

# **APARTHEID, SOUTH AFRICA AND INTERNATIONAL LAW**

**Selected Documents and Papers**

**Edited by**

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## INTRODUCTION

Apartheid is now generally recognised as a flagrant violation of international law, indeed an international crime. International law has, therefore, become an important instrument in the struggle for the elimination of apartheid.

The Charter of the United Nations, the Universal Declaration of Human Rights and other conventions and declarations of the United Nations and its family of agencies, judgements and opinions of the International Court of Justice and reports of the International Law Commission have created new norms of international law against apartheid, which are of wider significance. The consideration of the racial problem in South Africa by the United Nations General Assembly since 1946, and by other United Nations organs and inter-governmental organisations since then, has contributed substantially to these new norms.

Moreover, authoritative organs of the United Nations have repeatedly condemned the actions of the racist regime of South Africa, such as racial discrimination, segregation and repression in the country, continued occupation of Namibia and acts of aggression and terrorism against neighbouring States as violations of the Charter of the United Nations and of international law. They have also denounced the so-called "independence" of bantustans created by that regime and the new racist constitution enforced by it in the rest of South Africa in 1984 as null and void.

The legitimacy of the racist regime in South Africa has been placed in question, the legitimacy of the struggle for the elimination of apartheid has been recognised, and the national liberation movements of South Africa and Namibia have acquired international status.

The United Nations Special Committee against Apartheid has played a significant role in promoting these developments and gave special attention to publicising the international law aspects of apartheid as a means to reinforce the international efforts for the elimination of apartheid. It organised a hearing of legal experts in New York in March 1981 and an international seminar on "the Legal Status of the Apartheid Regime and Other Legal Aspects of the Struggle against Apartheid" in Lagos in August 1984.

I have prepared this compilation of selected documents and papers in order to assist in making more widely known the implications of the new norms of international law for the struggle against apartheid. Many of the papers had to be drastically condensed in order to avoid undue duplication and limit the length of the compilation.

I wish to express my gratitude to the Chairman of the Special Committee against Apartheid, H.E. Major-General Joseph N. Garba (Nigeria), for encouraging me to undertake this task, and a number of international lawyers and others - particularly Mr. Kader Asmal - for their advice.

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**I. DECLARATION OF THE SEMINAR ON THE  
LEGAL STATUS OF THE APARTHEID REGIME AND  
OTHER LEGAL ASPECTS OF THE STRUGGLE  
AGAINST APARTHEID  
(Lagos, 13-16 August 1984)**

*Introduction*

The international Seminar on the Legal Status of the Apartheid Regime and Other Aspects of the Struggle against Apartheid was organised by the United Nations Special Committee against Apartheid in co-operation with the Federal Military Government of Nigeria.

The Seminar brought together jurists and social scientists from a number of countries in Africa, Europe, North America and Asia, representing the principal legal systems of the world. The Seminar was opened by H.E. Major-General J. N. Garba, Chairman of the Special Committee against Apartheid, and heard addresses from H.E. Dr. Ibrahim A. Gambari, Minister for External Affairs of Nigeria, H.E. Mr. Ibrahima Fall, Minister for Higher Education of Senegal and H.E. Mr. E. J. M. Svogbo, Minister for Justice, Legal and Parliamentary Affairs of Zimbabwe. The greetings of the Secretary-General of the United Nations were communicated to the Seminar by Mr. Enuga S. Reddy, Assistant Secretary-General in charge of the Centre against Apartheid.

The Seminar elected H.E. Mr. Chike Ofodile, Attorney-General and Minister for Justice of the Federal Republic of Nigeria, as its Chairman.

Statements were made at the opening sessions by representatives of the African National Congress of South Africa, the Pan Africanist Congress of Azania, the Secretary-General of the International Commission of Jurists, the Palestine Liberation Organisation, the Movement of Non-Aligned Countries, the United Nations Educational, Scientific and Cultural Organisation and the League of Arab States.

The Seminar recognised that recent developments in southern Africa made it imperative for the international community to understand the urgent necessity for action through the application of international law to a situation which constituted one of the most serious threats to international peace and security.

Southern Africa today is a battlefield. For several years, the South African regime has been fighting an undeclared war against its neighbours. Military aggression, combined with economic pressure, has been the chosen method of regional

destabilisation and domination. South Africa has invoked the discredited legal notion of sphere of influence in order to enforce the colonial idea of a constellation of States.

The consequences have been devastating. Thousands of Angolans, Mozambicans, Namibians and South African refugees and citizens of other independent States have been killed, maimed and made homeless. Refugee camps have been particular targets of the South African regime. Economic damage to Angola and Mozambique alone amounts to over \$US 14 billion.

Namibia's one and one-half million people are subjected to a ruthless military occupation by South African troops and police. A tenth of the population has been driven into exile; 80 per cent of the population lives under martial law; hundreds are detained without trial or have "disappeared" after arrests. Church leaders have described apartheid rule in Namibia as a reign of terror.

In South Africa itself, a massive militarisation drive coupled with a complex series of adjustments to the apartheid system - mistakenly referred to as reforms by some of South Africa's allies - have centralised and consolidated white state power. In this process, nearly 8 million Africans have been denationalised in pursuit of the South African regime's policy of establishing "independent" homelands for Africans, and nearly 3.5 million Africans have been deported from their residences. A new constitution is about to be inaugurated establishing a tricameral parliament for whites, so-called Coloureds and South Africans of Indian descent.

The Seminar recognised that the international community had already condemned the total illegitimacy of the new constitutional arrangements in South Africa. They represent a step in the direction of consolidating rather than eliminating apartheid. The principles of white domination, ethnic division and African exclusion run right through the constitution. Apartheid in the form of racial group areas was brought right into parliament. The white chamber has a permanent majority. The African people are totally excluded. White domination is legally protected under the constitutional phrase "own affairs" which excludes the competence of the other chambers to consider the whole legislative scheme of apartheid which is thus constitutionally protected.

The only acceptable constitution is one based on non-racial and democratic principles in which all the people have the vote on a basis of full equality in an undivided country.

At the same time, the black population of South Africa and Namibia, united in a common desire to rid the subcontinent of apartheid and colonialism and establish democratic societies, is increasingly committed to a struggle through their liberation movements which takes many forms including armed struggle. They are supported in this struggle by independent African countries and by

people and Governments throughout the world. But some Western countries and their allies continue to support the apartheid system through their political, economic, military, nuclear, cultural and sporting collaboration in clear breach of international law.

### ***Contemporary Law and Liberation***

The Seminar recognised that international law has responded to the political issues arising out of the situation in southern Africa in a dramatic fashion. From the time the General Assembly of the United Nations was first seized of the race issue in South Africa in 1946, the General Assembly, the Security Council, specialised agencies and subsidiary organs of the United Nations, together with regional organisations, have established a repertory of practice unparalleled in modern international relations. Resolutions of international organisations, especially of the General Assembly, have deeply affected the perception of States through their state practice, of lawyers and the jurisprudence of the International Court of Justice in such a way that an international community consensus has been established.

International law has forged three important instruments which have won general acceptance. These are: (a) the rules relating to the right of self-determination; (b) the principle of the illegality of racial discrimination; and (c) the rules relating to the legitimacy of the liberation struggle in South Africa.

The Seminar discussed the ways by which these norms have developed. They arose directly from certain provisions of the Charter of the United Nations and derived content and precision from numerous resolutions and authoritative declarations of the United Nations and international conferences and conventions adopted by the General Assembly. These developments have given rise to rules of customary international law which have, therefore, often averted the need for ratification of treaties in certain cases.

The acceptance by the international community of the principle of *jus cogens*, certain basic, peremptory rules which control the freedom of States to enter into transactions and which regulate the effects of illegality on the international plane, has important consequences in the southern African situation.

There is, therefore, a strong body of law to support the international campaign for the eradication of apartheid and colonialism in South Africa and to provide support for the primary instruments of change, the national liberation movement of the people of South Africa.

### ***Legal Status of the South African Regime***

The central issue for law is the nature of the struggle in South Africa. It has been generally accepted incontrovertibly that the systematic, persistent and

massive violation of human rights is not a matter of domestic jurisdiction, thus excluding external intervention. But the application of the principle of self-determination to the situation in South Africa has had the important consequence that the political arrangements under apartheid have been assimilated to a colonial situation.

The right to self-determination has emerged as part of *jus cogens*, overriding principles of imperative norms of international law which cannot be set aside by treaty or acquiescence, but only by the formulation of a subsequent norm of the same States to the contrary. The recognition by the international community that apartheid is a denial of a national right as well as human rights means that the rules and principles associated with the practice of the United Nations with regard to decolonisation apply in their entirety to the South African situation.

This approach culminated in the decision of the General Assembly of the United Nations to refuse to accept the credentials of the so-called representatives of South Africa on the grounds that they did not represent the whole people of South Africa and the regime lacked legitimacy because of its breach of fundamental rules of international law.

The colonial nature of the South African regime, the Seminar recognised, arises from the institution and operation of the apartheid system in South Africa. There are, regrettably, many countries in the world where the people do not have an effective say in government. Where South Africa is unique is that it is the constitution itself which excludes the overwhelming majority of the people from the exercise of sovereignty and does so on the ground that they are of indigenous origin. This is the fundamental legal fact of apartheid. Twenty-five million Africans, 72 per cent of the total population, have, ever since the Union of South Africa was created in 1910, been treated as a colonised population. What happened in 1910, when the Union of South Africa was set up was not an act of decolonisation by Great Britain but a grant of independence to the colonisers, not to the colonised who were neither represented at the negotiations nor listened to when they made representations. The relationship between the colonisers and the colonised altered only in that it subjected the colonised to even greater domination by the colonisers.

The granting of independence to the Union of South Africa preceded the modern principles of international law enshrined in the right to decolonisation and to the self-determination of peoples subject to alien domination and in the prohibition of racial discrimination. While other States which have had a history of oppressing national groups have recognised, to a lesser or greater degree, the rights of their indigenous peoples, South Africa is alone and unique in basing its State upon a policy of dispossession and the perpetuation of alien and colonial-type domination.

A regime which negates the legal personality of the great majority of its people

on the ground that they are of indigenous origin, which deprives them of elementary rights and leaves them without citizenship and subjects them to massive, persistent and cruel racial discrimination cannot claim to be an independent community based on self-determination. It may have some of the physical ingredients of a State, but it lacks fundamental legitimacy because of its racist and minority foundations, Only the creation of a non-racial democracy based on the will of the majority of the population can introduce the element of legitimacy presently lacking.

The widely-known laws which impose racial discrimination in South Africa are essentially the symbolical and instrumental superstructure which maintains and reinforces the colonial base of apartheid, namely, the dispossession of the land (87 per cent reserved by the Land Acts for exclusive white ownership and occupation); control of movement (hundreds of thousands of blacks punished under the pass laws each year); control of residence in the form of bantustans in the rural area and locations and compounds in the urban areas; and control of labour, primarily under the pass laws and the legal system totally dominated and organised in the interest of the whites and resulting in two systems of law, one for the Africans and one for the rest of the population.

The establishment since 1976 of the so-called “independent” homelands - which has been denounced by the United Nations as an attempt to violate the right to self-determination of the people of South Africa and a further attempt to partition the national territory - has been presented to the outside world by the South African regime as an exercise in the right to self determination.

The Seminar considered it to be extremely important that the present international policy of non-recognition of the four “homelands” was strictly maintained and that covert recognition of their travel documents in their territories should not result in the subversion of the legal obligation of non-recognition.

The Seminar considered further that the legal objections to the granting of statehood to these homelands warranted a detailed analysis as to why the South African claim was impermissible.

The conditions for the exercise of the right to self-determination (derived from Article 1(2) of the Charter of the United Nations and common article 1 of the two International Covenants on Human Rights) are:

- (a) That there exists a “people” within the meaning of common article 1;
- (b) That a determination of their political status is made by that people;

- (c) That this determination is made freely;
- (d) That the people are free to pursue their economic, social and cultural development.

The “elements of a definition” of a “people” entitled to self-determination as formulated by the practice of the United Nations are:

- (a) The term “people” denotes a social entity possessing a clear identity and its own characteristics;
- (b) It implies a relationship with a territory, even if the people in question has been wrongly expelled from it and artificially replaced by another population;
- (c) A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognised in article 27 of the International Covenant on Civil and Political Rights.

In relation to the bantustans, the fundamental fact, universally acknowledged except in Pretoria, is that the scheme as a whole has been imposed by the racist regime against the will of the great majority of the people and with the objective precisely to frustrate their just claims to full rights in relation to the whole land. An examination of the details of the scheme merely provides factual proofs that the exercise was never seriously intended to constitute self-determination, which vests in and must be exercised by the South African people as a whole.

The alleged tribal units are not “social entities possessing a clear identity and their characteristics.” They reflect rather the white view of African traditional culture rather than the reality. Some of the supposed tribes have no bantustan status; others have been divided into two bantustans (e.g. Xhosa), while more than one have been allocated to a single bantustan (e.g. the Pedi and Ndebele).

The territories of the bantustans are not coherent areas of traditional lands of African tribes, but a patchwork of small pieces of land with their frontiers drawn in such a way as to exclude the lands of powerful white settlers, of white-owned industries or important mineral resources. The territories of Bophuthatswana and Ciskei have been divided into 19 separate areas not counting the so-called “black spots.”

A substantial proportion (in the case of Bophuthatswana amounting to 64 per cent of the majority) of the supposed “people” has little or no special relation to the territory concerned. These are Africans living in the so-called “white areas” who are being arbitrarily assigned by the Pretoria regime to one or other of the bantustans in order that it can later claim that there are no African citizens in the white areas. Those whose labour is no longer required are being deported to

their allotted bantustan.

Applying the third element of the definition, the tribal units, in so far as they may be said to exist, are an example of the ethnic or linguistic minorities with which a people should not be confused. The people entitled to self-determination in South Africa is the entire population, and in particular the whole of the disenfranchised African population.

As to the second and third conditions for the exercise of the right to self-determination, the people concerned have not determined their political status or done so freely. The delineation of the territories, the allocation of the populations to these territories and the political status of the bantustans have been solely determined by the white minority and its Parliament.

The controlled elections or referenda by which the populations were supposed to have approved the creation of the bantustans were in no sense a free determination. An example was Vendaland where 80 per cent of the people voted against independence, but their elected representatives were then detained under "security" legislation, and the President of the bantustan elected by the minority representatives. Finally, the people concerned are in no sense "free to pursue their economic, social and cultural development." Seventy-two per cent of the population of South Africa has been allocated to 13 per cent of the total land surface of South Africa, much of it being poor agricultural land affected by erosion.

Over 70 per cent of the economically active population has no alternative but to engage in the migratory labour system to provide cheap labour for the white areas. Access to this employment is strictly controlled by the South African authorities. The bantustans are dependent upon South Africa for financing their budgets to the extent of two thirds to three quarters. A large part of this is devoted to financing deportations from white areas to townships and camps in the bantustans. Capital inflow is almost entirely channelled through agencies of the Pretoria regime. It is only a fraction of that needed to make the economies of the bantustans viable, and three times as much capital is provided to white-owned as to African-owned enterprises. The extreme poverty of the bantustans, the constant deportations and the white domination of their economy make meaningless any claim to freedom to pursue their economic, social and cultural development. It follows, therefore, that none of the conditions required under international law for a valid exercise of the right to self-determination is satisfied in the alleged conversion of the bantustans into "independent" States, and the world community has very properly withheld recognition of them.

For more than a decade, the United Nations has recognised the special role of the national liberation movements of South Africa. Drawing on the experience of the earlier practice concerning the movements of liberation in the Portuguese colonies, the General Assembly and on occasion the Security Council have

established a clear practice from which some legal conclusions can be drawn. The Seminar considered that these are basic principles underpinning the right to liberation.

On the basis of the specific resolutions of the two major organs of the United Nations and on the additional basis of General Assembly resolutions, including the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970) and the Definition of Aggression (1974), the international community has recognised the right of the people of South Africa as a whole, irrespective of race, colour or creed, to the exercise of the right to self-determination. The connection between self-determination and apartheid has been made and the status of liberation movements recognised. Most of all, the fight of the people of South Africa, through their liberation movement, to use all the means at their disposal, including armed struggle, has been recognised.

In traditional international law, insurgency as a state of affairs has been recognised for nearly a century. Whether such a state of affairs exists has depended on recognition by other States. But in the case of liberation movements, there is the additional factor of legitimacy and the United Nations has accepted the national liberation movements recognised by the Organisation of African Unity as the authentic representatives of the people of South Africa.

Such a recognition of the legitimacy of the struggle has important consequences. The national liberation movements of South Africa, as the authentic representatives of the people, have the right to seek and obtain assistance in the exercise of the right to self-defence against the international crime constituted by the denial of self-determination and the criminal nature of the apartheid system. The Seminar drew attention to the fact that States have the legal right to provide all forms of assistance to these movements through their right to participate in collective self-defence measures against the domestic and external terrorism of the apartheid regime.

Arising from the protected role of the national liberation movement, the South African regime is bound by the rules of international humanitarian law relating to armed conflicts to treat captured combatants as prisoners of war.

Article 1 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) adopted on 8 June 1977 and the development of rules of international customary law show a commitment to assimilate the struggle against apartheid into the scheme of humanitarian law which regulates international armed conflicts. Protocol I recognises that the conventional criteria for identifying prisoners of war is irrelevant to the kind of military operations conducted by combatants of a national liberation movement. Any combatant as

defined by article 43, who falls into the hands of the enemy, is a prisoner of war. The South African regime has refused to ratify this protocol, but the widespread recognition of its norms by the international community has demonstrated that this provision reflects customary international law as the expectation of the world community.

It should be noted that the African National Congress of South Africa made a declaration in November 1980 to apply the Geneva Convention to captured South African forces. Therefore, the continued imprisonment or execution of combatant members of the African National Congress of South Africa by the apartheid regime and its courts throws into sharp focus the criminal and reckless disregard by the South African regime of basic rules concerning the humanitarian conduct of war. These men and women are exercising their legitimate rights to overthrow a regime whose policies are now recognised as a crime against humanity under international law. The execution of combatants is a war crime. The inability or refusal of South Africa's allies to ensure that the regime respects these humanitarian rules involves the culpability of these States.

The issue of political prisoners in South Africa and the demand for their release, especially that of such leaders as Nelson Mandela, Walter Sisulu, Zephania Mothopeng, Jeff Masemula, Ahmed Kathrada and Dennis Goldberg, have been closely associated with the granting of a full and free voice to the majority in the determination of their destiny.

Apart from any such consideration that these political prisoners are imprisoned for their lawful struggle, the General Assembly and the Security Council have recognised that meaningful negotiations about the future of the country can only be undertaken with the leaders of the people, many of whom are in prison.

The Seminar affirmed its support for the international campaign for the release of all political prisoners in South Africa.

### ***Apartheid as a Crime against Humanity***

The Seminar considered that the development of the rules concerning the norms of non-discrimination at the level of international law has important implications for the world community. Certain obligations are owed to all States which have a legal interest in their protection. As identified by the International Court of Justice in the Barcelona Traction case (1970), they are obligations *erga omnes* and derive in the contemporary world from the outlawing of acts of aggression and of genocide and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

The Court had earlier referred to the fact that there are principles which are binding without any conventional obligation. On this basis, the General

Assembly in 1973 declared apartheid a crime against humanity. The Seminar accepted that if non-discrimination is a case of *jus cogens*, apartheid, perhaps the most monstrous form of racial discrimination, also constitutes a specific and particular case of violation of *jus cogens*.

Subsequent developments at the level of customary international law showed that apartheid contains the elements of genocide which would also be a case of *jus cogens* in its own right.

The adoption by the General Assembly of the International Convention on the Suppression and Punishment of the Crime of Apartheid in 1973 - now ratified by almost 80 States - must be seen in the context of numerous resolutions of the General Assembly and the Security Council which have declared apartheid a crime against humanity. The Convention associates the crime with a serious threat to international peace and security and imposes international criminal responsibility on all those who commit the crime of apartheid and their accomplices. The Convention confers jurisdiction to all States parties to try persons guilty of the crime of apartheid or those who aid and abet its commission.

The Seminar made an urgent plea to States which had not done so, especially the Western States, to ratify this Convention. It commended the work of the Commission on Human Rights which has prepared lists of individuals, organisations, institutions and representatives of States who have participated in the crime or have acted as accomplices. States parties to the Convention have the authority to take action against these individuals or entities, the latter of which, on the basis of the Nuremberg Principles, can be described as criminal organisations.

### ***Consequences of Illegitimacy of the South African Regime***

The Seminar considered that the General Assembly, acting as the spokesman of the international community and as the only universal body, was entitled to proclaim the South African regime, because of its systematic violation of *jus cogens* involving racial discrimination and the infringement of the right of peoples to self-determination, as having placed itself in a situation of international illegitimacy.

South Africa has not infringed a mere norm of international law for which there are traditional remedies to confront and resolve the breach.

The Seminar considered that a State which had systematically, repeatedly and seriously violated *jus cogens* had isolated itself from the system of fundamental values which constituted the very essence of the international community, its current existence and, indeed, its survival.

The primary consequence, in the view of the Seminar, is that a State Member of

the United Nations which is in a situation of illegitimacy could be expelled from the Organisation. A State which has persistently violated the principles contained in the Charter of the United Nations, as provided for in Article 6 of the Charter, and which has been expelled, would still be answerable to the international community as the Charter provides (in Article 2, para. 6) that the Organisation shall ensure that it acts in accordance with the principles of the Charter so far as may be necessary for the maintenance of international peace and security.

Treaties entered into in breach of *jus cogens* are automatically void. The Seminar considered that the status of the South African regime implied that normal relations could not be pursued with it. One inescapable consequence of illegitimacy is that States should not maintain diplomatic, consular, economic or any other relations with South Africa. Such has been the demand of the international community as expressed through the General Assembly. The continued exercise of the veto by the three Western permanent members of the Security Council is a clear example of their refusal to remove a situation of serious criminality.

### ***Namibia***

It is now nearly 18 years since the General Assembly revoked the mandate exercised by South Africa over Namibia. It is more than 13 years since the International Court of Justice ruled that the continued presence of South Africa was illegal and that it was under an obligation to withdraw from Namibia immediately. The Court also held that States were under an obligation not to recognise the legality of South Africa's presence in Namibia, not to imply recognition or lend support to South Africa or its administration.

In spite of this very clear statement of the law and in spite of the overwhelming support by the international community for United Nations action over Namibia, South Africa remains entrenched in Namibia, conducting a violent colonial war against the people of Namibia, led by their liberation movement, the South West Africa People's Organisation. South Africa's refusal to accept the terms of Security Council resolution 435 (1978) of 29 September 1978 under which the United Nations would conduct free and fair elections has been assisted, firstly, by the activities of the Contact Group of States which have negotiated with the aggressor. Secondly, since 1981, irrelevant and impermissible conditions have been attached to South Africa's consent to a cease-fire and to subsequent elections through a "linkage" with the presence of troops invited by Angola to protect its sovereignty and independence from South Africa's aggression.

The Seminar was conscious that the inability of the international community to remove this serious illegality was likely to bring international law into greater disrepute. The Seminar urged maximum support for the United Nations Council for Namibia, the legal Administering Authority for Namibia, in its attempt to

protect the natural and other resources of Namibia. The Seminar considered that it was an urgent priority to provide maximum political, material and other support to the South West Africa People's Organisation in its struggle for national liberation. The Seminar demanded that the Security Council take immediate steps to implement resolutions 435 (1978) and invoke the provision of Chapter VII of the Charter by imposing mandatory economic sanctions in the face of the intransigence of the South African regime.

### ***Aggression against Neighbouring States: Terrorism and the South African Regime***

Closely linked with the oppression of the South African people by the apartheid regime is the aggressiveness of the apartheid regime towards its neighbouring States. The General Assembly and the Security Council have repeatedly condemned South Africa's acts of aggression against the neighbouring African States. Since 1975 the regime has wreaked havoc and devastation on much of the civilian population of Angola, Lesotho and Mozambique. Destabilisation acts against Zimbabwe have occurred since its independence. These acts of aggression are contrary to the Charter of the United Nations and give rise to a duty to pay reparation to the victim-States.

The Seminar condemned the invocation of the alleged right of "hot pursuit" against guerrillas over land territory by a regime. This has no justification under the principles of international law. In any event, the violence associated with the "pursuit" has been exercised by the Pretoria regime against civilians and refugees.

The Seminar rejected the self-defence claim advanced by the South African regime to justify its aggression against its neighbours as devoid of any merit. The Seminar noted that since 1965, the General Assembly and the Security Council had clearly established that the illegal status of the occupying Power denied that Power the automatic right to self-defence. Conversely, the right of the victim-peoples to take steps to pursue their right to self-determination cannot be equated with the aggressor's actions.

The Seminar specifically called upon the international community to support the right of Lesotho, completely surrounded by South Africa, to have free and unfettered access to the rest of the world.

The Seminar was seriously concerned at the barbaric actions taken by the regime against refugees fleeing from its persecution. Apart from the notorious massacre at Kassinga, Angola, when more than 800 Namibian refugees were murdered by South African forces, there have been a series of other attacks, abductions of and acts of violence against refugees in Angola, Botswana, Lesotho, Swaziland and Mozambique.

One of the clear motives of these attacks is to stifle the economic development of these States and to frustrate the work of the Southern African Development Co-ordination Conference (SADCC) which aims to lessen the dependence of the economies of those countries on South Africa.

The Seminar called upon the world community to provide maximum economic and other forms of support to those States which have been the victims of the racist aggression and destabilisation.

The Seminar considered that refugee camps and settlements enjoy a special, protected status in international law. It drew attention to the draft Principles on Prohibition of Military and Armed Attacks on Refugee Camps and Settlements, adopted by the Executive Committee of the Office of the United Nations High Commissioner for Refugees in 1983. Under the first draft principle, camps and settlements accommodating refugees shall not be the object of military or armed attacks. The second draft principle lays down that military attacks on refugee camps and settlements are in grave violation of existing fundamental principles of international humanitarian law. They can never be justified under any circumstances and must consequently always be condemned.

Furthermore, the Seminar made an earnest appeal to all States to respect the status and rights of refugees from South Africa, especially the principle that prohibits the expulsion or return of a refugee in the frontiers of a State where his or her life or freedom would be threatened on account of race, religion or nationality.

### ***Action against the Apartheid Regime***

The Seminar recognised that the international community had established clear guidelines for action in support of international law and for combating crimes committed by South Africa. Since 1963, the General Assembly has passed a large number of resolutions prescribing courses of action addressed to Governments, international and non-governmental organisations and individuals. These resolutions have addressed themselves to the need for the cessation of military, nuclear, economic, sporting, cultural and other collaboration with South Africa.

The Seminar affirmed its support for those resolutions and programmes of action as providing a necessary basis for concerted and co-ordinated action against the apartheid regime. It appealed to public opinion, especially to lawyers in the West, to recognise the urgency of the situation in South Africa and to assist in the process whereby their Governments would support action against the regime and provide assistance to the liberation movements.

The most urgent need is for the Security Council to impose binding economic, military, nuclear and other forms of sanctions because the situation in southern

Africa is a clear threat to international peace and security. Internally, the regime wages war on its own population through a process of enslavement, murder and terror. Externally, the attacks on front-line States and neighbouring States and its possession of a nuclear capability indicate that there is a clear and present danger to the international community requiring the Security Council to act.

In the meantime, the Security Council should strengthen both the content and the machinery of monitoring the arms embargo imposed in 1977. States should follow the example of many countries which have imposed voluntary embargoes in the areas of the sale of oil, investment and other forms of collaboration.

Where Governments are unwilling to act, the Seminar appealed to legal organisations, jurists and non-governmental organisations and individuals to consider bringing actions in their municipal courts to challenge governmental inactivity or complicity in such matters as the implementation of the arms embargo. Jurists have a special role in ensuring that Governments implement in good faith their obligations under the Charter of the United Nations and that legislative measures taken to implement such matters as the arms embargo are consistent with international obligations.

The Seminar noted that in a number of countries litigation strategies had been tried or mooted by lawyers who had relied on rules of customary international law or the Charter in order to strike at acts of collaboration with a regime which violated peremptory norms of international law.

The Seminar recognised that the use of domestic and international law to combat the apartheid regime could be advanced in a number of ways.

Committees of lawyers in as many jurisdictions as possible should be set up to study ways by which General Assembly and Security Council resolutions and internationally accepted human rights norms could be used in lawsuits to impede or frustrate the practice and perpetuation of apartheid. Assistance should be provided to trade unions and anti-apartheid movements that wish to impede the export or import of materials or know-how that are in breach of international obligations.

Finally, the Seminar believed that Governments, individuals and organisations had a duty to publicise as widely as possible the norms of law relating to the struggle of the peoples of southern Africa. There ought to be greater awareness of the issues at stake, the need to support the liberation movements of South Africa and Namibia and a recognition of the way in which rules of law must be used as effective instruments of the international community in the fight against racism and colonialism so as to bring about a true and enduring peace in southern Africa.

## **II. REPORT OF THE UNITAR<sup>1</sup> COLLOQUIUM ON THE PROHIBITION OF APARTHEID, RACISM AND RACIAL DISCRIMINATION AND THE ACHIEVEMENT OF SELF-DETERMINATION IN INTERNATIONAL LAW (Geneva, 20-24 October 1980)**

### **Extracts<sup>2</sup>**

The meeting explored, defined and emphasised the importance of the linkages implicit in the title of the conference. If the law is a seamless web, so is the strategy against apartheid, racism and denials of self-determination. The institutions created to pursue the various parts of this indivisible strategy, the legal instruments generated by these institutions, and the forms and forums of implementation that have developed, must be scrutinised with a view to making them into a more coherent, mutually reinforcing whole.

In addition, this unified strategy must be made relevant to the broader development strategy for the implementation of a New International Economic Order, for beneath apartheid, racism and denials of self-determination lie many of the same factors that make for economic subjugation.

Further, there must be an examination of the linkage between the strategies pursued by the public institutions of the international community, the strategies pursued by Governments in discharge of their international and national legal obligations, and the efforts of private or non-governmental groups including churches, trade unions and public interest law firms. These parallel efforts can and must support and reinforce each other more effectively.

Next, the meeting of experts emphasised with clarity and unanimity the high priority States should accord, individually and collectively, to their normative obligation to use all means to bring to an end the supreme and continuing evils of apartheid, racism and denials of self-determination. In the case of apartheid and forceful denials of self-determination, this means that States have a duty to assist the South African liberation movement, the authentic representative of the people of South Africa, and have a right to render that assistance either through the United Nations or directly to those recognised as the instruments of that

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<sup>1</sup> United Nations Institute for Training and Research

<sup>2</sup> For the full text of the report, see United Nations document A/35/677-S/14281

liberation.

Similarly, there is a duty on the part of the international community to examine means by which existing mandatory sanctions against South Africa can be made more effective, particularly by developing more reliable means for the timely detecting and exposing of violations.

References were made to the correlation between the critical situation of human rights in South Africa and Namibia and the volume and intensity of assistance accorded to the racist regime. In this regard participants mentioned that those who supported a State in the commission of acts of apartheid were in violation of their international obligations.

Efforts should also be directed towards strengthening the economies, and thus the resistance, of front-line States.

Many participants also expressed the view that priority should be given to the enhancement of sanctions to embrace all intercourse with South Africa, whatsoever. It was a widely shared view that the Security Council's Committee established by Resolution 421 (1977) concerning the Question of South Africa should establish an enforcement secretariat and, perhaps with the help of UNITAR, develop the expert techniques necessary to effective detection of violations of those prohibitions on trade with South Africa (in weapons, etc.) which had already been ordered by the Security Council. In addition, it was proposed that the Security Council request the Secretary-General to appoint a group of experts to study, within a relatively short, fixed time, the feasibility of a broader range of sanctions, including problems involved in imposing them, probable effectiveness, and means of enforcement. On receipt of that report, the Security Council should proceed to its implementation unless South Africa had substantially complied with its previous resolutions concerning Namibia and apartheid.

It was repeatedly pointed out that the international community had a moral and legal obligation to provide training to displaced Namibians and South Africans, thereby hastening and preparing for the day of liberation. In the view of the participants, States which did not contribute to those programmes were distinctly in violation of their international obligations.

The meeting considered and approved the view that apartheid, racism and denials of self-determination should come to be perceived as violative of the most fundamental norms governing international conduct. The meeting heard various views as to the legal consequences this might entail. Among the views expressed on this subject were these:

First, no State might under any circumstances justify a violation of peremptory norm of *jus cogens*, nor is any treaty, agreement or unilateral

act valid which conflicted with such a norm.

Second, a regime which consistently violated such a norm might eventually lose its legitimacy as the recognised government of the State concerned.

Third, persons with a violating State who refused to carry out its unlawful dictates and escaped its jurisdiction were entitled to special consideration as refugees.

Fourth, those engaged in combat against such a regime, if captured, were entitled to treatment as prisoners of war.

Fifth, civil transactions which lead a party to be enhanced or to profit by the illegal regime should not be recognised by legal institutions of other States.

Sixth, those directly involved in the illegal conduct should be subject to civil or criminal penalties wherever found. One example cited was the United States law permitting suit for damages by aliens in United States courts for violations of the law of nations committed anywhere.

Many participants in the meeting urged that the relevant organs and committees of the United Nations, perhaps with the aid of UNITAR, study further the legal consequences flowing from persistent, serious violations of the norms prohibiting apartheid, racism and denials of self-determination. Many participants called upon States which had not already done so to ratify the relevant conventions which declared those violations to be offences against fundamental international law and crimes *ergo omnes*.

It was emphasised that combating apartheid, racism and all forms of racial discrimination was an integral part of the struggle to promote and protect human rights and fundamental freedoms. Participants also stressed that world-wide adherence to international human rights instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination and the International Convention on the Suppression and Punishment of the Crime of Apartheid would help ensure the eradication of these evils.

It was also observed that, especially as to the norm of self-determination, the United Nations itself must conduct itself in such a manner as to give that norm priority in all applicable circumstances. Refusal to implement the norm against some States for political reasons would make it impossible to establish the fundamental nature of the norm as *jus cogens*, thereby undermining an essential part of the overall strategy.

The meeting considered with approval ways in which the domestic law of States, such as Sweden, had been revised to control and discourage investment in South

Africa, and expressed the view that the States not yet equipped with such laws should so arm themselves as a matter of urgency.

Similarly, States should be encouraged to adopt laws which would permit the appropriate United Nations agencies to monitor compliance with sanctions by obtaining through national judicial or administrative processes the needed access to records of entities engaged in international transactions that might violate sanctions against South Africa.

### **III. APARTHEID AS AN INTERNATIONAL CRIME**

#### **A. STATE CRIMINALITY IN SOUTH AFRICA<sup>3</sup>**

by

**Albie Sachs**

Massacre and violence are not new in South Africa. The gunning down by the police of hundreds of unarmed people in the streets of Sharpeville and Soweto is a direct continuation of shootings into crowds at Port Elizabeth, Queenstown and Pretoria, in the gold mines and in Namibia, over the decades since the Union of South Africa was created in 1910. The Union itself was preceded by a bloodbath in Natal when thousands of Africans resisting the imposition of new taxes and controls were killed by cannon and machine gun fire and hundreds more publicly flogged till their backs were torn. In fact the racial supremacist State in South Africa was and continues to be the product of violence - the violent conquest of the indigenous peoples, the violent destruction of their societies and usurpation of their land, the violent incorporation of the mass of the population into a fiercely exploitative economic system, and, finally, the violent suppression of campaigns by the people to liberate themselves from overlordship.

South Africa is of course not unique in having been founded in violence, but whereas in other States the founders have attempted to create a common nationality and a common citizenship, in South Africa they elevated concepts of conquest and legal inferiority into constitutional principles given explicit governmental form. The Act of Union of 1910 accorded almost exclusive

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<sup>3</sup> Paper presented to the first session of the International Commission of Inquiry into the Crimes of Apartheid and Racist Regimes in Southern Africa, held at Brussels, from 9 to 12 February 1979. Reproduced by the United Nations Centre against Apartheid in *Notes and Documents*, No. 2/79.

sovereignty to a racial minority and organised the institution of power around the principle that there existed in the land a superior people endowed by God and history with the right to control the destinies of their fellow countrymen and countrywomen. Since that time there have been shifts in the name given to this policy - called variously segregation, trusteeship, apartheid, separate development and separate nationhood - but changes in the rationalisation have not reflected changes in the colonialist essence. The pervasive, structured and enduring quality of the system of race domination in South Africa needs to be stressed, since from it flow three important consequences, each of which will be discussed in turn:

- (a) State violence against the people is a permanent and necessary outcome of the system of racial exploitation;
- (b) This violence necessarily extends over the borders and threatens the peace of Africa and of the world;
- (c) The solution can only be found in a radical restructuring of South African society which totally eliminates all the institutions of racial oppression and builds a new society.

### ***Violence by the State is a Permanent and Necessary Feature of Apartheid***

In South Africa the state system - the machinery of law, police and prisons - is used simultaneously to force the whole population into a single, highly exploitative economy, and then to exclude 80 per cent of the population from control of the land and its resources. This is done by formally reserving political, trade union and social rights to the minority: where government does not even claim to proceed by participation and consent, it must necessarily rule by coercion. In the face of the just claims of the people for self-determination and a share in the wealth of the country, the State of necessity resorts to violence to protect the privileges of the minority.

An unjust system cannot be administered in a just way. Nor does it contain within it the institutions for a just resolution of conflicts. Massacre, torture and wholesale and systematic destruction of communities, the depreciation of peoples and their history and culture are predictable, necessary and chronic. The exact timing and locality of a Sharpeville or a Soweto may depend on the operation of chance factors, but there is necessity lurking behind the accidental, an inherent oppressiveness that dictates the repeated recurrence of these cruel disasters.

In South Africa it is the State itself that regularly and inevitably kills defenceless people in the streets and fields, the state that robs citizens of land and cattle, that bulldozes peoples' homes, that forcibly evicts huge populations from their birthplaces and that utilises its police forces as an army of occupation, complete with curfews and documentary controls. Half a million people are received into

the state prisons each year, hundreds are flogged by judicial order, and between 50 and 100 executed by hanging. Apart from those killed when police fire into crowds, about 100 people lose their lives annually to police bullets as “fleeing suspects.” State officials, including magistrates and judges, acting in the name of State policy and legislation, deport families from one part of the country to another, forcing husbands and wives apart, and turning children into orphans while their parents live. The educational system is totally segregated and children are taught to despise the history and culture of the majority - a history and culture that the State first depreciates and annihilates and then resurrects in a parodied form.

So there is no lack of law in South Africa, but the law that exists is a law that protects the racist State in its violence against the people. The law expressly denies fundamental rights and freedoms. It reserves 87 per cent of the surface area of the country for the permanent ownership of the dominant racial minority, it forces the rest of the population to live in reserves, locations, compounds and ghettos, it allocates each individual to a particular racial group with differential rights and duties, it controls the movement and residence of workers and it denies to the voteless and dispossessed majority the right even to campaign for basic rights.

South Africa demonstrates that there can be crime and injustice through the law, and does so in two ways: first, various official enactments “legalise” the implementation of the cruel apartheid programme, authorising officials of State to dispossess and humiliate citizens on a massive scale, as well as to use force to repress those who resist; second, when State officials act outside even the wide authority given to them, and indulge in massacre and torture, laws are passed to grant blanket indemnity to those responsible.

Thus, after the killings of unarmed people, including scores of young children in the streets of Sharpeville and Soweto, it was not those responsible for the massacre who were brought before the courts, but the survivors, the main evidence against them being that they had bullet wounds. Similarly, there are more than 50 known cases of political detainees who died while in the hands of the security police, with most of the bodies showing terrible injuries on medical examination, yet not a single policeman has been punished for these deaths, and many have been promoted. In fact, torture of political suspects has become so systematic and widespread, with torture squads flying from police headquarters to all parts of the country, that there can be no doubt that it is a part of officially sanctioned policy. What is involved is more than a mere cover-up, or wilful ignorance, it is the deliberate instigation of torture from the Government itself (as is proved by the close working relationship until last year between B.J. Vorster first as Minister of Justice and then as Prime Minister, with H.J. van den Bergh, head of the Security Police).

***The Violence of the Racist State Necessarily Extends Beyond its Borders***

Colonialism-type violence does not respect frontiers. In the period of conquest it justified itself in the name of advancing civilisation; today, it justifies itself on the grounds of defence against barbarism. What begins as small-scale incursions by police into neighbouring countries extends itself into kidnapping, assassination, bombing and massacre. On the pretext of fighting for survival, it commits atrocity after atrocity.

The world community, through the United Nations, has recognised the international dimension of the system of racial repression in South Africa and condemned apartheid as a crime against humanity. It has firmly rejected the contention that apartheid is a purely domestic matter, on the grounds both that apartheid is abhorrent to mankind, so inconsistent with fundamental norms recognised by all humanity, that it needs to be legally stigmatised in the same way as piracy, slavery and genocide have been in the past, and that apartheid necessarily threatens peace, not only in southern Africa, but in the whole continent and the world. Resolutions of the United Nations have repeatedly drawn attention to the inherently aggressive nature of apartheid. It is a tribute both to the perspicacity of that body, and to its limitations, that what it condemned as far ago as the 1940s and 1950s as a potential threat to peace has in the 1960s and 1970s transformed itself into visible and extensive violation of peace.

In the past decade the army of the racist regime has been transformed into a striking force prepared to attack countries as far north as the equator. A giant military air-base has been constructed in the north-eastern Transvaal, and staging post facilities organised in Malawi, 1,000 miles to the north. It is no accident that the person chosen to succeed B.J. Vorster as the new Prime Minister of the racist regime should have been the Minister of Defence, P. J. Botha, personally responsible for organising the invasion of Angola and the Kassinga massacre, as well as for the build up of racist troops in Namibia.

What has emerged is a dual strategy for the defence of apartheid and colonialism in southern Africa, and with it a dual threat to peace. In the first place, direct physical aggression against opponents of the apartheid regime, whether inside or outside South Africa's borders, whether refugees, freedom fighters, neighbouring civilians, or neighbouring Governments; and in the second place, the creation by corruption and intimidation of collaborationist regimes dependent for their survival on racist South African arms and money, and committed to indefinite repression of people and civil war. The attempts, with foreign aid, to equip the racist forces with nuclear weapons, adds a particularly grave dimension to these trends.

***The Violence and Aggression by the Racist Regime both Internally and Externally Can only be Eliminated by the Total Dismantling of the Apartheid System and its Replacement by a new, Non-racial Democratic Society***

What is at stake in southern Africa is not whether this or that individual is Prime Minister or whether park benches are segregated, but the whole character of the society. Is it to be based on a continuation of racism, privilege and exploitation, or is it to be based on the principle of power belonging to the people? Only a correct characterisation of the nature of the racist regime can lead to a correct solution, without which the massacres, tortures and indignities will continue, whatever constitutional description may be given to new political arrangements. Just as none today would argue that slavery should have been ameliorated rather than abolished, or colonialism should have been democratised rather than dismantled, so none should contend that apartheid, an inherently cruel and oppressive system, should be liberalised

In that sense, the basic struggle in southern Africa is not for civil rights (though it includes this), it is a struggle to reconstitute society on totally new principles, to eliminate completely the existing systems of exploitation and privilege, to eradicate once and for all racial domination in any form. And in that sense, too, the international community has not only the legal right but the legal duty to support the attempts being made to overthrow apartheid and replace it with a non-racial democratic society.

What is involved is not the absorption of a small élite into the existing system of exploitation, or even a form of power sharing between different racial groups, but the abolition of race as a constitutional and political principle. What needs to be guaranteed is not rights for minority or majority groups, but rights for citizens. Cultural diversity can remain, even be encouraged, but only in the context of equality of political rights. True equality presupposes that the whole system of racially reserved land-ownership and economic control be abolished, and along with it the systems of locations, pass laws and migrant labour. The massive and institutionalised inequalities in health, learning, accommodation, sports and access to leisure will also have to be ended. It is not just racism that needs to be abolished, but privilege. Society must be reorganised, sovereignty must belong to the whole people, both in form and in fact.

Without these drastic measures, there will always be violence in southern Africa. Massacres in the streets and over the borders grow out of racism, and racism grows out of national and economic exploitation. Only by ending the legal and economic structures of exploitation can racist violence be eliminated.

## **B. STATE TERRORISM IN SOUTH AFRICA<sup>4</sup>**

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<sup>4</sup> Extract from a paper presented to the Seminar on the Legal Status of the Apartheid Regime and Other Legal Aspects of the Struggle against Apartheid, Lagos, 13-16 August 1984. Reproduced in full by the United Nations Centre against Apartheid in *Notes and Documents*, No. 15/84.

by

**I. E. Sagay**

“State terrorism” has been carefully and deliberately omitted in the numerous treaties and conventions on terrorism that have been concluded by various States from the early 1970s to the present time.<sup>5</sup> The reasons usually advanced for this are that the use of terror against their own populations by some governments is better considered under and covered by international human rights law than international law pertinent to terrorism.<sup>6</sup> And yet as is now universally admitted, the worst form of terrorism is that by a group of individuals in control of the coercive apparatus of a State, using the latter as a weapon of violence and repression against some or the majority of the inhabitants in the territory under its control. As the preamble to the draft Convention on International Terrorism presented by the relevant Committee to the fifty-ninth Conference of the International Law Association declares, “international terrorist offences violate human rights as protected by international law.”<sup>7</sup>

The greatest acts of terrorism in modern times are those perpetrated by men in government against their own citizens. The worst cases include (a) the Nazi regime of Germany; (b) the Amin regime of Uganda; (c) the apartheid regime in South Africa; and (d) various regimes in Latin America. As one commentator has rightly stated with regard to South Africa, terror is not simply the means for attaining the ends of apartheid. “In reality, the terror, whatever the intention of its perpetrators, is also the true apartheid, perhaps its most indestructible component, on which it is depended for its continuation.”<sup>8</sup>

The same writer further described the vicious cycle of apartheid and terror in

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<sup>5</sup> These include the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) 1963; the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) 1970; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention) 1971; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; the Convention against the Taking of Hostages, 1979; the Organisation of American States Convention to Prevent and Punish the Acts of Terrorism taking the Forms of Crimes against Persons and Related Extortion that are of International Significance, 1971; and the Council of Europe’s European Convention on the Suppression of Terrorism, 1976, together with the Dublin Supplement of 1979.

<sup>6</sup> See the report of the Committee on International Terrorism in the report of the sixtieth Conference of the International Law Association (1982), p. 349.

<sup>7</sup> Report of the fifty-ninth Conference of the International Law Association (1980), p. 497.

<sup>8</sup> Julian Friedman, “Basic Facts on the Republic of South Africa,” United Nations Centre against Apartheid, *Notes and Documents*, No. 8/77, p. 34.

these words. “So calamitous an order and system as apartheid has a self-fulfilling momentum of its own, a relentless need for victims. It creates its own opportunities for a show of force and thrives on additional excuses for more than intimidation and curtailment.”<sup>9</sup> In other words, apartheid feeds on terror to sustain it and keep it alive. Terror and apartheid are therefore synonymous.

Racial discrimination and apartheid are employed principally for the purpose of the social, economic and political exploitation and oppression of the black and overwhelming majority in the territory of South Africa for the benefit of the white minority. As Wilmot explains in his book *Apartheid and African Liberation*,<sup>10</sup> such exploitation and oppression are made possible by the total militarisation of the white society against the black majority. “Without terror then apartheid cannot be maintained.” Therefore in order to maintain and sustain apartheid, the South African Reich has turned all its awesome military and police power on the people of South Africa itself. Hence the condition in South Africa is aptly described as one of permanent State terrorism.

State terrorism, directed by the white settlers against the black majority is not a modern phenomenon. It has been employed right from 1652, when Jan Van Riebeeck led a group of white immigrants from the Netherlands to settle in the extreme southwest of what is now South Africa. The inhabitants of that part of South Africa, the Khoikhoi and the San, were soon systematically dispossessed of their lands and livestock by the settlers, who used their superior armed force to crush any resistance. Regular acts of military devastation and liquidation resulted in the depopulation of the indigenous inhabitants of the area and further ingress inland by the white settlers. Despite the heroic resistance put up by the various indigenous groups such as the Zulu, the Xhosa, the Sotho and the Tswana led by legendary figures such as Shaka, the Zulu Chief, the armed might of the settlers proved too superior in the end, and the indigenous majority was progressively crushed and then reduced to a state of slavery and destitution in its own land for the psychological satisfaction and material well-being of the white minority settlers.

This state of affairs has continued basically unchanged until the present. All that has been happening is the progressive modernisation of the system of exploitation, deprivation and repression by the increasing employment of legal, coercive and technological weapons. It is significant that the entry of the British into the colony in 1806 did not entail any improvement in the condition of the oppressed indigenes. On the contrary, after the British had defeated the Dutch settlers in their struggle for supremacy in 1902, both groups united to consolidate the exploitation and repression of the black and indigenous majority. This state of affairs has been maintained by the use of armed force and terrorism against the Africans ever since. This paper attempts to document some of the numerous

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<sup>9</sup> *Ibid.* p. 41.

<sup>10</sup> Wilmot, *Apartheid and African Liberation*, University of Ife Press, 1980, p. 91.

forms in which such State terrorism has been made manifest in its obsessive mission to destroy, devastate and dehumanise the African majority for the glory of the white settler minority.

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The contents of this paper, which is a very brief summary of the violence, repression and brutal exploitation inflicted by the white, racist South Africa, against the black peoples of the territory, particularly the majority African population, are well known to the international community.<sup>12</sup> What this paper has endeavoured to demonstrate is that this type of terrorism, in which a group of people (whether based on racial lines or party affiliation) who are in control of the coercive apparatus of a State, direct these weapons against the inhabitants of the very territory under their control in order to maintain their tyrannical hold of the humiliated and exploited people, is by far the worst type of terrorism. The international community must therefore not relent in its efforts aimed at dislodging the terrorists in Pretoria, in bringing about the attainment of self-determination, political, civil, social and economic rights for the people of South Africa as a whole.

## **C. INTERNATIONAL LAW AND THE LIQUIDATION OF APARTHEID<sup>13</sup>**

by

**Kader Asmal**

### ***Introduction***

One of the most striking aspects of legal developments at the international level in the past 20 years has been the development of norms to outlaw and combat racial discrimination. The United Nations has played a major part in such an evolution, but this is not to exclude the contribution of certain States and their constitutions which in theory and practice forbade racialism. The combating of theories of racial superiority has also been part of the struggle against colonialism and alien

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<sup>11</sup> A detailed description of the forms and extent of state terrorism in South Africa is omitted here.

<sup>12</sup> South Africa's terrorism is of course also directed against white persons opposed to apartheid. Some of the worst victims of repression and violence come from this group.

<sup>13</sup> Published by the United Nations Centre against Apartheid in *Notes and Documents*, No. 43/78

domination since colonialism and imperialism have been, in the last resort, justified by those who profit from economic exploitation by “theories” based on racial, ethnic and cultural superiority.

As long as international society was dominated by those forces and States which utilised military force to suppress the desire for independence, emancipation and freedom of subject peoples, so long did the provisions and spirit of the Charter of the United Nations and the Universal Declaration of Human Rights remain a dead letter. But once the balance of forces in the world community began to change, there was first of all the recognition of the political fact that “any doctrine of differentiation or superiority is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination either in theory or in practice.” This statement in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination adopted by the General Assembly in 1963 was given legal form when the Assembly adopted the International Convention on the Elimination of All Forms of Racial Discrimination in 1965. The 1965 Convention, not only calls for an end to racial discrimination in all its forms, but for the first time establishes international machinery to oversee the observance of its provisions.

Respect of human rights and fundamental freedoms and the practice of racial discrimination are incompatible. The adoption by the General Assembly of the two Covenants of 1966, apart from concretising the Universal Declaration of Human Rights, gave expression to the fact that the persistent denial of basic human rights by a State is a potential threat to international peace, security and co-operation. As one commentator puts it, “Contemporary international law proceeds from the fact, and this is exceedingly important, that a close link exists between a State’s ensuring basic human rights and freedoms and the maintenance of international peace and security. This link is stressed in many international conventions (particularly the Convention on the Elimination of All Forms of Racial Discrimination and the covenants on human rights), and in United Nations resolutions.”<sup>14</sup>

However, the situation arising out of the policies of apartheid is fundamentally different from “ordinary” racism because the policy of apartheid permanently denies, through the laws, administrative decrees and practices of the racist regimes of South Africa, any role for the 19 million blacks in that country and confers on the 4.5 million whites a monopoly of economic, political and social power. It is to the General Assembly of the United Nations that we must turn in order to evaluate the response of the international community.

### ***The Development of the United Nations Position on South Africa***

The United Nations concern with the racist policies of the regime in South

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<sup>14</sup> G. I. Tunkin, *Theory of International Law* (Harvard University Press, 1974), pp. 81-82.

Africa is of long standing, the General Assembly having first dealt in 1946 with complaints of racial discrimination against the people of Indian origin in South Africa at the request of the Government of India. Since 1960, with the newly independent African States in the vanguard, the tenor of the General Assembly's response to the persistent, systematic and gross violations of national and human rights has undergone dramatic changes.

In the period from 1946 until 1960, the General Assembly was content to censure and appeal to the Government of the Union of South Africa over its policies, notwithstanding South Africa's invocation of Article 2 (7) of the Charter of the United Nations concerned with domestic jurisdiction. The first major shift in the international legal order brought about by the Charter was in the field of self-determination and the systematic violation of human rights; where these are a matter of State policy, they are automatically lifted from *domain reserve* and regulated by international law and the United Nations.<sup>15</sup>

Since 1960, the General Assembly and the Security Council have moved from general to specific resolutions requesting States Members of the United Nations to take separate and collective actions against the South African regime, culminating in resolution 418 (1977) of 4 November 1977, whereby the Security Council unanimously imposed a mandatory arms embargo against South Africa under Chapter VII of the Charter, the first time in the history of the United Nations that such an action was taken under Chapter VII of the Charter against a Member State.

The change in the tone and context of these resolutions and other activities of the United Nations, in the specialised agencies and in major and subsidiary organs was originally due to the admission of 16 newly independent African States to membership of the United Nations at the fifteenth session of the General Assembly in 1960. This substantially altered the composition and balance of power in the General Assembly and gave added impetus to the growing demand for a speedy and unconditional end to colonialism and a frontal assault on racialism and apartheid. Until 1960, the West's "mechanical majority" in the General Assembly had stifled any far-reaching initiative from socialist and progressive States.

The fact that the apartheid regime has become more repressive and even stronger in this period and has carried out extensive acts of serious aggression against neighbouring countries such as Angola and underwritten in economic and military matters the illegal regime of Ian Smith in Zimbabwe is due more to South Africa's principal allies in the West refusing to carry out these resolutions, refusing to acknowledge the development of new norms and, in particular,

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<sup>15</sup> See R. Higgins, *The Development of International Law by the Political Organs of the United Nations* (London, Oxford University Press, 1963), where even at the time of the first edition in 1963 the author was able to identify legally significant practice.

blocking the invocation of Chapter VII of the Charter for the imposition of full economic and diplomatic sanctions against South Africa, than to the inherent merit or relevance of these resolutions.

Through these resolutions and other legal developments, the international community has recognised that the apartheid system and the situation in South Africa are special cases, requiring exceptional responses both from the world body and from international law. This period has seen the clarification and confirmation of principles contained in the Charter and the development of new rules of international law and practice within the organs of the United Nations, reflecting the new balance in the political, economic and social forces within the world community which evoked a grudging response from those States and commentators who had implicitly considered international law to be the preserve of the metropolitan and imperial Powers.

The linking of racial equality with decolonisation and self-determination, the development of the non-discrimination, the acceptance of the principle of self-determination as a clear rule of international law, the recognition of apartheid as a crime against humanity (first affirmed by the General Assembly in 1965), the recognition of the legitimacy of the use of all possible means of struggle by the oppressed people to overthrow apartheid and racialism and the use of the rules of procedure of the General Assembly to refuse to acknowledge the right of the representatives of the racist regime to represent South Africa, are examples of the ways in which the General Assembly and the United Nations have dynamically attempted to isolate South Africa.

### *Status of the Regime*

#### *Illegitimacy of the Regime*

The most dramatic culmination to this legal course of events is seen in General Assembly resolution 3411G (XXX) of 28 November 1975, adopted by 101 votes to 15, with 16 abstentions. It contained a major innovation in paragraph 6, where it stated that “the racist regime of South Africa is illegitimate and has no right to represent the people of South Africa.” It also recognised the national liberation movements of South Africa as the “authentic representatives of the overwhelming majority of the South African people.” The following year, in resolution 31/6 I of 9 November 1976, the Assembly reaffirmed “the legitimacy of the struggle of the oppressed people of South Africa and their liberation movements, by all possible means, for the seizure of power by the people and the exercise of their inalienable right to self-determination.”

South Africa’s major trading partners have generally voted against these kinds of general resolutions in previous sessions. On resolution 3411G (XXX), there were some interesting reasons provided in explanation of their votes. Some Western countries that voted against the resolution denied that apartheid was a self-

determination issue since the whites were South Africans living permanently in that country and self-determination was relevant only to such colonial situations as Namibia and Zimbabwe. Others opposed the reference to the “seizure of power” by the liberation movement and rejected the reference to “authentic representatives” since a State authority carrying out the functions of government existed in South Africa.

### *The International Status of the Apartheid Regime*

These observations from the Western States raise very important questions. In conventional terms, the apartheid regime fulfils the now accepted criteria for statehood and, therefore, for recognition by other States. Such criteria were laid down in the Montevideo Convention on the Rights and Duties of States (1933) which is generally accepted as reflecting, in general terms, the requirements of statehood under customary international law. Article 1 of the Convention lays down that:

“The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) Government; (d) capacity to enter into relations with other States.”

The argument against investing the regime in South Africa with the capacity to speak on behalf of its population turns on the fact that its very basis denies the vast majority of the population a rightful place in the political, administrative and economic life of the community which it purports to represent. Other Governments may suppress and outlaw opponents; South Africa denies 80 per cent of the population the minimal rights of citizenship strictly on the basis of colour.

For, in terms of international law, the South African apartheid system is in breach of a new rule of non-discrimination recognised by the International Court of Justice in the Namibia case<sup>16</sup> and clearly enunciated by Judge Padilla Nervo in his separate opinion when he said that:

“Racial discrimination as a matter of official government policy is a violation of a norm or rule or standard of the international community.”<sup>17</sup>

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<sup>16</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, pp. 16 and 57.

<sup>17</sup> *Ibid.*, p. 123. This norm of non-discrimination is of universal application and has been drawn up independently of the Mandate (which was an issue in the Namibia Opinion). For this norm of racial non-discrimination see also *South West Africa Cases (Second Phase)*, I.C.J. Reports 1966, p. 6, and p. 234 (Wellington Koo), pp. 286 ff. (Jessup), pp. 455 and 464-468 (Padilla Nervo).

White South Africa, with its policy of apartheid, breaks international law; its internal policies are akin to colonialism, with the difference that the colonists actually reside permanently in the territory itself. With the assimilation of the norm of racial equality to self-determination,<sup>18</sup> the denial of collective human rights in South Africa has been and remains a matter of self-determination.

In the treaty practice of the United Nations, it is important to note that this customary rule of “non-discrimination” identified by the World Court is closely associated with the right of self-determination. The preamble of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965, specifically refers to the condemnation of “colonialism and all practices of segregation and discrimination associated therewith” and invokes the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960<sup>19</sup> in support. But even more concretely, both the International Convention on Economic, Social and Cultural Rights and the International Convention on Civil and Political Rights, although they are concerned primarily with individual rights, begin the catalogue of human rights by reference to collective rights whereby: “All people have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>20</sup> Ratifying States undertake the further and important obligation to “promote the realisation of the right to self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”<sup>21</sup>

Since this right of self-determination is not a right established by the Covenants or even by the Charter and therefore is part of customary international law, what then is the basis for describing the apartheid regime as “illegitimate”? To provide the answer, we must turn to the nature of the apartheid system itself.

### *Internal Illegitimacy*

A constitution is usually the basic document that describes the fundamental legal and political structures and assumptions within a State. South Africa’s constitution is an avowedly racist document which, like its predecessors, is remarkable in specifically excluding blacks from taking seats in Parliament and in conferring the right to vote on racial grounds. “From the start,” as one writer has

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<sup>18</sup> See General Assembly resolution 2106 B (XX) of 21 December 1965.

<sup>19</sup> General Assembly resolution 1514 (XIV) of 14 December 1960; see also article 1.1 of the Convention.

<sup>20</sup> Article 1.1 of each Covenant.

<sup>21</sup> Article 1.3 of each Covenant

described South Africa's constitution, "it went beyond merely sanctioning or condoning racism and it expressly stipulated that South Africa should be a racist State founded on principles of minority rule."<sup>22</sup>

Under the Republic of South Africa Constitution Act, 1961, full legislative sovereignty is vested in Parliament and only whites are eligible to be members of the Senate<sup>23</sup> and the House of Assembly.<sup>24</sup> Only a "white person" can become President or Minister. By statute only whites may vote for the Assembly.<sup>25</sup>

Nothing reflects the colonised status of the blacks better than the constitutional status of the African majority which is found in section III of the Republic of South Africa Act: "The control and administration of Bantu affairs ... shall rest in the State President."<sup>26</sup> According to this provision:

"Two separate systems of Government exist in the one country. The first consists of a Parliament and Ministers in an *independent* State accountable to a white electorate. The second is a system of rule over a rightless and subordinate black majority by a white administration which disowns a common citizenship. By their own theory and law, the rulers of South Africa treat the majority of the population as a separate and alien people."<sup>27</sup>

The characteristics of the South African system of oppression and exploitation have been described by South Africa's revolutionary movement as internal colonialism because it "is based on the historical analogy of the classic imperialist-colonialist situation in which the ruling class of the dominant nation owns and control the colonial territory, and uses its instruments of force to maintain its economic, political and military supremacy against any would-be external competitors. All are agreed that in such a situation the elimination of direct foreign control is item one on the agenda of the struggle."<sup>28</sup>

The real nature of the colonial-type society in South Africa is described by the African National Congress of South Africa as follows:

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<sup>22</sup> Albie Sachs, at the World Conference against Apartheid, Lisbon, June 1977. See also Sachs' comprehensive study, *Justice in South Africa* (London, Sussex University Press, 1973).

<sup>23</sup> Section 34.

<sup>24</sup> Section 46.

<sup>25</sup> *Note by the Editor*: A new constitution, excluding the African majority, was brought into force in September 1984.

<sup>26</sup> Section 8 (4).

<sup>27</sup> Sachs, *Justice in South Africa*, *op. cit.*

<sup>28</sup> Joe Slovo in *Southern Africa, the New Politics of Revolution* (Davidson, Slovo and Wilkinson), 1976, p. 132.

“South Africa’s social and economic structure and the relationships which it generates are perhaps unique. It is not a colony, yet it has, in regard to the overwhelming majority of its people, most of the features of the classical colonial structures. Conquest and domination by an alien people, a system of discrimination and exploitation based on race, techniques of indirect rule; these and more are the traditional trappings of the classical colonial framework.

“Whilst at one level, it is an independent national State, at another level it is a country subjugated by a minority race. What makes the structure unique and adds to its complexity is that the exploiting nation is not, as in the typical imperialist relationship, situated in a geographically distinct mother country but is settled within its border. What is more, the roots of the dominant nation have been imbedded in our country for more than three centuries of presence.”<sup>29</sup>

The establishment of the bantustans shows very clearly the colonial nature of the society there. Although (white) aliens may aspire to full South African citizenship, Africans born and bred in South Africa may never do so and must carry passports of allegedly independent “States” such as the Transkei. On the assumptions of the racist South African Parliament, the bantustans (of which there are to be nine, two of which have now been declared “independent”) were anxiously portrayed as consistent with the international principles of self-determination. However, these manoeuvres did not confuse international public opinion which very quickly identified the colonialist and racist purposes behind the partitioning of South Africa.

International opposition to the establishment of bantustans was spearheaded by the General Assembly which in 1975 opposed the setting up of the bantustans and associated such opposition with the eradication of apartheid and the exercise of the right of the African people to self-determination.<sup>30</sup> Simultaneously with the fraudulent “independence” of the Transkei in 1976, the General Assembly adopted a resolution which affirmed the territorial integrity of South Africa and opposed the attempt to dispossess the African people of South Africa of their “inalienable rights”<sup>31</sup> passed by the remarkable majority of 134 votes to none, with the abstention of the United States.

This resolution also made a signal contribution to the law and practice relating to the recognition of States because it called upon “all Governments to deny any

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<sup>29</sup> “Strategy and Tactics of the African National Congress,” *Sechaba*, July 1969.

<sup>30</sup> General Assembly resolution 3411 D of 28 November 1975.

<sup>31</sup> General Assembly resolution 31/6 A of 26 October 1976.

form of recognition to the so-called Transkei and to refrain from having any dealings with the so-called independent Transkei or other bantustans.”

No State, apart from South Africa, has recognised either the Transkei or Bophuthatswana. The apartheid regime, by its own acts, has shown that the description of the South African system as colonialism of a special type based on racial hegemony is an apt one.

The total exclusion of the African majority from political power has meant that the white legislature has used state power in the interests of the whites. One of the first acts of the white Parliament was to pass the Native Land Act of 1913 which reserved nearly 90 per cent of the land of South Africa for white occupation and ownership and excluded Africans from having any property rights over this part of their territory. The reservation of jobs for whites; the institution of a special kind of education of Africans, described as Bantu Education”; the rigorous application of the pass laws against Africans only; influx control and the denial of a right of free movement and of residence to Africans; the herding of millions of Africans into townships and the implementation of the Group Areas Act in a malicious and racial manner; the use of legislative power to ensure that white children and students not only have free and compulsory education but also that the State spends 10 to 12 times the amount of money on the education of a white child as compared to a black child; all these examples demonstrate how State power is used for the benefit of the whites. Out of the depths of a degraded philosophy of racial purity and superiority, which is used to justify white exploitation of blacks, come also the obscenities of a race classification system and the forbidding of sexual relations across the colour line and the banning of “mixed marriages.”

The catalogue of institutionalised and formal oppression - unparalleled in history - cannot end without reference to the fact that the machinery of coercion and repression (the army, the police and the administration) operates in relation to the black population just as a colonial army of occupation does.

### ***The International Response***

#### ***New Rules of International Law***

In 1963, the formation of the Organisation of African Unity provided a further impetus for the external opposition to apartheid and racism and the rapid recognition of the role of the organisation is one of the great political facts of our day. The organisation at its establishment was committed to the overthrow of the apartheid State, and soon made an impact on the practice and procedures of the United Nations.

From condemnation and criticism, the international community began to mobilise

itself to action against the apartheid system. The regime's representatives were either expelled or suspended or withdrew from various international organisations; both the Security Council (which first became seized of the apartheid question in 1960 following the massacres at Sharpeville and Langa) and the General Assembly began to pass resolutions recommending action against the regime, and the establishment in 1962 of the Special Committee on the Policies of Apartheid of the Republic of South Africa (subsequently designated, significantly, the Special Committee against Apartheid) gave added impetus to a co-ordinated United Nations response.

While it is generally accepted that binding enforcement action against South Africa could only be taken under Chapter VII of the Charter of the United Nations by the Security Council, the General Assembly's activities on a wider front began the evolution of new rules of international law which, in the words of one distinguished judge of the International Court of Justice, resulted in the turning of a "page of history."<sup>32</sup> From 1962 onwards, after the General Assembly had passed, by an overwhelming majority, its now famous resolution on economic, military and other sanctions, Member States in progressive countries took unilateral measures to break links with the apartheid regime; some had done so earlier.

Developments in treaty laws, a more realistic interpretation of the provisions of the Charter in keeping with changes in the world community and changes in international customary law, have added new dimensions to the apartheid situation. Conventional international lawyers and those States that profit from super-exploitation of apartheid can no longer hide behind rigid and outdated formulae which mask the needs and demands of hegemonic politics and self-interest.

### *Self-determination and Jus Cogens*

Resolutions of the General Assembly, and recommendations of the Security Council not falling under Chapter VII of the Charter, have played a crucial role in the development of new norms of international law. Although resolutions may not directly create legal obligations, they have on occasion had considerable significance for legal questions; they may be cogent evidence of State practice and the *opinio juris sive necessatis*, the conviction that translates practice into custom. But more importantly, resolutions on a particular subject may provide authoritative interpretation of the Charter of the United Nations, and this could be binding *per se*. This is accepted now even by those who are antagonistic to the "legislative" role of the United Nations or the speedy development of new rules of international law. The final word rests with the International Court of Justice where it was stated that:

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<sup>32</sup> Judge Ammoun, in the Namibia opinion, *I.C.J. Reports 1971*, p. 75.

..it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific areas, within the framework of its competence, resolutions which make determinations or have operative design.”<sup>33</sup>

The historic Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the General Assembly in 1960,<sup>34</sup> regards the principle of self-determination as part of the obligations stemming from the Charter and is in the form of an authoritative interpretation of the Charter.<sup>35</sup> The principle has been incorporated in a number of international instruments and associated with the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. More than that, the principle of self-determination now forms part of the *jus cogens*, certain overriding principles or imperative norms of international law “which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent norm of contrary effect.”<sup>36</sup> The International Court of Justice, in giving examples of these “peremptory norms” which form part of the *jus cogens*, described these obligations as being obligations “towards the international community as a whole” and added:

“Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including the protection from slavery and racial discrimination.”<sup>37</sup>

### ***Norm of Non-discrimination***

The norm of “non-discrimination” as adopted by the International Court of Justice was explained by Judge Ammoun in the Namibia opinion<sup>38</sup> as the struggle for racial equality, and, it may be implied, as a collective right belonging to a group, when he said:

“The equality demanded by the Namibians and by other peoples of every

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<sup>33</sup> Namibia opinion, *I.C.J. Reports 1971*, p. 50.

<sup>34</sup> Resolution 1514 (XV) of 14 December 1960.

<sup>35</sup> Ian Brownlie, *Principles of Public International Law* (2nd ed.), p. 576.

<sup>36</sup> *Ibid.*, pp. 499-500.

<sup>37</sup> *The Barcelona Traction Case (Second Phase)*, *I.C.J. Reports 1970*, pp. 3 and 32.

<sup>38</sup> Namibia opinion, *I.C.J. Reports 1971*, p. 76.

colour, the right to which is the outcome of prolonged struggles to make it a reality, is something of vital interest to us here, on the one hand, because it is the foundation of other human rights which are no more than its corollaries, and, on the other hand, because it naturally rules out racial discrimination and apartheid, which are the gravest of the facts with which South Africa... stands charged.”

There can be little doubt that the norm of non-discrimination forms part of international law<sup>39</sup> and binds all States and entities which form part of the international community. The illegitimacy or defective status of the South African regime does not mean that it is not accountable in international law for its violent, racist and evil policies, for as the World Court has said: “Physical control of a territory, and not sovereignty or legitimacy, is the basis of State liability for acts affecting other States.”<sup>40</sup>

### ***International Convention on the Elimination of All Forms of Racial Discrimination***

The provisions of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 are aimed at combating racial discrimination within the territories of parties to the Convention but its wider significance has already been referred to. The Convention addresses itself to the obligation of States to “condemn racial discrimination”<sup>41</sup> and “particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.”<sup>42</sup> These articles provide a sufficient legal warrant or basis to insist that States parties to the Convention should not permit representatives or agents of the South African regime in the economic, social or sporting fields to establish links with their South African counterparts since the later practice apartheid. In particular, permitting the placing of obnoxious and insidious propaganda advertisements by South African embassies in Western countries would certainly be in breach of article 4 of the Convention.

### ***International Convention on the Suppression and Punishment of the Crime of Apartheid***

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<sup>39</sup> The treaty recognition of “peremptory norms is now provided for in article 53 of the Vienna Convention on the Law of Treaties, 1968, and although expressed to apply only “for the purposes of the present Convention,” induces the observation from a cautious writer, M. Akehurst, in *A Modern Introduction to International Law* (2nd ed.) p. 47, that “it is probably valid for all purposes.”

<sup>40</sup> Namibia opinion, *I.C.J. Reports 1971*, p. 54.

<sup>41</sup> General Assembly resolution 2106 (XX) A, annex, article 2, paragraph 1.

<sup>42</sup> *Ibid.*, article 3.

The further development at the level of international treaty law has been the adoption by the General Assembly in 1973 of the International Convention on the Suppression and Punishment of the Crime of Apartheid, which entered into force in July 1976 and by August 1978 had been ratified by 40 States.<sup>43</sup>

The Convention is of course binding on those States that have ratified it but the principles and rules that the Convention lays down are of more general application arising as they do out of a specific rule of international law which forbids the denial of individual and collective human rights as a matter of state policy solely on the grounds of race. The importance of the Convention is that it illustrates what international law had already laid down, the principle of individual responsibility for crimes against humanity which was clearly enunciated in the judgement of the Nuremburg International Military Tribunal during the trial of Nazi war criminals in 1946, when it laid down that:

“Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

There is no doubt whatsoever that the Nuremburg Principles form part of customary international law, independently of treaty law.<sup>44</sup>

The Convention in article I describes the inhuman acts resulting from the policies and practices of apartheid” as crimes violating the principles of international law and the purposes and principles of the Charter and, most importantly, as constituting a serious threat to international peace and security. Article II describes the “crime of apartheid as including the policies and practices of racial segregation and discrimination as practised in southern Africa and states that the term shall apply to certain itemised acts described as “inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them. It is interesting to note that the acts constituting the crime of apartheid follow the description of acts of genocide, which point is acknowledged in the preamble to the 1973 Convention which observes that: “in the Convention on the Prevention and Punishment of the Crime of Genocide, certain acts which may also be qualified as acts of apartheid constitute a crime under international law.”

Apartheid legislation and practice, in many of its aspects, would already be in

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<sup>43</sup> See I. P. Blishchenko, “Study of the International Convention on the Suppression and Punishment of the Crime of Apartheid,” United Nations Centre against Apartheid, *Notes and Documents*, No. 3/74.

<sup>44</sup> See General Assembly resolution 95 (I) of 11 December 1946 and the clear acceptance of these principles by, among others, the British Government, in Hansard, House of Lords, V51 253, 831 (1963).

breach of the rules laid down in the Genocide Convention. As with this Convention, the 1973 Convention imputes individual criminal responsibility irrespective of the motive involved, to individuals, members of organisations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State” and such responsibility is incurred for the commission, participation, conspiring or incitement of the acts or the aiding, abetting, encouragement or co-operation in the commission of the crime of apartheid.

Jurisdiction is conferred on a universal basis to any tribunal of a State party to the Convention or to any international penal tribunal which has been conferred with jurisdiction. Now that the Convention is in force, it has become an urgent task to draw up a register of persons, from the highest echelons of the State machinery in South Africa to the murderers and torturers of the police force, who have been responsible for committing crimes as defined in this Convention.

### *Statute of Limitations*

The seriousness with which the international community treats crimes against humanity is illustrated by the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968, which, in the preamble, describes war crimes and crimes against humanity as “among the gravest crimes in the international law.” Article I lays down that no statutory limitation shall apply to certain crimes “irrespective of the date of their commission” and specifically assimilates “inhuman acts resulting from the policy of apartheid” to “crimes against humanity.” The Convention reiterates the Nuremburg principle of individual responsibility by emphasising that its provisions apply to “representatives of State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.”

### *Legitimacy of the Struggle*

Self-determination and independence have not always been achieved by peaceful means in the history of States. For a number of years, beginning in 1965, General Assembly resolutions have recognised the legitimacy of the struggle of peoples under colonial rule to exercise their right to self-determination and independence and States have been “invited” to provide material and moral assistance to the national liberation movements in certain colonial Territories. Such resolutions have also been passed in relation to Namibia and South Africa.

At its twentieth session in 1965, the General Assembly, for the first time, recognised “the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination and independence” and at the same time

it invited “all States to provide material and moral assistance to the national liberation movements in colonial Territories.”<sup>45</sup> The following year, the General Assembly went one step further and stated that the preservation of colonialism and its manifestations, including racism and apartheid, were incompatible with the Charter and the declaration on decolonisation. It further declared that the continuation of colonialism threatened international peace and security and that the practice of apartheid, as well as all forms of racial discrimination, constituted a crime against humanity, and repeated the request to provide assistance to the liberation movements. In 1975, for the first time, this formula was used in a specific resolution on the situation in South Africa. It is to the legality of this that we must now turn, but before we do this, it is necessary to understand the background to the resistance of the African people of South Africa and the humanistic and non-racial nature of their struggle for emancipation.

Political legitimacy is just as important for Governments as legal legitimacy. Legitimacy in the broad sense is obtained by Governments - however illicit or violent their original root of title - by coercion or repression or by the encouragement of participation by recalcitrant majorities or minorities in government, or by the co-optation of leading dissident forces into the ruling elite or on a democratic basis by the extension of the suffrage. The end result, for nearly every organised society except the colonial society, is that the population accepts the State, its Government and institutions. Legitimacy is therefore concerned with the consent or acquiescence of the population in the political and economic arrangements that govern their lives. The South African regime, since its inception in 1910, has neither obtained such a consent from the black majority nor attempted to involve them in the machinery of government and administration.

Far from this being so, the historical record is one of rejection of the pretensions of the racist State and its institutions. From the armed resistance of the African people in the nineteenth century, when the wars of colonial aggression and expansion were at their height, to the formation of the African National Congress in 1912 - in the first co-ordinated political attempt by the African people in the continent to resist the diminution of their rights - the history of South Africa shows a consistent pattern of agitation, organisation and struggle against racialism and apartheid, culminating in the post-war developments which related specific demands - such as the right to organise and higher wages as in the African gold miners' strike of 1946 - to the overall question of freedom and liberation.

The racist regime treated every demand, from better wages to the lowering of bus fares, from opposition to the removal of peasants from their settlements to opposition to inferior racially determined education, as a direct threat to its hegemony. Massacres and repression, bannings, murders and death did not still the demand for freedom. From 1913 until 1961, the liberation movement

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<sup>45</sup> General Assembly resolution 2105 (XX) of 20 December 1965.

peacefully attempted to change the hearts of the racist overlords. Strikes, demonstrations and stay-at-homes reached their height with the disciplined Defiance Campaign of 1952, when 8,000 people of all races broke the apartheid laws in post offices and railway stations and on park benches. The savage retaliation of the apartheid regime did not break the spirit of the people; instead, the democratic aspirations of the people found a place in the Freedom Charter of 1955, with its ideal of a free and non-racial South Africa.

The Treason Trial of 1956, which lasted for four years and during which more than 150 leaders of the liberation movement were on trial for their lives, showed that to oppose apartheid peacefully and to advocate a non-racial society constituted, in the eyes of the racial masters, treason itself. There could be no better illustration of the racist nature of the State.

The shootings at Sharpeville and Langa, the banning of the liberation movements and their decision to have recourse to armed struggle in the early 1960s showed that the African people would not be cowed by their experiences at the hands of a tyrannical racist State and its laws. The struggle moved on to a new stage. The children and students, the men and women of Soweto, Guguletu, Cape Town, Witzieshoek and so on, are the heirs of a struggle for self-determination that goes back to the Bambata rebellion of 1906, and they draw their inspiration from the fact that their struggle is not and has not been a racially motivated one. For if the struggle is for the liberation of the blacks, then “Who are the blacks? They are the people known as kaffirs, coolies and hottentots, together with those South Africans whose total political identity with the African oppressed makes them black in all but the accident of skin colour.”<sup>46</sup>

There can be no doubt that what the African people in South Africa seek is the total overthrow of apartheid, because only through this will come their emancipation. By its nature, the economic and political system of racial domination cannot provide, within two diametrically opposed administrative and legal systems, a place for the 80 per cent of the population now deprived of basic national rights.

How, therefore, can international law assist the peoples of South Africa to overthrow the vicious system of apartheid?

Although Article 2, paragraph 4, of the Charter of the United Nations, which forbids any threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations, is a norm of fundamental importance in international law, it is not an absolute rule. The use of force by States in self-defence, individually or collectively, is permitted by the United Nations itself under Chapter VII. Article 2, paragraph 4, must be seen in the context of the purposes and principles

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<sup>46</sup> New Year message of the African National Congress of South Africa, 1971.

of the Charter and in the evolution of international law itself. The practice of the United Nations, as exemplified in resolutions, acknowledges that the right of self-determination has certain corollaries, among which are that intervention against a liberation movement may be unlawful and that assistance to the movement would be lawful.<sup>47</sup>

Whatever doubts may have existed about the right to overthrow established authority which contravenes the right to self-determination have now been dissipated by the unanimous adoption by the General Assembly of the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which is declaratory of customary international law. The principles of the Charter embodied in the Declaration are declared to constitute “basic principles of international law.” The Declaration lays down a duty of States “to refrain from any forcible action which deprives people referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.” But even more importantly, the Declaration recognises a right to fight against such deprivation because it lays down that:

“In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.”

It is quite clear that the Declaration recognised the right to have recourse to a war of liberation and clearly indicates that the use of force against the exercise of self-determination is a violation of international law. In so far as the resolution recognises the right of internal revolution, it codifies what international law has traditionally assumed. The application of the Declaration to South Africa, where the majority are under “alien subjugation, domination and exploitation,” means that notwithstanding the formal trappings of statehood, the South African situation, as it is, involves the right of the people to rebel.

Similarly, the General Assembly resolution on the Definition of Aggression passed in 1974 which, in accordance with the Charter, prohibits aggressive acts between States, expressly, under article 7, provides that nothing in the definition of aggression can prejudice the right of self-determination, freedom and independence of peoples under “colonial and racist regimes or other forms of alien domination,” nor the right of these peoples to struggle to that end and receive support, in accordance with the principles of the Charter and in

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<sup>47</sup> See Brownlie, *op. cit.*, p. 577; for one of the best articulated expressions of the application of the rules of belligerency and neutrality and the distinction made between the aggressor and the victim of aggression in a self-determination situation, see a Separate Opinion in the Namibia opinion, *I.C.J. Reports 1971*, pp. 93 ff.

conformity with the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.<sup>48</sup>

These developments in international law, consistent with and not in derogation from the Charter of the United Nations, have drawn the significant observation from one commentator that “It is clear that the right of revolution has been recognised more forthrightly and explicitly by the international community than it earlier had been.”<sup>49</sup>

While there may be argument about the scope and application of the principle of self-determination in a particular situation, the association of “racist regime” with the right to self-determination, taken together with other expressions of the international community, amounts to a clear legal statement that the apartheid regime lacks legitimacy because of a breach of a fundamental norm of international law. It is this approach that justified the General Assembly in 1970 approving the report of the Credentials Committee<sup>50</sup> “except with regard to the credentials of the representatives of the Government of South Africa.” In the following year, the General Assembly rejected the credentials of South Africa. In 1974, the Assembly called upon the Security Council to “review the relationship between the United Nations and South Africa in the light of the constant violation by South Africa of the principles of the Charter and the Universal Declaration of Human Rights.” The General Assembly, acting unilaterally, could not of course expel the apartheid regime from the United Nations. The draft resolution for the expulsion of South Africa from the United Nations was not adopted because of the veto by three of the permanent members of the Security Council: the United States, France and the United Kingdom.

Thereupon, the President of the Assembly ruled that the consistent refusal of the Assembly to accept the credentials of the so-called South African representatives was “tantamount to saying in explicit terms that the General Assembly refuses to allow the delegation of South Africa to participate in its work.” On a challenge made to this ruling, it was upheld by a vote of 91 to 22, with 19 abstentions.

These examples illustrate that for the vast majority of the States of the international community the illegitimacy of the South African regime must be given concrete manifestation and rules of procedure and standing orders cannot have priority over peremptory norms which imply the necessity for non-collaboration and non-recognition of the perpetrators of illegal situations such as the apartheid regime.

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<sup>48</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974.

<sup>49</sup> S. H. Schwebel in *Law and Civil War in the Modern World* (J.N. Moore, ed., Baltimore, Maryland, John Hopkins University Press, 1974).

<sup>50</sup> General Assembly resolution 2636 A (XXV) of 13 November 1970.

### *Authentic representatives*

The principle of self-determination “represents an important movement away from the old view under which international law rights pertain only to States and Governments and not to groups of individuals.”<sup>51</sup> Individual human rights ultimately require their recognition through the obligations imposed on a State but the essence of the principle of self-determination, which must be considered to be a collective right, presupposes that the peoples vindicating such a right have a degree of personality at the level of international law; otherwise the right is empty of meaning.

To exercise this right, peoples act through parties or liberation movements and the flexible development of the rules of international law is reflected in the way in which liberation movements, as representatives of their peoples, have acquired a degree of personality<sup>52</sup> to represent their territory, to negotiate with States and to receive assistance.

The culmination of this development is seen in the recognition of the liberation movement of South Africa by the General Assembly as the authentic representative of the people of South Africa, but the history of the General Assembly practice and the evolution of the law goes back, indirectly, to the decolonisation resolution of 1960 and, directly, to the General Assembly session of 1970 where, in relation to the then Portuguese colonies of Angola, Mozambique and Guinea-Bissau, respective liberation movements were recognised as the “authentic representatives of the true aspirations of the peoples” of those Territories.

Governments that opposed such resolutions attempted to raise the argument that their recognition as authentic or sole representatives (as in the case of SWAPO of Namibia) conflicted with the traditional rule that in order to be recognised as a governmental or representative agency, the recognised entity had to exercise some degree of continuous power of government over the Territory concerned. But this was a selective opposition because the same States ignored the precedents of the recognition of governments-in-exile during the Second World War when some of the Allies recognised these governments-in-exile although they did not exercise the powers and functions of government in their own territories.

Liberation movements from southern Africa have taken part in diplomatic conferences, participated in the work of the United Nations committees, and have been recognised by Governments either as representatives of the peoples of southern

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<sup>51</sup> Higgins, *op. cit.*, p. 106.

<sup>52</sup> See D.W. Greig, *International Law* 2nd ed., (London, Butterworths, 1970), p. 104.

Africa or as bearers of rights. In the context of South Africa, such a recognition is especially important as the racist regime cannot, by reference to its own constitution and laws, purport to speak in the name of the African people.

### *Humanitarian Law*

The latest and most critical development in the status of peoples combating racism and colonialism in South Africa can be found in article 1, paragraph 4 of Protocol I of June 1977 of the Geneva Conventions for the Protection of War Victims of 1949. Until fairly recently, the 1949 Conventions were, in general, applied to international inter-State armed conflicts.

The need to elaborate additional international norms for the protection of freedom fighters led the General Assembly to issue numerous appeals to ensure the application to the armies of the liberation movements of the protection of the provisions of the Geneva Conventions and the Hague Convention. At its twenty-eighth session in 1973,<sup>53</sup> the General Assembly “solemnly proclaimed” a set of basic principles concerning the legal status of combatants struggling against colonial and alien domination and racist regimes. These principles, in the form of a Declaration, reiterated some of the principles already set forth in previous resolutions and, in particular, laid down that the “armed conflicts involving the struggle of peoples against... racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Convention.”

The culmination of the campaign by progressive forces for the additional protection for the combatants of the liberation movement came at the International Conference on Humanitarian Law which was convened at Geneva and in 1977 adopted, *inter alia*, Protocol I, notwithstanding the opposition of some Western countries. The new protocol provides that “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,” shall be included within the definition of “armed conflicts” to which the 1949 Conventions apply. The protocol, signed by 100 States, is subject to ratification but it can be argued that the recognition of the rights of liberation movements under the protocol is merely a codification of an already existing rule of general international law demanding that the humanitarian standards be applied to conflicts. On this basis, the liberation movement of South Africa is entitled to the legal status, as regards the application of the *jus in bello*<sup>54</sup> of a regular army in inter-State wars.

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<sup>53</sup> General Assembly resolution 3103 (XXVIII) of 12 December 1973.

<sup>54</sup> I.e., the rules on the conduct of war and the treatment of its victims.

## *The Security Council*

The issue of apartheid and the threat that the implementation of this policy constitutes, for the peace of southern Africa in particular and Africa in general, the aggression that the apartheid regime has waged against Angola, Namibia and Zambia and the extent to which South Africa has underwritten the illegal regime of Southern Rhodesia, contrary to its express obligations under Article 25 of the Charter, have presented the Security Council with opportunities for action against the apartheid regime.

The fact that the Security Council has not used its undoubted legal authority and powers in a more all-embracing fashion has been due to the actual use or the potential threat of the use of the veto by the United States, the United Kingdom and France, the three Western permanent members of the Security Council and the States that have had the strongest traditional economic, political, military and cultural links with the racial minority in South Africa. Transnational corporations with headquarters in these States are responsible for most of the investments in South Africa.

However, within the constraints imposed by the veto, socialist and third world States have on a large number of occasions used the procedures of the Security Council to highlight the general and specific situation in South Africa. From 1960 onwards, the Security Council has been seized of the situation in South Africa, though South Africa's allies have ensured that the situation in South Africa has not been described as a "threat to the peace" under Article 39 of the Charter which would enable the Security Council to take a whole range of binding actions against the regime. As a result, the situation has been described as "one that has led to international friction and if continued might endanger international peace and security,"<sup>55</sup> "seriously disturbing international peace and security"<sup>56</sup> and a "potential threat to international peace and security."<sup>57</sup>

From 1963 onwards, however, the Security Council was seized of the serious dangers that the export of arms and other military material to South Africa constituted for the people of South Africa and imposed a voluntary arms embargo against South Africa. The Council has repeatedly condemned South Africa and its policies of apartheid as being in violation of its obligations under the Charter. It has recognised the legitimacy of the struggle of the oppressed people of South Africa and has described apartheid as a crime against "the conscience and dignity of mankind."

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<sup>55</sup> Security Council resolution 134 (1960).

<sup>56</sup> Security Council resolutions 181 (1963) and 182 (1963).

<sup>57</sup> Security Council resolution 282 (1970) of 23 July 1970.

Draft resolutions for the expulsion of South Africa from the United Nations and for the imposition of economic and other sanctions against South Africa have been vetoed by three Western permanent members of the Security Council. However, in November 1977, through resolution 418 (1977),<sup>58</sup> the Security Council unanimously took a decision under Chapter VII of the Charter imposing a limited arms embargo on South Africa. Interestingly enough, the determination required by Article 39 of the Charter was couched in language that limited the threat to the peace to “the acquisition by South Africa of arms and related material” which the Security Council determined “constitutes a threat to the maintenance of international peace and security.” Obviously, it is the policy and the implementation of apartheid that constitutes the threat to international peace and security but this formulation was a compromise in order to obtain the support of the Western members.

South Africa’s policy of apartheid, its continued occupation of Namibia and its flagrant flouting of the binding sanctions imposed on Southern Rhodesia, in breach of Article 25 of the Charter, constitute a threat to international peace and security; in a precise sense, the apartheid regime is an international outlaw. New rules of law have developed in the last 20 years to enable the organised international community to treat the government of an ostensibly independent State as an illegitimate regime. The fact that South Africa is not treated as such by its allies and principal trading partners is not due to any weakness in the law or in the international machinery of enforcement but arises simply from economic interests, possible racial loyalty, and strategic considerations.

## **IV. LEGAL STATUS OF THE APARTHEID REGIME AND THE NATIONAL LIBERATION MOVEMENTS**

### **A. IS SOUTH AFRICA AN INDEPENDENT STATE?<sup>59</sup>**

by  
**Albie Sachs**

Legal truth, like all truth, arises out of the clash of opposites. At the heart of all debate on the legal characterisation of the apartheid State, lies the opposition between

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<sup>58</sup> Adopted on 4 November 1977.

<sup>59</sup> Statement made at the Seminar on the Legal Status of the Apartheid Regime and Other Legal Aspects of the Struggle against Apartheid, Lagos, Nigeria, 13-16 August 1984.

two seemingly irreconcilable truths, namely, South Africa is an independent State, and the eradication of apartheid represents the culmination of the struggle to free Africa from colonial domination. Put in terms of the internal situation in South Africa, a struggle essentially anti-colonial in origin and character is taking place in a country that has long ceased to be a colony. It is to this seemingly contradictory situation that international lawyers must address themselves.

### *Is it Correct to Characterise South Africa as an Independent State?*

Much confusion has arisen over this question because of failure to appreciate that the basic question is not one of recognition but of de-recognition. The then Union of South Africa was long ago admitted to the family of nations as an independent State. The Union was created as a self-governing dominion in 1910, and thereafter the Statute of Westminster, 1928, and the Status Act, 1934, of the British Parliament removed any formal controls that Britain might still have exercised. South Africa was a member of the League of Nations and a founder member of the United Nations. It established diplomatic relations with a large number of countries and entered into many bilateral and multilateral treaties. There can be no question that for many decades South Africa was recognised as an independent State. State practice and legal theory seemed in accordance in this respect.

All the criteria of recognition as in independent State appeared to be present. South Africa had a defined territory, a permanent population and a government exercising internal control, and was not legally subject to the external control of any other States (see the Montevideo Convention, 1933, article 1). Even those who might have argued that in addition to effective control the element of legitimacy should have been added, would have been satisfied that sovereignty had properly passed according to due constitutional and legislative process from Britain.

Normally, time consolidates rather than undermines legitimacy. Public international law is extremely realistic in regarding possession as nine-tenths of the law, preferring not to look to the origin of States or to the title of governments or to the nature of social systems but rather to regard respect for the sovereignty of each State as the foundation for international peace and co-operation.

How, then, is it possible to challenge South Africa's claim to be an independent State? The answer to this question must be found in the changed nature of the international legal order and the increased emphasis given to the principle of self-determination of peoples as the foundation of sovereignty. The family of nations is now constituted on different bases. The domination of people by people, race by race, once consecrated in the international legal order in the form of colonial and racist rule, not only lost its legitimacy, but came to be regarded as legally obnoxious. The anti-colonial revolution changed both the rules and the nature of those who made the rules. At the time when General Smuts, as Prime Minister of

South Africa, was invited to help draft the Charter of the United Nations, Nigeria was regarded as “belonging” to Britain. Today it is the emergence of countries like Nigeria, not only as the subjects of international law but as its creators, that has ensured that the once uncontested presence of apartheid South Africa in the United Nations should be contested, and that the once ignored black population of South Africa should be given international recognition.

Thus what was once normal became abnormal; what was once abnormal became norm. It was not so much that the principle of self-determination became accepted in international law as that its applicability became universalised and the rights formerly conceded only to the peoples and nations of Europe and Latin America came to be extended to the peoples and nations of Asia and Africa as well. As a result, the once accepted legitimacy of racist authority in South Africa came to be questioned and what had formerly been considered blemishes to be corrected came to be regarded as fundamental defects requiring a total reconstruction of the State.

At the level of international State practice, what had previously been a majority phenomenon, namely, recognition of South Africa as a State and of the Pretoria authorities as representatives of that State, became a minority phenomenon. Some States that had formerly had diplomatic relations with Pretoria (India, the USSR, Czechoslovakia) ceased to have such relations. At the same time, of the 100 new States that took their place in the international community, only one went on to enter into diplomatic relations with Pretoria. Similarly, international organisations that had formerly accepted representatives of the apartheid State as being representatives of South Africa, one by one withdrew the credentials of these representatives. The result is that today there is not a single United Nations body - whether the General Assembly or the most specialised organ - in which the Pretoria authorities are represented.

On the contrary, the United Nations has sponsored the International Convention on the Suppression and Punishment of the Crime of Apartheid, which stigmatises the philosophy and practices of the apartheid State as a crime against humanity; the General Assembly has frequently called upon States to isolate apartheid South Africa economically, culturally, militarily and diplomatically; the Security Council has imposed a mandatory embargo on the sale of arms to South Africa; and the United Nations has established the Special Committee against Apartheid, sponsor of this Conference, to ensure that the people of the world are kept constantly aware of the affront that apartheid represents to the human personality. Similarly, the overwhelming majority of international non-governmental organisations have also expelled the representatives of Pretoria, as have virtually all international sports bodies.

The process of expulsion from international organisations, de-recognition by certain older States, and non-recognition by newer States, has created a situation in which time has undermined rather than legitimised the apartheid State. It is true

that many of the older States, especially those with strong commercial interests at stake, still treat South Africa as a normal, if criticised, State and still maintain normal diplomatic relations with it. But the day has long passed when these States, as the so-called civilised nations of the world, determined for themselves who should and who should not be considered members of the family of nations.

In a slightly different but essentially related context, Prof. Ian Brownlie has pointed to the importance of seeing legal rules and their application in the context of law as history. Referring to the question of rights over territory, he reminds us that the nineteenth century witnessed contradictory developments:

“In Europe and Latin America the principle of nationalities appeared, which, as the principle of self-determination, has become increasingly important. At the same time the European power made use of the concept of *res nullius*, which was legal in form but often political in application, since it involved the occupation of areas in Asia and Africa which were often the seat of organised communities. Thus the principle of self-determination requires harmonisation with the pre-existing law.”<sup>60</sup>

By analogy, the pre-existing law, namely, the recognition of South Africa as an independent State, has to be harmonised with the increasing importance attached to the principle of self-determination. To the extent that it can be shown that South African State is constructed - formally, legally, officially - on principles that deny self determination to the majority, excluding them from the sovereignty and denying them nationality, to that extent the once-accepted legitimacy of the South African State is impugned and its recognition as a member of the community of nations put in issue.

International State practice in relation to southern African questions in general casts an interesting light on the classic international law controversy between the adherents of the constitutive and the declaratory theories of recognition. The constitutive theory, which argued that international legal personality came essentially from recognition by the international legal community, was based historically on the situation in the nineteenth century when a relatively small group of nations, mainly in Europe and the Americas, dominated international law, constituting a sort of “club” to which other nations could only belong if “elected” as “members.” The declaration theory, on the other hand, which contended that recognition merely acknowledged the fact of the existence of a State with international legal personality and was not the basis of constituting such personality, was strongly supported by new revolutionary States as more progressive and as favourable to peaceful co-existence.

The question now arises, however, as to whether certain elements of the constitutive theory need not be revived in a new form, in the sense that in certain

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<sup>60</sup> Ian Brownlie, *Principles of Public International Law* (2<sup>nd</sup> ed.).

objectively defined circumstances the organised world community can refuse to admit to normal international intercourse an entity even though it might possess the elements of territory, population and government. Whereas previously the members of the “club” that decided to confer or not confer international legal status on other States constituted a self-elected elite applying the so-called norms of Western civilisation, today the international community has become global in character, and its norms have been universalised and made more democratic by virtue of such instruments as the United Nations Charter. The legitimacy of any new entity claiming admission to the family of nations therefore depends fundamentally on whether by its very character and constitution such entity contravenes any of the generally recognised principles of international law, and particularly the principle of self-determination.

Perhaps more emphasis needs to be given than has been shown in some scholarly writing to the difference between recognition of a new State and recognition of a new government. Whereas the principle of effectiveness is decisive in the case of recognising or not recognising a new government, it is the principle of self-determination that should of necessity be fundamental in the case of recognition or otherwise of a State. The same would apply to the process of de-recognition: the vast colonial empires, once recognised as falling within the sovereignty of the metropolises, were progressively de-recognised by international law, at times with the consent of the colonising Powers, at times against their wishes. Examples of this are Algeria’s independence from France and Guinea-Bissau’s independence from Portugal. The question of effective control ceased to be the determining element and was only indirectly relevant in that in both these cases it was popular insurrection and armed struggle that manifested to the world a claim to self-determination, and it was made clear in certain liberated zones, or a Provisional Government in exile that created the basis for the recognition of new state entities.

The greater the international acceptance of the principle of the rights of colonised peoples and nations to self-determination, the more tenuous became the legitimacy of the remaining colonial empires. Today only Namibia and South Africa remain “un-decolonised.” The forms of domination established in these two countries in the period of the heyday of colonialism remain essentially untouched, but what was once accepted has now become repugnant to international law.

This is not to argue that the United Nations has become a supranational organ with authority to determine whether the conditions of statehood exist or not in these cases, but to say that the acceptance by the international legal community of the principle of self-determination as the foundation of statehood has created a situation in which the once unassailable position of South Africa as an independent State has been undermined.

To sum up: South Africa has certain of the essential characteristics of an independent State, but lacks the fundamental one, namely, compliance with the

principle of self-determination. The mere existence of a territory, population and a government exercising a degree of effective control is not enough. A State that reserves its sovereignty to a small racially constituted minority, that negates the legal personality of the great majority of the people on the ground that they are of indigenous origin, that deprives them constitutionally of elementary rights of citizenship, that leaves them without nationality and subjects them to massive racial discrimination, cannot claim to be an “independent State” in the full meaning of the term. The State is independent in the sense that it is not subject to the legal control of any other States, but the people are not independent inasmuch as they lack sovereignty. The clearest proof of the exclusion of the majority of the people from national sovereignty comes from apartheid regime itself, through its bantustan policy, which is expressly designed to exclude the mass of people from the national polity under the guise of granting them separate independence in separate tribal States.

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A new popular sovereignty proclaims itself through the praxis of the mass national liberation struggle for democratic rights, so that the international legal community, while increasingly denying recognition to the old, increasingly grants recognition to the new. If South Africa is an independent State, it is one in which the majority of the people have never enjoyed independence. Until such time as the independence granted by Britain in 1910 to the white minority covers the whole population and the whole territory, it cannot be treated as an independent State in the proper sense of the word. Its independence is inchoate, and will only be complete when sovereign power is exercised not by a racial minority but by the people as a whole.

## **B. THE LEGAL STATUS OF NATIONAL LIBERATION MOVEMENTS (WITH PARTICULAR REFERENCE TO SOUTH AFRICA)<sup>61</sup>**

by

**Kader Asmal**

### ***Introduction***

A number of political developments in South Africa in recent years have thrown

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<sup>61</sup> Paper presented at the *Journal of South African Studies* Conference on “Law and Politics in Southern Africa,” London 6-8 April 1984.

into sharp focus the relevance of the rules of self-determination, the preferred and protected role of the national liberation movement and the legal character of the South African State.

Lawyers, and international lawyers in particular, have not worked out the implications of these developments in any systematic manner but a number of Studies in discrete areas have tried to tease out the implications of these developments and, in some cases, there has been some attempt to rely on these rules of international law in specific problems facing South African courts.

The continued refusal of the international community to recognise the independence of the four homelands, the controversy associated with South African Government's attempt in 1982 to transfer or cede Ingwavuma and Kangwane to Swaziland and the problems associated with the denaturalisation of more than 8 million Africans under the National States Citizenship Act of 1970 highlight the special features of the situation in South Africa. Finally, the recent trials of alleged combatants of the African National Congress of South Africa on charges of high treason, the nature of the pleas made by the accused and the declaration in November 1980 deposited by this organisation with the International Committee of the Red Cross raise very sharply the question of the interrelationship between the rules of self-determination and the role of the liberation movements.

The starting point must therefore be a discussion of the right to self-determination, which has had far-reaching effects in contemporary international law on nearly every aspect.

### ***The Right to Self-determination***

The right to self-determination of colonial peoples is an incontestable legal principle today. Apart from a handful of (largely Anglo-Saxon) legal writers, States and the international community recognise the right as providing a juridical foundation for the recognition of a people as a legal entity possessing rights, which denies the former colonial idea that peoples and territories "...are mere chattels to be acquired and disposed of by and for the benefit of the proprietary State, but are instead the heritage of those who dwell within them."<sup>62</sup>

The rule of self-determination is enshrined not only in the Charter of the United Nations but also finds a place in other sources of international law.

(a) The Charter refers to self-determination, firstly, in its purposes where in Article 1, paragraph 2, there is the requirement to "develop friendly relations among nations based on respect for the principle of equal rights

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<sup>62</sup> E. Lauterpacht, 2 *Harvard Law Journal* (1965), p. 271.

and self-determination of peoples.” Article 55, significantly concerned with international, economic and social co-operation, places respect for the “principle of equal rights and self-determination of peoples” in the context of “peaceful and friendly relations among nations,” and Article 56 enjoins Member States of the United Nations to take “joint and separate action in co-operation with the organisation for the achievement of the purposes set forth in Article 55.”

(b) The link between racial equality and decolonisation is reflected in resolution 2106 (XX) of 1965 where the General Assembly associated the right of self-determination with the International Convention on the Elimination of Racial Discrimination, 1965, the most highly ratified Convention.<sup>63</sup> Even more concretely, the right of self-determination finds expression in article 1, common to the two Covenants of 1966, both of which are now in force:

“(i) All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

“(ii) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”

(c) Since its formation, the United Nations has, in resolutions specially concerned with Namibia, referred to this right. But with the addition of a number of African States to the membership of the United Nations in the past two decades, there was impatience at the rate of decolonisation and, in association with the socialist States for whom self-determination was one of the historic imperatives, the General Assembly faced the challenge by passing the seminal Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>64</sup> The resolution sets out seven principles.

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Subsequent to 1960, a stream of important resolutions elaborated and further developed this right.<sup>65</sup> Whether General Assembly resolution 1514 (XV) itself

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<sup>63</sup> As of 1 September 1983, there were 121 ratifications.

<sup>64</sup> General Assembly resolution 1514 (XV) of 14 December 1960.

<sup>65</sup> See Sureta, *The Evolution of the Right to Self-Determination* (Leiden, 1973), for a comprehensive study of the early repertory of practice of the United Nations. Espiell, United Nations document E/CN.4/Sub.2/405/Res.1(6a) of 1980 and Cristescu, United Nations document

was law-making is now quite unimportant. Brownlie considers the resolution to be an example of an authoritative interpretation of the Charter. Some others may consider it to be part of customary international law because of State practice, acquiescence and consensus. The better view is that the resolution did not identify in concrete legal terms the right of self-determination, for as Manfred Lachs has said, “the relevant provisions of the Charter were not creative of a new rule of law. All they did was to confirm and lay down in writing a principle which had long been growing and maturing in international society until it gained general recognition. By including and laying it down as one of the principles of the newly born organisation, the Charter gave expression to one of the elements of the international law of the time.”<sup>66</sup>

This view is upheld by the subsequent development which ensured that this right of self-determination has emerged as part of *jus cogens*, certain overriding principles or imperative norms of international law, “which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent norm of contrary effect.”<sup>67</sup> The International Court of Justice, in giving examples of these “peremptory norms,” which form part of *jus cogens*, described these obligations as being obligations “towards the international community as a whole .”

The Declaration has been cited as a source of authority for the activities of the United Nations in support of national liberation movements. In the formative period of United Nations action, the only liberation movements recognised by the General Assembly were those in Africa - in the Portuguese colonies, Zimbabwe, Namibia and South Africa. These resolutions, underlying the norms of international law, have consistently embodied five basic principles which lie at the foundation of all international activity in support of liberation movements and they have been applied, to a greater or lesser extent, to the situation arising in the Western Sahara, Palestine and East Timor.

The five principles are:

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E/CN.4/Sub.2/404/Res.1) of 1981 provide the fullest collection of the relevant United Nations resolutions under the appropriate headings. For the legal effect or significance of the re-citation of General Assembly resolutions, see Bleicher, 63 *American Journal of International Law* (1969), p. 444.

<sup>66</sup> In *Indian Journal of International Law* (1961), pp. 429 and 432.

<sup>67</sup> Ian Brownlie, *Principles of Public International Law* (2nd ed.), pp. 495-500.

(a)

The resistance of these liberation movements to colonial, racist and alien regimes in their territories is legitimate and the opposition of those regimes to the effort of the movements is unlawful. The national liberation movements are the “legitimate” or “authentic” or, in the case of Namibia, the “sole” representatives of the oppressed people of their Territories in the international community, even though they do not claim to be the governments of independent States;

(b)

The liberation movements may utilise “all necessary means at their disposal,” including armed force, for the termination of colonialism and racism in their Territories;

(c)

All States and organisations associated with the United Nations should provide “moral and material assistance” to the liberation movements and should refrain from assisting their adversaries in unlawful opposition to them;

(d)

When considering matters dealing with the Territories for which national liberation movements exist, organisations associated with the United Nations should provide for the representation of those movements at their deliberations and conferences;

(e)

National liberation movements and their members combating colonialism, racialism and alien rule are entitled to the protection of the Geneva Conventions of 1949, especially those relating to the protection of civilians and prisoners of war.

### ***Legal Status of the Liberation Movements***

The right to self-determination is therefore a recognition of the collective rights of a national entity which is accorded rights under the Charter and under international law. The recognition of the rights of a people is important as it presupposes that such rights will be or can be pursued or vindicated through the instrument of a public body known as a national liberation movement and that the

struggle itself is thereby accorded a legal status in international law.

The consequences of this evolution of the law are far-reaching because it “represents an important movement away from the old view under which international law rights pertain only to States and governments and not to groups of individuals.”<sup>68</sup> Liberation movements recognised by the United Nations have, especially where there is a regional organisation such as the Organisation of African Unity to espouse their claim, therefore, the capacity of existence at the level of international law as they are the legally prescribed instruments for the vindication of the right to self-determination. Without such a recognition, the right to resistance, which is connected with a viable entity and accompanying political institutions, is devoid of meaning.

The creative development of international law in support of the rights of subject peoples fighting against the tyranny and violence of colonialism, racism and apartheid shows that international law adopts empirical tests as far as personality is concerned and the early statement of the Secretary-General of the United Nations that “practice has abandoned the doctrine that States are the exclusive subjects of international rights and obligations”<sup>69</sup> has been upheld by subsequent practice concerning national liberation movements.

In jurisprudential terms, this development has had extraordinary effects. “Colonial” issues, including the issue of apartheid and racism in South Africa, are removed from the restrictions of the domestic jurisdiction clause of the Charter;<sup>70</sup> sovereignty vests in the people of the Territory and not in the colonial Power and the liberation movement has interim personality, as the representative of the peoples of the Territory in question.

The impetus for this development came from the struggle of the people of Angola, Mozambique and Guinea-Bissau in the 1960s. The formula used by the General Assembly and the Security Council was applied, to a lesser extent, to other situations. At the twentieth session, in 1965, the General Assembly, for the first time, recognised the “legitimacy of the struggles by the peoples under colonial rule to exercise their right to self-determination and independence” and at the same time it invited “all States to provide material and moral assistance to the national liberation movements in colonial Territories.” The following year, the General Assembly went one step further and stated that the preservation of colonialism and its manifestations, including racism and apartheid, were

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<sup>68</sup> R. Higgins, *The Development of International Law by the Political Organs of the United Nations*, (1963), p. 106.

<sup>69</sup> Memorandum of Secretary-General, “Survey of International Law in Relation to Work of Codification of International Law Commission,” A/CN.4/1/Res.1, p. 19 (1949).

<sup>70</sup> Article 2 (7) of the United Nations Charter.

incompatible with the Charter and the Declaration on decolonisation. It further declared that colonialism threatened international peace and security and that the practice of apartheid constituted a crime against humanity, a characterisation that was to have important legal repercussions in the years ahead.

The representative nature of liberation movements was first applied by the General Assembly to the movements fighting Portuguese colonialism in Africa. As far as extant movements are concerned, the South West Africa People's Organisation (SWAPO) of Namibia, which was established in 1960 and began the armed struggle following the disgraceful judgement of the International Court of Justice in 1966, was recognised by the General Assembly as the "authentic representative of the Namibian people." The Assembly supported its efforts to strengthen national unity and requested an active commitment by all governments, international organisations and national bodies to channel aid - financial, material or otherwise - through SWAPO.<sup>71</sup>

Three years later, the General Assembly recognised SWAPO as the sole and authentic representative of the Namibian people, supported its armed struggle for self-determination, freedom and national independence, and invited States to provide assistance for this struggle. Significantly, the Assembly invited SWAPO to participate as an observer in the work and sessions of the General Assembly and in all conferences convened under the auspices of the Assembly (later to include all United Nations bodies). In relation to the implementation of Security Council resolution 385 (1976) on elections for a transfer of power in Namibia - whose initial impetus has been obscured by the intervention in 1977 of the five Western Contact States - the General Assembly, at its ninth special session in 1978, insisted that independence talks between SWAPO and the representatives of the South African regime, under the auspices of the United Nations, must be for the sole purpose of discussing the modalities for the transfer of power to the people of Namibia, and rejected the pretensions of the South African-sponsored groups in Namibia whom South Africa was intending to put forward as an alternative to SWAPO.

SWAPO has, as a result, enjoyed a special status representing the role as the organ for the self-determination for Namibia, reflecting the special international status of the Territory. It enjoys also a special relationship with the United Nations Council for Namibia in the implementation of various United Nations policy decisions.

The situation in South Africa, arising out of the official State policy of apartheid, has led to United Nations intervention since 1946, when the General Assembly was first seized of the issue. The systematic and violent imposition of the official policy of the State and the large-scale Western involvement in economic, military and diplomatic support for the system have made the apartheid issue one of the

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<sup>71</sup> Resolution 3111 (XXVIII) of 12 December 1973.

crucial legal problems of our time. More resolutions of the General Assembly, the Security Council and the associated or subsidiary organs of the United Nations have been passed on the issue of apartheid than on any other international situation or dispute. Through these repeated resolutions, which have assisted in legal developments, the international community has recognised that the apartheid system and the situation in South Africa are special cases, requiring exceptional responses both from the world body and international law.

There has been a clear recognition that apartheid is more than a matter of human rights whereby amelioration of the plight of the 20 million blacks would lead to improvements in the situation there. The development of the law over the past three decades has followed the following pattern. The linking of racial equality with decolonisation and self-determination, the development of the norm of non-discrimination, the recognition of apartheid as a crime against humanity, now clearly reflected in the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 which, like the Genocide Convention, imposes individual responsibility for such a crime, and the insistence of the General Assembly that the situation in South Africa is a threat to international peace and security partially recognised by the Security Council by the taking of Chapter VII Charter action against a Member State forbidding the export of arms and military material to South Africa, culminated in a recognition that the South African regime is illegitimate.

This dramatic conclusion was reached by the General Assembly when it declared that the “racist regime of South Africa is illegitimate and has no right to represent the people of South Africa.”<sup>72</sup> Associated with this was the reaffirmation of the “legitimacy of the struggle of the oppressed people of South Africa and their liberation movements, by all possible means, for the seizure of power by the people and the exercise of their inalienable rights to self-determination,” and the further and important recognition of the national liberation movement of South Africa as the “authentic representatives of the overwhelming majority of the South African people.”

To reach this conclusion, the world community had first to evaluate the nature of the South African State. Although ostensibly meeting the criteria of statehood - permanent population, defined territory, a government and the capacity to enter into relations with other States - the South African regime represents not the classical features of salt-water colonialism, to which the decolonisation process and the right of self-determination automatically apply, but a colonialism of a special kind where the colonisers and the colonised live in the same territory, and where the racial minority, in their laws and in the Constitution itself, considers and treats the majority as rightless aliens in their own country. The bantustan system, with its inner “logic” of ultimately dividing South Africa into a number of territorial units with an alleged independent status granted by the colonial

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<sup>72</sup> General Assembly resolution 3411 E (XXX) of 28 November 1975, adopted by a vote of 101 to 15, with 16 abstentions.

Parliament, will remove citizenship rights for all “citizens” of the bantustans. The bantustan policy, more sharply than any other manifestation of apartheid, shows the classical features of a colonial administration conferring “independence” on what must be considered as a subject people. But since the “people” as a whole have never been consulted about their fate, such partition attempts must be seen as contrary to the right of self-determination, rather than simply as a part of the anti-human rights policy of apartheid.

In other words, two systems of law and government exist side by side in South Africa, one for the colonisers and the other for the colonised. The former enjoyed a transfer of legal authority from the imperial overlord, Britain, but since the establishment of the Union of South Africa in 1910, the essence of the colonial relationship has been continuously maintained.<sup>73</sup>

In any event, the rules of international law have developed to an extent where the apartheid system has been held to be in breach of the rule of non-discrimination recognised by the International Court of Justice and articulated by Judge Padilla Nervo:

“Racial discrimination as a matter of official government policy is a violation of norm or rule or standard of the international community.”<sup>74</sup>

Secondly, the norm of racial equality has been associated with, or even assimilated to, the norm of self-determination<sup>75</sup> and racial discrimination as a “factor giving rise to a colonial situation has also been apparent apart from the case of Southern Rhodesia, in the resolutions adopted in recent years on the apartheid policies followed by South Africa.”<sup>76</sup>

Thirdly, apart from the 1973 Convention on Apartheid, customary international law and treaty law view apartheid as a crime under international law. This is illustrated by the ease with which the Geneva Conference on Humanitarian Law, when adopting Protocol I of 1977 additional to the Geneva Conventions of 1949,

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<sup>73</sup> For a fuller discussion of the status of the South African regime in international law and the extent to which an entity is liable in a legal system although its legal warrant is suspect, see the writer’s article “Law versus Apartheid,” *Review of Contemporary Law* (1979), p. 57.

<sup>74</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *I.C.J. Reports 1971*, p. 123. See also the *South West Africa Cases (Second Phase)*, *I.C.J. Reports 1966* on the norm of non-discrimination, Wellington Koo, p. 234; Jessup, p. 455, Padillo Nervo, p. 464; and, especially, Tanaka, p. 286.

<sup>75</sup> General Assembly resolution 2106 B (XX) of 21 December 1965.

<sup>76</sup> Sureda, *op. cit.*, p. 243, where Sureda refers to the early resolutions showing this assimilation.

accepted the provision whereby apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination, shall be regarded as “grave breaches of the Protocol” when “committed wilfully and in violation of the [Geneva] Conventions or the Protocol.” Under section II of the Protocol, these acts have been added to the list of “grave breaches.” Under article 85, paragraph 5, of Protocol I, grave breaches of the Conventions and the Protocol are to be regarded as war crimes.

In the same vein, the International Law Commission, which has been reporting on international crimes in the context of state responsibility, adopted at its twenty-eighth session a definition which has urgent and serious implications for international order:

“An international wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole, constitutes an international crime.”

On the basis of the practice of the General Assembly and the development of rules that genocide and apartheid are examples of offences to be included in the category of the most serious internationally wrongful acts, the Commission adopted article 19 which states that an international crime may result, among other examples, from “a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, apartheid.”

In Namibia and South Africa, therefore, the right of the population to overthrow a system that has been incontestably recognised to be a crime against humanity cannot be doubted.

### ***The Right to Revolt***

A people revolting against colonial aggression represent their interest through a public body such as a national liberation movement. Such interim international personality of a national liberation movement reflects the personality of a new State that is in the process of establishment.

In order to vindicate the principle of self-determination, nations or peoples have resorted to physical force, and will continue to do so. It may be artificial to consider that such a struggle is a form of self-defence of the emerging State under Article 51 of the Charter of the United Nations. It is more fruitful to consider recourse to armed struggle as consistent with the Charter because it is in pursuit of a rule of *jus cogens*, the right to self-determination. In other words, the conflict is between “forces which represent different authorities and different peoples”<sup>77</sup> and

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<sup>77</sup> Skubiszewski in *Manual of Public International Law*, 1963, p. 80.

from the earliest stage of United Nations involvement, these conflicts were considered to be “international conflicts” and thus removed from the domestic jurisdiction clause. Although the threat or use of force in contemporary international law is forbidden, specially but not exclusively under Article 2 (4) of the Charter, and no title to territory may be acquired through illegal methods, an armed colonial struggle belongs to “an area where force may still be employed for the purpose virtually of bringing about a change in territorial sovereignty, without necessarily impinging upon prohibitions of the use of force laid down by international law.”<sup>78</sup>

Western Governments objected to the concrete application of the right to revolt in pursuit of the right to self-determination in its early stages but the United Nations in its repertory of practice reflected, in the early 1960s an awareness of changing political realities which “symbolise [d] and concretise [d] a new politico-juridical conception: the definite repudiation and end of colonialism.”<sup>79</sup>

For a number of years, beginning in 1965, the General Assembly has recognised the legitimacy of the struggle of peoples under colonial rule to exercise this right to self-determination, starting with the colonies under Portuguese occupation and in relation to Zimbabwe, but later generalising this right to Namibia, South Africa and the people of Palestine.

At its twentieth session in 1965, the General Assembly recognised the legitimacy of the struggle by the peoples under colonial rule to exercise this right to self-determination and independence.<sup>80</sup> At the same session, in the Declaration on the Inadmissibility of Intervention in Domestic Affairs and the Protection of Independence and Sovereignty (passed without a vote against), the General Assembly identified the other aspect of this right when it demanded not only “respect for self-determination and independence of peoples and nations... with absolute respect for human rights and fundamental freedoms” but demanded that all States should contribute to “the complete elimination of racial discrimination and colonialism in all its forms and manifestations.”

The right to revolt now had additional dimensions, the right to seek and obtain assistance from other States and the obligation on other States not to assist in the preservation of colonialism, racism and apartheid. Brownlie identifies this aspect of the principle as one of the “corollaries,” namely, “...intervention against a liberation movement may be unlawful and assistance to the movement may be lawful.”<sup>81</sup> Western Governments may continue to vote against specific resolutions

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<sup>78</sup> Jennings, *The Acquisition of Territory in International Law*, 1963, p. 80.

<sup>79</sup> Casteneda, *Legal Effects of United Nations Resolutions* (1969), p. 13.

<sup>80</sup> General Assembly resolution 2105 (XX) of 21 December 1965.

<sup>81</sup> Brownlie, *op. cit.*, p. 577.

that recognise these rights and obligations in relation to specific Territories but this is untenable because they are parties to two major declarations passed without dissent or abstention by the General Assembly.

Whatever doubt may have existed about the right to overthrow established authority which contravenes the right to self-determination, has now been dissipated by the unanimous adoption by the General Assembly of the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>82</sup> which is declaratory of customary international law. The principles of the Charter embodied in the Declaration are declared to constitute “basic principles of international law.” The Declaration lays down a duty on States “to refrain from any forcible action which deprives peoples referred to in the elaboration of the present principle of their rights to self-determination and freedom and independence.” But even more importantly, the Declaration recognises a right to fight against such deprivation because it lays down that:

“In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.”

It is quite clear that the Declaration recognises the right to have recourse to a war of liberation and clearly indicates that the use of force against the exercise of self-determination is a violation of international law. In so far as the resolution recognises the right of internal revolution, it codifies what international law has traditionally assumed. The Declaration clearly applies to Namibia, where the majority is under “alien subjugation, domination and exploitation.”

Similarly, the General Assembly resolution on the Definition of Aggression passed by consensus in 1974 which, in accordance with the Charter, prohibits aggressive acts between States, expressly (under article 7) provides that nothing in the definition of aggression can prejudice the right of self-determination, freedom and independence of peoples under “colonial and racist regimes or other forms of alien domination,” nor the right of these peoples to struggle to that end and receive support, in accordance with the principles of the Charter and in conformity with the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.<sup>83</sup>

These developments in international law, consistent with and not in derogation from the Charter of the United Nations, have drawn the significant observation

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<sup>82</sup> General Assembly resolution 2625 (XXV) of 24 October 1970.

<sup>83</sup> General Assembly resolution 3814 (XXIX) of 14 December 1974.

from one commentator that “it is clear that the right of revolution has been recognised more forthrightly and explicitly by the international community than it earlier had been.”<sup>84</sup>

The liberation movements of South Africa have had observer status with the United Nations since 1974, have participated in conferences held under the auspices of the organisation and even signed the text adopted at the conclusion of the Geneva Conference on Humanitarian Law in 1977. This has been the result of the persistence of the General Assembly where, by increasing majorities, the Assembly has characterised the South African regime as “illegitimate,” resulting in the withdrawal of the credentials of the South African delegation in 1974, proclaiming that the national liberation movements of South Africa are the authentic representatives of people of South Africa in their just struggle for national liberation” and recognising the “right of the oppressed people and their national liberation movements to resort to all the means at their disposal, including armed struggle, in their resistance to the illegitimate racist minority regime of South Africa.”<sup>85</sup>

In case the practice of the General Assembly is dismissed as the result of the “tyranny of automatic majorities” obtained by the third world, it is interesting to turn to the evolution of the practice of the Security Council.

The Security Council was first seized of the South African issue in 1960, following the massacres at Sharpeville and Langa. Resolution 134 (1960) recognised that the situation in South Africa “is one that has led to international friction and if continued might endanger international peace and security.” Although there was a call for South Africa to “abandon apartheid,” there was no characterisation of the regime or the nature of the struggle. The “legitimacy of the struggle of the oppressed people” was first recognised in resolution 82 (1970) but the struggle was related to their “human and political rights set forth in the Charter of the United Nations and the Universal Declaration of Human Rights.” France, the United Kingdom and the United States abstained on this resolution. The same formula, repeated in resolution 392 (1976), adopted three days after the shootings at Soweto, went somewhat further and recognised the “legitimacy of the struggle of the South African people for the elimination of apartheid and racial discrimination.”

The combination of “struggle” and “elimination” was significant and in resolution 417 (1977) the Security Council unanimously reaffirmed the earlier recognition of the legitimacy of the struggle against apartheid, but went one step further. For the first time, the Council affirmed the right of the people of South Africa as a whole, irrespective of race, colour or creed, to the exercise of self-determination. The

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<sup>84</sup> Schwelb in *Law and Civil War in the Modern World* (ed. Moore), 1974.

<sup>85</sup> General Assembly resolution 38/39 A of 5 December 1983.

connection between apartheid and self-determination has been asserted in a subsequent resolution<sup>86</sup> and support for the legitimacy of the struggle reiterated.

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These resolutions of the General Assembly (and even of the Security Council) have affirmed the right of colonial peoples to resort to armed struggle and to such necessary material support and other support against foreign domination. More recently, the responsibilities of the specialised agencies and other organisations within the United Nations for the provision of “moral and material assistance, on a priority basis, to the peoples of the colonial Territories and their national liberation movements” has been clearly identified.<sup>87</sup>

Since 1965, when both the General Assembly and the Security Council have had to condemn the violence of colonialism, especially against the territory of States that have provided assistance to liberation movements, resolutions have demanded that the colonial aggressor pay compensation to the States that have suffered damage. Until 1981, this was the constant position of the Security Council. No resolution of any United Nations body has either condemned the country providing assistance to a liberation movement or equated the reaction of the liberation struggle with the violence of colonial and racist regimes. The constant theme of resolutions passed in response to complaints brought by Zambia, Mozambique, Angola and Lesotho has been to condemn the acts of violence or aggression by South Africa, as it had been previously in the case of then Southern Rhodesia. For the first time in 1981, following the massive invasion of Angola by South Africa under the code name of “Operation Protea,” the United States used the veto because the resolution lacked “balance,” as there has been no reference to SWAPO’s activities from Angola.

But what these resolutions have established, as they did in the earlier instances of the Portuguese colonies, is that the illegal status of the occupying Power denies that Power the automatic right to self-defence. Conversely, the right of the victim-peoples to take steps to pursue their right to self-determination is not to be equated with the aggressor’s actions.

### ***Humanitarian Law***<sup>88</sup>

Principle VI (b) of the Nuremberg Principles of 1946, adopted by the General

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<sup>86</sup> Security Council resolution 473 (1980) of 13 June 1980.

<sup>87</sup> Paragraph 12 of General Assembly resolution 34/42 of 21 November 1979.

<sup>88</sup> See also Kader Asmal, “The status of the combatants of the liberation movement of South Africa under the Geneva Conventions of 1949 and Protocol I of 1977,” United Nations Centre against Apartheid, *Notes and Documents*, No. 10/80.

Assembly, defines war crimes as:

“Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in an occupied territory, murder or ill-treatment of prisoners-of-war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity.”

Wars of national liberation did not fit easily into the traditional description of parties covered by international humanitarian law in that one party (the liberation movement) is not a State while the other party is, however illegal its occupation (as South Africa in Namibia, Israel in the West Bank) or illegitimate its status (as in the case of South Africa itself).

The applicability of the Nuremberg Principles to these territories depends on the legal nature of these conflicts. There is here a rich area of the law developing to meet the needs of the international community.

### ***The Geneva Conventions***

The core of the law for the protection of individuals in time of war is provided by the four Geneva Conventions of 1949 consisting of four treaties, relative to the wounded and the sick, the wounded, sick and shipwrecked at sea, prisoners of war and civilians. There are other provisions regulating the conduct of war on land or sea, especially the Hague Convention of 1907 on the conduct of war on land, but it is the “Geneva Principles” as they have become known which are especially relevant, particularly Conventions III and IV dealing with prisoners-of-war and civilians respectively. They form the basis of international humanitarian law.

These Conventions are ratified by about the highest number of States compared with any other international treaty. As of June 1977, 143 States were parties to the Conventions (including South Africa). With one exception, the whole of the organised international community is bound by these rules. The question of whether these Conventions are part of customary international law, thus providing rights for entities not parties to the Convention, is not of “academic interest”<sup>89</sup> as one writer suggests, but of profound importance. If the Hague Regulations were held to be declaratory of customary international law by the Nuremberg War Crimes Tribunal, although they were ratified by far fewer States, the near-universality of the Geneva Conventions must undoubtedly make them part of customary international law.

In any case, there are features to these Conventions that are unique in international relations and in texts imposing duties on States. For example, article

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<sup>89</sup> Baxter, *Harvard International Law Journal* (1975)

1 common to all four Conventions provides that “the contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” This obligation does not overlap with the results of ratifying the Convention. It emphasises that the Conventions imply certain pledges taken by the State itself, in accordance with its humanitarian duties and which are independent of any reciprocity on the part of other or co-contracting Powers. Therefore, this “imperious obligation of civilisation” imposes not only a duty on a contracting State to carry out its duties. This would seem to place interesting obligations on the allies of South Africa to ensure that the regime complies with the provisions of the Conventions, which may be one reason why even Western Powers have appealed to the South African regime not to execute combatants of the African National Congress. Otherwise, the other contracting States may themselves be in breach of common article 1.

The major obstacle to the reliance on the Geneva Conventions by combatants struggling against colonial and alien domination and racist regimes was that these Conventions applied to international conflicts, i.e., inter-State wars and conflicts, and they presupposed that only States could become parties or contracting Powers to the Conventions.

Article 3 common to the four Conventions attempts to deal with armed conflicts not of an international character by laying down the minimum of humane treatment to be guaranteed for prisoners. But the terms on which article 3 may apply are vague and they depend on a State party to the Conventions applying them to the situation.

Not once in the recent anti-colonial struggles against the Portuguese up to 1974 did the metropolitan Power recognise the application of article 3. Also, the three kinds of struggle referred to above were not really assimilable to the kind of civil war situation regulated by article 3.

### *Move Towards New Law*

The development of new rules to regulate the status of combatants fighting for national liberation, against alien occupation and against racism, is inextricably bound up with the norms of law associated with three other areas. Firstly, there was the effect of General Assembly resolution 1514 (XV) of 1960 embracing the Declaration on the Granting of Independence to Colonial Countries and Peoples; secondly, the development of the right of movements representing such peoples to employ armed struggle in pursuit of these objectives, which owed so much to the 1966 Conference of Heads of State or Government of 47 Non-Aligned Countries which declared that “colonised people may legitimately resort to arms to secure the full exercise of their right to self-determination and independence if the colonial Powers persist in opposing their national aspirations.” The “right to revolt” was asserted in subsequent General Assembly resolutions and found its

clearest manifestation in the consensus Declaration on Definition of Aggression of the General Assembly in 1974.

Thirdly, the majority of members of the United Nations had contended for a number of years that the conflicts in countries under colonial domination were in fact international conflicts for the reasons we have already seen and since these Territories have an internationally-protected right to revolt, foreign States, (or in the special kind of colonialism existing in South Africa, South Africa itself), are bound to observe the Geneva Conventions, especially those relating to civilians and prisoners-of-war. If, therefore, rules in a treaty stipulated that wars of national liberation are international armed conflicts, these rules would simply codify international law already in force.<sup>90</sup>

As far as the status of combatants of national liberation movements was concerned, the United Nations Conference on Human Rights held in Teheran in 1968 on the twentieth anniversary of the Universal Declaration on Human Rights specifically referred to the need to extend human rights provisions to all international conflicts. Direct United Nations interest in this area was aroused very quickly and in 1970 the General Assembly requested the Secretary-General of the United Nations to give “particular attention to the need for the protection of the rights of civilians and combatants in conflicts which arise from struggles under colonial and foreign rule, for liberation and self-determination, and to the better application of existing humanitarian international conventions and rules to such conflicts.”

This development culminated in the adoption by the General Assembly in 1973 of resolution 3103 (XXVIII) which reaffirmed the right to revolt, stressed that the policy of apartheid and racial discrimination had been recognised as an international crime, referred to the illegal status of mercenaries and, in paragraphs 3 and 4, stated:

“The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions, and the legal status envisaged to apply to the combatants... is to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes.

“The combatants struggling against colonial and alien domination and racist regimes captured as prisoners are to be accorded the status of prisoners of war and their treatment should be in accordance with the provisions of the Geneva Convention relative to the Treatment of Prisoners...”

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<sup>90</sup> See further, N. Ronzitte, “Resort to force in wars of national liberation,” in *Current Problems of International Law* (ed. Cassese), 1975, p. 319. *Contra*, Dugard, SWAPO: The *Jus ad Bellum* and the *Jus in Bello*, 93 *South African Law Journal* (SALJ) (1976), p. 145, and Theodoropoulos’ persuasive response to Dugard in *Africa Today* 26 (1979), p. 39.

The International Committee of the Red Cross had already convened meetings of experts to consider the elaboration of the 1949 Conventions. The invitation of the General Assembly to deal with the above matter could not have come at a more propitious time and provided the appropriate backdrop when the Geneva Conference of Diplomatic Representatives was convened in 1974 and adopted Protocols I and II in 1977.

### *Scope of Application of Protocol I*

Protocol I supplements and augments the four Geneva Conventions of 1949 as they applied to international conflicts. Armed conflicts not of an international character are covered by Protocol II of 1977. The real advance in 1977 was the extension of the notion of international conflicts to cover the situation in southern Africa, and to other anti-colonial conflicts covered by the Protocol.

To reflect the developments since 1960, the Conference, in the text adopted in article 1 of Protocol I, incorporated the three conflict categories recognised in a number of United Nations resolutions and made the Protocol applicable to:

..armed conflicts in which the peoples are fighting colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.”

The history of this provision shows that those who proposed it did not intend to limit its application to the category of conflict which simultaneously involves all three conditions, i.e., those fighting against colonial domination and alien occupation and against racist regimes, as some Western commentators had suggested. If this limited view were accepted, the Protocol would apply only to externally imposed colonial and racist regimes and not to the situation in South Africa.

This view is untenable for two reasons. Firstly, for many years, the General Assembly of the United Nations has characterised the struggle of the people of South Africa as a struggle for self-determination and has associated the demand for the overthrow of apartheid with the right of self-determination. Secondly, from 1968 to 1975, more than 20 resolutions of the General Assembly were passed supporting the extension of human rights in periods of armed conflicts culminating in the seminal resolution of 1973 entitled “Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes,” a Declaration which lent substantial impetus to the article 1 of Protocol I.<sup>91</sup> This Declaration explicitly treats racist regimes as a form of

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<sup>91</sup> General Assembly resolution 3103 (XXVIII) of 12 December 1973.

oppression distinct from foreign occupation and expressly alludes to preceding resolutions dealing exclusively with apartheid and racial oppression.

This conclusion is supported by an authoritative study not sympathetic to the extension of the application of the Conventions to the South African situation which concludes that the Declaration did not qualify the racist regimes falling within its ambit by limiting them to those involving external domination. “Rather, it is submitted that the history of the amendment indicates that three distinctive alternative conflict categories were contemplated.”<sup>92</sup> Western commentators have been generally antipathetic to a formulation that presents a judgement value on the role of a liberation movement as “the recipients of a discrete system of humanitarian safeguards”<sup>93</sup> but they tend to ignore or minimise the strength of the feeling of other States and communities concerning the crimes of colonialism and apartheid and the associated legal developments, and the way in which rules of international law have developed.

The traditional view was that only States might become parties to or accede to the Conventions, notwithstanding the post-war evolution that a territory or political entity that is denied its right of self-determination guaranteed by the Charter of the United Nations can be regarded as an international person for some purposes. This approach enables Professor Abi-Saab to come to the conclusion that “liberation movements have a *jus ad bellum* under the Charter,” and “they are subject to the international *jus in bello* in its entirety.” A national liberation movement may therefore constitute itself as a “Power” by accepting the provisions of the four Conventions, including, therefore, article 96, paragraph 2, of the Protocol.

However, what difficulties there may have been in conferring such a power on a liberation movement which may not, at the present time, be administering a territory, have been removed by the automatic triggering mechanism of article 96, paragraph 2, of Protocol I of 1977 which states:

“The authority representing a people engaged against a High Contracting Party in an armed conflict of the types referred to in article I, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depository. Such declaration shall, upon its receipt by the depository, have in relation to that conflict, the following effects:

- (a) The Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;

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<sup>92</sup> De Pue, *Military Law Review* (1977), p. 71.

<sup>93</sup> *Ibid.*, p. 57.

(b) The said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol;

(c) The Conventions and this Protocol are equally binding upon all Parties to the conflict.”

There is thus no impediment in the way of a liberation movement becoming a Party to the Conventions and the Protocol since the 1977 Protocol clearly and expressly confers such a right.

The Protocol is subject to ratification or accession by States. However, as many delegates at the Geneva Conference in 1974 and 1977 pointed out, article 1 of the 1977 Protocol is a codification of the developing rules of law exemplified by the General Assembly Declaration of 1973 on the legal status of combatants struggling against colonial and alien domination and racist regimes which espouses the extension of the full convention protection to them. Article 1, therefore, does not create new law for liberation movements, but merely crystallises in treaty form already existing rules of customary international law, especially those rules embraced by the four Geneva Conventions of 1949.

On this basis, these liberation movements are entitled to the legal status, as regards the application of the *jus in bello*, of a regular army and the inhabitants of these Territories are entitled to the protection of the accepted rules concerning the conduct of such hostilities. It can therefore be argued that all that the Protocol, through article 96, does is to establish the modalities by which these rights and obligations come into being: it does not create them. If the liberation movement does make the unilateral declaration envisaged in article 96, paragraph 3, then a heavy responsibility rests on the belligerent State to observe the customary rules, especially in relation to the treatment of prisoners of war, or to accede to the Protocol itself. SWAPO, for example, has already made a public statement that the “Namibian Liberation Army must - and does - comply with the laws and customs of war as set out, in particular, in the Geneva Conventions of 1949 and South Africa’s armed forces are also bound by these Conventions.”<sup>94</sup>

On 28 November 1980, the African National Congress of South Africa deposited the following Declaration with the International Committee of the Red Cross, which was received on behalf of the Committee by its President:

“It is the conviction of the African National Congress of South Africa that international rules protecting the dignity of human beings must be upheld at all times. Therefore, and for humanitarian reasons, the African National Congress of

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<sup>94</sup> SWAPO statement at the Dakar International Conference on Namibia and Human Rights, in *International and Comparative Law* (1978), p. 389.

South Africa hereby declares that, in the conduct of the struggle against apartheid and racism and for self-determination in South Africa, it intends to respect and be guided by the general principles of international humanitarian law applicable in armed conflicts.

“Whenever practically possible, the African National Congress of South Africa will endeavour to respect the rules of the four Geneva Conventions of 12 August 1949 for the victims of armed conflicts and the 1977 additional Protocol I relating to the protection of victims of international armed conflicts.”<sup>95</sup>

In a number of trials in South Africa in recent years, defence lawyers have invoked the internationally-protected status of combatants of the African National Congress and the General Assembly’s demands for either commutation of death sentences imposed by South African courts or for prisoner-of-war status. In a remarkable vote on 1 October 1982, 136 States called for this status when Mogorane, Mosoli and Motaung were sentenced to death following the attacks on the Booyens police station and Sasolburg. There were no votes against and only the United States of America abstained.

Western commentators were largely antagonistic to the evolution of article 1, paragraph 4, of the Protocol and to the criteria used for the identification of prisoners of war under article 44, paragraph 3.

However, in spite of the early opposition at Geneva of some Western Governments, there is now a grudging respect for the new situation arising out of Protocol I and the evolution of these rules of customary international law. As one writer put it, “It cannot be denied that the promulgation of these instruments represents an important step forward in the desire of modern nations to alleviate the suffering inflicted upon both combatants and civilians in the conduct of armed conflicts and to reach a balance between military necessity and the most basic values.”<sup>96</sup>

If the “most basic values” are to have any immediate relevance to Namibia as it is illegally occupied by South Africa, then there is a special duty on the major Western Powers to ensure that the South African regime observes the principles of the legal status of the combatants “struggling against colonialism and racist regimes,” solemnly proclaimed by the General Assembly Declaration of 1973, as expressing the law, and elaborated in Protocol I of 1977.

If the South African regime continues to murder prisoners of war and its allies continue to permit it to do so, then the rest of the international community will draw the appropriate conclusion as to whether the West is seriously concerned at

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<sup>95</sup> See United Nations General Assembly document, A/35/710 of 4 December 1980.

<sup>96</sup> Buckley, *Mercer Law Review* (1978), p. 1164.

all with the systematic violation of the “most basic values” for the vast majority of the people of Namibia and South Africa, and with the rest of the territories covered by article 1.

The liberation movements lay great store on this legal dimension, and governments are obliged under General Assembly resolution 34/9 H of 1979 to take “appropriate measures to save the lives of all persons threatened with execution in trials staged by the illegitimate racist regime [of South Africa] on charges of high treason and under the obnoxious Terrorism Act.”

### ***Conclusion***

International law is no longer the monopoly or preserve of a small number of States from Western Europe and the Americas. In the past three decades, under the inspiration of new pressures, it has responded to the needs, desires and aspirations of a larger community of peoples and States, many of whom have recently undergone the humiliation, violence and racism inherent in colonialism. The legal developments must not therefore be seen as part of an emerging regional law of Africa or the “soft law” of the United Nations.

The rules relating to self-determination reflect an urgency where the maintenance of the *status quo* must yield to the imperatives of change. The Western system which excluded the vast majority of mankind and which had no creative potential for solving difficult problems, has given way to the United Nations Charter system which, through the fundamental law of the organised world community, affirms the right of political and economic self-determination, and repudiates racial discrimination.

The new legal order makes demands upon lawyers to ensure a commitment to national liberation movements. The territorial integrity of colonial Territories such as Namibia must be maintained. The bantustanisation of South Africa must be rejected. The demand for the treatment of captured freedom fighters as prisoners of war in terms of the relevant Geneva Convention has assumed particular significance in the context of Protocol I of 1977.

Most importantly, the need to use the legal power of the United Nations in support of mandatory action under Chapter VII of the Charter in those Territories where demands for economic, military and nuclear sanctions have been made by the liberation movements, has become urgent. In order to do this, there must be a political will in the West. Lawyers may be able to contribute to such an evolution.

The national liberation movements of southern Africa, SWAPO of Namibia and the African National Congress of South Africa, concerned as they are with the racist violence of the forces of apartheid, look to international lawyers to focus attention on the tripartite nature of crimes which invite individual responsibility under international law. Lawyers need to investigate the extent to which the crime

of aggression, against subjects of international law such as Angola, Zambia, Botswana, and peoples protected by international law such as the people of Namibia and South Africa; crimes against humanity, through the execution of policies of racial discrimination and political, economic, social and racial oppression of a people; and war crimes, through acts contrary to the laws of war, non-recognition of prisoner of war status, etc., have been committed by the racist and colonial regime of South Africa.

## **B. THE LEGAL STATUS OF NATIONAL LIBERATION MOVEMENTS (WITH PARTICULAR REFERENCE TO SOUTH AFRICA)<sup>97</sup>**

by

**Kader Asmal**

### ***Introduction***

A number of political developments in South Africa in recent years have thrown into sharp focus the relevance of the rules of self-determination, the preferred and protected role of the national liberation movement and the legal character of the South African State.

Lawyers, and international lawyers in particular, have not worked out the implications of these developments in any systematic manner but a number of Studies in discrete areas have tried to tease out the implications of these developments and, in some cases, there has been some attempt to rely on these rules of international law in specific problems facing South African courts.

The continued refusal of the international community to recognise the independence of the four homelands, the controversy associated with South African Government's attempt in 1982 to transfer or cede Ingwavuma and Kangwane to Swaziland and the problems associated with the denaturalisation of more than 8 million Africans under the National States Citizenship Act of 1970 highlight the special features of the situation in South Africa. Finally, the recent trials of alleged combatants of the African National Congress of South Africa on charges of high treason, the nature of the pleas made by the accused and the declaration in November 1980 deposited by this organisation with the International Committee of the Red Cross raise very sharply the question of the

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<sup>97</sup> Paper presented at the *Journal of South African Studies* Conference on "Law and Politics in Southern Africa," London 6-8 April 1984.

interrelationship between the rules of self-determination and the role of the liberation movements.

The starting point must therefore be a discussion of the right to self-determination, which has had far-reaching effects in contemporary international law on nearly every aspect.

### ***The Right to Self-determination***

The right to self-determination of colonial peoples is an incontestable legal principle today. Apart from a handful of (largely Anglo-Saxon) legal writers, States and the international community recognise the right as providing a juridical foundation for the recognition of a people as a legal entity possessing rights, which denies the former colonial idea that peoples and territories "...are mere chattels to be acquired and disposed of by and for the benefit of the proprietary State, but are instead the heritage of those who dwell within them."<sup>98</sup>

The rule of self-determination is enshrined not only in the Charter of the United Nations but also finds a place in other sources of international law.

(a) The Charter refers to self-determination, firstly, in its purposes where in Article 1, paragraph 2, there is the requirement to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." Article 55, significantly concerned with international, economic and social co-operation, places respect for the "principle of equal rights and self-determination of peoples" in the context of "peaceful and friendly relations among nations," and Article 56 enjoins Member States of the United Nations to take "joint and separate action in co-operation with the organisation for the achievement of the purposes set forth in Article 55."

(b) The link between racial equality and decolonisation is reflected in resolution 2106 (XX) of 1965 where the General Assembly associated the right of self-determination with the International Convention on the Elimination of Racial Discrimination, 1965, the most highly ratified Convention.<sup>99</sup> Even more concretely, the right of self-determination finds expression in article 1, common to the two Covenants of 1966, both of which are now in force:

“(i) All people have the right of self-determination. By virtue of that right they freely determine their political status and freely

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<sup>98</sup> E. Lauterpacht, 2 *Harvard Law Journal* (1965), p. 271.

<sup>99</sup> As of 1 September 1983, there were 121 ratifications.

pursue their economic, social and cultural development.

“(ii) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”

(c) Since its formation, the United Nations has, in resolutions specially concerned with Namibia, referred to this right. But with the addition of a number of African States to the membership of the United Nations in the past two decades, there was impatience at the rate of decolonisation and, in association with the socialist States for whom self-determination was one of the historic imperatives, the General Assembly faced the challenge by passing the seminal Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>100</sup> The resolution sets out seven principles.

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Subsequent to 1960, a stream of important resolutions elaborated and further developed this right.<sup>101</sup> Whether General Assembly resolution 1514 (XV) itself was law-making is now quite unimportant. Brownlie considers the resolution to be an example of an authoritative interpretation of the Charter. Some others may consider it to be part of customary international law because of State practice, acquiescence and consensus. The better view is that the resolution did not identify in concrete legal terms the right of self-determination, for as Manfred Lachs has said, “the relevant provisions of the Charter were not creative of a new rule of law. All they did was to confirm and lay down in writing a principle which had long been growing and maturing in international society until it gained general recognition. By including and laying it down as one of the principles of the newly born organisation, the Charter gave expression to one of the elements of the international law of the time.”<sup>102</sup>

This view is upheld by the subsequent development which ensured

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<sup>100</sup> General Assembly resolution 1514 (XV) of 14 December 1960.

<sup>101</sup> See Sureta, *The Evolution of the Right to Self-Determination* (Leiden, 1973), for a comprehensive study of the early repertory of practice of the United Nations. Espiell, United Nations document E/CN.4/Sub.2/ 405/Res.1(6a) of 1980 and Cristescu, United Nations document E/CN.4/Sub.2/404/Res.1) of 1981 provide the fullest collection of the relevant United Nations resolutions under the appropriate headings. For the legal effect or significance of the re-citation of General Assembly resolutions, see Bleicher, 63 *American Journal of International Law* (1969), p. 444.

<sup>102</sup> In *Indian Journal of International Law* (1961), pp. 429 and 432.

that this right of self-determination has emerged as part of *jus cogens*, certain overriding principles or imperative norms of international law, “which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent norm of contrary effect.”<sup>103</sup> The International Court of Justice, in giving examples of these “peremptory norms,” which form part of *jus cogens*, described these obligations as being obligations “towards the international community as a whole .”

The Declaration has been cited as a source of authority for the activities of the United Nations in support of national liberation movements. In the formative period of United Nations action, the only liberation movements recognised by the General Assembly were those in Africa - in the Portuguese colonies, Zimbabwe, Namibia and South Africa. These resolutions, underlying the norms of international law, have consistently embodied five basic principles which lie at the foundation of all international activity in support of liberation movements and they have been applied, to a greater or lesser extent, to the situation arising in the Western Sahara, Palestine and East Timor.

The five principles are:

- (a) The resistance of these liberation movements to colonial, racist and alien regimes in their territories is legitimate and the opposition of those regimes to the effort of the movements is unlawful. The national liberation movements are the “legitimate” or “authentic” or, in the case of Namibia, the “sole” representatives of the oppressed people of their Territories in the international community, even though they do not claim to be the governments of independent States;
- (b) The liberation movements may utilise “all necessary means at their disposal,” including armed force, for the termination of colonialism and racism in their Territories;
- (c) All States and organisations associated with the United Nations should provide “moral and material assistance” to the liberation movements and should refrain from assisting their adversaries in unlawful opposition to them;
- (d) When considering matters dealing with the Territories for which

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<sup>103</sup> Ian Brownlie, *Principles of Public International Law* (2nd ed.), pp. 495-500.

national liberation movements exist, organisations associated with the United Nations should provide for the representation of those movements at their deliberations and conferences;

- (a) N  
ational liberation movements and their members combating colonialism, racialism and alien rule are entitled to the protection of the Geneva Conventions of 1949, especially those relating to the protection of civilians and prisoners of war.

### ***Legal Status of the Liberation Movements***

The right to self-determination is therefore a recognition of the collective rights of a national entity which is accorded rights under the Charter and under international law. The recognition of the rights of a people is important as it presupposes that such rights will be or can be pursued or vindicated through the instrument of a public body known as a national liberation movement and that the struggle itself is thereby accorded a legal status in international law.

The consequences of this evolution of the law are far-reaching because it “represents an important movement away from the old view under which international law rights pertain only to States and governments and not to groups of individuals.”<sup>104</sup> Liberation movements recognised by the United Nations have, especially where there is a regional organisation such as the Organisation of African Unity to espouse their claim, therefore, the capacity of existence at the level of international law as they are the legally prescribed instruments for the vindication of the right to self-determination. Without such a recognition, the right to resistance, which is connected with a viable entity and accompanying political institutions, is devoid of meaning.

The creative development of international law in support of the rights of subject peoples fighting against the tyranny and violence of colonialism, racism and apartheid shows that international law adopts empirical tests as far as personality is concerned and the early statement of the Secretary-General of the United Nations that “practice has abandoned the doctrine that States are the exclusive subjects of international rights and obligations”<sup>105</sup> has been upheld by subsequent practice concerning national liberation movements.

In jurisprudential terms, this development has had extraordinary effects.

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<sup>104</sup> R. Higgins, *The Development of International Law by the Political Organs of the United Nations*, (1963), p. 106.

<sup>105</sup> Memorandum of Secretary-General, “Survey of International Law in Relation to Work of Codification of International Law Commission,” A/CN.4/1/Res.1, p. 19 (1949).

“Colonial” issues, including the issue of apartheid and racism in South Africa, are removed from the restrictions of the domestic jurisdiction clause of the Charter;<sup>106</sup> sovereignty vests in the people of the Territory and not in the colonial Power and the liberation movement has interim personality, as the representative of the peoples of the Territory in question.

The impetus for this development came from the struggle of the people of Angola, Mozambique and Guinea-Bissau in the 1960s. The formula used by the General Assembly and the Security Council was applied, to a lesser extent, to other situations. At the twentieth session, in 1965, the General Assembly, for the first time, recognised the “legitimacy of the struggles by the peoples under colonial rule to exercise their right to self-determination and independence” and at the same time it invited “all States to provide material and moral assistance to the national liberation movements in colonial Territories.” The following year, the General Assembly went one step further and stated that the preservation of colonialism and its manifestations, including racism and apartheid, were incompatible with the Charter and the Declaration on decolonisation. It further declared that colonialism threatened international peace and security and that the practice of apartheid constituted a crime against humanity, a characterisation that was to have important legal repercussions in the years ahead.

The representative nature of liberation movements was first applied by the General Assembly to the movements fighting Portuguese colonialism in Africa. As far as extant movements are concerned, the South West Africa People’s Organisation (SWAPO) of Namibia, which was established in 1960 and began the armed struggle following the disgraceful judgement of the International Court of Justice in 1966, was recognised by the General Assembly as the “authentic representative of the Namibian people.” The Assembly supported its efforts to strengthen national unity and requested an active commitment by all governments, international organisations and national bodies to channel aid - financial, material or otherwise - through SWAPO.<sup>107</sup>

Three years later, the General Assembly recognised SWAPO as the sole and authentic representative of the Namibian people, supported its armed struggle for self-determination, freedom and national independence, and invited States to provide assistance for this struggle. Significantly, the Assembly invited SWAPO to participate as an observer in the work and sessions of the General Assembly and in all conferences convened under the auspices of the Assembly (later to include all United Nations bodies). In relation to the implementation of Security Council resolution 385 (1976) on elections for a transfer of power in Namibia - whose initial impetus has been obscured by the intervention in 1977 of the five Western Contact States - the General Assembly, at its ninth special session in

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<sup>106</sup> Article 2 (7) of the United Nations Charter.

<sup>107</sup> Resolution 3111 (XXVIII) of 12 December 1973.

1978, insisted that independence talks between SWAPO and the representatives of the South African regime, under the auspices of the United Nations, must be for the sole purpose of discussing the modalities for the transfer of power to the people of Namibia, and rejected the pretensions of the South African-sponsored groups in Namibia whom South Africa was intending to put forward as an alternative to SWAPO.

SWAPO has, as a result, enjoyed a special status representing the role as the organ for the self-determination for Namibia, reflecting the special international status of the Territory. It enjoys also a special relationship with the United Nations Council for Namibia in the implementation of various United Nations policy decisions.

The situation in South Africa, arising out of the official State policy of apartheid, has led to United Nations intervention since 1946, when the General Assembly was first seized of the issue. The systematic and violent imposition of the official policy of the State and the large-scale Western involvement in economic, military and diplomatic support for the system have made the apartheid issue one of the crucial legal problems of our time. More resolutions of the General Assembly, the Security Council and the associated or subsidiary organs of the United Nations have been passed on the issue of apartheid than on any other international situation or dispute. Through these repeated resolutions, which have assisted in legal developments, the international community has recognised that the apartheid system and the situation in South Africa are special cases, requiring exceptional responses both from the world body and international law.

There has been a clear recognition that apartheid is more than a matter of human rights whereby amelioration of the plight of the 20 million blacks would lead to improvements in the situation there. The development of the law over the past three decades has followed the following pattern. The linking of racial equality with decolonisation and self-determination, the development of the norm of non-discrimination, the recognition of apartheid as a crime against humanity, now clearly reflected in the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 which, like the Genocide Convention, imposes individual responsibility for such a crime, and the insistence of the General Assembly that the situation in South Africa is a threat to international peace and security partially recognised by the Security Council by the taking of Chapter VII Charter action against a Member State forbidding the export of arms and military material to South Africa, culminated in a recognition that the South African regime is illegitimate.

This dramatic conclusion was reached by the General Assembly when it declared that the “racist regime of South Africa is illegitimate and has no right to represent the people of South Africa.”<sup>108</sup> Associated with this was the reaffirmation of the

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<sup>108</sup> General Assembly resolution 3411 E (XXX) of 28 November 1975, adopted by a vote of 101 to 15, with 16 abstentions.

“legitimacy of the struggle of the oppressed people of South Africa and their liberation movements, by all possible means, for the seizure of power by the people and the exercise of their inalienable rights to self-determination,” and the further and important recognition of the national liberation movement of South Africa as the “authentic representatives of the overwhelming majority of the South African people.”

To reach this conclusion, the world community had first to evaluate the nature of the South African State. Although ostensibly meeting the criteria of statehood - permanent population, defined territory, a government and the capacity to enter into relations with other States - the South African regime represents not the classical features of salt-water colonialism, to which the decolonisation process and the right of self-determination automatically apply, but a colonialism of a special kind where the colonisers and the colonised live in the same territory, and where the racial minority, in their laws and in the Constitution itself, considers and treats the majority as rightless aliens in their own country. The bantustan system, with its inner “logic” of ultimately dividing South Africa into a number of territorial units with an alleged independent status granted by the colonial Parliament, will remove citizenship rights for all “citizens” of the bantustans. The bantustan policy, more sharply than any other manifestation of apartheid, shows the classical features of a colonial administration conferring “independence” on what must be considered as a subject people. But since the “people” as a whole have never been consulted about their fate, such partition attempts must be seen as contrary to the right of self-determination, rather than simply as a part of the anti-human rights policy of apartheid.

In other words, two systems of law and government exist side by side in South Africa, one for the colonisers and the other for the colonised. The former enjoyed a transfer of legal authority from the imperial overlord, Britain, but since the establishment of the Union of South Africa in 1910, the essence of the colonial relationship has been continuously maintained.<sup>109</sup>

In any event, the rules of international law have developed to an extent where the apartheid system has been held to be in breach of the rule of non-discrimination recognised by the International Court of Justice and articulated by Judge Padilla Nervo:

“Racial discrimination as a matter of official government policy is a violation of norm or rule or standard of the international community.”<sup>110</sup>

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<sup>109</sup> For a fuller discussion of the status of the South African regime in international law and the extent to which an entity is liable in a legal system although its legal warrant is suspect, see the writer’s article “Law versus Apartheid,” *Review of Contemporary Law* (1979), p. 57.

<sup>110</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p. 123. See also the *South West Africa Cases (Second Phase)*, I.C.J. Reports 1966 on the norm of non-discrimination, Wellington Koo, p. 234; Jessup, p. 455, Padillo Nervo, p. 464; and, especially,

Secondly, the norm of racial equality has been associated with, or even assimilated to, the norm of self-determination<sup>111</sup> and racial discrimination as a “factor giving rise to a colonial situation has also been apparent apart from the case of Southern Rhodesia, in the resolutions adopted in recent years on the apartheid policies followed by South Africa.”<sup>112</sup>

Thirdly, apart from the 1973 Convention on Apartheid, customary international law and treaty law view apartheid as a crime under international law. This is illustrated by the ease with which the Geneva Conference on Humanitarian Law, when adopting Protocol I of 1977 additional to the Geneva Conventions of 1949, accepted the provision whereby apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination, shall be regarded as “grave breaches of the Protocol” when “committed wilfully and in violation of the [Geneva] Conventions or the Protocol.” Under section II of the Protocol, these acts have been added to the list of “grave breaches.” Under article 85, paragraph 5, of Protocol I, grave breaches of the Conventions and the Protocol are to be regarded as war crimes.

In the same vein, the International Law Commission, which has been reporting on international crimes in the context of state responsibility, adopted at its twenty-eighth session a definition which has urgent and serious implications for international order:

“An international wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole, constitutes an international crime.”

On the basis of the practice of the General Assembly and the development of rules that genocide and apartheid are examples of offences to be included in the category of the most serious internationally wrongful acts, the Commission adopted article 19 which states that an international crime may result, among other examples, from “a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, apartheid.”

In Namibia and South Africa, therefore, the right of the population to overthrow a system that has been incontestably recognised to be a crime against humanity cannot be doubted.

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Tanaka, p. 286.

<sup>111</sup> General Assembly resolution 2106 B (XX) of 21 December 1965.

<sup>112</sup> Sureda, *op. cit.*, p. 243, where Sureda refers to the early resolutions showing this assimilation.

## ***The Right to Revolt***

A people revolting against colonial aggression represent their interest through a public body such as a national liberation movement. Such interim international personality of a national liberation movement reflects the personality of a new State that is in the process of establishment.

In order to vindicate the principle of self-determination, nations or peoples have resorted to physical force, and will continue to do so. It may be artificial to consider that such a struggle is a form of self-defence of the emerging State under Article 51 of the Charter of the United Nations. It is more fruitful to consider recourse to armed struggle as consistent with the Charter because it is in pursuit of a rule of *jus cogens*, the right to self-determination. In other words, the conflict is between “forces which represent different authorities and different peoples”<sup>113</sup> and from the earliest stage of United Nations involvement, these conflicts were considered to be “international conflicts” and thus removed from the domestic jurisdiction clause. Although the threat or use of force in contemporary international law is forbidden, specially but not exclusively under Article 2 (4) of the Charter, and no title to territory may be acquired through illegal methods, an armed colonial struggle belongs to “an area where force may still be employed for the purpose virtually of bringing about a change in territorial sovereignty, without necessarily impinging upon prohibitions of the use of force laid down by international law.”<sup>114</sup>

Western Governments objected to the concrete application of the right to revolt in pursuit of the right to self-determination in its early stages but the United Nations in its repertory of practice reflected, in the early 1960s an awareness of changing political realities which “symbolise [d] and concretise [d] a new politico-juridical conception: the definite repudiation and end of colonialism.”<sup>115</sup>

For a number of years, beginning in 1965, the General Assembly has recognised the legitimacy of the struggle of peoples under colonial rule to exercise this right to self-determination, starting with the colonies under Portuguese occupation and in relation to Zimbabwe, but later generalising this right to Namibia, South Africa and the people of Palestine.

At its twentieth session in 1965, the General Assembly recognised the legitimacy of the struggle by the peoples under colonial rule to exercise this right to self-

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<sup>113</sup> Skubiszewski in *Manual of Public International Law*, 1963, p. 80.

<sup>114</sup> Jennings, *The Acquisition of Territory in International Law*, 1963, p. 80.

<sup>115</sup> Casteneda, *Legal Effects of United Nations Resolutions* (1969), p. 13.

determination and independence.<sup>116</sup> At the same session, in the Declaration on the Inadmissibility of Intervention in Domestic Affairs and the Protection of Independence and Sovereignty (passed without a vote against), the General Assembly identified the other aspect of this right when it demanded not only “respect for self-determination and independence of peoples and nations... with absolute respect for human rights and fundamental freedoms” but demanded that all States should contribute to “the complete elimination of racial discrimination and colonialism in all its forms and manifestations.”

The right to revolt now had additional dimensions, the right to seek and obtain assistance from other States and the obligation on other States not to assist in the preservation of colonialism, racism and apartheid. Brownlie identifies this aspect of the principle as one of the “corollaries,” namely, “...intervention against a liberation movement may be unlawful and assistance to the movement may be lawful.”<sup>117</sup> Western Governments may continue to vote against specific resolutions that recognise these rights and obligations in relation to specific Territories but this is untenable because they are parties to two major declarations passed without dissent or abstention by the General Assembly.

Whatever doubt may have existed about the right to overthrow established authority which contravenes the right to self-determination, has now been dissipated by the unanimous adoption by the General Assembly of the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>118</sup> which is declaratory of customary international law. The principles of the Charter embodied in the Declaration are declared to constitute “basic principles of international law.” The Declaration lays down a duty on States “to refrain from any forcible action which deprives peoples referred to in the elaboration of the present principle of their rights to self-determination and freedom and independence.” But even more importantly, the Declaration recognises a right to fight against such deprivation because it lays down that:

“In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.”

It is quite clear that the Declaration recognises the right to have recourse to a war of liberation and clearly indicates that the use of force against the exercise of self-determination is a violation of international law. In so far as the resolution

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<sup>116</sup> General Assembly resolution 2105 (XX) of 21 December 1965.

<sup>117</sup> Brownlie, *op. cit.*, p. 577.

<sup>118</sup> General Assembly resolution 2625 (XXV) of 24 October 1970.

recognises the right of internal revolution, it codifies what international law has traditionally assumed. The Declaration clearly applies to Namibia, where the majority is under “alien subjugation, domination and exploitation.”

Similarly, the General Assembly resolution on the Definition of Aggression passed by consensus in 1974 which, in accordance with the Charter, prohibits aggressive acts between States, expressly (under article 7) provides that nothing in the definition of aggression can prejudice the right of self-determination, freedom and independence of peoples under “colonial and racist regimes or other forms of alien domination,” nor the right of these peoples to struggle to that end and receive support, in accordance with the principles of the Charter and in conformity with the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.<sup>119</sup>

These developments in international law, consistent with and not in derogation from the Charter of the United Nations, have drawn the significant observation from one commentator that “it is clear that the right of revolution has been recognised more forthrightly and explicitly by the international community than it earlier had been.”<sup>120</sup>

The liberation movements of South Africa have had observer status with the United Nations since 1974, have participated in conferences held under the auspices of the organisation and even signed the text adopted at the conclusion of the Geneva Conference on Humanitarian Law in 1977. This has been the result of the persistence of the General Assembly where, by increasing majorities, the Assembly has characterised the South African regime as “illegitimate,” resulting in the withdrawal of the credentials of the South African delegation in 1974, proclaiming that the national liberation movements of South Africa are the authentic representatives of people of South Africa in their just struggle for national liberation” and recognising the “right of the oppressed people and their national liberation movements to resort to all the means at their disposal, including armed struggle, in their resistance to the illegitimate racist minority regime of South Africa.”<sup>121</sup>

In case the practice of the General Assembly is dismissed as the result of the “tyranny of automatic majorities” obtained by the third world, it is interesting to turn to the evolution of the practice of the Security Council.

The Security Council was first seized of the South African issue in 1960, following the massacres at Sharpeville and Langa. Resolution 134 (1960)

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<sup>119</sup> General Assembly resolution 3814 (XXIX) of 14 December 1974.

<sup>120</sup> Schwelb in *Law and Civil War in the Modern World* (ed. Moore), 1974.

<sup>121</sup> General Assembly resolution 38/39 A of 5 December 1983.

recognised that the situation in South Africa “is one that has led to international friction and if continued might endanger international peace and security.” Although there was a call for South Africa to “abandon apartheid,” there was no characterisation of the regime or the nature of the struggle. The “legitimacy of the struggle of the oppressed people” was first recognised in resolution 82 (1970) but the struggle was related to their “human and political rights set forth in the Charter of the United Nations and the Universal Declaration of Human Rights.” France, the United Kingdom and the United States abstained on this resolution. The same formula, repeated in resolution 392 (1976), adopted three days after the shootings at Soweto, went somewhat further and recognised the “legitimacy of the struggle of the South African people for the elimination of apartheid and racial discrimination.”

The combination of “struggle” and “elimination” was significant and in resolution 417 (1977) the Security Council unanimously reaffirmed the earlier recognition of the legitimacy of the struggle against apartheid, but went one step further. For the first time, the Council affirmed the right of the people of South Africa as a whole, irrespective of race, colour or creed, to the exercise of self-determination. The connection between apartheid and self-determination has been asserted in a subsequent resolution<sup>122</sup> and support for the legitimacy of the struggle reiterated.

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These resolutions of the General Assembly (and even of the Security Council) have affirmed the right of colonial peoples to resort to armed struggle and to such necessary material support and other support against foreign domination. More recently, the responsibilities of the specialised agencies and other organisations within the United Nations for the provision of “moral and material assistance, on a priority basis, to the peoples of the colonial Territories and their national liberation movements” has been clearly identified.<sup>123</sup>

Since 1965, when both the General Assembly and the Security Council have had to condemn the violence of colonialism, especially against the territory of States that have provided assistance to liberation movements, resolutions have demanded that the colonial aggressor pay compensation to the States that have suffered damage. Until 1981, this was the constant position of the Security Council. No resolution of any United Nations body has either condemned the country providing assistance to a liberation movement or equated the reaction of the liberation struggle with the violence of colonial and racist regimes. The constant theme of resolutions passed in response to complaints brought by Zambia, Mozambique, Angola and Lesotho has been to condemn the acts of violence or aggression by South Africa, as it had been previously in the case of

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<sup>122</sup> Security Council resolution 473 (1980) of 13 June 1980.

<sup>123</sup> Paragraph 12 of General Assembly resolution 34/42 of 21 November 1979.

then Southern Rhodesia. For the first time in 1981, following the massive invasion of Angola by South Africa under the code name of “Operation Protea,” the United States used the veto because the resolution lacked “balance,” as there has been no reference to SWAPO’s activities from Angola.

But what these resolutions have established, as they did in the earlier instances of the Portuguese colonies, is that the illegal status of the occupying Power denies that Power the automatic right to self-defence. Conversely, the right of the victim-peoples to take steps to pursue their right to self-determination is not to be equated with the aggressor’s actions.

### ***Humanitarian Law***<sup>124</sup>

Principle VI (b) of the Nuremberg Principles of 1946, adopted by the General Assembly, defines war crimes as:

“Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in an occupied territory, murder or ill-treatment of prisoners-of-war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity.”

Wars of national liberation did not fit easily into the traditional description of parties covered by international humanitarian law in that one party (the liberation movement) is not a State while the other party is, however illegal its occupation (as South Africa in Namibia, Israel in the West Bank) or illegitimate its status (as in the case of South Africa itself).

The applicability of the Nuremberg Principles to these territories depends on the legal nature of these conflicts. There is here a rich area of the law developing to meet the needs of the international community.

### ***The Geneva Conventions***

The core of the law for the protection of individuals in time of war is provided by the four Geneva Conventions of 1949 consisting of four treaties, relative to the wounded and the sick, the wounded, sick and shipwrecked at sea, prisoners of war and civilians. There are other provisions regulating the conduct of war on land or sea, especially the Hague Convention of 1907 on the conduct of war on land, but it is the “Geneva Principles” as they have become known which are especially relevant, particularly Conventions III and IV dealing with prisoners-of-war and

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<sup>124</sup> See also Kader Asmal, “The status of the combatants of the liberation movement of South Africa under the Geneva Conventions of 1949 and Protocol I of 1977,” United Nations Centre against Apartheid, *Notes and Documents*, No. 10/80.

civilians respectively. They form the basis of international humanitarian law.

These Conventions are ratified by about the highest number of States compared with any other international treaty. As of June 1977, 143 States were parties to the Conventions (including South Africa). With one exception, the whole of the organised international community is bound by these rules. The question of whether these Conventions are part of customary international law, thus providing rights for entities not parties to the Convention, is not of “academic interest”<sup>125</sup> as one writer suggests, but of profound importance. If the Hague Regulations were held to be declaratory of customary international law by the Nuremberg War Crimes Tribunal, although they were ratified by far fewer States, the near-universality of the Geneva Conventions must undoubtedly make them part of customary international law.

In any case, there are features to these Conventions that are unique in international relations and in texts imposing duties on States. For example, article 1 common to all four Conventions provides that “the contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” This obligation does not overlap with the results of ratifying the Convention. It emphasises that the Conventions imply certain pledges taken by the State itself, in accordance with its humanitarian duties and which are independent of any reciprocity on the part of other or co-contracting Powers. Therefore, this “imperious obligation of civilisation” imposes not only a duty on a contracting State to carry out its duties. This would seem to place interesting obligations on the allies of South Africa to ensure that the regime complies with the provisions of the Conventions, which may be one reason why even Western Powers have appealed to the South African regime not to execute combatants of the African National Congress. Otherwise, the other contracting States may themselves be in breach of common article 1.

The major obstacle to the reliance on the Geneva Conventions by combatants struggling against colonial and alien domination and racist regimes was that these Conventions applied to international conflicts, i.e., inter-State wars and conflicts, and they presupposed that only States could become parties or contracting Powers to the Conventions.

Article 3 common to the four Conventions attempts to deal with armed conflicts not of an international character by laying down the minimum of humane treatment to be guaranteed for prisoners. But the terms on which article 3 may apply are vague and they depend on a State party to the Conventions applying them to the situation.

Not once in the recent anti-colonial struggles against the Portuguese up to 1974 did the metropolitan Power recognise the application of article 3. Also, the three

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<sup>125</sup> Baxter, *Harvard International Law Journal* (1975)

kinds of struggle referred to above were not really assimilable to the kind of civil war situation regulated by article 3.

### *Move Towards New Law*

The development of new rules to regulate the status of combatants fighting for national liberation, against alien occupation and against racism, is inextricably bound up with the norms of law associated with three other areas. Firstly, there was the effect of General Assembly resolution 1514 (XV) of 1960 embracing the Declaration on the Granting of Independence to Colonial Countries and Peoples; secondly, the development of the right of movements representing such peoples to employ armed struggle in pursuit of these objectives, which owed so much to the 1966 Conference of Heads of State or Government of 47 Non-Aligned Countries which declared that “colonised people may legitimately resort to arms to secure the full exercise of their right to self-determination and independence if the colonial Powers persist in opposing their national aspirations.” The “right to revolt” was asserted in subsequent General Assembly resolutions and found its clearest manifestation in the consensus Declaration on Definition of Aggression of the General Assembly in 1974.

Thirdly, the majority of members of the United Nations had contended for a number of years that the conflicts in countries under colonial domination were in fact international conflicts for the reasons we have already seen and since these Territories have an internationally-protected right to revolt, foreign States, (or in the special kind of colonialism existing in South Africa, South Africa itself), are bound to observe the Geneva Conventions, especially those relating to civilians and prisoners-of-war. If, therefore, rules in a treaty stipulated that wars of national liberation are international armed conflicts, these rules would simply codify international law already in force.<sup>126</sup>

As far as the status of combatants of national liberation movements was concerned, the United Nations Conference on Human Rights held in Teheran in 1968 on the twentieth anniversary of the Universal Declaration on Human Rights specifically referred to the need to extend human rights provisions to all international conflicts. Direct United Nations interest in this area was aroused very quickly and in 1970 the General Assembly requested the Secretary-General of the United Nations to give “particular attention to the need for the protection of the rights of civilians and combatants in conflicts which arise from struggles under colonial and foreign rule, for liberation and self-determination, and to the better application of existing humanitarian international conventions and rules to such conflicts.”

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<sup>126</sup> See further, N. Ronzitte, “Resort to force in wars of national liberation,” in *Current Problems of International Law* (ed. Cassese), 1975., p. 319. *Contra*, Dugard, SWAPO: The *Jus ad Bellum* and the *Jus in Bello*, 93 *South African Law Journal* (SALJ) (1976), p. 145, and Theodoropoulos’ persuasive response to Dugard in *Africa Today* 26 (1979), p. 39.

This development culminated in the adoption by the General Assembly in 1973 of resolution 3103 (XXVIII) which reaffirmed the right to revolt, stressed that the policy of apartheid and racial discrimination had been recognised as an international crime, referred to the illegal status of mercenaries and, in paragraphs 3 and 4, stated:

“The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions, and the legal status envisaged to apply to the combatants... is to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes.

“The combatants struggling against colonial and alien domination and racist regimes captured as prisoners are to be accorded the status of prisoners of war and their treatment should be in accordance with the provisions of the Geneva Convention relative to the Treatment of Prisoners...”

The International Committee of the Red Cross had already convened meetings of experts to consider the elaboration of the 1949 Conventions. The invitation of the General Assembly to deal with the above matter could not have come at a more propitious time and provided the appropriate backdrop when the Geneva Conference of Diplomatic Representatives was convened in 1974 and adopted Protocols I and II in 1977.

### ***Scope of Application of Protocol I***

Protocol I supplements and augments the four Geneva Conventions of 1949 as they applied to international conflicts. Armed conflicts not of an international character are covered by Protocol II of 1977. The real advance in 1977 was the extension of the notion of international conflicts to cover the situation in southern Africa, and to other anti-colonial conflicts covered by the Protocol.

To reflect the developments since 1960, the Conference, in the text adopted in article 1 of Protocol I, incorporated the three conflict categories recognised in a number of United Nations resolutions and made the Protocol applicable to:

“...armed conflicts in which the peoples are fighting colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.”

The history of this provision shows that those who proposed it did not intend to

limit its application to the category of conflict which simultaneously involves all three conditions, i.e., those fighting against colonial domination and alien occupation and against racist regimes, as some Western commentators had suggested. If this limited view were accepted, the Protocol would apply only to externally imposed colonial and racist regimes and not to the situation in South Africa.

This view is untenable for two reasons. Firstly, for many years, the General Assembly of the United Nations has characterised the struggle of the people of South Africa as a struggle for self-determination and has associated the demand for the overthrow of apartheid with the right of self-determination. Secondly, from 1968 to 1975, more than 20 resolutions of the General Assembly were passed supporting the extension of human rights in periods of armed conflicts culminating in the seminal resolution of 1973 entitled “Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes,” a Declaration which lent substantial impetus to the article 1 of Protocol I.<sup>127</sup> This Declaration explicitly treats racist regimes as a form of oppression distinct from foreign occupation and expressly alludes to preceding resolutions dealing exclusively with apartheid and racial oppression.

This conclusion is supported by an authoritative study not sympathetic to the extension of the application of the Conventions to the South African situation which concludes that the Declaration did not qualify the racist regimes falling within its ambit by limiting them to those involving external domination. “Rather, it is submitted that the history of the amendment indicates that three distinctive alternative conflict categories were contemplated.”<sup>128</sup> Western commentators have been generally antipathetic to a formulation that presents a judgement value on the role of a liberation movement as “the recipients of a discrete system of humanitarian safeguards”<sup>129</sup> but they tend to ignore or minimise the strength of the feeling of other States and communities concerning the crimes of colonialism and apartheid and the associated legal developments, and the way in which rules of international law have developed.

The traditional view was that only States might become parties to or accede to the Conventions, notwithstanding the post-war evolution that a territory or political entity that is denied its right of self-determination guaranteed by the Charter of the United Nations can be regarded as an international person for some purposes. This approach enables Professor Abi-Saab to come to the conclusion that “liberation movements have a *jus ad bellum* under the Charter,” and “they are subject to the international *jus in bello* in its entirety.” A national liberation

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<sup>127</sup> General Assembly resolution 3103 (XXVIII) of 12 December 1973.

<sup>128</sup> De Pue, *Military Law Review* (1977), p. 71.

<sup>129</sup> *Ibid.*, p. 57.

movement may therefore constitute itself as a “Power” by accepting the provisions of the four Conventions, including, therefore, article 96, paragraph 2, of the Protocol.

However, what difficulties there may have been in conferring such a power on a liberation movement which may not, at the present time, be administering a territory, have been removed by the automatic triggering mechanism of article 96, paragraph 2, of Protocol I of 1977 which states:

“The authority representing a people engaged against a High Contracting Party in an armed conflict of the types referred to in article I, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depository. Such declaration shall, upon its receipt by the depository, have in relation to that conflict, the following effects:

- (a) The Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
- (b) The said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol;
- (c) The Conventions and this Protocol are equally binding upon all Parties to the conflict.”

There is thus no impediment in the way of a liberation movement becoming a Party to the Conventions and the Protocol since the 1977 Protocol clearly and expressly confers such a right.

The Protocol is subject to ratification or accession by States. However, as many delegates at the Geneva Conference in 1974 and 1977 pointed out, article 1 of the 1977 Protocol is a codification of the developing rules of law exemplified by the General Assembly Declaration of 1973 on the legal status of combatants struggling against colonial and alien domination and racist regimes which espouses the extension of the full convention protection to them. Article 1, therefore, does not create new law for liberation movements, but merely crystallises in treaty form already existing rules of customary international law, especially those rules embraced by the four Geneva Conventions of 1949.

On this basis, these liberation movements are entitled to the legal status, as regards the application of the *jus in bello*, of a regular army and the inhabitants of these Territories are entitled to the protection of the accepted rules concerning the conduct of such hostilities. It can therefore be argued that all that the Protocol, through article 96, does is to establish the modalities by which these rights and obligations come into being: it does not create them. If the liberation movement

does make the unilateral declaration envisaged in article 96, paragraph 3, then a heavy responsibility rests on the belligerent State to observe the customary rules, especially in relation to the treatment of prisoners of war, or to accede to the Protocol itself. SWAPO, for example, has already made a public statement that the “Namibian Liberation Army must - and does - comply with the laws and customs of war as set out, in particular, in the Geneva Conventions of 1949 and South Africa’s armed forces are also bound by these Conventions.”<sup>130</sup>

On 28 November 1980, the African National Congress of South Africa deposited the following Declaration with the International Committee of the Red Cross, which was received on behalf of the Committee by its President:

“It is the conviction of the African National Congress of South Africa that international rules protecting the dignity of human beings must be upheld at all times. Therefore, and for humanitarian reasons, the African National Congress of South Africa hereby declares that, in the conduct of the struggle against apartheid and racism and for self-determination in South Africa, it intends to respect and be guided by the general principles of international humanitarian law applicable in armed conflicts.

“Whenever practically possible, the African National Congress of South Africa will endeavour to respect the rules of the four Geneva Conventions of 12 August 1949 for the victims of armed conflicts and the 1977 additional Protocol I relating to the protection of victims of international armed conflicts.”<sup>131</sup>

In a number of trials in South Africa in recent years, defence lawyers have invoked the internationally-protected status of combatants of the African National Congress and the General Assembly’s demands for either commutation of death sentences imposed by South African courts or for prisoner-of-war status. In a remarkable vote on 1 October 1982, 136 States called for this status when Mogorane, Mosoli and Motaung were sentenced to death following the attacks on the Booyens police station and Sasolburg. There were no votes against and only the United States of America abstained.

Western commentators were largely antagonistic to the evolution of article 1, paragraph 4, of the Protocol and to the criteria used for the identification of prisoners of war under article 44, paragraph 3.

However, in spite of the early opposition at Geneva of some Western Governments, there is now a grudging respect for the new situation arising out of Protocol I and the evolution of these rules of customary international law. As one

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<sup>130</sup> SWAPO statement at the Dakar International Conference on Namibia and Human Rights, in *International and Comparative Law* (1978), p. 389.

<sup>131</sup> See United Nations General Assembly document, A/35/710 of 4 December 1980.

writer put it, "It cannot be denied that the promulgation of these instruments represents an important step forward in the desire of modern nations to alleviate the suffering inflicted upon both combatants and civilians in the conduct of armed conflicts and to reach a balance between military necessity and the most basic values."<sup>132</sup>

If the "most basic values" are to have any immediate relevance to Namibia as it is illegally occupied by South Africa, then there is a special duty on the major Western Powers to ensure that the South African regime observes the principles of the legal status of the combatants "struggling against colonialism and racist regimes," solemnly proclaimed by the General Assembly Declaration of 1973, as expressing the law, and elaborated in Protocol I of 1977.

If the South African regime continues to murder prisoners of war and its allies continue to permit it to do so, then the rest of the international community will draw the appropriate conclusion as to whether the West is seriously concerned at all with the systematic violation of the "most basic values" for the vast majority of the people of Namibia and South Africa, and with the rest of the territories covered by article 1.

The liberation movements lay great store on this legal dimension, and governments are obliged under General Assembly resolution 34/9 H of 1979 to take "appropriate measures to save the lives of all persons threatened with execution in trials staged by the illegitimate racist regime [of South Africa] on charges of high treason and under the obnoxious Terrorism Act."

### ***Conclusion***

International law is no longer the monopoly or preserve of a small number of States from Western Europe and the Americas. In the past three decades, under the inspiration of new pressures, it has responded to the needs, desires and aspirations of a larger community of peoples and States, many of whom have recently undergone the humiliation, violence and racism inherent in colonialism. The legal developments must not therefore be seen as part of an emerging regional law of Africa or the "soft law" of the United Nations.

The rules relating to self-determination reflect an urgency where the maintenance of the *status quo* must yield to the imperatives of change. The Western system which excluded the vast majority of mankind and which had no creative potential for solving difficult problems, has given way to the United Nations Charter system which, through the fundamental law of the organised world community, affirms the right of political and economic self-determination, and repudiates racial discrimination.

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<sup>132</sup> Buckley, *Mercer Law Review* (1978), p. 1164.

The new legal order makes demands upon lawyers to ensure a commitment to national liberation movements. The territorial integrity of colonial Territories such as Namibia must be maintained. The bantustanisation of South Africa must be rejected. The demand for the treatment of captured freedom fighters as prisoners of war in terms of the relevant Geneva Convention has assumed particular significance in the context of Protocol I of 1977.

Most importantly, the need to use the legal power of the United Nations in support of mandatory action under Chapter VII of the Charter in those Territories where demands for economic, military and nuclear sanctions have been made by the liberation movements, has become urgent. In order to do this, there must be a political will in the West. Lawyers may be able to contribute to such an evolution.

The national liberation movements of southern Africa, SWAPO of Namibia and the African National Congress of South Africa, concerned as they are with the racist violence of the forces of apartheid, look to international lawyers to focus attention on the tripartite nature of crimes which invite individual responsibility under international law. Lawyers need to investigate the extent to which the crime of aggression, against subjects of international law such as Angola, Zambia, Botswana, and peoples protected by international law such as the people of Namibia and South Africa; crimes against humanity, through the execution of policies of racial discrimination and political, economic, social and racial oppression of a people; and war crimes, through acts contrary to the laws of war, non-recognition of prisoner of war status, etc., have been committed by the racist and colonial regime of South Africa.

## **V. STATUS OF CAPTURED FREEDOM FIGHTERS**

### **THE LAWS OF ARMED CONFLICT AND APARTHEID<sup>133</sup>**

by

**Keith D. Suter**

... This report has three objectives. The first is to provide some background information on what will become an increasingly significant aspect of South

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<sup>133</sup> Published by the United Nations Centre against Apartheid in *Notes and Documents*, No. 24/80.

African affairs in the 1980s. The second is to show the contribution which the southern African national liberation movements have already made to the progressive development of the laws of armed conflicts. The final objective is to provide some detailed information on the law of armed conflicts. The overall intention is twofold: (a) to provide a new dimension to the struggle against apartheid: the role and importance of the laws of armed conflicts; and (b) to provide a number of specific policy suggestions for United Nations bodies and others opposed to apartheid.

Liberation movements, especially within southern Africa, have contributed to the new laws of armed conflicts. Firstly, they revealed the considerable weakness of the old laws of armed conflicts. Secondly, the struggles by these movements were recognised eventually by the international community as being sufficiently important to warrant what was to become one of the most thorough reviews of the laws of land warfare in the past 110 years. Thirdly, the liberation movements participated in the Geneva Diplomatic Conference which drafted the new laws.

The new laws of armed conflicts owe a great deal to the southern African liberation movements. Indeed, without those movements, it is likely that the preparatory work of the new laws may have been delayed. A few years later, with work well advanced on the new laws, it seemed, ironically, that the entire project would grind to a halt because of disagreements over the liberation movements. Even though most of the movements achieved victory before work on the new laws was eventually completed, they still influenced opinions about the new laws when the new treaties were opened for signature...

### *The Geneva Conventions (1949)*

The scope of international law covering armed conflicts is approximately as broad as that covering peace. International law does not suddenly cease to exist in the event of armed conflicts. Diplomatic relations, treaty relations, government aid and the rights of persons, such as tourists, finding themselves in the territory of the government with which their government is now at war, are all aspects of international law's involvement in wartime issues. There are also the rights and responsibilities of nations wishing to remain neutral in the armed conflict.

The laws regulating armed conflicts can be broadly divided into two categories. One category consists of laws which regulate the conditions under which a government may or may not resort to war as an instrument of national policy. The present situation is governed by Article 2(4) of the Charter of the United Nations, which has in effect outlawed the use of war except for self-defence or when used by the United Nations:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any

State, or in any other manner inconsistent with the purposes of the United Nations.”

Judging by the wars that have taken place since the Charter of the United Nations was written in 1945, this has not had as much success as its authors hoped.<sup>134</sup>

The other category of laws regulates the way in which armed conflicts are fought. This category is the basis of this report.

The second category has sometimes been classified as the Law of the Hague and the Geneva Conventions. The Law of the Hague lays down the rights and duties of belligerents in the actual conduct of hostilities and limits the use of weapons. Most of this branch of the law is the product of the Hague Peace Conferences of 1899 and 1907, especially the Fourth Hague Convention Concerning the Laws and Customs of War on Land. The law of the Hague also includes other instruments, not drawn up at the two peace conferences, such as the Declaration of St. Petersburg, 1868, prohibiting the use of explosive bullets and the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or other Gases and of Bacteriological Methods of Warfare.

The Law of Geneva consists of rules designed to ensure respect, protection and humane treatment of war casualties and non-combatants. These rules have been periodically revised and adapted to modern needs and conditions. The 1949 Geneva Conventions, at least in their application to international conflicts, represent a recent and relatively complete codification of these rules. They contain detailed provisions for the benefit of the persons to whom they relate; civilians, prisoners of war, the wounded, the sick, the shipwrecked. The four Conventions also establish machinery designed to ensure, as far as possible, that the rules laid down are observed.<sup>135</sup>

The origin of the Geneva Conventions could be traced back for many centuries to the customs that had evolved in ancient wars but it would take too much space to trace this evolution. It is easier to begin on the evening of 24 June 1859, at Solferino, where Europe's largest battle since Waterloo in 1815 had been fought that day. Quite by accident, a Swiss businessman, Jean Henri Dunant, was present and helped in the care of the wounded that evening. He noted that many wounded

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<sup>134</sup> It has had, however, the curious effect of eradicating “declared wars,” since to do so would be an automatic violation of this provision; instead, Governments go to elaborate lengths to claim to act in their “self defence” or else to assist in the “self-defence” of others. Also, “wars” have been replaced, in legal terms, by “armed conflicts.”

<sup>135</sup> See Keith D. Suter, “Modernising the Laws of War,” *Australian Outlook*, August 1975, pp. 211-219.

died simply because of a lack of medical treatment. As one Dunant biographer has commented:

“It is important to remember that for literally thousands of years neither the means nor the wish to care for the wounded existed. Ordinary foot soldiers were considered just so much cannon fodder, men to be kept clothed and fed only well enough to be efficient in battle. If they were wounded or died it was scarcely thought of in personal terms.”<sup>136</sup>

Dunant was shocked by what he had seen and wrote a book, *A Memory of Solferino*, which soon became a “resounding and widespread success,” coming as it did soon after Florence Nightingale’s publicised activities for wounded personnel in the Crimean War. In this, Dunant asked:

“Would it not be possible in time of peace and quiet to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers?”<sup>137</sup>

Along with four other Geneva citizens, Dunant formed the International Committee for the Relief of the Wounded. In October 1863 this Committee convened in Geneva a conference of civil servants and doctors from 16 nations to discuss the possibility of creating national private committees for the relief of the wounded. From this conference has grown the International Red Cross. This organisation is composed of three sections: the International Committee of the Red Cross (ICRC), which is the continuation of the Committee founded by Dunant and acts as the neutral intermediary in wars and is responsible for the revision of the Geneva Conventions; in every State (including Switzerland) there is a national Red Cross Society which handles the relief of victims of war and natural disasters (ICRC usually co-ordinates the Societies’ war relief work); also in Geneva but separate from ICRC is the League of Red Cross Societies which co-ordinates the Societies’ natural disasters relief work.

The Conference also agreed on the “Red Cross” emblem, which just happens to be the reverse of the Swiss federal flag (white cross on a red background) but the exact reason for the choice of what is one of the world’s most famous emblems is obscure; there was no religious significance.

A third important point of agreement was the principle:

“That in time of war the belligerent nations should proclaim the neutrality of ambulance and military hospitals, and that neutrality should likewise be recognised, fully and absolutely, in respect of official medical personnel,

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<sup>136</sup> Carol Z. Rothkopf, *Jean Henri Dunant*, (New York, Franklin Watts, 1969), p. 5.

<sup>137</sup> *Ibid.*, p. 81.

voluntary medical personnel, inhabitants of the country who go to the relief of the wounded, and the wounded themselves.”<sup>138</sup>

The importance of this principle may be seen in two ways. Firstly, it provided the legal basis for relief bodies to intervene in wars as an independent party and, secondly, by proclaiming all wounded to be neutral, this principle reversed the traditions of all countries which claimed that medical priority should be given to their own troops who needed help since they were fighting for the “right side”; now it made no difference what side a soldier had been fighting for.

To implement these ideas, a Diplomatic Conference was required and this took place in 1864 in Geneva. It resulted in the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, which was revised in 1906. In 1929, this Convention was revised again and joined by the Geneva Convention on Prisoners of War. At the 1949 Diplomatic Conference, the present four Conventions were agreed: for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, for the Treatment of Prisoners of War, and for the Protection of Civilian Persons in Time of War.

The trend in the Conventions is both to spread the category of persons covered (wounded personnel, to prisoners of war [POWs], to civilians) as well as to extend the provisions relating to each category so that the provisions agreed on in 1949 are very detailed. For instance, in article 49 of the POW Convention, non-officer POWs who are fit may do certain types of work; non-commissioned officers (NCOs) shall only do supervisory work; and officers may not be compelled to work at all. Under article 71, all POWs are to be allowed to receive not less than two letters and four cards monthly.

It could be argued that it is pointless having laws of war since when wars break out the object is to win and this must take priority over any legal niceties. A discussion of this argument would go beyond this paper’s scope, but four observations should be made. First, many acts are not regulated by the laws of war and so it is unfair to blame the laws for not preventing these acts. Second, where the laws do apply they are more often followed than people give them credit for; for instance it is now rare for soldiers to be instructed to take no prisoners in a battle, in other words, that everyone captured is to be killed. Third, the obligations imposed upon States by the laws are not onerous so that most provisions can be easily followed without causing a side to lose the war. Therefore, the laws are followed by one side, and the other side is thereby encouraged to do the same so as to appear to be just as much a respecter of international law as is the former side. Finally, even if the laws are followed on

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<sup>138</sup> ICRC/League of Red Cross Societies, *International Red Cross Handbook*, Geneva, 1971, p. 377.

only one occasion in a war, the people who benefit from that rare occurrence would certainly not regard the laws as being pointless.

### *The Conventions and Wars of National Liberation*

The Geneva Conventions were a splendid monument of legal reasoning. But they were written with, quite naturally, the memories of the Second World War still fresh in everyone's memory. The conflicts since 1945 have almost always taken on different forms, and the Geneva Conventions have had only a limited application.

First, wars traditionally took place between nations, and so the Geneva Conventions and the Law of the Hague have been based on government-to-government conflicts. However, most conflicts since 1945 have lacked a clear international character and have tended to be more of a non-international character. At the 1949 Geneva Diplomatic Conference there was the new provision, which had no precedent at all in earlier Geneva Conventions, in providing an article (number 3, common to all four Geneva Conventions) providing respect for basic human values and prohibiting certain acts. The application of the article would not affect the legal status of the parties at conflict. Article 3 was a convention within a convention. ICRC, which had been active in the Spanish Civil War (1936-1939), argued strongly for such an article. Also, although Article 2(4) of the Charter of the United Nations outlaws international conflicts, it does not touch upon non-international conflicts.

Article 3 was the most hotly debated issue at the 1949 Geneva Diplomatic Conference. Even at that point, when there were - by later standards - few non-international conflicts being fought, it was clear that many governments had doubts about the article. The doubts were slightly eased by a lack of precise definition of when an internal disturbance had reached the level of a non-international conflict. They could hope, therefore, to evade having to follow article 3 by claiming that in fact it did not apply to their internal conflicts. Experience from 1949 has shown that Governments have almost always tried to evade their responsibilities under article 3.

Another problem concerned the application of the Geneva Conventions to wars of national liberation. Such wars were already in progress by 1949 and several more were to come. But the Geneva Conventions were mainly devised by Governments which had colonial empires, or were often sympathetic to those who had, rather than third world countries, of which very few were independent in 1949, and the countries with centrally-planned economies. No specific provision was made at all for wars of national liberation. As with the previous problem, then, the drafters of the 1949 Geneva Conventions were more influenced by what had already happened - rather than creating laws for what could happen. This is, of course, a common criticism addressed to law-makers. Be they working at the local, national

or international level, they draft laws in reaction to existing and past problems rather than as ways of avoiding future problems.

Wars of national liberation did not have in 1949 the same publicity which they were later to enjoy. In 1949 it was widely assumed that the decolonisation process would be slow, orderly and done on the basis of negotiation. Southern Africa was, owing to white intransigence, going to be a difficult decolonisation process.

Third, guerrilla warfare received no specific attention. Once again, this omission reflected the historical, cultural and legal background of most, but not all, nations represented at Geneva. Their method of fighting on land was based on an honour code going back centuries: their soldiers wore uniforms, carried their arms openly, fought in organised groups and in theory anyway, obeyed the laws of armed conflicts. Guerrilla warfare is, ironically, the world's oldest form of fighting because it has the opposite qualities to those listed in the previous sentence, although such fighters often had their own limits to violence which constituted their laws of armed conflicts. Most opposition to European colonial expansion was conducted by guerrilla warfare. It remains the method of warfare of poor, oppressed people. But, of course, the two World Wars, which so overshadowed the creation of the 1949 Geneva Conventions, were largely conducted by conventional warfare.

In sum, the Geneva Conventions were designed to regulate conventional international conflicts. No special attention was given to wars of national liberation. If these were classified for the benefit of the Geneva Conventions, as non-international conflicts, then only one Article - out of about 400 - applied to such conflicts. No attention was given to guerrilla fighters, thereby implying that such persons were not "privileged" combatants. The laws of armed conflicts began as rules dealing only with persons who fought or were otherwise directly involved in a conflict; the Fourth Convention, on civilians, is therefore the newest. Persons who are "privileged" can expect prisoner-of-war (POW) status upon capture and medical treatment. Combatants who are not "privileged" are not eligible to the protection of international law. They are, therefore, branded as "bandits," "terrorists," etc., and subject to the usually severe national laws against such persons.

The 1949 Geneva Conventions, while being respected in some conflicts and providing a legal foundation for the International Committee of the Red Cross to apply for permission to carry out its valuable humanitarian relief work, have not been as successful as was hoped for in 1949. The blame does not reside with ICRC. Most of the world's nations are now bound by the Conventions. Each party is therefore obliged to carry out article I common to all four conventions:

"The High Contracting Parties undertake to respect and to ensure respect for the present convention in all circumstances."

Those are strong words and no party at all can claim to have followed them in all conflicts, including those in which they were not directly involved and yet for which they had an obligation to ensure respect for the four conventions.

From 1968 onwards, the United Nations General Assembly adopted resolutions requesting the implementation of the Geneva Conventions in the southern African liberation struggles. In resolution 2383 (XXIII), the General Assembly called upon the United Kingdom to ensure the application of the third (POW) Convention to the Rhodesian conflict. In resolution 2395 (XXIII), it called upon Portugal to ensure the application of the third Convention to the struggles in its Territories. In resolution 2396 (XXIII), dealing with South Africa's apartheid policies, it expressed "grave concern over the ruthless persecution of opponents of apartheid under arbitrary laws and treatment of freedom fighters who are taken prisoner during the legitimate struggle for liberation and condemns the Government of South Africa for its cruel, inhuman and degrading treatment of political prisoners." It called again for the release of such prisoners. And it declared "that such freedom fighters should be treated as prisoners of war under international law, particularly the Geneva Convention relative to the treatment of Prisoners of War of 12 August 1949." The South African Government ignored the request and was condemned for it by the General Assembly.<sup>139</sup> It is notable that those Western Powers which have special influence in South Africa as a result of their financial investment, did nothing to carry out their obligations under article I of the Third Geneva Convention.

South Africa's attitude illustrates another weakness of the Geneva Conventions and most of international law in general; lack of external enforcement measures. International military tribunals, on the post-Second World War Nuremberg pattern, have been rare in human history. Indeed, from the victims' point of view, the important matter is to discourage a government's abuse of the Geneva Conventions from the outset, rather than having some system of punishment after the violations have been committed. The victims of apartheid require protection now, rather than assurances that their tormentors may later stand trial by some international system, which, of course, is not even envisaged at present.

Finally, the legal vacuum created by South Africa's attitude towards the Geneva Conventions has highlighted another weakness of the Geneva Conventions: if a government regards its opponents as "terrorists" or "bandits," then this encourages such persons to act like terrorists or bandits. There is no incentive for them to follow the laws of armed conflicts. At present, of course, the liberation movement's level of violence is minute compared with the direct violence used by the South African Government's forces. But the government's attitude is putting the people at risk. The people are suffering because of the government. Before looking at that suffering and its implications for the future, it is necessary to look at the way in which the Geneva Conventions have been updated.

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<sup>139</sup> General Assembly resolution 2506 (XXIV) of 21 November 1969.

## *Updating the Laws of Armed Conflicts*<sup>140</sup>

“In one very important field, the protection of human rights in armed conflicts, some concrete progress has been made this year. A resolution sponsored by India, Czechoslovakia, Jamaica, Uganda and the United Arab Republic was unanimously adopted (with two abstentions) at the International Conference on Human Rights in Teheran, drawing attention to the inadequacy of the existing humanitarian conventions both as regards their scope and effective application to the armed conflicts which disgrace our age. The resolution also calls for the conventional protection of the victims of racist and colonial regimes and the protection under international law of such victims who are imprisoned and for their treatment as prisoners of war or political prisoners under international law.

“This resolution is really worthwhile and may well be the most valuable concrete result of Human Rights Year. It is to be hoped that top priority will be given to its implementation.

“It is noteworthy that this important resolution was no doubt inspired by the sustained pressure of the non-governmental sector for action in this much neglected area of human rights; it is the area in which the most massive destruction of human life and rights occur.”<sup>141</sup>

That was how Sean MacBride, the person most responsible for the resolution on human rights in armed conflicts, described the resolution. The resolution adopted by the International Conference on Human Rights held in Teheran, from 22 April to 13 May 1968, reflected international concern over the suffering of civilians and armed personnel, particularly in the Indo-Chinese, Middle East and southern Africa conflicts.

The resolution<sup>142</sup> had several significant results. Firstly, it injected a fresh legal dimension into consideration of these conflicts, especially at a time when only the Indo-Chinese conflict was receiving detailed consideration by international lawyers. Secondly, for the first time it established linkage between human rights,

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<sup>140</sup> For a detailed study of the updating of the new laws, especially in regard to their application to guerrilla warfare, see Keith D. Suter, *An International Law of Guerrilla Warfare: A Study of the Politics of Law Making* (Ph.D. dissertation, University of Sydney, 1977).

<sup>141</sup> Sean MacBride “New avenues of implementation,” *Towards the Non-Governmental Organisational (NGO) Strategy for the Advancement of Human Rights* (Paris, Non-Governmental Organisation (NGO) Bureau, UNESCO, 1968), pp. 64-65.

<sup>142</sup> Final Act of the International Conference on Human Rights (A/CONF.32/41), p. 18.

armed conflicts and the laws of armed conflicts. Thirdly, it paid particular attention to the plight of persons struggling against minority, racist or colonial regimes and called for their treatment as POWs. This was taken up by the United Nations General Assembly a few months later, as noted above. Fourthly, it was the first time in almost two decades that a United Nations body had decided to consider the need for codifying the laws of armed conflicts. Fifthly, the United Nations commenced its very significant contribution to the development of the laws of armed conflicts. Finally, it augmented the initiative being undertaken by the International Committee of the Red Cross (ICRC) to update the Geneva Conventions. The 1968 resolution was, in retrospect, one of the most important developments in the International Year for Human Rights.

ICRC, following on from international consultations, produced two draft Additional Protocols to the four Geneva Conventions.

The first Protocol dealt with international conflicts. The second Protocol went well beyond article 3 common to the four conventions in providing rules for non-international conflicts.

The final stage of the ICRC's work was the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. The first session took place between 20 February and 29 March 1974. Besides a procedural wrangle over whether or not the Provisional Revolutionary Government of South Viet Nam should be invited to participate (it was eventually not invited), the main controversy was easily that of the status of national liberation movements, in effect, those of southern Africa and the Palestine Liberation Organisation. Within a year, the Portuguese colonial Government was overthrown and the new rulers indicated their intention of dissolving Portugal's colonial empire.

The number of liberation movements, well before the final session of the Diplomatic Conference in 1977, was suddenly reduced to the Palestine Liberation Organisation and to those in Southern Rhodesia, South Africa and Namibia. But the struggle at the Conference was highly significant for the history of national liberation.

### ***The Legal Status of Wars of National Liberation***

The majority of the States Members of the United Nations wanted captured members of liberation movements to be granted POW status. This idea started at the 1968 International Conference on Human Rights and was repeated in United Nations General Assembly resolutions. This posed the question: what was the best legal method to achieve this? Apart from some procedural problems, that was the

main focal point of the 1974 session of the Geneva Diplomatic Conference.

Almost all of the provisions in the third (POW) Geneva Convention apply in international conflicts. The exception is, of course, common article 3 on non-international conflicts. The logical action, therefore, would be to decree all wars of national liberation to be international conflicts. This suggestion was opposed by most Western Powers and the Conference atmosphere was so tense that it seemed to observers such as this writer that the minority Western Powers might withdraw from the Diplomatic Conference.

In retrospect, however, the debate was a useful experience. It brought out into the open the entire legal problem of wars of national liberation - an issue which had previously been debated in non-legal political gatherings, such as the United Nations General Assembly. It was a legal debate which the international community had to undertake and resolve at some point. The Diplomatic Conference was a good forum for such a debate. Also, all national liberation movements recognised by regional intergovernmental organisations (League of Arab States and Organisation of African Unity) were present. They were thus able to obtain at first hand a clear exposition of the wider legal environment in which their campaign should be conducted. There was also a further reminder (if one were needed) of the determination and solidarity of Third World nations and their allies to work for the victory of all liberation movements recognised by the League of Arab States and the Organisation of African Unity. Finally, the debate was resolved in favour of the liberation movements.

The dispute over the legal status of wars of national liberation had ramifications beyond that of the laws of armed conflicts. In essence, the dispute was over the history of colonialism.

Governmental practice, especially by Western Powers, had long shown a trend to treat wars of national liberation as international conflicts. In the eighteenth century, France aided the 13 American colonies in their fight against the United Kingdom. In the nineteenth century, the United Kingdom and Russia helped Greece in its struggle against the Ottoman (Turkish) Empire. In the First World War, President Woodrow Wilson of the United States proclaimed the doctrine of national self-determination as “an imperative principle of action which statesmen will henceforth ignore at their peril.”<sup>143</sup>

Meanwhile, United Nations practice has long shown that opposition to colonialism and apartheid are matters of international concern. The United Nations Security Council has intervened, in effect, on the side of South Africa's national liberation struggle by imposing a partial arms embargo.

In its preparatory work for the Diplomatic Conference, the International

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<sup>143</sup> Quoted in David Thompson, *Europe Since Napoleon* (London, Penguin, 1966), p. 571.

Committee of the Red Cross, in consultations with governmental experts, drafted a provision for Protocol I which it believed met United Nations requirements.<sup>144</sup>

“Article 42 - New category of prisoners of war

“1. In addition to the persons mentioned in article 4 of the Third Convention, members of organised resistance movements who have fallen into the hands of the enemy are prisoners of war provided such movements belong to a Party to the conflict, even if that Party is represented by a government or an authority not recognised by the Detaining Power, and provided that such movements fulfil the following conditions:

- (a) That they are under a command responsible to a Party to the conflict for its subordinates;
- (b) That they distinguish themselves from the civilian population in military operations;
- (c) That they conduct their military operations in accordance with the Conventions and the present Protocol.

2. Non-fulfilment of the aforementioned conditions by individual members of the resistance movement shall not deprive other members of the movement of the status of prisoners of war. Members of a resistance movement who violate the Conventions and the present Protocol shall, if prosecuted, enjoy the judicial guarantees provided by the Third Convention, and, even if sentenced, retain the status of prisoners of war.

“3. In cases of armed struggle where peoples exercise their right to self-determination as guaranteed by the United Nations Charter and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, members of organised liberation movements who comply with the aforementioned conditions shall be treated as prisoners of war as long as they are detained.”

This proposal did not satisfy the majority of nations represented at the Diplomatic Conference. It was not enough merely to grant captured freedom fighters POW status as though they were fighting in an international conflict. The entire rules relating to international conflicts should apply to wars of national liberation. They

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<sup>144</sup> *Draft Additional Protocols to the Geneva Conventions of 12 August 1949* (Geneva ICRC 1973), pp. 47-48.

eventually attained their point of view.<sup>145</sup>

*“Article 1 - General principles and scope of application*

“1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.

“2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.

“3. This Protocol, which supplements the Geneva Convention of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in article 3 common to those Conventions.

“4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.”<sup>146</sup>

The relevant portion of common article 3 to the 1949 Geneva Convention reads:

“... the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.”

This was a significant breakthrough in the legal and diplomatic struggle against apartheid. It followed United Nations General Assembly resolutions, especially resolution 3103 (XXVIII). It represented the unwillingness of Western international lawyers and their governmental employers to support apartheid. It has been suggested<sup>147</sup> “... that the recognition of the rights of liberation

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<sup>145</sup> The debate is described in David P. Forsythe, “The 1974 Diplomatic Conference on Humanitarian Law: some observations,” *American Journal of International Law*, January 1975, pp. 77-91.

<sup>146</sup> The text of both Protocols is reprinted in document A/32/144 of 15 August 1977, “Respect for human rights in armed conflicts,” Fourth session of the Diplomatic Conference on Reaffirmation and Development of International and Humanitarian Law Applicable in Armed Conflicts: report of the Secretary-General.

<sup>147</sup> Kader Asmal, “Apartheid South Africa: The Illegitimate Regime,” United Nations Centre

movements under the Protocol is merely a codification of an already existing rule of general international law demanding that humanitarian standards be applied.” In other words, the South African liberation movement is entitled to the legal status of an armed force fighting in an international conflict.

### *South Africa's Attitude*

South Africa was represented at the first (1974) session of the Diplomatic Conference. As at all international conferences, it was heavily criticised and had few allies willing to speak publicly in its favour - although its allies were willing to resort to legalisms to assist it. Two members of the credentials committee (Senegal and Madagascar) disputed its delegation's credentials "... since the Government of that country represents only a minority of the population and is carrying out a policy of racial discrimination contrary to the spirit and aims of the Conference."<sup>148</sup> Some of the other delegations saw their role limited only to determining the validity of the credentials of participants and not deciding who may attend the conference.<sup>149</sup>

South Africa naturally opposed the amendment to Protocol I dealing with wars of national liberation. But in this author's observations of the 1974 session, the delegation took little part in the detailed negotiations.

South Africa did not attend the 1975 session. By this time, the new Portuguese Government was following new policies towards its colonies, and the South African Government had responded to the collapse of the Portuguese colonial empire by initiating its short-lived "détente" policy.<sup>150</sup> A South African official based in Geneva told this author on 19 February 1975 that South Africa had not withdrawn from the Diplomatic Conference but that with sensitive negotiations currently underway with some African leaders, the Government did not want to become embroiled in a public controversy at the Conference which could disturb the other negotiations. It gave no explanation to the Diplomatic Conference for its absence.<sup>151</sup>

South Africa did not attend the third (1976) session. It did not attend the final

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against Apartheid, *Notes and Documents*, No. 30/77, p. 15.

<sup>148</sup> Conference document CDDH/51/Rev.1, 2 September 1974, p. 5.

<sup>149</sup> *Ibid.*, p. 7.

<sup>150</sup> For a pro-South African Government study, see Patrick Wall, *Prelude to Détente* (London, Stacey International, 1975).

<sup>151</sup> Conference document CDDH/Summary Record/30, 18 April 1975, p. 94.

(1977) session. It did not, therefore, sign the two Protocols. The Palestine Liberation Organisation (PLO), the Pan Africanist Congress of Azania (PAC), the African National Congress of South Africa (ANC) and the South West Africa People's Organisation (SWAPO) did do so. The Additional Protocols are now in force for those nations that have ratified them.

South Africa is still not, as of writing, bound by the Additional Protocols. This writer has been unable to obtain any public statement on when the South African Government will become a party to the Additional Protocols. It is likely that it will refuse to do so.

### *The South African Liberation Movement and the Laws of Armed Conflicts*

#### *A State of War*

South Africa is in a no-win military situation. The gathering fury of the international community may yet oblige the South African Government to back down and set a course for majority African rule. Meanwhile, the national liberation movement had no alternative but to increasingly turn to force to achieve victory. Even if the movement does not win an outright military victory, it will force Western interests to recognise that they need to change policies. The West is most unlikely to act voluntarily against the government while it has such a large financial stake in South Africa. However, if the liberation movement can jeopardise that financial stake, then the West will change sides.

With the liberation of Zimbabwe-Rhodesia, South Africa now has one of the longest and most difficult-to-patrol borders in any of the world's combat zones. South Africa's forces are, moreover, hindered by the comparative scope of infiltration. There are the nation's open veldt, lack of mountains and a lack of forests. Rural guerrilla warfare could begin in a major way in the east where the hilly country of the traditional Zulu homeland backs on to Mozambique. The guerrilla struggle has at least already started:

*“Umkhonto We Sizwe, or Spear of the Nation, the military wing of the banned African National Congress, a liberation movement, is crossing the Limpopo River into South Africa, caching weapons, and fighting when detected. Guerrilla incidents are on the rise in the northern Transvaal. Because of the security hazard and a lack of economic opportunity, rural whites are flocking to cities; at least 25 per cent of border-area farms are unoccupied. And the war is spreading to urban centres. An explosion in a posh shopping area in downtown Johannesburg injured several whites. Such bombings, as well as fatal shootings and arson, are increasing.”*<sup>152</sup>

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<sup>152</sup> James H. Mittelman, “Apartheid,” *The New York Times*, 18 March 1979.

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South Africa is, then, already well advanced along the path to guerrilla warfare. While the violence is still at a comparatively low level, even the Western mass media have grudgingly been obliged to admit that it is developing.

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The precise form the war will take cannot be predicted. What can be predicted, however, is that a protracted conflict is now inevitable. The South African Government could have avoided it - but decided not to do so. Apartheid policies remain as firm as ever.

Opponents of apartheid, both inside and outside South Africa, must now give far more attention to the First Additional Protocol and the four Geneva Conventions of 1949.

### *Application of the Laws of Armed Conflict*

The Geneva Diplomatic Conference, responding to United Nations General Assembly decisions, decided that the four Geneva Conventions and the First Protocol all applied to wars of national liberation. The South African Government apparently does not accept that ruling. The Geneva-based International Committee of the Red Cross may be invited each year by the United Nations General Assembly to impress upon the South African Government that it should follow the laws of armed conflicts in combating the South African liberation movement.

Likewise, the South African liberation movement publicly may be called upon to commit itself to following the laws of armed conflicts. The liberation movement should ensure, in accordance with the laws, that its own personnel are aware of their obligations under the laws.<sup>153</sup>

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<sup>153</sup> *Note by the Editor:* In November 1980, the African National Congress of South Africa deposited a declaration accepting the Geneva Conventions and Additional Protocol I.

### *Apartheid is a War Crime*

The Geneva Diplomatic Conference gave considerable attention to the repression of breaches of the Geneva Conventions and the First Protocol: “war crimes.” The First Protocol listed various war crimes, including (in article 85(4)(c)): “practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.”

The specific classification of apartheid as a war crime further emphasised the opinion by the majority of Governments that the South African national liberation movement is fighting an international conflict. Moreover, the text indicates that the Diplomatic Conference considered apartheid at present to be a war crime - even though the level of conflict itself is currently low.

Greater publicity may be given to the fact that the Geneva Diplomatic Conference decided that apartheid is a war crime. All nations bound by the First Protocol may also be reminded of their duty in the opening line of the text: “The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.”<sup>154</sup> Such Governments, therefore, have an obligation - whether or not South Africa ratifies the Protocol - to encourage South Africa to stop committing the war crime of apartheid.

### *Treatment of Captured Freedom Fighters*

“Mr. Mahlangu, a school student at the time of the Soweto uprisings of 1976, left South Africa for training as a freedom fighter with *Umkhonto we Sizwe*. He returned with two comrades in June 1977 and was captured, with Mondy Motlouw, in Johannesburg. Mr. Mahlangu was sentenced to death for the murder of the two whites, although he was not present when the shooting took place. His torture under interrogation by Captain Cronright and Lt. Divrouw - including being hurled up in the air and dropped on the floor, which the police described as killing him gradually - and his trial for murder was described to the Group by a witness. The African National Congress maintains that Mr. Mahlangu ought to be treated as a prisoner of war under the terms of the Geneva Convention of 12 August 1949, which includes armed conflict in which the people are fighting against colonial domination and alien occupation, and against racist regime in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations.”<sup>155</sup>

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<sup>154</sup> Geneva Conventions, Additional Protocol 1, article 1(1).

<sup>155</sup> “Treatment of Political prisoners and detainees in South Africa,” (Excerpts from the report of the *Ad Hoc* Working Group of Experts of the Commission of Human Rights), United Nations

The Geneva Diplomatic Conference has recognised that claim.

The execution by hanging of Solomon Mahlangu on 6 April 1979 illustrated the need for all governments to recognise the full implications of the First Protocol. His execution was a war crime. Governments bound by the First Protocol are obliged to ensure its respect in all circumstances.

It is timely to emphasise that the attitude of the South African Government to the laws of armed conflicts - such as their recognition of POW status - jeopardises all of South Africa's people. The laws of armed conflicts have evolved over the centuries to protect war victims. They provide a mantle of safety for all persons in conflict situations. The potential South African conflict victims are not only the captured freedom fighters but everyone else in the country.

For the sake of all South African people, the Government should ensure that its own personnel follow the laws of armed conflicts. This would further induce the liberation movement to ensure that its own personnel do likewise - and so both sides can take steps to prevent unnecessary suffering.

The best practical way for the South African Government to prove its sincerity in wanting to stop unnecessary suffering is to guarantee captured freedom fighters POW status. It is not doing so at present out of political considerations. But this means that it is playing politics with all South African lives. This rebounds against the Government in two ways. It shows how little regard the Government really has for the South African people. It also means that people who die are treated as martyrs and it is often the case in guerrilla warfare - where winning hearts and minds is so important - that a dead martyr is more dangerous than a live POW. But the Government's delay in grasping this fact indicates its inability to wage counter-guerrilla warfare - and shows that the liberation movement will ultimately win.

### ***Truth - the First Casualty***

Truth is always the first casualty in a conflict. The South African Government has an efficient propaganda machine - albeit somewhat tarnished owing to the recent scandals involving Dr. C. P. Mulder. The Government is aided by the sympathy it gets from the Western-dominated international mass media.

As the guerrilla warfare gets under way, so South Africa is bound to try to devise ways of showing how well its own troops are fighting - and that the guerrillas are "terrorists," scaring people who would allegedly prefer to be governed by the white minority Government.

During the closing stages of the Zimbabwe liberation war, Smith's African troops, especially the Selous Scouts, were used to commit atrocities which were then blamed on the freedom fighters.

Members of the Selous Scouts and Rhodesian Special Air Services are now joining the South African Defence Force in large numbers. The Selous Scouts, founded in 1972, are credited with the highest kill-rate in the Zimbabwe war. Their recruitment in South Africa would extend the Government's capacity for fighting the freedom fighters as well as enabling it to carry out some of Smith's propaganda "dirty tricks" - which the Western mass media fell for.

In this connection, a special impartial investigation unit is needed. This could be part of the existing United Nations Committee structure or be a completely new body. Its task would be to carry out a constant monitoring of all war crimes committed in South Africa. It should seek information from other United Nations bodies, non-governmental organisations, such as Amnesty International and the International Committee of the Red Cross, and journalists. It should publicise its findings.

One of the main strengths of the laws of armed conflicts is that obedience to them helps a military campaign - especially one in which the prime aim is to win the hearts and minds of people.

## **VI. BANTUSTANS**

### **SELF-DETERMINATION AND THE "INDEPENDENT BANTUSTANS"<sup>156</sup>**

by

**Niall MacDermot**

In examining the South African claim that the creation of the bantustans is an

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<sup>156</sup> Paper presented to the International Seminar on the Legal Status of the Apartheid Regime and Other Legal Aspects of the Struggle against Apartheid, Lagos, Nigeria, 13-16 August 1984. For the full text, issued by the United Nations Centre against Apartheid, see *Notes and Documents* No. 4/84, October 1984.

exercise of the right of self-determination of peoples, it is first necessary to examine the nature and extent of that right and the conditions for its exercise.

It is one of the most difficult questions in international law, especially when it is applied to “peoples” who form part of a sovereign State, rather than to those under colonial domination or military occupation.

The crux of the question is the conflict between the principle of the integrity of sovereign States and the assertion of the right of self-determination. Secretary-General U Thant described this in 1971 as a “problem which often confronts us and to which as yet no acceptable answer has been found in the Charter.”

The International Commission of Jurists had occasion to examine this question in the study it made on the events in East Pakistan, as Bangladesh was then called, in 1971. I will seek to summarise what we then said.

### ***Principle of Self-determination and Territorial Integrity of States***

Under Article 1(2) of the Charter of the United Nations, one of the purposes of the United Nations is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...”

This principle finds its definition as a right in common article 1 of the two International Covenants on Human Rights. Paragraph 1 of that article reads:

“1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;”

Paragraph 2 asserts the right of all peoples freely to dispose of their natural wealth and resources.

Paragraph 3 of the same article established that the duty to promote the realisation of this right is imposed upon all States Parties and not only upon the colonial Powers.

The conditions for the exercise of the right are, therefore:

- (a) That there exists a people within the meaning of the Article;
- (b) That a determination of their political status is made by that people;
- (c) That this determination is made freely;
- (d) That the people are free to pursue their economic, social and cultural development.

These provisions do not, however, resolve the problem of the reconciliation of

this right with the territorial integrity of States, nor do they specify the form or forms which self-determination may take, or define the “peoples” to whom the right of self-determination applies. For the first two of these questions one must turn to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, approved by the General Assembly in 1970.

The principles of equal rights and self-determination of peoples is there defined in similar terms to those in the Covenants, with the addition of a requirement that a free determination of a people’s political status shall be made “without external interference.”

The form which self-determination may take is stated to be either the establishment of a sovereign and independent State, or free association or integration with an independent State, or any other political status freely determined by a people.

Under the Principle of Sovereign Equality of States, the territorial integrity and political independence of the State are declared to be “inviolable.”

The relationship of this principle to the right of self-determination is defined under the principle of equal rights and self-determination of peoples in these terms:

“Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”

This crucial passage indicates the way in which the two conflicting principles are to be reconciled. It states that the principle of territorial integrity is to prevail in the case of sovereign States conducting themselves “in compliance with the principles of equal rights and self-determination of peoples” and possessed of a government representing the whole people of the territory without distinction as to race, creed or colour. By implication, where these conditions are not fulfilled, the right of self-determination may prevail over that of territorial integrity.

As just mentioned, the Declaration also states “the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that

people.”

This recognises that a State may include more than one “people” each of whom is entitled to self-determination, and that self-determination may be achieved within the framework of a larger State, as by various forms of local autonomy or by a federal constitution.

Although not relevant to the present case, it should perhaps be added for the sake of completeness that it is a generally accepted principle in international law that the right of self-determination is one which can be exercised only once. If a people or their representatives have once chosen to join with others in a unitary or federal State they cannot afterwards claim the right to secede under the principle of self-determination, or at least cannot do so if they enjoy equal rights under a government representing the whole people without discrimination.

### ***Motivation of the South African Government***

When these principles are applied to the creation of the alleged independent States of South Africa, the first comment to be made is upon the paradoxical situation in which the claim to self-determination is put forward. A claim to independent status for a people within a sovereign State is usually made by the people concerned who strive to obtain that independence, who formulate the proposals and decide the territory for which they are seeking the independence, and it is the government of the sovereign State which usually opposes this. In the South African case, the roles are reversed. It is the government of the sovereign State which formulates the proposals, and decides to what peoples and to what territories they are to apply, and any attempt to organise opposition to their proposals by the persons concerned is ruthlessly repressed under laws supposedly formulated to protect the national security. To say the least, the motivation of these proposals is thus suspect from the outset.

Furthermore, the government which is claiming to create these independent States under the principle of self-determination is one which itself cannot claim legitimacy under that principle, since it violates the principle of equal rights by denying all political rights to over 80 per cent of the population on a basis of racial discrimination. It represents only the dominant white racial minority and not “the whole people belonging to the territory.” At the outset, therefore, the supposed granting of independence to the bantustans may be compared with a gift by a thief of stolen property. The donor seeks to confer title to something he possesses but to which he is not entitled.

If the South African Government wishes to convince the world that it has embraced the principle of self-determination, it must first grant equal rights, civil and political, as well as economic, social and cultural, to the Africans, the Asians and the Coloureds, as they are called, in their territory and in Namibia. If this

were done, of course, the world would hear no more about the claim to independence of bantustans.

### ***Bantustans Created by the White Majority***

So much for the claim of South Africa to be granting self-determination. What then of the claim of the bantustan governments to be establishing themselves as independent States under this principle? This question does not, as is usual in such cases, depend on whether or not the population concerned has been denied equal rights or has been discriminated against. Rather, the issues are whether the populations concerned constitute “people” within the meaning of this principle, and if so, whether they have determined their political status and done so freely, and whether they are free to pursue their economic, social and cultural development. A very heavy burden lies on those seeking to assert this right, bearing in mind that there is no government in existence which represents the whole people of the territory from which they are seeking to secede, and that there is no way in which this whole people can make known their views on the subject.

The circumstances of the creation and development of the bantustans must now be examined in order to see whether the conditions are fulfilled for a legitimate exercise of the right of self-determination.

The history of the creation of the bantustans, later called “homelands,” which are now claiming independence, has been carefully traced in several studies. I may refer, for example, to the paper entitled “The South African bantustan programme: its domestic and international implications,” published by the Unit on Apartheid (now Centre against Apartheid) in 1975,<sup>157</sup> and in particular to *Divide and Rule: South Africa's Bantustans*.<sup>158</sup>

Such studies show how the bantustans are but the latest stage in the application of a consistent racial policy by the white settlers towards the African, Asian and Coloured peoples. They find their origin in the slave labour in the seventeenth and eighteenth centuries, and in the seizure by the settlers of the best agricultural lands and the driving out of the Africans from these lands and from their pastures. When slavery was abolished at the beginning of the nineteenth century, “native reserves” were established in which the Africans were confined, and which they could leave only in order to serve the whites.

As mining and other industries were developed, the demand for cheap labour was satisfied by drawing on the labour force in the reserves, assisted by methods such as the notorious “hut tax,” forcing the Africans to seek work in the mines and

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<sup>157</sup> United Nations Centre against Apartheid, *Notes and Documents*, No. 36/75.

<sup>158</sup> Barbara Rogers, *Divide and Rule: South Africa's Bantustans* (International Defence and Aid Fund for Southern Africa, London, 1976).

industry in order to pay the tax. In time, with the increasing congestion and poverty in the reserves, more than half of the African working population was driven to seek employment in the urban areas or on white farms, where they lived in humiliating subjection in the townships or locations allotted to them.

The network of “native reserves” thus had an essential economic function to provide a plentiful supply of cheap labour for the white minority. The pattern was established of denying political and social rights to all but the whites and of maintaining in subjection a black labour force in the white areas, who were, or were regarded as, migratory citizens from the reserves, in which all other blacks were forced to live.

After the Second World War when the tide of world opinion turned towards the granting of independence to subject peoples and to the abolition of racial discrimination, the leaders of white South Africa formulated the theory of apartheid or “separate development” to seek to satisfy the consciences of their own people and of those with whom they wished to trade or whose investments they sought. When in turn this failed to impress, they developed under this theory the notion of bantustans or homelands, with supposed autonomy for the Africans in their own territories. As the final stage in the process, they have now purported to confer independence on 4 of the 10 or so bantustans they have created, and propose in time to extend this status to the others.

So, far from being a concession won by the African population from the whites, the whole bantustan programme, like the original “native reserves,” has been devised and formulated by the whites so as to maintain the economic subjection of the Africans and ensure the continuance of a plentiful labour force in the white areas, in which the Africans have no political rights. The territories of the bantustans are not coherent areas or traditional lands of African tribes, as the South African Government claims, but a patchwork of small pieces of land with their frontiers drawn in such a way as to exclude the lands of powerful white settlers or white-owned industries. The territories of two of the so-called independent States, Bophuthatswana and Ciskei, each with a little over half-a-million inhabitants, were divided into 19 separate areas, not counting the so-called “black spots.” Of the four supposedly independent States, the smallest, Venda, had, in 1970, 67 per cent of its allotted population living in the territory concerned; Ciskei and Transkei had 55 per cent; and Bophuthatswana only 36 per cent.

The bantustans are almost all rural areas containing no important towns, no seaports and no control over territorial waters. The land is being seriously eroded and exhausted and the population density is extremely high and increasing rapidly. The number of bantustans and the areas of land they comprise has been frequently altered by the South African authorities. The second most numerous tribe, the Xhosa, has been divided into two so-called independent States, namely, the Transkei and the Ciskei. One may ask why all this is necessary if the

territories are, as is claimed, traditional tribal lands?

### ***Deprivation of Nationality of Africans***

Most significant of all is the inclusion in the supposed bantustan populations of all the Africans living and working in the townships of the white areas. They are considered to be members of one or other of the tribes concerned, however tenuous their links with the bantustan territories. Africans who have lived for generations in the townships and who have no family or land in the bantustans, are now considered by the South African Government to be citizens of the so-called independent bantustans and are deprived against their will of their South African citizenship. In some of the newly proclaimed “independent homelands,” the governments have in turn denied their citizenship to those who do not want it. But whether they do so or not, in the eyes of the world all these people became stateless persons, since no government other than South Africa recognises the bantustans and the new allegedly independent States. These people are, therefore, being arbitrarily deprived of their nationality and their right to a nationality contrary to article 15 of the Universal Declaration of Human Rights. This deprivation of nationality has been characterised by the General Assembly in its resolution 37/69 A of 9 December 1982 as “an international crime.” Dr. Paul Weis states in his study on *Nationality and Statelessness in International Law*:

“Considering that the principle of non-discrimination may now be regarded as a rule of international law or as a general principle of law, prohibition of discriminatory denationalisation may be regarded as a rule of present-day international law. This certainly applies to discrimination on the ground of race, which may be considered as contravening a peremptory norm of international law.”

The purpose of this policy is to convert all Africans working in the white areas into aliens with no right to remain in the territory when they are no longer required as part of the labour force. As a South African Minister of the Interior has stated: “We are looking forward that in the near future there will not be a single black citizen within what is called white South Africa.” This has led in turn to the heartless mass population transfers through the deportations involved in the so-called consolidation or resettlement programmes. Some of these deportations have included the entire populations of townships from neighbouring urban areas. No official statistics are published, but the forced removals into the bantustans, with all the suffering which they entail, are now estimated at 3,500,000 Africans, and it has been estimated that the government programme, if fully carried out, could involve one in five of the African population, a total of nearly five million people. Can anyone believe that this is a policy freely determined by the people concerned?

Against this brief summary of the background, I turn to consider the conditions

for a valid exercise of a right to self-determination.

### ***Tribal Entities are not “Peoples” Entitled to Self-determination***

The first question is whether the population concerned are “peoples” within the meaning of the principle of self-determination.

As already indicated, there is no agreed definition of “peoples” for this purpose. However, in the report entitled “Right to self-determination,” prepared for the Commission on Human Rights and its Sub-Commission in 1978,<sup>159</sup> formulated the “elements of a definition” which have emerged from discussions on this subject in the United Nations, and which can be taken into consideration when it is necessary to decide whether or not an entity constitutes a people fit to enjoy and exercise the right to self-determination. These elements are as follows:

- (a) The term “people” denotes a social entity possessing a clear identity and its own characteristics;
- (b) It implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population;
- (c) A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognised in article 27 of the International Covenant on Civil and Political Rights.

With regard to this third element, the report quoted the passage from the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, reconciling self-determination with territorial integrity. The report moreover states that “the principle of self-determination cannot be regarded as authorizing dismemberment or amputation of sovereign States exercising their sovereignty by virtue of the principle of self-determination of peoples.”

Applying these elements to the tribal entities of the bantustans, it is questionable whether the alleged tribal units are social entities possessing a clear identity and their own characteristics. As Barbara Rogers points out,<sup>160</sup> the tribal classifications are artificial, reflecting the whites’ view of African traditional culture rather than the reality. There are, she says, basically only two linguistic groups of Africans in South Africa, the Nguni and the Sotho-speakers, which

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<sup>159</sup> Document E/CN.4/Sub.2/404, paras. 267-279.

<sup>160</sup> Rogers, *op. cit.*

are in turn closely related to Bantu language groups. Some of the supposed “tribes” concerned have no bantustan status, whereas the Xhosa have, as has been pointed out, been divided into two bantustans. On the other hand, two of the “tribes,” the Pedi and the North Ndebele, have been allotted to a single bantustan. No choice has been offered to those concerned asking whether they wished to be divided or fused in this way.

The territories to which these “tribes” are said to be related are, as already stated, a conglomeration of areas inhabited largely by members of one “tribe,” though in some areas the members of the “tribe” do not comprise the majority of the population. In some cases, consolidation plans resulted in the separation of different “tribal” groups even though they may have been living peacefully together for generations.

Applying the third element of the definition, it is clear that the tribal units are an example of the ethnic or linguistic minorities with which a “people” should not be confused. The “people” in South Africa who are entitled to self-determination are the whole of the disenfranchised African population, and not each of the somewhat artificial tribal groupings of which the Africans are said to be composed.<sup>161</sup>

### ***Status not Freely Determined by the Peoples***

The second and third conditions for a valid exercise of self-determination are that the people concerned have determined their political status and have done so freely without external interference. To this there can be only one answer. The political status of the bantustans, independent or not, has been determined not by the people concerned but by the South African Government and Parliament. Even those chiefs who accepted the principle of the bantustans and became the leaders of these subservient groupings have protested against the way in which their proposed territories were delineated by South Africa, and against the imposition upon them of workers from the white areas who do not want to be associated with the bantustans and whom the population living in the bantustans does not want to have forcibly transferred to their areas.

The controlled elections or referendums by which the populations are supposed to have approved the creation of the bantustans were in no sense a free determination of this issue. These territories inherited the whole *corpus* of South

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<sup>161</sup> In parenthesis, it should be said that South Africa’s new Constitution, with its House of Representatives of the so-called Coloured and Indian House of Delegates, bears no relation to the principle of self-determination. It was drawn up and approved by the whites without any consultation with the Coloureds or Indians. The Constitution is based on racial discrimination and the Coloureds and Indians have no say on all matters of a “general” nature, including the affairs of the overwhelming majority of the population, the unrepresented Africans.

African law, with its paraphernalia of repressive measures designed to suppress any real dissent and to outlaw any organisations or activities aimed at achieving a real self-determination by the African people. The tribal chiefs, real or self-styled, who are co-operating in the bantustan programme, appointed and paid by South Africa, have made good use of these powers to suppress any real opposition to their policies.

The Reverend T. S. Farisani, the effective head of the Lutheran Church in Venda, to which the majority of the population belongs, described the bantustan and its referendum as follows, during a visit to Geneva in January 1983:

“Vendaland and South Africa are to all practical purposes still one country, but for all political propaganda purposes they are two countries. In 1978 an election was conducted on the basis of whether the Venda people wanted independence or not. It is on record that over 80 per cent of the people voted against the ruling party and against independence and the members of Parliament of the opposition party who won the election were detained. When they were in detention, the governing party had a session to elect a president and in this way he won the vote and became the President of Vendaland and the Commissioner-General. A white man from South Africa, I remember, announced on the radio that P. Mphephu Hwa had been elected the President of Venda and Venda had become a good example to the whole of Africa. People were appointed to the cabinet; until today they are cabinet ministers. Candidates who performed hopelessly, in some instances getting only 2 per cent of the vote, are today Members of Parliament through fraud.

“So the Government we have as of now in Vendaland, *per se*, has not been elected by the people. To put it in clear terms, they have been rejected by the people and they must be very grateful to Pretoria that they are still in power.”

The Ciskei, another of the bantustans, granted so-called independence in December 1981, has a population of about 700,000, almost half of whom have been re-located there from “white” South Africa. The capital, Mdanstsane, is a “township,” second only in size to Soweto, which provides the labour force for the neighbouring East London in “white” South Africa. The ruler is Lennox Sebe, a commoner who ousted the Chief Minister in 1983 and proclaimed himself a chief, and, more recently, “President for Life.” He leads the single party, the Ciskei National Independence Party (CNIP), and rules largely through chiefs and headmen. The parliament has only 22 elected representatives and 32 appointed tribal personages. To enforce his rule, Sebe has an extensive security apparatus, including the police force, the Ciskei Central Intelligence Agency (CCIA), which works closely with its South African counterpart, the Traffic Police and, at times of unrest, an unruly force of auxiliary police or vigilantes, formerly known as the Green Berets. Ciskei has become notorious for the brutality, including systematic

torture, with which it tried to repress a prolonged and eventually victorious transport strike.

A further example of South Africa's disregard for the principle of self-determination by the population of the bantustans was its attempt to transfer against their will the population of KaNgwane to Swaziland, an attempt it had to abandon when the President's action in 1982 of disbanding the bantustan was declared *ultra vires* by the courts.

### ***Unviable Territories***

The fourth condition for a valid exercise of the right to self-determination is that the people concerned are free to pursue their economic, social and cultural development. In this short paper, I will address briefly some of the main features of the economy of the bantustans.

The territory of the bantustans represents approximately 12 per cent of the total land surface of South Africa, much of it being poor agricultural land severely affected by erosion. According to the 1970 census, of approximately 15 million Africans in South Africa, about 7 million lived in the homelands. With population increases and deportations, this number will now be much greater, and in theory the whole of the African population is allotted to these territories. Such unequal apportionment of land and resources in itself makes a mockery of the term "separate development."

The bantustans remain overwhelmingly subservient economically to South Africa through their dependency on income from migrant labour. Over 70 per cent of the economically active population is involved in the migrant labour system, nearly all being male workers. Access to employment in the white areas is strictly controlled by the pass laws and other restrictive legislation. It is an offence to leave a bantustan to seek work. A job must first be obtained through the labour bureaux in the bantustans, and Africans registered there have no freedom to choose their employment. They have to accept whatever they are offered. The legislation governing control of employment is used to channel African labour away from white urban areas into "border" industries, but even there, skilled work is largely, if not entirely, denied to the Africans.

At the end of their contract the workers must return to their bantustan and cannot obtain another job for at least a month. Owing to these conditions, the wages of workers from the bantustans are considerably lower than those of settled workers in the cities.

The economic development of the bantustans is dependent primarily upon the capital inflow, which is almost entirely channelled through investment corporations which are agencies of the South African Government. When the Tomlinson

Commission drew up in 1954 its blueprint for the bantustan policy, it foresaw that to make their economies viable would require a massive investment and radically different policies to provide employment in the bantustans. In fact, the investment has been only a fraction of that recommended by the Commission. In the first 15 years of its operation, the Bantu Investment Corporation, controlled by the South African Government, provided three times as much capital to white-owned enterprises in the bantustans as to African-owned enterprises.

The bantustan administrations are dependent upon South Africa for financing their budgets, to the extent of between two thirds to three quarters, and a large part of these budgets have been devoted to financing the deportations and establishing townships and camps to replace existing homes.

The bantustan boundaries, like those of the “native reserves” before them, were drawn so as to exclude mining areas. Where minerals were found in the reserves the land containing them was simply excluded from the reserve. Similarly, in 1975 a strip of coast was excluded from the KwaZulu bantustan when it was found that it could yield 2,000 million rand worth of titanium in its sand dunes, more than the total current world output. It is now being exploited by United States and Canadian corporations in partnership with the South African Industrial Development Corporation.

Where minerals have subsequently been discovered in bantustans, the mining operations are controlled by the South African Government and its agencies. Long-term concessions are granted to South African corporations. The bantustan authorities are not a party to the negotiations, and receive no royalties or other payments for the mining concessions.

The extreme poverty of the bantustans, the constant deportations and the white domination of their economy make meaningless any claim to freedom to pursue social and cultural rights. Land reform has been rejected in favour of communal ownership with land allocations made by the chiefs. White farms purchased to add to the bantustans are owned and operated by South African government agencies. Increasing numbers of Africans are forced to leave the land and join the growing class of people with no means of subsistence, who are then “resettled” in camps or townships in the bantustans, adding to the workforce dependent upon migrant labour.

Studies on health conditions in the bantustans have shown reports of malnutrition in all sections of the population, but particularly in children, many of whom die or are brain-damaged as a result. Child mortality in the camps is particularly high.

Riots at schools have been frequent, the leaders usually being children sent to bantustan schools because official policy prevents them from attending schools at home in the cities. In 1973, about 130 pupils were arrested after a riot at Cofimvaba High School. It was reported that one of the reasons for the riot was fear of coming examinations for which they had not received textbooks, stationery or adequate teaching.

These are examples of conditions in the bantustans to which South Africa is granting alleged independence. Their subservience to South Africa in every field makes nonsense of any assertion that this so-called independence leaves them free to pursue their economic, social and cultural development.

### ***No Condition of Self-determination Satisfied***

The position is, therefore, that none of the conditions required under international law for a valid exercise of the right to self-determination is satisfied in the alleged conversion of the homelands into independent States, and the world community has very properly withheld recognition from them.

Let me conclude by quoting the words of John Dugard, Professor of International Law at the University of Witwatersrand. He said that basically, the South African law relating to the bantustans:

“fulfils four functions. Firstly, it constructs a legal order based on racial discrimination and differentiation. Secondly ... by legitimising discriminatory practices, it neutralises the immorality of such practices in the eyes of the majority of the white population who accept without question any rule which has been blessed by Parliament. Thirdly, those laws which institutionalise separate development provide a convenient facade for the outside world. The Promotion of Bantu Self-Government Act, the Transkei Constitution and the Bantu Homelands Constitution Act are useful for foreign consumption as they adopt the rhetoric of self-determination and self-government without disclosing the realities of South African life. Legal tinsel is used to conceal the fact that most of the African population lives outside the homelands and cannot in fact participate in the homelands’ political process; that the African people themselves have not been consulted about their future; and that self-determination inside or outside the homelands is meaningless while the harsh security laws remain in force. Fourthly, the drastic security laws ... create a repressive atmosphere in which meaningful political debate and activity is stifled.”

## **VII. INTERNATIONAL ACTION AGAINST APARTHEID**

### **A. LEGAL STRATEGIES IN THE STRUGGLE AGAINST APARTHEID<sup>162</sup>**

by

**Gay J. McDougall**

It is particularly pertinent to discuss the use of law and lawyers in the struggle against apartheid inasmuch as one of the chief mechanisms used by the apartheid regime to maintain its system of controls over the black majority in South Africa has been a complex web of laws and a judicial system that has served the dictates of exploitation rather than the rule of law.

There are three levels on which law-related strategies to combat apartheid have been developed, each level necessarily being interrelated to the next, each level necessarily demanding co-ordination with the next. First, there is the level of intergovernmental organisations and bodies. It is at that level that significant achievements have occurred in the development of the normative and treaty obligations of South Africa and the other member States of the world community in relation to apartheid. Included in these would be the norms of non-discrimination based on race and self-determination, the obligations arising out of the numerous Security Council and General Assembly resolutions on apartheid, and the international human rights instruments, the Universal Declaration of Human Rights, and the interlocking International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discriminations the International Convention on the Suppression and Punishment of the Crime of Apartheid; Protocol I to the Geneva Conventions of 1949; and the Charter of the United Nations.

It is incumbent upon States to comply with those obligations in the conduct of their national policies. This, then, represents the second level on which law-

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<sup>162</sup> Statement at the special meeting of the United Nations Special Committee against Apartheid, on legal aspects of the international campaign against apartheid, held on 27 March 1981.

related strategies to combat apartheid must exist, for in doing so, States must not only refrain from proscribed activities, but are obligated to promote and encourage respect for the principles of the Charter by all other States, including South Africa.

The third level of law-related strategists are the non-governmental groups, including the public interest lawyers. It is on this level that I think you will find the greatest potential for a variety in approaches. With your permission, Mr. Chairman, in discussing two possible approaches that can be taken by public interest lawyers, I will use as an illustration the work of the Southern Africa Project of the Lawyers' Committee for Civil Rights Under Law.

### *Legal Defence in South Africa*

Fourteen years ago, it became apparent to the Southern Africa Project of the Lawyers' Committee that lawyers in this country could play a role in the defence of political opponents of apartheid. By illuminating the arbitrary and repressive nature of the judicial process in South Africa, moreover, we have provided immediate and effective help to persons deprived of basic rights. We have intervened in cases in South Africa representing such adverse deprivations of basic rights as public floggings, police invasion of lawyer-client relationships, testimony compelled by a star chamber proceeding, the show trial of the leadership of the black students and the Black Consciousness Movement, arbitrary deprivation of liberty by banning, and exposure of torture through inquest proceedings, to name only a few.

While in the majority of cases our intervention consists of financial assistance, we have also supplied useful technical assistance when necessary, such as brief writing and the supplying of expert witnesses and international legal observers. At a time when those few lawyers in South Africa who are willing to do political work are coming under increased governmental harassment, this kind of professional link is of inestimable value.

### *Domestic Litigation in the United States*

In addition, we have helped break new ground by domestic legal actions. Over the years we have sought to initiate or intervene in legal proceedings in United States domestic courts to deter official or private actions which are supportive of South Africa's policy of apartheid, particularly when such actions are expressly or arguably in violation of United States law. The novel approach taken by this programme has met with some successes over the years. It has helped focus the attention of the people in the United States and the rest of the world on racial problems of southern Africa and, on occasion, it has forced a change in the United States governmental policy and established new precedents with regard to the

legal interest of United States citizens in foreign policy matters.

Cases we have litigated have (a) challenged the publication by *The New York Times* of want-ads for employment in South Africa which expressed directly or indirectly racially discriminatory criteria for employment;<sup>163</sup> (b) challenged an order of the Civil Aeronautics Board which authorised South African Airways to serve a new route between Johannesburg and New York on the grounds that the order violated the Federal Aviation Act which prohibited the Civil Aeronautics Board from issuing a permit to a foreign air carrier which discriminates among its passengers on a racial basis;<sup>164</sup> (c) sought declaratory and injunctive relief to prohibit the United States Government from continuing to trade with South Africans and from importing seal furs from Namibia in violation of United Nations Security Council resolutions;<sup>165</sup> (d) challenged the Commerce Department practice of sending special trade missions to Namibia;<sup>166</sup> (e) challenged on behalf of the United Mine Workers and the State of Alabama the importation of South African coal into the United States on the grounds that it violated the Traffic Act of 1930 which precludes the importation of goods that have been produced by forced or indentured labour; and (f) intervened in a proceeding before the United States Nuclear Regulatory Commission to challenge the issuing of a licence to export a sizeable quantity of highly enriched uranium for use in South Africa.

I wish I could say that we have constantly won these cases from a substantive point of view. More often than not, the courts have chosen to focus their attention upon the propriety of judicial intervention into what they considered to be a “political question” or “act of State” and to resolve the issues on that narrow technical basis rather than to consider fully the merits of the cases.

Nevertheless, I think the tactic of domestic litigation to enforce international legal principles and obligations in relation to apartheid is a viable approach with increasing possibilities for success. Such lawsuits have the result of calling both public and judicial attention to the actions being challenged and, most importantly, portray them not merely as collaboration with South Africa, but, at least arguably, as violations of municipal and/or international law.

When we win, we make considerable substantive gains for the anti-apartheid movement. But even when we lose, the fact that the loss was based merely on “technical” legal arguments goes far to convince the United States public that

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<sup>163</sup> *American Committee on Africa vs The New York Times*.

<sup>164</sup> *Diggs vs Civil Aeronautics Board*.

<sup>165</sup> *Diggs vs Richardson*.

<sup>166</sup> *Diggs vs Dent*.

there is little justification for this country's blatant disregard of its international obligations. The generation of such public sentiment and the bringing of well-substantiated claims in specific cases will also tend to expand the way the courts, if not the executive, perceive these issues in the future.

For example, due in some part to the arguments raised in the line of cases I have discussed, the United States courts have begun to recognise to some degree the enforceability of international law in domestic courts. A recently decided landmark case, *Filartiga vs Pena* established that United States federal courts do have justification to entertain civil action based on human rights violations abroad and opened a door to the possibility of a judicial challenge of complicity between agencies of the United States Government and police officials from foreign countries, such as South Africa, which are notorious for their abuse of human rights.

### ***Need for International Co-ordination***

The tactic of using domestic litigation to enforce international obligations regarding apartheid presents a legitimate and innovative role for lawyers not only in the United States but in all countries where constant monitoring of those obligations is necessary. Where such a tactic is viable in other legal systems, it should be encouraged by the Special Committee against Apartheid. As a small step in that direction the Special Committee should consider holding small technical seminars of public-interest lawyers from those countries in which domestic enforcement and agitation would be most useful.

Contrary to the notion that the utility of such a seminar would be limited by the great disparity between legal systems, it would create a forum in which anti-apartheid lawyers could begin to assess the potential for complementary action created by that very disparity.

After all, in many instances the structures which are supportive of apartheid are transnational, frustrating legal attacks which are bound by narrow jurisdictional limits. For example, imagine an action taken against a corporation in Western Europe which is a wholly owned subsidiary of a United States firm. While certain facts necessary to support a claim against it may not be available to the Western European attorneys handling the case, such information may well be available to United States lawyers through a request under the Freedom of Information Act or the public disclosure rules of the Security Exchange Act.

Lawyers who are willing to take up the challenge to enforce United Nations embargoes need an opportunity to exchange strategies, co-ordinate efforts and collaborate across national boundaries.

**B. CERTAIN LEGAL ASPECTS OF THE  
INTERNATIONAL  
CAMPAIGN AGAINST APARTHEID<sup>167</sup>**

by

**Kader Asmal**

... In November 1980, the African National Congress of South Africa deposited its declaration of being bound by the Geneva Conventions and Protocol I of 1977 with the International Committee of the Red Cross.

In its statement, the African National Congress paid tribute to the United Nations for its contribution to the crystallisation of rules concerning armed conflict in the struggle against colonisation, racialism and apartheid. This dynamic move by the African National Congress has already evoked a response from certain circles of the white power structure inside South Africa. The Special Committee can take credit for its contribution in this campaign which will have an important bearing on whether the lives of the combatants now facing the death sentence in South Africa will be saved.

South Africa is bound by the rules of law governing the treatment of prisoners of war of the liberation movement, independently of Protocol I, because what the Protocol did was merely to confirm and declare the law as it had evolved. If the criminal regime declares its intention to execute these South African patriots - which would clearly be a serious breach of the humanitarian rules of law and equivalent to war crimes - then the Security Council must decide under Chapter VII of the Charter that the continued breach of these rules by the South African regime is a threat to international peace...

***Basic Legal Conclusions***

The implementation of the rules of law and the invocation of Chapter VII of the

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<sup>167</sup> Statement at the special meeting of the United Nations Special Committee against Apartheid, on legal aspects of the international campaign against apartheid, held on 27 March 1981.

Charter depend on the political will of the States Members of the United Nations and the balance of forces within the international community. No one can doubt that the South African system of apartheid, based as it is on a refusal to treat the majority of its own inhabitants as citizens, is a denial of the right to self-determination and lacks legitimacy. Coupled with the persistent acts of violence against its own population and against the territorial integrity and political independence of the front-line States, the South African regime has the hallmarks of an international outlaw. Can there be any doubt that the one Member State which has persistently violated the principles of the Charter is South Africa and, therefore, ought to have been the prime candidate for the application of Article 6 of the Charter?

The refusal of South Africa's collaborators and principal trading partners to carry out their legal and political obligations is reflected in the occasions on which they have used the veto at the Security Council when enforcement action has been proposed because of the illegal occupation of Namibia. This is in the face of the clearest identification of the legal issues by the International Court of Justice in the Namibia opinion of 1971.

There are certain basic legal conclusions that can be safely arrived at which would provide the tools for the struggle against apartheid.

- (a) Firstly, it is now recognised that the right of self-determination is not only a legal right at the level of customary international law but is also part of the peremptory rules of international law, otherwise known as *jus cogens*;
- (b) Secondly, that there exists at the level of customary international law a norm of non-discrimination which, as a result of judicial interpretation<sup>168</sup> is also part of *jus cogens*;
- (c) That the particular form of racialism and colonialism, elevated to a philosophy of the State, is a striking example of a breach of these norms and that a State which persistently flouts these norms is illegitimate, with resulting consequences for the illegitimate entity, together with international responsibility for other States, organisations, corporations and individuals;
- (d) The question of reparation for the crime of apartheid now becomes an urgent issue for the international community.

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<sup>168</sup> Barcelona Traction Cases and the Namibia opinion.

## *An International Crime*

For many years, apartheid, the racist trimming of which camouflages the fascist rule of force, has been denounced in the United Nations as an international crime.<sup>169</sup> Even States such as the United States, the United Kingdom and the Federal Republic of Germany, which in most of the resolutions directed against the apartheid regime abstain from voting or, as far as they are able, prevent sanctions from being imposed against South Africa in the Security Council, no longer deny the criminal nature of the apartheid regime. The struggle against the apartheid regime has therefore entered such a phase that the time has come to examine what possibilities exist for enforcing international responsibility for the apartheid crime; a violation of international law which is of such a magnitude and of such a dimension that it has been recognised as an international crime by the international community as a whole.

South Africa has, under three aspects, been convicted by the General Assembly and the Security Council of the United Nations for having committed serious violations of international law, so-called international crimes, which endanger the maintenance of international peace and security:

- (a) For a number of years apartheid as such has been characterised by the General Assembly as a crime against humanity. It suffices to point out the repetition of such statements in resolution 34/93A adopted on 12 December 1979. That assessment was already the basis of the International Convention on the Suppression and Punishment of the Crime of Apartheid. Nowadays it has achieved general validity. That is why in article 19 of the draft of the International Law Commission on the international responsibility of States, apartheid is named, side by side with aggression, the forcible maintenance of colonialism, slavery and genocide, as a typical example of an international crime.<sup>170</sup> A violation of international law is qualified to be an international crime if the wrongful act infringes international obligations that are essential for the protection of fundamental interests of the international community as a whole.<sup>171</sup>

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<sup>169</sup> General Assembly resolutions 2202 (XXI) of 16 December 1966, 2396 (XXIII) of 2 December 1968, 2671F (XXV) of 8 December 1970, 3068 (XXVIII) of 30 November 1973, 3411G (XXX) of 28 November 1975 and 34/93A of 12 December 1979, as well as Security Council resolutions 392 (1976) of 19 June 1976 and 473 (1980) of 13 June 1980.

<sup>170</sup> Report of the International Law Commission, twenty-eighth session (A/31/10), p. 226.

<sup>171</sup> When the Security Council in its resolution 418 (1977) of 4 November 1977, basing itself on Chapter VII of the Charter, decided on the arms embargo against South Africa, it expressly confirmed that “the policies and acts of the South

(b) Closely linked with the oppression of the South African people by the apartheid regime is the second aspect, the aggressiveness of the apartheid regime towards other countries. Time and again the General Assembly has condemned the aggressive acts perpetrated by South Africa against neighbouring States and confirmed “that the policies and actions of the apartheid regime constitute a threat to international peace and security.” As an example one may refer to resolution 34/93 A adopted by the General Assembly in 1979. The Security Council, too, already in its resolution 387 (1976),<sup>172</sup> had expressly condemned the aggression committed against the People’s Republic of Angola.<sup>173</sup> South Africa has neither legal right nor warrant to invoke the so-called right of “hot pursuit” over land territory. The countries attacked have the right to seek and obtain assistance in self-defence.

(c) The third aspect under which the crime of apartheid has been condemned by the United Nations is the continued occupation, in violation of international law, of Namibia, after the Mandate had been ended by the General Assembly resolution 2145 (XXI) on 27 October 1969.<sup>174</sup>

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African Government are fraught with danger to international peace and security.” Already in its resolution 393 (1976) of 30 July 1976, it had stated that “the elimination of apartheid in South Africa [is] necessary for the attainment of justice and lasting peace in the region.”

<sup>172</sup> Security Council resolution 387 (1976) of 31 March 1976.

<sup>173</sup> Also resolution 428 (1978) of 6 May 1978. The Security Council based its decision regarding sanctions, resolution 418 (1977) of 4 November 1977 not only on the “defiant continuance of the system of apartheid” but *expressis verbis* also on South Africa’s “attacks against neighbouring States.” This had already been mentioned in resolution 393 (1976) of 30 July 1976.

<sup>174</sup> In its resolution 269 (1969) of 12 August 1969, the Security Council had stated “that the continued occupation of the territory of Namibia by the South African authorities constitutes an aggressive encroachment on the authority of the United Nations, a violation of the territorial integrity and a denial of the political sovereignty of the people of Namibia.” Time and again, albeit with the United States of America and some of its allies abstaining from voting but without any dissenting vote, the General Assembly declared that “the continued illegal occupation of Namibia by South Africa constitutes an act of aggression against the Namibian people and their national liberation movement, as well as against the United Nations, which has direct responsibility over the Territory until independence” (resolution 34/92 G of 12 December 1979.)

### *Accomplices in the Crime*

The responsibility for the crime of apartheid is not confined to the apartheid regime in South Africa, but extends to its accomplices which artificially keep alive that criminal regime. For a number of years, the General Assembly has stated that the “main obstacle to the liquidation of the racist regime and the abolition of the inhuman and criminal apartheid system is the continuation of its co-operation with the most important Western and other trading partners of South Africa with the racist regime.”<sup>175</sup> The General Assembly has declared “that any collaboration with the racist regime and apartheid institutions is a hostile act against the purposes and principles of the United Nations and constitutes a threat to international peace and security.”<sup>176</sup>

In this context, the General Assembly does not only refer to States, but expressly singles out organisations, transnational corporations and other institutions which continue to collaborate with the racist regime. The Assembly most severely condemned “the activities of all foreign corporations operating in Namibia under the illegal administration of South Africa which are exploiting the human and natural resources of the Territory.”<sup>177</sup> Time and again the General Assembly stated in warning terms that those “States, which give assistance to the colonial and racist regimes in southern Africa, become accomplices in the inhuman practices of racial discrimination, colonialism and apartheid perpetrated by those regimes.”<sup>178</sup>

The charge of collaboration, complicity and participation in the apartheid crime is based solely upon the objective facts of the economic and, if any, military collaboration with the apartheid regime or the fact that some States do not hinder organisations and corporations under their jurisdiction from collaborating with the apartheid regime or institutions of South Africa.

Obviously, all the resolutions adopted by the United Nations proceed from the

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<sup>175</sup> General Assembly resolutions 34/93 A, E and Q of 12 December 1979. Also resolutions 33/183 H and M of 24 January 1979 and resolution 3411 (XXX) of 28 November 1975.

<sup>176</sup> General Assembly resolutions 34/93 A of 12 December 1979, 34/44 of 23 November 1979 and 133/23 of 29 November 1978.

<sup>177</sup> General Assembly resolutions 34/92 B, 33/183 H of 24 January 1979, 33/23 of 29 November 1978, 33/40 of 13 December 1978 and 34/41 of 21 November 1979.

<sup>178</sup> Resolution 33/23 of 29 November 1978; also resolution 3383 (XXX) of 10 November 1975.

fact that, after apartheid had been exposed to be a crime against humanity, the very fact of support given to the apartheid regime suffices to establish responsibility for participation in the crime.

In contrast to the proposal submitted by the International Law Commission which tries to make the responsibility for participating in an act contrary to international law dependent on whether the assisting State intended to support the commission of an internationally wrongful act,<sup>179</sup> the General Assembly bases its condemnation solely on the fact that collaboration with a regime or its institutions, the criminal character of which has been established, constitutes in itself a way of taking part in the international crime. This applies not only to actions performed by the States themselves but also to omissions<sup>180</sup> ...

The commission of the crime of apartheid in its various forms results in the international responsibility of South Africa and those countries which aid and abet it and it involves the criminal responsibility of the guilty persons and the participating organisations.

The legal consequences, which result from or are created by the crime of apartheid, differ. They range from the use of military means by the affected peoples and States in exercise of individual and collective self-defence, to economic and political sanctions, and reparation claims and measures of criminal responsibility against persons and organisations. International law has recognised the right of peoples held under colonial or racial domination to overthrow colonial or racial rule. This right to revolt, with the attendant use of force, must not be allowed to be equated with “terrorism” and lawyers have a special duty to draw attention to this important dimension of the law. In addition, the national liberation movement has the right to seek and obtain aid in its struggle against apartheid and colonialism.

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<sup>179</sup> Article of the Draft on State Responsibility, in the Report of the International Law Commission, thirtieth session (A/33/10), p. 243 *et seq.*

<sup>180</sup> Resolution 34/93 A; thus, e.g., also the Commission on Human Rights of the United Nations, having discussed the Khalifa Report, called in February 1980 in its resolution 11 (XXXVI) on States not only “to take effective measures to end the supply of funds and other forms of assistance, including military and nuclear supplies and equipment, to the racist regimes which use such assistance to repress the peoples of southern Africa and their national liberation movements.” In the same resolution we read: “Calls upon the Governments of the countries where the banks, transnational corporations and other organisations named and listed in the revised report are based, to take effective action to put a stop to their trading, manufacturing and investing activities in the territories of the racist and colonial regimes in southern Africa”; see E/CN.4/1366, annex III, for this list.

In this context, I will confine myself to some aspects of reparation claims and of the criminal responsibility of organisations.

### *Criminal Responsibility*

Owing to the present conditions of the struggle against the apartheid regime the main emphasis of the actions, resolutions and deliberations is, as a rule, placed upon the support for the legitimate liberation struggle waged by the peoples of South Africa, the application of more stringent sanctions and their observance as well as the bringing about of a general economic and, in particular, an oil embargo against South Africa...<sup>181</sup>

Within the framework of the possible sanctions against the apartheid regime it would, also with a view to the future enforcement of reparation claims, be particularly important to devote special attention to the careful tracing of those responsible.

If need be, a special set of devices ought to be established. This does by no means refer solely to the criminal responsibility of individuals. For this purpose, there already exists an instrument, the International Convention on the Suppression and Punishment of the Crime of Apartheid, although so far adequate use of it has not been made. This applies, above all, to the international responsibility of States for collaboration with the apartheid regime and the criminal responsibility of banks, monopolies and enterprises for their participation in the apartheid crime.

So far not sufficient attention has been paid to the fact that the criminal responsibility for the commission of or participation in such crimes as defined by the International Convention on the Suppression and Punishment of the Crime of Apartheid does not only apply to individuals but, as article I, paragraph 2, explicitly states, also to organisations and institutions. Although this provision does not go into details about the responsibility of organisations and institutions and the type of punishment to be applied to them, article 10 explicitly empowers the Commission on Human Rights to compile a list not only of the responsible individuals but also of organisations and institutions.

The activities which have been carried out in connection with the Khalifa Report<sup>182</sup> in the Sub-Committee on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights and in the Special Committee

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<sup>181</sup> Also resolutions 34/93 A, D and F of 12 December 1979.

<sup>182</sup> E/CN.4/Sub.2/383/Rev.1 as well as E/CN.4/Sub.2/425, Corr.1 and 2 and Add.1-6; see also resolution 11 (XXVI) of the United Nations Commission on Human Rights.

against Apartheid<sup>183</sup> establish a good basis for the singling out of those enterprises and organisations which are accused of having participated in the crime of apartheid and must consequently be placed on that list. During the Second World War, the list of the major war criminals did not only contain individuals but also institutions and corporations; the list of apartheid criminals should likewise not be confined to individual persons.

### ***Reparation Claims***

On the other hand, the establishing of the criminal character of an organisation does, unlike in the Charter of the International Military Tribunal and the Control Council law No. 10, aim not merely at prosecuting the members of that organisation. In the case of apartheid crimes, the main emphasis of the criminal responsibility of organisations will be laid on the fact that enterprises, corporations and other organisations, whose participation in the apartheid crime is established, may be expropriated in favour of the people of southern Africa or made liable to pay compensation. The legislation on the expropriation of enterprises and assets of war and Nazi criminals after the Second World War is, in this regard, an interesting precedent.<sup>184</sup>

The practical significance, particularly of these aspects, becomes immediately obvious if it is realised that with the liquidation of the apartheid regime the main criminal, the South African Government in its present structure, disappears.

Regarding the issue of reparation for the damage caused by the apartheid regime, it will be of great political importance that a free and independent South Africa is entitled to claim compensation also from collaborators and organisations and that there exist assets out of which such claims can be satisfied.

The existence of a claim to reparation in cases of a breach of international law is beyond any doubt. It has also been laid down repeatedly and expressly by the United Nations with regard to the crime of apartheid.

After the liquidation of the apartheid regime in South Africa, the South African people and their new authorities will be faced with the problem against whom and out of which assets they are able to enforce or discharge their own claims for reparation and those of their neighbours. In such a situation it will be important to recall that there exists an international responsibility for collaboration and complicity with the apartheid regime. The drawing on assets of institutions of the

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<sup>183</sup> Resolution 34/93 C of 12 December 1979.

<sup>184</sup> Beate Klein, "Bank loans to South Africa 1972-1978," United Nations Centre against Apartheid, *Notes and Documents*, No. 5/79.

apartheid regime and its foreign accomplices in South Africa, Namibia and in other countries, for the sake of meeting reparation claims is not only justified but will, in many cases, also be the only effective means. The drawing on Germany's foreign assets for the sake of meeting reparation claims after the Second World War may serve here as a model.

Another responsibility is offered by the imposition of penalties on corporations, enterprises, banks and other organisations for their participation in the crime of apartheid.

The punishing of organisations, as has expressly been provided by the International Convention on the Suppression and Punishment of the Crime of Apartheid, is by no means an individual phenomenon. In the anti-trust legislation, as well as in legislation on taxes and duties of many countries, a responsibility of organisations for breach of certain regulations has been known for a long time. Punishment ranges from fines to the liquidation of the organisation concerned.

There is no doubt that a new South Africa, when implementing the International Convention on the Suppression and Punishment of the Crime of Apartheid, is entitled to apply such measures when meting out justice against enterprises and organisations which, by their collaboration, took part in the commission of the apartheid crime. The expropriation of the war and Nazi criminals after the Second World War presents itself as a parallel case. Nobody could seriously doubt that a liberated South Africa is under any obligation to repay any debts or loans incurred or received by the apartheid regime and which helped the regime to keep the apartheid rule in power after it had been stigmatised by the United Nations as a crime against humanity. In other words, private rights, contracts and transactions may be affected because of the violation of *jus cogens*, because overriding rules of *jus cogens* produce a situation of irreducible obligation that illegal actions be ignored or not be allowed to affect the obligations of other States.

Under the aspect of listing and securing assets which may serve to discharge reparation claims of the peoples of South Africa and its neighbours, activities for the listing of those States, banks, transnational corporations and enterprises which are still collaborating with the apartheid regime and take part in the exploitation of Namibia, are of invaluable importance. It would be necessary to co-ordinate such investigations and to apply more work and wider publicity to them.

Finally, the drawing on such organisations and assets will not only meet claims for reparation. It affects the very roots of the apartheid regime and of racism<sup>185</sup>

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<sup>185</sup> In resolution 33/182 A of 21 December 1978, the General Assembly explicitly declares "that South Africa is liable to pay reparations to Namibia for the damage caused by its illegal occupation of Namibia and its act of aggression against the Namibian people since the termination of the mandate over Namibia." In connection with the South African aggression against Angola, too, the Security

and will therefore, at the same time, be a decisive step towards the liberation of the peoples of South Africa from the domination and exploitation by the transnational corporations.

Arising out of their right to self-determination, the national liberation movement of South Africa has rights and obligations at the level of international law and international personality. There must be increasing recognition of the primacy of the liberation movement in international and regional organisations.

Where possible, national organisations and individuals should consider bringing actions in their own municipal courts to challenge governmental inactivity or complicity in such matters as the implementation of the arms embargo imposed under Chapter VII of the Charter by the Security Council in November 1977 and possible action under the International Convention for the Elimination of All Forms of Racial Discrimination of 1965.

Action against the South African regime has a clear basis in the development of the rules of the international community. Rules of procedure take second place to the basic rules of the international community, in the United Nations and elsewhere...

## **C. SOME REMARKS ON RESPONSIBILITY FOR THE CRIME OF APARTHEID UNDER INTERNATIONAL LAW<sup>186</sup>**

by

**G. Brahme**

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Council did not confine itself to a condemnation of the aggression but demanded explicitly that the Government of South Africa “meet the just claims of the People’s Republic of Angola for a full compensation for the damage and destruction inflicted on its State and for the restoration of the equipment and materials” (resolution 387 (1976) of 31 March 1976).

<sup>186</sup> Paper submitted to the International Seminar on the Legal Status of the Apartheid Regime in South Africa and Other Legal Aspects of the Struggle against Apartheid, Lagos, 13-16 August 1984.

## *The International Crime*

According to generally established opinion, the violation of obligations under international law entails the responsibility of the State or any other subject of international law having committed this violation. This responsibility has its foundation in the very nature of present international law, especially in its general principles which are binding for all. It comes into being with the violation itself, irrespective of the question whether the prevailing circumstances allow, at the moment of that violation, the enforcement of this responsibility.

The doctrine of international law prevailing in the socialist countries since long advocates the proposition that the internal structure of present international law and the experience related to the investigation of breaches of international obligations and the responsibility thereof, demand a distinction between two categories of violations of international obligations, namely, between international crimes and other violations.<sup>187</sup> At the beginning of the 1970s, a similar concept was also developed in the deliberations of the United Nations International Law Commission (ILC). In 1976, at the twenty-eighth session of ILC, Rapporteur Ago proposed such a distinction in his fifth report.<sup>188</sup> This proposal was accepted by ILC, which differentiated between international crimes and international delicts.<sup>189</sup>

This concept was the logical outcome of developments, which had been going on in international law since the end of the Second World War - e.g., the differentiation between *jus cogens* and other norms of international law reflected in the convention on the law of treaties; the implementation of personal responsibility for criminal acts committed in official capacity, as well as the establishment, by the United Nations Charter, of the special competence of the Security Council in the case of threats to or breaches of the peace. Indeed, the development of an international legal order which is characterised by generally recognised and binding basic principles of ... peaceful co-existence and co-operation had to be reflected also in case that these principles are violated.<sup>190</sup>

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<sup>187</sup> See, e.g., the Draft Codification of Responsibility of States, submitted by Graefrath and Steiniger in 1973, in B. Graefrath, E. Oeser and P. A. Steiniger, *Volkerrechtliche Verantwortung der Staaten* (Responsibility of States under international law) (Berlin, 1977), pp. 232-233; *Volkerrecht* (Berlin) , part 2, pp. 260 *et seq.*

<sup>188</sup> A/CN.4/291/Add.2, paras. 26 *et seq.*

<sup>189</sup> Official Records of the General Assembly, Thirty-first Session, Supplement No. 10 (A/31/10), pp. 226 *et seq.*

<sup>190</sup> See B. Graefrath, E. Oeser and P. A. Steiniger, "Internationale Verbrechen - internationale Delikte" (International crimes - international delicts), *Deutsche*

The differentiation between international crimes and international delicts is based upon the contents of the international obligation violated and the dimension of that violation. Basically, there are three main criteria for characterising an international crime:

- (a) It is a wrongful act infringing international obligations that are essential for the protection of fundamental interests of the international community as a whole and which therefore concern the international community as a whole;
- (b) It is an especially heavy violation of international law;
- (c) It is, for these very reasons, recognised by the international community as being an international crime.

This fundamental differentiation between the responsibility for international crimes and for other international delicts is far more than an academic position, but is the result of the correct analysis of the present state of international law and the main tendencies of its development. Still less academic are the consequences which follow from this proposition as to the further codification of international law as well as to its implementation in international practice.

### ***Apartheid - an International Crime***

The overwhelming majority of States, international State and non-State organisations, as well as movements, centres and groupings fighting against apartheid, have repeatedly expressed their conviction that apartheid is an international crime in the sense described above. This conviction has been reflected in numerous resolutions and other United Nations documents,<sup>191</sup> as well as in international conventions, especially in the International Convention on the Suppression and Punishment of the Crime of Apartheid which was adopted by the General Assembly in 1973 and came into force in 1976.<sup>192</sup> But we arrive at the same result if we apply certain general principles of present international law which have the quality of *jus cogens*, the international instruments related to the prosecution and punishment of the crimes of the Nazi regime, and some other international conventions which cover at least certain aspects of the criminal

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*Aussenpolitik* (Berlin), No. 3/77, p. 92.

<sup>191</sup> E.g., for recent times, see the Declaration and Programme of Action, adopted by the Second World Conference to Combat Racism and Racial Discrimination, Geneva, 1-12 August 1983 (A/CONF/119/26).

<sup>192</sup> General Assembly resolution 3068 A (XXVIII) of 30 November 1973.

apartheid policies. Rightly, therefore, article 19 of the ILC draft codification on the responsibility of States, mentioned above, expressly denounces apartheid - side by side with aggression, establishment or maintenance by force of colonial domination, slavery and genocide - as a typical example of an international crime.

South Africa has, under three aspects, been convicted by the General Assembly and the Security Council of the United Nations of having committed serious violations of international law, that is, international crimes:

(a) Because of its aggressiveness, which is inherent in the very system of apartheid and repeatedly resulted in heavy aggressive acts against neighbouring States, that is, breaches of peace. This aggressiveness makes the apartheid system a permanent threat to international peace and security, as was spelled out, for the first time, in the General Assembly resolution 2054 (XX) of 1965 and has since been confirmed in numerous resolutions. Thus the responsibility of the apartheid regime under international law results from its crimes against peace and has its legal basis in the generally recognised principles and norms related to the prohibition and punishment of aggression;

(b) Because of its continued illegal occupation of Namibia in defiance of the decision of the United Nations General Assembly of 27 October 1966,<sup>193</sup> which officially abrogated the mandate of South Africa. This continued occupation of Namibia constitutes an aggression against the people of Namibia, aimed at the suppression of its right to self-determination, and an aggressive encroachment of the authority of the United Nations which has decided to take over direct responsibility for the Territory until its final liberation. Thus, the responsibility of the apartheid regime under international law results from the illegal maintenance, by force, of a colonial regime which nowadays is generally recognised as a variant of an international crime;

(c) Because of its institutionalised system and policy of racial segregation and racial discrimination, which constitutes a gross violation of the principles of equality and self-determination, and the barbaric acts of terror which are committed on a mass scale against the black majority in order to maintain the system, constituting a massive violation of fundamental human rights.

Thus, the responsibility of the apartheid regime under international law results from a crime against humanity. As known from the comprehensive information which has been accumulated, and is still being accumulated by the liberation movements, the United Nations, anti-apartheid centres and other bodies, this

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<sup>193</sup> General Assembly resolution 2145 (XXI) of 27 October 1966.

crime against humanity materialises in numerous individual criminal acts, which entail individual responsibility. But it should be pointed out that it is the system itself, its political, legal and institutional foundations and structure, as well as the whole policy based upon it, which constitutes a crime against humanity, a criminal regime under international law.

This assessment is the main basis of the International Convention on the Suppression and Punishment of the Crime of Apartheid. Indeed, the adoption and the coming into force of this Convention marked an important step in the course of codification of international law and in the struggle against apartheid. The Convention supplements the legal foundations of this struggle, applies generally recognised principles of international law to the special situation of apartheid, describes the various forms of commission of the crime of apartheid as a crime against humanity, defines those responsible and regulates a variety of forms of penal responsibility, which can be implemented by individual States.

Considering the significance of the Convention, it is to be welcomed that the number of States having entered into the treaty grew considerably during the first Decade to Combat Racism and Racial Discrimination from 1973 to 1983. By 1 September 1983, 74 States had ratified the Convention,<sup>194</sup> among them the socialist countries and quite a number of non-aligned countries, but, significantly, none of the developed Western countries. Rightly therefore, the documents of the Second Decade to Combat Racism and Racial Discrimination, proclaimed by the United Nations, at its thirty-eighth session, make it one of the main tasks of this Decade to increase further the number of participants in the international instruments in order to strengthen their universal effectiveness.<sup>195</sup>

The fact that none of the Western countries acceded to the Convention until now is - on the legal level - nothing else than a form of indirect support for the apartheid regime on the part of those States which, as is well known, co-operate with that regime also in the political and economic fields. In face of the clear and detailed text of the Convention, it is not convincing to advance, as a number of representatives of Western countries did, the argument of uncertainty and vagueness as a pretext not to accede to the Convention. I would also like, in this context, to recall that during the preparatory stages, only very few States voted against the text while most of the Western States abstained.<sup>196</sup> This demonstrates

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<sup>194</sup> Status of the International Convention on the Suppression and Punishment of the Crime of Apartheid (A/38/543).

<sup>195</sup> General Assembly resolution 38/14. See also paragraph 1 (g) of resolution 32/130 on alternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms.

<sup>196</sup> In the Commission on Human Rights (2 April 1973) 21 in favour, 2 against; in

that the international consensus on the criminal character of apartheid is much broader than is reflected by the number of ratifications of the Convention.

Though the significance of the Convention and the necessity to strengthen its universal validity is beyond any doubt, it should be pointed out that the responsibility for apartheid as an international crime was not introduced into international law by this Convention. The Convention starts from this responsibility rooted in international instruments as well as in international customary law existing already before the Convention,<sup>197</sup> and regulates in greater detail one of the main aspects of apartheid as an international crime, that is, as a crime against humanity, and some of the main forms of responsibility, above all of a penal character.

If we consider the three aspects of apartheid as an international crime, it is obvious that it is a particularly heavy and dangerous violation of international law because this violation has its roots in the economic structure and the political power system itself and, therefore, is a continued, permanent and systematic violation, something which has sometimes been called “permanent delict” in the international law doctrine.<sup>198</sup> Characterising the apartheid system *per se* as being contrary to international law and constituting an international crime means that all measures taken by this system, especially all those executing the force of state power in order to maintain and implement the system, are to be regarded as exercising wrongful use of force in the sense of an international crime.

Consequently, the international community does not confine itself to condemning individual wrongful and criminal acts of the apartheid regime, though, of course, it is very important to do this comprehensively and as effectively as possible, but demands the total eradication of apartheid as a socio-economic, political and legal system. This demand is fully justified in the light of international law because a

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the Third Committee of the General Assembly (October 1973) 93 in favour, 1 against, 24 abstentions; in the General Assembly (30 November 1973) 91 in favour, 4 against (United States of America, United Kingdom, South Africa, Portugal), 26 abstentions. See B. Graefrath, “Apartheid - an International Crime,” *Information* (edited by the GDR Committee for Human Rights, Berlin), No. 1/74, pp. 3 and 4.

<sup>197</sup> The Convention itself mentions, in its preamble, as international instruments the United Nations Charter, the Universal Declaration of Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the International Convention on the Elimination of all Forms of Racial Discrimination and the Convention on the Prevention and the Punishment of the Crime of Genocide.

<sup>198</sup> See *Volkerrecht* (Berlin, 1973), part 2, p. 327.

system which itself is the source of permanent and massive criminal violations of international law ceases to be a domestic affair of the State concerned and becomes itself an international affair.

### ***Forms of Responsibility***

The assessment of a violation of international law as an international crime is, *inter alia*, reflected in the amount and the forms of responsibility which result from this violation, that is, in the kind of sanctions and the possibilities of international and national action. It would be erroneous to derive from the notion of international crime that the responsibility for that crime is exclusively of a penal character. The notion of international crime is a notion *sui generis* of international law; though it contains some elements which usually are known in national criminal law, it comprises, at the same time, also other elements which result from the special nature of international law.

The characteristic feature of an international crime, as contrasted with other international delicts, is that it, in principle, can cause all the main forms of responsibility known in international law. These are, *inter alia*:

(a) The right of individual and collective self-defence. This right can be exercised either by the State which is victim of such a crime or - in the case of colonial and racist regimes - the peoples who are deprived of their fundamental rights, especially the right to self-determination. This is the root of the right of the oppressed peoples to fight with all means at their disposal, including armed struggle, for their right to self-determination which is not (as President Reagan alleges) "international terrorism" but, on the contrary, the just struggle against the official terrorism which constitutes the international crime. It entails, at the same time, the special responsibility of the criminal system for the brutal suppression of the liberation movements of these peoples and the duty of all States to assist the oppressed peoples in their just struggle.

(b) The right of the Security Council to decide on mandatory sanctions against the State committing the international crime. The Security Council, according to Chapter VII of the United Nations Charter, is entitled to take such measures in the case of threat to or breach of international peace and security. Therefore, it is of great significance that the United Nations, for more than two decades, has stressed in numerous declarations and resolutions that apartheid is a permanent threat to international peace and security. In a number of cases, this permanent threat has been converted, by the apartheid State, into actual aggressive acts against its neighbouring States, actual breaches of peace, escalating in the case of Angola to the permanent illegal occupation of parts of the territory, causing thousands of deaths and casualties as well as immense material damage.

It should be pointed out that the nature of this responsibility, in essence, does not result from these individual manifestations of aggressiveness, though, of course, on their part these do entail a special responsibility, but again from the criminal character of the apartheid system itself. Rightly, therefore, the General Assembly and the international public have demanded for a long time that the Security Council decide on mandatory sanctions against the apartheid State. Such a measure, as an international action, would be not only a decisive and necessary step in the practical struggle for the eradication of apartheid, but would, at the same time, be a use of force and coercion, through the channel of the authorised international organisation which is provided for by international law as one of the main means of enforcing responsibility for an international crime.

As is known, the Security Council has, on this very basis, decided on mandatory sanctions against the former racist regime in Southern Rhodesia<sup>199</sup> and on a mandatory arms embargo against South Africa in 1977.<sup>200</sup> It is exclusively due to the resistance of certain permanent members of the Security Council that, until now, more far-reaching sanctions have been prevented and the implementation of this important form of responsibility for an international crime has not been possible.

(c) Suspension of membership rights in international organisations or of membership itself. Generally, this is possible in the case of permanent violation of obligations stemming from the membership of a State in the international organisation concerned. It goes without saying that an international crime such as apartheid constitutes one of the heaviest, most massive and permanent violations of such obligations. Therefore the United Nations, its specialised agencies and other international organisations were fully justified in suspending the membership of South Africa or certain forms of its participation in the activities of the organisations. The principles of State sovereignty and of equality of States, being the underlying principles of international organisations, do not comprise the right to commit international crimes. Consequently, acts which constitute international crimes cannot be regarded as foreign acts of State which have to be respected by other States and international organisations.

(d) Reparation of damages caused by an international crime. Not only States having victims of an international crime are entitled to claims of such reparation, but - in the case of apartheid - also the peoples in the criminal State itself or in the illegally occupied Territory. Of course, in these cases the political preconditions for implementing this kind of responsibility have

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<sup>199</sup> Security Council resolution 232 (1966) of 16 December 1966.

<sup>200</sup> Security Council resolution 418 (1977) of 4 November 1977.

to be created by the liberation of the peoples concerned, by the eradication of the apartheid system and the colonial occupation of Namibia and the establishment of a democratic State as the result of their victorious struggle. Nevertheless, it is important to stress that these peoples, represented by their legitimate liberation movements, do have these rights already now, according to the principle that responsibility for an international crime emerges at the moment the international crime has been committed, and that they are entitled, with the assistance of the international community, to define the amount and the contents of their claims already now.

(e) Penal responsibility of individuals participating in committing international crimes. It is particularly this kind of responsibility introduced into the international practice, above all, by the prosecution and punishment of Nazi criminals after the Second World War, which the International Convention on the Suppression and Punishment of the Crime of Apartheid has in mind. Starting from the international instruments and the legal concepts which have been applied in these actions (the so-called Nuremberg principles), the Convention confirms some generally recognised principles, related to this kind of responsibility, *inter alia*:

- That the criminal State is responsible for all organs which acted on behalf of the State;
- That all organisations, institutions and individuals participating in committing the international crime are responsible;
- That individuals who acted on behalf of the State have no recourse to the excuse that their act had been allowed (or even demanded) by the legislation of the State. On the contrary, as the Convention stipulates very clearly, the promulgation of such legislation itself constitutes an international crime;<sup>201</sup>
- That the penal responsibility results from the international character of the crime, having its base in international law; that, therefore, all States are entitled to prosecute and punish this crime irrespective of the question whether there are special provisions in the domestic system of criminal law. Of course, that does not mean that such a legal basis in the domestic legal system is without importance. Therefore, the Convention, in its article IV, calls upon all States to take the respective legislative, judicial and administrative measures. In accordance with their membership in the Convention, the legislation of the socialist States contains the

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<sup>201</sup> Article II, paras. (c) and (d), of the Convention.

necessary provisions;<sup>202</sup>

- That these crimes can be prosecuted and punished by the competent organs of any State, irrespective of the question whether the criminal act has been committed within or outside the territory of the punishing State.<sup>203</sup> This universal jurisdiction also results from the character of apartheid as an international crime; it is, therefore, not as pretended by some representatives of Western States in the discussion on the draft Convention<sup>204</sup> - an undue extension of the criminal jurisdiction of States. This is also in full accordance with the concept applied in the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.<sup>205</sup>

The International Convention does not provide for the establishment of an international court for the punishment of apartheid crimes, and indeed, the international conditions for the establishment of such a court seem to be not there at present. The Convention, on the other hand, does not exclude such an international jurisdiction, but mentions expressly the possibility of an international penal tribunal with respect to those States Parties which shall have accepted its jurisdiction.<sup>206</sup> We find a similar idea in the documents of the International Commission of Inquiry into the Crimes of the Racist and Apartheid Regimes in Southern Africa which, in a number of public sessions, investigated the crimes of the apartheid regime and published its findings.<sup>207</sup>

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<sup>202</sup> For the German Democratic Republic, see Penal Code, paras. 91 (crimes against humanity) and 92 (Fascist propaganda, hateful agitation against peoples and races).

<sup>203</sup> Article III of the Convention.

<sup>204</sup> See United Nations documents A/C.3/SR.2008, para. 13 (United States of America), and para. 14 (New Zealand).

<sup>205</sup> General Assembly resolution 2391 (XXIII).

<sup>206</sup> Article V of the Convention.

<sup>207</sup> In the first interim report of this Commission it is said: "When the Commission has completed its task it will present its report to the United Nations and other appropriate bodies and invite the United Nations to set up an International Criminal Tribunal to try and punish those responsible ...." See "International Commission of Inquiry into the Crime of the Racist and Apartheid Regimes in Southern Africa," United Nations Centre against Apartheid, *Notes and Documents*, No. 1/79, p. 1.

I would like, in this context, to refer to a significant fact. At the end of 1981/the beginning of 1982, the so-called Contact Group submitted “Principles concerning the Constituent Assembly and the Constitution of an Independent Namibia.” It was proposed that all parties concerned should reach an agreement about these principles prior to independence, and a future Namibian Government should be bound to these principles. It is very interesting to note that these principles contained a provision according to which a future Namibian Government should not be allowed to promulgate a law for the punishment of crimes which had been committed before independence. Significantly, this proposal was submitted by those States, which, until now, were not willing to accept the criminal character of apartheid. Obviously they were concerned about the possibility that a future Namibian Government might not share their position - rightly so, because Namibia has acceded to the Convention in the meantime.

To sum up, we see that the forms of responsibility for the crime of apartheid are comprehensive and that this responsibility is universal in the sense that it comprises rights not only of the direct victims of this crime but also of all States and international organisations. This is also an essential feature of apartheid as an international crime.

### ***Subjects of Responsibility***

As far as the subjects of responsibility for the crime of apartheid are concerned, we have to discern different groups depending upon the legal ground of responsibility and the legal consequences.

(a) It is clear that the main responsibility for the crime of apartheid lies with the racist State, its organs and functionaries. As already pointed out, individuals cannot plead as an excuse for their criminal acts that they acted on behalf of the State and in accordance with the law and order of this State. Actually, most of the crimes of apartheid could not be committed unless the individual concerned acts in an official capacity, that is, with the authority of the racist State.

According to article X of the International Convention on the Suppression and Punishment of the Crime of Apartheid, the States Parties authorise the United Nations Commission on Human Rights “to prepare, on the basis of reports from competent organs of the United Nations and periodic reports from the States Parties to the present Convention, a list of individuals, organisations, institutions and representatives of States which are alleged to be responsible for the crimes enumerated in article II of the Convention.” A first list of persons allegedly guilty of the crime of apartheid was published in January 1981.<sup>208</sup> This list contains the names of 143 members of the police, the security police and the courts of the South African racist regime, including high ranking officers and a general, held to

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<sup>208</sup> United Nations *Bulletin of Human Rights*, No. 28, Geneva, April-June 1980, p. 18.

be responsible for murder, torture and violations of other fundamental rights.

The publication of the list had to be welcomed. But we look in vain for the names of those mainly responsible for the crime of apartheid, the prominent racists, the inventors of apartheid and the many other racists controlling the economic and political system of oppression and exploitation in South Africa. The Chairman of the Special Committee against Apartheid rightly pointed out in his statement to the Commission on Human Rights that “criminal responsibility under the International Convention extends equally to the Ministers of Police and Justice, the Commissioners of the Police, the Heads of the Security Police, as well as judicial officers.”<sup>209</sup>

Attention should also be paid to the positive experience with the lists of Nazi criminals drawn up by the Allied Powers during the Second World War. In addition to the names of mass murderers who had committed crimes in the concentration camps, they also contained the names of the leading figures, including Hitler, of high-ranking officers of the *Schutz-Staffel* (SS) and the Fascist army, as well as leading representatives of the German monopoly capital.

(b) As pointed out expressly in the International Convention, responsibility for the crime of apartheid also relates to organisations and institutions participating in the practice of apartheid and drawing advantages and profits from it. Here, the Convention applies a principle which was also developed after the Second World War, in connection with the punishment of Nazi crimes. This provision covers, e.g., non-State organisations like political parties, the infamous Broederbond, etc. Possible responsibility under this provision has to be examined also in respect of monopoly corporations active in the territory of South Africa and in occupied Namibia. As known, responsibility for the crimes that had been committed in the Nazi Reich extended to certain groups of the German capital and to leading corporations which had supported the Nazi regime and drawn their profits from its crimes. In the Socialist countries, this responsibility of corporations was implemented by their expropriation without compensation.

In South Africa and in Namibia, South African and transnational capital, utilising the racist legislation and practice of apartheid, has for decades drawn huge profits from the exploitation of the discriminated and, therefore, extremely cheap black labour. Time and again, the United Nations and the international public has drawn attention to the fact that the economic activities of the transnational corporations essentially contribute to the maintenance of the apartheid regime, and with that, to the continuation of an international crime. The General Assembly strongly condemned “the activities of all foreign corporations operating in Namibia under the illegal administration of South Africa which are exploiting the human and

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<sup>209</sup> United Nations document E/CN.4/1327/Add.2 of 27 February 1979.

natural resources of the Territory.”<sup>210</sup> The Declaration of the First World Conference to Combat Racism and Racial Discrimination stated that “all those who profit from racial domination and exploitation in South Africa ... are accomplices in the perpetration of this crime against humanity.”<sup>211</sup>

That is why the General Assembly requested the Commission on Human Rights, in continuing with its list that is to be compiled according to article X of the Convention, to take into account, *inter alia*, that transnational corporations, banks and other organisations giving assistance to the apartheid regime become accomplices in the inhuman practices of apartheid.

Indeed, there is already extensive information about this which could be utilised for that purpose. I may refer to the Khalifa Report,<sup>212</sup> which listed about 2,000 of those institutions, or the report entitled “Bank Loans to South Africa 1972-1978” prepared by Beate Klein.<sup>213</sup> Again, in 1982, the United Nations Centre against Apartheid published another alarming report on bank loans to South Africa which reveals that from 1979 to the middle of 1982, 181 banks from 18 capitalist countries gave 57 loans and credits to South Africa totalling \$2,756.8 million, a third of this sum coming from 36 banks of the Federal Republic of Germany alone,<sup>214</sup> including successors of those leading German banks which had been deeply involved in the criminal activities of the Nazi Reich.

These studies are invaluable not only for the mobilisation of world opinion today but also as a preparatory step to enforce responsibility for participation in the crime of apartheid in the future.

(c) As a possible third group of subjects of responsibility for the apartheid crime we should mention those States which - in spite of continued condemnation of apartheid and its crimes by the United Nations and the international public - continue to support the racist regime by co-operating and collaborating with it. This support and co-operation escalated again under the policy of so-called “constructive engagement” proclaimed and pursued under the Reagan

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<sup>210</sup> General Assembly resolutions 34/93 A, E and Q of 12 December 1979.

<sup>211</sup> United Nations document A/33/262 of October 1978, p. 14.

<sup>212</sup> United Nations document E/CN.4/Sub.2/283/Rev.1, as well as E/CN.4/Sub.2/425/Corr.1 and 2 and Add. 1-6.

<sup>213</sup> Corporate Data Exchange Inc., “Bank loans to South Africa 1972-1978,” United Nations Centre against Apartheid, *Notes and Documents*, No. 5/79.

<sup>214</sup> *Ibid.*, Special Issue, October 1982; also see *GDR Committee for Human Rights Bulletin*, No. 3/83, pp. 71 *et seq.*

Administration in the United States. Objectively, this concept is based on the thesis that “the best way to combat a criminal is to co-operate with him” - a principle which will not be found in any domestic legal system, including the United States system. For a number of years now, the General Assembly has stated time and again, that the “main obstacle to the liquidation of the racist regime and the elimination of the inhuman and criminal practice of apartheid” is the continuation of the collaboration by “the major Western and other trading partners of South Africa with the racist regime.” The General Assembly also stated in warning terms that those States “which give assistance to the colonial and racist regimes in southern Africa become accomplices in the inhuman practices of racial discrimination, colonialism and apartheid perpetrated by those regimes.”<sup>215</sup>

In recent times, ILC also dealt with the problem of participation of other States in an international crime of a State and the responsibility for it.<sup>216</sup> The draft article 27 defines as participation in the wrongful acts “Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter.” In this case, aid or assistance itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.<sup>217</sup>

Thus it seems that the ILC draft does not confine itself to the kind of connection between States and the international criminal (aid or assistance) and the objective effect this connection has *vis-a-vis* the violated international obligation, but introduces the subjective element of the intention to support the other State in committing the internationally wrongful act.

I consider that concept to be too restrictive.<sup>218</sup> At any rate, on this important point we should also have in mind the differentiation between international crimes and other international delicts. The introduction of such a subjective element which,

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<sup>215</sup> General Assembly resolution 33/23.

<sup>216</sup> See United Nations document A/34/10, pp. 228 *et seq.*

<sup>217</sup> United Nations document A/33/10, p. 243.

<sup>218</sup> For the position of scholars of international law in socialist countries see B. Graefrath and E. Oeser, *Teilnahmeformen bei der volkerrechtlichen Verantwortlichkeit* (Forms of participation in responsibility under international law), in *Staat and Recht* (Berlin), No. 5/80, pp. 446 and 447; B. Graefrath, “Problems of responsibility and reparation for the crime of apartheid,” *GDR Committee for Human Rights Bulletin*, No. 3/81, p. 30.

of course, would be denied in most cases and is difficult to be verified seems not to be in accordance with the opinion of the overwhelming majority of States reflected, for instance, in numerous United Nations resolutions. In these documents, the charge of collaboration, complicity and participation in apartheid is based solely upon the objective facts of economic and even military collaboration with the apartheid regime. All the resolutions of the United Nations proceed from the fact that, after the apartheid regime has been exposed to be a crime against humanity, the very fact of support given to that regime suffices to establish responsibility for participation in that crime.

This position should be clear, at any rate, when the Security Council has decided on mandatory sanctions against the apartheid State and individual States that, contrary to their obligations under the United Nations Charter, violate the sanctions, e.g., if a State, contrary to the mandatory arms embargo of 1977, continued to supply military equipment to the racist regime. In this case, when the international crime has been clearly established and specified forms of co-operation with the responsible State have been explicitly prohibited, there can be no room for the excuse that one did not intend to support the commission of an international crime.

There are some experiences in this respect, related to the case of former Southern Rhodesia. As is known, the Security Council decided upon mandatory economic sanctions against the Smith regime under Chapter VII of the United Nations Charter.<sup>219</sup> Later on, the General Assembly condemned a number of States, among them the United States of America, because of violation of these sanctions, and called upon the Security Council to consider, if necessary, mandatory measures against South Africa and Portugal. Obviously, the General Assembly regarded the continued violation of sanctions decided upon by the Security Council as a form of participation in the maintenance of a racist colonial regime on the part of the States concerned, constituting an international crime.

The responsibility of States for the support of apartheid as an international crime is not confined to the direct collaboration from State to State, or to positive acts performed by the States themselves; it applies also to omissions, i.e., their not being active in the suspension of economic relations between corporations, banks etc., under their jurisdiction and institutions of the apartheid regime, let alone the support of such relations by the State through credits, export guarantees, tax policies, etc. Having discussed the Khalifa report, the United Nations Commission on Human Rights called upon “the Governments of the countries where the banks, transnational corporations and other organisations named and listed in the revised report are based, to take effective action to put a stop to their trading, manufacturing and investing activities in the territories of the racist and

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<sup>219</sup> Security Council resolution 232 (1966) of 16 December 1966.

colonial regimes in southern Africa.”<sup>220</sup>

The enforcement of this responsibility will depend on the further results of the joint struggle of all forces fighting against the crime of apartheid. Nevertheless, to unmask systematically the companies and corporations profiting today from the continuation of the racist regime and to define thoroughly all the accomplices of the apartheid regime is important in providing substantial pre-conditions to register sources on the basis of which responsibility for the crime of apartheid can be enforced when the time is ripe.

## ANNEX I

# **INTERNATIONAL CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID<sup>221</sup>**

*The States Parties to the present Convention,*

*Recalling* the provisions of the Charter of the United Nations, in which all Members pledged themselves to take joint and separate action in co-operation with the Organization for the achievement of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

*Considering* the Universal Declaration of Human Rights, which states that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour or national origin,

*Considering* the Declaration on the Granting of Independence to Colonial Countries and Peoples, in which the General Assembly stated that the process of liberation is irresistible and irreversible and that, in the interests of human dignity, progress and justice, an end must be put to

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<sup>220</sup> United Nations Commission on Human Rights resolution 11 (XXXVI).

<sup>221</sup> The Convention was adopted by the United Nations General Assembly on November 30, 1973 [resolution 3068 (XXVIII)]. It entered into force on 18 July 1976.

colonialism and all practices of segregation and discrimination associated therewith,

*Observing* that, in accordance with the International Convention on the Elimination of All Forms of Racial Discrimination, States particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction,

*Observing* that, in the Convention on the Prevention and Punishment of the Crime of Genocide, certain acts which may also be qualified as acts of apartheid constitute a crime under international law,

*Observing* that, in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, "inhuman acts resulting from the policy of apartheid" are qualified as crimes against humanity,

*Observing* that the General Assembly of the United Nations has adopted a number of resolutions in which the policies and practices of apartheid are condemned as a crime against humanity,

*Observing* that the Security Council has emphasized that apartheid and its continued intensification and expansion seriously disturb and threaten international peace and security,

*Convinced* that an International Convention on the Suppression and Punishment of the Crime of Apartheid would make it possible to take more effective measures at the international and national levels with a view to the suppression and punishment of the crime of apartheid,

*Have agreed* as follows:

### ***Article I***

1. The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.

2. The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of apartheid.

## *Article II*

For the purpose of the present Convention, the term "the crime of apartheid," which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) By murder of members of a racial group or groups;

(ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

(d) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

(e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

(f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

### ***Article III***

International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they:

(a) Commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention;

(b) Directly abet, encourage or co-operate in the commission of the crime of apartheid.

### ***Article IV***

The States Parties to the present Convention undertake:

(a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime;

(b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.

### ***Article V***

Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.

### ***Article VI***

The States Parties to the present Convention undertake to accept and carry out in accordance with the Charter of the United Nations the decisions

taken by the Security Council aimed at the prevention, suppression and punishment of the crime of apartheid, and to co-operate in the implementation of decisions adopted by other competent organs of the United Nations with a view to achieving the purposes of the Convention.

#### *Article VII*

1. The States Parties to the present Convention undertake to submit periodic reports to the group established under article IX on the legislative, judicial, administrative or other measures that they have adopted and that give effect to the provisions of the Convention.
2. Copies of the reports shall be transmitted through the Secretary-General of the United Nations to the Special Committee on Apartheid.

#### *Article VIII*

Any State Party to the present Convention may call upon any competent organ of the United Nations to take such action under the Charter of the United Nations as it considers appropriate for the prevention and suppression of the crime of apartheid.

#### *Article IX*

1. The Chairman of the Commission on Human Rights shall appoint a group consisting of three members of the Commission on Human Rights, who are also representatives of States Parties to the present Convention, to consider reports submitted by States Parties in accordance with article VII.
2. If, among the members of the Commission on Human Rights, there are no representatives of States Parties to the present Convention or if there are fewer than three such representatives, the Secretary-General of the United Nations shall, after consulting all States Parties to the Convention, designate a representative of the State Party or representatives of the States Parties which are not members of the Commission on Human Rights to take part in the work of the group established in accordance with paragraph 1 of this article, until such time as representatives of the States Parties to the Convention are elected to the Commission on Human Rights.
3. The group may meet for a period of not more than five days, either before the opening or after the closing of the session of the Commission on Human Rights, to consider the reports submitted in accordance with article VII.

## ***Article X***

1 . The States Parties to the present Convention empower the Commission on Human Rights:

(a) To request United Nations organs, when transmitting copies of petitions under article 15 of the International Convention on the Elimination of All Forms of Racial Discrimination, to draw its attention to complaints concerning acts which are enumerated in article II of the present Convention;

(b) To prepare, on the basis of reports from competent organs of the United Nations and periodic reports from States Parties to the present Convention, a list of individuals, organizations, institutions and representatives of States which are alleged to be responsible for the crimes enumerated in article II of the Convention, as well as those against whom legal proceedings have been undertaken by States Parties to the Convention;

(c) To request information from the competent United Nations organs concerning measures taken by the authorities responsible for the administration of Trust and Non-Self-Governing Territories, and all other Territories to which General Assembly resolution 1514 (XV) of 14 December 1960 applies, with regard to such individuals alleged to be responsible for crimes under article II of the Convention who are believed to be under their territorial and administrative jurisdiction.

2. Pending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV), the provisions of the present Convention shall in no way limit the right of petition granted to those peoples by other international instruments or by the United Nations and its specialized agencies.

## ***Article XI***

1. Acts enumerated in article II of the present Convention shall not be considered political crimes for the purpose of extradition.

2. The States Parties to the present Convention undertake in such cases to grant extradition in accordance with their legislation and with the treaties in force.

## ***Article XII***

Disputes between States Parties arising out of the interpretation, application or implementation of the present Convention which have not been settled by negotiation shall, at the request of the States parties to the dispute, be brought before the International Court of Justice, save where the parties to the dispute have agreed on some other form of settlement.

### ***Article XIII***

The present Convention is open for signature by all States. Any State which does not sign the Convention before its entry into force may accede to it.

### ***Article XIV***

1. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

### ***Article XV***

1. The present Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

### ***Article XVI***

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

### ***Article XVII***

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request.

***Article XVIII***

The Secretary-General of the United Nations shall inform all States of the following particulars:

- (a) Signatures, ratifications and accessions under articles XIII and XIV;
- (b) The date of entry into force of the present Convention under article XV;
- (c) Denunciations under article XVI;
- (d) Notifications under article XVII.

***Article XIX***

1. The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Convention to all States.

**Annex II**

**EXTRACTS FROM DECLARATIONS OF THE  
UNITED NATIONS  
GENERAL ASSEMBLY AND THE SECURITY  
COUNCIL**

**A. GENERAL ASSEMBLY**

***Resolution 1514 (XV) of 14 December 1960 on the Declaration on the Granting of Independence to Colonial Countries and Peoples***

...

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

***Resolution 2131 (XX) of 21 December 1965 on the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty***

6. All States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms. Consequently, all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations.

***Resolution 2625 (XXV) of 24 October 1970 on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations***

*The General Assembly,*

...

*Convinced* that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality.

...

1. *Solemnly proclaims* the following principles:

...

... States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all and in the elimination of all forms of racial discrimination and all forms of religious intolerance;

...

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realisation of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

- (a) To promote friendly relations and co-operation among States; and
- (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

...

***Resolution 3314 (XXIX), annex, of 14 December 1974 on the Definition of aggression***

...

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of the peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

...

***Resolution 3411 C (XXX) of 28 November 1975 on the special responsibility of the United Nations and the international community towards the oppressed people of South Africa***

The General Assembly

...

1. *Proclaims* that the United Nations and the international community have a special responsibility towards the oppressed people of South Africa and their liberation movements, and towards those imprisoned, restricted or exiled for their struggle against apartheid.

...

***Resolution 31/6 A of 26 October 1976 on the so-called independent Transkei and other bantustans***

*The General Assembly,*

...

1. *Strongly condemns* the establishment of bantustans as designed to consolidate the inhuman policies of apartheid, to destroy the territorial integrity of the country, to perpetuate white minority domination and to dispossess the African people of South Africa of their inalienable rights;
2. *Rejects* the declaration of 'independence' of the Transkei and declares it invalid;
3. *Calls upon* all Governments to deny any form of recognition to the so-called independent Transkei and to refrain from having any dealings with the so-called independent Transkei or other bantustans;
4. *Requests* all States to take effective measures to prohibit all individuals, corporations and other institutions under their jurisdiction from having any dealings with the so-called independent Transkei or other bantustans.

***Resolution 32/105 J of 14 December 1977 on assistance to the national liberation movement of South Africa***

*The General Assembly,*

...

1. *Strongly reaffirms* the inalienable right of the people of South Africa as a whole, irrespective of race, colour or creed, to determine, on the basis of majority rule, the future of South Africa;
2. *Further reaffirms* the legitimacy of the struggle of the oppressed people of South Africa and their national liberation movement for the eradication of apartheid and the exercise of the right of self-determination by the people of South Africa as a whole;
3. *Declares* that, in view of the intransigence of the racist regime, its defiance of resolutions of the United Nations and its continued imposition of the criminal policy of apartheid, the national liberation movement has an inalienable right to continue its struggle for the seizure of power by all available and appropriate means of its choice, including armed struggle;
4. *Further declares* that the international community should provide all assistance to the national liberation movement of South Africa in its legitimate struggle and exercise all its authority, under the provisions of the Charter of the United Nations, including Chapter VII, to facilitate the transfer of power from the minority racist regime to the genuine representatives of the

people of South Africa.

***Resolution 34/93 0 of 12 December 1979: Declaration on South Africa***

1. All States shall recognise the legitimacy of the struggle of the South African people for the elimination of apartheid and the establishment of a non-racial society guaranteeing the enjoyment of equal rights by all the people of South Africa, irrespective of race, colour or creed.
2. All States shall recognise the right of the oppressed people of South Africa to choose their means of struggle.
3. All States shall solemnly pledge to refrain from overt or covert military intervention in support or defence of the Pretoria regime in its effort to repress the legitimate aspirations and struggle of the African people of South Africa against it in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, or in its threats or acts of aggression against the African States committed to the establishment of a democratic government of South Africa based on the will of the people as a whole, regardless of race, colour or creed, as the imperative guarantee to lasting peace and security in southern Africa.
4. All States shall take firm action to prevent the recruitment, financing, training or passage of mercenaries in support of the apartheid regime of South Africa or the bantustans created by it in South Africa.
5. All States shall take appropriate measures to discourage and counteract propaganda in favour of apartheid.
6. All States shall respect the desire of African States for the denuclearisation of the continent of Africa and refrain from any co-operation with the South African regime in its plans to become a nuclear Power.
7. All States shall demonstrate international solidarity with the oppressed people of South Africa and with the independent African States subjected to threats or acts of aggression and subversion by the South African regime.

***Resolution 39/72 A of 13 December 1984 on comprehensive sanctions against the apartheid regime and support to the liberation struggle in South Africa***

*The General Assembly,*

...

*Gravely concerned* over the threat to international peace and security, and repeated breaches of the peace and acts of aggression, caused by the policies and

actions of the racist regime in South Africa,

*Reaffirming* that apartheid is a crime against humanity and a threat to international peace and security,

*Reaffirming* the legitimacy of the struggle of the oppressed people of South Africa waged by all means at their disposal, including armed struggle, for the exercise of their right to self-determination and for the establishment of a society in which all the people of South Africa as a whole, irrespective of race, colour or creed, will enjoy equal and full political and other rights and participate freely in the determination of their destiny,

...

*Strongly convinced* that peace and stability in southern Africa require the total eradication of apartheid and the exercise of the right of self-determination by all the people of South Africa, irrespective of race, colour, sex or creed,

...

*Reaffirming* that the elimination of apartheid constitutes a major objective of the United Nations,

...

*Recalling* that the racist regime of South Africa has consistently defied the relevant resolutions of the General Assembly and the Security Council, and violated its obligations under the Charter of the United Nations,

*Considering* that, in the light of General Assembly resolutions, 38/11 of 15 November 1983 and 39/2 of 28 September 1984 and Security Council resolutions 554 (1984) and 556 (1984), no recognition can be accorded to the so-called 'new constitution' of 1984,

...

6. *Proclaims* that the United Nations and the international community have a special responsibility towards the oppressed people of South Africa, their liberation movements and all those engaged in the legitimate struggle for the elimination of apartheid and the establishment of a non-racial democratic society ensuring human rights and fundamental freedoms for all the people of the country, irrespective of race, colour, sex or creed;

...

8. *Further demands* that the racist regime of South Africa pay full compensation to Angola, Lesotho and other independent African States for the damage to life and property caused by its acts of aggression;

9. *Declares* that the situation in South Africa constitutes a grave threat to international peace and security and that the racist regime of South Africa is guilty of acts of aggression, breaches of the peace and constant violations of the provisions of the Charter of the United Nations;

...

12. *Requests* all States to refrain from any action that would provide or imply legitimacy for the Pretoria regime;

...

18. *Again proclaims* that the South African liberation movements recognised by the Organisation of African Unity are the authentic representative of the people of South Africa in their just struggle for national liberation;
19. *Recognises* the right of the oppressed people and their national liberation movements to resort to all means at their disposal in their resistance to the illegitimate racist minority regime of South Africa;
20. *Reaffirms*, in particular, the legitimacy of the armed struggle by the oppressed people of South Africa and their national liberation movements, and holds the Pretoria regime responsible for any violence and conflict;
21. *Reaffirms* that freedom-fighters of South Africa should be treated as prisoners of war in accordance with Additional Protocol I to the Geneva Conventions of 12 August 1949;
22. *Strongly supports* the movement against conscription into the armed forces of the racist regime of South Africa;

...

24. *Urges* all Governments and organisations to provide maximal moral, political and material assistance to the South African liberation movements recognised by the Organisation of African Unity, namely, the African National Congress of South Africa and the Pan Africanist Congress of Azania, and all those struggling for freedom in South Africa in uncompromising opposition to apartheid;

...

27. *Calls upon* all specialised agencies and other institutions within the United Nations system, as well as other international organisations that have not yet done so, to exclude the Pretoria regime forthwith;

...

***Resolution 39/72 G of 13 December 1984 on concerted international action for the elimination of apartheid***

*The General Assembly,*

...

*Recognising* the responsibility of the United Nations and the international

community to take all necessary action for the eradication of apartheid, and in particular the need for increased and effective pressure on the South African authorities as a peaceful means of achieving the abolition of apartheid,

...

5. *Urges* the Security Council to consider without delay the adoption of effective mandatory sanctions against South Africa;

...

7. *Appeals* to all States that have not yet done so, pending mandatory sanctions by the Security Council, to consider national legislative or other appropriate measures to increase the pressure on the apartheid regime of South Africa, such as:

(a) Cessation of further investments in, and financial loans to, South Africa;

(b) An end to all promotion of trade with South Africa;

(c) Cessation of all forms of military, police or intelligence co-operation with the authorities of South Africa;

(d) An end to nuclear collaboration with South Africa;

8. *Appeals* to all States, organisations and institutions;

(a) To increase humanitarian, legal, educational and other assistance to the victims of apartheid;

(b) To increase support for the liberation movements recognised by the Organisation of African Unity and to all those struggling against apartheid and for a non-racial, democratic society;

(c) To increase assistance to the front-line States and the Southern Africa Development Co-ordination Conference in order to increase their economic strength and independence from South Africa;

9. *Appeals* to all Governments and organisations to take appropriate action for the cessation of all academic, cultural, scientific and sport relations that would support the apartheid regime of South Africa as well as relations with individuals, institutions and other bodies endorsing or based on apartheid and also appeals for further strengthening of contacts with those opposed to apartheid;

10. *Reaffirms* the legitimacy of the struggle of the oppressed people of South Africa for the total eradication of apartheid and for the establishment of a non-racial, democratic society in which all the people, irrespective of race, colour or creed, enjoy human rights and fundamental freedoms;

11. *Pays tribute to and expresses solidarity with* organisations and individuals struggling against apartheid and for a non-racial, democratic society in accordance with the principles of the Universal Declaration of Human Rights.

## **B. SECURITY COUNCIL**

### ***Resolution 418 (1977) of 4 November 1977***

*The Security Council,*

...

*Acting* therefore under Chapter VII of the Charter of the United Nations,

1. *Determines*, having regard to the policies and acts of the South African Government, that the acquisition by South Africa of arms and related *materiel* constitutes a threat to the maintenance of international peace and security;
2. *Decides* that all States shall cease forthwith any provision to South Africa of arms and related *materiel* of all types, including the sale or transfer of weapons and ammunition, military vehicles and equipment, para-military police equipment, and spare parts for the aforementioned, and shall cease as well the provision of all types of equipment and supplies and grants of licensing arrangements for the manufacture or maintenance of the aforementioned;
3. *Calls upon* all States to review, having regard to the objectives of the present resolution, all existing contractual arrangements with and licenses granted to South Africa relating to the manufacture and maintenance of arms, ammunition of all types and military equipment and vehicles, with a view to terminating them;
4. *Further decides* that all States shall refrain from any co-operation with South Africa in the manufacture and development of nuclear weapons;
5. *Calls upon* all States, including States non-members of the United Nations, to act strictly in accordance with the provisions of the present resolution;

...

### ***Resolution 473 (1980) of 13 June 1980***

*The Security Council,*

...

3. *Reaffirms* that the policy of apartheid is a crime against the conscience and dignity of mankind and is incompatible with the rights and dignity of man, the Charter of the United Nations and the Universal Declaration of Human Rights, and seriously disturbs international peace and security;
4. *Recognises* the legitimacy of the struggle of the South African people for the elimination of apartheid and for the establishment of a democratic society in which all the people of South Africa as a whole, irrespective of race, colour, or creed, will enjoy equal and full political and other rights and participate freely in the determination of their destiny;

...

#### ***Resolution 554 (1984) of 17 August 1984***

*The Security Council,*

...

*Convinced* that the so-called 'new constitution' endorsed on 2 November 1983 by the exclusively white electorate in South Africa would continue the process of denationalisation of the indigenous African majority, depriving it of all fundamental rights, and further entrench apartheid, transforming South Africa into a country for 'whites only',

...

*Reaffirming* the legitimacy of the struggle of the oppressed people of South Africa for the elimination of apartheid and for the establishment of a society in which all the people of South Africa as a whole, irrespective of race, colour, sex or creed, will enjoy equal and full political and other rights and participate freely in the determination of their destiny,

...

1. *Declares* that the so-called 'new constitution' is contrary to the principles of the Charter of the United Nations, that the results of the referendum of 2 November 1983 are of no validity whatsoever and that the enforcement of the 'new constitution' will further aggravate the already explosive situation prevailing inside apartheid South Africa;
2. *Strongly rejects and declares as null and void* the so-called 'new constitution' and the 'elections' to be organised in the current month of August for the 'coloured' people and people of Asian origin as well as all insidious manoeuvres by the racist minority regime of South Africa to further entrench white minority rule and apartheid;

...

4. Solemnly declares that only the total eradication of apartheid and the establishment of a non-racial democratic society based on majority rule, through the full and free exercise of universal adult suffrage by all the people in a united and non-fragmented South Africa, can lead to a just and lasting solution of the explosive situation in South Africa;

...

***Resolution 569 (1985) of 26 July 1985***

*The Security Council,*

...

6. *Urges* States Members of the Organisation to adopt measures against the Republic of South Africa, such as the following:

- (a) Suspension of all new investment in the Republic of South Africa;
- (b) Prohibition of the sale of krugerrands and all other coins minted in South Africa;
- (c) Restrictions in the field of sports and cultural relations;
- (d) Suspension of guaranteed export loans;
- (e) Prohibition of all new contracts in the nuclear field;
- (f) Prohibition of all sales of computer equipment that may be used by the South African army and police;

...