Authority maintained a definite policy—the policy of separate development? By separate development is meant that the people should manage their own affairs and shall be their own destiny. This policy the Bantu people have aspired to during the last decade. It is the policy envisaged by the Government and in my own submission it is the only policy which can lead to the practical solution to race conflicts ²."

70. Addressing the Zoning Committee appointed in terms of section 60 of the Transkei Constitution Act, 1963, Dr. Gwele, a medical practitioner, said:

"First of all I would like to express the view that we are very thankful to Providence and the Republican Government for this very fine idea of parallel development, because at least it gives us something to look forward to as Non-Europeans. For a very long time we have experienced lipservice promises from the various Governments we have had but today, under this idea of self-development at least we Non-Europeans can look forward to something tangible, and what is most encouraging to us is that, as far as we have observed in many parts of the Republic, the promises that have been made by the Government have gone forward in many avenues of life . . . ³"

71. In his customary Christmas message to the Zulu people in December 1959, Paramount Chief Cyprian Bhekuzulu, wrote, *inter alia*:

"Zulu, we have been living in a state of uncertainty for many generations and during that period we did not know where we stood in common society. We were roaming around aimlessly because no definite way had been shown to us which we could walk along.

To-day however, the position has changed, a road has been opened to us, our own road, a road that everybody can see.

Through this policy we as a Nation can regain our former self-respect, pride in our National traits, love for our folk-lore and obedience to authority. There is a lot that is good and noble in our old traditions. Let us retain the good of the past and build our future on it. Every Nation in the world has its traditions and even battles have been fought to safeguard those traditions. Why should our traditions then be looked upon disrespectfully?

Zulu, in terms of the present policy in this country as a whole, the

¹ Transkeian Territorial Authority, *Proceedings and Reports of Select Committees at the Session of 1959: Annual Reports and Accounts for 1958 and Estimates of Revenue and Expenditure for 1959-1960* (1959), pp. 30-31.

² Transkeian Territorial Authority, *Proceedings and Reports of Select Committees at the Session of 1961: Annual Reports and Accounts for 1960 and Estimates of Revenue and Expenditure for 1961-1962* (1961), p. 103.

³ Departmental information.

road before us is clear. Everybody can see it and everybody should be able to understand it. Development on separate but parallel lines makes for orderly societies . . . ¹

72. On 8 December 1964 the Tswana Territorial Authority unanimously adopted the following resolutions:

"This Authority, representing approximately one million Tswana people in the Republic of South Africa, wishes to place on record—

(a) its unswerving loyalty to the Government of the Republic of South Africa,

(b) its full support for the policy of separate development, and

(c) undertakes to carry out to the full, its share of the whole programme of separate development ²."

73. That Respondent's policies enjoy increasing support also among the urban Bantu, appears, *inter alia*, from the following passage by "Mhloli", a Bantu columnist of *The Star* ³.

"There has, in the last few months, been a noticeable swing among African urban leaders in favour of the urban Bantu council system which, it is felt, would not only give Africans more local self-government but would also enable them to improve the running of their townships.

Thinking African businessmen in Dobsonville, including ex-board member and ex-school-teacher, Mr. A. L. Molefe, have condemned the present advisory board system as archaic. They would like to see the system of the Urban Bantu Councils put into practice in this township as soon as possible.

According to Mr. Molefe: "The Urban Bantu Council system is the only one to give us a break-through to a complete say in our affairs."

Mr. Molefe is strongly of opinion that those African townships which have accepted the U.B.C. system will in the long run benefit immensely. For more than 10 years he served on the local advisory board and it was largely through his great influence that Dobsonville became what it is today.

"The advisory boards are useless and do not conform with the modern way of thinking and trends. To-day the emphasis is on separate development" ⁴.

74. The Bantu Advisory Board of Brakpan passed a resolution in 1963 expressing the "warm appreciation" of the Bantu community because the Town Council of Brakpan "implements the policy of the Government, for its active contribution towards the achievement of Government policy and for the sympathetic consideration given to requests" ⁵. (Translation.)

75. In a recent article, Mr. D. E. Mabudafahasi, Lecturer in Sociology in the University College of the North at Turfloop, wrote:

¹ *Bantu*, No. 12 (Dec. 1959), pp. 12-13.

² Departmental information.

³ Which, as already noted, is a newspaper relied upon as an authority by Applicants. *Vide* para. 54, *supra*.

⁴ *The Star*, 3 Nov. 1964. *Vide* also 25 Nov. 1959, article in the same newspaper referred to in para. 67, *supra*.

⁵ *Die Transvaler*, 17 May 1963.

"Since its implementation, the policy of Separate Development has already proved its worth against humanitarian arguments from armchair speculation. I cannot imagine what would happen in South Africa in the absence of this policy ¹."

76. As a final example, Respondent will refer to an article by Mr. Obed M. Makapan, a prominent Bantu leader and principal of a Bantu school in Johannesburg:

"Apartheid is a natural line of demarcation between people of a different outlook and different standards of civilization, and therefore I welcomed the Government's policy of Separate Development. I feel that this policy should be given a fair chance by those people who do not know what has already been done.

Separate development is a unique chance for the Bantu of South Africa given them by the Government. I say unique, because it is necessary to study this idea meticulously to discover all its true values ²."

And, after discussing the progress that has been made under the policy of separate development in the fields of education, employment in the civil service, health, and Bantu authorities, the writer concluded:

"So, in all spheres of life the benevolence of *apartheid* can be felt, the progress can be perceived, the success of individuals can be seen because the foundations of development have been well and truly laid for the even higher separate advancement of all the progressing Bantu National units ³."

77. From the foregoing it is apparent that among the Bantu, as among all other peoples of South Africa, the challenge of the country's problems has brought forth a variety of views, some opposing the Government, some supporting it, and some cutting across its policies. It is equally apparent that there is no unanimity amongst opponents of the Government as to what would constitute a preferable policy to the one implemented at present. It follows that, also with regard to the Bantu, Applicants' suggestion that the policy of separate development has met with universal condemnation, must be held to be entirely unfounded.

G. South African Coloureds

78. The first major political organization among Coloureds was founded in 1902, and was called the African Political (later People's) Organization (A.P.O.). Its aim was to champion the rights of the Coloured people in all parts of South Africa. In later years the A.P.O. developed into a supporter of the so-called non-European Unity Movement which sought to secure full citizenship rights for Bantu, Coloureds and Indians on an integrated basis. This policy was opposed by the Coloured People's National Union (C.P.N.U.), an organization established in 1944 for the purpose of improving the economic, social, educational and political conditions of the Coloured people by means of closer understanding with

¹ *Dagbreek en Sondagnuus*, 20 Sep. 1964.

² Makapan, O. M., "Apartheid As I See It", *South Africa, The Road Ahead*, Spottiswoode, H. (Ed.) (Nov. 1960), p. 121.

³ *Ibid.*, p. 122.

the Government ¹. The C.P.N.U. did not believe that the best interests of either race would be served by common political action between Bantu and Coloured ¹.

The president of the C.P.N.U., Mr. George J. Golding (quoted by Applicants under the heading "South African 'Coloureds'") ², expressed this attitude as follows:

"As a Coloured group we say quite definitely that we are prepared to organize the immense potential field among our people and to fight our own battles . . . Unless the Coloured people are prepared to share every aspect of their lives in an unreserved and honest manner with the Natives of this country, then they have absolutely no grounds for making use of the numerical superiority of the Natives for purposes of generating a social revolution ¹."

The C.P.N.U.'s attitude to the A.P.O. was expressed by Mr. Golding in these words:

"If the A.P.O. had fulfilled its true function, there would have been no need for the C.P.N.U.; but since the A.P.O. has expressed itself against collaboration with the Government, and by throwing its doors open to persons other than Coloured people, it now becomes a conglomeration of cosmopolitan interests, with the result that it no longer speaks specifically on behalf of the Coloured people ¹."

79. Although dissatisfied with the extent of political rights granted to the Coloured people, it is clear that Mr. Golding supports many aspects of Government policy. Recently he said:

"Fourteen years have elapsed since I wrote a Foreword to the pamphlet 'The Coloured Man Speaks' ³. I am convinced today, as I was then when I spoke on behalf of my Coloured people, that there was no justification—moral or legal—in depriving the Coloured people of South Africa of political rights which they enjoyed for over a century and in having the Coloured voters removed from the Common Voters Roll . . . Having said that, however, I must confess, in all fairness, that since those far off days in 1950 the lot of the Coloured man in South Africa has improved beyond recognition. Leaving aside the political aspects to which I have referred I must in all fairness state that since 1950 there has been a progressive betterment in every aspect of the living conditions of the Coloured people of this country . . . As a result of progressive steps taken under the present Government, the doors of the public service, practically in all its branches, have been opened wide to our Coloured people. In many Government Departments we now have top ranking positions held by members of the Coloured group . . .

The Government has created a new Department of Coloured Affairs under the control of a Minister who occupies full Cabinet ranking. This Department is responsible for reorientating the attitudes of all Governmental Departments towards the Coloured people. This Department is responsible for protecting and developing the functions and livelihood of the Coloured group. Economically

¹ Hellmann, E. (Ed.), *Handbook on Race Relations in South Africa* (1949), pp. 526-527.

² *IV*, p. 292.

³ Quoted by Applicants at *IV*, p. 292.

there has been a great upliftment of the Coloured people. The Government formed the Coloured Development Corporation and by means of large funds placed at the disposal of this Corporation, Coloured people have been helped to take part in the economic development of South Africa. For the first time in the history of our country Coloured business men and Coloured controlled companies have been given financial help to establish and develop new commercial enterprises in South Africa. In previous years these facilities were the preserve of the White only. Today this monopoly no longer exists. Today members of the Coloured community are enabled to open up their own liquor stores, their own cinemas, their own departmental stores in competition with their fellow White citizens. There is no longer any restriction placed upon our Coloured people. No business activity whatsoever, either in the field of commerce or industry or farming is now closed to the Coloured man. Governmental help in the form of loans and subsidies are available to him to enable him to take his place in what was hitherto regarded as a European preserve. Quite recently the first bank for Coloured persons was established in this country and this particular field offers unlimited scope for development and upliftment of our people.

In the sphere of education, the Government has been generous in building magnificent schools and making much larger facilities available to our Coloured children. Many additional high schools have been established in most modern and well equipped buildings and our Coloured people have shown their appreciation of this by the manner in which they have responded to filling those schools. Our education system, as far as the Coloured people is concerned, is comparable with any educational system in any part of the country . . . The Government has established a University College of the Western Cape which has made it possible for hundreds of Coloured youths to obtain a full University education which hitherto was denied to them. Previously a very limited number of Coloured students were accepted at our European Universities. Today Coloured people can claim that every Coloured boy or girl who is desirous of pursuing a University education can be accommodated in this Coloured University. Whilst the Coloured people originally opposed the arrangement of this separate University, by and large the Coloured people today appreciate the many advantages which this University has created for them. I have only mentioned a few examples of the improvements which have been created for the Coloured people during the past ten years. In all fairness I must confess that there has been a sincere endeavour on the part of the Government to help the Coloured community wherever possible. I think that the Government has now come to realise the fact that the Coloured people are partners in one South African nationality, that we take second place to no other section of the South African population in our patriotism and loyalty to our country. It is for this reason that the Government has, with great rapidity, improved the educational, social and economic aspects of our lives.

I am quite certain that, without the sympathetic help of our Government, it would have taken our Coloured folk many more long years of toil and sweat and frustration to have achieved the advancement which has been made in these last few years. It is my

earnest desire that the spirit of good will which now exists between the Coloured people and the Government and generally with the White people of South Africa should continue. Coloured leaders feel that if this advancement in our educational, social and economic spheres can be maintained and improved, the time must come when the Government of the day will have a new approach to our political rights. For the present we feel that we must strive in a spirit of good will and loyalty to our country to develop the already magnificent advancement which has been created for us under the present regime in South Africa¹."

So. It is significant how many other Coloured leaders have, like Mr. Golding, become increasingly aware of the benefits of the policy of separate development, or at least certain aspects thereof. Thus, for example, in October 1964, the following report of an address to the Minister of Coloured Affairs by Mr. M. D. Arendse (quoted by Applicants under the heading "South African 'Coloureds'")², appeared in a newspaper for Coloureds:

"Mr. M. D. Arendse said that he was grateful for the opportunity of taking part in thanking [the Minister]. Where he had expressed criticism in the past, the Minister should accept it in the spirit in which it was said. He had not been happy about the transfer of education, but now he was happy about the spirit in which it occurred. He could also perceive the tremendous improvement in technical education, Mr. Arendse said.

He had opposed local committees, but now he had come to the conclusion that it could serve a useful purpose to bring democratic government to the majority of the people. The fact that he served on the Council [for Coloured Affairs] proved his confidence and hope that the Government was genuine in 'the socio-economic improvement which we are seeing'. He felt that the Coloured folk should take up its position to render South Africa strong against the onslaught of Black Africa, Mr. Arendse said³." (Translation.)

Reference may also be made to the following report of a speech by Mr. Tom Swartz, Chairman of the Council for Coloured Affairs:

"Fruitful co-operation between the Government and the Coloured people was the result of the policy of separate development, Mr. Tom Swartz, Chairman, said in his opening address at the twentieth session of the Council for Coloured Affairs in Cape Town. He mentioned the services of councillors and members of other bodies, and said, 'Five years ago this state of affairs was almost impossible—however, a remarkable change has occurred, and many leaders who were actively against are now actively co-operating, a fact which vindicates the stand which members of the Council took when they accepted office on the Council in the midst of malicious personal vilification³.'"

¹ Golding, G. J., President of the Coloured People's National Union: Unpublished Statement dated 12 Nov. 1964.

² IV, p. 292.

³ *Die Banier* (1st ed.), Oct. 1964, p. 8.

Another Coloured leader, Mr. C. I. R. Fortein, said:

"The present political climate in South Africa is in favour of the advance of the Coloured people with their white compatriots towards a common destiny along parallel paths. This is completely logical and moral for the one cannot interfere in or injure the interests, wishes and aspirations of the other. This has been demonstrated by goodwill, sympathy and generous allocation by Parliament of resources for problems of administrative character in our forward development and should serve as a practical indication of a completely new healthy and promising Afrikaner-Coloured reapproachment in the history of South Africa¹."

Mr. Booker Lakey (Secretary of *Die Kleurling Volksbond* of South Africa and a prominent Coloured leader), wrote in a letter to the Mayor and Council of Aberdeen, Scotland, in connection with that Council's decision to boycott goods from South Africa:

"The decision portrays a complete lack of knowledge of the vitality separate development infuses into the lives of Coloured folks which enables them to become masters of their own destiny in their fast-developing separate residential areas²."

81. The "spirit of good will" between the Coloured people and the Government referred to by Mr. Golding has manifested itself in the creation of political movements supporting the policy of the National Party, particularly for the purpose of contesting elections for the newly created Coloured Persons' Representative Council³. In this regard, a recent report stated:

"The newly-formed Federal Coloured Peoples' Party issued a statement in Cape Town recently pledging to seek independence for the Coloureds, and to encourage them to make use of the opportunities offered by the South African Government's policy of separate development.

The new party will enjoy the support of, among others, two members of the existing Council for Coloured Affairs—Mr. N. P. Arends of Bellville, Cape Province, and Mr. R. H. Fischat of Port Elizabeth.

The establishment of the Federal Coloured Peoples' Party had been foreshadowed by the chairman of the Council, Mr. T. R. Swartz.

The granting of the franchise to all adult Coloureds had thrust them into a new situation, Mr. Swartz said at a meeting of the Council. One of the first reactions to the franchise grant was the establishment of political parties exclusively for Coloureds.

It is reported from Port Elizabeth that Mr. Fischat intends to have Coloureds throughout the Country informed of the new party and to encourage them to register as voters for the election of the Coloured Persons' Representative Council.

Mr. Fischat said that he was pleased to find that Coloured leaders who had formerly strongly opposed the policy of separate development and who had even intimidated him on account of his accept-

¹ *Die Banier* (2nd ed.), Sep. 1964.

² Copy filed with documentation.

³ Established in terms of Act 49 of 1964.

ance of the policy, were now enthusiastic for the establishment of an all-Coloured political party ¹."

And still more recently a new party was established for Coloured persons in the Transvaal, the policy of which, according to its executive, embraced the following:

"As the Government's policy of separate development is being unfolded, it becomes clear that the Coloured population is receiving ever increasing rights to manage its own affairs and to develop as a separate population group which must seek its own salvation . . .

A policy of multi-racialism and liberalism must eventually destroy the Coloured population.

We reject completely any liberalist or integration policy of any political party or group in the Republic.

We accept the policy of separate development as the only principle upon which each population group in the country can develop fully and upon which a future can be built by the Coloured people for the Coloured people ²." (Translation.)

Similarly, it was reported:

"A new political party for Coloured people, called the Republikeinse Party, has been formed at Beaufort West. Claiming a membership of nearly 300, the party 'wholeheartedly' supports the policies of the Government ³."

82. It is apparent from the foregoing that among the Coloured population, as among all other groups or sections of the population, there exist wide differences of opinion regarding the policy of separate development or of particular aspects thereof, and that, contrary to the impression sought to be created by Applicants, Respondent's policies command a substantial and increasing volume of support.

H. South African Asiatics

83. Amongst Asiatics in South Africa, as among all the other groups dealt with herein, the matter of race relations is a burning question on which opinions differ widely. It is significant that Applicants, although attempting to create the impression of providing a representative selection of persons, have once again limited their "cross-section" to the most extreme wing of Government opponents. An interesting example of this technique is found in the case of Nana Sita ⁴, who is described as a "trader in Pretoria since 1913". Since Sita was born (in India) only in 1898 ⁵ Applicants' date is apparently wrong. Moreover, Applicants refrain from saying that Sita has been an active politician for many years, having been Chairman of the Transvaal Indian Congress and a leading participant in the passive resistance campaigns of the 1950s.

84. Respondent submits that the extreme opponents of Respondent's policies of the type quoted by Applicants represent a small minority of Asiatics, and that, apart from more moderate critics, this group also

¹ *South African Digest*, 18 Sep. 1964.

² *Die Transvaler*, 8 Oct. 1964.

³ *The Cape Times*, 29 Apr. 1964.

⁴ Quoted at IV, p. 598.

⁵ Departmental information.

contains an ever increasing number of supporters of the Government policy. Thus Mr. A. S. Kajee, a prominent Indian leader, said recently:

"For the first time in the history of the Indians in South Africa we have been accepted by the present Nationalist Government as South Africans, and also the Government has for the first time appointed a special Minister for Indian Affairs to deal with Indian matters and problems, and these could only be successfully achieved by co-operative consultations. Our duty now is to bring to the notice of our Minister the Hon. Mr. Maree our legitimate grievances, who I am satisfied is sincere and will do everything within his power to give us the desired relief ¹."

Even more recently another prominent Indian leader was quoted in the Press as saying:

"We support Dr. H. F. Verwoerd's policy of separate development . . . There are many Indians in Natal who support the Government ²." (Translation.)

Mr. Sayed Ahmed Rassool, President of the Muslim Religious League of Durban, was reported to have said that ". . . he supported Apartheid because his league believed that the various races should retain their identity" ³.

Further refutation of the picture sought to be sketched by the persons quoted by Applicants, can be found in the words of Mr. T. K. M. Balasubramaniam, famous international lecturer and citizen of India, who said after a visit to South Africa that—

"[t]he Whites seem to be sociable, accommodating and sincerely interested not only in the general welfare of the country, but also in promoting the interests of Indians and other fellow citizens in this country ⁴."

I. Conclusion

85. From the above survey it is abundantly clear that Applicants have failed in their attempt at establishing that there exists among South Africans a general consensus of opinion either to the effect that separate development is an immoral or impracticable policy, or to the effect that some other policy is preferable thereto. This in itself suffices to neutralize any effect which Applicants' alleged "cross-section of evaluations" might otherwise have had. Once it is clear that honest and informed opinions differ as to the merits of a particular policy, then it is clear that the mere fact that it is condemned by some persons, could not establish that it is "beyond question" a bad policy or that another policy is beyond question a preferable one ⁵. This would *a fortiori* be the case in circumstances like the present, where the policy which Applicants attempt to discredit enjoys very much greater support, at least among educated and politically conscious persons, than the policy which Applicants seek to impose

¹ *The Graphic*, 21 Aug. 1964.

² *Die Transvaler*, 12 Nov. 1964.

³ *Daily News*, 11 Jan. 1964.

⁴ *Indian South Africans*, p. 38.

⁵ *Vide* sec. C, paras. 26 and 38-39.

on South West Africa (i.e., universal franchise in the framework of a single territorial unit) ¹.

86. The opinions of persons quoted by Applicants were relied upon as being "judgments of qualified persons" ². It is clear therefore that Applicants do not intend these quotations to constitute separate complaints to be dealt with on their merits as something additional to the charges formulated in the rest of their pleadings. It will suffice therefore to refer briefly to some of the main topics referred to in these quotations, and to indicate where, if relevant, Respondent deals with them. The main topics are:

(a) Homelands, and, in particular, the Transkei ³.

This topic has been dealt with in the Counter-Memorial ⁴ and further in this Rejoinder ⁵.

(b) Job reservation ⁶.

The laws on job reservation regarding which Applicants quote certain comments, are not applicable to South West Africa and the "judgments" are therefore not relevant at all to these proceedings. Reference may be had, however, to a brief discussion in the section of this Rejoinder dealing with economic aspects ⁷, of the topic in relation to an allied although very dissimilar situation in South West Africa.

(c) Pass laws and influx control ⁸.

These matters, in so far as they relate to South West Africa, have been dealt with ⁹.

(d) Migratory labour ¹⁰.

This subject is dealt with below ¹¹.

(e) Separate Universities ¹².

This matter is dealt with elsewhere ¹³.

(f) Abolition of Natives' Representatives in Parliament ¹⁴.

Respondent cannot see what relevance this issue has either to the present case, or to South West Africa at all. However, the basic

¹ IV, p. 441.

² *Ibid.*, p. 277.

³ Referred to, *inter alios*, by Prof. Brookes (IV, p. 281), Dr. Keet (p. 284), the Hon. Mr. Schreiner (pp. 285-286), Mr. Donald Molteno (p. 286), Stanley Uys (pp. 287-288), P. van Rensburg (p. 288), ex-Chief Luthuli (pp. 289-290), Archbishop Hurley (p. 596), Mrs. Suzman (p. 596).

⁴ II, pp. 457-488.

⁵ *Vide* Chap. V, *supra*.

⁶ Referred to in the Reply by Prof. Frankel (IV, p. 282), Dr. du Plessis (p. 284), the Cottesloe Consultation (p. 284), the Hon. Mr. Schreiner (p. 285), Mr. Arendse (p. 292) and Mr. Joshi (p. 292).

⁷ *Vide* sec. H, Chap. IV, paras. 8-24, *infra*.

⁸ Reply, referred to by Dr. du Plessis (IV, p. 284), Colin Legum (pp. 288-289), ex-Chief Luthuli (pp. 289-290), Mrs. Suzman (pp. 596-597).

⁹ Counter-Memorial, Book VI.

¹⁰ Referred to, *inter alios*, by Cottesloe Consultation (p. 284), Colin Legum (pp. 288-289), Rev. Huddleston (pp. 595-596), Phyllis Ntantala (p. 598).

¹¹ *Vide* sec. H, Chap. II, paras. 15-42, *infra*.

¹² Referred to, *inter alios*, by the Hon. Mr. Centlivres (p. 286), Prof. Matthews (p. 290) Academicians, etc. (pp. 593-594).

¹³ III, pp. 477-489 and *vide* sec. G, *infra*.

¹⁴ Referred to by the Hon. Mr. Fagan (p. IV, p. 285) and Mr. Basson (p. 287).

principles underlying this measure are discussed in the Counter-Memorial ¹ and herein ².

(g) Group Areas Act ³.

This Act does not apply to South West Africa and the comment in the Reply is accordingly of no relevance. Respondent will accordingly not deal with such comment save to say that it is biased and one-sided, and in many instances completely inaccurate. The Act was designed to benefit all the various groups in South Africa, and has indeed made a valuable contribution to the peaceful development of the whole population.

The social, historical and legal background to separate residential areas is different in the Territory from that prevailing in the Republic. In so far as the factors militating in favour or such separation show some correspondence, reference may be made to the treatment thereof in the Counter-Memorial ⁴.

¹ II, pp. 457-488.

² *Vide* Chaps. IV and V, *supra*.

³ Referred to, *inter alios*, by Mr. Paton (IV, p. 287), Dr. van der Ross (p. 292), Yusuf Cachalia (p. 293) and Nana Sita (pp. 598-599).

⁴ III, pp. 167-193.

CHAPTER VII

VIEWS OF FOREIGN GOVERNMENTS AND COMMENTATORS

1. The second class of "relevant evidence" adduced by Applicants is described by them as "[o]fficial views of Governments in all parts of the world, expressed, *inter alia*, through the United Nations . . . as well as through findings and resolutions of the United Nations itself"¹.

Applicants seem somewhat uncertain as to the exact basis of relevance of these "official views". At the outset of their discussion they say, with reference to Respondent's submission that United Nations reports and resolutions are of no relevance to this Court's judicial function², that—

"Respondent thus denies the relevance of findings and recommendations of the 'organized body' in and through which Applicants have sought to settle their dispute with Respondent through processes of 'diplomacy by conference or parliamentary diplomacy'. Such a contention would appear to be unworthy of elaborate refutation³." (Footnotes omitted.)

Once again, Applicants have succeeded in being completely obscure. Whether or not United Nations reports and resolutions could serve to establish the existence of a dispute between the Parties, and the further fact that any such dispute could not be settled by negotiation, were matters which were dealt with at the Preliminary Objections stage. These issues were decided in Applicants' favour, and are of no further relevance at the present stage of the proceedings. Consequently it is assumed that Applicants are not, in the above-quoted passage, still fighting these defunct issues. It follows that they must be suggesting that the reports and resolutions have some relevance to the merits of the present dispute. However, the only ground advanced by them in the above passage for such suggestion is that the said reports and resolutions emanated from the body in and through which the parties allegedly sought to settle their dispute. Respondent does not appreciate the cogency of this consideration, and can consequently do no more than to refer to its previous discussion of the alleged significance of such reports and resolutions².

2. But Applicants go further. They say that Respondent's dismissal of the relevance of findings and recommendations of the United Nations ". . . may be regarded as a *reductio ad absurdum* of its total rejection of international supervision and accountability"⁴.

Once again the logic of this proposition is not apparent. Respondent does not appreciate what relationship there is between supervision by or accountability to the United Nations (assuming it to exist), and the totally distinct question whether United Nations findings and recommendations are of any relevance to the Court's judicial functions. Even had such accountability or right of supervision existed, the Court would still, in Respondent's submission, have been obliged to determine the issues

¹ IV, p. 277.

² As to which, *vide* Part III, sec. A, paras. 16-20, *supra*.

³ IV, p. 293.

⁴ *Ibid.*, p. 294.

between the Parties strictly on the evidence before it, and would not have been entitled to rely upon disputed conclusions reached by the political or administrative supervisory organs as being probative of the charges made against Respondent. On any construction of the Court's functions they could hardly have been intended to consist of a mere rubber-stamping of decisions reached by a political body. At the very least the Court must have been expected to make an independent investigation of the merits of the dispute before it.

3. Accordingly, in Respondent's submission, neither of the two above propositions relied upon by Applicants¹ could, even if correct, serve to render the said findings and recommendations relevant at the present stage of the proceedings. Their only relevance could be on the basis set out above², viz., as evidence from which an inference of *mala fides* may be drawn. For this purpose Applicants would have to show the existence of a general consensus of honest and informed opinion from which an inference can be drawn that no governmental authority honestly applying its mind to the problems of the Territory could come to the conclusion that Respondent's policies constitute the most suitable method for "promoting to the utmost"—or in other words, that there is no room for honest difference of opinion thereanent. At the outset it must be emphasized that this test could never be satisfied by showing merely that certain aspects of Respondent's policy have been generally criticized, or even universally condemned³. Every conceivable system of government suffers from certain defects, which may be universally acknowledged without there existing any general consensus that the system as a whole is not a sound one. As has been shown⁴, the over-all soundness of a system can be evaluated only by comparison with possible alternatives, and by weighing up the relative advantages and disadvantages of such systems.

This factor is of particular relevance to the present enquiry. As has been seen, in South African political, intellectual and even spiritual life, the unceasing debate about group relations has on the whole a strongly positive and constructive nature in that it concerns itself with a comparison of the merits and demerits of various proposed policies. International criticism, as will be shown, is on a different level entirely.

4. The background to the international political agitation against Respondent was briefly sketched in the Counter-Memorial⁵. In the course thereof Respondent demonstrated, *inter alia*:

- (a) the sudden manifestation and growing momentum, particularly during the last decade, of a highly charged anti-colonial campaign waged mainly by certain States in Africa and Asia;
- (b) the patent policy adaptations made by Colonial and Trusteeship Powers pursuant to this campaign, to the point of acceding to demands for independence, on the basis of Native majority rule,

¹ Viz., that the reports and resolutions assertedly emanated from the organ in and through which the parties sought to settle their dispute, and from the body allegedly exercising administrative supervision.

² *Vide* Part III, sec. C, para. 39.

³ Which, as Respondent will show, is in any event not the case.

⁴ Chap. IV, paras. 4-7, *supra*.

⁵ II, pp. 440-450.

- as a matter taking complete precedence over economic, educational and other aspects of development; and
- (c) the fact that the present proceedings form part of the same campaign, aimed at securing for South West Africa as a whole, and eventually for the Republic of South Africa as a whole, independent rule by African Natives.

From the circumstance that Applicants find it necessary to distort certain aspects of the exposition, and to pour scorn and abuse on others, but signally fail to adduce any facts to controvert it, Respondent accepts that the said exposition must be taken to be correct. It will consequently at the outset be necessary only to point out Applicants' misrepresentations and to set the record straight.

In the first place, Respondent's purpose was not, as suggested by Applicants¹, to approve or disapprove of recent international philosophies and events, but merely to record them. This, indeed, was explicitly so stated². In the second place, Respondent wishes to draw attention to the following sentence in the Reply:

"The attribution by Respondent to such other Members of the United Nations—comprising the vast majority of the whole—of views and convictions so weak, indecisive or vacillating as to be deemed the product of 'pressures' or 'political action' on the part of other Governments is unworthy of serious reply³."

It is, of course, clear that Respondent was not guilty of such "attribution". The only States which it was suggested were influenced by pressures, were the Powers administering Colonial and Trusteeship territories⁴ and such pressures were said to have been exerted both by the indigenous populations of the territories concerned and by other States⁴, and not, as stated by Applicants, only the latter.

5. Whether it is indeed, as stated by Applicants, "weak, indecisive or vacillating"³ of a government to be influenced by political pressures exerted by other States or whether, on the contrary, it is realistic, practical, and, indeed, moral, would appear to be a matter of opinion depending on circumstances and the point of view of the person passing judgment. Since this question is not relevant to the present proceedings, Respondent does not propose expressing an opinion thereon. Respondent is constrained to say, however, that such pressures existed and still exist, and that they still play a vital role in the current international political campaign against South Africa. Thus in a recent publication Professor C. A. W. Manning, a well-known authority on international affairs, wrote the following:

"The hostility of the non-white world can be explained without reference to the merits of the apartheid program. Indeed, for Afro-Asians the possibility that it has any merits can scarcely arise. It is the policy of white men governing black; and the only good thing that white men still wielding authority in Africa can do is to abdicate in favor of the non-white majority. Anything else they may think

¹ IV, p. 294, footnote 8.

² II, pp. 449-450.

³ IV, p. 295.

⁴ Vide II, pp. 441-447.

to do is by definition bad. In the eyes of the Bandung confraternity, South Africa ought never to have existed and ought now no longer to exist. It is not a question of whether she is meeting her responsibilities with humanity, wisdom, even a measure of self-abnegation. What in their eyes is wrong is not what South Africa may do, but the fact that she should continue in a position to do anything at all.

Nor should it be beyond South Africa's comprehension that the major Western governments may in these circumstances shy away from identifying themselves with her position. In the world of tough diplomacy old friendships may have to be set aside in deference to new expediencies. At a time when even Emperor Haile Selassie is constrained to forget what he owes to South Africa, when Israel finds it necessary to ignore the analogy between South Africa's predicament and her own, and when Britain has to be cautious even in her support for Israel, it is easy to see why neither Britain nor the United States can be other than cautious in support of South Africa¹.

6. Apart from the emotional reasons mentioned by Professor Manning for the hostility of the non-White world towards South Africa, some leaders are of course also influenced by more practical ones. In a recent address, President Nkrumah of Ghana delivered a plea for African unity, which he motivated, *inter alia*, as follows:

"We must unite for economic viability, first of all, and then to recover our mineral wealth in Southern Africa, so that our vast resources and capacity for development will bring prosperity for us and additional benefits for the rest of the world²." (Italics added.)

And later in the same address he stated that capital for development in Africa—

"... flows out of Africa today in gold, diamonds, copper, uranium and other minerals from southern Africa, Northern Rhodesia, the Congo, and other parts of the continent³".

Others again have an interest in fomenting disorder and chaos as a prelude to extending their ideological and political influence in Africa, and are consequently hostile towards South Africa as an effective bastion of security in a continent where political violence is never far from the surface. This applies mainly to Communists, and particularly the Chinese variety. As stated by Elspeth Huxley:

"What the Chinese want is trouble, as violent and bloody as possible. Rebellions in Kwilu, Angola, Cameroun are right up their street. Revolution, in their view, is not an unpleasant necessity but a positive good: a purge for the sick body, a consuming fire, a forge from which tried and tested leaders will emerge. 'Revolution', Chou En-lai told the Algerians, 'is the locomotive of history which will

¹ Manning, C. A. W., "South Africa and the World: In Defense of Apartheid", *Foreign Affairs*, Vol. 43, No. 1 (Oct. 1964), pp. 135-136.

² "Africa's Finest Hour", *Supplement with 'Ghana Today' of 29 July 1964*, Speech delivered by President Nkrumah at the Conference of African Heads of State and Government in Cairo on 19 July 1964, p. 4.

³ *Ibid.*, p. 5.

break through all barriers . . . the people of Africa want revolution'¹." The nature of Chinese intentions in Africa was confirmed by a recent editorial in Peking's *Jenmin Jih Pao* which referred to the "excellent revolutionary situation" emerging in the Congo².

There exist strong indications that, in accordance with this principle, Communists have had a hand in many of the recent revolutions in Africa, including those in Zanzibar, the Congo and Cameroon³; and, according to the evidence in recent trials, in an abortive attempt at initiating an uprising in South Africa⁴. To what extent Communist influence also plays a role in the campaign of international vilification of South Africa must remain a matter of conjecture. What is clear, however, is that both Chinese and Russian Communists would give a great deal to destroy the present orderly and anti-Communist administration in South Africa, and no doubt use whatever weapon is available to them towards that end.

7. The hostility of the non-White world (and particularly many of the newly independent States in Africa) towards South Africa, has increasingly and avowedly been directed towards alienating the Western nations from South Africa, and in the process the new nations have made full use, as bargaining factors, of their voting strength in the United Nations, as well as of their actual and potential economic and strategic importance. In this regard Professor Thomas Hovet Jr., of New York University writes:

"Charges of irresponsibility, then, can be leveled against the African states when it is evident that they are uninformed on issues that they are willing to support in exchange for support on issues of concern to them. Their constant argument is that their position on any African issue will be supported by all states who understand it and therefore recognize the logic of the African viewpoint. But for responsible negotiation most states do not expect to get voting support simply by crass bargaining on the principle of 'you vote for me; I'll vote for you'. Thus if the policy positions of the African states are to be respected, they must show respect for the policy positions of other states. And resolutions of the General Assembly will not have an impact or be implemented unless they are passed in an atmosphere of responsibility⁵."

In the result the African States have managed to obtain a long list of condemnations of Respondent's policies even by nations with close ties with South Africa.

However, on analysis, the list becomes considerably less impressive. In the first place, even a cursory examination shows that most of the statements, if sincerely meant, were based on entirely fallacious assumptions. This aspect will be dealt with later⁶. In the second place it is questionable to what extent the expressions of views really represent the

¹ Huxley, E., "The face behind the mask: Some thoughts on revolutions", *Optima*, Vol. 14, No. 2 (June 1964), p. 64.

² *The Star*, 25 June 1964, p. 1.

³ *Vide* the discussion of Chinese revolutionary activity in Africa by Elspeth Huxley, "The face behind the mask: Some thoughts on revolutions", *Optima*, Vol. 14, No. 2 (June 1964), particularly at pp. 63-64.

⁴ *Vide* Chap. VI, para. 61, *supra*.

⁵ Hovet, T. (Jr.), *Africa in the United Nations* (1963), p. 219.

⁶ *Vide* para. 15, *infra*.

considered opinions of the governments expressing them¹, in particular since the statements quoted by Applicants are all negative in character—they oppose or condemn a policy, without indicating or suggesting that the spokesmen have given any real thought to possible alternatives. It may be accepted that the extreme Black nationalists do not have any difficulty in this regard—they advocate immediate introduction of a universal franchise paying no account to the probable effects thereof on the standards of efficiency, prosperity or security of the country, or on the very existence of minority groups such as the Europeans, Coloureds or Indians. The attitude of militant Communism may be expected to be similar, for reasons indicated above². However, Respondent assumes that outside of the ranks of extremists, such an attitude does not conciously exist, even in Africa. The question then remains: What value can be attached to an expression of disapproval from anyone, even a representative of a State, who has not given proper thought to, or decided upon, a preferable alternative?

8. The extent to which the condemnations of apartheid by or on behalf of many States are entirely unrealistic, and also the extent to which policies in Africa have indeed been shaped by pressure from other States, appear clearly from the following example. Perhaps the most offensive passage quoted by Applicants under the heading "Views of Governments" emanated from Mr. Patrick Wall, a British member of Parliament and United Nations representative, who is reported to have said:

"For over 40 years, whatever the material progress that might have been made, the South African Government had deprived the indigenous inhabitants of the Territory of their basic human rights. His Government's position was quite clear: it could not accept a system which set men on different levels because of colour, or which enabled the men of one race to have complete power over the men of another by denying them the rights that should be theirs. *Apartheid was morally abominable, intellectually grotesque and spiritually indefensible.* Thus, the Government of South Africa was sufficiently to be blamed for the existence in South West Africa of a situation in which the rights of the individual were set at nought unless his skin was of the right colour³."

This was in 1962. In 1963 Mr. Wall wrote as follows in a letter to *The Times*:

"Britain's decision to give independence to her African colonies was both right and inevitable. But one of the main reasons we face the difficulties so well described in your leading article 'African Squeeze' is because the British withdrawal since 1959-1960 has not been planned and has been carried out at great speed.

Expediency has governed principles and as a result, not only a small number of Europeans, but a large number of Africans are now facing a decline in standards of freedom, security, and economy as independent

¹ Not even to mention the people of the States concerned, to whom further reference will be made in paras. 16-39, *infra*.

² *Vide* para. 6, *supra*.

³ *IV*, pp. 297-298.

African States become politically authoritarian and adopt socialist economies.

It is becoming increasingly clear that though the white man can work in independent Africa he cannot have his home there as he finds the new standards of justice, education, and agricultural development intolerable. *What then is the future of the whites in Southern Africa where some have been for over 300 years?* They have the will and the power to fight and few doubt that they will do so.

Britain's failure to introduce multi-racialism against local opposition at an earlier stage, and her equally disastrous failure to fight for multi-racialism when it was threatened by black domination means that we will soon have to choose between supporting the whites in Southern Rhodesia, Angola, Mozambique, and South Africa or fighting against them. The recent United Nations action against Southern Rhodesia was largely motivated by the desire to deprive that country of her main defensive weapon, the Royal Rhodesian Air Force. Britain used the veto and will have to do so again.

For the future of Africa as a whole a strong case can be made out for the virtual partition of the continent and for the continuance of white leadership in the industrial South provided the leaders are prepared to educate the majority race and gradually to share power with them. From the British point of view not only family ties but major investments, over-flying rights, use of vital airfields and ports, as well as access to 70 per cent. of the Free World's gold supply would be sacrificed if we supported the Pan-African drive to eliminate the white settler from the continent of Africa. This choice may have to be made sooner than many may expect ¹. (Italics added.)

Mr. Wall's views on the governing factors in British policy in Africa are instructive. It is also interesting to note that his condemnation of apartheid does not imply any support for the extremist views referred to above. But how practical is the policy proposed by him? It evoked an immediate reaction from the well-known authoress and authority on Africa, Mrs. Elspeth Huxley. She wrote:

"Even Major Patrick Wall, in his cogent plea (21 September) for facing facts in Africa, shies off the harshest fact of all.

He urges a kiss of life for multiracialism in South Africa, whose leaders should 'gradually share power with' the black majority. *Alas, multiracialism is dead beyond hope of revival and there can be no sharing of power, only seizure of it.* If the whites relinquish their grip then the black majority will take it, as in Kenya—and as blacks, African racialists, not as so-called 'civilized men' measuring up to some common non-racial standard politically expressed in a qualified franchise.

To urge whites in southern Africa to share their political power is to urge them to commit race suicide. It may be right that they should do so—if a principle is right morally then no doubt it should be followed at whatever cost—but to expect them to embrace their fate gladly is to ask a lot, and to force them into it a considerable responsibility. *Until we face this bleak reality I do not think we shall be*

¹ *The Times*, 21 Sep. 1963.

able to extricate ourselves from the mixture of wishful thinking, good intentions, expediency, and funk, cemented with guilt money, that has passed for an African policy in the past few years. We believe in compromise and face saving; most African nationalists do not. Theirs, they believe, is the earth of Africa and everything that's in it, and this they mean to have. Whether we think this 'reasonable' or not is beside the point. It is no good going on trying to ride a dead horse¹." (Italics added.)

Soon thereafter a letter by one Vivian Wadsworth appeared in support of Mrs. Huxley. This reads as follows:

"I attended the 1960 Constitutional Review Conference for the Federation of Rhodesia and Nyasaland as a Government adviser. Official Secrets legislation forbids me to reveal what transpired there, but when the records become available to the historians they will prove beyond doubt the contentions of Mrs. Elspeth Huxley.

The only people who have ever wanted partnership have been the 'Whites'. For the African leaders the only issue has been power and, for the British Government, appeasement²."

9. In January 1964 Mr. Wall set out his views at greater length in an article in *The Yorkshire Post*. He also described the British policy as one of "appeasement towards pan-African ambitions"³. This he amplified by drawing "a parallel between the policy of appeasement in Europe in the 1930s and the policy of appeasement in Africa in the period 1959-1963"³. Although still paying lip-service to "some form of multi-racial solution"³ for South Africa, he stated:

"Four years ago, people were thinking of multi-racialism as an equal sharing between black and white, the former contributing the numbers and the latter the know-how. As the wind of change became a hurricane, it became clear that there was to be no sharing, and that as soon as the Africans had a majority of one in the local Parliament they would demand complete domination which they could obtain within two years.

There was not even to be a partnership based on African political power and European economic power, as African independence became synonymous with the one-party State and African socialism left less and less room for European private enterprise³."

That it would be immoral and unpractical to attempt to force the Europeans out of South Africa, was also recognized by Mr. Wall. He stated:

"The denial of independence to Southern Rhodesia will be the next step down this slippery slope, followed by the exploitation of the High Commission Territories as bases for sabotage against South Africa. People say that the Arabs can never push one million Jews into the sea, but the same people seem to assume that four million Whites in Southern Africa can be forced into the ocean.

Many families have been there since the 16th century; only with their help can the vast economic potential of the continent be developed; they know that unless white leadership is prolonged until

¹ *The Times*, 24 Sep. 1963.

² *Ibid.*, 8 Oct. 1963.

³ *The Yorkshire Post*, 16 Jan. 1964.

the African continent has got over the first pangs of independence they will have no future ¹."

Mr. Wall's proposed solution was adumbrated in the last sentence of the above passage. It was further elaborated as follows:

"Firm action now by Britain and the United States could still stabilise the continent for the next decade on the basis of partition, the line of the Zambezi dividing the black-led north from the white-led south ¹."

10. Respondent has devoted some space to the views expressed by Mr. Patrick Wall, not only because of the status of their author and the self-evident significance of their contents, but because they illustrate two important considerations regarding views that have been expressed on behalf of governments concerning apartheid or separate development. The first is that, for various reasons ² a condemnation expressed at the United Nations cannot by itself be regarded as affording any significant evidence of the merits or demerits of the policy: if this were not so, it would not be possible to understand how Mr. Wall could, in all apparent sincerity, have followed up the condemnation at the United Nations with the published views quoted above. The second is that criticism of Respondent's policy, without reference to practicable alternatives, serves little purpose. In his later writings in the press Mr. Wall—in contrast with the ordinary practice of commentators in international politics, and, indeed, with his own quoted address at the United Nations—did give attention to the question of a positive alternative policy. It seems at least doubtful, however, whether the policy suggested by him would be an improvement on separate development. It seems to have been designed only for ten years to come—the author possibly assumes that at the end of another decade of White rule, the objectionable features which he now sees in multi-racialism would have fallen away ³. This seems in Respondent's view, a very doubtful assumption, to put it at its lowest. At the same time he appears to assume that the South African Bantu would be satisfied to defer all significant progress towards self-government for ten years. Again this assumption does not appear to be a realistic one.

11. Among the nations who have in the past expressed critical comments on Respondent's policies were the Scandinavian countries. As the Danish Minister of Foreign Affairs once said: "Numerous manifestations of one kind or another bear witness to the intense preoccupation of the Danish people with the question of *apartheid* ⁴."

A similar preoccupation seems to prevail in other Scandinavian countries. It seemed at one stage that these countries were beginning to realize that it was not enough to oppose apartheid, but that some thought should be devoted to an acceptable alternative. This approach was manifested, *inter alia*, in the following words of the same Danish Minister:

"[*Apartheid's*] abolition will . . . pose other problems . . . We must

¹ *The Yorkshire Post*, 16 Jan. 1964.

² *Vide* further para. 13, *infra*.

³ Although it is significant that he has become much more guarded in his references to multi-racialism as a possible solution than in the letter commented on by Elspeth Huxley.

⁴ *U.N. Doc. A/PV. 1215* (25 Sep. 1963), *Eighteenth Session, General Assembly, Provisional Verbatim Record of the 1215th Plenary Meeting*, p. 23.

face the fact that the great majority of the European population in South Africa wrongly assume that abandonment of white domination means abandonment of their own existence. It is our duty to prove to them that that is not so. It is our duty to demonstrate that there is an alternative to catastrophe and that the only road to this alternative goes through the abolition of *apartheid*.

In other words, if the approach of the United Nations has so far followed a single line, we feel that it has now become necessary for the Assembly to formulate a supplementary policy, to make clear to the world what we would like should take the place of the present set-up—a truly democratic, multiracial society of free men, with equal rights for all individuals, irrespective of race.

Changing a society so deeply rooted in *apartheid* and dominated by a minority into such a free democratic, multiracial society may well prove to be a task which cannot be solved by the people of South Africa alone. I feel convinced that in such a process of development the United Nations will have to play a major role if we are to avoid a tragic disaster. We must consider how, if necessary, we can in a transitional period contribute to the maintenance of law and order and the protection of life and civil rights of all individuals. We must likewise consider how the United Nations can best assist South Africa in laying the foundation of its new society.

In our opinion it is high time for the Assembly to give thought to the positive policy to be pursued in South Africa . . .¹

The whole question formed the subject of discussion between the Foreign Ministers of the Scandinavian countries. Respondent has always assumed that the interest displayed by Scandinavian countries in South African affairs was well-intentioned, and it welcomed a departure from the general line of negative criticism normally encountered at the United Nations. At the same time it considered that these countries were at a great disadvantage in their attempt at playing a constructive role regarding South African affairs by reason of their remoteness, geographically and in terms of experience, from African realities—a disadvantage which appears very clearly also from the above statement by the Danish Minister. In order to assist them in their self-imposed task, Respondent consequently issued an unconditional invitation to the Foreign Ministers of Sweden, Denmark, Finland, Iceland and Norway to visit South Africa with complete freedom to visit any place or speak to any person².

However, to Respondent's surprise, the invitations were declined on the grounds that—

“ . . . the Government . . . feels that the Minister could only undertake the journey if it would serve the purpose of furthering progress towards a solution in accordance with the principles of the United Nations Charter which, in the opinion of the Government . . . regrettably does not seem to be the case at the present time³.”

¹ U.N. Doc. A/PV. 1215 (25 Sep. 1963), *Eighteenth Session, General Assembly, Provisional Verbatim Record of the 1215th Plenary Meeting*, p. 26.

² U.N. Doc. A/PV. 1236 (10 Oct. 1963), *Eighteenth Session, General Assembly, Provisional Record of the 1236th Plenary Meeting*, p. 11.

³ Departmental information. Text of the Swedish, Danish, Finnish and Icelandic reply. The Norwegian reply was in similar but not identical terms.

From this reply Respondent could only assume that first-hand and accurate information in some way constitutes an obstacle in the way of delegates searching for a solution in accordance with what they consider the principles of the United Nations Charter to be. Respondent had often before gained the impression that many delegates adopted such an approach, but it had never before been expressly so stated.

On Scandinavian initiative, certain "experts" were, however, appointed to examine conditions in South Africa. Further reference will be made to them in the next paragraph.

12. The same attitude of an extreme readiness to criticize coupled with a complete reluctance to propose an alternative may be seen in the report of the so-called "recognized experts", referred to in the previous paragraph. They were appointed in terms of a Security Council resolution requiring them to—

"... examine methods of resolving the present situation in South Africa through full, peaceful and orderly application of human rights and fundamental freedoms to all inhabitants of the Territory as a whole, regardless of race, colour or creed . . . ¹".

Although outspoken in their condemnation of Respondent's policies (which condemnation was based largely upon a distorted, slanted or, at least, inaccurate rendering of facts) ² the so-called experts could, when it came to suggesting an alternative, do no more than pronounce a number of platitudes and suggest the calling of a South African National Convention to draw up a new constitution for the country ³.

13. In assessing the significance of opinions expressed by governments on the merits or ethics of Respondent's policy, substantial weight should, it is submitted, be attached to the above-mentioned fact that they have on the whole apparently not considered the problems involved in any alternative policy. In this regard Professor Manning said:

"Where the irresponsible foreign onlooker has merely to insist that apartheid is 'morally wrong', the responsible South African has rather to ask himself whether there is any less immoral approach to South Africa's problem ⁴."

Or, as stated even more pungently by a foreign journalist:

"A simpleton can criticise apartheid, but it will take a very wise man to provide an alternative system which will work and at the same time improve the situation in South Africa ⁵."

The irrationality of the approach which condemns a policy without having regard to possible alternatives is occasioned, it is submitted, by the fact that a great part of the criticism directed at South Africa is motivated by emotional rather than rational considerations, as has been noted by Professor Manning in the passage quoted above ⁶. Where reason

¹ U.N. Doc. S/5658, 20 Apr. 1964, p. 1.

² For discussion of examples hereof, *vide Letter dated 22nd May, 1964 from the Permanent Representative of South Africa addressed to the President of the Security Council. S/5723 (28 May 1964).*

³ U.N. Doc. S/5658, 20 Apr. 1964, p. 18.

⁴ Manning, C. A. W., "South Africa and the World: In Defense of Apartheid", in *Foreign Affairs*, Vol. 43, No. 1 (Oct. 1964), p. 136.

⁵ Beilby, L., "Living with South Africa", *The Daily Telegraph*, 24 Nov. 1964.

⁶ *Vide para. 5, supra.*

plays any role at all, it is generally directed not at the merits or demerits of Respondent's policy, but at the interests of the State on whose behalf the criticism may be voiced. These interests could take the form of the naked acquisitiveness apparent from the address of President Nkrumah quoted above¹, the political or ideological ambitions of militant Communism, or merely of the need to gain or keep the favour of the so-called "anti-colonialist" States, or avoid falling into disfavour with those States.

14. It is apparent that no impartial observer can draw any conclusion regarding the merits of Respondent's policy from the fact that it has been criticized on behalf of a number of States, where the criticism was motivated by the features considered in the previous paragraph. The extent to which considerations other than the merits of a particular policy weigh with certain delegations, has been pointed out also in another context by Professor Manning, who said that—

"... in recent debates at the United Nations it has become increasingly difficult to impute much sense of reality to delegations which could join in a demand that South Africa take no action against those accused of attempting to destroy with high explosives the installations upon which the country's viability is dependent"².

15. Allied to the lack of reality referred to above, regard must be had to the consideration that, even in the passages quoted by Applicants, it is apparent that the speakers concerned either had no accurate conception of the true nature of Respondent's policies, or deliberately exaggerated, misrepresented, or distorted them. Thus, almost without exception, Respondent's policies were represented as being intended to oppress the non-White population for the benefit of the Whites, or even as being based on "an ill-conceived notion of the superiority of one race over another"³. That this is not so has been demonstrated repeatedly⁴. Respondent accepts that in many instances wrong impressions about the nature and effect of its policies are honestly and seriously maintained. The picture of South Africa presented overseas has so often been one-sided, exaggerated or completely incorrect that some governments or their representatives may well have been misled thereby. In addition, many persons were no doubt attracted by philosophies or theories of multi-racialism which exerted a strong appeal on the emotions but have been singularly unsuccessful in practice. As the fruits of Respondent's policy become visible, and the defects of alternative policies can no longer be ignored, Respondent expects an ever-improving world climate of informed opinion regarding the principles of separate development.

16. Statements made by a government during debates in the United Nations can, for the reasons set out above, not be assumed to represent a reasoned assessment of the merits of Respondent's policy based upon substantially correct information. Even less can they be assumed to represent the universal or even majority views of the subjects of the governments concerned. Outside southern Africa the merits of Respond-

¹ *Vide* para. 6, *supra*.

² Manning, C. A. W., "South Africa and the World: In Defense of Apartheid", *Foreign Affairs*, Vol. 43, No. 1 (Oct. 1964), p. 137.

³ Representative of Malaya, quoted by Applicants at IV, p. 300.

⁴ *Vide*, e.g., II, pp. 457-488, also Chap. V, paras. 7-12, *supra*, and Chap. VIII, *infra*.

ent's policies are matters of largely academic interest of which the man in the street knows very little and normally cares even less, and which fall outside the political arena altogether. In southern Africa the position is of course totally different. As has been seen¹, in South Africa this policy has obtained ever-increasing support from all sections of the population. In the Central African Federation the voters toyed with the concepts of partnership and multi-racialism but, as noted elsewhere, policies based on these concepts did not come up to expectations, and many erstwhile supporters of partnership are today very sorry that a policy of separation was not attempted years ago².

17. Since the merits of Respondent's policies have in the nature of things never been systematically canvassed before the people of any foreign State, and no vote taken thereon, or the views of the people ascertained in some other way, it follows that nobody could say either that the informed opinion in any such State is in favour of separate development, or that it is opposed thereto. Respondent does however make bold to say that among foreign commentators who have examined the situation with a view to determining the best policy from the point of view of all *the inhabitants of South Africa*, the policy of separate development enjoys substantial and ever-increasing support, and where not supported, is at least given serious consideration as a reasonable and sincerely meant attempt at solving an intractable problem. Some examples of favourable comment were furnished in the Counter-Memorial³. Further examples of the type of consideration which Respondent's policies have been enjoying in responsible circles overseas will be given in the next succeeding paragraphs.

18. In a recent article in the *Schweizer Monatshefte*, entitled "South Africa—an attempt at a positive appraisal", Dr. Wilhelm Röpke, Professor at the Graduate School of International Studies, Geneva, wrote, *inter alia*, as follows:

"In order to understand the issue and its unique nature, one must start with the indisputable fact that the Whites of South Africa have *not merely a doubtful right to the land which they have settled and brought to the highest prosperity, but, rather, they are completely justified in owning and controlling it*"⁴.

"Nor must we lose sight of the fact that the South African Negro is not only a man of an utterly different race but, at the same time, stems from a completely different type and level of civilization. One of the most shocking signs of the intellectual confusion of our times is that too few seem to ask themselves if it is at all possible to weld a nation worthy of the name out of such utterly different ethnic-

¹ *Vide* Chap. VI, para. 5, *supra*.

² *Vide* van Eeden, G., *Die Vuur Brand Nader* (1964), pp. 140-141. Respondent expresses no opinion on the question whether or not such a policy would indeed have been practicable in the Central African Federation or any of its constituent States, where circumstances differ very materially from those obtaining in South Africa and South West Africa.

³ II, pp. 484-488.

⁴ Röpke, W., "Südafrika: Versuch einer Würdigung", *Schweizer Monatshefte*, 44th Year, No. 2 (May 1964), pp. 103-104.

cultural groups and, on top of that, to organize it politically as a democracy¹."

" 'Apartheid' concerns a separation of the races, by means of which the South African government is trying to solve, or at least render bearable, the ethnic problem of the country. We, as outsiders, should make an honest effort to understand the true nature of the issue—its uniqueness and the heaviness of the burden it represents. What—possibly in unattractive fashion—this Dutch word is meant to convey is the effort, at the cost of great sacrifice, to do something completely reasonable, that is to say, keep apart the immiscible ethnic groups through setting up of autonomous areas reserved for the Negroes, the first of which has now been given over to the pertinent Bantu tribes under the name of 'Transkei'.

If we find it hard, in principle, to reach a just verdict, we should remember other cases in which the separation of ethnically heterogeneous groups, painful as the operation generally is, is considered today as unavoidable²." (Translation.)

"Apartheid means, therefore that certain appropriate possibilities for development will be given the two ethnic groups in South Africa, black as well as white, through the establishment of 'Bantustans'. This is the specific form in which South Africa pursues the policy of 'decolonializing' and 'development aid', which corresponds to this country's needs. No expense is being spared and all the experience of the Whites who have had contacts with Negroes for centuries is being utilized. One of the major aims of this policy is to raise the educational standards of the Bantus, already higher than in any other part of Africa, and to teach them modern agricultural methods³." (Translation.)

"One may judge the chances of success of this policy as good or not, but it could hardly be called stupid or evil⁴." (Translation.)

"At all events, it is unfair to reject this policy if one has no ideas for a better solution. Only completely confused ideologists such as the so-called 'liberals' in South Africa and their counterparts in other countries can seriously propose that one should give the blacks full political equality within the framework of a unified South Africa, thereby actually handing over to them jointly undisputed control of the country. This would be nothing less than advising national suicide⁵."

19. Dr. Max Lamberty, Professor at the *Hoger Instituut voor Overzeese Gebieden* at Antwerp, wrote in *De Vlaamse Gids*:

" 'Integration' can be a greater evil than 'segregation' when it is not accepted by all the parties concerned, when it is achieved not by free choice but by force.

A policy of separation, which leads to the establishment of separate institutions which grant to each of the groups differing racially, culturally or religiously its own possibilities, can, on the other hand,

¹ Röpke, W., *op. cit.*, p. 104.

² *Ibid.*, p. 105.

³ *Ibid.*, p. 106.

⁴ *Ibid.*, p. 107.

⁵ *Ibid.*, p. 109.

be a benefit when it gives all the groups concerned the possibility of completely developing and realising their own way of life.

The attitude which most States adopt towards South Africa is unsound. It has only become possible by a great lack of understanding and a very dubious opportunism¹. (Translation.)

20. After a tour of South Africa by three French senators (Professor Georges Portmann, Dr. A. Plait, and Mr. L. Yung) the leader of the group, Professor Portmann said, *inter alia*:

"We have been through the Transkei . . . and were astonished by the results obtained there. We saw the schools and the roads. They were perfect. We talked to Native farmers and members of the Native Government. Our impressions are very, very good . . .

We do not know what the ideas of the South African Government are, or what it intends doing in the future, but we can say that we cannot fault the result of Bantustans as we saw it—even though Bantustans may not be the answer to South Africa's problems²."

21. A German publisher, Mr. Waldemar Schutz, was reported as saying after a visit to South Africa:

"Bantustans . . . are a wise development. The Government is giving the Africans the right to develop in their own sphere . . . The critics of South Africa have not looked at the position closely enough. If people say that the measures taken by the Government are for the benefit of Whites at the expense of non-Whites they are wrong.

Present Government policy is for the benefit of everybody³."

He added that he would soon be publishing an exhaustive book by Dr. Peter Kleist, formerly of the West German Foreign Affairs Department, which would reflect the same opinions.

22. In the well-known Dutch paper *Elseviers Weekblad* Drs. F. A. Hoogendijk wrote:

"It is a remarkable experience travelling through the country and participating in the problem of *apartheid* from nearby. Great *apartheid* works reasonably well in practice. It is the best of the worst, as Winston Churchill once said of British democracy. It is the only way to avoid creating chaos among the various population groups and to see to it that one population group does not oppress the other. That the Europeans in South Africa are now oppressing the non-Europeans, is untrue⁴." (Translation.)

23. In the *National Review*, published in New York, Professor Thomas Molnar wrote as follows after a visit to South Africa:

"The Government of South Africa today is totally committed to the Bantustan policy. It hopes to secure for the Bantus a number of territories where they will eventually exercise self-rule. This is the positive counterpart of *apartheid*. It is a form of decolonization plus foreign aid to which the majority of the whites and many of the politically conscious Bantus are fully committed. The latter—that

¹ Lamberty, M., "Wat betekent pluralisme (11)?" in *De Vlaamse Gids*, No. 12 of 1963, pp. 811-812.

² *Sunday Times*, 11 Oct. 1964, p. 9.

³ *The Natal Mercury*, 10 Oct. 1962, p. 6.

⁴ Hoogendijk, F. A., "De verdachtmakingen en de Werkelijkheid", *Elseviers Weekblad*, 4 Apr. 1964, p. 3.

is, the politically hep Bantus—do not want a qualified suffrage that will keep them in a permanent minority situation, nor do they want one-man one-vote for the simple reason that they know that would soon lead to a Bantu majority in parliament, and even sooner to general civil war and massacre since the whites and the sizable Indian minority would never accept such a situation.

Instead they favor the Transkei experiment: the creation of a semi-autonomous state in the traditional homeland of the Xhosas.

The Verwoerd government is not engaged in window dressing designed to placate world opinion; it is earnestly trying to develop Bantu talent, potentiality and prosperity¹.

24. A retired United States Circuit Court judge, Judge Max M. Kors-hak, is quoted as saying after a visit to South Africa:

"I came here with extreme hostility; ready to criticise and scorn. I shall leave as a dedicated protagonist of the racial policies of this Government whether these are popular abroad or not²."

25. In a letter to *The Times*, Lord Milverton, former Governor of Nigeria, wrote, *inter alia*, as follows:

"The whole basis of the apartheid policy is that the South African problem is a multi-national one, not a multi-racial one.

What is the alternative to apartheid? Africa is strewn with the wreck of multi-racial dreams. Surely there is everything to be said for separate development—a system which guards the human dignity of both black and white Africans by providing that each should govern themselves . . .

Africans are beginning, in large numbers, to appreciate the independent future offered to them by the policy of apartheid, but the encouragement of unrest is a Communist interest, and it seems to me a pity that those who have no use for Communist principles or practices should unconsciously be playing their game³."

26. One of the editors of *De Telegraaf*, the well-known Dutch paper, wrote:

"... South Africa proceeds to exploit its fabulous riches and to educate its Bantu with love and efficiency at a cost of large amounts of money.

South Africa will also maintain its 'great' apartheid policy, consisting of the establishment of separate Bantu states, not because it considers it very pleasant, but because nobody has been able to demonstrate a practical alternative for this policy which has its roots in history⁴." (Translation.)

27. The famous author, John Creasey, said:

"... I have no doubt that South Africa is a freer, happier, more prosperous and more united country than most people in England realise.

¹ Molnar, T., "First Step in the Transkei", *National Review*, 25 Feb. 1964, pp. 155-156.

² *Sunday Express*, 20 Sep. 1964, p. 15.

³ *The Times*, 17 June 1964, p. 13.

⁴ *De Telegraaf*, 2 Mar. 1963, p. 2.

I hope I will be forgiven for saying that my preference is for the Rhodesian approach to the problem of Black and White. That doesn't alter the fact that on the surface at least there is a great deal to indicate that the South African approach is working much, much better than most people at home dreamt was possible¹."

28. Hans Edgar Jahn, who has earned international recognition as an impartial and objective observer, stated:

"The Bantu reserves existing in the country are to be made independent. There the Black man is to govern, administer and develop himself. The White man is not allowed to intrude. He is, however, encouraged to develop industries on the borders between the White and Black areas thus creating employment opportunities for the population of the reserves. The Black intelligentsia educated in the schools and universities are also to be deployed in the Bantustans. In principle the Bantustan project is to be recommended. Millions of Blacks have been living in these reserves for generations²." (Translation.)

29. Major Allister Smith of the Salvation Army recently wrote in a Canadian religious magazine after a visit to South Africa:

"The [South African] government has recently granted self-government to nearly two million Africans living in one of the most fertile and beautiful reserves, where no white man may own land. Modern medical and educational facilities are provided for Africans, mostly paid for by the White tax-payer. Many African chiefs and others support the Government policy and are not agitating for integration. But people who have never visited South Africa are so blinded by hateful propaganda that they can believe nothing good of the country³."

30. Drs. A. M. den Hartog, a teacher at the Catholic College of St. Joris at Eindhoven, Holland, recently visited South Africa at his own expense in order to examine the situation there. His report, entitled "Impressions of a Roman Catholic regarding South Africa", included the following:

". . . I also encountered persons of my own faith. It is customary at present to say that we, because we are Catholics, must also be against South Africa. My conclusion now is that most of my co-religionists support their leader, the Archbishop of Bloemfontein⁴ and that they consider the policy which is applied in South Africa to be just and in accordance with the Doctrine of our Church. Naturally everybody does not agree with everything, but as regards the main lines the people are in complete accord.

I am of the opinion that South Africa is a country with a truly Christian population, and that it is a bastion in the turmoil of Africa, from which civilization will at some stage radiate forth. May God lead her in accordance with the same sentiments of

¹ *Sunday Times*, 30 Sep. 1962, p. 5.

² Jahn, H. E., *Vom Kap Nach Kairo: Afrikas Weg In Die Weltpolitik* (1963), p. 31.

³ Smith, A., "The Truth About South Africa", *The Peoples Magazine*, Vol. 43, No. 10-12 (Fourth Quarter, 1964), p. 15.

⁴ Quoted in Chap. VI, para. 50, *supra*.

justice as heretofore and may He open the eyes of some fellow Christians in our part of the world so that they can see that we are on the wrong road in our judgment of Good and Evil ¹." (Translation.)

31. In a Dutch religious publication, *De Rotterdamse Kerkbode*, an article on the Church and Mission in the Republic of South Africa by a well-known Dutch theologian, Reverend G. H. H. Gijmink, ended by quoting the late Dag Hammarskjöld as saying after his visit to South Africa:

"I understand your problems completely. I am convinced of the complete integrity of the people who are executing your policy of separate development. My visit has given me a better understanding of your plans. It is clear that much criticism of South Africa is based on wrong information and is one-sided. I hope that God may give you time to do what you propose doing ²." (Translation.)

32. William F. Buckley, Jr., concluded an article on South Africa in the *National Review* with the following invitation:

"Some day, when you have nothing else to do, come up with a solution for South Africa, won't you? But remember the rules of the game. All the marbles have to end up each in a cavity—you can't just throw a few of them away, to make the game simpler. The people who picked *apartheid* are solidly committed to it; it is a radical solution in which they are investing their wit, their passion, and their means; they are men and women of urbanity and culture and understanding, and of courage, who are not fooling themselves, or trying to fool the world; men who, the more ignorant of them, feel the same contempt for the aimlessness of the American approach to race relations that Americans, the more ignorant of them, feel for the schematism of the South African approach. They may be wrong, as we may be; but we should try at least to understand what it is they are trying to do, and deny ourselves that unearned smugness that the bigot shows. I cannot say, 'I approve of Apartheid'—its ways are alien to my temperament. But I know now it is a sincere people's effort to fashion the land of peace they want so badly ³."

33. In an article in the *Haagsche Post* under the title "Apartheid—purely objectively" the following was said:

"Without a trace of fear for the public opinion, Prof. Pieter van Stempvoort (52) stated in a television interview that apartheid is a healthy solution for the South African racial problem. He had just returned from a three weeks visit to South Africa, where he acted as expert witness in an action for the rehabilitation of Professor of Theology Albert Geyser ⁴." (Translation.)

After pointing out that Geyser was known to possess moderately progressive views on apartheid, the article stated that T.V. viewers expected Van Stempvoort, a noted theologian, to return propagating equal rights for the Bantu population. But, the article continued, "... he found that

¹ *NZAW-Kroniek*, 1st Year, No. 1 (15 Sep. 1964).

² Gijmink, G. J. H., "Kerk en Zending in de Republiek van Suid-Afrika", *De Rotterdamse Kerkbode*, 9 Mar. 1963.

³ Buckley, W. F., "South African Fortnight", *National Review*, 15 Jan. 1963, p. 23.

⁴ *Haagsche Post*, 8 June 1963.

policy of the South African government was realistic and completely justifiable”¹.

34. The Reformed Ecumenical Synod, an ecumenical body representing approximately 30 Churches and nearly 3 million members of different colours and races in various parts of the world, recently expressed itself on racial matters, *inter alia*, as follows:

“2. Synod states as its belief that God’s Word does not teach either racial integration or separate racial development as a universally regulative principle expressing God’s will for our Christian conduct in race relations. God’s Word speaks relevantly to specific racial problems but it cannot be simply assumed that every form of separate racial development is either biblical or anti-biblical; neither can it simply be assumed that every form of racial integration is either biblical or anti-biblical. The specific and highly complex societal relationships within each land and nation must be taken into careful account when applying the biblical principles of love and righteousness for all men of all races and all nations.

4. Synod declares that where members of one ethnic group or nation permanently live together with other ethnic groups or nations within the same country, all individuals, groups and nations shall be equally accorded God-given rights before God and the law, and each individual, group or nation in the exercise of God-given rights must not violate the God-given rights of other individuals, groups or nations. *If two or more nations or ethnic groups in the same country wish to maintain their respective identities, territorial separation between these nations or ethnic groups cannot be disapproved on the basis of principle*”². (Italics added.)

35. Reverend G. J. H. Gijmink, referred to above³, wrote in a pamphlet entitled “Thus I saw South Africa”:

“General impression: economically and socially the Bantu are developing fast. In the long run this can be overtaken only by integration or a territorial separation implemented as vigorously as possible, whereby all black peoples would achieve completely their own chances. This is now Government policy. Would it, in view of the Biblical teaching of the fall of man and the many illustrations thereof in history (Cyprus), not be the best? Is integration not too idealistic and is autogenous development not more sober?” (Translation.)

36. Stanley N. Shaw, editor of Whaley-Eaton Service, Washington, D.C., wrote:

“Since 1949 the successive South African Governments have tended increasingly to be reform and welfare minded. Leadership has been in the hands of dedicated reformers hellbent for action much in the style of our own New Dealers of the 30’s.

¹ *Haagsche Post*, 8 June 1963.

² *Acts of the Reformed Ecumenical Synod 1963* (1963), p. 225.

³ *Vide* para. 31, *supra*.

⁴ Zo zag ik Zuid-Afrika, Reisdagboek van G. J. H. Gijmink, Herv. Pred. te Rotterdam—Grotekerkwijkgemeente, Voorzitter N. Z. A.W., under “Johannesburg, 13 April [1964]”.

Confident of the right as God gives them to see the right, they trample any opposition, and yet the strange fact of all this is that they have the single simple objective of bettering the future for black and white alike, for protecting all the underdogs¹."

37. Dr. Max Yergen, an American Negro and a well-known consultant on African affairs, was reported as follows while visiting Umtata, the capital of the Transkei:

"Separate development is a 'realistic policy' marked by qualities of sincerity and honest commitment, said Dr. Max Yergen, Negro guest of the National Foundation, at a dinner in the Transkei Legislative Assembly restaurant last night.

I do not hesitate to say that the responsibility rests with the rest of the world to understand separate development more fully than they do now and to give South Africa a more honest, objective and fair judgment.

The genuineness and sincerity with which the policy was backed made South Africa 'in every sense a bright spot on the continent of Africa—a spot which can grow even brighter when the rest of the world understands separate development better'²."

38. Démians d'Archimbaud, writing in *La Revue Française*, said:

"The celebrated geographer Elisée Reclus said about 1880: 'Between populations which are mixed but separated by origins, tradition, customs, and social condition, there is no other alternative than gradual assimilation, disappearance through servitude or massacre'. Not one of these solutions is applicable in South Africa today and a division of territory seems the sole possibility.

This should suffice by showing amply that South Africa, far from opposing the general current of emancipation which unfurls in Africa, on the contrary navigates clearly in this direction. Through apartheid she anticipates the big socio-political developments which are appearing from one end to the other of the continent of Africa. There is only one reservation: she wants to see the Bantu people progress in an orderly and systematic way towards a democratic governmental autonomy and not to go headlong by chance and disorder towards chaos and anarchic totalitarianism, as has come about in the Congo and in so many other states recently and prematurely emancipated³." (Translation.)

39. In a recent article in *La Quotidienne*, the following was said:

"In the face of this check of 'decolonisation' which is rapidly changing into 'decivilisation', by reason of an absolute disregard for African realities, South Africa, which lives in direct contact with the African masses, has attempted another experiment: that of separate government 'apartheid'. Until now, one must recognise that the results have been good and have allowed an increase in the standard of living of the populations, whilst in the former Africa

¹ Shaw, S. N., "The Truth About South Africa", *U.S. News and World Report*, 19 Nov. 1962, p. 114.

² *The Star*, 25 Nov. 1964, p. 3.

³ d'Archimbaud, D., "L'Afrique du Sud devant l'opinion", *La Revue Française*, No. 139 (Apr. 1962), p. 15.

possessions, with one or two exceptions, the standard of living is declining.

With the postulate that the multiracial communities which exist in the Republic of South Africa are not at the same level of development and that each has the right to progress and to dignity, nothing is more normal than that each community should progress according to its ability . . . The general prosperity of the country is such that it can furnish the means for expansion necessary for an accelerated development, a condition which cannot be fulfilled in other African countries ¹. (Translation.)

40. Finally, reference should be made to two foreign authorities quoted by Applicants, viz., Lord Hailey ² and Professor Gwendolen Carter ³.

As regards Lord Hailey, Respondent has already demonstrated ⁴ that the basic premise underlying his views was not even correct as at the time when he wrote, and that its incorrectness has been established conclusively by subsequent events. His criticism that institutions of Local Government are based on Tribal Councils rather than on electoral bodies is reminiscent of an attitude also expressed at one stage by Professor Cowen ⁵ and which Professor Cowen has freely acknowledged, has now fallen away ⁶. And whatever justification there might have been in 1956 for Lord Hailey's reference to an "assumption that discrimination is not merely an act of expediency but a law of nature" ⁷ it is clear that in the light of recent pronouncements ⁸ any basis therefor has fallen away.

If Applicants' comment ⁹ on Respondent's treatment in the Counter-Memorial of a portion of this extract from Lord Hailey's work is intended to suggest that Respondent has questioned or denied the impartiality of Lord Hailey's attitude, this would be unfounded. A reading of the relevant passage in the Counter-Memorial ¹⁰ renders it abundantly clear that the contrast between the views expressed by Lord Hailey and those of other commentators quoted by Respondent, lay in the contents of the views, and not in the impartiality or otherwise of their authors.

41. The above comments regarding Lord Hailey are of equal application to Professor Carter. Her basic criticism is that—

" . . . the emphasis is mainly on [*apartheid's*] negative aspect, i.e., on maintaining the European areas of the Union under the exclusive control of white South Africans, rather than the positive one of promoting a distinctive life for the Bantu ³¹."

Respondent disputes that this was a correct statement even when regard is had to the date of the publication (1958) from which it was taken. It is easy to be mistaken about a matter of emphasis in circumstances where the negative aspects receive much more publicity and are generally

¹ *La Quotidienne*, Paris, July 1964, pp. 4-5.

² IV, pp. 278-280.

³ *Ibid.*, p. 280.

⁴ II, pp. 487-488.

⁵ *Vide* IV, pp. 322-323.

⁶ *Vide* Chap. VI, para. 21, *supra*.

⁷ IV, p. 279.

⁸ As to which, *vide* Chap. V, para. 106, *supra*.

⁹ IV, p. 279, footnote 1.

¹⁰ II, pp. 484-487.

more conspicuous than the positive aspects, which may in substance nevertheless be of far greater significance or importance. However, be that as it may, there can be no mistaking that the emphasis at present falls heavily on the positive aspects of separate development, thus rendering Professor Carter's judgment outdated.

42. For the reasons set out above, it is submitted that the "evidence" adduced by Applicants regarding views of governments and foreign authorities does not assist them in establishing that there is no room for, nor actual existence of, wide differences of opinion regarding the merits of Respondent's policies. In particular, it is significant that overseas commentators who give reasoned and responsible consideration to the circumstances in South Africa, including the possible alternative policies which could be applied, tend increasingly to favour the policy which Respondent has formulated on the strength of long acquaintanceship with and intimate knowledge of realities in Southern Africa.

CHAPTER VIII

WEIGHT OF SCIENTIFIC AUTHORITY: GROUP PREFERENCES AND PREJUDICES

A. General

1. Chapter IV B.3.b.3 of the Reply ¹ is devoted to an attempt to illustrate that the “[o]verwhelming weight of contemporary authority in the political and social sciences” ², shows that “. . . Respondent’s policy and practice of *apartheid* fails (sic) to promote the well-being and social progress of the inhabitants of the Territory . . .” ³. It is an attempt, more particularly, to show that such “contemporary authority in the political and social sciences” refutes certain “Contentions” which, according to Applicants, have been advanced by Respondent, as being basic to Respondent’s policy of separate development. These “Contentions” are described as follows in the Reply:

- (a) “Respondent’s Contention Regarding ‘Difference’ without ‘Inferiority’” ⁴;
- (b) “Respondent’s Contention of Inevitable ‘Frustration’ (sic) if all Inhabitants of the Territory are Accorded Equal Opportunity” ⁴;
- (c) “Respondent’s Contention that as a ‘Realistic Government’ it must Support Existing ‘Group Reactions’” ⁵.

Applicants’ treatment of the aforementioned three “Contentions” forms the subject-matter of Chapters IX, X and XI, respectively, below. This Chapter is devoted to a discussion of certain matters raised in the introduction to Applicants’ treatment of the said “Contentions”.

2. In the said introduction Applicants say, with reference to certain passages in the Counter-Memorial, that—

“Respondent’s formulations of its policy of *apartheid*, or separate development, are based, *inter alia*, upon explicit and implicit assumptions concerning patterns of human behavior, and asserted limits upon the ability of public authorities to influence or affect such behavior. These assumptions, stated for the most part in the form of generalizations, appear clearly, for example, in Respondent’s rationale of its policy on Education in the Territory” ⁶,

and reference is then made to certain paragraphs in the Counter-Memorial dealing with education ⁷. These “assumptions”, or “underlying premises” ⁶ of Respondent’s policy, as Applicants also call them, are said to be—

“. . . in effect, that historical circumstances have created a situation in which members of different ‘groups’ *prefer* to ‘associate with

¹ IV, pp. 302-312.

² *Ibid.*, p. 277.

³ *Ibid.*, pp. 305-307.

⁴ *Ibid.*, pp. 307-308.

⁵ *Ibid.*, pp. 308-312.

⁶ *Ibid.*, p. 302.

⁷ *Ibid.*, and *vide* footnote 3 on that page.

members of their own group'; that 'many Europeans, in all probability the vast majority, *are not prepared* to serve in positions where Bantu are placed in a position of authority over them'; that these are 'social phenomena which exist as facts, *independently of any governmental policy*, legislation or administrative practices'; and that 'whatever the moral rights or wrongs pertaining to them in particular situations, there can be no denial that such group reactions exist as *facts of which due cognizance must needs be taken by any realistic government*'¹;

and it is alleged by Applicants that, on the basis of such "assumptions and generalizations" Respondent—

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

Applicants furthermore refer to a few passages in the Counter-Memorial³ to illustrate what they term Respondent's "theme that it is helpless to act other than as it presently does, if it wishes to act responsibly"⁴. They point out that the Odendaal Commission, in explaining its recommendations, also expressed the view that—

"... [A] policy of integration is unrealistic, unsound, and undesirable, and *cannot but result* in continual social discrimination, discontent and frustration, friction and violence—a climate in which no socio-economic progress can be expected to take place. Under such conditions the social cost in non-economic terms must outweigh any possible economic advantages. In the circumstances it is therefore *desirable to accept the position as it is and not to put idealism before realism*"⁵.

And they conclude with the statement that Respondent "seeks also to justify its policy on the basis of comparisons with human behaviour at all times and in all places"⁵; and that Respondent also contends that "the most analogous situation for comparative purposes is that of all mixed, plural, or multi-racial communities in the world"⁵.

3. Applicants make no attempt to substantiate their aforementioned allegation that Respondent "seeks also to justify its policy on the basis of comparisons with human behaviour at all times and in all places", but proceed to add that Respondent "suggests that its assumptions hold for at least a certain category of situations, e.g., all African countries"⁵.

¹ IV, pp. 302-303.

² *Ibid.*, p. 303.

³ *Ibid.*, pp. 303-304.

⁴ *Ibid.*, p. 304.

⁵ *Ibid.*, p. 305.

Respondent never suggested that its "assumptions" held good for "all African countries". In one of the passages in the Counter-Memorial referred to by Applicants to substantiate this allegation¹, Respondent stated:

"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 . . ."

It is obvious, in Respondent's submission, that Applicants' allegation is not borne out by what is said in the passage to which they refer. Nor is it borne out by their reference to a second specific passage in the Counter-Memorial, where it was stated by Respondent that the "position" of Natives in the mining industry in South West Africa was "very much the same as that found elsewhere in Africa"². As will appear from the context in which the statement was made by Respondent, the intention was to point out that the "position" of Natives in the mining industry was much the same as elsewhere in Africa because of the lack of experience of Natives in the said industry. This is not the same as seeking to justify policy on the basis of comparisons with situations elsewhere.

The third reference made by Applicants to the Counter-Memorial in support of their allegation³ concerns education. It was pointed out by Respondent on the page referred to by Applicants that its policy regarding the content and method of Native education in South West Africa corresponded with views which had been expressed in many African countries—including both Applicant States. It is significant that Applicants have not referred to any scientific views to dispute the soundness of the educational principle involved in the matter dealt with by Respondent in the paragraph in issue, nor have they themselves denied the soundness thereof. In the circumstances the relevance of Applicants' reference to the said paragraph is not clear.

In support of their above-mentioned statement that Respondent "contends that the most analogous situation for comparative purposes is that of all mixed, plural, or multi-racial communities in the world"⁴, Applicants refer to a paragraph in the Counter-Memorial in which Respondent dealt with certain group reactions in South Africa. Respondent stated, *inter alia*, that such reactions were "social phenomena" which "mani-

¹ IV, p. 305, footnote 4, reference to II, p. 383. This statement by Respondent was intended to cover the contents of Book IV of the Counter-Memorial, to which Book Applicants also refer without specifying any particular paragraph or page.

² III, p. 57, referred to in IV, p. 305, footnote 5.

³ IV, p. 305, footnote 5, reference to III, p. 381.

⁴ *Vide* para. 2, *supra*.

fest[ed] themselves, to a greater or lesser extent, in mixed or plural communities throughout the world"¹, and that—

"[d]epending upon the exact circumstances of a particular situation, the phenomena may partake of the nature of group preferences, group self-protection, group assertiveness, group conceptions of differences in social and cultural level, or sometimes simply group prejudices. Whatever their exact nature or causes, and whatever the moral rights or wrongs pertaining to them in particular situations, there can be no denial that such group reactions exist as facts of which due cognizance must needs be taken by any realistic government"².

Respondent discusses hereafter the phenomenon of group preferences and certain related aspects, but before doing so it deals briefly with Applicants' above-mentioned³ references to certain passages in the Counter-Memorial dealing with education.

4. Applicants refer to certain passages in the Counter-Memorial as containing the "rationale" of Respondent's policy on education in the Territory⁴. Respondent points out that the passages in the Counter-Memorial⁵, whilst relevant to the question of group reactions, as referred to in the paragraphs below and again in Chapter X hereafter, and also to certain aspects of education, cannot properly be said to set out the "rationale" of Respondent's educational policy in the Territory. Respondent does not propose to deal with the matter in any detail, and merely points out that the said passages are by no means concerned with all the various factors, discussed in the Counter-Memorial⁶, which underlie Respondent's system of separate education in South West Africa.

Two further passages relating to education which are quoted by Applicants⁷ hardly seem relevant to the point Applicants seek to make, viz., Respondent's alleged "theme that it is helpless to act other than as it presently does, if it wishes to act responsibly"⁸. The first passage⁸ deals with economic considerations flowing from differing social and economic levels of development in the case of the European and indigenous groups of the Territory, whilst the second⁹ deals merely with attitudes found amongst the indigenous groups in regard to compulsory education—i.e., not with any inter-group attitudes.

B. Group Preferences and Prejudices

5. In the paragraphs in which they describe the "underlying premises" of Respondent's policy of separate development, Applicants say that, according to Respondent, "historical circumstances" created the "situation" referred to in the said paragraph. Respondent no doubt indicated

¹ III, p. 528 (para. 20 (f)).

² *Ibid.*, pp. 528-529.

³ *Vide* para. 2, *supra*.

⁴ IV, p. 302.

⁵ The reference is to III, pp. 528-530, which are quoted at IV, pp. 266-268. *Vide* also the quotations on IV, pp. 303-304 at footnote 3 in the text on p. 303 and at footnote 1 on p. 304 which are likewise concerned with group reactions.

⁶ III, pp. 353 ff.

⁷ IV, p. 304.

⁸ At footnote 4 in the text in IV, p. 304.

⁹ At footnote 5 in the text in *ibid.*, p. 304.

that historical circumstances played a part in the pattern of group relations and reactions referred to by it, but it did not say, or suggest, that the situation was wholly the result of historical circumstances. In fact, Respondent made it clear that it was dealing not only with a situation which was the creation of historical circumstances¹, but also with "social phenomena" which manifested themselves, "to a greater or lesser extent, in mixed or plural communities throughout the world"².

6. The phenomenon of preferential association among men is not a mere "assumption", as Applicants suggest³, but a generally accepted and scientifically established fact on the pervasiveness of which many social scientists have commented. The late Professor Fairchild said:

"From time immemorial it has been inherent in the very nature of human group identification that the members of any particular group should feel more warmly attracted and attached to other members of their own group than to outsiders. It is the very essence of human association that persons who live together continuously in more or less intimate bonds of society should be characterized by many similarities of thought, feeling, and action, and moreover that they should regard their own ways as right and good and preferable to those of strangers. . . ."⁴

Professor George A. Lundberg, former President of the American Sociological Society, says:

"In every society men react selectively to their fellow men, in the sense of seeking the association of some and avoiding the association of others. Selective association is necessarily based on *some* observable differences between those whose association we seek and those whose association we avoid. . . ."⁵

and "[t]he phenomenon of intergroup discrimination is as widespread and as old as human society"⁶.

Professor A. James Gregor says in this connection that the phenomenon of preferential association—"the preference for one's kind"⁷—is "an elementary social fact"⁷, and that it is "characteristic of all social animals"⁷.

Science establishes that the basis for such preferential, or selective,

¹ *Vide* the second quotation from the Reply in para. 2, *supra*, which is part of para. 20 (*f*) at III, p. 528. This sub-para. (*f*) refers, in terms, to South Africa, because it forms part of a paragraph written in reply to an allegation regarding an aspect of higher education in South Africa. There is therefore no substance in Applicants' allegation—*vide* footnote 2 on IV, p. 266—that "[t]he omission of reference here to South West Africa underscores the extent to which Respondent's policies in the mandated Territory are essentially projections of its policies in the Republic". It appears from other paragraphs in the Counter-Memorial that there has at all times been social separation in the Territory between Europeans and non-Europeans, and to a certain extent, also between the non-European groups: *vide* III, pp. 367-368.

² III, p. 528 (para. 20 (*f*)).

³ IV, p. 302.

⁴ Fairchild, H., *Race and Nationality* (1947), p. 4.

⁵ Lundberg, G. A., "Some Neglected Aspects of the 'Minorities' Problem", *Modern Age* (1958). Reprint in *The Mankind Quarterly*, Vol. III, No. 4 (Apr.-June 1963), p. 212.

⁶ *Ibid.*, p. 227.

⁷ Gregor, A. J., "On the Nature of Prejudice", *The Eugenics Review*, Vol. LII (Apr. 1960-Jan. 1961), p. 222.

association is provided [by observed similarities and, conversely, differences. Professor Lundberg says in this regard, as appears from the passage quoted above, that—

“[s]elective association is necessarily based on some observable differences between those whose association we seek and those whose association we avoid . . .”.

Professor Niceforo has expressed the view that group interaction is governed by an attraction of similars and a corresponding repulsion of dissimilars¹. Professor Gregor says in this regard:

“There can be little serious doubt that the ‘sentiment of identity’, what Niceforo calls the ‘invariable law’ of ‘attraction of similars and repulsion of dissimilars’ is somehow rooted in the nature of man, a nature which man shares in its most significant features with all social animals . . .

A group is sustained by mutual attraction . . .

In every complex society men react selectively to their fellows. Preferential association is based upon observable differences².”

This sense of similarity, or “sentiment of identity”, is often referred to in social science literature as a “shared consciousness of kind”. This “consciousness of kind” constitutes in the words of one of the founders of the science of social psychology, Professor William MacDougall, “the principal force underlying all human associations”³. It has its counterpart in what has been called “a consciousness of difference”⁴ and, it has been stated by Professor I. D. MacCrone, who is quoted by Applicants in another connection⁵, that the stronger the identification between the members of a group, the stronger the feeling against “alien” groups:

“The identification which lies at the basis of group psychology, while leading to the development of those attitudes and impulses without which a genuine group-life would be impossible, at the same time, and necessarily, gives rise to those veiled or overt manifestations of hostility directed against others which constitute the essence of the psychology of group prejudice. The greater and more intense the group feeling, that is, the stronger the identification between members of a group, the greater is the strength of the prejudice against the alien group and against those who are not members of one’s own group. Social psychology may, or may not, have its laws, but there can be little doubt about the existence of that principle of group psychology according to which the feeling for one’s own group and the feeling against some other group tend to wax and wane in direct proportion to one another⁶.”

7. Social scientists teach that the differences which give rise to group preferences and prejudices can be of many kinds, and that they can, depending on circumstances, have different consequences. It has been said in this connection that—

¹ According to Gregor, A. J., “The Dynamics of Prejudice”, *The Mankind Quarterly*, Vol. III, No. 2 (1962), p. 80.

² *Ibid.*, pp. 80-81.

³ MacDougall, W., *The Group Mind* (1920), p. 5.

⁴ Hoebel, E. A., *Man in the Primitive World* (1958), p. 117.

⁵ IV, p. 307 and *vide* Chap. H, para. 6, *infra*.

⁶ MacCrone, I. D., *Race Attitudes in South Africa* (1957), p. 249.

"[t]he differences which are the basis for selective association are of indefinitely large variety, of all degrees of visibility and subtlety, and vastly different in social consequences . . .¹",

and that—

"[g]roup antagonisms seem to be inevitable when two peoples in contact with each other may be distinguished by differentiating characteristics, either inborn or cultural, and are actual or potential competitors. Only by eliminating the outward evidences of distinction, such as color, dress, or language, or by removing the competitive factor, may racial antagonisms be destroyed²."

It has been said, also, that—

"[t]hese differences can reside . . . in attitudes, religious opinions, speech, aesthetic judgements, technical achievements or observable physical differences. In varying contexts, in different areas of competition one or the other or several in combination will be of primary importance³",

and that overt physical differences play an important part in preferential association and group identification because such distinctions are of "permanent duration and of high social visibility"⁴, and provide a "broad and sure base for group identification"⁴. Professor Gregor has said in this connection:

"Where differences between groups in contact possess high social visibility (such 'visibility' can involve cultural differences or physical differences), relations are sensitive and hostility is the consequence of seemingly trivial provocation. This is particularly true when groups singularly marked by anthropometrical distinctions come into contact. Cultural differences can, in a relatively short period, be ameliorated. Physical differences persist to foster social distance which characterizes out-group avoidance. Even a superficial consideration of race (understood in its restricted sense) relations, i.e. contact between black and white, in the United States and Britain, indicate that the Negro, one in class, language, religion and general culture with the host people, remains in essentially caste status, facing overt or covert prejudice in their day to day contacts with their white conationals⁵."

And also:

"In the United States, where immigrant populations composed of all the European sub-races basically akin to the native stock have been, by and large, absorbed, the Negro and the Asiatic remain in caste isolation.

This is true in spite of the fact that the Negro is one with the majority of Americans with respect to language, religion, customs

¹ Lundberg, G. A., "Some Neglected Aspects of the 'Minorities' Problem", *Modern Age* (1958). Reprint in *The Mankind Quarterly*, Vol. III, No. 4 (Apr.-June 1963), p. 212.

² Young, D., *American Minority Peoples* (1932), p. 586.

³ Gregor, A. J., "On the Nature of Prejudice", *The Eugenics Review*, Vol. LII (Apr. 1960-Jan. 1961), p. 218.

⁴ *Ibid.*, p. 219.

⁵ Gregor, A. J., "The Biosocial Nature of Prejudice", *Genus*, Vol. XVIII, No. 1-4 (1962), pp. 13-14.

and general allegiance . . . The retention of social distance seems a function of high social visibility¹."

Professor Kenneth B. Clark, whose views are referred to by Applicants in another connection², points out in this regard that in the United States "[d]isadvantaged white groups have a greater chance of increasing their economic status and being assimilated into the dominant culture"³ than Negroes, since "[t]he barriers against such assimilation are more formidable for the Negro child and are further complicated by the fact that everyone can see what his color is"⁴.

8. Social science studies teach, and contemporary events in various countries of the world confirm⁵, that the nature and intensity of group attitudes are, in large part, determined by the degree of difference between groups, the permanence of the respective differences, and the nature of the contact situation. And, furthermore, that the potential for intergroup tension and for social disorder materially increases where differences between groups are emphatic, particularly physical differences of high social visibility; where group differences have, in the past, given rise to group conflicts; where there are threats of economic competition or loss of status; and where there are gross differences in demographic strength so that one group feels itself or its traditional values threatened by another group. Where differences between ethnic groups are of such extent and permanence that they prevent their assimilation on a voluntary basis, attempts at enforcing assimilation may evoke strong and violent reactions. Thus Professor Gregor says:

"We can generalize (bearing in mind exceptions which can conceivably result from singular socio-political circumstances) that where two peoples, marked by gross physical dissimilarities make contact, the attempt at assimilation is invariably met with tensions and disharmonies which it is almost beyond the power of men to resolve⁶."

9. As was pointed out above⁷, the phenomenon of group preferences is "as widespread and as old as human society", and it has been remarked that the prospect of eliminating that disposition in man is remote. Thus Professor Gregor says:

"Sanguine hopes that the disposition to preferential association will be eliminated by education, by legislation or by time itself seem belied by historic experience. Only a sensitive awareness of the complexity of the problems which face our world in the increasingly frequent contact of races and cultures can assist us in avoiding the tragedy that has attended such contacts in the past⁸."

¹ Gregor, A. J., "On The Nature of Prejudice", *The Eugenics Review*, Vol. LII (Apr. 1960-Jan. 1961), p. 220.

² IV, p. 307 and Chap. X, para. 8, *infra*.

³ Clark, K. B., *Prejudice and Your Child* (1955), p. 50.

⁴ *Ibid.* *Vide* also Chap. XI, paras. 6-7, *infra*.

⁵ *Vide* Chap. III, *supra*, and also Chap. XI, paras. 6-7, *infra*.

⁶ Gregor, A. J., "On The Nature of Prejudice", *The Eugenics Review*, Vol. LII (Apr. 1960-Jan. 1961), p. 219.

⁷ *Vide* para. 6, *supra*.

⁸ Gregor, A. J., "On The Nature of Prejudice", *The Eugenics Review*, Vol. LII (Apr. 1960-Jan. 1961), p. 222.

C. Conclusion . . .

10. It seems obvious, in the light of the foregoing, that where the population of a country is composed of heterogeneous groups, the potentiality for inter-group tension and conflict can be considerable, particularly in a country like South West Africa where there are substantial differences relating to race (i.e., physical differences), culture, social institutions, language and levels of development between the various groups. That such differences mark the various population groups of the Territory, cannot be questioned, and the problem therefore is how best to ensure the peaceful development of all the various groups and their members. In Respondent's view existing group differences and attitudes in the Territory are such that any attempt designed at compelling groups to surrender their identities, or at forcing them into an unwanted pattern of integration, will generate such tension and hostility as to wreck all hope of peaceful development and progress in the future. A policy which aims at such development and progress should, in Respondent's view, take due note of the differences between the groups and of the attendant preferences and prejudices; give due recognition to the separate identities of the groups; regulate contact between the groups in such a way as to render each group safe against intrusion or domination by any of the others; and seek to obtain as much co-operation as possible between the various groups in those fields where contact between them will not be accompanied by tension, fear or friction.

CHAPTER IX

WEIGHT OF SCIENTIFIC AUTHORITY: "DIFFERENCE" WITHOUT "INFERIORITY"

A. Introductory

1. This Chapter deals with Applicants' treatment of what they describe as Respondent's "Contention regarding 'Difference' without 'Inferiurity'" ¹.

In the Counter-Memorial Respondent made it clear that its policy of separate development was "not based on a concept of superiority or inferiority, but merely on the fact of people being different" ², and attention was on more than one occasion drawn to differences between the various population groups of the Territory. Thus—to mention only one example—Respondent referred to differences between the White and the indigenous groups, and to the effect thereof, in the following terms:

"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 ³."

Respondent made it plain, in other words, that its policy was based on group differences, and not on any concept of superiority or inferiority. In the circumstances there is, in Respondent's submission, no justification for Applicants' describing Respondent's statement that "[t]he policy of separate development is not based on a concept of superiority, but merely on the fact of being different" as "ambiguous and meaningless" ⁴, nor for their pretended ignorance as to the "intended significance" ⁵ of the said statement.

2. Applicants allege in the Reply that Respondent's policy, as characterized by them, "... necessarily implies not only that some 'groups' are inferior, but that individual members thereof are 'permanently and irremediably inferior'" ⁵, and they proceed to say that—

"... the overwhelming weight of authority in the sciences of biology, psychology, sociology and anthropology argue (sic) that no scientific evidence supports an assumption that groups or races differ innately ⁵".

In support of this statement, whatever its real meaning may be ⁶, Applicants refer to a South African Professor of Anatomy at IV, page 306 and to "additional authorities" in Annex 12 to the Reply ⁷.

¹ IV, pp. 305-306 and *vide* also Annex 12, pp. 500-502.

² II, p. 471 (para. 23).

³ *Ibid.*, p. 422 (para. 7).

⁴ IV, p. 269.

⁵ *Ibid.*, p. 306.

⁶ *Vide* para. 5 (c), *infra*.

⁷ IV, pp. 500-502.

In the paragraphs which follow, Respondent will first deal with the alleged necessary implication of inferiority. Then, after briefly stating its attitude in regard to Applicants' statement concerning modern science, Respondent will refer to modern scientific views, and also comment briefly on some of the views quoted by Applicants.

B. Alleged Necessary Implication of Inferiority

3. Respondent has stated positively that its policy of separate development is "not based on a concept of superiority or inferiority"¹, and it rejects Applicants' allegation that it must, nevertheless, necessarily be implied that the policy is based on an assumption "not only that some 'groups' are inferior, but that individual members thereof are 'permanently and irremediably inferior'"².

In an earlier part of the Reply, Applicants make the allegation that—
 "[t]he necessary and direct consequence of allotting rights and burdens by treating 'groups' *differently* is the treatment of at least some individuals in some 'groups' as inferior"³,

and that members of non-White groups are allotted "'permanently and irremediably inferior' status, rights and opportunities"⁴. Respondent does not intend to deal here with the truth or otherwise of these allegations, but points out that they amount to something different from saying⁵ that Respondent's policy is based on the concept that some groups and their members *are* inferior.

It may be—although it is not clear that it is so—that Applicants seek to draw the inference that Respondent regards some groups and their members as inferior from the mere fact that the various groups are treated differently⁶. If so, it is denied that the inference can validly be drawn. Applicants, it may be pointed out, speak in this regard of the "fallacious and self-contradictory nature of Respondent's profession that the policy of *apartheid*, or separate development, is 'not based on people being inferior but being different'"⁶. This "fallacy", they say, is "reflected in Respondent's own inconsistent formulations of its policy"⁶, and the inconsistency is alleged to exist in the following two statements which appear in the Counter-Memorial, viz.: "We prefer each of our population groups to be controlled and governed by themselves as nations are . . .", and—

"[w]here is the evil in . . . the fact that in the transition stage the guardian must needs keep the ward in hand and teach *him* and guide *him* and check *him* where necessary? This is separate development"³.
 (Italics added by Applicants.)

Respondent fails to see what inconsistency there can be said to be in the two statements. The first states the aim of the policy, whilst the second deals with the relationship in South Africa between the guardian (White group) and the ward (Native groups) *in the transition stage*, i.e.,

¹ II, p. 471 (para. 23).

² IV, p. 306.

³ *Ibid.*, p. 275.

⁴ *Ibid.*, p. 276.

⁵ As Applicants do at IV, p. 306.

⁶ *Vide* the emphasis on "*differently*" at IV, p. 275.

while in transition to the stage mentioned in the first statement. It is clear, furthermore, that there is no suggestion of inferiority on the part of the ward in the statements quoted—only the implication of immaturity and as yet insufficient development on its part.

4. It is clear, in Respondent's submission, that Applicants have not shown why an inference of inferiority should be drawn—let alone why it must necessarily be drawn. They are, in the circumstances, left with the mere assertion of such an inference, and with a reference to an argument by Mr. Philip Mason, in the following terms:

“... as a matter of choice, people may prefer to mix socially with those of their own group, but to say that by law people of one group must mix with no others can really only proceed from a conviction not only that the other groups are inferior but that every member of each of the other groups is permanently and irremediably inferior”¹.

Mr. Mason's reasoning in the above passage, and the conclusion to which it leads him, are totally invalid. The basic reason for this is that he sets out from a premise which is erroneous, at least to the extent of constituting serious over-simplification. He does not explain from what source he derives the description of Respondent's policies as “say[ing] that by law people of one group must mix with no others”. There are, of course, laws which have the effect of restricting, although by no means totally excluding, social contact between persons of various groups. But such restrictions are mostly of reciprocal application, and they represent only one facet of policies designed to find a solution for extremely difficult problems of group relations in the South African context. Where the ultimate aims of the whole policy, i.e., separate self-realization for each group, are properly understood by members of the groups concerned, as is happening in an ever-increasing measure², and as they come to experience the emphasis which is placed upon respect for their distinctive cultures and for their dignity as human beings, there is ever less occasion for anyone to regard himself as being treated as “permanently and irremediably inferior”.

That restrictive measures may be considered necessary to avoid complex problems of government, without any suggestion of inferiority on the part of the group concerned, has been recognized in certain countries which are aware of the difficulties which arise in heterogeneous situations. Thus, as has been noted³, the immigration of non-Europeans into Australia (which has a non-European population of little more than 30,000) is limited, and the purpose of this policy has been officially stated to be—

“... to maintain homogeneity of Australian people in order to avoid insoluble problems which arise from inability of Europeans and non-Europeans in any one country to merge successfully into a single harmonious community. In such an attitude there is not the slightest suggestion that Europeans are the superior race”⁴.

Respondent further refers in general to facts and comment dealt with

¹ VI, p. 339 and *vide* p. 306, footnote 1.

² *Vide*, e.g., Chap. VI, paras. 65-84, *supra*.

³ *Vide* Chap. III, para. 17, *supra*.

⁴ In an article entitled “Commonwealth Check on Entry of Non-Whites”, *The Times* (London), dated 18 Apr. 1962.

in Chapter III of this section, which clearly demonstrate the inability of many peoples between whom there is a large measure of difference—e.g., in colour, culture, standards of development, or the like—to become assimilated with each other, not because of any question of innate inferiority or superiority, but merely because the differences are too great. It cannot validly be suggested that differentiation which is aimed at avoiding group reactions of the kind mentioned in the said Chapter and in Chapter VIII immediately above must nevertheless be considered to “proceed from a conviction” of superiority or inferiority on the part of any group or its members.

In all the circumstances Respondent says that the inference which Applicants and Mr. Mason seek to draw, is completely unwarranted.

C. Respondent's Attitude in Regard to Applicants' Statement on Modern Science

5. Applicants say that—

“... the overwhelming weight of authority in the sciences of biology, psychology, sociology and anthropology argue [sic] that no scientific evidence supports an assumption that groups or races differ innately¹”.

As stated before, Respondent's policy of separate development is not based on the concept of inferiority or superiority on the part of any group. Whilst the policy no doubt takes account of the present stages of development of the respective population groups, it does not rest on any assumption of innate, or biological, differences in the potential socio-cultural ability of those groups. If it should be a scientific fact—Respondent does not say that it is a fact—that observed differences in the cultural development and achievements of different groups are, wholly or in substantial part, the consequence of irremediable biological, or hereditary, determinants governing cultural development, science would lend support to a policy which took proper account of such differences and factors. But, and Respondent stresses the point, whilst the existence of such determinants could, if established, provide further evidence of the desirability of a policy of separate development in circumstances as existing in Southern Africa, the absence of such biological, or hereditary, determinants does not in the slightest degree affect the argument for separate development.

Applicants' above-quoted statement must obviously be qualified so as to exclude at least some physical differences, since certain physical characters constitute the very basis on which racial classification is made by scientists at the present time². Thus qualified, Respondent would have no quarrel with the statement if it is intended to convey—

- (i) that scientific evidence available at present can give no definite answer to the question whether races differ innately, and
- (ii) that it is, for that reason, wrong to assume that such differences exist, just as it would be wrong to assume that they do not exist.

¹ IV, p. 306.

² *Vide*, e.g., the following in “Statement On The Nature Of Race And Race Differences”, by Physical Anthropologists and Geneticists, June 1951, in Unesco: *The Race Concept* (1951), p. 12: “In its anthropological sense, the word ‘race’ should be reserved for groups of mankind possessing well-developed and primarily heritable physical differences from other groups.”

It is, however, not clear that this is the meaning which Applicants intend to convey; for, although it is said, in negative form, that "no scientific evidence supports an assumption that groups or races differ innately", the impression is nevertheless created that Applicants' contention is that most scientists hold the view that present scientific knowledge *establishes the absence* of such differences. This impression is strengthened when regard is had to the positive form in which statements are made by some of the authorities quoted by Applicants. The following examples will suffice:

"The scientific evidence indicates that the range of mental capacities in all ethnic groups is much the same¹."

"... If their contributions are distinctive—and there can be little doubt that they are—the fact is to be accounted for by geographical, historical, and sociological circumstances, not by special aptitudes...²"

It would seem, therefore, that Applicants' contention is that the weight of modern scientific authority is to the effect that there are, in fact, no innate differences between races. If this is indeed their contention as to the weight of present scientific knowledge, it is disputed by Respondent.

In the paragraphs which follow Respondent will show that modern scientists hold opposing views as to the question whether or not there are innate mental differences between races. Inasmuch as Applicants have referred to individual views that no such differences exist, Respondent will refer only to views that such differences do exist, and, also, to views that science cannot give a definite answer one way or the other.

6. *Conflicting scientific views.*

(a) In the introduction to the Unesco publication, *The Race Concept*, which contains a statement on the nature of race and race differences, as drawn up by a number of physical anthropologists and geneticists at the request of Unesco in 1951, and also observations and comments by other scientists on the said statement, it is said:

"The concept of race and the question whether or not there are mental differences between races are highly controversial matters on which anthropologists and geneticists hold widely divergent views, defending them more passionately than any other theory³."

(b) Arthur G. J. Cryns, of the Department of Psychology, University of Detroit, U.S.A., writes as follows of two opposing schools of thought:

"As to the interpretation of their research data, the students of racial intelligence generally belong to either of the following schools of thought. One category, taking a predominantly nativistic view, conceives the observed Negro-White differences in intelligence test observance as indicative of an inborn intellectual inferiority of the Negro. The other, adhering to a more pronounced environmental viewpoint, holds that the inferior test performance of the Negro is largely, if not fully, accounted for by unfavorable environmental factors such as the lack or inadequacy of educational opportunity,

¹ IV, Annex 12, p. 600 (para. (v)).

² *Ibid.*, p. 601 (para. (viii)).

³ Unesco: *The Race Concept* (1951), pp. 10-11.

intellectual stimulation, socio-economic challenges, the absence of truly 'culture-free' tests, etc. . . . This dichotomy of interpretation, so clearly crystallized in the American literature on cross-cultural intelligence research, may also be found in the African studies ¹."

- (c) Dr. G. M. Morant, of the University of London, refers to opposing points of view on the question in the following terms:

"The general inference is that there are racial differences in mentality, although clear demonstration of them—regarding particular characters and particular pairs of populations—is not available yet. Anyone who enunciates this conclusion is liable to be misunderstood; discussion of the problem has always tended to run to extremes. On the one hand there have been writers who asserted that there are racial differences of profound significance, and opposed to them have been others who have vehemently denied the existence of any inborn inequalities between groups of people ²."

- (d) Professor Dwight J. Ingle, Chairman of the Department of Physiology of the University of Chicago, says the following:

"Racists have drawn the firm conclusion that the Negro race is genetically inferior to other races in intelligence, while some equalitarians have drawn the firm conclusion that all races are equally endowed with intelligence. Both groups support their respective dogma by spurious argument, emotionalism, and intolerance, also known as bigotry ³."

7. *Views that there are, or that there probably (or possibly) are, differences.*

- (a) Professor H. J. Muller, an internationally known geneticist who has been described as "one of the leading modern biologists"⁴ says:

"... in view of the admitted existence of some physically expressed hereditary differences of a conspicuous nature, between the averages or the medians of the races, it would be strange if there were not also some hereditary differences affecting the mental characteristics which develop in a given environment, between these averages or medians. At the same time, these mental differences might usually be unimportant in comparison with those between individuals of the same race ⁵."

"To the great majority of geneticists it seems absurd to suppose that psychological characteristics are subject to entirely different laws of heredity or development that other biological characteristics ⁵."

"... we do have every reason to infer that genetic differences, and

¹ Cryns, A. G. J., "African Intelligence: A Critical Survey of Cross-Cultural Intelligence Research In Africa South of The Sahara", *Journal of Social Psychology*, Vol. 57 (1962), pp. 292-293.

² Morant, G. M., *The Significance of Racial Differences* (1952), p. 46. Morant is cited by Applicants on IV, p. 600 (para. (ii)).

³ Ingle, D. J., "Comments on the Teachings of Carleton Putnam", *The Mankind Quarterly*, Vol. IV, No. 1 (1963), p. 28.

⁴ *Vide* Dunn, L. C. and Dobzhansky, Th., *Heredity, Race and Society* (1959), p. 14.

⁵ Unesco: *The Race Concept* (1951), p. 49.

even important ones, probably do exist between one living racial group of men and another . . . ¹”

“ . . . it seems to me that it is entirely incorrect to say ([that]—: ‘Available scientific knowledge provides no basis for believing that the groups of mankind differ in their innate capacity for intellectual and emotional development.’ For this passage would imply that given the same environment, the same degree and type of development would be attained by the average (or median) of all races ².”

- (b) Dr. C. D. Darlington, Sherardian Professor at the University of Oxford, England, speaks of the “. . . diverse, the ineradicably diverse, gifts, talents, capacities . . .” ³ of each race. He is also recorded as having said that—

“[d]ifferent kinds of results have arisen from race crossing in all parts of the world. They show reliably and conclusively that the progeny are different in innate capacity from either parent of the so-called pure race and that these differences are sometimes advantageous and sometimes disadvantageous, to one or both in the circumstances obtaining. Simply because the innate capacities of all races of men, as of animals, are different, and are suited to different circumstances and habitats ⁴.”

- (c) Professor A. H. Sturtevant, a geneticist of the California Institute of Technology, U.S.A., has written:

“There is excellent evidence for the existence of individual differences in mental characteristics . . . There can also be little question that there are at least statistical differences between races in such genes ⁵.”

And, speaking of race mixture:

“It is true that such crosses give the possibility of producing some individuals that are ‘better’ (in any specified respect), than any to be found in either parental race—but experience and theory are agreed that, after the first generation, these are much less likely to be found than are ‘inferior’ individuals. The result of these considerations is that, even on a purely physiological level, crosses between quite different races are not free of danger ⁶.”

- (d) Professor Sir Ronald Fisher, a geneticist of the University of Cambridge, England, believes that—

“[a]vailable scientific knowledge provides a firm basis for believing that the groups of mankind differ in their innate capacity for intellectual and emotional development, seeing that such groups do differ undoubtedly in a very large number of their genes ⁷.”

- (e) Professor K. F. Saller, of the Anthropological Institute of the University of Munich, Germany, objected to the aforementioned statement on race in the following terms:

¹ Unesco: *The Race Concept* (1951), p. 50.

² *Ibid.*, p. 54.

³ *Ibid.*, p. 26.

⁴ *Ibid.*, p. 58.

⁵ *Ibid.*, p. 51.

⁶ *Ibid.*, p. 64.

⁷ *Ibid.*, p. 61. *Vide* also p. 52.

"... I feel that there is a certain danger in the Statement, especially in so far as the drafts hitherto evolved have utterly disregarded or even flatly denied the existence of mental (psychic) differences between certain groups of peoples. We may or may not give the name of race to such groups of human beings, who differ in their inherited psychic characteristics; but the whole science of eugenics is based on the existence of such hereditary psychic differences ¹."

(f) Professor L. S. B. Leakey, a British social anthropologist, says:

"As a social anthropologist, I naturally accept and even stress the fact that there are major differences, both mental and psychological, which separate the different races of mankind. Indeed, I would be inclined to suggest that however great may be the physical differences between such races as the European and the Negro, the mental and psychological differences are greater still ²."

(g) Dr. David C. Rife, an American geneticist, whilst saying that "no completely valid tests of intelligence have as yet been devised", states:

"Even if we discard all the results of test comparison between different kiths and racial groups as being unreliable, we can be sure that if intelligence has a genetic basis, both individuals and populations differ with respect to it. Statements to the effect that individual differences in intelligence are largely hereditary and those between populations are environmental are not only naive, but can lead to grave misconceptions on the part of the general public ³."

Speaking of a passage in the aforesaid Unesco statement on race to the effect that "with respect to most, if not all, measurable characters, the differences among individuals belonging to the same race are greater than the differences that occur between the observed averages for two or more races within the same major group" ⁴, Rife says:

"True, but what of it? It may also be stated that the average differences between individuals belonging to the same race are usually less than the average differences between people belonging to different races ⁵."

(h) J. B. S. Haldane, an internationally recognized geneticist, says:

"I am inclined to believe that there are innate statistical differences in various capacities between different human races... ⁶"

(i) Professor Fritz Lenz, a geneticist of the Institute of Human Heredity, Goettingen, says:

"Contrary to what is stated in this paragraph [i.e., of the aforementioned Unesco statement on race] it seems to me that there is

¹ Unesco: *The Race Concept* (1951), p. 32.

² Leakey, L. S. B., *The Progress and Evolution of Man in Africa* (1961), p. 15.

³ Rife, D. C., *Heredity and Human Nature* (1959), p. 218.

⁴ *Vide* also IV, Annex 12, p. 601 (para. (vi)), for a similar statement.

⁵ Rife, *op. cit.*, p. 248. *Vide* also Genna: "... it is also true that differences between races are usually greater than those which may exist between individuals of the same race": Unesco: *The Race Concept* (1951), p. 62.

⁶ Haldane, J. B. S., "Comments", *Current Anthropology* (Oct. 1961), pp. 322-323.

very strong evidence to show that genetic differences are a 'major factor' in producing differences between cultural groups¹.

- (j) S. D. Porteus, emeritus Professor of Experimental Psychology and recipient of the 1963 American Psychological Association Award in Experimental Psychology, and Professor A. James Gregor say:

"In both ethnic groups and individuals, cultural or nurtural advantages have considerable influence, but as determining factors come far short of outweighing the natural and probably hereditary differences in mentality²."

- (k) Kluckhohn, one of the authorities cited by Applicants³, believes that potentialities for certain traits may be present in different proportions among the various human stocks:

"Mental, temperamental, and character traits are almost impossible to isolate in pure form because from the very day of birth the influence of social tradition modifies the biologically inherited trends. It is, however, more than possible that the potentialities for such traits are present in different proportions among the various human stocks. The distribution of musical and other special capacities does not appear to be equal in all peoples. Biological causes are probably involved; and, even though these account for only a small fraction of cultural differences, they are still true causes⁴."

8. *Views that science cannot furnish a definite answer.*

- (a) L. C. Dunn and Th. Dobzhansky say:

"... the question of whether or not human races differ in hereditary psychological traits for the time being must be regarded as open...⁵"

- (b) G. M. Morant says:

"[t]here are racial differences in physical characters, but whether the situation is the same or not for mental characters is a question which cannot be answered definitely at present—mental characters being more difficult to define and assess, and none hitherto used being very satisfactory for the purpose of making racial comparisons⁶."

- (c) Michel Leiris states:

"... in the present condition of science it is not possible to say of

¹ Unesco: *The Race Concept* (1951), p. 57.

² Porteus, S. D. and Gregor, A. J., "Studies in Intercultural Testing", *Perceptual and Motor Skills*, Vol. 16, No. 3 (1963), p. 722.

³ IV, Annex 12, p. 600 (para. (i)).

⁴ Kluckhohn, C., *Mirror For Man* (1949), pp. 124-125. A similar view was expressed by the late Professor André Dreyfus, a biologist of the University of Sao Paulo, Brazil. Certain characteristics, he said, had a "genetic substratum". He referred to "musical talent, which, admittedly, can develop only in a suitable environment, but which is quite obviously of genetic origin": *vide* Unesco: *The Race Concept* (1951) p. 21. It has been said that "Many scientists believe that there may be special innate capacities which occur more frequently in one race than in another...": *ibid.*, pp. 82-83.

⁵ Dunn, L. C. and Dobzhansky, Th., *Heredity, Race and Society* (1959), p. 134. These authorities are referred to by Applicants in IV, Annex 12, p. 601 (para. (vi)).

⁶ Morant, G. M., *The Significance of Racial Differences* (1952), p. 45.

a particular race that it is more (or less) 'intelligent' than another¹.

(d) Professor S. E. Luria, of the Department of Bacteriology, University of Illinois, U.S.A., is recorded as having said that—

"... 'innate capacities' are not amenable now to measurement at the level of national groups, particularly because of the preponderant role of 'cultural heredity' in any human community²".

(e) Professor Ingle, referred to above³, says:

"Are there significant average differences in the genetic component of intelligence and other qualities of intellect of Negroes and Whites? I am of the opinion that the question is unsettled...⁴"

"It is clearly established that there is an extensive overlap in the intelligence of Whites and Negroes. The concept that White and Negro races are approximately equally endowed with intelligence remains a plausible hypothesis for which there is faulty evidence. The concept that the average Negro is significantly less intelligent than the average White is also a plausible hypothesis for which there is faulty but, in my opinion, somewhat stronger evidence⁵."

(f) Dr. S. Biesheuvel, Director of the National Institute for Personnel Research, S.A. Council for Scientific and Industrial Research, says:

"The only scientifically valid standpoint, which does not outrun the known facts, and which neither prejudices nor prejudges future findings, we hold to be the following: That observed African abilities are different from, in some respect superior, in others inferior to those of Western man; that environmental, more particularly cultural circumstances have greatly contributed to bring about these differences, which are sometimes artifacts of the method of measurement, sometimes the result of social conditioning; that it is not known at present from what genetic origins the manifest mental attributes of Africans have developed, nor whether this development would have equalled that of the average European if environmental circumstances had been comparable; that a new orientation in research, and the utilization of different experimental and control techniques will be necessary in order to provide conclusive answers⁶."

9. *Comments on views quoted by Applicants.*

In the light of the above exposition of views held by scientists on the question of innate differences between races, it is not necessary to deal with the various views quoted by Applicants. It will have been observed that most of the quotations in the said Annex reflect views which are directly or indirectly disputed or queried by other scientists, and, furthermore, that some scientists believe that science is not in a position to give a definite answer to the question in issue. In the circumstances Respond-

¹ Leiris, M., *Race and Culture* (1951), p. 16. Referred to in IV, Annex 12, p. 601 (para. (x).)

² Unesco: *The Race Concept* (1951), p. 53.

³ *Vide* para. 6 (d), *supra*.

⁴ Ingle, D. J., "Comments on the Teachings of Carleton Putnam", *Mankind Quarterly*, Vol. IV, No. 1 (1963), p. 28.

⁵ *Ibid.*, p. 29.

⁶ Biesheuvel, S., "The Study of African Ability", *African Studies*, Vol. II, No. 2 (June 1952), p. 55.

ent merely points to the following in regard to the passages quoted by Applicants:

(a) The passage quoted by Applicants from a lecture by Professor Tobias¹ does not deal with the question whether there are innate differences between races. It is, however, relevant to the view that some races should not be regarded as superior, or inferior, to others. Respondent has already made it clear that its policy of separate development is not based on any such concept of superiority or inferiority, so that nothing more need really be said in regard to the quotation from Professor Tobias.

Respondent feels constrained, however, to deny Professor Tobias' allegation that its policy, whilst purportedly based on "cultural differences", is, in fact, based on the various "assumptions" mentioned by him¹. It is specifically denied that Respondent's policy makes any of the "assumptions" about race which are referred to in the passage quoted. As to Professor Tobias' reference to the evidence provided by science, Respondent refers to the various views quoted above.

(b) Although perhaps not of any real importance, it is pointed out that some of Applicants' quotations are hardly relevant to the question whether science knows of innate differences between races. The quotation from M. Leiris² deals with the age and alleged origin of "[r]ace prejudice"³, and not with any scientific views on the question in issue. Equally irrelevant are views as to "prejudices and myths" which are alleged to be a means of finding "a scape-goat"⁴, or as to alleged exploitation, colonization and slavery⁵, and Respondent says that it is not called upon to reply thereto.

D. Conclusion

10. It is clear, in Respondent's submission, that it cannot be suggested, as Applicants appear to do, that there is virtual unanimity of opinion amongst scientists that there are no innate racial differences. On the contrary, it is clear that there are serious differences among scientists on the question; that many scientists believe that there are such differences and that, *inter alia*, socio-cultural differences between racial and ethnic groups may, at least in part, be the consequence of differences in genetic potential. Be this as it may. As already stated, Respondent's policy of separate development does not rest on any assumption of such innate differences, but merely on the existence of *de facto* differences, however caused, between peoples, which stand in the way of peaceful assimilation between them—a distinction which, it is submitted, is amply supported by what is stated herein before.

¹ IV, p. 306.

² *Ibid.*, Annex 12, p. 601 (para. (x)).

³ In regard to the alleged age and origin of race prejudice it may be pointed out that other authorities on whom Applicants rely differ from Leiris. They say that "[t]he idea of biological superiority based on race appears in the Old Testament. Here it is quite clear that Jehovah made his covenant with Abraham and 'with his seed', that is, with those descended biologically from Abraham. In the New Testament there are vivid descriptions of the conflict between this view and the radical, even revolutionary doctrine of universal brotherhood of man": Dunn, L. C. and Dobzhansky, Th., *Heredity, Race and Society* (1959), p. 108.

⁴ IV, Annex 12, p. 600 (para. (iv)).

⁵ *Ibid.*, p. 601 (para. (ix)). *Vide* also reference to Lipschutz in footnote 5.

CHAPTER X

WEIGHT OF SCIENTIFIC AUTHORITY: RESPONDENT'S ALLEGED CONTENTION OF INEVITABLE FRUSTRATION

A. General

1. In this Chapter Respondent deals with Applicants' treatment of what they describe as "Respondent's Contention of Inevitable 'Frustration' (sic) if All Inhabitants of the Territory are accorded Equal Opportunity"¹.

In the Counter-Memorial Respondent indicated how certain frustrations could arise for Natives in the White economy². It was stated, *inter alia*, that such frustrations arose from circumstances which existed as facts, "independently of any governmental policy, legislation or administrative practices"³, and from considerations which manifested themselves, "to a greater or lesser extent, in mixed or plural communities throughout the world"⁴. Respondent indicated, also, that it was fully devoted to the ideal of "eradicating, avoiding or reducing to a minimum all undesirable aspects and manifestations of such group reactions, such as unfair discrimination, domination of one group by another, and the like"⁵, and that it believed that the interests of all groups could best be served, and that peaceful co-existence between them could best be secured, by a policy which provided for their separate development, "the goal aimed at being a situation where the Bantu groups will have self-government and, eventually, full independence in their homelands, and where economic relations between these homelands and the White areas will be such as to amount to a position of economic inter-dependence"⁶. Respondent stated, also, that the application of its policy was passing through a stage of transition which it was sought to complete "with a minimum of group friction and the negative consequences that could result therefrom"⁷, the transition being from "White guardianship and leadership in every sphere of a partially integrated economy to equality of opportunity for members of the non-White groups in the form of leadership in largely separated, though mutually inter-dependent, economies of their own groups"⁷. Respondent stated, furthermore, that in its view there was no alternative policy which could achieve a just and fair solution in the Territory⁸.

2. Respondent made it clear, in other words, that whilst the existence

¹ IV, pp. 306-307.

² III, pp. 55-56, 65-67 and 529-531.

³ *Ibid.*, p. 528 (para. 20 (f)).

⁴ *Ibid.*, and *vide* Chap. VIII; *supra*.

⁵ *Ibid.*, p. 529 (para. 20 (g)).

⁶ *Ibid.*, p. 528 (para. 20 (b)).

⁷ *Ibid.*, p. 529 (para. 20 (h)).

⁸ *Ibid.* (para. 20 (g)) and *vide* also II, pp. 472-473 (paras. 25-28).

of separate groups, and of tendencies on their own part towards differentiation *inter se*, admittedly had certain negative consequences of the kind mentioned, the overriding consideration was not merely how to avoid those particular consequences, but how to solve the totality of problems existing in a multi-group and multi-cultural country to the best advantage of all the groups and all their members. And in this connection, as has been stated before, Respondent is convinced that, whatever the negative aspects of its policy of separate development may be at the present time, they are heavily outweighed by the detrimental consequences which must inevitably flow from any policy which has as its aim the integration of the various population groups of the Territory. Such attempted integration will without doubt evoke serious and violent resistance, which cannot fail to have far more disadvantageous results for all the population groups and their members than are likely to be experienced by any of them under the application of Respondent's policy, even in its present stage of evolution. The goal aimed at, as was stated in the Counter-Memorial, is to eradicate, avoid or reduce to a minimum "all undesirable aspects and manifestations of such group reactions"¹, and to establish a situation where the Native groups will have "self-government and, eventually, full independence in their homelands, and where economic relations between these homelands and the White areas will be such as to amount to a position of economic inter-dependence"¹.

It is clear, in Respondent's submission, that the achievement of this goal must, as a matter of logic, not only remove, or minimize, frustrations of the kind referred to in the Counter-Memorial¹, but also frustrations of the kind mentioned by some of the authorities cited by Applicants in the Reply², which, as Respondent will indicate hereafter³, are considered by social scientists to arise for members of minority⁴ groups who aspire to be assimilated into the dominant group, but are refused admission to the ranks of that group.

3. In the Reply Applicants refer to passages in the Counter-Memorial in which Respondent dealt with certain frustrations experienced by Natives in the economic field⁵. They say the following in this regard:

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

¹ *Vide* para. 1, *supra*.

² IV, p. 307.

³ *Vide* para. 8, *infra*.

⁴ The term "minority" is used in this context not only in the ordinary quantitative sense, but also in a qualitative sense, as applying to a group—no matter what its size—which occupies a lower status, or is at a lower level of development, than the dominant group.

⁵ IV, pp. 303-306.

able. Such contentions are repeated throughout the Counter-Memorial¹."

It is clear from the Reply that when Applicants speak of "equality of access of all individuals to employment, equal educational opportunities, equal residence rights and the like", they refer to a situation where no distinctions at all are to be made between the various population groups, and where the same treatment must be afforded to all individuals in the Territory. This being so, their allegation that an absence of differentiation in all fields will bring about, in Respondent's view, a "refusal of white persons to continue to operate the economy", is clearly far too narrow a statement of Respondent's views as to what the results will be of a policy which does not differentiate between the various population groups. Without going into any detail, and to mention only two examples, Respondent points out that Applicants make no reference to what are, in Respondent's view, the predictable consequences of a policy of non-differentiation in the political² and educational fields³.

Furthermore, the description, in the above-quoted passage, of the manner in which a "sense of 'frustration' and unhappiness among 'non-white groups' greater than they feel under the present system" will allegedly arise, is Applicants' own, and is not derived from anything said in the Counter-Memorial. Respondent did not deal with the situation which might arise if it should first do away with differentiation between the groups and should then seek, at a later stage, to re-introduce it: such a hypothesis was not raised at all in the Counter-Memorial. What Respondent dealt with was, more particularly, the frustration that could arise, independently of any government policy or legislation, for a Native who qualifies for a profession, or other form of higher occupation, in which he will have to compete with Europeans in the White society—especially if his livelihood should depend on European patronage, or on the services of European employees, or on being employed in a position of authority over Europeans⁴. And it was in relation to this problem, *inter alia*, that Respondent indicated that, in its view, the solution was to be sought on the basis of separate development⁴.

4. Applicants also say in the Reply that the—

"... basic fallacy of Respondent's contention, captioned above [viz., 'Respondent's Contention of Inevitable "Frustration" (sic) if All Inhabitants of the Territory are accorded Equal Opportunity'], consists, in the scientifically demonstrable fact that the greatest 'frustration' is caused by denial of equal opportunity inherent in the policy of *apartheid* itself⁵".

It will be evident from the Counter-Memorial, and more particularly from the passages referred to by Applicants themselves⁶, that Respondent did not advance any contention in the form in which it is framed by Applicants. Respondent admitted that there were certain potential frustrations for Natives in the economic field, as set out above⁷, but it

¹ IV, p. 303.

² II, pp. 472-473.

³ III, p. 382.

⁴ *Vide* III, pp. 527-531, especially p. 528 (para. 20 (e)) and p. 529 (para. 20 (h)).

⁵ IV, p. 306.

⁶ *Ibid.*, pp. 303-307.

⁷ *Vide* paras. 1 and 3, *supra*.

submitted, at the same time, that its policy of separate development aimed at removing, or minimizing, such unsatisfactory aspects as there were at present by creating self-governing and, ultimately, independent homelands for the various population groups. Respondent further made it clear that, in its view, a policy of attempted integration of the various population groups would create much more serious disadvantages for all the groups and their members, in all spheres of their lives than were experienced at present ¹.

Applicants' allegation that "the greatest 'frustration' is caused by denial of equal opportunity inherent in the policy of apartheid itself" is not developed by Applicants in any way. All they do is to quote five passages—four from works of, presumably, social scientists ², and one from the decision in the case of *Brown v. Board of Education* ³—without any comment or argument. Respondent now deals with these views.

B. Views Quoted by Applicants⁴

5. As has been pointed out above ⁵, Applicants are concerned with showing that "frustration" is caused by the "denial of equal opportunity inherent in the policy of apartheid". Applicants have never alleged that "apartheid" denies opportunities to the Europeans of the Territory, so that it must be presumed that they refer to "frustration" on the part of Natives—which was also the context in which Respondent dealt with the question of frustration in the Counter-Memorial.

6. Applicants do not explicitly indicate the purpose for which they seek to rely on the first two quotations, viz., from Raab and Lipset ⁴ and from I. D. MacCrone ⁶. The theme in both cases is that the White child—in the first instance in the United States, and in the second in South Africa—learns from childhood to look upon a black person as an "inferior". This is in itself a highly tendentious proposition. But the important aspect for present purposes is that the charge is in neither instance laid at the door of government policy as such. In the first instance the "pattern of community practices" or the "social situations" are held to blame. In the second instance "[the] present economic, political and social structure" is said to create the tendency. If Applicants' suggestion is that social attitudes and reactions on a question of this nature ought to be changed by governmental action, Respondent refers to its discussion of that subject in the next Chapter ⁷. If the suggestion is that the whole political structure in South Africa and in South West Africa is to be changed to one of attempted integration, Respondent contends that it has demonstrated overwhelmingly why, in its view, the consequences of such a step would be disastrous for all the peoples for whom Respondent is responsible, or at least the preponderant number of their members.

¹ *Vide* paras. 1 and 3, *supra*.

² IV, p. 277 (para. b.3).

³ *Brown v. Board of Education of Topeka*, 347 U.S. 483, in United States Supreme Court Reports, Lawyers' Edition, Book 98 (1954), pp. 880 ff. *Vide* IV, p. 307, footnote 5.

⁴ IV, pp. 306-307.

⁵ Para. 4, *supra*.

⁶ IV, p. 307.

⁷ *Vide* Chap. XI, *infra*.

7. The third passage cited by Applicants is from a book by Professor Robert MacIver, of Columbia University. It reads as follows:

"Under all conditions the discrimination of group against group is detrimental to the well-being of the community. Those who are discriminated against are balked in their social impulses, are prevented from developing their capacities, become warped or frustrated, secretly or openly nurse a spirit of animosity against the dominant group¹."

Respondent has never been in favour of a situation where there is "discrimination of group against group". On the contrary, as has been shown in the Counter-Memorial², Respondent's policy aims at the establishment of a situation where there will be no such discrimination. The question is, however, how group discriminations can best be removed, or minimized. In Respondent's submission the solution must depend on the circumstances which prevail in a given territory. Professor MacIver speaks in this regard of the "well-being of *the community*" (italics added), thereby apparently contemplating a case where groups in fact form one *wider community*, or where the policy is to treat them as such. He indeed advocates the development of a "sense of community"³, in the reassertion of the "common values of the embracing culture"³, and in the establishment of a "multi-group society"³. Whether such a solution could have reasonable prospects of success, must clearly depend on all relevant circumstances in the territory concerned. As far as South West Africa is concerned, Respondent is convinced that the remedy does not lie in an attempt to create one, single, multi-group society.

8. The next passage relied on by Applicants is from a book by Professor Kenneth B. Clark, of the United States, and it reads as follows:

"... the evidence from social-science research, from general observations, from clinical material, and from theoretical analyses consistently indicates that the personality pattern of minority-group individuals is influenced by the fact of their minority status⁴".

It may be accepted that the "personality pattern of minority-group individuals is influenced by the fact of their minority status". The passage refers to the position of Negroes, and, more particularly, of Negro children, in the United States. Professor Clark indicates that Negro children in the United States realize from a tender age that they belong to a minority group which has a lower social and economic status than the White dominant group, and he states that the Negro group is "subject to a more general condition of social isolation, rejection and frustration"⁵ than other minority groups in America. The result is that Negroes, and Negro children, develop feelings of inferiority, or even psychological disorders of a serious nature. Professor Clark says in that regard:

"As the Negro observes the society in which he lives, he associates whiteness with superior advantage, achievement, progress and power,

¹ MacIver, R. M., *The Web of Government* (1947), p. 428.

² II, pp. 466-475.

³ MacIver, *op. cit.*, p. 429.

⁴ IV, p. 307. The passage quoted is from Clark, K. B., *Prejudice and Your Child* (1955), p. 47.

⁵ Clark, *op. cit.*, p. 52.

all of which are essential to successful competition in the American culture. The degree of whiteness that the individual Negro prefers may be considered an indication of the intensity of his anxiety and of his need to compensate for what he considers the deficiencies of his own skin color¹.

The result, according to Professor Clark, is that Negroes tend to reject themselves², and to deny their "skin color and racial ancestry"¹.

Professor Clark points out that such self-rejection, or self-hatred, has its source in the failure of members of a minority group to be assimilated into the ranks of the dominant group. He says that such "self-hatred is not restricted to Negroes"², but that—

"[d]isadvantaged white groups have a greater chance of increasing their economic status and being assimilated into the dominant culture"².

In the case of the Negroes, he says,

"... the barriers against such assimilation are more formidable for the Negro child and are further complicated by the fact that everyone can see what his color is"².

The basic problem is, therefore, the Negro's inability to be successfully assimilated into the ranks of the dominant White group. There is in their case, says Professor Clark, a "continuous cold war for status"³.

Professor Clark states that he made certain tests to determine the "development of racial awareness and racial preferences in Negro children"⁴. His findings⁵ seemed to indicate that northern Negro children suffered "more personality damage from racial prejudice and discrimination than southern Negro children"⁶ who attended segregated schools. Professor Clark argues, however, that the "apparent emotional stability of the southern Negro child may be indicative only of the fact that through rigid racial segregation and isolation he has accepted as normal the fact of his inferior social status"⁶. It may be pointed out in this regard, however, that certain other social scientists do not accept Professor Clark's argument in regard to his findings. Thus Professor Gregor holds the view that Negro children who attend Negro schools develop a more positive conception of themselves than do Negro children who attend biracial schools where they are often rejected by White children. In regard to psychological impairments suffered by Negro school children, he says, *inter alia*:

"In considering whatever evidence is available, the first appeal can be made to evidence that minority children of high social visibility enjoy positive advantages at critical periods of personality formation in a racially insulated environment. K. B. Clark's studies of Negro pre-school children indicate that in projective tests Negro children in segregated schools tended to prefer their own race, i.e., 80% of southern Negro children showed a preference for brown skin

¹ Clark, *op. cit.* p. 49.

² *Ibid.*, p. 50.

³ *Ibid.*, p. 55.

⁴ *Ibid.*, p. 19.

⁵ *Ibid.*, pp. 44-45.

⁶ *Ibid.*, p. 45.

color, while northern Negro children in integrated situations showed a marked preference for white skin color, i.e., only 20% of the northern Negro children indicated brown as their skin preference. Eleven and twelve year old Negro children attending a non-segregated school were more likely to prefer light skin color than children of the same age attending an all-Negro school¹."

Professor Clark's explanation of his findings, as quoted above, has also been rejected by C. P. Armstrong, S. S. Crutchfield, W. E. Hoy and R. E. Kuttner. They say in regard to the tests performed by Professor Clark:

"Professor Clark thus demonstrated that the segregated students were less confused, had better self-images, and manifested a smaller amount of self-hatred. These are precisely the items which Clark felt were indicators of segregation damage²."

They call his explanation a "manipulation", and say that—

"[w]ith this manipulation, Clark bestows on the Negro child (as young as three years) the ability to identify the color 'brown' with position on the socio-economic scale³."

It appears from the foregoing that the frustrations suffered by the Negro in the United States is, to a very large extent, the result of the fact that he cannot successfully be assimilated into the ranks of the dominant group, and that his physical appearance, viz., the colour of his skin, plays an important part in this failure. It appears, furthermore, that there is evidence which suggests that Negro children who attend all-Negro schools show more emotional stability and have greater self-esteem than Negro children who attend school in integrated situations where they do not enjoy full acceptance by members of the dominant group. All this tends to support Respondent's view that major frustration and personality impairment occur precisely in circumstances of attempted but unaccomplished integration with a more developed group, and that the root cause thereof disappears when the aim is set not at such integration, but at advancement of the less developed group in its own right, on the basis of respect for its distinctive identity and all positive values attached thereto.

9. Applicants' final quotation is from the judgment in the case of *Brown v. Board of Education*. It reads as follows:

"To separate [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone³."

It is somewhat strange, in Respondent's submission, to have the Court's decision presented as that of a "scientific authority"⁴, particularly when no indication is given of the nature of the scientific evidence on which the Court relied, or of similar evidence (if any) which was also put before the Court, but rejected by it.

¹ Gregor, A. J., "The Law, Social Science, and School Segregation: An Assessment", *Western Reserve Law Review*, Vol. 14, No. 4 (1963), p. 627.

² Legal Testimony and Scientific Evidence: A Contrast, *The Mankind Quarterly*, Vol. IV, No. 2 (1963), p. 108.

³ *IV*, p. 307.

⁴ *Ibid.*, p. 302.

Respondent deals with the case of *Brown v. Board of Education* in some detail in the section of the Rejoinder dealing with education¹ and refers the honourable Court to what is stated there. At this stage Respondent points to the following:

- (a) The Court's decision must obviously be viewed in the context in which it was given, viz., that of present-day American society in which Negroes are, on the whole, one with their White fellow citizens in matters of language and culture, and where racial origin is the only significant difference between them². The Court had regard to the question of segregation on grounds of race only, and not also to other factors—such as language or culture—as possibly being of significance in the matter of segregation. It does not follow, therefore, that the Court's decision will be valid in situations where different circumstances apply, e.g., in a heterogeneous country like South Africa or South West Africa where there are population groups which are desirous of maintaining their separate identities, and where the aim is to develop self-respecting communities of which the members will be free from such tensions as arise when individuals seek admission to an out-group, only to have their attempt rejected.
- (b) It would appear that social scientists in the United States have seriously questioned the evidence which was put before the Court by the successful Appellants, and on which the Court probably relied. So, e.g., it has been said that the evidence of Professor Clark, who is referred to above³, misled the Court⁴, and that the evidence on which the Court presumably relied was inconclusive⁵. Indeed, it has been argued that whilst scientific knowledge on the subject in issue is incomplete, "whatever evidence is available tends to support racial separation in the schools at least throughout childhood and adolescence"⁶.

It is, naturally, not Respondent's concern to take sides in this dispute regarding the specific situation in the United States, but merely to point out that it does exist, even although circumstances in that country would from the outside appear to be so much more favourable for integration than in Southern Africa. This matter is further dealt with in the following Chapter⁷.

C. Other Views

10. Various social scientists in the United States have referred to the fact that Negroes suffer personality impairments when they cannot successfully identify themselves with their own group, and are also not

¹ *Vide* sec. G, Chap. III, para. 9, *infra*.

² *Vide* Chap. VIII, para. 7, *supra*.

³ *Vide* para. 8, *supra*.

⁴ van den Haag, E., "Social Science Testimony in the Desegregation Cases—A Reply to Professor Clark", *Villanova Law Review*, Vol. 6 (1960), p. 69.

⁵ Ross and van den Haag, "The Fabric of Society" (1957), as quoted by Gregor, A. J., "The Law, Social Science, and School Segregation: An Assessment", *Western Reserve Law Review*, Vol. 14, No. 4 (1963), p. 625.

⁶ Gregor, A. J., "The Law, Social Science, and School Segregation: An Assessment", *Western Reserve Law Review*, Vol. 14, No. 4 (1963), p. 626.

⁷ *Vide* Chap. XI, *infra*.

capable of being successfully assimilated into the ranks of the out-group they wish to enter. Reference has already been made to Professor Clark's views in this regard¹. It has been shown, *inter alia*, that the Negro's unattainable wish to be White becomes the source of serious inner conflict. Professor Gunnar Myrdal said of this conflict that it produced "a personality problem for practically every single Negro. And few Negroes accomplish an entirely successful adjustment"². Professor Gregor argues in this connection that an individual cannot attain a coherent and viable self-concept, which is necessary for healthy personality development, without a sense of group-belonging, and that an individual who identifies himself with a group which commands his respect and allegiance is able to attain psychological maturity with far less hazard than one who lacks such a sense of group identity. He says: "The development of a coherent self-system is a function of group identity"³, and also refers to the following view expressed by Hill:

"Hill's studies of Negroes educated and raised in an all-Negro community indicate that such a Negro tends to have a 'much higher regard for Negroes'; he tends to have a 'higher opinion of Negroes', and is 'more favorable in [his] expression toward [his] race' ⁴."

D. Conclusion

II. Respondent points out in conclusion that various leaders of African thought have in recent years expressed themselves about the detrimental and demoralizing effect which an unsuccessful attempt at adopting White ways and notions—including colour notions—has on Africans, and that they have emphasized that a healthy group sentiment serves to establish self-respect and a sound self-image on the part of the individual. Professor W. E. Abraham, Associate Professor of Philosophy at the University of Ghana, comments on the "tension" and "near-neurosis" affecting the African who has managed to achieve only a superficial imitation of European culture, and whom Professor Abraham calls a "truly displaced man". He writes:

"The man of two worlds, the man who has been exposed in no consistent or radical fashion to a *milieu* which is different from that to which he belongs, though the latter continues to surround him, is a truly displaced man. His mastery of the new culture is not comprehensive enough, it is selfconscious, and, such as it is, it is generally in conflict with *mores* into which he was born, and which he has never truly uprooted from his system. His is cultural ambiguity, not cultural ambivalence, for it is characteristically accompanied by misgivings. These misgivings, this tension, this near-neurosis, can be most tragic. The man of two worlds, uncomfortably striding both, is the real displaced man ⁵."

¹ *Vide* para. 8, *supra*.

² Myrdal, G., *An American Dilemma: The Negro Problem and Modern Democracy* (1944), p. 699.

³ Gregor, A. J., "The Dynamics of Prejudice", *Mankind Quarterly*, Vol. III, No. 2 (Oct./Dec. 1962), p. 82. *Vide* also the view expressed by Hill, para. 10, *supra*.

⁴ *Vide* Gregor, A. J., "The Law, Social Science and School Segregation: An Assessment", *Western Reserve Law Review*, Vol. 14, No. 4 (1963), pp. 627-628.

⁵ Abraham, W. E., *The Mind of Africa* (1962), p. 100.

Conscious attempts are being made in these new African States to impress on the people that they differ from the peoples of other continents, and the realization of such differences is stressed as being, and is seen as, something of value for African self-respect. Alionne Diop, Secretary General of the *Société Africaine de Culture* and Director and Editor of the journal *Présence Africaine*, has stated in this regard that the "African personality" would come into its own—

"... to the degree that the African writers and artists and the African people themselves become aware of what characterizes them in the present world and become aware at the same time of their ancient patrimony and the possibilities of their future—to the degree that they affirm themselves different and original . . . ¹".

One of the factors which is emphasized as being something unique, almost as a standard around which all can be united, is the African's distinctive colour. Professor Biesheuvel has written in this regard:

"An interesting development in the growth of cultural self-consciousness is the popularity which the concept of an African personality has recently attained in many parts of Africa. At more than one conference of black African states, the importance of vindicating the worth of Africans by establishing the uniqueness and value of their own personality has been stressed . . .

There was a time when the suggestion of any difference was vehemently repudiated, for fear that it would lead to discrimination, especially in the educational and social fields . . .

It is a sign of maturity and increased self-confidence that the possibility of difference is not only conceded, but that it is seen as something of positive value for African self-respect ²."

12. Such views clearly indicate, in Respondent's submission, that the members of self-respecting African communities, such as are envisaged in Respondent's policy of separate development, have every chance of being free of the personality tensions which seem to mark—as was indicated above—the Negro's unsuccessful attempt at assimilation into a White dominant community.

¹ American Society of African Culture, *Pan-Africanism Reconsidered* (1962), p. 344.

² Biesheuvel, S., "Race, Culture and Personality", *South African Institute of Race Relations* (1959), pp. 4-5.

CHAPTER XI

WEIGHT OF SCIENTIFIC AUTHORITY: GOVERNMENT POLICY AND GROUP REACTIONS

A. Introduction

1. The third respect in which Applicants set out to establish that Respondent's policies, or premises underlying them, are "contrary to . . . the overwhelming weight of authority in the political and social sciences"¹, is dealt with by them under the heading "*Respondent's Con-
sultation that as a 'Realistic Government' it must support existing 'Group
Reactions'*"². Their argument in this regard may be briefly summarized as follows:

- (1) Respondent's policy loses sight of the fact that attitudes of prejudice, discrimination and fear can be modified, particularly through governmental action³.
- (2) Authorities agree that the enforcement of legislation can be a decisive means of overcoming discriminatory behaviour and reducing conflicts between groups⁴, and that "legislation is educative"⁵.
- (3) Modern social science rejects Respondent's "assumption" that attempts to anticipate or modify public opinion are "unrealistic" or even dangerous⁶.
- (4) By "refusing to act against racial discrimination", and thus reducing discriminatory behaviour and the attitudes of prejudice lying behind it, Respondent "has encouraged and abetted" racial discrimination⁵, and has thus "hindered the well-being and thwarted the social progress of the inhabitants of the Territory"⁶.

2. Most of the authorities quoted by Applicants in the course of this part of their argument are American authors whose views and comments are based on the racial situation which exists in the United States of America. Respondent did not in its Counter-Memorial deal with the racial situation existing in the United States, nor with the attempts of the Government of that country to solve its own racial problems; Respondent refrained from doing so, *inter alia*, because in its view the factual situation in the United States with regard to the composition of the different racial groups there differs very materially from the situation existing in South West Africa. However, by reason of the form of Applicants' argument, Respondent is now compelled to refer to the racial problems of the United States in three respects, as explained in the next paragraph.

3. In the first place, Applicants' argument assumes that the views expressed by the authorities on whom they rely, and who are dealing

¹ IV, p. 305.

² *Ibid.*, pp. 307-312.

³ *Ibid.*, p. 308.

⁴ *Ibid.*, p. 309.

⁵ *Ibid.*, p. 311.

⁶ *Ibid.*, p. 312.

with the situation in the United States, apply automatically and with equal force to the situation in South West Africa, as if the situation in the two countries were the same. It is necessary for Respondent to demonstrate to the Court that Applicants' assumption is incorrect, that the racial problems facing the Government of the United States are greatly different from the problems with which Respondent has been and is confronted in South West Africa¹, and that accordingly the views of the authorities relied upon by Applicants cannot be regarded as being in any way authoritative with regard to the present case².

Secondly, Applicants' argument suggests by implication that in the United States the enforcement of anti-discrimination legislation has had only beneficial and no detrimental results. It is necessary for Respondent in this respect to show that that is in fact not so, that the measure of success achieved by the Federal Government's policy of enforcing desegregation in the United States has been limited³, and that there have on the other hand been highly detrimental effects which must be brought into account in evaluating that policy⁴.

Thirdly, Applicants' argument creates the impression that all authorities, or at least the overwhelming weight of authority, support the views advanced by Applicants. Respondent will show that the impression conveyed by Applicants is a false one. Some of the statements quoted by Applicants require qualification by virtue of what the quoted authors themselves have said in other parts of their works⁵. More importantly, there is a substantial body of opinion which is opposed to the views quoted by Applicants, particularly with reference to the situation in the United States⁶.

4. Before proceeding to deal with the matters referred to in the preceding paragraph, Respondent states emphatically that it does not wish to, nor does it in fact, criticize the Government of the United States for the manner in which it has attempted to solve the racial problems existing in that country—problems which are peculiar to that country and on which Respondent would prefer not to pass any comment. Respondent must in particular not be understood as advancing any submissions on the question whether the policy of enforced desegregation which is applied in the United States, is or is not the best policy to be adopted in the circumstances existing in that country, either as regards its general approach or as regards specific aspects thereof. The problems that exist in that regard are, of course, not matters for adjudication in these proceedings. But what is relevant in the present case is the impression sought to be created by Applicants that governmental action directed at eliminating racial discrimination has everything to recommend it and nothing against it, an impression which purports to be based mainly on the views of authorities dealing with the situation in the United States. It is this impression which Respondent is constrained to refute, and it is solely with the object of doing so that Respondent gives some consideration to the situation in the United States.

¹ As indeed, in the Republic of South Africa itself.

² *Vide* paras. 5-10, *infra*.

³ *Vide* paras. 12-22, *infra*.

⁴ *Vide* paras. 23-32, *infra*.

⁵ *Vide* para. 34, *infra*.

⁶ *Vide* paras. 36-46, *infra*.

B. The Composition and Nature of Population Groups in the United States

5. The largest minority group in the United States are the Negroes¹: they constitute over 95 per cent. of the non-White residents of the United States². In 1961 the United States Commission on Civil Rights reported³ that—

“Mexican-Americans, Puerto Ricans, Indians, and other minorities to some extent still suffer inequalities and deprivation. But Negroes are our largest minority group, and their rights are denied more often in more respects and in more places than are those of any other group⁴.”

Yet Negroes constitute only about 10.5 per cent. of the total United States population⁵; in other words, Whites outnumber Negroes by roughly 9 to 1⁶.

6. In the United States, the Negro minority group has been living in that country for centuries; they profess the same religious beliefs, speak the same language and have the same values as the majority group; and they share moral and cultural mores with the White community. It would seem, therefore, that as far as the Negro minority is concerned, the racial problem in the United States may be truthfully described as being pre-eminently a problem of colour. Thus, the United States Commission on Civil Rights refers to the position of the Negro in American society as follows:

“Like earlier immigrants from overseas, many of today’s largely nativeborn minorities have been forced into urban slums, restricted to the poorest schools, and employed in the lowest paid occupations . . . As with earlier groups, these deprivations have led to discrimination, which in turn reinforces the deprivations.

While many of these problems are similar to those of other minorities, there are important differences. The Negro is no stranger to this country: he is an American by birth and by long ancestry. *But he is set apart by the color of his skin . . .*” (Italics added.)

Professor E. F. Frazier has said:

“Although the folk Negro has become transformed through education and greater participation in American culture, *the fact of*

¹ 1961 U.S.C.C.R.R., Book 5, p. 135: “The 1960 census reported on five racial minorities. In order of population size, they were as follows: Negroes, 18,871,831; American Indians, 523,591; Japanese, 464,332; Chinese, 237,292; and Filipinos, 176,310.”

² United States Department of Labor, *The Economic Situation of Negroes in the United States* (Revised 1962), p. 1.

³ 1961 U.S.C.C.R.R., Books 1-5.

⁴ *Ibid.*, Book 1, p. 2.

⁵ 18,871,831 out of 179,323,175: *ibid.*, p. 21 and United States Department of Labor, *The Economic Situation of Negroes in the United States* (Revised 1962), p. 1. The figures are taken from the 1960 U.S. Census.

⁶ The 1960 Census figures are: Whites, 88.6 per cent.; Negroes, 10.5 per cent.; “Other”, 0.9 per cent. *United Nations Demographic Yearbook 1963, Special Topic: Population Census Statistics II*, Fifteenth Issue (1964), p. 313.

⁷ 1961 U.S.C.C.R.R., Book 1, pp. 8-9.

his color has continued to retard his integration into American life . . .¹" (Italics added.)

7. The fact that it is the colour of his skin, and not any dissimilarity in cultural, religious or social background, which is the basic feature differentiating the Negro from the White majority group, is pointedly illustrated by the way in which the Civil Rights Commission in its 1961 report dealt with another minority group in the United States, viz., the American Indians. The Commission devoted a separate section of its report to a survey of denial of civil rights suffered by the American Indians², saying:

"If American Indians are a minority, they are a minority with a difference. Of course Indians face problems common to all minorities—jobs, homes and public places are not as accessible to them as to others. Poverty and deprivation are common. Social acceptance is not the rule . . . Yet to think of the Indian problem *solely in terms of bias, discrimination, or civil rights* would be a mistake. For *unlike most minorities*, Indians were and still are to some extent a *people unto themselves, with a culture, land, government, and habits of life all their own*³." (Italics added.)

It is significant that the distinguishing characteristics of the Indian group have been recognized by the Federal Government in the field of its education policy. With regard to Negroes, Federal Government policy has been directed at complete integration of Negroes with Whites⁴. With regard to Indians, however, the position is different. The Civil Rights Commission found that prior to 1934 the federal policy in education was committed to the acculturation of the American Indian, a policy that was "not entirely successful"⁵. Changes in policy were made in 1934, the effect of which is summarized as follows in the Commission's 1961 report:

"The cohesiveness of tribal life was now recognized to be an important element in a child's education. At the same time, the backwardness of some tribes was at least recognized as a liability to be reckoned with. Education, therefore, was to be directly pointed to the needs of Indians—to help them gain the skills needed to function in the white man's world without, at the same time, destroying their own. The boarding school gave way to the day school. Acculturation as an end in itself was softened. Children were to be schooled within their home environment by persons who were to be trained in Indian lore. The use of the native language was no longer forbidden and the Indian heritage was *not* looked upon as a scourge⁶."

The Commission appears to approve of this policy for the federally-controlled Indian schools, where it is apparently still being applied⁷.

¹ Frazier, E. F., *The Negro in the United States* (1957), p. 689.

² 1961 U.S.C.C.R.R., Book 5, Part VIII, pp. 115-160.

³ *Ibid.*, pp. 115-116.

⁴ *Ibid.*, Book 2 and *vide* para. 16, *infra*.

⁵ *Ibid.*, Book 5, p. 140.

⁶ 1961 U.S.C.C.R.R., Book 5, p. 141.

⁷ *Ibid.*, pp. 140-144 and 157.

C. The Composition and Nature of Population Groups in South West Africa

8. In South West Africa there are at least nine major population groups¹. The size, composition and characteristics of each group have been described in detail in Respondent's Counter-Memorial², and need not be repeated here. Suffice it to emphasize, by way of summary, the vast differences between the various groups: they differ *inter se* in almost every conceivable physical and socio-cultural characteristic. With regard to physical appearance, for instance, there are white people, yellow people, brown people and black people. But the differentiating features of the various groups do not begin and end with skin colour. Indeed, cultural differences between the various groups are probably even more marked than physical differences. Thus they manifest wide diversities of language, religion, moral standards, social and political conception, technological sophistication, everyday habits, modes of dress and adornment, and general level of development². The relative sizes of the different ethnic groups also vary considerably. For instance, the largest single group (the Ovambo) constitutes about 45.5 per cent. of the total population³; Europeans account for about 14 per cent. and the Bushmen are only slightly more than 2 per cent. of the total population³.

9. In South West Africa the problem arising from the existence in the Territory of a number of different ethnic groups, is not simply a problem of colour, or even of race. The groups here are set apart from each other not merely by reason of physical appearances, but more important, by reason of widely differing cultural systems. Each group is, in itself, a separate and distinct nation in embryo. Thus, while it would not be inapposite to describe an American Negro as a black member of the American nation, it would be quite unrealistic to regard the Bushmen, the Herero and the Whites of South West Africa, for instance, as components of one nation. Moreover, some of the groups have been living since before the advent of Respondent's administration in their own areas of the Territory, geographically separated from one another and from the other inhabitants⁴.

D. The Significance of the Differences in the Composition and Nature of the Population Groups in the United States and in South West Africa

10. The importance of the differences between the situation in the United States and the situation in South West Africa must be obvious. The circumstances in the United States are, on their face, particularly favourable for the integration of the Negro people with the White majority of the population. Not only are the Negroes a relatively small minority, but they share the socio-cultural values and habits of the substantial White majority—which is a relatively opulent and educated group, living in what is possibly the most industrially advanced and educationally enlightened country in the world. It would be hard to imagine a situation better suited, to all outward appearances, for the implementation of legislation relating to integration.

The situation in South West Africa offers strong contrasts in every

¹ II, pp. 311 ff.

² *Ibid.*, for further details.

³ *Ibid.*, p. 401.

⁴ II, p. 312.

material respect. The differences amongst the plurality of groups there are so numerous and emphatic¹ that they must militate heavily against any natural tendency towards assimilation, and therefore also against prospects of successful attempts at enforcement of assimilation. The potential for serious social disorder consequent upon such attempts, seems obvious; and it is materially increased by the fact that there are gross differences in the demographic strength between groups accustomed to different standards of life¹, so that some groups would almost inevitably feel threatened by superior numbers.

It is for the above reasons that circumstances in the United States and in South West Africa, in regard to the desirability and probable consequences of a governmentally enforced programme of non-discrimination, are in Respondent's submission not truly or fairly comparable.

In the following paragraphs Respondent proceeds briefly to examine the factual situation in the United States in connection with the desegregation policy of the Government of that country. In this regard the facts and figures supplied by Respondent are derived chiefly from the 1961 and 1963 reports of the United States Commission on Civil Rights. In those reports the Commission concerned itself principally with the civil rights problems of Negroes²; Respondent's discussion will be confined to the Negroes' position in American society.

E. Anti-Discrimination Legislation in the United States

11. Anti-discriminatory legislation has existed in the United States for almost a century. The principle of non-discrimination on the grounds of race, colour, religion or national origin has been enshrined in the 14th and 15th amendments to the Constitution ever since 1870³. The effect of these amendments is described by the Commission on Civil Rights in the following terms:

"The 15th amendment to the Constitution commands that neither the Federal Government nor the States may deny or abridge the right to vote on account of race or color. More broadly, the 14th amendment forbids any State or its agents to 'deny to any person the equal protection of the laws'. This principle, applicable also to the Federal Government, forbids discrimination against any person on the grounds of race, color, religion, or national origin. It does not reach the conduct of persons acting in a purely private capacity. Still, a State may not enforce private agreements to discriminate...⁴"

Violation of these provisions could be dealt with under certain sections of the United States Criminal Code⁵. In its 1963 report, the Commission states:

"Long before this Commission was established in 1957, the doctrine of equal opportunity had been firmly embedded in the law. It was eloquently stated in the Declaration of Independence and reaffirmed in the Bill of Rights and the 13th, 14th, and 15th amendments to the Constitution. It has since been implemented in a series

¹ *Vide* paras. 8 and 9, *supra*.

² 1961 *U.S.C.C.R.R.*, Book 1, p. 2 and 1963 *R.U.S.C.C.R.*, pp. 1-4.

³ 1961 *U.S.C.C.R.R.*, Book 1, p. 73.

⁴ *Ibid.*, p. 7.

⁵ *Ibid.*, p. 74, for further details.

of judicial decisions which affirm without qualification that racial segregation in any aspect of public life violates the Constitution ¹."

In addition, over the past two decades numerous legislative, executive and administrative steps have been taken by the Federal Government with the object of ending the discrimination against Negroes in various spheres of society ². Some of these measures will be briefly referred to in the following paragraphs hereof, under the appropriate particular headings.

F. The Extent to which Government Policy in the United States Has Failed to Achieve Success

12. In their argument Applicants have pointed only to the advantages that may result from the enforcement of anti-discriminatory legislation, omitting even to mention the difficulties that have been encountered by the Government of the United States in its attempts to implement such a policy, and the disadvantages that have resulted therefrom. Applicants have thus presented a one-sided account of the effects of governmental attempts to enforce integration.

In correcting the distorted image, Respondent is compelled to hold up the other side of the picture, the negative side: the extent to which the aim of the policy still falls short of achievement, and the harmful effects that have followed in its wake. In doing so, Respondent must not be taken to suggest the complete converse of what Applicants contend—that governmental policy in the United States has had no beneficial, and only detrimental, results. Respondent certainly does not aver that, in the particular circumstances existing in the United States, no progress of any significance has been made in regard to desegregation by governmental action. For the sake, however, of a proper evaluation of Applicants' contention that a similar policy should be adopted by Respondent in South West Africa, the negative and harmful aspects of the policy as applied in the United States must necessarily also be brought into account—in addition to the very important differences between the factual situations in the two countries, as discussed above.

13. The United States Commission on Civil Rights noted in its 1961 report that in the two years since its first report there had been "dynamic changes in civil rights at all levels of government" ², but found that despite this progress "the Nation still faces substantial and urgent problems in civil rights" ³. The major civil rights problems discussed in the 1961 report were summarized as follows:

"In some 100 counties in eight Southern States there is reason to believe that Negro citizens are prevented—by outright discrimination or by fear of physical violence or economic reprisal—from exercising the right to vote.

There are many places throughout the country where, though citizens may vote freely, their votes are seriously diluted by unequal electoral districting, or malapportionment.

There are many counties in the South where a substantial Negro

¹ 1963 R.U.S.C.C.R., p. 1.

² 1961 U.S.C.C.R.R., Book 1, p. 2 and for further details *vide* pp. 2-5.

³ *Ibid.*, p. 5

population not only has no voice in government, but suffers extensive deprivation—legal, economic, educational, and social.

There are still some places in the Nation where the fear of racial violence clouds the atmosphere . . .

Unlawful violence by the police remains in 1961 not a regional but a national shame.

In public education there still are three States—Alabama, Mississippi, and South Carolina—where not one public school or college conforms with the constitutional requirements enumerated by the Supreme Court 7 years ago. In May 1961, 2,062 of the 2,837 biracial school districts in the 17 Southern and border States remained totally segregated.

A Federal court decision in 1961 brought to the Nation's attention the fact that unconstitutional inequality in public education is not confined to Southern States. Such inequalities in public educational systems seem to exist in many cities throughout the Nation.

Unemployment in the recent recession, hitting Negroes more than twice as hard as others, underlined the fact that they are by and large confined to the least skilled, worst paid, most insecure occupations; that they are most vulnerable to cyclical and structural unemployment and least prepared to share in, or contribute to, the economic progress of the Nation.

Although racial segregation in the Armed Forces of the United States officially ended 6 years ago, it continues in some parts of the Reserves and the National Guard.

Much of the housing market remains closed in 1961 to millions of Americans because of their race, their religion, or their ancestry; and partly in consequence millions are confined to substandard housing in slums.

In spite of repeated commitments to the principle that benefits created by the funds of all the people shall be available to all without regard to race, religion, or national ancestry, the Federal Government continues in some programs to give indirect support to discriminatory practices in higher education, in training programs, in employment agencies and opportunities, in public facilities such as libraries, and in housing ¹.

14. Two years later, as appears from the Commission's 1963 report, these problems remained substantially unchanged, although some progress has been made. With reference to the legislative, judicial and administrative measures affirming and implementing the doctrine of equal opportunity, the Commission remarked:

"Yet, as the Commission was to learn from 6 years of study and investigation in all sections of the Nation, the civil rights of citizens—particularly of Negro citizens—*continued to be widely disregarded* ²." (Italics added.)

While reporting "an atmosphere of genuine hopefulness", the Commission also found that—

"[t]here is a broad gulf between the abandonment of enforced segre-

¹ 1961 U.S.C.C.R.R., pp. 5-6.

² 1963 R.U.S.C.C.R., p. 1.

gation and the achievement of a society in which race or color is not a factor in the hiring or promotion of an employee, in the sale of a home, or in the educational opportunity offered a child ¹''.

In the following paragraphs some more detailed indication is given of the extent to which the Government's integration policy has in fact not met with success in the particular fields of voting, education, employment, housing, justice, and social contact.

15. *Voting.* The command of non-discrimination contained in the 15th amendment to the Constitution ² was reinforced in 1957 by the passage of a Civil Rights Act, which, *inter alia*, authorized the Federal Government to bring civil actions for injunctive relief where discrimination denied or threatened the right to vote, and which forbade intimidation, threats, and coercion for the purpose of interfering with the right to vote in federal elections ³. Two years later the results of the Act seemed disappointing ⁴. In 1960 a further Civil Rights Act was passed for the purpose of giving effect to certain recommendations that had been made by the Civil Rights Commission in its 1959 report, and which provided, *inter alia*, for the appointment of federal voting referees when a pattern or practice of racial discrimination is found to exist ⁵. The Commission found that the United States Department of Justice had acted with vigour to apply the Civil Rights Acts and that since 1960 it had initiated and sustained a determined attack on racial discrimination in the franchise ⁶; this resulted in a considerable amount of litigation ⁶.

Nevertheless, the Commission's reports indicate that there are at least 100 counties in eight southern states where there is reason to believe that substantial discriminatory disfranchisement of Negroes still exists ⁷; the 100 counties referred to in the reports contained nearly a third of all Negroes of voting age in the 11 states of the former Confederacy ⁸. Registration statistics by race in 1960 indicated that in 17 of the 21 so-called "black-belt" counties, where Negroes form the majority of the population, they did not vote at all, or did so only in small numbers. The reasons for the failure to vote include fear of economic or physical reprisals, official discrimination, blatant or subtle, and lack of education and motivation ⁹.

In 1956, the last year before the passage of the first Civil Rights Act to secure the rights to vote, about 5 per cent. of the voting-age Negroes in the 100 counties referred to above were registered to vote. Seven years later the Commission commented:

"Despite the subsequent passage of two civil rights acts, the institution of 36 voting rights suits by the Department of Justice, and the operation of several private registration drives, *Negro registration in these counties has risen only to 8.3 per cent.* ¹⁰" (Italics added.)

¹ 1963 R.U.S.C.C.R., p. 4. *Vide* also para. 24, *infra*.

² *Vide* para. 11, *supra*.

³ 1961 U.S.C.C.R.R., Book 1, p. 75.

⁴ *Ibid.*, pp. 76-78.

⁵ *Ibid.*, p. 136 and 1963 R.U.S.C.C.R., p. 13.

⁶ *Vide* 1961 U.S.C.C.R.R., Book 1, pp. 79-100 and 1963 R.U.S.C.C.R., pp. 16-26.

⁷ 1961 U.S.C.C.R.R., Book 1, p. 23 and 1963 R.U.S.C.C.R., p. 15.

⁸ 1963 R.U.S.C.C.R., p. 15.

⁹ 1961 U.S.C.C.R.R., Book 1, pp. 195-196 and *vide* also p. 111.

¹⁰ 1963 R.U.S.C.C.R., pp. 14-15.

"An examination of the 100 counties where denials of voting rights were indicated in the 1961 *Voting Report* compels the conclusion that racial discrimination persists and the policy of the Civil Rights Acts has been frustrated¹."

Generally, the Commission came to the conclusion that:

"Its findings reveal clearly that the promise of the 14th and 15th amendments to the Constitution remains unfulfilled.

... the right to vote is still denied many Americans solely because of their race²."

Two members of the Commission said in a concurring statement that:

"The evil of arbitrary disfranchisement has not diminished materially ... Progress toward achieving equal voting rights is virtually at a standstill in many localities³."

16. *Education*. In 1954 the Supreme Court of the United States decided that enforced racial segregation in public education is a denial of equal protection under the 14th amendment of the Constitution⁴. The decision recognized that the Negro and White schools involved had been, or were being, equalized, in all tangible respects, but held that separate educational facilities are inherently unequal⁴. A year later the Court reaffirmed the principle that racial discrimination in public education is unconstitutional and held that all provisions of federal state or local law requiring or permitting racial segregation in public schools were void⁵. All school authorities were required to make a prompt and reasonable effort in good faith to comply with the Constitution⁵, and lower courts were instructed to consider the adequacy of the plans proposed by school authorities "to effectuate a transition to a racially nondiscriminatory school system ... with all deliberate speed"⁶. A large volume of Court decisions followed over the years, in which the requirements of desegregation were enforced⁷. In many cases the Courts dealt with the unconstitutionality of massive legislative resistance measures passed by southern states opposing enforced desegregation of schools⁸.

The efforts of the Supreme Court to bring about integration in the schools have met with but limited success. In 1961 the Commission on Civil Rights reported:

"The Nation's progress in removing the stultifying effects of segregation in the public elementary and secondary schools—North, South, East, and West—is slow indeed⁹."

In 1963 the Commission found that progress continued to be slow in the south¹⁰, while in the north and west school segregation was still wide-

¹ 1963 *R.U.S.C.C.R.*, p. 16.

² *Ibid.*, p. 13.

³ *Ibid.*, p. 30.

⁴ 1954 *U.S.C.C.R.R.*, Book 2, p. 5. The Commission refers to the decision as the "historic decision in the *School Segregation Cases*"; the case is also known as *Brown's case*.

⁵ *Ibid.*, p. 10.

⁶ *Ibid.*, p. 7.

⁷ *Ibid.*, pp. 7-10 and 15-37, for further details.

⁸ *Ibid.*, Book 1, p. 6 and Book 2, pp. 65-77.

⁹ 1961 *U.S.C.C.R.R.*, Book 2, p. 173.

¹⁰ 1963 *R.U.S.C.C.R.*, p. 63.

spread because of existing segregated housing patterns and the practice of assigning pupils to neighbourhood schools¹.

Seven years after the first Supreme Court decision mentioned above, 2,062 out of 2,837 school districts in the south in which both White and Negro pupils were involved, had not even started to comply with the Constitution². Others had barely begun a 12-year progression, and some had kept the number of Negroes attending at formerly White schools at a minimum³. In the two years from 1959 to 1961 there was in the 17 southern and border states an increase of only 1.5 per cent. in the number of biracial school districts which were desegregated at least in part⁴. In 1963 most schools in the South continued to be segregated by official policy⁵. By then, about one-third of the biracial districts in the 17 southern and border states had policies or practices permitting the admission of Negroes to formerly all-White schools; yet only 8 per cent. of the Negro pupils in these states attended schools with White children⁶. Over 94 per cent. of these Negro students attended schools with Whites in the six border states; three southern states still had no Negroes attending schools with Whites below college level⁶. In 1964 it was estimated that in the 10 states of the Deep South less than six-tenths of 1 per cent. of all Negro children attended school with Whites⁷. Many of the southern states have resisted desegregation by means of various legislative and administrative measures⁸; by 1963 the Commission found no evidence that this resistance was dissipating. Even token desegregation had only come after a lawsuit was threatened or prosecuted⁹.

In the north and west, where segregation is not officially countenanced, it exists in fact in many public schools¹⁰. In New York City the number of elementary schools containing 90 per cent. or more Negro and/or Puerto Rican students more than doubled between 1957-1958 and 1963-1964; during the same period the number of junior high schools so circumstanced increased by 250 per cent.¹¹ This indicates a marked and progressive segregation despite the fact that the New York City Board of Education had made racial integration in the schools a major policy goal in 1955¹². Similarly, in Chicago some 87 per cent. of Negro elementary school pupils attend virtually all-Negro schools, while in Philadelphia 14 per cent. of all public schools have a Negro enrolment of over 99 per cent.¹³

17. *Employment.* In the sphere of employment, non-discrimination has

¹ 1963 *R.U.S.C.C.R.*, p. 53.

² 1961 *U.S.C.C.R.R.*, Book 2, pp. 39 and 173.

³ *Ibid.*, p. 173.

⁴ *Ibid.*, p. 39 and for details, *vide* pp. 39-63.

⁵ 1963 *R.U.S.C.C.R.*, p. 53.

⁶ *Ibid.*, p. 63.

⁷ Silberman, C. E., *Crisis in Black and White* (1964), p. 289.

⁸ 1961 *U.S.C.C.R.R.*, Book 2, pp. 65-98. The eruption of racial violence and rioting as a result of enforced desegregation is referred to in para. 25, *infra*.

⁹ 1963 *R.U.S.C.C.R.*, p. 68.

¹⁰ 1961 *U.S.C.C.R.R.*, Book 2, pp. 99-115 and 173.

¹¹ Silberman, *op. cit.*, p. 290. Decter, M., "The Negro and the New York Schools", *Commentary*, Vol. 38, No. 3 (Sep. 1964), pp. 25-34.

¹² Silberman, *op. cit.*, p. 290.

¹³ Bickel, A. M., "The Decade of School desegregation", *Columbia Law Review*, Vol. 64, No. 2 (Feb. 1964), pp. 193-229 at p. 215.

for many years been the declared policy of the Federal Government, which is the nation's largest employer¹. Discrimination in federal employment, based on race, creed, or colour, was specifically proscribed in an Act of 1940¹, and administrative measures were taken subsequently to implement the policy².

Nevertheless, the Commission on Civil Rights found in 1961 that discrimination against Negroes still existed in many branches of the employment field and that such discrimination contributed to the depressed economic status of Negroes³. With regard to apprentice training, for instance, the Commission noted that large segments of the population were denied access to work and training in many skilled occupations because of widespread prejudices against racial and ethnic groups, the discrimination being the strongest and most widespread in the case of Negroes⁴. As a result, Negro workers continue to be concentrated in the less skilled jobs⁵. This in turn is reflected in Negroes being disproportionately represented amongst the unemployed⁶; from 1958 to 1962, for instance, the rate of unemployment for Negroes remained throughout at more than twice that of the White population⁷. The Commission remarks that the old adage that Negroes are the last hired and the first fired has been all too clearly demonstrated⁸. Also, Negro workers generally occupy less senior positions than Whites⁹, and their median income is considerably less than that of Whites with the same level of education¹⁰. The Commission concluded that "... the goal of equal employment opportunity is still far from achievement"¹¹. Other commentators have taken an even more pessimistic view; finding that, contrary to popular impression, the Negroes' economic position has actually deteriorated over the last ten years, relative to that of Whites¹².

18. *Housing*. In 1866 a Civil Rights Act was passed by Congress which provided that all citizens of the United States shall have the same rights, in every state and territory, as is enjoyed by White persons therein, to inherit, purchase, lease, sell, hold and convey real and personal property¹³. The 14th amendment of the Constitution guaranteed that this right could not be denied on the state or local level¹³. As early as 1917 the Supreme Court had ruled unconstitutional an ordinance requiring racial segregation in housing¹³, a principle which was reaffirmed in subsequent decisions of

¹ 1961 U.S.C.C.R.R., Book 3, pp. 6-17 and 19.

² *Ibid.*, pp. 21-26.

³ *Ibid.*, pp. 2-3, 153 and 159-161.

⁴ *Ibid.*, p. 108.

⁵ *Ibid.*, p. 153.

⁶ 1963 R.U.S.C.C.R., p. 90.

⁷ United States Department of Labor, *The Economic Situation of Negroes in the United States* (Revised 1962), pp. 4-5 and 1963 R.U.S.C.C.R., p. 73.

⁸ 1961 U.S.C.C.R.R., Book 3, p. 1.

⁹ *Ibid.*, p. 155 and United States Department of Labor, *The Economic Situation of Negroes in the United States* (Revised 1962), pp. 4 and 6.

¹⁰ 1961 U.S.C.C.R.R., Book 3, p. 155 and the United States Department of Labor, *The Economic Situation of Negroes in the United States* (Revised 1962), p. 9.

¹¹ 1961 U.S.C.C.R.R., Book 3, p. 155.

¹² Silberman, *op. cit.*, p. 41. *Vide* also Killian, L. and Grigg, C., *Racial Crisis in America: Leadership in Conflict* (1964), p. 117.

¹³ 1961 U.S.C.C.R.R., Book 4, p. 16.

the Court ¹. Since 1949 various administrative measures have been introduced with the object of ending segregation in housing ².

But the Civil Rights Commission found that it was still an urgent fact that a considerable number of Americans were being denied equal opportunity in housing by reason of their colour or race ³. Since the First World War, when Negroes first moved north in significant numbers, discrimination against them had been fairly common in roughly its present form ⁴. By 1933 racial discrimination had become an operating practice of the private housing industry ⁵. Residential segregation between Negroes and Whites had increased steadily over past decades ⁶. The forces preventing equality of opportunity in housing begin with the prejudice of private persons, but they also involve large segments of the organized business world ⁷. The Commission stated:

"Throughout the country large groups of American citizens—mainly Negroes, but other minorities too—are denied an equal opportunity to choose where they will live. Much of the housing market is closed to them for reasons unrelated to their personal worth or ability to pay. New housing, by and large, is available only to whites . . .

As a consequence, there is an ever-increasing concentration of non-whites in racial ghettos, largely in the decaying centers of our cities—while a 'white noose' of new suburban housing grows up around them ⁸."

A member of the New York Mayor's Commission on Intergroup Relations has stated:

"The harsh reality is that the seemingly relentless ghetto trend takes place under a smoke-screen created by the very 'gains' so welcomed by proponents of civil rights. This trend moves on—while we hail the enactment or introduction of anti-discrimination laws in state and municipal legislatures throughout the North and West . . . ?"

Recently, even "the introduction of anti-discriminatory laws" suffered a set-back in the state of California, when the electorate voted overwhelmingly in favour of a proposed amendment to the state Constitution, which would have the effect of nullifying California's Fair Housing Act. This Act, also known as the "Rumford Act", was passed in 1963, and made it unlawful "[f]or the owner of any publicly assisted housing accommodation . . . to refuse to sell, rent or lease or otherwise to deny to or withhold from any person or group of persons such housing accommodation because of the race, color, religion, national origin, or ancestry of such person or persons" ⁸. During the recent American election, the voters of California were asked at the same time to vote on a proposal to

¹ 1961 *U.S.C.C.R.R.*, Book 4, p. 16.

² 1963 *R.U.S.C.C.R.*, pp. 96-101.

³ 1961 *U.S.C.C.R.R.*, Book 4, pp. 144-145 and 1963 *R.U.S.C.C.R.*, p. 95.

⁴ Silberman, *op. cit.*, p. 43.

⁵ 1961 *U.S.C.C.R.R.*, Book 4, p. 2.

⁶ *Ibid.*, p. 1 and *vide* also 1963 *R.U.S.C.C.R.*, p. 95.

⁷ Horne, F. S., "Interracial Housing in the United States", *Phylon*, Vol. XIX, No. 1 (Spring 1958), pp. 13-20 at p. 14

⁸ State of California, Department of Justice, Constitutional Rights Section. *Equal Rights under the Law: Key Laws, Fair Housing Act (1964)*.

amend the state Constitution; the amendment was to prohibit the state and its agents from denying, limiting or abridging "the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses"¹. In the result, the proposed amendment was approved by 4,101,295 votes to 2,116,318, and the Fair Housing Act thus rendered nugatory.

Another commentator has referred to—

"... the kind of racial movement which, in the last thirty years, has turned segregation from a negligible city phenomenon into a vast urban institution"².

19. *Justice*. In the United States, it has been said, the jury is perhaps the most important instrument of justice, for jury service is the only avenue of direct participation in the administration of justice open to the ordinary citizens³. In 1875 a law was enacted prohibiting jury exclusion by reason of race; since that time the exclusion of persons from juries by reason of their race has always been a federal crime⁴. For over 80 years the Supreme Court has repeatedly held the discriminatory exclusion of Negroes from jury service to be a violation of the equal protection clause of the 14th amendment⁵.

Still:

"The practice of racial exclusion from juries persists today even though it has long stood indicted as a serious violation of the 14th amendment. As a result, the bar of race and color is placed at the only gate through which the average citizen may enter for service in the courts of justice"⁶.

The Commission on Civil Rights found that, while the discriminatory exclusion of Negroes from juries has diminished during the past century, this badge of inequality persists in the judicial system of many southern counties, in some of which the practice of jury exclusion is an enduring institution⁷. In 11 out of 21 southern "black-belt" counties Negroes have never served on grand or trial juries⁸.

20. *Social Contact*. The Federal Government's policy of non-discrimination does not appear to have stimulated social integration between Negroes and Whites to any marked degree. Two sociological studies, the one conducted in an upstate New York community⁹, and the other in a small New England town¹⁰, have recently been referred to in the following terms:

¹ *Proposed Amendments to Constitution: Proposition and proposed Laws, together with Argument*, Compiled by Morrison, A. C. (1964), Part I, p. 18 and Part II, p. 13.

² Clark, D., *The Ghetto Game: Racial Conflicts in the City* (1962), p. 43.

³ 1961 U.S.C.C.R.R., Book 5, p. 89.

⁴ *Ibid.*, pp. 89, 95.

⁵ *Ibid.*, pp. 89, 95 and 108.

⁶ *Ibid.*, p. 103.

⁷ *Ibid.*, pp. 106, 108.

⁸ *Ibid.*, p. 92.

⁹ Johnson, R., "Negro Reactions to Minority Group Status", in Barron, M. (Ed.), *American Minorities* (1957), pp. 192-212.

¹⁰ Lee, F. F., "The Race Relations Pattern by Areas of Behavior in a Small New England Town", *American Sociological Review*, Vol. XIX, No. 2 (Apr. 1954), pp. 138-143.

"These two studies of race relations in communities with very small Negro populations, lacking 'Southern traditions', and located in states which have civil rights laws and commissions, demonstrate the pervasiveness of the sense of 'the Negro's place' as an alien and a social inferior throughout American society. Summing up studies of the Negro's position based on 'social-distance scales', Muzafer and Carolyn Sherif observe that there is a scale of social distances established throughout the United States, accepted in some degree by the overwhelming majority of people, and remaining remarkably consistent over a long time period. The Negro remains near the bottom of this scale, below even recent immigrant groups ¹." (Italics added.)

21. *In General.* Respondent submits that the brief survey contained in the preceding paragraphs hereof lends considerable support for the view of the American situation expressed by the Washington correspondent of *The Times* on 27 August 1963 in the following terms:

"... there can be no argument that the combination of favourable circumstances here has failed to produce even the beginnings of an integrated society. The assimilative processes of American society, it seems, cannot absorb Negroes, even with the help and urging of a benevolent Federal Government ²." (Italics added.)

22. Two observations on the pattern of racial discrimination in the United States require to be made. On the one hand:

"Discrimination against Negroes seems to be positively correlated with their relative number ³." (Italics added.)

"It is apparent that the degree of racial prejudice and discrimination is highly correlated with the relative size of the groups involved . . ." (Italics added.)

In regard to the registration of Negroes as voters the Commission on Civil Rights reported:

"Another pattern that emerges is an inverse correlation between Negro concentration and Negro registration . . . In the more Southern States, both on a statewide basis and in terms of counties, a greater concentration of Negroes generally means a smaller proportion of Negroes registered. Perhaps the reason for this relationship is that the white community sees a high concentration of Negroes as a political threat and therefore feels impelled to prevent Negroes from voting. Certainly events in Macon County, Alabama, and Fayette and Haywood Counties, Tennessee, where the whites reacted vigorously to an apparent threat of Negro political inundation, suggests such a pattern . . ." ⁴ (Italics added.)

On the other hand, discrimination against Negroes is certainly not confined to those areas of the United States where the majority of the

¹ Killian, L. and Grigg, C., *Racial Crisis in America: Leadership in Conflict* (1964), pp. 112-113.

² *The Times* (late London air edition), 27 Aug. 1963.

³ Becker, G. S., *The Economics of Discrimination* (1957), p. 123. *Vide also* Berelson, B. and Steiner, G. A., *Human Behavior: An Inventory of Scientific Findings* (1964), p. 515.

⁴ *U.S. News and World Report*, 30 Mar. 1964, p. 37.

⁵ 1961 *U.S.C.C.R.R.*, Book 1, p. 112.

Negro population reside¹. Dealing with the differing nature of civil rights problems in the north and the south, the Commission commented as follows:

"In the South race restrictions have been strongly supported by law, tradition, and popular attitudes. In the North, where Negroes until recently have been a small proportion of the total population, restrictions are not the result of law, official policy, or acknowledged tradition—indeed many cities and States have laws prohibiting discrimination. *Yet discrimination persists* 2." (Italics added.)

G. Detrimental Results of the Federal Government's Policy in the United States

23. Thus far Respondent has drawn attention to the extent to which the anti-discrimination policy of the United States Government, which is reflected in its legislative and executive actions, has failed to achieve the object of wiping out racial discrimination against Negroes. Reference must now be made to grievously harmful results that have followed in the wake of governmental attempts to enforce desegregation. These have included strong and widespread resistance by the White population to enforced integration; racial tension, riots and violence; and large-scale bloodshed and damage to property. Respondent will not attempt to give a complete account of the occasions on which racial conflict in the United States has erupted into violence over the past decade; the examples mentioned in the following paragraphs hereof will suffice for the purposes of Respondent's argument.

24. The Commission on Civil Rights noted that—

"... since the Supreme Court desegregation decisions and increasingly urgent demands by Negroes for full equality, *tension and violence have increased in some parts of the country* 3." (Italics added.)

"... this Commission must report that *Negro citizens in some places today live in fear of violence*—accompanied by fearsome doubts regarding police integrity on race problems. It has seen this fear in the attitudes of Negroes it has interviewed; in their unwillingness to testify before the Commission—often in their unwillingness even to speak to Commission representatives. The same fear sometimes prevents the citizen from seeking redress from the Federal Government for violation of his rights. This fear is often without foundation any longer—but it exists 4." (Italics added.)

"The present conflict has brought about some progress, *but it has also created the danger that white and Negro Americans may be driven even further apart and left again with a legacy of hate, fear, and mistrust* 5." (Italics added.)

¹ "In 1900, about 90% of Negroes lived in the South, largely in rural areas . . . By 1960, only 60% were still in the South, and the majority of them were in towns and cities. Some 38% were in urban areas in the North or West. Only about one-fourth remained on farms, nearly all in the South." United States Department of Labor, *The Economic Situation of Negroes in the United States* (Revised 1962), p. 2.

² 1961 U.S.C.C.R., Book 1, p. 12.

³ *Ibid.*, Book 5, p. 33.

⁴ *Ibid.*, p. 43.

⁵ 1963 R.U.S.C.C.R., p. 4.

Recent events do not suggest that there has been an improvement in the situation described by the Commission, as will appear below.

25. An example of the resistance to enforced desegregation of schools is afforded by the events in the town of New Orleans, Louisiana, during 1960-1961¹. When it appeared in the summer of 1960 that the federal Court order to desegregate the first grades of New Orleans schools in the autumn of 1960 would be enforced, the Governor and General Assembly of Louisiana resisted by every means at their command. In five days of "hysteria" during November 1960, 21 emergency bills were passed to preserve segregation. The General Assembly was called into special sessions five times during 1960-1961, at a total cost to the taxpayers of \$934,000, in a vain attempt to prevent the admission of Negro children to the White schools. On 14 November 1960, four 6-year-old Negro girls, accompanied by United States Marshals, enrolled in the "William Frantz" and "McDonough 19" elementary schools. A day of rioting followed; White high school students, thwarted in their ambitions to "get the Mayor" and march on the schools, burnt the American flag; screaming mobs of women milled in front of the two schools.

The Commission remarked that the violence that occurred in New Orleans in conjunction with school desegregation stands out in striking contrast to the city's reputation of gaiety. The schools were promptly boycotted by most White pupils; some transferred to schools in an adjoining parish, but it is estimated that nearly 300 White children received no schooling whatever throughout the school year. The number of White students attending "William Frantz" with one Negro girl reached a maximum of 23 in December 1960, but "McDonough 19" was completely boycotted by White pupils until January 1961, when a White boy joined the three Negro girls there. At the end of the 1961 school year only 15 White pupils were enrolled at "William Frantz" with one Negro girl, and only the three Negro girls attended "McDonough 19"². By 1963 Negroes represented only slightly more than 1 per cent. of the children in Louisiana's desegregated schools³.

26. The history of Birmingham, Alabama, prior to 1950, included a number of bloody incidents, in which the element of race was partly involved⁴. By the early 1950s industrial peace and lessening racial tension had led some people to believe that a permanent break had been achieved in the unhappy tradition of violence⁴. With the second School Desegregation Decision on 31 May 1955, however, racialism and violence revived in Birmingham⁵. Racial tension and acts of violence increased throughout the State.

"From 1956 to 1961 at least 20 violent acts were publicly reported in Birmingham alone, including allegations of racially-motivated beatings, bombings, and one castration⁶."

In 1956 a segregationist told a rally in Birmingham: "We want trouble and we want it everywhere we can get it"⁷. In 1957 a White mob

¹ *Vide 1961 U.S.C.C.R.R.*, Book 2, pp. 41-43.

² *Ibid.*, p. 33.

³ *1963 R.U.S.C.C.R.*, p. 231.

⁴ *1961 U.S.C.C.R.R.*, Book 5, p. 34.

⁵ *Ibid.*, pp. 33-37.

⁶ *Ibid.*, p. 34.

⁷ *Ibid.*, p. 35.

attacked a White man who had joined a Negro leader and his wife in a White station waiting room, and stoned his car; later in the same year the same Negro was attacked and severely beaten by a White mob which also hurled stones at cars driven by Negroes. Acts of violence continued in 1958, 1959 and 1960. In the last-mentioned year Birmingham's Police Commissioner declared:

"The truth is, ladies and gentlemen—they (Negroes) don't want racial equality at all. The Negroes want black supremacy.

Yes, we are on the one-yard line. Our backs are to the wall. Do we let them go over for a touchdown or do we raise the confederate flag as did our forefathers and tell them, 'You shall not pass!' ¹."

In 1961 a field report of the Civil Rights Commission found "... the clearest documentation of the climate of fear and the conspiracy of silence that exist in Birmingham", and concluded as follows:

"Racial prejudices are incredibly tense in Birmingham. Until local leaders make a concerted effort to control those feelings, the slightest provocation can be expected to unleash acts of violence as ugly and as frightening as any that Birmingham has seen in its ... history ²."

About three weeks after the field report was written, two small groups of White and Negro bus passengers, styling themselves "Freedom Riders", embarked on a journey from Washington to the southern states with the avowed purpose of challenging racial segregation in inter-state bus travel. When they reached the state of Alabama, violence erupted ³. A mob of Whites of Birmingham attacked the bus passengers, and a Birmingham newspaper commented that fear and hatred stalked Birmingham's streets ⁴. Similar events occurred in the towns of Anniston and Montgomery, the state capital: in the former, an incendiary device was thrown through the window of the bus, setting it afire; in the latter, another group of "Freedom Riders" was attacked and brutally mauled by a mob of White men and women, and a similar mob rioted outside a church where Negroes were holding a meeting, setting fire to one car and stoning others.

Shortly thereafter Attorney-General Robert Kennedy expressed the hope that the tragic events in Alabama would not again arise in the country ⁵. His hope was not fulfilled; Birmingham itself again experienced racial violence in 1963 ⁶. Early in that year the Negro leader Martin Luther King, describing Birmingham as the most thoroughly segregated big city in the United States, announced that he would lead demonstrations there until this situation was permanently altered. In April, Negroes began a daily march through the city, and each day more of them were arrested; within three weeks hundreds had been arrested. On 7 May the demonstrations erupted in violence: more than 2,000 Negroes swarmed through police lines, moved down town and pelted the police with stones. Altogether more than 3,000 Negroes had been imprisoned before the

¹ 1961 U.S.C.C.R.R., Book 5, p. 35.

² *Ibid.*, p. 36.

³ *Ibid.*, pp. 29-33.

⁴ *Ibid.*, p. 30.

⁵ *Ibid.*, p. 44.

⁶ *Vide* MacAdam, I., *The Annual Register of World Events: A Review of the Year 1963* (1964), pp. 181-182.

demonstrations were over ¹. Dogs, clubs and firehoses were used to disperse mass demonstrations ². Bombs exploded in the house of Dr. King's brother and at the headquarters of the Negro campaigners, touching off a night of rioting in which at least 50 people were injured.

Troops had to be used to enforce a federal Court order for the admission of Negroes to the University of Alabama. The President of the United States appealed to the nation to examine its conscience about this and of related incidents; shortly after he had finished speaking the Negro secretary of the National Association for the Advancement of Coloured People in Mississippi was shot in the back and killed outside his home in Jackson ².

27. Sometimes the reaction of the White section of the population to enforced integration has taken the form of economic reprisals against Negroes. Thus, in Fayette and Haywood Counties, Tennessee, a drive to encourage the registration of Negroes as voters led to intensive and serious economic retaliation by the White population ³. Negroes who registered themselves to vote were boycotted; traders ceased trading with them; their credit was stopped; their loans called up; their mortgages foreclosed; their employment, sharecropping and tenancy relationship terminated ³.

28. Peaceful sit-in demonstrations by Negroes sparked off racial violence in Jacksonville, Florida, during August 1960 ⁴. It started when White men launched a series of attacks on Negroes in an apparently carefully planned assault. The Whites were armed with axe handles and baseball bats; two White men were seen cutting the wire from a bundle containing about 50 new axe handles, which were passed out to the waiting crowd. The attacks soon developed into a race riot which continued for several days.

29. Although it has been observed that---

"[t]he greatest resistance to school desegregation and extension of the franchise arises in those areas where the size of the Negro population approaches or exceeds that of the white ⁵",

violent resistance to enforced desegregation has not been confined to the southern states of America. The Commission on Civil Rights stated:

"No section of the Nation has a monopoly on racial violence. In the North and West the *breeding places for discord have been the cities where large concentrations of Negroes and whites are in direct competition for employment and housing*. Following mass Negro migrations, racial tension erupted in Detroit, Los Angeles, New York, and in other cities during the early 1940s causing severe loss of life and property damage ⁶." (Italics added.)

30. In the north, the more recent history of violence in Chicago, from 1953 to 1961, bears testimony to the racial explosions that may accom-

¹ MacAdam, *op. cit.*, p. 182.

² 1963 R.U.S.C.C.R., p. 114.

³ As described in 1961 U.S.C.C.R.R., Book 1, pp. 36-37.

⁴ As described in 1961 U.S.C.C.R.R., Book 5, pp. 37-39.

⁵ Dr. Brewton Berry, as quoted in *U.S. News and World Report*, 30 Mar. 1964, p. 37.

⁶ 1961 U.S.C.C.R.R., Book 5, p. 39.

pany compulsory desegregation¹. In July 1953, the Trumbull Park Housing Project riots started in the South Deering section of Chicago. As soon as Negro families began moving into the previously all-White project the residents of the neighbourhood started rioting. During the next four years Whites committed numerous acts of violence against the few Negroes in the project. Negro tenants had to travel to and from their homes under police guard. On some occasions 1,200 policemen were assigned to cover the housing project area during the course of a 24-hour period.

In the summer of 1957 rioting began again near the South Deering area; this time the issue was the use of Calumet Park by Negroes. The police did not prevent crowds numbering several thousands from gathering outside the Park on consecutive Sundays, from throwing rocks at Negro motorists, or from attacking Negro pedestrians. For several weeks the situation was tense, and hundreds of police were required to keep it from getting worse².

Another incident took place in 1959, when a Negro family bought a house on West Jackson Boulevard¹. Crowds gathered, rocks were thrown and threatening telephone calls made. Two minor disturbances occurred in the summer of 1960. One was at a beach, the other in a city park; both were prompted by Negroes using swimming facilities usually only used by Whites. In 1961 new instances of inter-racial violence again erupted in Chicago; the Police Department took vigorous action to quell the trouble¹. Chicago's history of racial violence continued up to the summer of 1964, when violence again broke out there.

31. Perhaps the worst instances of racial conflict occurred most recently when during the summer of 1964, violence rocked the United States. This explosion of racial violence followed shortly after the United States Congress had again passed a Civil Rights Act in furtherance of its policy. From 18 July until 23 July New York City suffered rioting that broke out in the Negro residential section. Before the rioting was brought under control by police armed with hand guns, rifles, shot guns and tear gas, one person was killed, 144 were injured, 519 were arrested and 541 places of business were damaged and looted at a cost to the community of nearly 2 million dollars.

On 24 and 25 July Negro rioting broke out in the northern New York community of Rochester. Before the National Guard could restore order four persons had been killed, 350 were injured, 976 were arrested and 204 places of business were damaged and looted at a cost to the community of between 2 and 3 million dollars.

On 2, 3 and 4 August Negroes rioted in Jersey City, New Jersey—another northern metropolitan area—and before peace was restored 46 persons were injured, 65 arrested and 71 places of business damaged and looted at a cost to the community estimated at three hundred thousand dollars.

From 28 August until 30 August rioting raged throughout the Negro districts of Philadelphia, during which 341 persons were injured in the fighting, 774 were arrested and 225 places of business were damaged and

¹ As described in 1961 U.S.C.C.R.R., Book 5, pp. 39-41.

² The Chicago Commission on Human Relations estimated that it costs \$1,800,000 in police protection "to keep the city free of uncontrolled (race) rioting".—Weyl, N., *The Negro in American Civilization* (1960), p. 307.

looted at a cost to the community of more than 3 million dollars. The cost involved in maintaining riot police to cordon off Negro areas for days and for rushing in National Guard units is not known ¹.

32. As far as Respondent is aware, no attempt has been made to estimate the material and human costs involved in the Federal Government's programme of integration in the face of White resistance. An indication of the magnitude of such costs is the fact that the Federal Government spent \$4,522,964 in order to secure the admission in 1962 of one Negro student into the student body of the University of Mississippi: 14,000 troops, including the Army National Guard, the Air Force, the Military Air Transport Service and United States Marshals were used to effect the integration. Two persons were killed and hundreds injured in the protracted fighting that ensued ¹. Yet, at the time of writing, no Negroes are enrolled at the University of Mississippi.

33. The above, then, presents a brief picture of some aspects of the implementation of the United States Government's civil rights policy, and of the effects thereof. Respondent submits that it has been shown that, on the one hand, governmental action in the United States over a period of many years has not been successful in ending discrimination against Negroes, or even in bringing the end visibly nearer; while on the other hand the detrimental results of the Government's policy have been enormous.

In the light of the foregoing, it is not surprising to find that there is indeed no weight of authority in favour of Applicants' thesis about the desirability of attempts at enforcement of integration by government action—a matter which is dealt with in the succeeding paragraphs.

H. The Views of Authorities Quoted by Applicants

34. Some of the authorities quoted by Applicants do not appear to hold the views ascribed to them in the unqualified form suggested by Applicants. This is illustrated by the following further quotations from the works of some of the authors referred to by Applicants:

(i) J. Dean and A. Rosen ²:

"Intergroup understanding is impeded by ignoring individual and group differences and treating all persons as though they were alike ³."

¹ For a summary of the above figures, *vide* a report in *U.S. News and World Report*, 14 Sep. 1964, pp. 36-41. From the report, it is not clear to what extent, if any, the rioting referred to in the text is linked with the passing, shortly before, of a Civil Rights Act. Some commentators quoted in the report said that the riots were not essentially a race problem. Yet, according to the report, the trouble in Rochester exploded after a routine arrest by two White policemen of a Negro charged with being drunk; New York's riots began as a protest against the killing of a Negro youth by a White police lieutenant (who was later cleared of criminal responsibility); in Jersey City the riots began after a routine arrest of a Negro woman for drunken brawling; and in Philadelphia rioting began soon after a routine police attempt to remove a Negro woman from a car that was blocking traffic at an intersection. The fact that incidents such as these could spark off rioting is indicative that a tension situation already existed.

² IV, p. 308, footnote 1.

³ Dean, J. P. and Rosen, A., *A Manual of Intergroup Relations* (1955), p. 19.

"... but genuinely equal treatment comes from recognizing real ethnic-group differences, so that each individual can be understood in the context of his own ethnic traditions and experiences ¹."

"We do not mean that the leaders should proceed rigidly, ignoring individual and group variations in readiness to change ²."

(ii) G. Saenger ³:

"Needless to say, existing laws may be circumvented or not enforced even where adequate machinery exists. In New York State, for example, discriminatory advertising was forbidden by law in 1943. Since that time resort places advertising in the New York newspapers simply substituted the phrase 'near churches' for the outlawed phrase 'restricted clientele'. While New York State possesses a law which forbids discrimination in higher education it has been singularly ineffective. There have been only three complaints made to the enforcing agency ⁴."

(iii) H. Blumer ⁵, with reference, *inter alia*, to the statement quoted by Applicants:

"The above policy principles—even as principles—are crude and require refinement and qualification ⁶."

(iv) R. M. Williams, Jnr., and M. W. Ryan ⁷:

"A clear definition of law and policy by legitimate social authorities *may reinforce willingness* to conform to the requirements of new situations . . . Important social changes generally do not occur *without some resistance and friction* ⁸." (Italics added.)

(v) E. A. Suchman *et al.* ⁹:

"From the point of view of practical application, the implications of these propositions for the practitioner should be taken merely as suggestive. These suggestions must be viewed with extreme care and only as general guide lines. Only in combination with specific knowledge of a local community setting could they be used as directives for action ¹⁰."

(vi) M. Tumin ¹¹, writing about the enthusiasm for the use of legal restraints against discrimination:

"This enthusiasm has been tempered, in more sober appraisals, by the realization that no matter how temporarily effective legal restraints may prove, one cannot hope to develop *continuous* and

¹ Dean, J. P. and Rosen, A., *A Manual of Intergroup Relations* (1955), p. 21.

² *Ibid.*, p. 88.

³ IV, p. 308, footnote 2 and p. 309, footnote 1.

⁴ Saenger, G., *The Social Psychology of Prejudice* (1953), p. 270.

⁵ IV, p. 308, footnote 3.

⁶ "Research on Racial Relations: United States of America", *International Social Science Bulletin*, Vol. X, No. 3 (1958), p. 433.

⁷ IV, p. 308, footnote 4.

⁸ Williams, R. M. (Jnr.), and Ryan, M. W., *Schools in Transition: Community Experiences in Desegregation* (1954), p. 247.

⁹ IV, p. 308, footnote 5.

¹⁰ Suchman, E. A. *et al.*, *Desegregation: Some Propositions and Research Suggestions* (1958), p. 5.

¹¹ IV, p. 309, footnote 2 and p. 310, footnote 2.

stable traditions of non-discrimination through legal instruments alone ¹."

(vii) R. M. Williams, Jnr. ², states that—

"[t]he existence of laws protecting the rights of minorities and court decisions upholding these laws tend, in the long run, to decrease conflict over the rights involved ³."

"Whenever there is sufficient flexibility in public attitudes, the abolition of legal discriminations and disabilities in the long run will reduce hostility and conflict ⁴." (Italics added.)

(viii) Dr. Gordon Allport ⁵:

"To sum up: While it is true that *many Americans will not obey laws of which they disapprove strongly*, most of them deep inside their consciences *do approve civil rights and antidiscrimination legislation* ⁶." (Italics added.)

"We have said that laws will, by and large, be obeyed *if they are in line with one's conscience, and if they are tactfully administered*. We should add an *additional condition: they should not be felt to be imposed by an alien will . . .* Prejudices are not likely to be reduced by laws which, in the manner of their passing, arouse other prejudices ⁷." (Italics added.)

(ix) K. B. Clark ⁸:

"Within the present ambiguities and conflicts of social theory, it is difficult for the contemporary social scientist to take a clear stand against the point of view held by some practical men that '*one must change men's hearts before one can change their social behaviour*' ⁹." (Italics added.)

(x) M. Deutsch ¹⁰:

"To determine if the passive, legally based acquiescence to desegregation by some individuals actually is a mask for personal acceptance of desegregation would be an extremely important task in understanding the underlying dynamics of the individual 'leader's' or influential person's role in social change. I would feel that it would be extremely difficult to impose desegregation by normative legal processes *unless there were at least this type of ambivalence on the part of a certain proportion of community leaders and decision-makers*. A variable such as this might play a significant

¹ Tumin, M. M., *Desegregation: Resistance and Readiness* (1958), p. 84.

² IV, p. 309, footnote 3.

³ Williams, R. M. (Jnr.), *The Reduction of Intergroup Tensions: A Survey of Research on Problems of Ethnic, Racial, and Religious Group Relations* (1947), pp. 73-74.

⁴ *Ibid.*, p. 74.

⁵ IV, pp. 309-310, footnote 1; p. 310 and p. 312, footnote 1.

⁶ Allport, G. W., *The Nature of Prejudice* (1954), p. 472.

⁷ *Ibid.*, p. 473.

⁸ IV, p. 310, footnote 3.

⁹ Clark, K. B. (Issue Author), "Desegregation: An Appraisal of the Evidence", *The Journal of Social Issues*, Vol. IX, No. 4 (1953), p. 72.

¹⁰ IV, p. 310, footnote 4.

role in explaining the absence or presence of violence in one or another community ¹." (Italics added.)

35. The above-quoted views of authors cited by Applicants have all been expressed with reference to the situation in the United States ², where, as has been pointed out earlier ³, conditions are ideal for the enforcement of anti-discrimination legislation.

Apart from these authors, Applicants have also quoted authors commenting on racial integration in Canada, New Zealand and Great Britain ⁴. But Applicants have made no attempt to show that the basic facts of the racial situation in these countries are comparable with the facts of the situation existing in South West Africa. In fact they are not. A reference to the population figures in each of these countries is sufficient to show that the composition of the racial groups there is fundamentally different from the situation existing in South West Africa. Thus, in Canada, Negroes form only about 0.2 per cent. of the population, Europeans about 96.8 per cent. and other groups 3 per cent. ⁵ In New Zealand, the Maoris constitute but 4 per cent. of the total population, Europeans about 90.5 per cent. and other groups 5.5 per cent. ⁶

In passing it may also be noted that many New Zealanders have been reported to feel that attempts to force the pace of integration will succeed merely in accentuating race-consciousness, while some Maoris feel that treasured traditions and something of their distinctive identity as a race may suffer if too many controls are brought to bear, where basically continued tolerance is the real social requirement ⁷.

In Great Britain, the non-White section of the population forms less than 2 per cent. of the total population ⁸. The racial situation in Great Britain has been more fully referred to elsewhere in this Rejoinder ⁹.

I. The Views of Authorities and Commentators Opposed to those Quoted by Applicants

36. Respondent does not dispute the suggested premise of Applicants' argument, viz., that attitudes are learned and can be unlearned. But in so far as Applicants' argument contains the further, implied generalization that all or any attitudes can be unlearned with equal facility, whatever the setting may be in which they occur, it loses sight of the fact that attitude modifiability is determined by a number of factors, not the least of which is the group affiliations of the individual concerned. This is illustrated by the following findings of Professors Berelson and Steiner:

"Given consistent support from historical, parental, group, and strata characteristics [opinions, attitudes and beliefs], are unlikely

¹ Deutsch, M., "Some Perspectives on Desegregation Research". *The Role of the Social Sciences in Desegregation: A Symposium*, pp. 4-6 at p. 6.

² The same applies to M. Berger, IV, p. 310, footnote 5, A. Rose, *ibid.*, p. 311, footnote 5 and C. R. Nixon, *ibid.*, p. 311, footnote 6.

³ *Vide* paras. 5-10, *supra*.

⁴ IV, pp. 310-311.

⁵ *United Nations Demographic Yearbook 1963, Special Topic: Population Census Statistics II*, Fifteenth Issue (1964), p. 311.

⁶ *Ibid.*, p. 317.

⁷ According to a report in *The Times*, 7 Dec. 1962.

⁸ An estimate made by Moses Gohoho in *The Star*, 13 Oct. 1964.

⁹ *Vide* Chap. III, Annex XV, *supra*.

to change at all. If, for example, historical conditions remain the same; if the parents have felt strongly and harmoniously about a particular matter and instilled the appropriate belief early and thoroughly; if strata characteristics in later life are consistent with the position; if the primary groups surrounding the person agree on the matter—then it is hardly too much to say that *the [opinions, attitudes and beliefs] simply will not change*¹.” (Italics added.)

37. With regard to Applicants' contention that legislation can be used to change attitudes, the ineffectiveness of legislation that does not coincide with the mores of the people has been recognized by various authorities. Berelson and Steiner summarize contemporary findings as follows:

“Social changes, however large, that are desired by the people involved can be assimilated with little social disruption. Changes that are not desired, even quite small ones, can be put into effect *only at considerable social and personal cost . . . Social changes imposed on a society from outside are especially likely not to be accepted.* Forced change from the outside tends to result in *overt compliance* but *covert resistance*².” (Italics added.)

38. Contemporary science leaves little doubt that human groups are animated by what are frequently termed in-group preferences and out-group aversion; a recent summary of research findings states unequivocally that in-group preference, accompanied by a tendency to prejudice or stereotype members of out-groups, is universal, existing in every kind of human society³. No authority is required for the proposition that the fact of permanent racial difference is a real, enduring and socially important fact. A situation conceived as threatening the survival of one's own group (e.g., economic or socio-cultural competition) gives rise to an attitude of persistent and resistant national hostility. Thus, attitudes arising from racial and cultural differences between groups are particularly strong, deep-seated and resistant to change. This is illustrated by the following comments on the situation in the United States:

“It is true that the problems of assimilation presented by the great floods of immigrants from Europe have become largely resolved with time, leaving only limited and local adjustments to run their course. *Where the color line is involved, there is still stubborn resistance to complete assimilation . . .*”

“We are peoples whose whole cultural systems are geared to change, but *there are also limits to the changes which can be made without destruction of the essentials of our cultural ways of life*⁴.” (Italics added.) “*. . . there is this significant difference which we shall stress, that in regard to the colored minorities, amalgamation is violently denied them, while in regard to all the other minorities, it is welcomed as a long-run process*⁵.” (Italics added.)

¹ Berelson, B. and Steiner, G. A., *Human Behavior: An Inventory of Scientific Findings* (1964), p. 575.

² Berelson and Steiner, *op. cit.*, pp. 613-614.

³ Suchman, E. A. et. al., *Desegregation: Some Propositions and Research Suggestions* (1958), p. 57.

⁴ Walter, P. A. F. (Jr.), *Race and Culture Relations* (1952), pp. 408 and 412 respectively.

⁵ Myrdal, G., *An American Dilemma: The Negro Problem and Modern Democracy* (1944), p. 52, footnote a.

"While amalgamation is considered the approved way of solving the problem of our foreign white immigrant groups, Americans are opposed to the assimilation of the 'racial' minorities, Negroes, Orientals, Mexicans, and Indians. They insist on keeping their racial minorities separate¹."

39. Applicants' contention that discriminatory behaviour may be modified by the enforcement of anti-discriminatory legislation is no doubt true to the extent that an individual can be forced to *behave* in a prescribed manner, that he can be *forced* to do almost anything. But what Applicants omitted even to mention, are the indisputably harmful effects of coercion, when the result sought to be achieved is opposed to the habitually accepted norms and traditional values of the society. Changes of this nature cannot be brought about, even by force, without resistance, and resistance results in disorganization:

"The more a social change threatens or appears to threaten the traditional values of the society, *the greater the resistance to that change and the greater its attendant cost in social and personal disorganization*."² (Italics added.)

Where there are actual or potential conflicts between racial or cultural groups within a nation, each national group looks increasingly to its own internal unity³. A clash of cultural standards tends to weaken the hold of both cultures on individuals⁴; conflict between habitual norms and requirements of new-life situations leaves the individual confused and disturbed⁵. When the old concept of rights and duties is broken down, the results are class friction and pathological relationships⁶; a change in the traditional way of life leads to friction and insecurity, to social tensions and disruptions⁷. Cultural conflict operates to produce crime, because it creates confusion in standards of conduct and in emotional balance for some individuals and because it results in hatred and strife between nations and between groups within a nation⁸. This has been proved by experience in the United States; thus, within the zones occupied separately by various cultural and racial groups, the crime rate is relatively low, but where zones overlap zones of other cultural or racial groups, places where cultural conflict is most likely to be acute, the rate of crime and delinquency is highest⁹. Moreover: "... Along the boundaries of change, race conflict frequently explodes into violence"¹⁰.

40. Enforced assimilation as a solution to racial problems has been rejected in the following terms by Paul A. F. Walter, writing in 1952:

"As a general rule, enforced assimilation becomes arrested short-

¹ Saenger, G., *The Social Psychology of Prejudice* (1953), p. 162.

² Berelson, B. and Steiner, G. A., *Human Behavior: An Inventory of Scientific Findings* (1964), p. 614.

³ Walter, P. A. F. (Jr.), *Race and Culture Relations* (1952), p. 408.

⁴ *Ibid.*, p. 440.

⁵ Gillin, J. L., *Social Pathology* (Revised ed., 1939), p. 620.

⁶ *Ibid.*, pp. 559-570.

⁷ *Ibid.*, p. 564.

⁸ Gillin, J. L., *Criminology and Penology* (3rd ed., 1945), pp. 199-200.

⁹ Sutherland, E. H. and Cressey, D. R., *Principles of Criminology* (1955), p. 147 and Walter, P. A. F. (Jr.), *Race and Culture Relations* (1952), p. 435.

¹⁰ Weyl, N., *The Negro in American Civilization* (1960), p. 307, citing as an example Chicago's 1957 Calumet Park riots, mentioned in para. 30, *supra*.

of complete amalgamation and leaves vestiges of old cultural and racial distinctions, often crystallized into class and caste systems ¹."

"While thus complete assimilation may be considered, as it is by some, as the ultimate answer to all ethnic problems either in a restricted area or globally, *the history of such problems indicates that this is not true* ²." (Italics added.)

More recently, A. J. Gregor has said:

"We can generalize (bearing in mind exceptions which can conceivably result from singular socio-political circumstances) that where two peoples, marked by gross physical dissimilarities, make contact, *the attempt at assimilation is invariably met with tensions and disharmonies which it is almost beyond the power of men to resolve* ³." (Italics added.)

D. Purves states:

"There is ample evidence to indicate that *social instability is inevitable whenever attempts are made to create multi-racial communities*, and a number of apparently insoluble situations already exist in Africa ⁴ and the United States. In view of the instinctive character of the antagonisms inherent in the multi-racial community, there appear to be good grounds for preventing the establishment of communities of this kind in the future and for attempting to solve the problem of the existing communities by resolving them into separate societies on a racial basis. However harsh the application of such policies may appear to be, they do provide the possibility of social harmony and friendly competition between national groups in the future—*the alternatives are permanent instability and exploitation of one racial group by the other indefinitely prolonged* ⁵." (Italics added.)

Prof. Max Lamberty ⁶:

"The 'integration' can be a greater evil than the 'segregation' when it is not accepted by all parties concerned, when it must be achieved not by free will but by coercion ⁷." (Translation.)

41. A number of authorities and commentators dealing specifically with the racial situation in the United States in recent years have been outspoken in their criticism of enforced integration as a method of resolving racial discrimination in that country. They consider that the Federal Government's policy instead of substantially changing basic attitudes of racial prejudice and racial discrimination, has engendered a hardening and intensification of such attitudes, leading often to increased

¹ Walter, P. A. F. (Jr.), *Race and Culture Relations* (1952), p. 55.

² *Ibid.*, p. 406.

³ Gregor, A. J., "On the Nature of Prejudice", *Eugenics Review*, Vol. LII (Apr. 1960-Jan. 1961), pp. 217-224 at p. 219.

⁴ *Vide* Chap. III, *supra*.

⁵ Purves, D., "The Evolutionary Basis of Race Consciousness", *Mankind Quarterly* (July 1960), Vol. I, No. 1, pp. 51-54 at p. 54.

⁶ Doctor in Social Sciences; Professor at the Hoger Instituut voor Overzeese Gebieden, Antwerp; Professor at the Koninklijke Militaire School, Brussels.

⁷ Lamberty, M., "Wat betekent pluralisme?" *De Vlaamse Gids*, No. 12 (Dec. 1963), pp. 798-812 at p. 811.

racial friction and violence¹. As to the former aspect of the American situation, Professor C. Vann Woodward has commented:

"It is true that the present Court has consistently held against segregation. But Americans have developed over the years a *curious usage of the law as an appeasement of moralists and reformers*. Given sufficient pressure for a law that embodies reputable and popular moral values, the electorate will go to great lengths to gratify the reformers. They will even go so far as to unlimber the cumbersome machinery of Constitutional amendment. But having done this much, they are inclined to regard it as *rather tedious of the reformers to insist upon* literal enforcement. Under these circumstances the new law is likely to become *the subject of pious reference, more honored in the breach than in the observance*, a proof of excellent intentions rather than the means of fulfilling them²." (Italics added.)

42. The resistance of the White population to the enforcement of residential integration in practice affords cogent support for the above comment. One author has stated:

"The experience of Chicago shows that displacement of whites by Negroes can be reversed in its early stages. However, after Negro population reaches a certain level, both the flight of white residents and the influx of colored gain momentum *and become irreversible*. . . Sociologists write about the 'tip point' in the racially mixed neighborhood. Essentially, this is the point of no return. It defines that degree of Negro concentration which makes the process of white displacement irreversible. This tip point generally is in the range of 10% to 20% Negro³." (Italics added.)

Another author recently reported that irrespective of verbal assurances of tolerance,

"... the mere presence of a Negro in a white residential neighborhood *unleashes fears and hatreds* of the most elemental sort, and leads almost without exception to an exodus of the white residents"⁴. (Italics added.)

43. The effect of current government policy in the United States on racial attitudes generally is described with striking impact in the following recent opinion:

"... the North is finally beginning to face the reality of race. In the process, *it is discovering animosities and prejudices that had been hidden in the recesses of the soul*. . . revealing a degree of anti-Negro prejudice and hatred that surprised even the most sophisticated observers. After interviewing whites from coast to coast, for example, the journalist Steward Alsop and the public opinion expert Oliver Quayle reported in the *Saturday Evening Post* that '*The white North is no more ready to accept genuine integration and real racial equality than*

¹ Consistently with Respondent's general approach as outlined above (paras. 4 and 12), Respondent must not be taken to subscribe in every respect to the views of all the authors quoted in the text. As will be noticed, some hold more extremist views, while others are more restrained in their comments. The object of Respondent's quotations is to show that varying shades and degrees of opinion do exist.

² Vann Woodward, C., *The Strange Career of Jim Crow* (1957), pp. 171-172.

³ Weyl, N., *The Negro in American Civilization* (1960), pp. 307 and 308.

⁴ Silberman, C. E., *Crisis in Black and White* (1964), p. 43.

the deep South'. So strong and widespread was the prejudice they found that Alsop and Quayle concluded that for the moment, at least *'there is simply no way to reconcile the aspirations of the new generation of Negroes for real integration and true equality with the resistance to those aspirations of the majority of whites'*. Pollster Louis Harris, who sent interviewers all over the country for *Newsweek*, reached much the same conclusion. He found that 'Whites, North and South, do not want the Negro living next door'; that 'Most whites fear and shun social contact with Negroes'; and that 'the white image of the Negro is . . . an implausible and contradictory caricature . . . cunning, lewd, flashy, strong, fearless, immoral and vicious' ¹. (Italics added.)

44. White resistance to the enforcement of anti-discriminatory legislation in the United States, with its attendant harmful consequences, is reflected in the following comment on the compulsory desegregation of schools in the South:

"After five years of practically no progress in mixing the schools of the Deep South, the Eisenhower Administration and the moderates of both parties realized *the futility of using military force to change the mind and mores of the South*. Both sides searched for face-saving formulas and compromises that might calm *the storms of race and sectional hate*. Five years after the Supreme Court decision the theory that the South could be dragged, cajoled and coerced into school desegregation seemed dubious in the extreme. *The deep-seated nature of Southern opposition to mixed schools* was finally becoming apparent to the North. After Little Rock, it seemed clear that *the use of the naked power of the Federal Government to enforce desegregation*, whether in the form of military occupation or wholesale contempt proceedings in Federal courts, *would merely make the white South more sullen, more rebellious, more obstinate and less willing to compromise* ²." (Italics added.)

"What appears as softening of resistance to desegregation in the South may merely be expediency. It reflects a recognition by the forces of resistance that it is easier and cheaper to comply symbolically by accepting a few 'exceptional' Negroes in White institutions than it is to resist symbolically by fighting federal pressure to the bitter end ³."

45. Some observers have even condemned the Federal Government's policy as having done more harm than good to racial harmony in the United States. Thus, Carleton Putnam reflects on the school desegregation decision as follows:

"Indeed, there now seems little doubt that the court's recent decision *has set back the cause of the Negro in the South by a generation*. He may force his way into white schools, but *he will not force his way into white hearts* nor earn the respect he seeks. *What evolution was slowly and wisely achieving, revolution has now arrested, and the trail of bitterness will lead far* ⁴."

¹ Silberman, *op. cit.*, p. 8.

² Weyl, N., *The Negro in American Civilization* (1960), pp. 289 and 290.

³ Killian, L. and Grigg, C., *Racial Crisis in America: Leadership in Conflict* (1964), p. 114.

⁴ Putnam, C., *Race and Reason: A Yankee View* (1961), p. 9.

More recently, in 1964, shortly after the waves of violence which followed upon the passage of the 1964 Civil Rights Act, a number of United States' Senators and Representatives were interviewed on the situation¹. Some supported the Government's legislative programme; others expressed the opinion that it was not the complete answer to the racial problem; and still others condemned it. Of the latter group, Respondent quotes the following:

Senator Richard B. Russell, Georgia:

"The New York race riots prove the fallacy of a principal argument that was advanced for passage of the so-called Civil Rights bill. During the long weeks that the bill was before the Senate, the country was assured over and over again by advocates of the measure that its passage was necessary to prevent violence and demonstrations.

We now see the wanton destruction of life, limb and property in Harlem and Rochester. The fact that the racial outbreaks occurred in the State having the greatest array of so-called civil-rights laws and the most ardent political champions of the Negro *is telling evidence that legislation of this type is more likely to harm than to help the cause of peace, order and good race relations*²." (Italics added.)

Senator John L. McClellan, Arkansas:

"The Civil Rights law as enacted cannot at all be the complete answer to the civil-rights issue in this country. *It is calculated to provoke, and is provoking, an attitude that is contrary to the concept of bringing about an understanding and harmony between the races.*

You can't, just by legislation, change the nature of a people or of a race from their present status to one far advanced³." (Italics added.)

Senator Herman E. Talmadge, Georgia (in answer to the question: "Is Civil Rights the answer to the race problem?"):

"Certainly not, if by 'civil rights' you mean force legislation telling people how they should conduct their private affairs and private business. *If legislation of this type were the answer to this problem, certainly States which have an abundance of it on their law books would not be having the trouble they are now having.* The real civil rights of all Americans, of course, are embodied in the Bill of Rights, the Thirteenth and Fourteenth Amendments to the Constitution. They are now and have always been enforceable in all the courts throughout the land, both federal and State.

The race problem, which really concerns man's relation to his fellow man, will be resolved only by a transformation of mental attitudes and self-improvement on the part of all people, white and Negro. For instance, job opportunities, for which we now have so much demand, come with skills and talents which can be attained only by hard work and self-improvement. . . ." (Italics added.)

Senator Frank Carlson, Kansas (Question: "What is your opinion now of Civil Rights as the answer to the race problem?"):

¹ U.S. News and World Report, 10 Aug. 1964, pp. 26-32.

² Ibid., p. 27.

³ Ibid., p. 28.

⁴ Ibid., p. 29.

"I've felt all along that legislation would not resolve this problem, which, after all, gets to be a matter of the heart and mind. Solution is going to be a long process ¹."

Senator Bourke B. Hickenlooper, Iowa (answering the question, "... would you say that Civil Rights is the answer to the race problem now?"):

"No, I wouldn't. Certain civil-rights guarantees are essential to equality of treatment. But it's been manifest that the protection of guarantee of rights is not the answer ¹."

Representative Horace R. Kornegay, North Carolina (Question: "Do Civil Rights Laws provide the answer to race problems—North and South?"):

"It would certainly appear to me that they do not. The trouble that has come to the Northern cities in Negro communities is indicative of the fact that *racial peace cannot be brought about by litigation* ²." (Italics added.)

46. Finally, Respondent quotes the following comment on the results of the United States Civil Rights policy, contained in the recent conclusion of two major research specialists:

"The danger that America faces is that the desegregation decision of 1954 may prove to be not the beginning of the resolution of 'a struggle in the hearts and minds of white Americans' *but the opening battle of a race war* . . .

The prospect is dismal; the need for a solution to *the crisis in race relations is desperate* ³."

J. Conclusion

47. It is not for Respondent to take part in the controversy as to whether the policy at present being pursued in the United States should be persisted with, or whether the approach or techniques involved therein should be altered, or whether it will eventually bring success or not. For the purposes of this case, the important points are that a serious controversy does exist among students of the problem; that there has as yet been no proof that the policy will succeed and that if it does, it will clearly take a long time and the cost involved therein will be enormous, not only in material terms but also in respect of moral values—and all this in circumstances so much more favourable for integration than in South West Africa. How, then, can it be said that, in not following the United States precept in South West Africa, and in taking account of group reactions in its endeavour to establish harmonious relations, the soundness of Respondent's approach "is refuted by the overwhelming weight of scientific authority" ⁴?

48. If the policy suggested by Applicants produces resistance, tension

¹ *U.S. News and Report, op. cit.*, p. 30.

² *Ibid.*, p. 32.

³ Killian, L. and Grigg, C., *Racial Crisis in America: Leadership in Conflict* (1964), pp. 128 and 130. *Vide* also the comment of the Commission on Civil Rights in its 1963 Report, quoted in para. 24, *supra*.

⁴ *IV*, p. 307.

and violence in the favourable circumstances existing in the United States, the threat of utter social disorganization in South West Africa as the result of such a policy is surely self-evident. It appears to Respondent that it is difficult to conceive of a policy more calculated and more apt to endanger the present well-being and social progress of the inhabitants of South West Africa than the one advocated by Applicants. Only a due regard for the disposition to group separation has converted life in the Territory from one of continual friction and bloodshed, as in comparatively recent historical times, to one of harmonious development towards peaceful and friendly co-existence. Respondent considers that to avoid the threat of grievous social disorder and to advance the cause of harmonious relations, the responsible administration of the Territory demands that the existence of real, substantial and enduring differences between the population groups, and the influence those differences exercise on inter-group relations, should be duly recognized in the formulation of a policy best calculated to promote to the utmost the well-being and progress of all the inhabitants.

CHAPTER XII

CONCLUSION TO SECTION E

1. In the preceding chapters of this section Respondent dealt with the material adduced by Applicants in their attempt at establishing, as a fact, that the principles of Respondent's policies by themselves fail to "promote to the utmost the material and moral well-being and social progress of the inhabitants of the territory"¹.

The legal basis of this factual issue is an essentially straightforward one, viz., the question whether Respondent, in deciding upon and progressively putting into effect its impugned policy of separate development, is bona fide pursuing the prescribed objective, cited above, relative to *all* the inhabitants of South West Africa². In dealing with their charge of *mala fides*² Applicants have, however, unnecessarily complicated the matter by their purported reliance upon unformulated current "norms and standards", said to be "universally accepted". On analysis this appeared to be merely a particular method of attempting to discharge the *onus* of establishing the bad faith alleged by them—although Applicants did not make a real and consistent effort to treat the material offered by them in the light of such *onus*.

By reason of their purported reliance on "norms and standards", as well as by the very nature of the present dispute, Applicants ranged far and wide in their search for material which could be usefully employed in these proceedings. As the previous chapters will have demonstrated, Respondent did not hesitate to follow Applicants onto terrains with which, in the ordinary course of events, the legal process has but little contact.

2. It is submitted that the net effect of the material thus gathered from diverse sources and placed before the Court, was to show the untenability of Applicants' case: the exposition of Respondent's policies in the above chapters, relative to erroneous assertions, distortions, misconceptions, points of criticism, weighing of advantages and disadvantages, and the like, served to confirm Respondent's complete good faith in regard to its administration of South West Africa; the account of events and exhibited tendencies in a number of other countries and territories overwhelmingly established the defects of, and the dangers of utter disaster inherent in, the only real alternative to separate development, viz., attempted integration; and the discussion of the views of scientists, politicians and others showed the existence of a substantial body of opinion which accords with the underlying premises of Respondent's policies. In the result Respondent contends that Applicants have failed entirely to establish that, in deciding upon and pursuing the broad approach, principles, objectives and methods involved in its policy of separate development—which is the essence of the matter—Respondent was in any way imbued with bad faith, as alleged or at all.

¹ Art. 2, para. 2, of the Mandate for German South-West Africa.

² *Vide* Chap. I, para. 1, *supra*.

3. In the present section Respondent dealt with the general principles of its policies. The ensuing sections will be devoted to more detailed aspects of the application thereof in specific spheres, commencing with that of Government and Citizenship.

Annex to Section E

HISTORICAL BACKGROUND TO RESPONDENT'S POLICY OF DIFFERENTIATION IN SOUTH AFRICA

A. INTRODUCTORY

1. It will be recalled¹ that in Part 4 of Chapter IV.B.3.c. of the Reply Applicants, under the heading "Relevant Historical Resumé"², purport to show:

- (a) that South Africa was already effectively occupied by non-Whites before Europeans began to settle in the country;
- (b) that the Europeans proceeded to take occupation of non-White land;
- (c) that the Voortrekkers, being "an exceptionally colour-conscious people", established "a caste system"³, which was maintained at and after the unification of South Africa; and
- (d) that as a result of the influx through the years of Natives into White areas, a multi-racial society in South Africa, as in South West Africa, is a fact.

Respondent has already dealt with the last aspect⁴, and it therefore remains to consider Applicants' effort "to set straight the historic record"⁵ regarding the first three aspects. As has been pointed out¹, references to historical events in South Africa also occur in Annex 3 to the Reply, and in the succeeding paragraphs Respondent will, where necessary, also refer to the relevant portions of the said Annex.

B. THE INHABITANTS OF SOUTH AFRICA CIRCA 1652

2. With reference to the first European settlement in South Africa, Applicants state that—

"[c]ontrary to Respondent's account that before the whites began to settle in the seventeenth century Southern Africa was 'nearly empty', the eastern half of the country was effectively occupied by Bantu-speaking farming tribes, and the western half was occupied more thinly, but effectively, in relation to their economy, by hunting and herding peoples whom the whites were to call Bushmen and Hottentots"⁷.

In support of the latter portion of this statement Applicants cite Schapera⁶ and Marais⁷, neither of whom, however, suggests that the western half of South Africa was ever occupied effectively by the Bushmen or the Hottentots.

¹ *Vide* sec. E, Chap. V, para. 15, *supra*.

² IV, p. 459.

³ *Ibid.*, p. 460.

⁴ *Vide* sec. E, Chap. V, paras. 16-35, *supra*.

⁵ IV, p. 458.

⁶ Schapera, I., *The Khoisan Peoples of South Africa* (1960).

⁷ Marais, J. S., *The Cape Coloured People 1652-1937* (1939).

3. It is generally accepted that the Bushmen were the original inhabitants of South Africa—at least in modern times¹. At one stage or another they must have roamed in thinly scattered clans over large portions of the areas at present comprising the Cape Province, Natal and the Orange Free State. With the advent of the Hottentots and the Bantu, however, the Bushmen were to a large extent exterminated or driven to the mountains of the interior². Schapera, who is cited by Applicants, states in this regard:

“[B]y the time when European contact with South Africa was first established, the Bushmen in the Cape had already been reduced to living in isolated groups scattered about among the more numerous Hottentots³.”

The Hottentots migrated southwards along the west coast of Africa, and, having reached the Cape peninsula, proceeded along the east coast of the Cape. They never ventured into the vast interior of the Cape, and when the first Dutch settlement was established at the Cape in 1652 they were to be found only in the coastal areas between the sea and the mountains to the east, and especially to the west, of the peninsula⁴. Even these areas were by no means densely populated, and vast open spaces were found between the various tribes⁵. Theal, a recognized historian, estimates the total Hottentot population of the Cape Province (and consequently of South Africa) *circa* 1650 at 50,000 at the most⁶, while Stow is of the opinion that “. . . the total Hottentot race did not exceed thirty-five or forty thousand people”⁷.

It is, for various reasons⁸, impossible to estimate the number of Bushmen in southern Africa round about 1652. Historians seem to agree, however, that their number was less than that of the Hottentots. There can consequently be no question, even if due allowance is made for their nomadic habits, of the Bushmen and the Hottentots having effectively occupied the western half of South Africa at the time of the arrival of the Dutch settlers.

4. Applicants rely on an article by Monica Wilson⁹ in support of their statement that the Bantu occupied the eastern half of South Africa before the Europeans began to settle at the Cape. In the said article the authoress examined the early history of the Transkei and Ciskei, and came to the conclusion that *circa* 1686 the Bantu occupied the coastal belt and the areas adjacent to this belt north of the Buffalo River (East London)¹⁰. She certainly does not suggest that the interior of either the Eastern

¹ *Vide*, e.g., Stow, G. W., *The Native Races of South Africa* (1910), pp. 5-6.

² Marais, *op. cit.* (1957), p. 5; Schapera, *op. cit.*, p. 30 and Theal, G. M., *Ethnography and Condition of South Africa before A.D. 1505* (1922), p. 47.

³ Schapera, *op. cit.*, pp. 40-41.

⁴ Stow, *op. cit.*, p. 236 and Theal, *op. cit.*, pp. 88-89.

⁵ Stow, *op. cit.*, p. 247; Le Roux, H. J., *Die Toestand, Verspreiding en Verbreding van die Hottentotstamme in Suid-Afrika, 1652-1713* (Unpublished Thesis, University of Stellenbosch, 1945), p. 2.

⁶ Theal, G. M., *History and Ethnography of Africa South of the Zambesi*, Vol. II (1909), pp. 126-127.

⁷ Stow, *op. cit.*, p. 247.

⁸ *Vide* Schapera, *op. cit.*, pp. 38-39.

⁹ Wilson, M., “The Early History of the Transkei and Ciskei”, *African Studies*, Vol. 18, No. 4 (1959), pp. 167-179.

¹⁰ *Ibid.*, p. 178.

Cape or Natal was inhabited. In fact, Theal, one of the sources cited by her, narrates that a Portuguese ship-wreck party found the plateau in the interior of the eastern Cape completely uninhabited towards the end of the sixteenth century ¹.

Respondent does not dispute that Bantu were living in the coastal areas of the Eastern Cape and Natal when Van Riebeeck (the leader of the first Dutch settlement) arrived at the Cape. These areas, however, by no means comprised "the eastern half" of South Africa, as will be apparent from the map attached hereto ².

It is impossible to establish with any degree of certainty to what extent Bantu tribes had migrated into the north-central parts of South Africa by 1652. It seems highly improbable, however, that such tribes had migrated further south than the upper waters of the Vaal River ³. Although no exact calculation is possible, it would appear that all the areas inhabited by the various Bantu tribes comprised approximately one-eighth of the total area of South Africa (including the protectorates).

5. Immediately on their arrival the settlers came into contact with the Hottentots. It is true, as stated by Applicants ⁴, that the Dutch authorities at the Cape did try to keep the area of White settlement apart from the non-White races, but it is an unfounded generalization that the authorities failed—

"... because the white settlers themselves took occupation of land previously used by Bushmen, Hottentots and Africans, and because the white settlers themselves became dependent on the use of Bushmen, Hottentot and African labour, as well as the labour of imported slaves ⁵."

In a number of instructions and proclamations issued in the first decade after the settlement, the settlers were instructed to treat the Hottentots benevolently and not to punish or even pursue them in cases of theft ⁶. Though it cannot be said that these instructions were always implicitly obeyed, the primary and real cause of two so-called wars against the Hottentots in later years, which did not involve much more than skirmishing, was the persistent raids of the Hottentots on the possessions, especially cattle, of the settlers, one of which in 1653 culminated in the murder of a herdsboy ⁷. These raids were apparently so exasperating to the authorities that they even conceived the novel, if completely impracticable, idea of severing the area of White settlement (the Cape peninsula) from the Hottentots by means of a canal ⁸.

As a result of the above "wars", the Hottentots retreated from the areas immediately adjoining the peninsula. At the time, however, when the settlers began to move away from the vicinity of the Cape, the Hottentots were no longer in effective occupation of the areas formerly

¹ Theal, G. M., *History of Africa South of the Zambesi*, Vol. I (Vol. II of the Series), (1927), pp. 327-328.

² Not reproduced.

³ *Vide* Theal, G. M., *The Beginning of South African History* (1902), p. 30.

⁴ *Ibid.*, p. 459.

⁵ *Ibid.* It should be observed that Applicants refer to no sources whatsoever.

⁶ *Vide*, e.g., *Original Placcaatboek, 1652-1686*, 14 Oct. 1652, pp. 31-32, Cape Archives Depot: C.680 and Walker, E. A., *A History of Southern Africa* (1957), p. 36.

⁷ Theal, G. M., *History of South Africa*, Vol. I (1897), p. 37.

⁸ *Ibid.*, p. 68.

inhabited by them. Several causes contributed to this, the most important being the following:

- (a) Although the Hottentots were initially loath to part with their cattle and sheep, they eventually exchanged substantial portions of their flocks for liquor, tobacco, knives and other articles¹. Then, in 1661², in 1693³, and again in 1714⁴, diseases killed off vast numbers of their flocks. The upshot was that the Hottentots became so impoverished that some were compelled to enter the service of the settlers. This, in turn, led to the destruction of tribal life.
- (b) The old feud between the Hottentots and the Bushmen never ceased, and in the process thousands were killed on both sides. So, for instance, in 1689 three Hottentot kraals and in 1692 the whole Kouchuma Hottentot tribe were exterminated⁵.
- (c) Diseases introduced to the Cape by the settlers killed off many thousands of Hottentots. In 1661⁵, and again in 1663⁶, infectious diseases caused the death of many Saldanhars and Kaapmans. In 1666 the whole Cochoqua tribe very nearly died out⁷. Thereafter the Hottentots were plagued just about every year with some infectious disease or other⁸. The greatest disaster occurred in 1713 when an extremely serious epidemic of smallpox led to the complete extermination of many tribes⁹. When the Hottentots realized the seriousness of the disease, many fled over the mountains where they met their death at the hands of local tribes who feared that the refugees carried the disease with them¹⁰. This rather vigorous policy was of no avail, however, and the disease spread ever further away from the western Cape¹¹. The disastrous consequences of the disease, which reappeared in 1755¹² and in 1767¹³, are summarized as follows by Theal:

"The very names of the best-known tribes were blotted out by the fell disease. They no longer appear in the records as organised communities, but as the broken-spirited remnant of a race, all whose feelings of nationality and clanship had been crushed out by a great calamity¹⁴."

¹ Walker, E. A., *op. cit.*, p. 41.

² *Original Placcaatboek*, 24 Nov. 1661, p. 174, Cape Archives Depot: C.680.

³ *Ibid.*, 7 Sep. 1693, p. 182, Cape Archives Depot: C.681.

⁴ Theal, G. M., *History and Ethnography of Africa South of the Zambesi*, Vol. II (1909), p. 446.

⁵ *Vide* Le Roux, H. J., *Die Toestand, Verspreiding en Verbrotkeling van die Hottentotstamme in Suid-Afrika, 1652-1713* (Unpublished Thesis, University of Stellenbosch, 1945), pp. 224-225.

⁶ *Day Journal*, 29 Nov. 1663, p. 494, Cape Archives Depot: V.C.4.

⁷ Theal, G. M., *History and Ethnography of Africa South of the Zambesi*, Vol. II (Vol. III of the Series) (1922), p. 156.

⁸ Le Roux, H. J., *Die Toestand, Verspreiding en Verbrotkeling van die Hottentotstamme in Suid-Afrika, 1652-1713* (Unpublished Thesis, University of Stellenbosch, 1945), p. 2.

⁹ Theal, G. M., *History and Ethnography of Africa South of the Zambesi*, Vol. II (1909), pp. 431-433.

¹⁰ *Day Journal*, 19 May 1713, p. 129, Cape Archives Depot: V.C.20.

¹¹ *Ibid.*, 11 June 1713, p. 145, Cape Archives Depot: V.C.20.

¹² *Ibid.*, 31 Oct. 1755, pp. 208-209, Cape Archives Depot: C.626.

¹³ *Ibid.*, 5 Dec. 1767, pp. 638-639 and 657, Cape Archives Depot: C.635.

¹⁴ Theal, G. M., *History and Ethnography of Africa South of the Zambesi*, Vol. II (1909), p. 433.

As a result of the above factors, and also of inter-marriage between Hottentots on the one hand and Bantu and slaves on the other hand, the Hottentot race has virtually ceased to exist. It is extremely doubtful whether a single pure blooded Cape Hottentot is at present still to be found in South Africa ¹.

6. As already stated ², the Bushmen were thinly scattered over parts of the present Cape Province when Van Riebeeck landed at the Cape. The Bushmen were nomads in the truest sense of the word. They built no huts or homes of any description, and slept either in caves or in the open veld ³.

Eric Walker, emeritus Professor of Imperial and Naval History in the University of Cambridge, said of the Bushmen:

"[T]hey were relics of the Stone Age... Unprepossessing in appearance the Bushmen were, and every man's hand was against them, for they were hunters, and between Jacob, the tender of flocks and herds, and Esau, the wanderer, there can be no peace ⁴."

Theal described the Bushmen as "... vindictive, passionate and cruel in the extreme... they never spared an enemy who was in their power..."⁵.

7. By virtue of their habits and disposition the Bushmen were the natural enemies of all other races. Instances of attacks on Bushmen by Hottentots, Griquas ⁶ and Bantu in which no mercy was shown to those captured, abound in historical records ⁷. As early as 1653 it was recorded that the Hottentots slew all captured Bushmen and threw them to the dogs ⁸.

The Bushmen regarded the cattle of the settlers as lethargic prey, and during the eighteenth century a number of punitive expeditions were sent out against the little hunters. Towards the close of the century, in the eastern Cape Province, instances occurred where more Bushmen were killed by such expeditions than was necessary for the recapture of stolen cattle. This gave rise to accusations that the Europeans drove the Bushmen "out of their own country" ⁹. Such accusations were, however, effectively refuted by H. Lichtenstein, a German who travelled extensively in the present Cape Province at the beginning of the nineteenth century. Referring to the clashes between the Europeans and Bushmen in the central and eastern Cape Province, he said:

"The Bosjesmans [Bushman] did not originally inhabit the countries whence they now carry on their most injurious warfare against the colonists; it cannot therefore be urged, that the savages are but revenging themselves for being dispossessed of their country. At the time when the Europeans settled in the Roggeveld, in the Snow Mountains, in Agterbruintjeshoogte, and other parts, there were no Bosjesmans there; it was the wealth of the colonists which

¹ Schapera, I., *The Khoisan Peoples of South Africa* (1960), p. 46.

² *Vide* para. 3, *supra*.

³ Theal, G. M., *The Beginning of South African History* (1902), p. 17.

⁴ Walker, E. A., *A History of Southern Africa* (1957), p. 33.

⁵ Theal, G. M., *The Beginning of South African History* (1902), pp. 14-15.

⁶ Half-caste Hottentots.

⁷ *Vide*, e.g., *Resolutions*, 11 Oct. 1712, p. 271, Cape Archives Depot: C.8; *Memorials and Reports*, 7 May 1776, Cape Archives Depot: C.310 and *Letters Received*, 24 Mar. 1830, Cape Archives Depot: C.O.373.

⁸ *Day Journal*, 9 Jan. 1653, pp. 362-363, Cape Archives Depot: V.C.1.

⁹ Barrow, J., *Travels into the Interior of Southern Africa*, Vol. I (1806), p. 242.

first attracted them thither, from their own proper districts on the banks of the Great River ¹."

In 1809 Colonel Collins, an official of the British Government, came to the same conclusion. He wrote:

"The supposition that the enmity of the Bosjesmen was originally occasioned by their resentment at being forced by the colonists to quit the territory of their ancestors, seems unfounded, as it appears that they have always resided in the country they now inhabit since the Cape has been possessed by Europeans ²."

The traditional homeland of the Bushmen, according to Lichtenstein, was "the district which lies between the Orange River, and the mountains" ³.

In this area there was never any conflict between the Europeans and the Bushmen. In fact, when the former began to settle there the Bushmen had already been virtually driven out to South West Africa by the Hottentots ⁴.

8. It is clear, therefore, that when the settlers began to move away from the vicinity of the Cape peninsula, the whole area comprising the present Cape Province, save the most eastern portion occupied by the Bantu, was virtually uninhabited. There can consequently be no question of the settlers having robbed the Bushmen and the Hottentots of their land.

C. THE FIRST CONTACT WITH THE BANTU

9. During the seventeenth century no contact was made between the settlers and the Bantu. In 1738 White hunters found no Bantu west of the Keiskamma River ⁵, and an expedition sent out by the Cape government in 1752 to explore the eastern Cape, found the position still to be the same ⁶.

After 1752 members of Xhosa tribes at times crossed the Keiskamma River as a result of disturbances in the areas occupied by such tribes. As soon as peace was re-established, however, they returned to the eastern side of the river. Even as late as 1803 Governor Janssens did not find a single Bantu between the Fish and Keiskamma Rivers ⁷.

As a result of the eastern movement of the settlers, the authorities at the Cape entered into an agreement with Xhosa chiefs in terms of which

¹ Lichtenstein, H., *Travels in Southern Africa*, translation from the original German by Anne Plumtre, Vol. II (1930), p. 64.

² Collins, Col., "Journal of a Tour to the North Eastern Boundary, the Orange River, and the Storm Mountains", *The Record: or A Series of Official Papers Relative to the Condition and Treatment of the Native Tribes of South Africa*, Part V, No. 1 (1808-1819), compiled, translated and edited by Moodie, D. (1960), p. 34.

³ Lichtenstein, H., *Travels in Southern Africa*, translation from the original German by Anne Plumtre, Vol. II (1930), p. 242.

⁴ Van der Merwe, P. J., *Die Noordwaartse Beweging van die Boere voor die Groot Trek (1770-1842)*, p. 140.

⁵ Collins, Col., "Journal of a Tour to the North Eastern Boundary, the Orange River, and the Storm Mountains", *The Record: or A Series of Official Papers Relative to the Condition and Treatment of the Native Tribes of South Africa*, Part V, No. 1 (1808-1819), compiled, translated and edited by Moodie, D. (1960), p. 9.

⁶ Theal, G. M., *Belangrijke Historische Dokumenten*, Vol. II (1896) p. 64.

⁷ *Ibid.*, Vol. III (1911), p. 249.

the Fish River was proclaimed in 1778 as the boundary of the area under their jurisdiction¹. The British Government later recognized this boundary, but the Xhosa continuously conducted raids on the western side of the river and a number of wars followed². At the end of the sixth war in 1836 the British Government proclaimed the Keiskamma River the boundary of the then Cape Colony, and in this way the traditional border of the Bantu area was re-established³.

10. In Annex 3 to the Reply it is stated that "[f]rom 1779, a series of 'Kaffir Wars' began, as the Bantu and Europeans fought each other for land"⁴. This statement constitutes an over-simplification of the causes of the various wars which occurred during the period 1779-1878. Although it is true that some frontiersmen may have coveted areas occupied by the Bantu, the real cause of these wars was the continuous disregard by the Xhosas of the boundaries agreed upon, from time to time, as between their areas and the areas of the White settlement. Not only did the Xhosas cross these boundaries with impunity whenever they sought further pastures for their herds, but over a period of a century they indulged in the periodic raids, mentioned above, which involved robbery and murder on a large scale⁵.

11. In the said Annex 3 it is further alleged that—

"Great Britain, which established its rule over the country [presumably the Cape Colony] in 1814, also pursued a systematic policy of annexation and increased political authority over the Bantu . . . The Africans were thus progressively confined to limited areas of land⁶."

In the Counter-Memorial a brief description was given of the process by which the Bantu areas in the eastern Cape were annexed to the Cape Colony. It was also pointed out, however, that there was no intention of depriving the Bantu of their land, and that the areas concerned were administered as Bantu dependencies rather than as integral portions of the Cape Colony⁷. The position has remained virtually unchanged,

¹ Walker, E. A., *A History of Southern Africa* (1957), p. 98.

² *Ibid.*, e.g., Theal, G. M., *History of South Africa* (1927), Vol. I (Vol. V of the Series), p. 321, and *ibid.* (1926), Vol. II (Vol. VI of the Series), pp. 86-89.

³ Theal, G. M., *History of South Africa*, Vol. II (Vol. VI of the Series) (1926), p. 150.

⁴ *IV*, p. 350. In the said Annex 3 the United Nations Special Committee alleges that "the Afrikaners called the Bantu people 'Kaffirs' (unbelievers)"—*ibid.*, p. 350, footnote 2. Thus the impression is created that the Afrikaners called the Bantu people "Kaffirs" because they were "unbelievers". The true position, however, is that the settlers took over this name for the Xhosa (which was later also applied to other Bantu tribes) from the Portuguese—who called the East Coast Bantu "cafres"—without being aware that it was not a tribal name but derived from the Arabic word for infidel—*vide* Fowler, H. W. and Fowler, F. G. (Eds.), *The Concise Oxford Dictionary of Current English* (1956), p. 648, s.v. "Kaffir". In fact, the term was formerly used freely by English and other missionaries in South Africa without any derogatory intent.

⁵ Theal, G. M., *History of South Africa from 1846 to 1860* (1904), pp. 6-7 and 96-97; Theal, G. M., *History of South Africa*, Vol. I (Vol. V of the Series) (1927), pp. 331 and 335-336; *ibid.*, Vol. II (Vol. VI of the Series) (1926), pp. 90-91 and Theal, G. M., *History and Ethnography of Africa South of the Zambesi*, Vol. III (1922), pp. 192-193 and 281; Theal, G. M., *History of South Africa from 1873 to 1874*, Vol. I (Vol. X of the Series), p. 52.

⁶ *IV*, p. 350.

⁷ *Ibid.* III, pp. 234-235.

and these areas—the Ciskei and the Transkei—are still at present predominantly Bantu areas. It follows that as far as the Cape Province is concerned, there is no substance in the allegation that the Europeans took occupation of Bantu land.

12. As regards Applicants' allegation that the attempts of the authorities to keep the area of White settlement apart failed because the settlers "became dependent on the use of Bushmen, Hottentot and African labour"¹, it should be observed that while Hottentots did enter the employ of Europeans, very few Bushmen ever did. And up to the stage when the great migration from the eastern Cape to the interior (the Great Trek) took place between 1830 and 1840, hardly any Bantu were employed by Europeans.

D. THE GREAT TREK AND THE ESTABLISHMENT OF THE REPUBLICS

13. Applicants allege that the Great Trek—

"... was in large measure an ideological protest against the attempts which the colonial government had been making to apply the rule of law to the entire colony and to abolish legal discrimination on racial grounds"².

It is perhaps not surprising that Applicants do not quote a single authority in support of this allegation, which is devoid of all substance. The Colonial Government took no steps, affecting the settlers in the eastern Cape, "to abolish legal discrimination on racial grounds", and leading historians are agreed that the main cause of the Great Trek was the failure of the government to protect the settlers against the incessant raids, accompanied by robbery and murder, carried on by Xhosa tribesmen on the western side of the Fish River. As Theal puts it:

"Some years later [i.e., after the Great Trek] when, owing to the internal weakness of the different governments established by the emigrants, coupled with security against violence by blacks, it became possible for runaway debtors and rogues of different descriptions to live and thrive upon the borders of their settlements, it was frequently asserted by their enemies that the farmers left the colony to free themselves from the restraints of law. *This charge was untrue. The early emigrants constantly maintained that they left the colony to free themselves not of law but of lawlessness.* A few men of indifferent character may have gone with the stream, but their boast as a body was that they left in open day and after their intentions had been publicly announced. That they should be followed by men whose motives were different was quite natural, but they cannot in justice be blamed for it"³. (Italics added.)

If any further refutation of Applicants' allegation is necessary, it suffices to quote from a despatch to the Secretary of State in London, dated 29 July 1837, in which the English Governor of the Cape Colony, Sir Benjamin D'Urban, attributed the Great Trek to the—

"... insecurity of life and property occasioned by the recent

¹ IV, p. 459.

² *Ibid.*, p. 460.

³ Theal, G. M., *History of South Africa from 1828 to 1846* (1904), pp. 268-269.

measures, inadequate compensation for the loss of the slaves, and despair of obtaining recompense for the ruinous losses by the Kaffir invasion¹.

The author described the Trekkers as "... a brave, patient, industrious, orderly, and religious people, the cultivators, the defenders and the tax contributors of the country"¹.

14. The Trekkers journeyed through the east-central part of the present Cape Province to the Orange Free State, where some remained behind while others either went on to the Transvaal or branched off to Natal. The areas in the said three provinces through which they trekked were for the most part completely uninhabited. This was due to what the Bantu at present still call the *Mfecane*, the crushing². Over a period of 15 years, from approximately 1820 to 1835, the most terrible bloodshed and devastation imaginable took place in these areas. It started with the succession of Shaka as king of the Zulus. His impi (regiments) drove right through Natal and even crossed the Drakensberg mountains into the Transvaal, leaving a trail of desolation behind them. Other tribes were either exterminated or driven out of Natal. In the process, some tribes, notably the Amangwane, the Hlubi and the Mantatis, poured northward, smashing every tribe that lay in their path². According to reliable calculations the Batlokwa Mantatis tribe alone completely exterminated between 28 and 30 other tribes in the north-western Transvaal³.

15. But even worse times were to come. Mzilikazi, a lieutenant of Shaka, fled with his men from his former master and established the Matabele tribe in the Transvaal². Agar-Hamilton, the historian, remarks that—"... missionary evidence shows him to have been the plague of all, natives and white men alike"⁴. Mzilikazi first laid waste the eastern Transvaal—

"... robbing those who gave him shelter, burning their homes, capturing their women, impressing their young men into his service, leaving nought behind but a long black and bloody trail of conflagration, massacre and desolation"⁵.

Mzilikazi originally settled near the Olifants River and eventually made his home in the western Transvaal. For years on end his impi continued their murderous raids on other tribes; e.g., the Mapoggers and the Pedi in the north-eastern Transvaal⁶, the Bakwena near the present Rustenburg⁷, and the Bahurutsi and Barolong in the western Transvaal⁷. The

¹ Theal, G. M., *History of South Africa from 1828 to 1846* (1904), p. 170.

² Walker, E. A., *A History of Southern Africa* (1957), p. 175.

³ Stow, G. W., *The Native Races of South Africa* (1910), pp. 460-471; Huyser, J. D., *Die Natuure- en Politiek van die Suid-Afrikaanse Republiek, 1838-1877* (Unpublished Thesis, University of Pretoria, 1936), p. 23 and Voigt, J. C., *Fifty years of the History of the Republic in South Africa*, Vol. I (1899), p. 192.

⁴ Agar-Hamilton, J. A. I., *The Native Policy of the Voortrekkers* (1928), p. 18.

⁵ Bryant, A. T., *Olden Times in Zululand and Natal* (1929), p. 423.

⁶ Van Rooyen, T. S., "Die Verhouding tussen die Boere, Engelse en Naturelle in die Geskiedenis van die Oos-Transvaal tot 1882", *Archives Year Book for South African History*, Vol. I (1951), p. 88.

⁷ Huyser, *op. cit.*, p. 24.

missionary, Robert Moffat, gave a vivid description of the slaughter and horror involved in the attack on the Bakwena¹.

Mzilikazi's impis also laid waste parts of the Orange Free State. But it suffices to point out that, in the words of Agar-Hamilton, the end result of their murderous raids was to have—

“... destroyed many tribes and depopulated large stretches of country. Wide areas were left available for European settlement, and few tribes survived².”

16. Up to 1819 the present Orange Free State province was inhabited only by a few scattered Bushmen clans³. John Edwards, one of the very first missionaries to visit the territory, described it as “... a vast extent of country, inhabited by nothing but Bushmen and wild animals”⁴.

After 1819 a number of Bantu tribes fled to the Free State from Natal and the Transvaal, only to become in due course victims of Mzilikazi's marauding impis⁵. During the period 1820-1830 a number of half-bred Hottentot tribes crossed the Vaal River from the northern Cape Colony into the Free State and immediately began to exterminate the Bushmen⁶. At that stage White farmers living in the northern Cape were already in the habit of crossing annually into the southern Free State, in search of pasture for their flocks⁷, and since approximately 1825 a number of these farmers settled permanently in this area⁸. When the Griquas—members of the Hottentot tribes referred to above—laid claim to portion of the southern Free State in later years, Sir Harry Smith, the then Governor of the Cape Colony, wrote to Lord Grey:

“I must here assure your Lordship, that Captain Adam Kok and his followers are mere squatters, and have no more hereditary right to the country in question than the Boers themselves, who have been in the habit, for many years, for the sake of pasturage, of driving their herds and flocks over the Orange River⁹.”

While not recognizing the claims of the Griquas, the Orange Free State Republic in 1861 bought the so-called Griqua area from their chief, Adam Kok, for the sum of R8,000¹⁰.

17. When the Trekkers arrived in the Free State, the position was that the territory was uninhabited save for the farmers in the south, the above-mentioned Hottentots, thinly scattered Bushmen and a few small Bantu tribes. The latter were a Bechuana tribe numbering about 800, which in 1833 migrated under the guidance of a French missionary, Pellissier, from

¹ Quoted by Kotze, D. J., “Die Eerste Amerikaanse Sendelinge onder die Matabeles”, *Archives Year Book for South African History* (1950), Vol. I, p. 199.

² Agar-Hamilton, J. A. I., *The Native Policy of the Voortrekkers* (1928), p. 4.

³ Malan, J. H., *Die ophoms van 'n Republiek* (1929), p. 9.

⁴ Edwards, J., *Reminiscences of the Early Life and Missionary Labours* (1886), p. 79.

⁵ Bryant, A. T., *Olden Times in Zululand and Natal* (1929), pp. 142-143.

⁶ Stow, G. W., *The Native Races of South Africa* (1910), pp. 309-310.

⁷ Van der Merwe, P. J., *Die Noordwaartse Beweging van die Boere voor die Groot Trek* (1770-1842) (1937), pp. 117-126.

⁸ Oberholzer, J. J., *Streekopname van die Suidoos-Vrystaat: Eerste Voorlopige verslag* (Unpublished manuscript), p. 11.

⁹ “British Blue Book”, *Correspondence relative to assumption of Sovereignty over the Territory between the Vaal and Orange Rivers* (1851), p. 82.

¹⁰ Theal, G. M., *History of South Africa*, Vol. IV (Vol. VIII of the Series) (1919), p. 197.

the region of the Vaal River to Bethulie in the most southern part of the Free State ¹; the Barolong which in 1834 moved from the same region to Thaba Nchu near Basutoland ²; the Bataung which the Trekker leader, Potgieter, found along the Vet River, and a number of disintegrated tribes in the north-western and mountainous north-eastern parts of the territory. As will be shown hereinafter ³, the Trekkers recognized the claims of these Bantu.

18. In order to appreciate the extent to which the interior of South Africa was uninhabited at the time of the Great Trek, regard should be had to the following:

- (a) In 1836 and 1837 W. C. Harris, a big game hunter, explored the central and northern Free State and later made the following observations on his journeys:

“Although thinly populated by skulking broods of Bushmen and by starving remnants of nomadic pastoral tribes, which have been broken up by war and violence, this is a land in which no man permanently dwells—neither is the soil any man’s property, being abandoned as water or fuel fails . . . Amongst the savage nations of South Africa, as elsewhere, a principle of extinction has indeed for ages past been in active operation. Regions now silent and deserted, once contained their busy throng, whose numbers and strength have been gradually brought down by war and want. Whole tribes have been rooted out from their hereditary homes, and have either disappeared from the face of the earth, or, pursued by the ‘gaunt and bony arm’ of famine, still wander with fluctuating fortunes over these measureless tracts. For hundreds of miles, therefore, the eye is not greeted by the smallest trace of human industry, or by any vestige of human habitation—the wild and interminable expanse ever presenting the same appearance—that of one vast uninhabited solitude ⁴.”

- (b) The leader of one of the first treks, Louis Trichardt, reported in his diary that he found the central and northern Free State uninhabited, and that he found no Bantu whatsoever between the Vaal and Olifants Rivers in the Transvaal ⁵. The only tribe of any importance encountered by Trichardt, was the Venda who lived in the Soutpansberg mountains in the most northern part of the Transvaal ⁶.
- (c) In 1836 a party of Trekkers under the leadership of Hendrik Potgieter left the Sand River in the Free State for the purpose of inspecting the interior as far as Portuguese East Africa. During the first 18 days of their journey (covering a distance of more than 400 miles, or 640 kilometers) they met no one, and it was only after

¹ Pellissier, S. H., *Jean Pierre Pellissier van Bethulie* (1956), p. 162; Bethulie was at the time known as Boesmanskool.

² Theal, G. M., *Basutoland Records* (1883), Vol. I, pp. 2 and 4-6.

³ *Vide* para. 23, *infra*.

⁴ Harris, W. C., *The Wild Sports of Southern Africa* (1963), pp. 255-256.

⁵ The distance between these two rivers covered by Trichardt was approximately 250 miles (400 kilometers).

⁶ Huyser, J. D., *Die Naturelle-Politiek van die Suid-Afrikaanse Republiek 1838-1877* (Unpublished Thesis, University of Pretoria, 1936), pp. 25-26.

passing Rhenoster Poort (west of Louis Trichardt) that they found a few scattered inhabitants ¹.

- (d) In 1853 the British Government sent Sir George Clark to the Free State to report on the proposed evacuation of the territory. In a letter to the Duke of Newcastle, written in his camp on the Vet River on 3 December 1853, he said:

"Their [the Dutch boers] occupation of the central position of this territory displaced no one, excepting the half-human Bushmen, squattered here and there, roofless, amongst the rocks ²."

- (e) The historian, J. C. Voigt, who made a thorough study of, *inter alia*, the settlement of the Trekkers in the Transvaal, states that even in the northern areas, short of the Soutpansberg mountains,

"... nowhere on the banks of the magnificent rivers were any kraals or native towns to be seen. The sands showed not even a single human footprint ³."

- (f) In 1880 the missionary, G. Blencowe, wrote:

"When the Boers entered the Transvaal, the Wakkerstroom, the Heidelberg, the Pretoria and the Potchefstroom districts were without any of the original inhabitants; while the southern half of the Rustenburg, the southern two-thirds of the Middelburg, and the like proportion of the Lydenburg districts were also unoccupied. The Wakkerstroom and a portion of the Heidelberg districts do not seem to have been occupied by Natives, except in some of the sheltered valleys, but the other parts of the southern half of the Transvaal were well, and in many cases densely peopled, as their ruined kraals at present time show ⁴."

In reaction to this statement another missionary, A. Merensky, who came to the Transvaal in 1859 and who was known to be a champion of the Bantu, declared:

"It is true that before the arrival of the Boers the Natives of the Transvaal were entirely routed and dispossessed of their respective territories; but this was the case in the northern districts as well as the southern. Not only the Zulu's of Mosilikatse, but the Zulu's of Tshaka and Manekos, the Amaswazi and others, have taken part in those raids by which the Natives of this country have been reduced to the state of scattered and miserable fugitives, living in caves, and on rocks, and in deserts. Even Sikukuni wandered in those times with his father from one spot to the other on the northern side of the Limpopo. In the meantime the Zulus live in the Bapedi country . . . If the strongest of all Basuto tribes living in the northern parts of the Transvaal were routed by the Zulus in such a way, you may easily come to the conclusion that not a single tribe of our Natives actually remained in possession of its territory . . . But even in the year 1844, when the Boers arrived to settle in the districts of Waterberg, Lydenberg and Zoutpansberg, they found

¹ Theal, G. M., *History of South Africa from 1828 to 1846* (1904), p. 276.

² Theal, G. M., *Basutoland Records*, Vol. II (1883), p. 79.

³ Voigt, J. C., *Fifty years of the History of the Republic in South Africa*, Vol. I (1899), p. 205.

⁴ "British Blue Books", *Further Correspondence respecting the Affairs of South Africa*, C.—2740, p. 5.

only very small numbers of Natives anywhere, who were only too glad to see them, and to be protected by them from the assegai of the Zulu¹."

19. The first Trekkers were fortunate to have escaped the attention of Mzilikazi's impis, but by October 1836, the latter had already massacred 46 people and had swept off with a hundred horses, nearly 5,000 head of cattle, and more than 50,000 sheep and goats². Thereafter expeditions were sent out against Mzilikazi who, with his 10,000 warriors and their dependents, was then living in the western Transvaal. In November 1837 the Matabeles were decisively beaten, and they then fled to the present Rhodesia³.

20. When the Trekkers arrived in Natal, there were only 10,000 Bantu living in Natal proper, mainly in the southern and mountainous areas⁴. In February 1838 the leader of the Trekkers, Piet Retief, obtained from the Zulu chief, Dingaan, a written cession of "the place called Port Natal, together with all the land from the Tugela to the Umzimvubu river . . ."⁵.

Before Retief and his party could return to their people, however, they were treacherously murdered in the kraal of Dingaan⁶. Immediately thereafter the Zulu impis set out against the encampments of the Trekkers in the vicinity of the present town of Weenen, and massacred a number of them⁷. Nearly a year later, in December 1838, the Trekkers decisively beat Dingaan's impis at Blood River⁸. But it was left to Mpande, a half-brother of Dingaan who had turned against him, finally to break the power of the tyrant in January 1840⁹. Thereafter Mpande was recognized as king of the Zulus by the government established by the Trekkers, and the Zulus were left in undisturbed possession of Zululand¹⁰.

21. The above exposition shows that the Trekkers did not by force or otherwise drive Bantu away from land occupied by them—save for Mzilikazi and his Matabeles who were intruders in the Transvaal¹¹. There can be no doubt that the victory over the Matabeles was warmly welcomed by the remnants of the Bantu tribes which had suffered immensely during Mzilikazi's reign. As Theal puts it:

"It would be difficult to exaggerate the importance of the victory . . . to civilization and the happiness of both white and black people in South Africa¹²."

22. In cases in which there was any doubt as to claims to land, the Trekkers and the later governments of the Republics negotiated with the

¹ "British Blue Books", *op. cit.*, p. 90.

² Theal, G. M., *History of South Africa from 1828 to 1846* (1904), p. 281.

³ *Ibid.*, p. 293.

⁴ *Vide III*, p. 234.

⁵ Theal, *op. cit.*, pp. 316-317.

⁶ *Ibid.*, pp. 317-318.

⁷ *Ibid.*, p. 320.

⁸ *Ibid.*, p. 331.

⁹ *Ibid.*, p. 344.

¹⁰ *Ibid.*, p. 345.

¹¹ *Vide para. 15, supra.*

¹² Theal, G. M., *History of South Africa*, Vol. II (Vol. VI of the Series) (1926), p. 320.

chiefs concerned. So, for instance, Hendrik Potgieter¹ in 1836 bought the area between the Vaal and Vet Rivers from Makwana, the chief of the Bataung, although his small tribe could not really have been regarded as being in occupation of this area². In June 1845 Potgieter obtained from Sekwati, chief of the Pedi, land which allegedly belonged to his tribe before the reign of the Matabeles³. In 1846 it transpired that the Pedi had no claim whatsoever to the land, and a new agreement was then concluded with the chief of the Swazis⁴.

23. In the three major Republics established by the Trekkers, their governments always sought to keep the areas of White settlement apart from the Bantu. After the Trekkers had settled in Natal, thousands of Bantu refugees moved in, and this caused the *Volksraad* (legislative body) in August 1841 to pass a resolution that such Bantu should settle either in Zululand or in the districts between the Umzimvubu and Umtamvuna Rivers, so as to effect a separation between the races⁵.

In the Free State the claims of the Barolongs were recognized although this tribe had moved to Thaba Nchu only two years prior to the Great Trek⁶. The Barolong reserve at Thaba Nchu still exists at present. Another reserve was set aside in the north eastern Free State where scattered tribes had taken refuge against the onslaughts of the Zulus.

In 1853 Andries Pretorius, the recognized leader in the Transvaal, issued a proclamation prohibiting the White inhabitants of the Transvaal from settling in the immediate vicinity of areas occupied by Bantu tribes⁷. Although this proclamation was not always strictly adhered to, the government of the old South African Republic (Transvaal) saw to it, in so far as was in its power, that Bantu tribes remained in undisturbed possession of their villages and areas⁸. As was pointed out in the Counter-Memorial, a commission was subsequently appointed for the purpose of assigning defined areas to Bantu, but before the commission could complete its work, the Anglo-Boer War (1899-1902) broke out⁹. Another commission, appointed in 1905, duly completed the work interrupted by the war⁸.

It follows, therefore, that there is no substance in Applicants' allegation that the settlers, because of their "appetite for land", took occupation of non-White territories⁹.

¹ *Vide* para. 18, *supra*.

² Nathan, M., *The Voortrekkers of South Africa* (1937), p. 141.

³ Van Rooyen, T. S., "Die Verhouding tussen die Boere, Engelse en Naturelle in die Geskiedenis van die Oos-Transvaal tot 1882", *Archives Year Book for South African History* (1951), Vol. I, pp. 3-4.

⁴ Theal, G. M., *History of South Africa from 1828 to 1846* (1904), p. 363.

⁵ *Vide* para. 17, *supra*.

⁶ *Proclamation signed by A. W. J. Pretorius*, 22 Apr. 1853, pp. 1-2, Transvaal Archives Depot: Vol. State Secretary No. 5, R. 519/53.

⁷ *Letter by M. W. Pretorius to Native Chief Massouw*, 24 July 1869, pp. 1-2, Transvaal Archives Depot: State Secretary B.B. 657/1869; *Letter by M. W. Pretorius to Grulzner*, 19 Oct. 1869, pp. 1-2, Transvaal Archives Depot: State Secretary B.B. 981/69; *Letter by M. W. Pretorius to J. Brooks*, 19 Oct. 1869, pp. 1-2, Transvaal Archives Depot: State Secretary B.B. 979/69; *Letter by B. C. E. Proes to Landdrost, Bloemhof*, 23 Nov. 1869, Transvaal Archives Depot: State Secretary B.B. 1310/69 and *Letter by State President to Paramount Chief Moshette*, 27 Nov. 1874, Transvaal Archives Depot: State Secretary B.B. 1490/74.

⁸ *Vide* III, p. 236.

⁹ IV, p. 459.

24. With reference to the settlers from whose ranks the Trekkers were drawn, Applicants allege that—

“[s]ince the only non-whites they encountered were their slaves, their servants, or their enemies, and since they were imbued with a simplistic version of Calvinism, they became an exceptionally colour-conscious people¹.”

Having made the unsubstantiated statement, already referred to², that the Great Trek was mainly caused by the attempts of the Colonial Government “to apply the rule of law . . . and to abolish legal discrimination on racial grounds”, Applicants proceed:

“Thereafter in the South African Republic and the Orange Free State the Afrikaner Voortrekkers established a caste system in which only ‘Whites’ were deemed to be members of the body politic and all non-‘Whites’ were subject peoples¹.”

Applicants create the impression that the Voortrekkers were such “an exceptionally colour-conscious people” that they denied all human rights to the Bantu in the Republics established by them. In the succeeding paragraphs Respondent will briefly demonstrate that this impression is completely misleading.

25. In support of the first allegation quoted above, Applicants rely on MacCrone without, however, referring to specific passages from his book. Professor MacCrone is probably an authority in his own field of study, psychology, but he is certainly no historian and the conclusions reached in his book are not based on a thorough study of historical sources.

It is true that there were groups among the Voortrekkers who had a narrow approach to religion and also an exaggerated opinion of the inferiority of the Bantu in his then existing state. It is also true, however, that most of the Voortrekkers were very humane in their approach to the Bantu. They certainly did not regard the Bantu as their equals, but in this they were no different from their English compatriots, or from Europeans all over the world, in general. There was at the time such an enormous difference between the background and general level of civilization of the Voortrekkers and those of the Bantu that the natural reaction of the former was to differentiate on a basis of race or colour.

26. Eric Walker, the historian quoted by Applicants in another context³, made a detailed study of the Voortrekkers in his authoritative book covering the Great Trek, and certainly did not reach the same conclusions as MacCrone. As far as the religious conceptions of the Voortrekkers are concerned, it suffices to quote the following passage from Walker:

“It might be that the religion of the frontiersmen was often a narrow thing amounting even to the bigotry that incensed liberal-minded visitors; it might be fatalistic, as when a mother could refuse to have her child’s physical defect remedied because ‘as God had appointed it she could not alter it’ . . . The Boers were not singular in these things, and, as for fatalism, life in and around the Karoos was apt to breed such an attitude towards a God whose ways clearly passed understanding and from whose decrees there was no appeal.

¹ IV, p. 460.

² *Vide* para. 13, *supra*.

³ IV, p. 459, footnote 4.

Be all that as it may, religion was a real thing to the Boers, *real enough to have prevented them from becoming 'wholly degenerate and savage'*. They owed it to religion first and then to their wives, who womanlike clung to the amenities of life and the consolations of the Church more desperately than the men, that in the course of their long wanderings among the 'heathen' they had not sunk to their level as Westerners sometimes feared they might sink, and the borderers in both the Americas of their days were actually sinking¹. (Italics added.)

27. In the Republic only adult, male Europeans were eligible to vote and to be elected to the legislative bodies. At a time when the franchise was withheld from women, it would indeed have been unthinkable to confer the same on the Bantu, whose contact with Western civilization dated back no more than a decade or two, and who had not the slightest conception of the functioning of a democratic society. Moreover, and as already pointed out, the governments of the Republics sought from the outset to segregate territorially among members of the White and Bantu groups.

Apart from the sphere of government, however, all the inhabitants of the Republics were generally speaking treated alike by their laws. No enmity was shown by the governments to missionaries working among the Bantu², and slavery was expressly outlawed³.

28. In 1874 President Bürger sent out a questionnaire to certain persons in which they were asked to comment on the Native policy of the South African Republic. It is perhaps of some significance that George Sharley, rector of the Church of England in Pretoria, replied: "The policy followed by the present Government with regard to the natives is humane, mild and not too severe a character⁴."

29. In a letter quoted in the British parliament in 1881, Bishop Colenso, known as a champion of the interests of the Bantu, wrote:

"I have urged the simple fact that 800,000 Natives were living under the Boer Government without taking to flight and running over to Natal for protection is enough to show that the accusation against the Boers of illtreating the Natives under their rule must be grossly exaggerated, and that, to all appearance, they even prefer the Boer rule to our own⁵."

30. It is unnecessary to dwell any further on the policies adopted by the Republics in regard to the Bantu. The above brief exposition makes it abundantly clear that no "caste system"—with all the negative implications associated with the word "caste"—was established by the Voortrekkers.

¹ Walker, E. A., *The Great Trek* (1934), pp. 57-58.

² Nathan, M., *Paul Kruger* (1946), p. 254.

³ *Minutes of the Council of Representatives*, 4 Nov. 1847, pp. 103-105, Transvaal Archives Depot: E.V.R.1.

⁴ Huyser, J. D., *Die Naturelle-Politiek van die Suid-Afrikaanse Republiek 1838-1877* (Unpublished Thesis, University of Pretoria, 1936), p. 261.

⁵ Jordaan, J. T., *Die Ontwikkeling van die Sending van die Nederduits Gereformeerde Kerk in Transvaal* (Unpublished Thesis, University of Pretoria, 1962), pp. 98-99.

E. UNIFICATION AND ITS AFTERMATH

31. Applicants contrast the "caste system" which was allegedly established in the Boer Republics with the position in the Cape Colony where—

"... the idea that the law should not discriminate between people on account of their race or religion gained considerable support among all sections of the population ¹".

Applicants proceed to quote the views held before 1910 by two Cape politicians, J. W. Sauer and F. S. Malan, and the authoress Olive Schreiner, with a view to substantiating the above statement, and to showing that the Cape delegates to the National Convention, which was convened for the purpose of drawing up a constitution for a united South Africa, "pledged themselves to uphold the Cape system" ². Having stated that "the delegates from the northern colonies, including Natal, were determined to debar all non-whites from exercising political power in the Union", and having by way of illustration quoted the views of a member of the Orange River Colony parliament, Applicants conclude that—

"[t]he result was that the Cape delegates agreed that only 'Whites' should be eligible to become members of the South African parliament and that the franchise laws of the four colonies should remain in force in the respective provinces of the Union, until they were altered by parliament; and the way was thus paved for the establishment and maintenance of a caste system throughout South Africa ²."

32. It is conceded that in the old Cape Colony there was theoretical legal equality between the races in the sense that the franchise was open to all men, irrespective of race, who complied with certain qualifications. It is also true that the Cape delegates to the National Convention, or at least the majority of them, sought to introduce the Cape system in the proposed constitution for the country as a whole. It should be borne in mind that, almost without exception, the Cape political leaders were living in the western Cape in which hardly any Bantu were to be found at the time, and which was far removed from the concentrations of Bantu in the areas reserved for their occupation. To these leaders the problems created by the presence in one and the same country of different population groups in different stages of development and with different languages, cultures, moral concepts, etc., were understandably not so real as to their colleagues in Natal and the northern colonies who had already conceived the notion that a policy of separate development offered a real and equitable solution to the said problems.

33. One of the main reasons why the northern and Natal delegates almost unanimously, and a number of the Cape delegates as well, opposed the Cape franchise system, was the abuse which had been made of the system in the Cape Colony. In the words of B. K. Long:

"They [the Natives] had a vote in Cape Colony before Union, and their names were then on the same voters' roll as those of the white voters. The qualification for a vote then was ability to write name, address, and occupation, as well as ownership of a small amount of property, or earning of a not very large annual wage. There was no distinction between Europeans and non-Europeans, so far as their

¹ IV, p. 460.

² *Ibid.*, p. 461.

right to the franchise went; any man, whatever his colour, could have a vote if he could satisfy the registration official that he had the requisite qualification. What was the result? There was widespread abuse. Political parties hired rooms close to the office where the registration officer sat. Raw natives, quite unable to read or write, were taken into these rooms, taught to write down their name, address, and occupation, and hurried next door to get themselves registered before they forgot the lesson. The whole thing was an open scandal, in which both the then political parties connived¹.

34. Despite the initial attempts of the Cape delegates to incorporate the Cape franchise system in the draft constitution, the parliaments of the Orange River Colony, the Transvaal and the Cape Colony, and the electorate of Natal eventually accepted the draft, as amended at a short final session of the National Convention in Bloemfontein, whereafter it was duly approved by the British Government. As Professor Eric Walker puts it:

"The Draft Act was naturally assailed on various grounds in each of the colonies as soon as it was published; but Hofmeyr failed to swing the Bond against it in the Cape, and three of the Parliaments accepted the Draft, though those of the Cape, and the O.R. Colony proposed serious amendments. The Transvaal legislature proposed none . . . The amendments were nevertheless disposed of at a short final session at Bloemfontein, the revised Draft was accepted by three of the parliaments and by an unexpectedly large majority of the electorate voting at a referendum in Natal and, in spite of Schreiner's efforts to mobilise English opinion against the franchise clauses, which he regarded as a trap rather than a safeguard, it passed the Lords without challenge, easily overrode opposition in another place, and duly received the Royal Assent²."

35. By stating that—

" . . . the delegates from the northern colonies, including Natal, were *determined to debar* all non-whites from exercising political power in the Union³" (italics added),

and then quoting the view expressed by a single member of the Orange River Colony parliament, J. P. G. Steyl, Applicants create the impression that the said delegates held a similar view, viz., "that the Native was (not) a man and that he was (not) entitled to rights"⁴. Applicants fail to mention, however, that the Prime Minister of the Colony, Abraham Fischer, the leader of the opposition, Sir John Fraser, and the Attorney-General, J. B. M. Hertzog, deprecated the tone of Steyl's speech⁴, and that the true view of the majority of the members of the Colony's parliament was during the same debate expressed by C. L. Botha who said that "[h]e wished the black man to have all his *rights* in his own country and the White man in his"⁵. (Italics added.)

Shortly after the Union of South Africa was established, legislation was

¹ Long, B. K., *In Smuts's Camp* (1945), p. 102.

² Walker, E. A., *A History of South Africa* (1935), pp. 533-534.

³ *Ibid.*, p. 461.

⁴ Thompson, L. M., *The Unification of South Africa 1902-1910* (1960), pp. 333-334.

⁵ *Ibid.*, p. 333.

adopted to give effect to the firm conviction of the majority of the political leaders in the country, viz., that it would be in the best interests of all the inhabitants of South Africa if the White and Native groups were to exercise their basic rights in their own respective areas. As pointed out in the Counter-Memorial, the Natives Land Act of 1913 was the initial legislation embodying the principle of territorial segregation and separation of land rights¹. During the debates preceding the adoption of this Act, leaders of the government said that in the areas set aside for the Natives "[t]hey would be able to tax themselves and govern themselves under the control of the white man", and that "his [the Native's] position would become stronger and stronger, and he would be able even to have a continually growing measure of self-government within that territory"¹.

The Schedule to the Act contained descriptions of areas known as Scheduled Native Areas. These areas comprised the then existing Native reserves and locations, together with certain land held by Native tribes, communities and individuals. The Act prohibited, without the consent of the Governor-General being obtained, the acquisition by any person other than a Native of any land or interest in a Scheduled Native Area, and conversely it prohibited, without such consent, the acquisition by a Native of any land or interest in land outside a Scheduled Native Area from a person other than a Native².

36. In Annex 3 to the Reply, the United Nations Special Committee states, with reference to the Natives Land Act, that "African leaders protested (sic) it as an unjust law directed against the vital interests of their people"³. The Committee proceeds to emphasize the restrictions placed by the Act on the purchase of land by Natives, but ignores the reciprocal restrictions, referred to above, placed on non-Natives³.

While it is true that some Natives did object to the provisions of the Act forbidding the acquisition of land by Natives outside Scheduled Native Areas, Native leaders welcomed the provisions of the Act which clearly demarcated the reserves and forbade the transfer of such land to non-Natives. The said objection seemed to have ignored the Government's expressed intention of adding substantially to the Native reserves in due course. In fact, the Act specifically provided for the appointment of a commission to determine what additional areas should be set aside for Native occupation.

¹ III, p. 237.

² *Ibid.* In para. 105 of Annex 3 to the Reply, IV, p. 350, it is alleged that in 1903 General Botha, who was to become the first Prime Minister of the Union of South Africa, declared that "he would, if necessary, break up the areas of land reserved for the Natives (including the Protectorates), in order to provide labour for the mines and farms". The source cited in the said Annex (IV, p. 350, footnote 4) is an article by Julius Lewin in *The Political Quarterly*, Jan.-Mar. 1957, p. 67. Lewin, however, cites no source to substantiate his statement that General Botha used the words quoted above, and it has consequently been impossible for Respondent to establish whether General Botha in fact made the said statement, and if so, in what context. It should be observed, however, that this alleged statement is diametrically opposed to the known views of General Botha regarding the Native reserves, as is evidenced by his speeches during the debates on the Natives Land Bill. Thus, for instance, he stated that "[s]ome people thought the solution of the Native question meant the finding of sufficient labour for their requirements. He wished to tell these people at once that they could not supply their labour by means of legislation"—*U. of S.A. Parl. Deb., House of Assembly (1913)*, Col. 2514.

³ IV, p. 351 (para. 107).

As was pointed out in the Counter-Memorial, the reports of the Native Lands Commission—appointed in terms of the Act—and of five local committees later culminated in the passing of the Native Trust and Land Act of 1936, the object of which was—

“... to provide further areas where the Natives can maintain a reasonable standard of life and develop their own institutions, and secure a better adjustment of the relations between white and black¹.”

In implementation of this object, the Act created the South African Native Trust, which was to be the agency to acquire further areas totalling over 7 million morgen for transfer to the Native reserves. The Trust has consistently worked towards this end, and, as has been pointed out, has to date acquired a further 5,393,730 morgen for the sole use and occupation of the Bantu².

37. In view of what has been stated above, and also in the Counter-Memorial regarding the establishment of homelands in South Africa³, Respondent submits that there is no substance in the suggestion that the founders of the Union paved the way for the establishment of “a caste system” which has been maintained through the years⁴.

F. CONCLUSION

38. In the foregoing paragraphs Respondent has dealt briefly with Applicants' version of historical events in South Africa and with references to such events in the extract of the Report of the United Nations Special Committee, being Annex 3 to the Reply. Respondent has demonstrated that there is no substance in allegations such as that South Africa was already effectively occupied by indigenous inhabitants at the time of the arrival of the first White settlers; that the Europeans proceeded to take occupation of non-White land; that the Voortrekkers or the founders of the Union established and maintained “a caste system”, and that the Natives have been progressively confined to limited areas of land. It follows that the assertions that Respondent has created a “... false impression... of a kind of historic ‘separateness’ or *apartheid*”⁵, and that “... the traditional geographical separation is mainly a restriction on landownership imposed by the Government”⁶, are likewise unfounded and without substance.

¹ *Vide* III, p. 238.

² *Vide* sec. E, Chap. V, para. 18, *supra*.

³ Counter-Memorial, Book IV, Chaps. IV to VII.

⁴ IV, pp. 461-462.

⁵ *Ibid.*, pp. 458-459.

⁶ *Ibid.*, p. 351.

