WORKERS REVOLUTIONARY PARTY

DRAFT PROPOSAL TO THE WORKING PEOPLE OF NAMIBIA AND SOUTHERN AFRICA FOR THE

RESTORATION OF THE LAND TO ITS RIGHTFUL OWNERS

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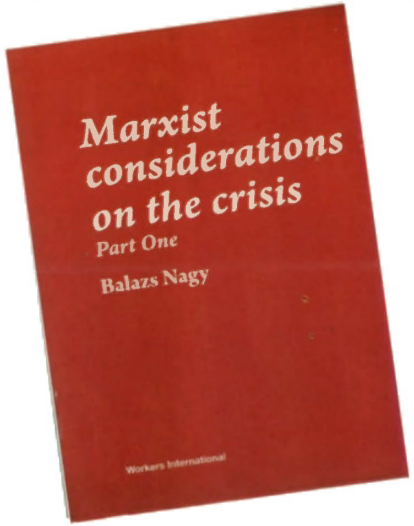
A WORKERS INTERNATIONAL PAMPHLET



Marxist Considerations on the Crisis: Part 1

by Balazs Nagy

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The Hungarian Marxist BALAZS NAGY originally planned this work as 'an article explaining the great economic crisis which erupted in 2007 from a Marxist point of view'. However, he 'quite quickly realised that a deeper understanding of this development would only be possible if I located it within a broader historical and political context than I had anticipated ... it would only be possible to grasp the nature and meaning of this current upheaval in and through the development of the economic-political system as a whole'

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OUR POSITION

In 1884, the German Reich, illegally in terms of international law, colonised independent nations which already held their own demarcated lands under their own laws. It had nothing to do with ancestral lands. It was their own property in law and natural reality.

Nothing that occurred from 1884 to 1990 in the colonisation of Namibia has legalised the expropriation of lands of the occupied peoples. We say that legality must be restored before there can be talk of the rule of law. The nations of Namibia are entitled to the restoration of their expropriated lands.

Cognisant of the fundamental changes in Namibian society in terms of economic and social classes, in particular rural and urban workers, brought by colonialism and capitalism, the WRP calls for a National Conference of all interested parties (classes) to put their respective positions for debate and democratic decision.

It is in the interest of the working class and poor peasantry in particular to neutralise the propaganda advantage which imperialism holds over land reform through the perversion of "expropriation without compensation" by black middle classes, by calling for open democratic scrutiny of the land question and democratic decisions.

Should the landowning classes decline to participate, the landless and working people should go forward to deliberate and formulate a broad programme of land reform and demand legal restitution of ownership.

This process must be widely propagated. Our slogan further is, "land had been collectively expropriated, it shall be collectively restored."

The WRP rejects the policy of individual ownership of collective land. It is only the collective ownership of land by the working people, which can create 30% arable land in Namibia with agriculture to create the material conditions for the working people to lead the life they want to live.

BACKGROUND TO THE WRP POSITION

On 18 March we posted the following on public media (Facebook).

"EXPROPRIATION OF LAND WITHOUT COMPENSATION?

1. Is it the Mugabe manner?
2. Is it land to a black middle class to mediate between black capitalism (land ownership) and 'white monopoly capitalism'?.
Is it without discussing with the true workers of the land, the poor peasants and farm workers, why and how this land shall be expropriated?
3. Is it by discussion with the workers of the land and the urban landless to discuss and for them to decide on the optimum utility of the land to produce shelter, food and create jobs?
4. Is it by discussions with the workers of the land to decide whether the technical and financial resources (taxes) of the people shall be used to finance and make all technical resources available for collective farming or cooperative farming or both given that land was collectively owned and collectively illegally expropriated?
5. Is it by discussions by the entire working class on the optimum and most beneficial use of natural resources in particular fish with conservation?
The WRP proposes to the working people of Namibia to reject 1. and 2. as rubbish and the way into the political and economic gutter.
The WRP advances amongst others 3, 4, 5, as the only advance of the working people and the only way forward.
This is without distinction of race, but holds for all working people."

The fundamental social and economic changes which capitalism and colonialism brought in Namibian society must be taken seriously. These TCL workers gathered in Windhoek for a protest over stolen pension funds.

We posted this in response to the apparently radical policy adopted by the African National Congress (ANC) of land "expropriation without compensation" in South Africa.

This the very same slogan and policy pursued by Robert Mugabe of Zanu PF in Zimbabwe. But we can see how this slogan and policy resulted in a few cronies of the Zimbabwean ruling party receiving vast tracts of profitable farmlands, while poor and struggling small farmers not only got nothing but were forced to become seasonal workers.

The ANC has adopted the slogan, just like Zanu PF, in an attempt to deceive the rightful owners of the land, the working people (urban and rural) of South Africa. They loudly demonstrate how radical they are, while behind the scenes they are arranging to sell off the land to enrich themselves and a tiny number of their friends who are members of a new black middle class.

Cyril Ramaphosa, the current President of South Africa, is a member of this new class, vastly enriched by South Africa's "Black

Economic Empowerment' policies, as is Mugabe of Zimbabwe. Meanwhile the working people and peasantry of both of those countries continue to live in utmost poverty.

This new black middle class of both countries collaborate with international capital to mercilessly exploit the labour of their fellow countrymen and to throw them on the garbage heap of unemployment when their work can be dispensed with.

In Namibia the ruling party proceeds along the same lines as the ANC and Zanu PF. It will make sure it enriches itself and its friends from any distribution of land.

How do we decide how the land in Namibia should be distributed?

Do we decide on the basis of black petit bourgeois undefined notions such as "ancestral lands", which imbues a black or yellow man with some mystical, spiritual connections and entitlement to the land? NO!

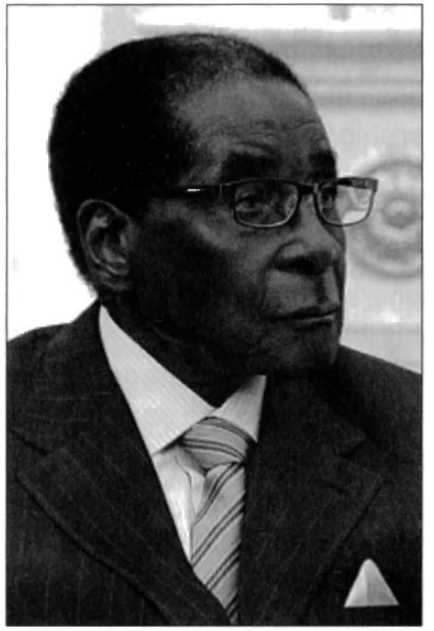
The WRP considers the question on the principle of necessity.

The landless peoples' movement will claim their land, because it is theirs. It belongs to them. They need it for agriculture. It should not be bought nor sold.

Together with them we will see how it is possible to provide for the social and economic needs for the working people who live in Namibia.

From this premise it is self-evident that the present obscene land ownership system in Namibia does not serve this principle. On the contrary, it is maintaining the most horrendous social-economic depravity human persons can suffer. On the farms around Windhoek, farm workers walk around in rags, still addressing their owners as "baas" and "miesies". Families who, over generations, became the personal servants of landowners and created massive wealth, not for themselves, but for their owners, are ejected from farms to walk the highways of Namibia.

On this principle of human and economic development, it is justified to use land for optimum production and human development.



Comprador (caretaker for imperialism) regimes and leaderlessness of the working class. Zimbabwe's Mugabe (left) and South Africa's Ramaphosa (right)

The landowners move on the premise of "legality". They depend on imperialist-brokered constitutional agreements in which "law" is supposed to protect private ownership. But these agreements depend on the caretaker regimes and the leaderlessness of the working people to apply the definition selectively.

If we really proceed from legality, then we must start with the illegal and criminal acquisitions of land through the municipalities and the State. This should involve prosecution, and compensation – not to the thieves – but from those from whom it was stolen. If the land has been used by those who stole it to enrich themselves, then they must pay compensation to the rightful owners.

This would affect both white and black thieves – though the latter have stolen less. We then move to the illegal expropriation of the collectively-owned land belonging to the various communities throughout Namibia.

And then to lands illegally expropriated (at times even with massacres) during the colonial period, such as Hoachanas, Aukheigas near Windhoek, Bulhoek in South Africa, etc, etc.

But, as we have said, we proceed from the rationale of necessity. This means that the producers on the land - the farm workers, the poor peasants, and the urban landless - should be part of the decision on how to transform land ownership for the optimal use of the land.

If this is not acceptable to the present landowners, including the State, the working people must produce a programme including seizing political power to change ownership into collective ownership of all resources, which is the only way forward.
But the working class must guard at all times against the deceptive petit bourgeois perverting the land question to the doom of the working masses with their falsely radical slogans.

THE SECOND LAND CONFERENCE OF OCTOBER 2018

The government of Namibia has announced the Second Land Conference for October 2018. It will take place from 1 to 5 October.

The government describes the purpose of the Second Conference as being to assess the progress of its reform policy based on the decisions taken at the first Land Conference in June 1991, 27 years ago. The government's land policy is set out in the Prime Minister's report on the first conference.

In the Minister's 1991 report, the government claimed that consensus in the First Land Conference had been reached that no regard will be given to ancestral land claims and that the government will only deal with transactions on commercial land on the basis of affirmative action.

That meant that the government will not deal with the dispossession of the national groups. Nor will it deal with the poor peasantry's need for land. Nor will it deal with the extreme situation of 50,000 farm workers (with an estimated 350,000 relatives, including child labourers, who work unregistered on the farms).

It will only seek to get land for black individuals in commercial areas primarily owned by whites, using State resources to buy up land.

It proclaimed this purported consensus as official government policy:

1. Resettlement: The Namibian government buys farms from commercial farmers and allocates them to previously disadvantaged people.
2. Loans: AgriBank, a state-owned bank, grants loans with interests below market level to the previously disadvantaged population.
3. Communal land: Communal land, which all belongs to the state, is parcelled into small units and distributed by traditional leaders.

NOT TRUE

However, the claim that the first conference had unanimously decided to disregard dispossession on the grounds of clashing (contradictory) claims to ancestral land was devoid of any truth.

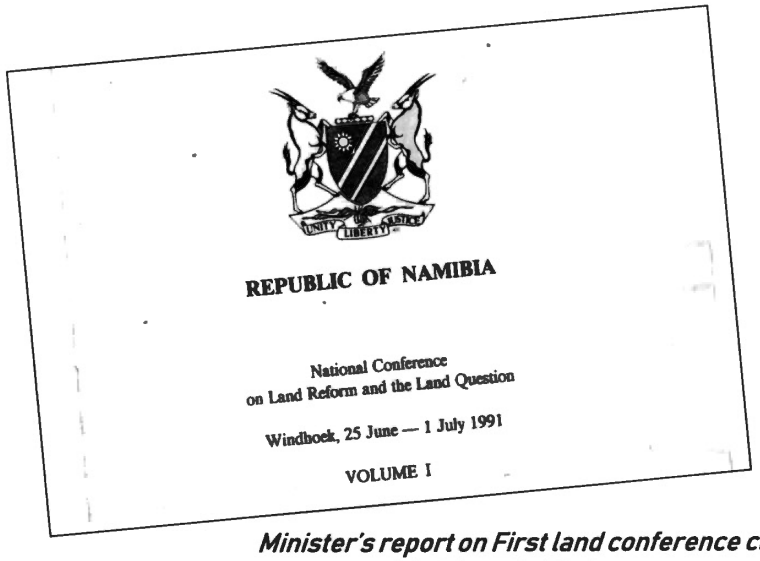
Newspaper articles and documents from the first conference showed just the opposite. Reports showed that the majority of the conference demanded restoration of land immediately to dispossessed communities. There was a slogan, "No Land, no Justice!"

It was not true that the people abandoned claims to the so-called ancestral land, and decided to concentrate on the provision of farms in the commercial area to individuals.

FURTHER UNVEILING OF GOVERNMENT'S ACTUAL POLICY: "NO LAND TO THE POOR"

Over the past 27 years the Government has stated its policy of "no land to the poor!" more and more directly and openly. It has stated that its policy is to give land specifically to well-off middle-class blacks, purportedly to lessen the gap between whites and blacks.

In fact. in April 2012 the then president, Pohamba, informed tribal chiefs in a conference in the north that neither they nor the communities they represent any longer held land: all land belonged to the



Minister's report on First land conference claimed a 'consensus' that is belied by Press coverage

government. He informed them that land previously owned by these communities did not belong to them but to the government of Namibia.

Similar statements thereafter became more frequent from government officials and SWAPO leaders.

In October 2017 the mayor of Katima Mulilo made clear statements that land will not be given to poor people. He bulldozed poor settlements. At the same time Okahandja municipality gave written notice they were going to bulldoze the poor.

The purpose of the Second Land Conference is solely to get funds (from Germany mostly) to buy farmland for ministers, government officials and black tribal middle-class elements, as Mugabe did in Zimbabwe and as Ramaphosa plans to do in South Africa.

It is a continuation of the same policy of 1990 of self-enrichment.

The heady excitement and expectation which the Namibian media wish to drum up for the Second Land Conference is immoral and calculated to create the illusion of a serious process. They seek at all costs to retain the present situation of land ownership.

In the process they are the advocates of continued racist savagery and social degradation.

"NAMIBIAN SUN" REPORT ON SECOND LAND CONFERENCE

This is how the "Namibian Sun" reported on preparations for the conference, under the headline: "AR, LPM, Rukoro sidelined"

"The leaked official programme of the country's second national land conference slated for October indicates the event will be dominated by cabinet ministers and Swapo affiliates.

The programme line-up includes the country's two former presidents Sam Nujoma and Hifikepunye Pohamba, President Hage Geingob, Prime Minister Saara Kuugongelwa-Amadhila, Khomas governor Laura McLeod-Katjirua, Works Minister John Mutorwa and former agriculture permanent secretary Joseph Iita.

It also shows that former deputy prime minister Marco Hausiku and Kuugongelwa-Amadhila will chair a discussion on ancestral land rights and restitution from a South African perspective.

International relations minister Netumbo-Nandi-Ndaitwah and Libertine Amadhila, also a former deputy PM, will co-chair a discussion on land governance and security of tenure.

Local businessman Haroldt Urib and Mutorwa will chair a discussion on urban land delivery, looking at land prices and an upgradable land tenure system.

Iita and local land economist Martin Shapi will chair a discussion on land tax and the property valuation system.

Meanwhile, associate professor for land and property sciences at Nust, Wolfgang Werner, and International University of Management (IUM) professor Earle Taylor will give a presentation on thematic areas.

Unam lecturer Phaneul Kaapama will give a presentation on injustice and land ownership patterns in Namibia from a historical perspective.

Ovaherero paramount chief Vekuii Rukoro yesterday criticised the inclusion of pro-government traditional chiefs and genocide committees, in contrast to the total exclusion of representatives from the Ovaherero and Ovambanderu Genocide Committee (OGF), the Landless Peoples Movement (LPM), the Association of Nama

Traditional Leaders and Gaob Justus Garoeb of the Damara King's Council.

Job Amupanda's Affirmative Repositioning (AR) movement is also nowhere to be seen on the programme. Gaob/Gaseb, who has been under fire from his traditional community that demanded he step down in March, has been invited to represent traditional leaders. It was reported /Gaseb had failed to establish legislative authority structures and operated in a vacuum, allegedly selling, donating and alienating portions of communal land to private investors without the consent of the community.

Rukoro promised that just as they are fighting their exclusion from government's official negotiations for genocide reparations, they will also "fight tooth and nail" against their exclusion from the land conference. 'In its proposed format, the land conference is fatally flawed and is thus doomed to fail, as it is designed to continue to entrench the privileges of the imperialists, neo-colonialists and the new tribal cabal that is seeking to capture our structure of governance.

'Those who never lost land during colonialism want to exclude us from discussing our ancestral land. They want to discuss land issues without our participation' he said.

LPM leader Bernadus Swartbooi believes the line-up of cabinet ministers and Swapo affiliates for the conference is a ploy to intimidate and threaten attendees to behave, while their talking time would also be limited.

'It is a Swapo election gimmick at best; this national land conference. The Swapo secretary-general (Sophia Shaningwa) forms part of this important committee and only one other political party is invited to say one or two things,' he said.

Government's land conference concept paper, which has been seen by Namibian Sun, bemoans the past imbalances in the land distribution, which remains one of the burning issues Namibia has faced since independence.

The state's objectives for the conference include reviewing the implementation of the 1991 land conference resolutions, addressing the structure of land ownership and deliberations on ancestral land claims for restitution and the removal of the red line, amongst others. 'The slow pace of land acquisition, the scarcity of such land and inadequate financial resources to acquire land remain a bottleneck in the attainment of land reform objectives in the country,' the concept paper said."

THE FORM AND NATURE OF THE 'SECOND LAND CONFERENCE'

The SWAPO Government is the sole participant in the conference to air their policy of acquiring land in the commercial sector for the top officials mainly, from State resources and donor funds, under the pretext of war reparations.

Academics, representative of corporate interests and landowners are delivering papers at punctuated moments. They are the ideologues who are tasked with backslapping the duplicitous heroes of the comprador (yes-boss) State of SWAPO with ludicrous nonsense and vilify the victims whilst putting forward a distorted history on behalf of the landowners as a justification of the SWAPO policy.

They present the following characteristic fallacies:

- The issue is about "ancestral land" with self-defeating disputes amongst different groups;
- The land was ill defined with no definite boundaries;
- No centralised authority existed;
- Some sort of no-man's land existed without law and authority.

All this implies that the German Kaiser's Reich, as an advanced civilization, was within international law in annexing the occupants' land as no-man's land of savages. (The treaties signed by the Reich with the nations inside the territory and their International Legal

implications for annexation conveniently escape these academics. Treaties are only signed between equal nations).

MAIN IDEOLOGUES

Dr Wolfgang Werner is the main academic tasked to give theoretical credence to the SWAPO policy, of "no land to the poor". (There is another one, Henning Melber of Uppsala University in Sweden.)

The following article by Werner illustrates what we mean:

"A Brief History of Land Dispossession in Namibia"

"The process of dispossession not only meant that indigenous communities had lost their ancestral lands. European appropriation of land brought in its wake new forms of land tenure. More specifically, the notion of private land ownership rapidly replaced communal land utilisation and for the first time introduced rigid land boundaries. This signalled the end of pre-colonial systems of trans-humance with their high degree of ecological adaptation, and increasingly restricted access to land to those who claimed title, however spurious such claims were.

Although the territory had been parcelled out to concession companies, very little actual colonisation of the land had taken place before 1897. Indigenous rulers resisted selling land outright to Europeans. A series of natural catastrophes, particularly the rinderpest pandemic of 1897, rapidly changed the balance of forces, however. With an approximate 90 per cent of cattle wiped out by the pandemic many pastoralists in the central and southern parts of the territory were forced into wage labour for the first time. More importantly, land increasingly became the object of barter and trade. To make matters worse, the land traded was much cheaper than the land offered by concession companies, who had acquired their land for speculative purposes.

Stock losses as a result of rinderpest in the northern regions increased pressures by kings on commoners, forcing many into wage labour. In contrast with the southern, pastoral regions, however, peasants in the north retained access to land as crop production had not been affected by the pandemic.

Avaricious settlers took advantage of the plight of stockless pastoralists in the central and southern regions of the country. By means of unequal trade they acquired large tracts of land and substantial numbers of the livestock which had survived the rinderpest. By 1902 only 31.4 million hectares (38 per cent) of the total land area of 83.5 million hectares remained in black hands. White settlers had acquired 3.7 million hectares, concession companies 29.2 million hectares and the colonial administration 19.2 million hectares.

Tensions arising from unscrupulous trading practices and the resulting loss of land spurred the Herero and Nama war of resistance of 1904.

Between 75 and 80 per cent of the Herero and about 50 per cent of the Nama were exterminated by the German colonial forces. Indigenous resistance thus crushed, the German colonial administration issued regulations at the end of 1905 announcing the expropriation of all 'tribal land - including that given to the missionaries by the chiefs'. More specific regulations followed in 1906 and 1907, empowering the colonial administration to expropriate all the land of the Herero and Nama. Henceforth, black Namibians could obtain land only with special permission of the Governor.

Up until 1912 this was never granted. Squatting on uncultivated or unsettled land was also strictly controlled. By contrast, the Baster community at Rehoboth and several Nama and Damara communities were secured access to small reserves as a reward for their loyalty to the Germans.

Peasants in northern Namibia were largely unaffected by these developments.

Early attempts by the German colonial Governor to sign protection treaties with Ovambo chiefs had been rejected.

Moreover, the temptation to conquer Ovambo and Kavango territories contemplated before 1904 - was resisted by Governor Leutwein. Part of the reason seems to have been that the Ovambo region

The straightforward message of land campaigners in Namibia to the "Stakeholders" at the Second Land Conference: 'We want Land! We are not cattle!'

in particular was regarded as neither having any mineral potential, nor being considered particularly attractive for white settlement.

In addition, the relatively small German garrison was no match for the military and political strength of Ovambo kingdoms. As a result, the German colonial administration never exercised formal jurisdiction over Ovambo and Kavango territories.

The centrality of land in Namibia seems self-evident: about 90% of the population derives its subsistence from the land, either as commercial or subsistence farmers, or as workers employed in agriculture. But the structure of land ownership and tenure does not only affect those who derive their livelihood directly from the land.

The racially-weighted distribution of land was an essential feature in the colonial exploitation of Namibia's resources, directly affecting the profitability not only of settler agriculture, but also of mining and the industrial sector. As in pre-independence Zimbabwe, 'the whole

wage structure and labour supply system depended critically on the land divisions in the country'.

Access to land determined the supply and cost of African labour to the colonial economy. So, the large scale dispossession of black Namibians was as much intended to provide white settlers with land, as it was to deny black Namibians access to the same land, thereby denying them access to commercial agricultural production and forcing them into wage labour.

It follows that colonial land policies cannot be fully understood unless set within the process of capital accumulation in Namibia. Conversely, changes in the distribution and utilisation of land will affect the economic structure of independent Namibia.

Capital accumulation in Namibia was facilitated by the establishment of 'native reserves'. As in South Africa, these not only provided cheap labour to the settler economy, but enabled the colonial state to exert political control over the population through co-opting indigenous leaders and appointing local headmen into the colonial system as lower-level bureaucrats who administered the 'native areas' on behalf of the administration in return for an annual salary together with bonuses of all kinds, retaining those elements of 'native law and customs' that were not subversive of the capitalist system.

Pre-colonial agriculture and land use can be divided into two distinct production systems. Communities in southern and central Namibia such as the Nama, Herero, Damara and Baster communities, led a predominantly pastoral existence. The scarcity and unpredictability of pastures required these communities to disperse widely over the territory in small groups in order to utilise existing resources efficiently. Moreover, the maximisation of pastures and water resources required a high degree of mobility, characterised by epicyclic migration. As a result, no fixed boundaries existed among different communities, although loosely defined areas of jurisdiction by small chiefs were generally recognised. Corresponding to the high degree of mobility was a social and

political structure characterised by a relatively low degree of political centralisation. Coherent tribal units with a paramount chief at the top did not as yet exist, and were the subsequent creation of colonial officials. Consequently, competition for resources made conflict among chieftaincies a constant feature of pre-colonial Namibia.

This state of affairs had a curious implication for the further development of Namibia as a settler colony, namely the proclamation of the Police Zone. Unable to confront and subdue the powerful Ovambo kingdoms in the north, the German colonial administration announced in 1907 that police protection should be confined 'to those areas which fall within the sphere of influence of the railway line or main roads'. It added that 'settlement must for the time being be confined to the aforementioned areas'.

The subsequent establishment of the Police Zone thus separated that part of Namibia which was later settled by white farmers from those areas where peasant production was largely left intact. The latter comprised the Kaoko, Ovambo, Kavango and Caprivi regions." (*Journal of Southern African Studies*, Vol. 19, No. 1, March 1993)

CALCULATED MISREPRESENTATIONS AND FABRICATIONS

Werner and his ilk are given to fabrications, half-truths and misrepresentations with an eye to building a premise for their position that things should stay as they are, that is, the working people should accept their landlessness and wretchedness, for the good of food production and the economy.

Contrary to his fabrication that significant colonisation of the lands of the nations started only after the Rinderpest of 1897, the colonisation of Namibia by Germany in 1884 was based on the colonisation of the land of Namibian nations. In 1890 they started "Landvermessung" by measuring a baseline at Windhoek for sub-dividing farms for German settlers in the Okahandja district. This land was seized from the Herero Nation.

From 1896, triangulation chains were developed to the south, the west and the north for the main purpose of mapping expropriated lands for German settlement. These lands were to be expropriated southwards from the Baster and Nama Nations. The Namas subsequently lost more than 90% of their land while two thirds of Rehoboth was expropriated.

"Research" by Werner and others not quoted here is defective and misleading when it comes to understanding social-economic and political developments in Namibia under colonialism.

They present Namibia's total farming land as comprised of 31% "communal" land and 44% commercial farming land. They get to these convenient figures by adding the northern peoples' lands, Kaoko, Ovambo, Kavango and Kaprivi – which were not expropriated – to the 90% of land in the south that was expropriated.

In the south the peasants have no land. In the north the situation is equally grim in that no State resources (financial and technical) are provided to the poor peasants and no agricultural and industrial development alleviates their wretched poverty. Minimum wages and law are only applicable in the south. The masses of poor peasants and workers are used for commercial enterprises and for the mutual benefit of the northern chiefs and the commercial farms, mining and industrial companies in the south.

There is a strong tendency on the part of tribal and middle-class elements in the south to hurl indiscriminate tribal expletives at the northern tribal dominance of the national thievery. But a closer scrutiny of their position reveals that they themselves are on the periphery of the thievery.

Nevertheless, the question of land should be addressed separately for the north and the south: in the north as a question of State resources to the poor peasants and workers, and, in the south as the question of landless-ness and State resources, their own taxes, compensation and rental of the expropriated lands.

The main omission on the part of the "researchers" and academics concerns the penetration of finance capital into Namibia and the

change of Namibian society into a proletariat (rural and urban), an impoverished peasantry and a middle class now consisting of black and white. (In the south, the proletariat [workers] is the most significant class.)

Tribal dominance is disproportionate to its social and economic importance, because of its linkage to imperialism.

Chiefs in Namibia are recognised under the Traditional Authorities Act of 2000, which disenfranchises both the chief and the community he/she claims to represent, by providing that their properties no longer belong to them, but to the State.

These 'kapaters' are now used to sanctify the SWPO regime's deadly policies.

The ideologues treat the demand for land reform as a demand of black middle-class elements for entrance into the commercial landowning class.

They omit the crucial indicator of the failure of commercial farming in Namibia and the incumbent capitalist regime, which is that only 1% of agricultural land is arable, whilst one quarter of Namibia (the north-east) should have been the breadbasket of Namibia.

REHOBOTH - THE WATERLOO OF THE LANDOWNERS' PET ACADEMICS

We can use the detailed case made in May 2014 for the Rehoboth Basters' rights to their land as an example of the land rights of many other Namibians

Rehoboth was always anathema to the historical researchers, academics and theoreticians of the landowners and middle classes both black and white, who were also the ideologues of the tribalist regime.

The fabrication that the southern nations did not have defined and centralised authority is disproved by the fact that the Nama and Herero Nations in 1870 met to grant Rehoboth, an area of roughly 300km x 300km in extent, to the Basters.

The demarcation and mapping of Rehoboth and the issue of title deeds to families (subordinate to the collective ownership) disproved the claim that boundaries were not clearly demarcated.

It is a legal absurdity that two legal non-entities can give rise to a third legally-designated entity.

Moreover, the universal compliance by the three nations regarding the legality of the Rehoboth grant is testimony to the fact that a jurisdiction not only of customary law was practised over the domains of the nations' territories, but a system similar to common law.

Rehoboth, through the guidance of the Reverend Friedrich Heidmann, accepted a pseudo-European model of land administration in 1872, in which all land was inalienable and collectively managed. Land was mapped and demarcated with two forms of ownership. Vast tracks of communal (collectively owned) land on which each family unit had rights to an erf for shelter; and inalienable property rights per family to a farm.

The Rehoboth Basters promulgated the "Laws of the Fathers" in 1872 drafted by Heidmann in Warmbad in 1870 as the Constitution of Rehoboth.

The grant of Rehoboth had a further fatal implication to the spurious landowners' claim that the national groups of Namibia had legally lost their land by 1990 through the Constitution. It proved that the collective ("communal") land of each of these nations was private property, which the Constitution purports to protect. See also the Richtersveld case, the details of which are available online).

In May 2014, the Rehoboth Baster Gemeente requested Hewat Beukes's assistance in an urgent application brought by the SWAPO Town Council against its Captain. The issue was that he had issued 2000 free erven to landless working class families justified by the "Laws of the Fathers" in December 2013. The beneficiaries were from all tribal backgrounds. Hewat applied for the recusal of Judge Harald Geier, triggered by the fact that he was entertaining an urgent applicant on a cause of action dated December 2013 and one which was launched 1 April 2014 without knowledge of the respondents.

His affidavit contained the following:

<u>The brief historical background to the application is as follows:</u>

4. In 1872 the Rehoboth Baster Nation promulgated "Die Vaderlike Wette" which constituted the Constitutional jurisdiction over the independent land known as Rehoboth. Its boundaries were beaconed and mapped.

5. The Reverend Heidmann, the German missionary wrote the "Laws of the Fathers". It provided for private ownership of land allocated to each of the founding families and collectively owned land to which each new family had the right of private ownership of a residential erf (non-alienable) and usufruct. The 'private' land was not alienable and subject to collective control.

6. Ownership of Rehoboth as a whole vested in the Nation. An elected Captain with a Volksraad comprised the Government.

7. In 1884, In the Berlin Conference Africa was carved up and allocated to the European colonial powers, contrary to International Law.

The first council of the Rehoboth Basters 1872: From left to right: Paul Diergaardt, Jacobus Mouton, Hermanus van Wijk and Christoffel van Wijk. The Paternal Laws lie on the table.

8. Germany invaded Namibia. In 1890 they started "Landvermessung" by measuring a baseline at Windhoek for sub-dividing farms for German settlers in the Okahandja district. This land was seized from the Herero Nation.

9. From 1896 triangulation chains were developed to the south, the west and the north for the main purpose of mapping expropriated lands for German settlement. These lands were to be expropriated southwards from the Baster and Nama Nations. The Namas subsequently lost more than 90% of their land while two thirds of Rehoboth was expropriated.

10. It is evident from the systematic procedures of the German Government in Deutsch Süd West Afrika and the later race experiments of Herr Eugen Fischer that the NAZI concept of "Lebensraum" was full force in the making here with its logical corollary of "Platz zum Töten" or perhaps "Platz zu sterben" for other "species" of humans which found its praxis in extermination campaigns in Deutsch Südwest Afrika.

11. Thus, in 1904 General Lothar von Trotha issued orders of extermination against the Herero and Nama nations followed by genocide. An extermination order was also issued against the Rehoboth Basters but not pursued due to the pleas of the Reverend Heidmann.
12. In 1915, an extermination order was issued against the Rehoboth Basters which led to the battle at Sam Khubis about 50 km west of Rehoboth town, but the Basters defeated the Germans.
13. The Germans could not follow up their attacks as South African union troops had entered Namibia on behalf of the British Crown. However, the beneficiaries of the expropriation and genocide retained their properties and racial privileges.
14. In 1920 the League of Nations granted the mandate to rule South West Africa to South Africa, under the stated purpose of developing the inhabitants to the highest level of civilization.
15. In 1924 the South African government by force disbanded the institution of the Captaincy and Volksraad elected in accordance with the "Vaderlike Wette" (Paternal Laws). It put an "Adviesraad" (Advisory Council) with an Afrikaner (Boer) Captain appointed by the South African Government in place.
16. In 1952 members of the Rehoboth Baster Community including councillors petitioned the UN for a legal opinion on the legal validity of laws made by the South African Government in Rehoboth. The UN responded as follows: since the South African regime had disbanded the "Kaptein en Volksraad" established under the jurisdiction of the Paternal Laws, the only body with which it could negotiate to make laws, all laws subsequent to the said disbandment in 1924 were *null and void*. This opinion was delivered to Eric Louw the then South African Ambassador. The finding was published in the 1952 UN Yearbook.
17. In 1971 the UN Security Council requested a legal opinion from the International Court of Justice in Geneva on the status of the South African administration of South West Africa. The Court found the continuing presence of South Africa illegal: (the full text of this opinion is reproduced separately in an appendix to this statement.

in 1904 General Lothar von Trotha issued orders of extermination against the Herero and Nama nations followed by genocide

Its significance is expressed in the penultimate paragraph: "that the Mandate had been validly terminated and that in consequence South Africa's presence in Namibia was illegal and its acts on behalf of or concerning Namibia illegal and invalid".)
18. In October 1971 the UN further condemned the Bantustan Policy of the South African Government:
United Nations Security Council Resolution 301, adopted on October 20, 1971, after reaffirming previous resolutions on the topic, the Council condemned the Bantustans, which they described as moves designed to destroy unity and territorial integrity along with South Africa's continued illegal presence in Namibia, then known as South West Africa.

The Council finished by calling upon all states to support the rights of the people of Namibia by fully implementing the provisions of this resolution and requested the Secretary General to report periodically on the implementation of the resolution.

The resolution was adopted by 13 votes to none, with France and the UK abstaining.

This was the last resolution adopted prior to the expelling of the Republic of China from the United Nations.

19. In January 1976 the United Nations Security Council adopted Resolution 385.

United Nations Security Council Resolution 385, adopted unanimously on January 30, 1976, recalled previous resolutions on the topic as well as an advisory opinion of the International Court of Justice that South Africa was under obligation to withdraw its presence from the Territory of Namibia. The Resolution reaffirmed the United Nations' legal responsibility over Namibia, expressed its concern over the continued illegal actions of South Africa and deplored the militarization of Namibia.

The Council then demanded that South Africa put an end to its policy of bantustans and its attempts calculated to evade the demands of the United Nations. The rest of the resolution demands that South Africa promise to allow a UN-organized election to select a future government, release all political prisoners, leave Namibia and respect international law.

20. South Africa disregarded the resolutions of its mandate grantor and summarily promulgated the Bantustan Act, The Rehoboth Self-Governing Act, Act 56 of 1976 on 28 April 1976.

21. The main purpose of the Act was the final liquidation of the collective land ownership of the Rehoboth Baster Nation.

22. Its central provision was at item 23:

(1) From the date of commencement of this Act the ownership and control of all movable and immovable property in Rehoboth the ownership or control of which is on that date vested in the Government of the Republic or the administration of the territory of South

West Africa or the Rehoboth Baster Community and which relates to matters in respect of which the Legislative Authority of Rehoboth is empowered to make laws, shall vest in the Government of Rehoboth.

(2) The said property shall be transferred to the Government of Rehoboth without payment of transfer duty, stamp duty or any other fee or charge, but subject to any existing right, charge, obligation or trust on or over such property and subject also to the provisions of this Act.

23. The above provision fell on the following grounds *inter alia*:

a. The UN as the legal successor of the League of Nations made binding resolutions on the South African administration of Namibia.

b. The land of Rehoboth was not acquired by Germany and South Africa through any legal means;

c. Any property expropriation under the Mandate was illegal. (In any event while the Mandate itself was invalid in terms of international law itself given the socio-political establishments in South West Africa as it was neither no-man's land nor occupied by savages, and the 1884 Berlin Conference was a violation of the purport of International Law and Natural Justice. South West Africa was comprised of independent national territories at the commencement of German colonial rule).

d. The Bantustan laws were illegal, in particular the Rehoboth Self-Government Act.

e. Even if the said Bantustan Act was legal, the same principle *inter alia* that no legal authority existed to give transfer of Rehoboth land, the above section 23 would have been a nullity in any event.

f. Even if a lawful Captain and Volksraad had existed it could not transfer Rehoboth land belonging to the Baster Nation as same would constitute an act of High Treason and the individual property rights of each Rehoboth Baster citizen.

g. The contemplation that a Bantustan act or a South African proclamation could possibly disown an indigenous people both collectively and individually is an affront to the peoples of Africa in general.

24. Thus, Rehoboth land at no stage was legally transferred into the name of the Rehoboth homeland government and Schedule 5 of the Namibian Constitution bears no relevance to this matter.

25. A further synopsis of the relevant aspects of the history of Deutsch Südwestafrika follows herewith:

South-West Africa (Afrikaans: *Suidwes-Afrika*; Dutch: *Zuidwest-Afrika*; German: *Südwestafrika*) was the name for modern-day Namibia when it was ruled by the German Empire and later South Africa.

German colony

As a German from 1884, it was known as German South-West Africa (*Deutsch-Südwestafrika*). Germany had a difficult time administering the territory, which experienced many insurrections, especially those led by guerilla leader Jacob Morenga. The main port, Walvis Bay, and the Penguin Islands were annexed by Britain as part of the Cape Colony in 1878, and became part of the Union of South Africa in 1910.

As part of the Heligoland-Zanzibar Treaty in 1890, a corridor of land taken from the northern border of Bechuanaland, extending as far as the Zambezi river, were added to the colony. It was named the Caprivi Strip (*Caprivizipfel*) after the German Chancellor Leo von Caprivi.

South African rule

In 1915, during the South-West Africa Campaign of the First World War, South Africa captured the German colony. After the war, it was declared a League of Nations Mandate territory under the Treaty of Versailles, with the Union of South Africa responsible for the administration of South-West Africa, including Walvis Bay. South West Africa remained a League of Nations Mandate until World War II.

The Mandate was supposed to become a United Nations Trust Territory when League of Nations Mandates were transferred to the United Nations following the Second World War. The Union of South Africa objected to South-West Africa coming under UN control and refused to allow the territory's transition to independ-

ence, regarding it as a fifth province (even though it was never formally incorporated into South Africa). For example, between 1950 and 1977, whites in the territory were represented in the South African Parliament by four Senators and six MPs.

These South African actions gave rise to several rulings at the International Court of Justice, which in 1950 ruled that South Africa was not obliged to convert South-West Africa into a UN trust territory, but was still bound by the League of Nations Mandate with the United Nations General Assembly assuming the supervisory role. The ICJ also clarified that the General Assembly was empowered to receive petitions from the inhabitants of South-West Africa and to call for reports from the mandatory nation, South Africa. The General Assembly constituted the Committee on South-West Africa to perform the supervisory functions. In another advisory opinion issued in 1955, the Court further ruled that the General Assembly was not required to follow League of Nations voting procedures in determining questions concerning South-West Africa. In 1956, the Court further ruled that the Committee had the power to grant hearings to petitioners from the mandated territory. In 1960, Ethiopia and Liberia filed a case in the International Court of Justice against South Africa alleging that South Africa had not fulfilled its mandatory duties. This case did not succeed, with the Court ruling in 1966 that they were not the proper parties to bring the case.

Bantustan

The South African authorities established 10 bantustans in South-West Africa in the late 1960s and early 1970s in accordance with the Odendaal Commission, three of which were granted self-rule. These bantustans were replaced with separate ethnicity-based governments in 1980.

The bantustans were:

- Basterland (self -rule 1976)
- Bushmanland
- Damaraland
- East Caprivi (self rule 1976)

- Hereroland (self-rule 1970)
- Haokoland
- Kavangoland (self-rule 1973)
- Namaland
- Ovamboland
- Tswanaland

26. In 1982 the UN endorsed the Constitutional principles agreed to by the five Western Powers, and South Africa with which Resolution 435 had to be enforced. The salient provision was that the protection of private property would be the cornerstone.

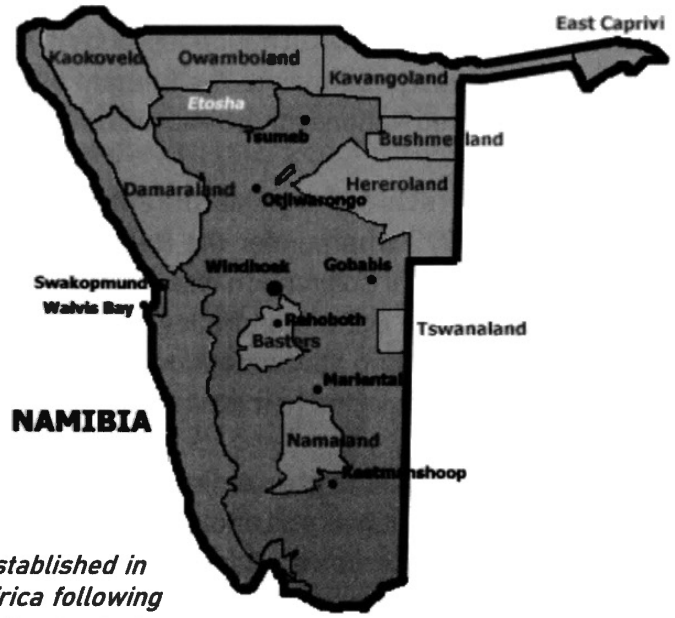
27. In 1990 Captain Hans Diergaardt elected under the Bantustan Act 56 of 1976 approached the Court on the basis of the said Act to stop the transfer of the lands of Rehoboth to the Namibian Government.

28. This gave Nic Hannah, a judge appointed by the Namibian Government, the opportunity to abuse the Bench as was his habit to launch groundless and presumptuous attacks and insults against the Rehoboth Baster Community *inter alia* as follows:

- The Nation opportunistically accepted the Bantustan Policy in 1976 for maximum benefits. (He did not bother to explain what benefits one could possibly reap from a homeland except to be in a labour reserve for the benefit of people like Hannah himself).
- The people of Rehoboth now opportunistically wished to share equally in the benefits of independence. (He reckons that Rehoboth Basters were not entitled to independence).
- The people wilfully disowned themselves to transfer their property to the Rehoboth Bantustan authority. (i.e. that a bunch of idiots would give away their means of existence.)

29. Mr Hannah taught law at Liverpool University, was then appointed to the Bench in Botswana, then appointed Chief Justice in Swaziland, and accepted to the Bench under the colonial regime under illegal legislation in Namibia in 1985.

30. Mr. Hannah did not know the history, disregarded rudimentary law pertaining to the oppressed peoples of Namibia, arrogated



Bantustans established in South West Africa following the Odendaal Commission

for himself the right to abuse a people who had built this country both objectively and subjectively, both its infrastructure and its aesthetics and had campaigned tirelessly for the independence not only of Rehoboth but for the whole of Namibia. He was in a word not competent to have presided over this matter.

31. Mr. Hannah endorsed the Bantustan Act which was a nullity and did not fall within the jurisdiction of a Namibian Court.

32. Mr Hannah disregarded the question of whether the Rehoboth Baster Nation's collective properties were indeed private property to the exclusion of others.

33. This matter is defended on the inalienability of Rehoboth land from the Rehoboth Baster Nation, on the illegality of the South African Administration since 1967 and the illegality of the laws of South Africa pertaining to the Rehoboth lands. Such defence relies *inter alia* on the fact that Rehoboth is private land and equally protectable as all other privately-owned land, and on equality, and the right not to be discriminated against.

34. The Rehoboth Basters opposed the South African administration since its inception. Of all national groups it was the first and the most vociferous petitioner to the League of Nations and its successor the United Nations for the end to South African presence in Namibia.

35. It was the first to call together the entire Namibian nation in a united front in 1970 when under the Rehoboth Baster Nation's leadership the National Convention was called.

36. It opposed the Bantustan Policy. In 1976 more than 5500 persons over a weekend sent a petition to Vorster rejecting the intended promulgation of the homeland Act. Vorster nevertheless went ahead.

37. Mr Hannah's insults of an entire people from the Namibian Bench had no basis, but was still enough to attack their very existence on their own properties and land.

38. In 1996 the German and Namibian Governments concluded their "bilateral relations". Since 1990 more than N$7 billion in "bilateral aid" has been given to Namibia to "develop" the north on the condition that the Namibian Government would protect German descendants' farms, obtained by mass expropriation of Baster, Herero, Nama, Bushman and Damara land, and their social-economic privileges. Their subsidised status as German citizens would be maintained.

39. The land demands and the demands for restitution by the expropriated Rehoboth Basters and the partially exterminated nations of the Herero and Nama are anathema to both the incumbent German Government and the German land owners and those who draw exclusive social-economic privilege and benefit from the form of land ownership in Namibia.

40. The nature of the collective property relations in the mapped and titled land in Rehoboth is considered a threat, alternatively a restriction, by the commercial land owners in Namibia especially by the German landowners.

41. The Society of Advocates of which Judge Geier was a leading member is reported as having threatened a lawyer with "excommunication" should she continue to argue the case of the private ownership of the Rehoboth Baster People to their land.

42. Judge Geier may not sit on this case on *inter alia* the following grounds:

a. The Geier family is an old family in Namibia which is a direct beneficiary of the land expropriation and the intended and near extinction of the Baster, Herero and Nama Nations.

b. He is a beneficiary of the continuing exclusion of the Rehoboth Baster Nation and other indigenous nations from their expropriated lands.

c. He is a direct social-economic beneficiary of the enforced inequality which is still maintained by force and fraud.

d. He is a direct beneficiary of the cultural and educational exclusivism maintained by the German State in Namibia through subsidised educational institutions such as the DHPS and the racially exclusive *Deutsche Interressengemeinschaft*.

e. Petrus Beukes a grand uncle of deponent was killed by German Schutztruppe in the battle set off by the extermination order against the Rehoboth Baster Nation.

f. In the extermination war against the Nama Nation deponent's families such as the Swartbooi family of Warmbad were killed *en masse*.

g. The land of the Rehoboth Baster Nation, the livestock and land of the Nama Nation formed the economic foundation on which German settlers and their descendants built their pre-eminence and from which the deprived peoples are still excluded.

43. It cannot be tenable that a man who is at peace with the pursuit of exclusive interests of German people who sought the end of the local peoples' existence in Namibia of which he is a direct beneficiary may sit on those of a nation which was historically in a life-and-death struggle for its very existence with them AND whilst those issues of belligerence have not been resolved.

44. It is documented fact that Hitler's birthday is still being celebrated in Namibia by Germans. While deponent is not a proponent of guilt by association, nothing public suggests that Judge Geier condemns or has condemned the sentiments associated with such celebration while he is a direct social-economic beneficiary of the praxis which such sentiments sustain as its underlying principled and theoretical basis.

45. Captain Hendrik Witbooi remarked that the imposition of German settlers' rule and interest on the Namibian nations would become "the sun on the jackal's back". This is indeed the case.

46. This is a selective land ownership situation in which the bilateral partners of the German Government and the Namibian Germans – the Namibian Government – recognise the land rights of Ovambo Chieftains in the north while disregarding the land rights of the communities in the south. Moreover, the 1982 private property protection provision is not made to apply on the lands of the indigenous people. It is used to apply only to white private ownership. Each people in Namibia utilised their lands to the exclusion of non-members which constitute the concept of private ownership. Judge Geier's background militates against this piece of justice.

47. Judge Geier was recommended by a SWAPO constituted Judicial Service Commission and appointed by the SWAPO President and President of Namibia as judge, whilst the application in this matter was brought by SWAPO Councillors who are already boasting in the press that they have all but won the case.

48. This situation is absurd: The reasonable man beholding Judge Geier sitting as adjudicator on this matter, would without hesitation, instantly baulk and proclaim it an absurdity and a failure of justice. Indeed, this is not a situation of a reasonable apprehension of bias, it is an absurd distortion in which failure of justice was already the end result.

49. Besides the clear unreasonability of Mr Justice Geier sitting as judge, he does not have the competence to preside over this matter.

Appendix

Summary of the Advisory Opinion of 21 June 1971

LEGAL CONSEQUENCES FOR STATES OF THE CONTINUED PRESENCE OF SOUTH AFRICA IN NAMIBIA (SOUTH-WEST AFRICA) NOTWITHSTANDING SECURITY COUNCIL RESOLUTION 276 (1970)

Advisory Opinion of 21 June 1971

In its advisory opinion on the question put by the Security Council of the United Nations, "What are the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)?", the Court was of opinion,

by 13 votes to 2,

(1) that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;

by 11 votes to 4,

(2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration;

(3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.

***

For these proceedings the Court was composed as follows: President Sir Muhammad Zafrulla Khan; Vice-President Ammoun; Judges Sir Gerald Fitzmaurice, Padilla Nervo, Forster, Gros, Bengzon, Petron, Lachs, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov and Jiminez de Archaga.

The President of the Court, Sir Muhammad Zafrulla Khan, has appended a declaration to the Advisory Opinion. Vice-President Ammoun and Judges Padilla Nervo, Petron, Onyeama, Dillard and de Castro have appended

separate opinions. Judge Sir Gerald Fitzmaurice and Judge Gros have appended dissenting opinions.

Course of the Proceedings

(paras. 1-18 of the Advisory Opinion)

The Court first recalls that the request for the advisory opinion emanated from the United Nations Security Council, which decided to submit it by resolution 284 (1970) adopted on 29 July 1970. The Court goes on to recapitulate the different steps in the subsequent proceedings.

It refers in particular to the three Orders of 26 January 1971 whereby the Court decided not to accede to the objections raised by the Government of South Africa against the participation in the proceedings of three Members of the Court. These objections were based on statements which the Judges in question had made in a former capacity as representatives of their Governments in United Nations organs dealing with matters concerning Namibia, or on their participation in the same capacity in the work of those organs. The Court came to the conclusion that none of the three cases called for the application of Article 17, paragraph 2, of its Statute.

Objections against the Court's Dealing with the Question

(paras. 19-41 of the Advisory Opinion)

The Government of South Africa contended that the Court was not competent to deliver the opinion, because Security Council resolution 284 (1970) was invalid for the following reasons: *(a)* two permanent members of the Council abstained during the voting (Charter of the United Nations, Art. 27, para. 3); *(b)* as the question related to a dispute between South Africa and other Members of the United Nations, South Africa should have been invited to participate in the discussion (Charter, Art. 32) and the proviso requiring members of the Security Council which are parties to a dispute to abstain from voting should have been observed (Charter, Art. 27, para. 3). The Court points out that *(a)* for a long period the voluntary abstention of a permanent member has consistently been interpreted as not constituting a bar to the adoption of resolutions by the Security Council; *(b)* the question of Namibia was placed on the agenda of the Council as a *situation* and the South African Government failed to draw the Council's attention to the necessity in its eyes of treating it as a *dispute*.

In the alternative the Government of South Africa maintained that even if the Court had competence it should nevertheless, as a matter of judicial propriety, refuse to give the opinion requested, on account of political pressure to which it was contended, the Court had been or might be subjected. On 8 February 1971, at the opening of the public sittings, the President of the Court declared that it would not be proper for the Court to entertain those observations, bearing as they did on the very nature of the Court as the principal judicial organ of the United Nations, an organ which, in that capacity, acts only on the basis of law, independently of all outside influences or interventions whatsoever.

The Government of South Africa also advanced another reason for not giving the advisory opinion requested: that the question was in reality contentious, because it related to an existing dispute between South Africa and other States. The Court considers that it was asked to deal with a request put forward by a United Nations organ with a view to seeking legal advice on the consequences of its own decisions. The fact that, in order to give its answer, the Court might have to pronounce on legal questions upon which divergent views exist between South Africa and the United Nations does not convert the case into a dispute between States. (There was therefore no necessity to apply Article 83 of the Rules of Court, according to which, if an advisory opinion is requested upon a legal question "actually pending between two or more States", Article 31 of the Statute, dealing with judges *ad hoc*, is applicable; the Government of South Africa having requested leave to choose a judge *ad hoc*, the Court heard its observations on that point on 27 January 1971 but, in the light of the above considerations, decided by the Order of 29 January 1971 not to accede to that request.)

In sum, the Court saw no reason to decline to answer the request for an advisory opinion.

History of the Mandate

(paras. 42-86 of the Advisory Opinion)

Refuting the contentions of the South African Government and citing its own pronouncements in previous proceedings concerning South West Africa (Advisory Opinions of 1950, 1955 and 1956; Judgment of 1962), the Court recapitulates the history of the Mandate.

The mandates system established by Article 22 of the Covenant of the League of Nations was based upon two principles of paramount importance: the principle of non-annexation and the principle that the well-being and development of the peoples concerned formed a sacred trust of civilisation. Taking the developments of the past half century into account, there can be little doubt that the ultimate objective of the sacred trust was self-determination and independence. The mandatory was to observe a number of obligations, and the Council of the League was to see that they

were fulfilled. The rights of the mandatory as such had their foundation in those obligations.

When the League of Nations was dissolved, the raison d'etre and original object of these obligations remained. Since their fulfilment did not depend on the existence of the League, they could not be brought to an end merely because the supervisory organ had ceased to exist. The Members of the League had not declared, or accepted even by implication, that the mandates would be cancelled or lapse with the dissolution of the League.

The last resolution of the League Assembly and Article 80, paragraph 1, of the United Nations Charter maintained the obligations of mandatories. The International Court of Justice has consistently recognized that the Mandate survived the demise of the League, and South Africa also admitted as much for a number of years. Thus the supervisory element, which is an essential part of the Mandate, was bound to survive. The United Nations suggested a system of supervision which would not exceed that which applied under the mandates system, but this proposal was rejected by South Africa.

Resolutions by the General Assembly and the Security Council
(paras. 87-116 of the Advisory Opinion)

Eventually, in 1966, the General Assembly of the United Nations adopted resolution 2145 (XXI), whereby it decided that the Mandate was terminated and that South Africa had no other right to administer the Territory. Subsequently the Security Council adopted various resolutions including resolution 276 (1970) declaring the continued presence of South Africa in Namibia illegal. Objections challenging the validity of these resolutions having been raised, the Court points out that it does not possess powers of judicial review or appeal in relation to the United Nations organs in question. Nor does the validity of their resolutions form the subject of the request for advisory opinion. The Court nevertheless, in the exercise of its judicial function, and since these objections have been advanced, considers them in the course of its reasoning before determining the legal consequences arising from those resolutions.

It first recalls that the entry into force of the United Nations Charter established a relationship between all Members of the United Nations on the one side, and each mandatory Power on the other, and that one of the fundamental principles governing that relationship is that the party which disowns or does not fulfil its obligations cannot be recognized as retaining the rights which it claims to derive from the relationship. Resolution 2145

(XXI) determined that there had been a material breach of the Mandate, which South Africa had in fact disavowed.

It has been contended *(a)* that the Covenant of the League of Nations did not confer on the Council of the League power to terminate a mandate for misconduct of the mandatory and that the United Nations could not derive from the League greater powers than the latter itself had, *(b)* that, even if the Council of the League had possessed the power of revocation of the Mandate, it could not have been exercised unilaterally but only in co-operation with the Mandatory; *(c)* that resolution 2145 (XXI) made pronouncements which the General Assembly, not being a judicial organ, was not competent to make; *(d)* that a detailed factual investigation was called for *(e)* that one part of resolution 2145 (XXI) decided in effect a transfer of territory.

The Court observes *(a)* that, according to a general principle of international law (incorporated in the Vienna Convention on the Law of Treaties), the right to terminate a treaty on account of breach must be presumed to exist in respect of all treaties, even if unexpressed; *(b)* that the consent of the wrongdoer to such a form of termination cannot be required; *(c)* that the United Nations, as a successor to the League, acting through its competent organ, must be seen above all as the supervisory institution competent to pronounce on the conduct of the Mandatory; *(d)* that the failure of South Africa to comply with the obligation to submit to supervision cannot be disputed; *(e)* that the General Assembly was not making a finding on facts, but formulating a legal situation; it would not be correct to assume that, because it is in principle vested with recommendatory powers, it is debarred from adopting, in special cases within the framework of its competence, resolutions which make determinations or have operative design.

The General Assembly, however, lacked the necessary powers to ensure the withdrawal of South Africa from the Territory and therefore, acting in accordance with Article 11, paragraph 2, of the Charter, enlisted the co-operation of the Security Council. The Council for its part, when it adopted the resolutions concerned, was acting in the exercise of what it deemed to be its primary responsibility for the maintenance of peace and security. Article 24 of the Charter vests in the Security Council the necessary authority. Its decisions were taken in conformity with the purposes and principles of the Charter, under Article 25 of which it is for member States to comply with those decisions, even those members of the Security

Council which voted against them and those Members of the United Nations who are not members of the Council.

Legal Consequences for States of the Continued Presence of South Africa in Namibia

(paras. 117-127 and 133 of the Advisory Opinion)

The Court stresses that a binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence.

South Africa, being responsible for having created and maintained that situation, has the obligation to put an end to it and withdraw its administration from the Territory. By occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation. It also remains accountable for any violations of the rights of the people of Namibia, or of its obligations under international law towards other States in respect of the exercise of its powers in relation to the Territory.

The member States of the United Nations are under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia and to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia. The precise determination of the acts permitted - what measures should be selected, what scope they should be given and by whom they should be applied - is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter. Thus it is for the Security Council to determine any further measures consequent upon the decisions already taken by it. The Court in consequence confines itself to giving advice on those dealings with the Government of South Africa which, under the Charter of the United Nations and general international law, should be considered as inconsistent with resolution 276 (1970) because they might imply recognizing South Africa's presence in Namibia as legal:

(a) Member States are under obligation (subject to *(d)* below) to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation. With respect to multilateral treaties, the same rule cannot be applied to certain general conventions such as those with humanitarian character, the non-performance of which may adversely affect the people of Namibia: it will be for the competent international organs to take specific measures in this respect.

(b) Member States are under obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there; and to make it clear to South Africa that the maintenance of diplomatic or consular relations does not imply any recognition of its authority with regard to Namibia.

(c) Member States are under obligation to abstain from entering into economic and other forms of relations with South Africa on behalf of or concerning Namibia which may entrench its authority over the territory.

(d) However, non-recognition should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, the illegality or invalidity of acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate cannot be extended to such acts as the registration of births, deaths and marriages.

As to States not members of the United Nations, although they are not bound by Articles 24 and 95 of the Charter, they have been called upon by resolution 276 (1970) to give assistance in the action which has been taken by the United Nations with regard to Namibia. In the view of the Court, the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of the situation which is maintained in violation of international law. In particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of any such relationship. The Mandate having been terminated by a decision of the international organization in which the supervisory authority was vested, it is for non-member States to act accordingly. All States should bear in mind that the entity injured by the illegal presence of South Africa in Namibia is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted.

Accordingly, the Court has given the replies reproduced above on page 1.

Propositions by South Africa concerning the Supply of Further Factual Information and the Possible Holding of a Plebiscite

(paras. 128-132 of the Advisory Opinion)

The Government of South Africa had expressed the desire to supply the Court with further factual information concerning the purposes and objectives of its policy of separate development, contending that to establish a breach of its substantive international obligations under the Mandate it would be necessary to prove that South Africa had failed to exercise its powers with a view to promoting the well-being and progress of the inhabitants. The Court found that no factual evidence was needed for the purpose of determining whether the policy of apartheid in Namibia was in conformity with the international obligations assumed by South Africa. It is undisputed that the official governmental policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups. This means the enforcement of distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights. This the Court views as a flagrant violation of the purposes and principles of the Charter of the United Nations.

The Government of South Africa had also submitted a request that a plebiscite should be held in the Territory of Namibia under the joint supervision of the Court and the Government of South Africa. The Court having concluded that no further evidence was required, that the Mandate had been validly terminated and that in consequence South Africa's presence in Namibia was illegal and its acts on behalf of or concerning Namibia illegal and invalid, it was not able to entertain this proposal.

By a letter of 14 May 1971 the President informed the representatives of the States and organizations which had participated in the oral proceedings that the Court had decided not to accede to the two above-mentioned requests.

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