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QUESTION OF SOUTH WEST AFRICA

Report of the Secretary-General

Addendum

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SOUTH AFRICA

15 February 1968

I have the honour to refer to my communication of 30 January 1968 (S/8370), in reply to your telegram of 25 January 1968.

Before offering some further comments, I wish at the outset to reaffirm that the basic position of the South African Government with respect to the relevant General Assembly resolutions on South West Africa remains as set out in my letter to you of 26 September 1967 (circulated as document A/6822 dated 28 September 1967). That letter also stated some of the reasons for my Government's attitude that resolution 2145 (XXI) is invalid. Briefly, these reasons included the following:

(a) The resolution violates the basic principle embodied in Article 10 and associated provisions of the Charter, viz., that, with limited and irrelevant exceptions, the powers of the General Assembly are confined to discussion and making of recommendations. In purporting to terminate, unilaterally, South Africa's right of administration of South West Africa, the majority in the General Assembly therefore acted in conflict with one of the basic principles upon which Members joined the Organization.

(b) The purported termination apparently rested upon the basis that the United Nations had succeeded to the supervisory powers of the League of Nations. However,

(i) It was never established, that the League of Nations itself had a power of unilateral cancellation of a Mandate. On the contrary, the findings of the International Court of Justice in its 1966 Judgement in the South West Africa cases indicate plainly that the League had no such power.1/

(ii) In any event, after the proceedings in the South West Africa cases, the question whether the United Nations did succeed to the supervisory

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1/ See analysis given by South Africa's representative during the 1431st plenary meeting of the General Assembly on 5 October 1966, (A/PV.1431, pp. 119-121).

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> powers of the League is, putting it at its lowest, more undecided than ever.[2]

(c) There was no substance in the suggested grounds that South Africa has failed to fulfil its obligations in respect of administration of the Territory and ensuring the well-being of the inhabitants. This point was dealt with at length by South Africa's representatives at the twenty-first session of the General Assembly in their statements on 26 September,[3] 5,[4] 12,[5] and 26 October 1966[6] and is carried further in the recently published "South West Africa Survey 1967" and below.

(d) It was exactly because of uncertainty about legal or factual justification for any drastic action on the part of the General Assembly of the United Nations that legal proceedings were recommended by the United Nations Special Committee in 1957-1959. One report mentioned:

> "... the advantage that the Court, in reaching its opinion, would proceed by impartial judicial methods and on the basis of evidence produced to and weighed by the Court".

I may just add that the provisions of the Charter as to the functions and powers of the General Assembly are quite clear, and my Government is not the only Member of the United Nations that will oppose any attempt which purports to ascribe to resolutions of the General Assembly the binding legal effect which some Members now claim in respect of South West Africa. I wish to repeat that my Government is not aware of any source of recognized international law which can be relied upon to terminate its right of administration of South West Africa. Neither is it aware of such a source of law on which United Nations supervision of its administration of the Territory can be based.

2/ See analysis by South Africa's representative during the 1417th and 1431st plenary meetings of the General Assembly, on 26 September and 5 October 1966, respectively (A/PV.1417, pp. 11-20, and A/PV.1431, pp. 97-106); see also "Ethiopia and Liberia v. South Africa", pp. 56-84; document A/6480, 20 October 1966, pp. 1-12; and "South West Africa Survey 1967", pp. 34, 37 and 38-39.

3/ A/PV.1417, pp. 2-50.

4/ A/PV.1431, pp. 96-121.

5/ A/PV.1439, pp. 81-108.

6/ A/PV.1451, pp. 12-17.

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The South African Government is administering the Territory in the spirit of the Mandate entrusted to it by the League of Nations and has no intention of abdicating its responsibilities towards the peoples of South West Africa. As will be evident from the publication "South West Africa Survey 1967" it has nothing to hide. Indeed, the South African Government is proud of the results achieved in the fields of political development, education, health, economics and moral well-being in respect of all the population groups of South West Africa.

Concern for the political rights and welfare of the non-White peoples of South West Africa has been used as the pretext for launching a campaign of terrorism and sabotage against South West Africa and South Africa from outside our borders. In this process, terrorists, who direct their activities indiscriminately against members (including women and children) of all population groups, are described as "freedom fighters"; measures which are taken to safeguard and protect the civilian population are decried as violations of the rule of law; and demands are being made which if acceded to would amount to the release of criminals, who in addition to contravening certain legislative measures for the maintenance of law and order, have committed ordinary crimes of violence such as attempted murder, arson, armed robbery, etc. It is our firm conviction that if such demands were acceded to, the rule of law would not be upheld but rather would it be flouted. Ignoring all the evidence as to the real motives of the terrorists and the methods employed by them in order to achieve their objectives, these terrorists are portrayed as "freedom fighters" in emotional political attacks against the alleged tyrannical rule of the South African Government.

The following brief survey of the salient features of the recent trial together with an analysis of the circumstances which led to the enactment of the Terrorism Act as well as a discussion of certain provisions of the Act itself, indicates to what extent these matters have been used to present the distorted picture mentioned above. In addition and in contrast to the allegations made, a short exposition of our policies and the methods used in leading the peoples of the Territory along the path of progress and stability towards self-realization is given in annex A.

It illustrates how, on a continent many parts of which are riddled with tension, violence and bloodshed, mainly because of difficulties between ethnic groups, South West Africa is one of the relatively few areas where

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peaceful evolutionary progress is continuing despite enormous diversity, adverse natural conditions and incitement from outside by trained terrorists. Being responsible for the welfare of all the inhabitants of South West Africa, the South African Government cannot allow a group of trained terrorists to create a Viet-Cong-like reign of violence.

Salient features of the trial. (The State vs. Eliaser Tuhadeleni and Others)

The hearing of the case commenced on 11 September 1967. A preliminary objection to the jurisdiction of the Court was raised by the defence but was overruled in a judgement given on 15 September 1967. On 18 September 1967, the trial was proceeded with.

The prosecution commenced by giving a brief outline of the State's case, the main charges against the accused and the nature and extent of evidence which would be submitted to the Court for adjudication. Thereafter evidence was led in addition to the submission of exhibits and documentary evidence. Altogether eighty witnesses testified for the State. Thirteen of them were treated as accomplices. Each of the latter was warned before testifying that he was an accomplice. No evidence in chief was presented by the defence. However many of the State's witnesses were cross-examined by the defence. The State closed its case on the merits on 16 November 1967. Thereafter the Court adjourned to 11 December 1967, to enable counsel to prepare oral argument. The latter commenced on 11 December 1967, and thereafter the Court adjourned to consider judgement. Judgement was delivered on 26 January 1968. At the instance of the defence the trial was postponed to 1 February 1968, for the purpose of leading evidence in mitigation and subsequently to 9 February 1968, for the passing of sentence. During the course of the trial the Court granted a number of applications by the defence for adjournments for the full periods applied for.

The prosecution presented an overwhelming volume of evidence to the Court. This included:

(a) Documents, correspondence and written notes some of which were in the handwriting of some of the accused. Many of the documents were actually found on the accused when they were arrested;

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(b) A large number of murderous implements which were found in the possession of some of the accused. These items included machine-guns and other fire-arms and ammunition mostly of communist Chinese and Russian origin;

(c) Oral testimony of thirteen witnesses who were treated as accomplices and whose evidence was supported by documentary evidence and exhibits as well as by the uncontroverted evidence of other witnesses (White and African) including expert witnesses and eye-witnesses.

As to the veracity of the evidence the judge found:

> "The general import of the evidence was not disputed in cross-examination by counsel for the accused, and no evidence was tendered in rebuttal of anything said by the witnesses for the State. Certain less important aspects of the evidence were however disputed in cross-examination and in representations addressed to the court."

The judge emphasized that apart from the lack of contradiction he had gained the impression that the testimony of the State's witnesses was in general creditable.

The judge found that it was proved on the basis of the testimony presented and as confirmed by the events which had occurred and the exhibits and documentary evidence that the conspirators were taught how to handle machine-guns and other fire-arms; that they received training in the use of explosives and the manufacture of explosives from material which could be obtained in ordinary shops in order to blow up buildings, bridges, trains and vehicles; that they received training to become physically fit and were taught how to engage in hand-to-hand fighting by the use of karate grips; that on completion of this training and equipped with the said arms they infiltrated into Ovamboland in small groups, inter alia, to organize similar training camps in the country and to recruit others for their evil designs; that they proceeded towards the execution of a previously designed plan to overthrow law and order in the Territory by violent means and by recruiting persons for training (sometimes under false pretences) in communist political views and in the art of armed violence and terrorism to achieve their objectives. The judge said:

> "It was also proved that these conspirators thereafter proceeded to violent, though mostly cowardly acts in the furtherance of their objectives."

Earlier the judge gave a review of events planned and executed by the accused and other conspirators. The review included:

(a) An analysis of certain grievances alleged to have existed amongst sections of the population of South West Africa. The judge indicated that evidence was submitted by the prosecution as to the living and other conditions in the Territory and that no endeavour was made during the course of the trial to present evidence to the effect that these statements were untrue. The judge agreed that some of the persons who left the Territory were induced to do so under false pretences believing that they would receive bursaries donated by the United Nations. However, on learning the true nature of the training designed for them they decided to go ahead and to undergo the training in subversive terrorist activities. They subsequently fully associated themselves with the illegal conspiracy designed by the leaders thereof. (Later when training camps were being organized in Ovamboland persons who were misled and who were recruited under a similar false pretext of educational training, actually deserted on learning the truth.)

(b) A night attack on the small administrative settlement at Oshikango. The buildings were set on fire and the inhabitants (including a woman and children) were shot at while they were running around in the glow of the fire. In this connexion the judge stated:

> "One cannot conceive of conduct against civilians which is more clearly criminal. Here, the terrorists committed arson and tried to commit murder in a well thought-out and planned attempt, which is something far removed from heroic freedom fighters fighting as soldiers (this they also call themselves) against soldiers in order to free their country. Like cowards in the night they attempted to kill innocent people, White and non-White, and then like cowards they fled from the scene when the return fire became too hot, while they could see their victims in the light of the fires as they themselves took cover behind bushes in the dark."

The accused who took part in this attack were, according to the judge, aware of the fact that there was not a single soldier or policeman present at Oshikango before the assault was made.

(c) An assault made on the life of an Ovambo (African) headman in which one of his bodyguards was killed and two others wounded. Concluding his review of events in this incident, the judge stated:

> "One piece of evidence is significant as showing what these conspirators were capable of, and that is that long after Utoni had been shot and lay groaning on the ground one of the intruders stood over him and shot him dead with a pistol."

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(d) An armed assault on a civilian farm homestead in order to rob rifles. The plan was to shoot the owner and his family should they resist. The conspir carefully watched the homestead and when night came, they approached the house. When the owner's dogs started to make alarm, he opened the back door and was immediately shot at and wounded, fortunately not fatally. The judge stated in this respect:

> "This conduct of the terrorists is just as abhorrent as that of their comrades already dealt with. This was not only a cowardly, nocturnal expedition to commit robbery, but also an attempt at murder upon an unsuspecting civilian after the telephone wire had been cut. Only he and his wife were at home."

(e) Violent resistance to arrest by various accused and accomplices in wh even machine-gun fire was directed at the police. On one occasion two policeme (one of whom was an African) were seriously wounded.

An important part of the judgement concerned the degree of participation a guilt of each accused in the over-all design of the conspiracy as well as in th specific acts committed by one or more of the accused. The defence argued that accused could not be treated alike in respect of all the specific acts charged having been committed by one or more of the accused or conspirators. In this connexion the defence relied on a case decided by the South African Appeal Cour in 1917 (McKenzie vs. Van der Merwe). In this case (according to the judgement the Appeal Court decided that in the case of a conspiracy of a general nature t personal contribution of each accused must be related to him and that an accuse could not be guilty of the actions of his co-conspirators merely because his membership of the conspiracy had been proved. Such an accused was however guilt of a crime committed by an accomplice if he had prior knowledge of the planned action and if he had not only approved of it, but also had taken part in it by h actual conduct or through the agency of his accomplice.

The judge explained that such participation by an accused in a premeditated subordinate action of one or more of the conspirators within the framework of a general purpose can be proved by direct evidence, by statements of, or orders gi by an accused or by a deduction that he had associated himself with the action concerned. The judge continued:

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"The argument on behalf of the accused was that the State had not succeeded in proving what the general intention of the conspirators was, or, as it was put in McKenzie's case, what the 'grand design' was. There was also no proof, it was argued further, that every accused had approved beforehand and associated himself with the conduct of every other accused or accomplice with regard to every alleged violent occurrence. Accordingly, so it is argued, the court will find the accused guilty on the main charge but in the case of every accused the court must confine itself to a finding of the part played by that accused in each of the alleged acts of terrorism.

"The reason for the admission that all the accused, except the three who pleaded guilty to the alternative charge, are guilty on the main charge, is that it is conceded that every one of them was guilty of one or other of the alleged acts.

"/Counsel/ for the State argued, however, that once the State has proved the general purpose of a conspiracy and it is further proved that an accused has associated himself therewith, then he is responsible for every crime committed by every one of his accomplices, even though the purpose is not defined in detail, provided the conduct of the accomplice within the general purpose of the conspiracy was reasonably foreseeable.

"For this proposition he relied upon the judgements in the cases of R. vs. Duma 1945 A.D. 410 at page 415 and R. vs. Segale and Others 1960 (1) S.A. 721 A.D. and upon a great deal of other authority.

"His argument was that each of the conspirators knew that the purpose was a violent uprising, that it was to be accomplished by the waging of guerilla-warfare, that such warfare involved a reign of terror embracing murder, arson and violence upon isolated persons and places, and that in their publications they had boasted of what they had already achieved. According to /Counsel for the State/ it is at this stage clear that all the conspirators knew what the purpose was and how it was to be accomplished, and that that which had happened clearly fits in with their purpose. They therefore knew or must have known that what was to happen was within the framework of that purpose. In support of his proposition that the evidence does not clearly outline the general purpose, /Counsel for the accused/ points out that the various accomplices gave different versions as to what they were to do when they returned to South West Africa after their training. For the purpose of this argument he compiled a chronological table showing the dates of arrival of certain groups of terrorists and their supposed objectives, as alleged by the State witnesses who had accompanied them. It is true that these versions differ. They differ, for example, as to whether and when there would be fighting, and whether the conspirators were to report to the leaders in South West Africa and hand over their weapons, or not."

The judge found, however, that he could not agree with the contention advanced by the defence because the purpose of the conspiracy was outlined in various documents and publications and crystallized with the passage of time in addition to

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reports in some publications referring to incidents of violence which had actually occurred. Furthermore, there was evidence that trainees were told in camps in South West Africa how action would be taken once the campaign of violence had commenced and that Oshikango was mentioned specifically as one of the first objectives.

The judge then concluded that every person proved to have been a member of the conspiracy, was guilty of all the proved acts included in the main charge. In addition, for the purpose of sentence the judge determined the part played by each individually.

The judge concluded his analysis of the actions of each accused with a finding as to the accused's guilt or otherwise in committing the charges brought against him. Thirty of the accused were found guilty on the main charges. In the case of three of the accused who had earlier pleaded guilty on an alternative charge of having contravened the provisions of the Suppression of Communism Act, the judge at the request of the defence Counsel, made no finding as to the degree of their guilt reserving pronouncement on this aspect for a later date. One of the accused was found not guilty and released. In the latter case the judge found:

> "The evidence against him is that he was seen in a group which was on its way to a training camp but there is no evidence that he underwent training of any kind. He signed the D.M.T. 7/ form but according to the evidence of /a witness/ they were on their way to a meeting, and there is also evidence that some of the people who were taken to camps under false pretences deserted after realizing the full implications of what was afoot. Notwithstanding the fact that he gave no evidence and that no special argument was addressed to us on his behalf, we are doubtful whether he really took part in the conspiracy. There is accordingly, in his case, doubt as to whether he participated in this conspiracy and he is found not guilty and discharged."

In the case of another of the accused who took ill, the judge decided not to deliver his finding until such time as he had recovered sufficiently in order to appear in court.

As regards the remaining two of the original thirty-seven accused, one of them was already acquitted when the State closed its case on the merits in November 1967. Although the person concerned was implicated by the evidence of a witness, he was

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7/ D.M.T. or Domomufitu indicating bush dwellers. Name given to themselves by those terrorists who have received their training in the camp in Ovamboland.

discharged as the Court was not satisfied that the State had adduced sufficient evidence to prove that he actually took part in the commission of an offence under the Act. The veracity of the witness implicating him was not questioned, but under cross-examination it became apparent that the accused, although he served on a committee which had managed or controlled the affairs of a group which was engaged in the commission of an offence, personally disagreed with the policy of the group in this respect, but could not prevent the commission of the offence.

The other accused died on 12 October 1967. As regards the latter, wild allegations have been made that he was tortured to death and the general impression was created that the accused in the trial were not provided with medical treatment. This is not true. The facts are fully stated in annex B.

The thirteen accomplices who testified during the trial were indemnified against prosecution on 26 January 1968.

After having convicted thirty of the accused of the main charges brought against them as well as three of the accused of charges under the Suppression of Communism Act (to which they pleaded guilty) the judge stated:

> "In my view it has been proved that the Accused because of the level of their civilization became the easy misguided dupes of communist indoctrination. Had it not been for the active financial and practical assistance which the Accused received from the Governments of Moscow and Peking and other countries, they would never have found themselves in their present predicament. I also think that had it not been for loudmouthed moral support and incitement by representatives of foreign countries and persons who published SWAPO newsletters, who have absolutely no respect for the truth, the Accused would never have embarked upon their futile and ill-conceived exploits. It also weighs with me that all the crimes whereof the Accused have been convicted on the main count were committed before the Act was passed by Parliament and that this is the first trial in which persons who are charged with the contravention of the Act appear before a Court because of the retrospective effect thereof.
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> "For these reasons I have decided not to impose the death penalty in the case of any one of the Accused. I will, however, take into account the common law offences which the Accused have been proved to have committed in the assessment of the appropriate sentence....".

At the request of the defence the Court granted an adjournment to 1 February 1968, for the purpose of leading evidence in mitigation before sentence was passed. The defence also asked the Court's assistance to obtain permission from the relevant South African authorities for an entry visa for an American citizen

whom the defence desired to consult as a possible witness. The judge immediately granted the request. However, this witness was not called by the defence. On 9 February 1968, nineteen of the accused[8] were sentenced to life imprisonment. Nine others were jailed for twenty years each and two were sentenced to five years' imprisonment. The three accused who were found guilty in terms of the Suppression of Communism Act were sentenced to five years imprisonment of which four years and eleven months were suspended for three years.

When sentence was passed on 9 February 1968, the judge stated:

> "I also agree with /counsel for the accused/ that the retrospective nature of that legislation is relevant to the question of sentence. Because of the retrospectivity I have already decided not to impose the death sentence. /Counsel for the accused/ also asked me, however, to extend this principle to the cases of such of the accused as have not committed common law crimes but are only guilty of having submitted to training as terrorists, but in my view all the accused except Nos. 21, 22 and 23 [9] were guilty of common law crimes, quite apart from any earlier legislation which also made such conduct criminal."

The judge stated that the actions of terrorists were not those of "freedom fighters" but of cowards, assassins and common criminals. He said:

> "The attack upon /the owner of the farm/ was nothing but an armed robbery and an attempt at murder, for which the death sentence could have been imposed had certain of the accused been found guilty upon such a charge.
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> "The planning of the attack upon /the Ovambo headman/ and the consequent death of his bodyguard during its execution, is murder, and the death sentence could also have been imposed upon the persons responsible had they been convicted upon a charge of murder.
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> "The resistance at the Umgulumbashe camp was not only resistance to arrest but a clear attempt to murder members of the Police force with communist machine-guns.... The State could have charged certain of the accused accordingly, and upon conviction the duty of the Judge would have required him to impose a very severe sentence.

8/ Who were found guilty of the more serious acts of violence.

9/ These three accused pleaded guilty to charges under the Suppression of Communism Act.

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"The attack upon Oshikango was a cowardly one. The culprits, had they so been charged, would have been guilty of arson and an attempt at murder upon a defenceless woman and small children, which would also have deserved a very severe sentence.

"Moreover, I also take into consideration that all the accused knew that acts of violence were to be proceeded with."

In giving the above brief survey of some of the main features of the trial, I wish to emphasize that the judgement may still be the subject of an appeal to the Appellate Division of the Supreme Court, and it will then be for that Court to decide on its correctness or otherwise.

The Terrorism Act, 1967 (Act No. 83 of 1967)

The measures contained in the Terrorism Act are of a far-reaching nature. That is necessarily so because they are aimed at combating terrorism - at persons who employ ruthless methods of violence to force innocent members of the public into submission, and who recklessly attempt to sow murder, arson and terror. The South African authorities wish to live in peace with all men, including those who do not think as they do, but they cannot surrender their responsibilities for maintaining order and for protecting the civil population from this guerrilla type of attacks and intimidation. Terrorism is the equivalent, on land, of piracy on the high seas. Nevertheless the South African authorities allow these terrorists the process of law which is not afforded to terrorists in some other parts of the world where quite different methods are used. The terrorists have been rendered harmless, those believed to have been guilty of terrorism being tried in a court of law in accordance with the norms of a civilized community.

Those captured are not the only ones. They formed the vanguard and the South African Government has had to prepare to cope with a continuation of this evil in all its ramifications. It could not allow a situation to arise where its legal machinery might prove inadequate to cope with a form of subversive warfare.

The Terrorism Act must be viewed against the whole background of the onslaughts which have been made against law and order not only in South Africa but also elsewhere in the world in recent times. The ruthless nature of the acts of these so-called freedom fighters is well known. They include the most barbarous murders

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of innocent members of the civilian population. Numerous attacks have been made on witnesses, many of whom have been killed. The question therefore arises: How does a Government deal with persons having only one aim - anarchy? The choice is limited to either acquiescence in the murder of innocent civilians or appropriate measures to prevent a loss in human lives.

In any country, where intimidation and other terrorist methods are used to bring about such a reign of fear, so that people dare not help the authorities maintain law and order and proper government, lest they be singled out for retaliation, the government of that country, any country, is forced to consider whether it should not supplement the traditional legal rules and procedures to meet these extraordinary circumstances. A Government does not then depart from the rule of law; it strengthens the rule of law. The alternative is anarchy and chaos.

The question has been asked whether measures already in existence could not have met the situation adequately. To a limited extent, existing measures would have sufficed, but not fully.

Terrorists differ from common criminals, in that whatever common law or statutory crimes they commit there is included a further element of conspiracy to bring about the disruption of law and order. Not only does this make their crimes far more serious and prevent their heinousness being correctly assessed at their face value, but it means that a terrorist gang may go a long way towards disrupting society before some overt criminal act, perhaps murder, allows of its members being charged with a normal common law or statutory offence. Obviously, such a gang should not be allowed to roam the countryside at will until it has committed the sabotage or murder it has planned, just for want of the necessary legal powers to restrain such things.

The Terrorism Act does not deal with an ideology but with acts committed inside and beyond the borders of South Africa and South West Africa. Terrorists conspire beyond the country's borders where the South African authorities have no access. Training outside the country takes place on a joint basis for all members of the various terrorist groups. They return sometimes in small groups, sometimes individually. Their actions are designed ultimately to undermine law and order throughout the whole area of the Republic of South Africa and the

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Territory of South West Africa. Indeed, as has lately become clear, their actions are aimed at virtually all the countries of southern Africa.

There is therefore nothing sinister or abnormal in providing for the trial of a terrorist in any South African court, irrespective of the place where he was apprehended. All courts in South Africa apply the same system and procedure in criminal cases, and judges are appointed to the various divisions of the Supreme Court from all over the country. Serious criminal cases committed in the Caprivi Strip, one of the northern parts of South West Africa, have for a long time been tried in Pretoria and at no stage was it suggested that that amounted to a miscarriage of justice. Indeed in all the years in which the League of Nations exercised supervision of South Africa's administration no complaint was registered against this procedure.

The rule of law may mean different things to different people; but there is general agreement that it requires that a person on trial be accused in open court; be given an opportunity of denying the charge and of defending himself and that he be given the choice of a counsel. Those rights are at all times assured by the South African Courts, as also in the case of persons charged under the Terrorism Act. In his judgement on 26 January 1968, the presiding judge indicated that he had granted adjournments on numerous occasions when requested by the defence because he had wished to do everything in his power to ensure that the accused had every opportunity to present their case fully.

In a sense, the Act re-defines existing offences and illegal activities. Section 2 of the Act, for example, creates the offence of participation in terrorist activities as one which includes, in general, any deed which is committed for the purpose of endangering the maintenance of law and order, including training, and the possession of explosives, ammunition and fire-arms which could have been used for participation in terrorist activities. Certainly this provision is wide - necessarily so because it has to cover all the activities in which terrorists partake. It is precisely the seemingly innocent or unobtrusive deed which can often result in disastrous consequences. Experience in all parts of the world where terrorists have operated has proved that they and their co-conspirators cannot be checked by ordinary measures.

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Again it must be emphasized that the Terrorism Act is what its title signifies - nothing more, nothing less. Not even South Africa's critics can sincerely believe that the South African Government could decide for no rhyme or reason to enact legislation to punish so severely a person who, for instance, in an isolated instance had stolen a piece of copper wire and damaged a telephone line in the process. Surely, the matter assumes a completely different complexion if such damage was caused in the execution of a co-ordinated plan to murder members of the population. If a certain act contributes as much to the killing of a person as the actual deed of killing, on what basis can it be said that that act is less offensive than the killing itself? It is therefore unrealistic to view any single clause of the Act in isolation, divorced from the evil which it is intended to combat. If the Act is read as a whole, it will be evident that a culprit can only be punished if his action, which may at first appear to be less offensive, was committed with the intention of contributing to the fulfilment of a much more serious and evil aim.

How are terrorists combated elsewhere in the world? Are they arrested by the police in the same way as an ordinary murder suspect is arrested? Under what law does the combating of terrorists take place in those parts of the world where terrorism currently occurs? Are they brought to trial in the same way as ordinary criminals stand trial? Are they detained only after a court order has been granted to that effect? Could the heavy loss of human life in certain areas of the world not have been avoided if proper legal action had been taken in time to stamp out the evil?

The main charge against the accused in the trial instituted in 1967 under the Terrorism Act, comprised activities such as conspiracies to murder, armed robbery, arson, possession of firearms, firing on the police and violently resisting arrest - all with the object of endangering law and order. It is significant that those who criticize the recent trial make no reference to the serious nature of the charges concerned nor to the evidence submitted to the Court. Instead, they quote certain apparently widely formulated provisions of the Act in vacuo and out of context, creating the impression that the accused in the terrorist trial had been charged with petty offences for

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which the punishment is the death sentence. In particular, the expression "to embarrass the administration of the affairs of the State" is frequently presented as one of the "crimes" created by the Terrorism Act. It is not, however, explained that sub-section 2(2) of the Terrorism Act, in which this expression appears, creates certain presumptions, not offences as such. Certain acts or consequences are tabulated in this sub-section which terrorists normally envisage in order to achieve their objectives. Naturally it would not be possible to define all the acts and consequences which they may be aiming at. Only the terrorist himself knows what goes on in his mind, and only he will be able to say whether he intended a certain consequence when contemplating the achievement of his ultimate aim.

Section 2(2) of the Terrorism Act creates a presumption in regard to the accused's intention because the crime of terrorism contains an element of intention which does not necessarily appear from the perpetrator's acts as clearly as, say, the intention to murder appears from the act of a villain who plunges a knife into his victim's heart. In a murder trial it is generally possible to deduce the accused's intentions from the peculiar circumstances surrounding the physical deed. But where an accused is charged with participation in terrorist activities, it will not be sufficient to show that he has killed a person and that the intention to murder was present - something more is needed, namely, proof that he has committed the murder with the intention of endangering the maintenance of law and order. In this respect the onus passes to the accused once the other elements of the offence have been proved by the State - and who is better qualified to discharge this onus than the accused himself?

The presumption created by section 2(2) in regard to the accused's intentions does not, however, place the entire onus of proof upon the accused and does not in any way come into effect before the prosecution has first proved two things: firstly, that the accused was in fact responsible for a specific deed with which he is being charged; and, secondly, that the deed which has been proved against him had the effect, or apparently has had one or more of the effects mentioned in the sub-section. For instance, according

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to section 2(1) (a) a person will be guilty of the offence of participation in terrorist activities if he commits an act with intent to endanger the maintenance of law and order. Now, the prosecution will have to prove the overt act and it will have to prove the intention on the part of the accused, but because, as has been stated, it is often impossible to do so, the adjudication of the case is assisted by the presumption created in section 2(2) in terms of which the prosecution has to prove that the act, the commission of which it has already established, had or was likely to have one of a number of results, and the accused is then presumed to have committed the act with the intention of endangering the maintenance of law and order, unless he himself proves otherwise. One of the specific results which the prosecution may prove is that the act caused embarrassment in the administration of the affairs of the State. But, in fact, once the prosecution has proved the overt act, say the destruction of a radio mast, and the result, namely, that the administration of the affairs of the State was embarrassed thereby, then the onus to prove that he did not destroy the mast with the intention of endangering the maintenance of law and order passes to the accused. The accused may, e.g., admit that he did destroy the mast and that his act did embarrass the administration of the affairs of the State, but he is free to testify himself or to lead the evidence of others to establish that his true intention was to steal the material of which the mast was constructed. Proof of such an intention would mean an acquittal on a charge of participating in terrorist activities.

The presumption created by the Terrorism Act, therefore, does not place an indefensible burden upon the accused, certainly not in the light of the grave consequences of the phenomenon of terrorism. In this regard, reference can be made to the one accused who was acquitted when the State closed its case on the merits in November, 1967, as well as to the accused who was released on 26 January 1968. (See in this connexion the section above on the salient features of the trial where the cases of these two accused are dealt with.)

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Not only is it therefore misleading and untrue to say that "to embarrass the administration of the affairs of the State" is one of the crimes created by the Act, but in addition, the uncontroverted evidence led by the prosecution in the terrorist trial shows that the accused were charged with anything but petty offences. The following are a few examples taken from the record of the proceedings:10/

On 18 September 1967, the first State witness testified that he was given military training inter alia in the use of explosives in Cairo by Arab officers, with an Ovambo translating.

After three months he was returned to Kongwa (Tanzania), where he received further training for a year in the use of carbines and a sub-machine-gun similar to the one exhibited in court.

The witness said that he had been taught "how to kill people in war" and how to lay mines which could destroy a whole building.

On 25 September 1967, a witness described his experiences after he had left South West Africa and had arrived at Dar es Salaam.

At Dar es Salaam, he said, he and some other men from South West Africa attended what he was told was "an American school" for a month, where they had been taught to read English.

From the "American school", the witness said, he had been sent to the military camp, Kongwa, just outside Dar es Salaam. There he had been told that he and a few others were to be sent to Moscow to be trained as wireless operators.

The witness and nine others had gone to Moscow by air, and had been met on the airfield by an English-speaking Russian. The Russians told them that they had no instructions to train them as wireless operators, but that they would give them a general military training.

They subsequently received training in the use of firearms and explosives. They were taught to mix explosives and shown how to use them to blow up bridges, roads, railway lines and other targets.

10/ See also the conclusions of the judge as given in the section above on the salient features of the trial.

They were also shown, he said, how explosives could demolish a concret slab and how they could be used to uproot trees so that they would fall across a road.

The Russians took them to cinemas and places of interest, and provided them with clothing and uniforms, and paid them in roubles. After four months' training they had spent six weeks seeing the sights in Russia.

They then returned to Dar es Salaam by air and there met former friends, including a group who had received military training in Egypt.

Another witness, testifying on the same day, denied that trainees had been told that only police who resisted their attacks were to be shot. He had received no instructions about taking prisoners. He also denied that only Whites who resisted their attacks were to be shot. He said: "No. They were all to be shot".

On 26 September 1967, a witness testified that one of the accused had told him that he wanted dynamite to blow up a bank, or a post office, or a mistrate's office. On the same day another witness told the Court that in 1966 he was approached by an alleged co-conspirator and asked to go to "school". Subsequently he found himself at a military training camp in the Ovamboland bush where he and others were taught by one of the accused to march. He had been one of a party which had planned to burn the village of Oshakati in Ovamboland and kill the inhabitants. On another occasion he was in a conspiracy, organized by one of the accused, to murder three Ovambo headmen. Later the accused concerned told a group consisting of himself, some of the accused and some alleged co-conspirators, to come with him to "burn Oshikango", a settlement in the central northern part of Ovamboland. Another accused had asked for pliers to cut the telephone wires on the main road.

On 3 October 1967, evidence was given by the wife of an official stationed at the settlement of Oshikango in the northern part of Ovamboland. She testified that she awoke on the morning of 27 September 1967 to find the west wing of the house, in which her two sons slept, was on fire. She woke her husband and while she was rushing through the burning house to the beds of her children, aged five and two, she heard a shot from outside, and a bullet whistled past her. She rescued her children and returned to the east wing of the house. There was a lot of gunfire from outside.

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The witness' husband testified on the same day that he had been awakend by his wife at about 1.30 a.m. on 27 September 1967. She told him that the west wing of the house was on fire and ran to her children. While he got up, he heard a volley of shots from outside. He took a rifle and followed his wife. On entering the dining room he saw four men on the verandah of the house. He fired a shot at them and they ran away. When his wife returned from the burning west wing with their children he told them to stay below the level of the window sills of the house, whereupon he went from room to room looking out of the windows. From various windows he had seen shadowy figures outside the house. He fired shots at them. At a certain stage pieces of burning ceiling were faling around him and the lounge carpet was on fire. He decided that he and his family would have to flee. He rushed out of the front door, firing as he ran, followed by his wife and children. They took shelter behind the screen doors on the porch of the post office. From there he could see that some other buildings were also on fire.

On 23 October 1967, an expert witness testified that judging by documents and notebooks found in the possession of some of the accused they had received highly effective training designed to make them guerrilla fighters. From a study of the documents, this witness stated that it was apparent that the men concerned had received the same type of training, possibly from the same instructors. The training which had been planned to the finest detail, was designed to make complete guerrilla fighters of them. The notebooks covered every aspect of guerrilla warfare. Lengthy and detailed descriptions were given of various explosives, their manufacture and use. The witness said that he had tested the formulae given for explosives and that they had all proved effective.

He also testified that propaganda, designed to win over the local population, inter alia alleged that in "olden times" people had lived in a "stateless and classless society", which was why this type of society had been called "communal". People in this society had been free to come and go as they pleased, and there had been no private ownership of anything, not even of food. All possessions were shared with everyone who was in need.

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The aforementioned examples of evidence are typical of the main body of testimony given to the court. Newspapers regularly reported the proceedings, including the evidence led.

The Terrorism Act also makes provision for the prosecution of any person who harbours, conceals or directly or indirectly renders any assistance to terrorists, but in this case also the measure applies only to those persons who have reason to believe that the person in question is a terrorist.

The detention provision in the Act has also been criticized, no doubt because critics do not keep in mind the circumstances under which acts of terrorism are committed. The police cannot go to a judge to request the continued detention of a terrorist if they do not have sufficient information at their disposal to make out a formal prima facie case for his detention. Furthermore, in the nature of things, facts may be known which might not be in the public interest to disclose. If a terrorist can hold a machine-gun to the head of an innocent man, why must there be objections to his detention in order to enable the authorities to complete their investigations or to take measures to safeguard the public? It is only after intensive checking of the details which may have to be obtained from various witnesses or which may have come into the State's possession in some other way, that it may be possible to get a picture of what is really happening or how a particular suspect fits into the framework of a given conspiracy. The State cannot wait until it first has a wealth of information at its disposal before clamping down on terrorists - that would amount to abdicating its duty to maintain the safety of the public.

Once the full implications of terrorism were realized and experience was gained as to terrorist methods, it was obvious that the normal judicial processes would not meet the demands of public safety. The need for machinery to detain a man found in a terrorist camp, even if there is as yet no evidence at hand that he has committed an offence, is obvious. Moreover, the detention of a witness, for instance for his own safety or to ensure that he will be available at a trial, is not without precedent in modern legal systems. In addition, preventive detention provisions (not only where offences against the security of the State are concerned) are found

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in many modern legal systems. Security legislation of a similar and even more severe kind is encountered not only in many States in Africa but also in other countries throughout the world. This fact is mentioned not as an indictment against the Governments of those countries, but in order to show that many other countries have found similar measures necessary, that they have, where necessary, adopted these measures and that such measures are accepted throughout the world as necessary in certain circumstances. They are not, therefore, in conflict with any universally accepted standard. Examples of such measures from outside Africa are given in annex C. In Africa itself many Governments other than the South African Government have also found it necessary to use similar legislation in an effort to protect their peoples and to maintain law and order. There can hardly be any Government on the African continent which has not felt itself compelled to employ such measures, either on a semi-permanent basis or occasionally over the last ten years. For instance, Kenya, faced with raids from Somalian territory, had to resort to regulations providing for the detention of "shifta" and suspected "shifta".

Regarding the retroactive clause in the Act, it may be pointed out that in South Africa law comes into being in the same way as in every other civilized country. No responsible Government introduces legislation which is not based on the broad consensus of the people or peoples under its jurisdiction, or which they would reject as oppressive and maliciously motivated. That is why the law is obeyed by the overwhelming majority of a nation. A Government would normally not resort to retroactive legislation. Normally there would be no need to legislate after the event. The Terrorism Act as a whole did not create unexpectedly a completely new crime, the commission of which is made punishable with retroactive effect. That is not the case at all. Its provisions indicate, and the factual charges against the accused in the trial confirm, that the accused could have been charged under other legislation and common law measures in existence before the Terrorism Act was passed. The fact is that terrorists have committed crimes which existed before the

Terrorism Act was promulgated with an intention which was never before present; they themselves thereby created the new crime, the Terrorism Act merely defining it.

The terrorists left the country from approximately 1962 onwards to receive their training. Only recently have some of them been returning. Their involvement has been uninterrupted. If terrorists began an offensive in 1962 which only came into full effect in 1967, why should the counter-offensive not also be valid from the first date? Should a terrorist who is still active at present be able to lay just claim to the fact that if, when he began with his activities in 1962, he had known that the State would be waiting for him upon his return in 1967 with the Terrorism Act, he would not have taken the steps which he did in fact take? The Act was made retroactive because of those who intentionally planned and took all the required steps to execute subversive terrorist activities. Can anyone really claim that the terrorists, when they left to be equipped for the task they had set themselves, did not know that they were acting illegally?

Nevertheless, as is indicated above in the section on the salient features of the trial, the presiding judge in his judgement delivered on 26 January 1968 stated:

> "It also weighs with me that all the crimes whereof the accused have been convicted on the main count were committed before the Act was passed by Parliament...".

The judge then continued to state that this was one of the reasons why he had decided not to impose the death penalty in the case of any one of the accused. He would, however, "take into account the common law offences which the accused have been proved of having committed" in the assessment of the appropriate sentence.

As regards international practice in the field of legislation with retroactive effect, Prof. Peter Papadatos wrote in 1964:

> "... despite its high moral value this principle /non-retroactivity/ by no means enjoys universal recognition at the present time. It is not even recognized in certain countries which enjoy the most highly developed legal systems and methods of government, which are based on the fundamental norm of the rule of law as, for example, in England." 11/

11/ Papadatos, P., The Eichmann Trial (Stevens and Sons Ltd., London), 1964, pp. 63-64.

He added that -

"... the English Parliament as a rule refrains from making laws with retroactive effect in the criminal field and if it does so in exceptional cases, it is only when the needs of public safety require such a measure...".12/

The South African Government respects the rights of all the peoples of South West Africa, and so long as their interests, as expressed by the overwhelming majority, demand that South Africa shall not abdicate its responsibilities, the South African Government will not abdicate. The persons arrested in Ovamboland and elsewhere were arrested with the full support and assistance of the Ovambo and the Okavango peoples themselves who demanded that firm action be taken by the South African authorities to prevent any further infiltration of terrorists into their territories.

The circumstances which have called forth the passing of the Terrorism Act will probably continue to exercise their influence for some time to come, at least until the current political and social turmoil in Africa has abated and made way for greater stability. Until such time it will be necessary to combat the evil of subversion by appropriate measures.

To conclude, the South African Government is as much concerned as any other civilized State about fundamental human values, freedoms, dignities and justice for all. Despite all efforts by foreign instigators to counter them, South Africa's policies enjoy the support of the overwhelming majority of the Territory's peoples and are achieving increasing success bringing satisfaction and security to them.

Her policy of self-determination provides the opportunity for political self-realization for each population group to the fullest extent. South Africa's efforts have already resulted in a standard of well-being comparing very favourably with the rest of Africa.

The South African Government subscribes to the rule of law, but it is not prepared to expose the peoples committed to its care to terrorist aggression because of a dogmatic insistence on the immutability of certain selective legal rules and procedures. In most countries of the world legislation exists which empowers the State to take exceptional measures to combat subversion and exceptional acts of violence. There is no reason why South Africa should be an exception.

12/ Ibid., see foot-note 60.

ANNEX A

Progress made in South West Africa

South Africa's efforts to promote the well-being of the inhabitants and to lead them towards self-determination are enjoying increasing support from the overwhelming majority of the peoples of South West Africa. To evaluate the progress made in all spheres of life since the Mandate was granted in 1921 requires an objective study of the facts and circumstances as they existed at that time - facts and circumstances which still exist today, It has generally been acknowledged by scholars in scientific disciplines such as history, geography and ethnology that South West Africa is a land of great diversity as regards its peoples, their ethnic origin, culture, language, level of development and modes of life. The eight major non-White groups recognize these differences among themselves. They consider themselves as separate peoples who wish to retain their identitites. Moreover, at the inception of the Mandate in 1921, their history of internecine war was still a recent memory.

Natural conditions largely shaped their culture and history. Thus, the Ovambo, Okavango and East Caprivi Peoples who still occupy the relatively well-watered and wooded north-eastern parts of the Territory, became settled agriculturists and pastoralists, showing no interest in the southern and central regions where conditions were unsuited to their traditional way of life. Hence they had little contact with the nomadic peoples of those parts, the hunting Bushmen and the pastoralist Nama, Dama and Herero who fought one another incessantly for supremacy.

At the inception of the Mandate the traditional systems of self-rule, economy and social organization of the northern peoples were intact; not so in the central and southern parts where a century of warfare had largely shattered the traditional systems and had drastically depleted the population, leaving many areas empty. The White population, then about 20,000 strong, had begun to develop a modern economy; but the revenue of the Territory had never been adequate to cover the costs of administration. The indigenous peoples could not remedy the situation. They did not possess the necessary skills for modern economic or administrative activities. Large numbers of them were dependent on

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wage-earning employment in the White economy. No international or other extraneous funds were available for balancing the budget, for extending responsibilities to the northern areas, or for raising the standards of living, health and civilization of the indigenous inhabitants. For all these purposes additional sources of revenue had to be created within the Territory.

These were the basic circumstances which originated and shaped the early development of the broad lines of South Africa's policies for South West Africa. It will be obvious that the need for differentiation between the various population groups arose naturally from the circumstances and conditions encountered in South West Africa - i.e. mainly from the general economic requirements of the Territory, coupled with the enormous differences between the various population groups and their diverse needs and desires.

The States represented at the Paris Peace Conference in 1919 fully realized that such differentiation would be desirable and necessary in the Mandated Territory. There was no alternative. General Smuts made that quite clear; and the Mandate contained specific authorization for it in Article 2 by stating that the Mandatory "may apply ... to the territory" the laws of South Africa, many of which were known to be based on the differential treatment of groups. Furthermore, differential treatment was considered the best method of meeting the needs, the desires and the aspirations of the peoples concerned.

South Africa, which had had long experience of dissimilarities, not only between groups of different colour but also between groups of the same colour, and had as a result pursued a policy of differential treatment in the then Union of South Africa, applied a similar policy to South West Africa. She did so for two main reasons. In the first place, she could see no alternative; in the second, she had learned from experience that such a policy ensured the greatest good for the greatest number in all the groups, and was therefore the best way - indeed, the only way - of adequately fulfilling her sacred trust for all the peoples of the Mandated Territory. Basically the application of the policy in South West Africa arose naturally from the conditions as they existed in that Territory.

As the Government is a mechanism for ordering human affairs, it follows that where groups differ fundamentally in their way of life, the governmental

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forms appropriate to them, and which they naturally adopt, must differ too. Attempts to impose uniformity in administration in Africa have often proved singularly unsuccessful.

In South West Africa, the various groups had within their respective domains adopted different forms of self-government appropriate to their situation. On the one hand, there was the White group, used to Western democratic procedures and the testing of public opinion by means of the ballot box, organized politically to carry on a complex modern economy involving all the laws which go with a society of that pattern. At the other end of the scale were primitive peoples, such as the Bushmen, whose organization was based on the maintenance of an efficient and mobile band of hunters. Between these two extremes were others differing greatly from one another in the type of governmental organization each required and had evolved for itself.

Progress in the early days of the Mandate was much slower than it is today. To begin with, life was then more leisurely. There was not the same sense of urgency.

Furthermore, adverse climatic conditions and lack of natural resources did not allow of rapid advance in the economic field, while progress was still further retarded by abnormal set-backs, such as economic stringency in the early 1930's, severe droughts and the Second World War with its accompanying drain on manpower and materials.

Nevertheless, steady progress was made. In general, the main economic objective was to develop a modern economy in the central and southern parts of the Territory to a point where it would provide surplus funds for financing the accelerated development of the indigenous peoples and their homelands. Sound economic foundations were laid, making rapid advance possible in the post-war period. The same is true in the educational and social spheres where the very rapid progress achieved from 1950 onwards owes so much to preparatory work between the wars.

After the Second World War, the situation in Africa changed radically and rapidly. The time factor changed in southern Africa too. Although circumstances there differed in certain respects from those further north, a similar need arose to accelerate the tempo of advance and to devise ways and means of

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satisfying the awakening political aspirations of the less developed peoples. The problem was how to do this in a manner which would do justice to all concerned and would avoid catastrophic upheavals, particularly in the face of enormous ethnic diversity.

This problem was accentuated by events in other countries where ethnic diversity existed. These events and situations were of considerable importance to South Africa precisely because they stimulated outside demands, originating from various quarters, that developments should proceed as fast as possible in the direction of welding South West Africa into an integrated whole, to be ruled on a basis of one-man-one-vote for the entire population. In view of the ethnic diversity in the Territory, the South African Government was convinced that any attempt to impose such a course upon the groups at that stage - in contrast with what they themselves might later decide in the exercise of rights of self-determination, was bound to lead to most unhappy consequences.

The prospect would immediate arise of domination of certain groups by others. The groups faced with subordination would include the most highly developed one, so important to the whole economy, as well as the weakest and least developed, most in need of protection. For all the minority groups it would mean the denial of their self-determination, indeed subjugation, a prospect likely to evoke the strongest forces of resistance. It was not difficult to foresee a likely chain-reaction of violance, collapse of the economy and the breaking down of so much that had been built up, the sufferers being all the inhabitants.

What, then, was the alternative, bearing in mind the need for accelerated development toward emancipation and self-realization? In South Africa's view (again endorsed by the experts) the only feasible course was a broad, flexible general approach, seeking as far as practicable the separate development of each group towards self-determination and self-realization - or turning them into self-respecting and self-governing organic entities. Experience elsewhere had amply shown that there was no practicable middle course. Every policy which suggested the giving of limited rights to the various groups inside one political structure, had the prospect of one-man-one-vote as an unavoidable end-result, with its easily predictable consequences. This would inevitably evoke rising tensions between the groups and a struggle for supremacy.

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The South African Government, therefore, resolved upon the broad approach of separate development as the best means of hastening emancipation. In the political sphere this entails developing institutions of self-government for each of the peoples concerned.

In the economic sphere the objective is to create increased opportunities for each people, protecting them against others, in so far as that may be necessary. Therefore, accelerated economic development in the homelands of the indigenous groups is a first priority, and hand in hand with this must go education on sound lines, attuned to their needs and developing at the correct speed. A detailed discussion of objectives and the progress made in different spheres of life, including health and social services, will be found in the publication entitled "South West Africa Survey 1967" which was published by the South African Department of Foreign Affairs in March 1967, and which is obtainable from the Government Printer in Pretoria.

The nature and objectives of South Africa's policies have been much misunderstood and misrepresented. The very purpose of adaptions in post-war years has been to do away with concepts of control or domination of one group of people over another, and situations in which this occurs, and to provide for peaceful processes of emancipation, leading to friendly and constructive co-operation between equals. Critics who make accusations to the contrary have either failed or refused to take cognizance of the revolutionary developments in the post-war period.

Some critics continue to say that South Africa has "extended to" South West Africa its policy of "apartheid"[13/] in violation and even defiance of its obligations under the Mandate. The fallacies and misconceptions underlying this kind of reasoning will be apparent from what has been set out above. The most obvious and fundamental of the fallacies is the assumption that "apartheid" or separate development is an evil thing, and that South Africa knows it; that

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13/ A coined Afrikaans word the English equivalent of which would be "separateness".

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it aims at the perpetual domination of the indigenous peoples, for racial reasons, thus denying them self-determination and even deliberately oppressing and exploiting them - hence the notion of "defying" the sacred trust by applying the system in South West Africa. It is scarcely necessary to add to what has already been said in answer to such propositions. Whatever room there may be for differences of opinion on the merits of South Africa's policies, the plain fact about these particular allegations is that they are untrue.

There is, however, a further and more subtle aspect of the underlying fallacy. The notion of extension to South West Africa seems to imply that "apartheid" or "separate development" is something of the nature of a doctrine or ideology, such as Communism or Hitlerism or the like; and this has indeed often been said by critics. In truth, the policy is nothing of the kind.

South West Africa, which is part of the whole southern Africa complex, has fully shared in the advantages of close economic co-operation within that region. Being for the most part an arid and thinly populated area, the peoples of South West Africa are, perhaps, dependent on their economically stronger neighbours to a greater extent than other nations of southern Africa. They have, indeed, for a long time relied on a multitude of South African agencies, official and private, in order to maintain their standard of living, health, prosperity, security and well-being. In short, there is at the disposal of South West Africa's economy a highly developed and complex apparatus of scientific, technical, business, professional, educational and other services and facilities, the benefits of which cannot be expressed in terms of money, and as far as the political advancement of the peoples is concerned, fear of domination has been removed, so that all the peoples can progress towards self-determination.

Furthermore, the South African authorities have worked unremittingly at the task of preparing the less-developed peoples of the Territory for self-determination. As a result of their work and of the economic development which had taken place since the inception of the Mandate, and of the trust which has been built up between the peoples of the Territory and the South African Government, it became possible for instance, on 21 March 1967, to offer to assist the Ovambo nation, which comprises over 45 per cent of the total population, to advance towards self-government. On that occasion the South African Minister concerned told a

representative meeting of the eight Ovambo tribes that the Government intended to continue its assistance on a basis of consultation and co-operation, and envisaged further development in Ovamboland: more buildings, more efficient hospitalization, increased school facilities, more and better roads, extended water services, expansion of business and so forth. He announced a comprehensive plan for expenditure in Ovamboland, over the next five years, of about $40 million by his Department alone, on stock breeding, fencing, water affairs, electricity, towns, buildings, roads, airports, economic affairs, education and welfare services.

Announcing that the way was open to them to advance to self-government in accordance with their wishes, the Minister emphasized that:

> "One very important matter which the Republican Government recommends to you is that in your system of self-government you should include elected representatives in addition to your traditional leaders and in a manner to be determined by yourselves."

The reaction of the Ovambo nation was one of unanimous and enthusiastic approval. Furthermore, the Ovambo people once more requested the South African Government to continue to guide them in all spheres of their development, including self-government.

In the case of the other national groups the position is broadly similar. An overwhelming majority of the peoples of the Territory has indicated support for political and economic advancement of the nature outlined above. The Government's offer to the Ovambo nation has been generally welcomed by responsible circles beyond South Africa's borders also. Criticism has been based mainly on the grounds that South Africa had no right to make such an offer. The position of the South African Government on that matter was set out in the communication to the Secretary-General of the United Nations, dated 26 September 1967, and in various statements by members of the South African Government as well as South African representatives at the United Nations.

Given the situation as it exists in South West Africa, no other policy of a democratic nature is possible, and no other policy is desired by the overwhelming majority of all the peoples of that Territory. Self-determination can only be a constructive process if it is firmly based on a sound human infra-structure. Funds and technical aid in themselves can avail nothing unless the people who are to

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apply them possess the necessary knowledge, outlook and drive. Many of the Territory's inhabitants have now reached that stage. They have learned to do things for themselves, and so the pace of development can successfully be quickened. Therefore, vast sums are being poured into their homelands to give them the chance for which they have been so carefully prepared. All kinds of remunerative employment have been opened to them: professional posts, technical posts, posts in the administration, the police, the medical services. Vast stretches of developed farmland have been and are being bought, to add to their homelands; vast water and electricity schemes are being undertaken for their good. Communications are being improved out of all recognition - roads, airfields, telecommunications. Irrigation is bringing them wealth and security they never dreamed of before. Agricultural schemes are under way and are prospering. Their livestock breeding and management have been put on a sound basis. They are opening up trade and industry. They are better educated and more healthy than ever before. There is now nothing to hold them back. The results already achieved have been quoted in the publication "South West Africa Survey 1967", referred to above. The facts are there, for all who are interested, to read.

The principle of self-determination to which the South African Government is committed leaves the way open for unlimited possibilities compatible with the choices which each population group may eventually wish to make. The South African Government's approach to the whole question of self-determination has been outlined from time to time by various members of the Government. For instance, the former Prime Minister stated in 1964, in a debate in the South African Parliament, that the Government's approach rested:

> "... on the pure and simple fact of being prepared to give political independence to all those who are different and seek to retain their separate identity."

The former Prime Minister also stated in the same debate in the South African Parliament:

> "... the basic principles of justice require that we should not allow the development of one imperialistic group but that each group should be able to enjoy its full rights: the Whites, the Ovambos, the Hereros, the Okavangos, the Namas, the Damaras and the Basters."

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Another relevant extract from his statement is the following:

"... 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."

Or, for that matter, this extract:

"As far as I am concerned, if the different groups wish to come together of their own volition at some stage or other of their development, they are free to do so. But what we are promoting is what they have today and what they want to do. That is all we are doing."

The South African Foreign Minister also frequently dealt with the matter in the South African Parliament. As recently as April 1967 he said:

"It is for each individual population group of South West Africa to determine its own destiny in the exercise of its right of self-determination... It is only when the separate identity of each nation is respected and protected, when none live under a threat of domination by others, that the basis is laid for proper development in all fields, such as economic, political, educational, etc. And it is only then that such development can lead to meaningful self-determination for all."

The present South African Prime Minister stated on 11 April 1967, with reference to a question as to the ultimate goal of his Government's policy that:

"It is independence, it is self-determination."

In addition, the following statements, pertinent to the further development of the peoples of South West Africa, appear in the "South West Africa Survey 1967," which was published by direction of the Prime Minister and the Minister of Foreign Affairs of South Africa:

"The growing autonomy of the various peoples should not be construed as an effort to maintain them for all time as totally distinct and isolated units too small to maintain a viable economy in the modern sense. On the contrary, it is hoped and can be confidently expected that the closest economic co-operation will come about between them, on the basis of agreement between equals."

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In another section the following is stated:

> "However, at this stage it is impossible to foresee with any degree of accuracy the ultimate interactions of the various population groups. Circumstances will alter radically. What is considered anathema today may well become sound practical politics tomorrow, and vice versa. Nor is it necessary to embark on speculation as to what the ultimate future political pattern will be - i.e. whether and to what extent there may be amalgamations or unions of some kind, federations, commonwealth or common market arrangements, etc. The peoples themselves will ultimately decide."

In conclusion, the circumstances, aims and principles underlying South Africa's policies can be summarized as follows:

(a) The South African Government is dealing with a problem posed by a number of different peoples, with different cultures, with distinct identities, living in one geographical territory. The Government's objective is that of promoting the well-being and progress of all, by making it possible for them to live in happiness and harmony and to achieve full self-realization.

(b) As regards the method, South Africa contends that where one is dealing with the problems of pluralistic societies there is no one method which is "best" or "right". For instance, in Ceylon the Tamils were repatriated to the Indian continent in large numbers. In the case of Cyprus and the complicated situation existing there a different solution is being attempted. In some instances loose federations were tried, the notable example being Nigeria where results have nevertheless not been happy, the recognition of diversity quite evidently not going far enough. The crux of the matter is that the best approach to a problem of this nature depends upon the local circumstances. It is of even greater importance that the search for a solution should not be prejudiced by action taken by others without a full appreciation of the facts and their implications. No universally accepted standard exists, by which methods can be judged, and which may be applied in all circumstances when problems of this kind arise.

(c) Relations between the various population groups have been regulated from the earliest times on the basis of separate and parallel institutions in land ownership, land settlement and self-government, traditions, cultures,

languages and stages of development. The divisions which exist in South West Africa, exist naturally and historically, through sociological affinities and not as a result of an ideology, just as a multiplicity of ethnic groups in other countries did not come about by reason of governmental policy. The South African Government recognizes the divisions which exist and is influenced by them - but it did not create them. It follows a practical policy determined by the historic circumstances which still persist.

(d) It is an historical fact that there were vast differences in the social systems and economic levels of the groups. The less developed peoples were at a lower economic level, not because of any governmental action but because, as a matter of historic fact, different nations in any continent of the world may differ in the stage of development reached, particularly in their level of economic development. Despite many efforts, those gaps have as yet not been closed, and doing so may well prove to be one of the most intractable problems ever to have faced our world. South Africa will continue to direct all her efforts to assisting the less developed peoples to improve their standards of living still further. But even now the standards of living of all the peoples of the Territory compare very favourably with those of the African nations.

(e) South Africa does not believe that the objective of self-determination for all the peoples of the Territory is to be achieved by attempting to force them into an artificial unit, to be ruled on the basis of a majority vote - and she has very good grounds and strong support for this view: it is clear that attempts at establishing integrated societies in conditions where substantial differences obtain amongst groups in one geographical area have not been successful at all. South Africa's approach cannot be used to uphold the assertion that her policy runs counter to civilized conceptions of human rights, dignities and freedoms. The fundamental aim of her policy is self-determination and the elimination of all domination of groups by one another. The very purpose is to

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build up each people into a self-governing organic entity, capable of co-operating with others in the political and economic spheres in such a manner as may voluntarily be agreed between them.

(f) South Africa has no rigid ideas about the type of franchise to be enjoyed by the different groups. It may be universal adult franchise or a qualified one or a mixture of systems. That is a matter on which the group in question may indicate its own preferences even if the result be a system of election and voting procedures which has no exact counterpart in Western democratic countries. The important thing is to meet the needs and aspirations of the particular group. Consequently, South Africa is averse to the indiscriminate transplanting of political institutions from one continent or people to another. Nor does she favour revolutionary changes whereby long-existing institutions, which are known and understood by the people concerned, and have proved of value to them, are abruptly terminated and replaced by others virtually unknown to them. She prefers an evolutionary policy of adaptation and innovation based on solid traditional foundations.

(g) The fundamental question is whether, seen as a whole and in their practical effect, the advantages of the system for all the groups outweigh the possible disadvantages that may occur in the implementation of the system; whether the alternative policy propagated by South Africa's detractors, that of forced integration of all the peoples of the Territory into one political system, can, in the light of current events elsewhere, reasonably be expected to prove more advantageous for all concerned.

(h) The policy is not based on any concept of superiority or inferiority, but merely on the fact that people differ, particularly in their group associations, loyalties, cultures, outlook, modes of life and standards of development.

(i) It is not an inflexible policy but one designed to cope with changing circumstances. It indicates a direction and formulates certain basic principles which allow much scope for development. Accordingly the policy is constructive, not destructive. There is no question either of forcing together peoples who do not wish to be joined, or of keeping peoples apart who wish to come together.

(j) The real point at issue is therefore the best practical way of ensuring progress in all spheres of life - which of the two methods, attempted integration

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or separate development, is better calculated to achieve the common ideal. South Africa believes that attempts to force the different peoples of the Territory into one artificial entity can never succeed, and that attempts to do so can only lead to oppression and strife. In this she is supported by the opinions of experts who have studied the problem and have found that events in other parts of Africa and the world amply justify her views.

(k) Can it be maintained that the achievements which have already materialized in South Africa were the result of a destructive, oppressive and negative policy? South Africa insists that the solution offered by her policy is a viable and equitable one, not only in the present but also for the future. The results already achieved fully substantiate this view.

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ANNEX B

MEDICAL TREATMENT OF ACCUSED IN TERRORIST TRIAL
(THE STATE vs. ELIASER TUHADELENI AND OTHERS)

Allegations that the accused in the said trial were not provided with medical treatment apparently arose largely as a result of the death of one of them, Ephraim Kamati Kaporo, on 12 October 1967. In addition the senior defence counsel at one stage during the trial also raised the matter of medical treatment for some of the accused, conceivably creating the impression that the prison authorities were unable to provide medical treatment for prisoners "so long as /they/ remain unconvicted prisoners".

The South African Commissioner of Prisons, through the Prosecution, subsequently informed the Court that under South African prison regulations every prisoner had to be examined by a medical officer as soon as possible after being taken into custody. All the accused in the terrorist trial were in fact medically examined when they were admitted to prison. In addition every prisoner has the right at any time to request and receive medical treatment. The medical records of the prison where the accused were detained, show that a number of them frequently exercised this right and that prompt and proper attention was given in each and every case. Furthermore, attached to the communication (of the Prisons Commissioner) referred to above, was an affidavit by a senior officer of the Prisons Department who stated that the instructing attorney for the defence had apologized to him after the remarks made in court by the senior defence counsel. The relevant correspondence was submitted to the court on 12 December 1967, and the presiding judge indicated that the matter appeared to have been cleared up.

As regards the deceased, Ephraim Kamati Kaporo, the facts concerning his death and the circumstances which preceded his death are as follows:

While in detention, the person concerned in July 1967, complained of toothache. On examination caries was found to be present in one of the molar teeth. Initially analgesic tablets were prescribed, but when a second complaint was made the medical officer recommended on 18 September that the tooth be extracted. This was done the next day. However, two days later the person

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complained of a headache. He was again examined and it was observed that there was a slight swelling of his lower jaw in the area of the extracted tooth. An antibiotic, tablets for pain and an antiseptic mouthwash were prescribed and administered. Improvement was noticeable within a day but antibiotic treatment was continued till complete cure of this specific condition was obtained a few days later.

On 26 September 1967, the person complained of a slight frontal headache. He was thoroughly examined but no apparent cause could be detected. He was, however, admitted to the prison hospital for observation. Two days later the attending medical officer could still not make a diagnosis due to lack of signs and further symptoms. In the meantime blood samples were sent to a laboratory for analysis and an X-ray examination of the chest was made. The results were negative. A specialist physician was also consulted and requested to see the patient. The specialist could also not arrive at a diagnosis because no further signs and symptoms could be detected. The specialist requested additional blood tests. The results were negative. Antibiotic treatment was continued with. On 1 October, he developed, for a day only, a slight temperature after which his temperature returned to normal. On 4 October he appeared somewhat drowsy and on 6 October he developed a temperature of 100°F. On examination it appeared that he had neck rigidity and he was immediately transferred to a public hospital with a diagnosis of suspected encephalitis, for treatment by a specialist. In the latter hospital a lumbar puncture was done. The preliminary diagnosis of encephalitis was confirmed by a clinical examination and the laboratory tests. Despite the best treatment modern science could supply, he did not respond satisfactorily and he died on 12 October 1967, of encephalitis.

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ANNEX C

EXAMPLES OF PREVENTIVE DETENTION MEASURES

Two examples will be examined. The first is the Civil Authorities (Special Powers) Act, 1922, of Northern Ireland. Originally this Act was extended from year to year until 1933 when it was extended "until Parliament otherwise determines".

The provisions of the Act and its regulations are stated hereafter as they were in 1963 but, as far as is known, they are still in force. Section 1 of the Act gives the "Civil Authority" the power to take all such steps and issue all such orders in respect of persons, matters and things within the jurisdiction of the Government of Northern Ireland, as may be necessary for preserving the peace and maintaining order according to and in execution of the Act and regulations.

Regulation 11 of the regulations contained in S.R.O. 1956, No. 191 provides that any authorized person or police constable may arrest without warrant any person whom he suspects of acting in a manner prejudicial to the preservation of the peace or maintenance of order or upon whom may be found any article, book etc., which gives ground for such a suspicion. Any person so arrested may be detained until he has been discharged by direction of the Attorney-General or is brought before a court of summary jurisdiction. Any detained person may apply to the "Civil Authority" for release on bail, and if the "Civil Authority" so directs, a magistrate may discharge him.

Regulation 12 provides that on the recommendation of a police officer not below the rank of a County Inspector or of an Advisory Committee that a person is suspected of acting in a manner prejudicial to the preservation of the peace and the maintenance or order, the Minister of Home Affairs may require that person forthwith, or from time to time, either to remain in, or to proceed to and reside in such place as may be specified, and to comply with such directions as to reporting to the police, restriction of movement and otherwise as specified, or to be interned as directed.

Regulation 13 provides that a person detained or interned shall not be permitted to be visited by any person, other than an officer of the prison, without the sanction of the "Civil Authority", but the "Civil Authority" may direct that

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no person, whether an officer of the prison or not, may visit the interned or detained person. No communication may be sent by a detained person except with the consent of the "Civil Authority" and all communications must be examined.

As second example, India's Preventive Detention Act of 1950 can be referred to. This Act was originally enacted for one year only, but as a result of periodic extensions, it has, as far as is known, continued to be on the statute book. It empowers the central government or a state government to detain any person if it is necessary to do so in order to prevent him from "acting in any manner prejudicial to:

(i) the defence of India, the relations of India with foreign Powers, or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(iii) the maintenance of supplies and services essential to the community."

The detaining authority is required to inform the detenu of the grounds upon which the order was made, unless it is considered against the public interest to do so.

The Act also provides for the establishment of advisory boards. The Government is required to place before the advisory board the grounds upon which the order was made, together with any representations received from the detenu. The advisory board considers all the information and hears the detenu in person (if he so desires). The board then makes a report to the government, and the government is required to act in compliance with the board's finding. The maximum period of detention is twelve months, but fresh detentions can be made from time to time. The number of persons detained under the Act has varied from 10,962 in 1950 to 200 in 1963. It has been held that the jurisdiction of the courts under the Act is confined solely to the examination of the question of whether a detenu has been furnished with the grounds of his detention to a sufficient extent.
