

CAN APARTHEID SUCCESSFULLY DEFY THE INTERNATIONAL LEGAL SYSTEM?

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INTRODUCTION

South Africa's policy of *apartheid* has engaged the attention of the world community for the past thirty years. The world community has determined that *apartheid* cannot be regarded as a purely internal South African concern; on the contrary, it has been determined that its practice constitutes a challenge to the essential principles of world order and consequently that it legitimately falls squarely within the scope of international prescriptions.

In a previous article one of the present authors reviewed the action undertaken within the framework of the United Nations Organization with a view to bringing about a termination of *apartheid*.¹ That review showed the progressive culmination of a series of pertinent United Nations Resolutions and Declarations into the view that *apartheid* qualifies as a crime against international law. The discussion which follows builds upon that review and is designed to show why, as a matter of both law and policy, that qualification is supportable, the implications to be drawn from the qualifications themselves and the ways in which these might conceivably be operationalized in the continuing struggle against *apartheid*. A preliminary and a brief account into the factual aspects of *apartheid* doctrine and practice as well as the legal bases of concern in international institutionalized bodies will be helpful in putting the problem in proper perspective.

I. THE DOCTRINE AND PRACTICE OF APARTHEID

Apartheid is an *Afrikaans* term meaning "apart-ness" or "segregation."² It is a system of racial discrimination created, maintained and intended to be perpetuated by governmental design. Its practice consists of the deliberate monopoly of base values with the intention of ensuring White supremacy over other races, particularly, the Africans, in South Africa. The Secretary-General of the International Commission of Jurists depicted the practice of *apartheid*, thus:

The Commission holds that the application of the principle of *apartheid* which has come under scrutiny in this report is morally reprehensible. The evil of the policy of separation of races lies in the presumption of racial superiority translated into the deliberate infliction of an inferior

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1. S. Tiewul, *Apartheid: Steps Towards International Legal Control*, ZAMBIAN L.J. (1974).
2. 12 INT. REV. SERV. 70 (1966).

way of life on "all who are taunted by non-white-skins." *Not permitted to choose their own way of life, the non-white population are reduced to permanent political, social, economic and cultural inferiority.*

*The impact of apartheid extends to virtually all aspects of life in the Union. At church, at home, at school, or university, at the cinema, on the beach, in the courts; in fact in all conceivable forms of human relations a ruthless discrimination against the non-white population has become the law. [Emphasis added.]*³

It operates through a process of value deprivation whereby all base values necessary for the maximization of human rights are concentrated and monopolized in the hands of a section of the South African community. Society is physically organized into separate but unequal, racial groupings: colored, Asian, and African or Bantu.⁴ In introducing the Group Areas Bill in Parliament on June 14, 1950, the Minister responsible for Interior said:

Mr. President, the underlying principle of this Bill is to make provisions for the establishment of Group areas, that is, separate areas for the different racial groupings by compulsion if necessary. . . . The setting aside for non-Europeans is not novel in our legislative history. The Precious and Base Metals Act of 1908, the Mission Stations and Communal Reserves Act of 1909, the Bethalstap Settlement Act of 1921, and various other Acts—referred in the white paper—are examples of areas which by law are reserved for certain specific racial groups.⁵

There is thus a clear and governmentally sanctioned denial of equal distribution of base values. The Minister of Native Affairs once put this forth explicitly, albeit unashamedly:

I just want to remind hon. members that if the Native in South Africa today in any kind of school in existence thinks he is being taught to expect that he will live his adult life under a policy of equal rights, he is making a big mistake. Hon. members always profess not to be in favor of equal rights, and therefore they should now support me in principle in what I am saying.⁶

In order to ensure the permanence of the pillars of *apartheid* the effort to carry the monopolization of power by one race is carried to extremes. Every

3. *Report on South Africa*, 6 (U.N.S.C. 1960). The then-Prime Minister of South Africa, J.G. Strijdom, had stated in 1955:

Call it paramountcy, baahkap or what you will, it is still domination . . . Either the White man dominates or the Black man takes over . . . The only way the European can maintain supremacy is by domination. 4141 H.A. DEB. (1955).

4. Population Registration Act 1950, No. 3. *See also*, Group Areas Act 1950, No. 41.

5. E. BROOKES, *APARTHEID: A DOCUMENTARY STUDY OF MODERN SOUTH AFRICA*, 31 (1968). Similarly, the long title to the Group Areas Act, read: "To provide for reservation of public premises and vehicles or portions thereof for the exclusive use of persons of a particular race or class." Section 5(1)(b) of the Banutu Administration Act, 1927, as appealed, also states:

The State President may, whenever he deems it expedient in the general public interest, without prior notice to any person concerned, order that, subject to such conditions as he may determine, any tribe, portion of a tribe, or Bantu shall withdraw from any place to any other place or any other district or province within the Union.

The Indian Women feeling the oppressive nature of the *apartheid* laws, demonstrated on December 10, 1963 in front of the government buildings in Pretoria. They handed a letter to the Prime Minister. It read:

As mothers and women we face a bleak future. . . . Our people are being deprived of their homes, means of livelihood and property, . . . the force of the law is being applied to drive us into isolated ghettos. Reuter, Dec. 10, 1963.

6. E. BROOKES, *supra*. In 1954, Dr. Verwoerd, the then-Prime Minister, was reported to have said: "The Bantu must be guided to serve his community in all respects. There is no place for him in the European country above the level of certain forms of labor. . . . It is of no avail for him to receive a training which has as its aim absorption in the European community where he cannot be absorbed, The Times (London), May 31, 1960 (supplement) at xvii.

available strategy is employed to impose deprivations. The African and other non-white groups have no peaceful access to processes which contribute to the constitution, modification or reversal of the norms which, in civilized society, are commonly shaped and shared among all or nearly all the participants of a particular social order.⁷ In the first place, the legislative process has been distorted and diverted into a forum for hatching and breeding *apartheid* policies.⁸

Since the present Government came to power in South Africa in 1948 a vast body of legislative enactments has come into existence designed to give effect to the new policy of *apartheid*. Hundreds of laws have been passed by Parliament; proclamations and Government notices have been issued under those laws. In addition, there are numerous by-laws made by municipal councils of cities and towns throughout the country. All these combine to institute the legal apparatus which regulates the daily lives of more than four fifths of the population of South Africa, *i.e.* the 15 million non-whites.⁹

In the second place, it is not open to African, Asian or "colored" participation.

The value-deprivation process is carried out by a comprehensive employment of all forms of strategies, especially economic and military. Coercive forces are used to achieve the objectives of *apartheid*. Furthermore, the non-whites are reduced to the lowest form of economic poverty, and are therefore at the mercy of their white counterparts who monopolize economic power.

The itemization of specific legislation enacted to promote the policies of *apartheid* will be helpful:

By the prohibition of Mixed Marriages Act 1949, any form of marriage between a white and a non-white was prohibited and declared illegal. The sword of the *apartheid* cuts through even church attendance. The Passage of the Native Laws Amendment Act¹⁰ was to restrict the movement of the "Natives" in attending church services in any part outside their residential areas. If the Minister for Native Affairs is of the opinion that the presence of natives in the area constitutes a nuisance to the residents in the area he may declare them *personae non gratae* in those residential areas concerned. So too with respect to the ownership of land. The South African African is not entitled as of right to acquire freehold title to land anywhere in South Africa, even in his own Bantu district.¹¹

7. Act No. 46 1959 which repealed the Representation of Natives Act of 1936. An example of how the whites have managed to entrench themselves in power can be found in the passage of the Promotion of Bantu Self-Government Act, which abolished the African representation in Parliament. Since the passage of this Act the Africans have ceased to have any say in the prescriptive process of the society.

8. L. RUBIN, *APARTHEID IN PRACTICE* 5 (1971). It has been said that, "The volume of the race legislation is matched by its complexity. Many of the Acts have been amended several times, contain obscure provisions and are expressed in tortuous language. These are the reasons why the average South African (let alone the average person outside the country) might well be forgiven for deciding that the task of finding what they mean is too difficult."

Professor Richard Falk, who was sent as an official observer by the International Commission of Jurists to the Terrorism trial, reported:

I did not appreciate beforehand that these "Bantu Laws" (the pass laws, and other regulations applied only to the African community) are of such a character that only a relatively small percentage of the African population is in a position to comply with them at any particular time. These laws are of such complexity that someone with legal training could not easily understand the requirements of compliance. *Id.* at 5.

9. *Id.*

10. Bantu Laws Amendment Act No. 36, 1957.

11. Bantu Land Act No. 27, 1913; Bantu (Urban Areas) Consolidation Act no. 25, 1946; Bantu Laws Amendment Act no. 19, 1970.

The South African Government, not insensitive to opposition to its *apartheid* policies, engages any coercive means to quell such opposition. One notorious means is the Suppression of Communism Act.¹² The enactment, among others, empowers the police to arrest any person suspected of being a threat to the *apartheid* ideology. Thus, under the General Law (Amendment) Act, the police can detain any person without warrant, and any such detainee may be held incommunicado.¹³ The worst part of the extension of police powers arose from the establishment of the Bureau of State Security on May 16, 1969. (Hereinafter referred to as BOSS). Under BOSS the police have enormous power of arrest and detention.

Another weapon used to suppress opposition is the 180-day Detention Law. This piece of legislation owes its existence to the passage of the Criminal Procedure Amendment Act¹⁴ which empowered the Attorney-General to detain any person who in his opinion might be a material witness in any case involving the state for a period of six months or for the period that the case may last, whichever would be longer.

But, the Terrorism Act,¹⁵ taken in conjunction with the Suppression of Communism and the Unlawful Organizations Act, is the most debilitating for the suppression of opposition to *apartheid*. This legislation explicitly aims to liquidate opposition to the aims and objectives of *apartheid*. The excessively wide scope of the Act is reflected, for instance, in Section 2(1)(a) where "Terrorism" is committed by:

. . . any person who—

with intent to endanger the maintenance of law and order in the Republic or any portion thereof . . . incites, instigates, commands, advises, encourages or procures any other person to commit any act.¹⁶

Another type of legislation deserving mention are the Pass Laws.¹⁷ These laws are the key-stone to the successful implementation of the practice of *apartheid*. It is mainly by the use of this legislation that the white domination of the Africans is very effective. The African, in every sphere of life, is required to possess a pass to any place he goes, and is obliged to produce it any time, anywhere for inspection. Failure to do any of these attracts a penalty of jail or flogging.

12. Suppression of Communism Act 1950, No. 1950. The important role that this particular piece of legislation plays in providing a strong basis for the *apartheid* system can be seen from a series of amendments that have followed its passage. It has been amended by: Act 50 (1951); Act 15 (1954); Act 76 (1962); Act 37 (1963); Act 80 (1964).

Under the Unlawful Organization Act, 1960, No. 34, a number of Organizations (mainly anti-*apartheid* movements) have been banned. Among them are: The Pan-African Congress; the Congress of Democrats; The South African Indian Congress and its Provincial Branches.

13. General Law Act No. 37, 1963. This Act has become popularly known as the "90-day Detention Clause."

14. Criminal Procedure Act no. 9, 1965.

15. Terrorism Act no. 83, 1967.

16. It was under this Act that 37 Africans were arrested in Namibia and tried in South Africa.

17. The most interesting thing is that the main legislation regulating the passes is said to be an Act which abolishes the passes, Bantu (Abolition of Passes and Co-ordination of Documents) Act, No. 67, 1952.

The South African Government has a funny way of legislating. In some cases the real *apartheid* laws are captioned in the reverse order: The extension of University Education Act which was said to be extending university education to the African was rather to deny him the right to enter certain Universities.

Perpetuation of *apartheid* is not limited to legislative and executive acts. The champions of *apartheid* have managed to infiltrate into the judiciary which in effect has become a third organ for the implementation of the objectives of *apartheid*. The Bench is packed by the Judges who support the *apartheid* cause.¹⁸ But these deserve sympathy as the concept of judicial independence is a stranger in *apartheid* South Africa.¹⁹

A. *Internal Opposition to Apartheid.*

Such as it has been conceived, preached and practiced, *apartheid* faces stiff internal opposition. This fact is especially relevant as it tends to erode possible conception of *apartheid* policy as one of national choice, and therefore entitled to respect in relations between states. For the truth of the matter is that it is not based upon any expression of the national will. In no way have the Peoples entrapped by *apartheid* "determined themselves" within the meaning of applicable international instruments. On the contrary, *apartheid* appears as it is: a Draconian tool of mass oppression which looms large from above and is permitted to unleash any toll it will upon human dignity at the behest of a minority regime.

Anti-*apartheid* movements have taken different forms ranging from silent protest, to criticism, to peaceful demonstrations, to violent opposition.

It is elusive to attempt to appraise the intensity as well as extensiveness of the opposition that operates against the policies of *apartheid* in Southern Africa. Apart from the victims of the system of *apartheid*, there are some whites who find the practice of *apartheid* objectionable. This can be seen from the attitude of the churches and other political parties to the racial policies of the South African Government.

On March 21, 1960, the famous incident at Sharpsville, Transvaal, occurred. A number of Africans demonstrated against the *apartheid* policies and surrendered themselves at police stations throughout the country in opposition to the pass system. Police opened fire on the defenseless Africans, about 20,000, at Sharpsville, killing 72 and wounding 178. Also at Langa Township, Cape, about 6 Africans were killed and 30 others injured from a similar incident when police opened fire on a group of professors. Dissenting voices can be found in the writings of professors:

It is true that if a State neglects order there can be no justice, but it is equally true that if the State denies justice it undermines the foundations of order. It is our firm conviction that the latest disorder in South Africa has its roots in a denial of elementary rights and essential needs. This denial, exemplified in the Raboroko's case, we believe to be a denial of

18. EROSION OF RULE OF LAW IN SOUTH AFRICA, iv (I.C.J. 1960).

It is essential that they (Judges) should maintain their spiritual independence, their devotion to the Rule of Law and the liberty of the subject should take precedence over their support for a political or social system. Unfortunately, the decisions cited illustrate that this is no longer generally the case in South Africa. In spite of a number of courageous decisions at first instance, the overall impression is of a judiciary as "establishment-minded" as the Executive, prepared to adopt an interpretation that will facilitate the executive's task rather than defend the Rule of Law."

19. An example is the 180-day Clause. Section 17(3) of the General Law Amendment Act no. 37, 1963 reads: "No court shall have jurisdiction to order the release from custody of any person so detained . . ." There is a similar provision in the 180-day Clause:

No court shall have jurisdiction to order the release from custody of any person detained under subsection (1) or to pronounce upon the validity of any regulation made under subsection (2) or the refusal of the consent required under subsection (4) or any condition referred to in subsection (4).

justice in the sense that the human wants and aspirations which are inherent in the Western tradition and, in fact, constitutes it, are defeated or frustrated.²⁰

In their protest against *apartheid* in the Universities, the Union of South African students, (both black and white), in 1959 prepared "A Digest of Protest Against University Apartheid Legislation." This was in response to the passage of the Extension of University Education Act,²¹ by which the Africans were refused admission into some Universities reserved for the whites. The students insisted that Universities should enjoy academic freedom and be able to admit anybody they like, (whether black or white), without any governmental control or influence.

The Principal of Adams College, (A Mission school, founded in 1853), refused to enforce the *apartheid* policies in the college. The government's reaction to this was the closing of the college in 1956, by invoking the Bantu Education Act. The Principal, in his last letter from the college, wrote:²²

. . . in order that the cause of apartheid may be advanced, Adams College must be liquidated. Indeed, in the eyes of the Minister there can be no place in Bantu Education for any institution which does not bow its knee before the Apartheid Idol.²³

Churches in South Africa have also not failed in registering their disapproval of the practice of racial discrimination in the country, especially in the churches.²⁴ The Churches became very articulate in their protests, and to some extent quite forceful and radical, after the passage of the Native Laws (Amendment) Act, No. 36 of 1957, which restricted the entry of the Africans into certain areas for the purposes of attending church services. One such protest came from an—which proved to be his last—address by the Anglican Archbishop to the Prime Minister. Drawing the Prime Minister's attention to the distinction between the things for God and those for Caesar,²⁵ the Archbishop pleaded against the extension of *apartheid* into the churches. He was found dead by the letter on March 6, 1957, (incidentally, the very day that Ghana, the first Black African country, South of the Sahara, attained her independence).

In 1962 the General Assembly of the Presbyterian Church passed two resolutions on race relations. The Assembly

(a) Strongly urges ministers and sessions to increase and strengthen multi-racial contracts, not only for the purposes of worship, but also for discussion, mutual understanding and joint service;

(b) Instructs Presbyteries to organize ministerial retreats and conferences for office-bureau and youth, on multi-racial basis.

This was directed to counteract the government's *apartheid* policies in the churches.²⁶

20. 83 SOUTH AFRICAN LAW JOURNAL 43 (1966).

21. Extension of University Education Act no. 45, 1959.

22. ISO Lomuzi, Sept. 17, 1956 (Magazine).

23. E. BROOKES, *supra*, at 53.

24. For an account of the protests by the Churches, see generally, L. CAWOOD, CHURCHES AND RACE RELATIONS IN SOUTH AFRICA (1964).

25. See generally, G. CLAYTON, WHERE WE STAND, ARCHBISHOP CLAYTON'S CHARGES 1948-1957 (1960).

26. Several other Churches joined the crusade against the *apartheid* policies. These were The Dutch Reformed Church, the Methodist Church, the Roman Catholic Church, the Presbyterian Church, and the Congregational Church.

Within Parliament itself, where most *apartheid* plans are hatched and executed, is vigorous resistance to apartheid by the opposition party.²⁷ Such resistance by an important constituency of elected representatives reflects at least the unilateral origin of *apartheid* policy as emanating solely from the prejudices of a single, and for the time being dominant, party. This is not to say that either *apartheid* theory or *apartheid* practice would stand in favoured light if generally backed by the totality of public-body decision makers. However, the fact that it is not so backed multiplies further the criteria by which to evaluate and condemn it.

The opposition from the African and Coloured parties and organizations has often been associated with violence after all attempts of non-violence had proved futile. The African National Congress (A.N.C.), the main spokesman for the African cause between 1912 and 1959, had to resort to sabotage as from 1950 after the suppression of the Communist Party. This led to the arrest and detention of its leader, Nelson Mandels, subsequently sentenced to life imprisonment in 1964.

In 1959 the Pan Africanist Congress was formed as a result of the frustration of the Africans at the ineffectiveness of the A.N.C. Its objective was:

. . . government of the African by the Africans and for the Africans with everybody who owes his only loyalty to Africa and is prepared to accept the democratic rule of an African majority being regarded as an African.

Another anti-*apartheid* organization emerged later. In July, 1964, a new organization calling itself, the African Resistance Movement, was formed to counteract the racial policies of the government.

In Namibia also, the *apartheid* has not been able to thrive without opposition. It was mainly the violent opposition to the system of *apartheid* there that led to the passage of the Terrorism Act of 1967. As was pointed out earlier this led to the arrest and trial of 37 Namibians for alleged terrorism activities in Namibia. It was in the said trial that Mr. Ja Toivo, one of the accused, made his speech in court:

There are some who will say that they are sympathetic with our aims, but that they condemn violence. I would answer that I am not by nature a man of violence and I believe that violence is a sin against God and my fellow men. S.W.A.P.O. itself was a non-violent organization, but the South African Government is not truly interested in whether opposition is violent or non-violent. It does not wish to hear any opposition to *apartheid* . . .

Is it surprising that in such times my countrymen have taken up arms? Violence is truly fearsome, but who would not defend his property and himself against a robber? And we believe that South Africa has robbed us of our country.²⁸

27. It might be argued that this cannot be a genuine criterion for determining an opposition to the established order as opposition parties in Parliament are characteristically known for registering their opposition to the policies of the ruling government; always seeking any available opportunity to supplant the ruling party. Nevertheless, there have been instances where an opposition party in Parliament, headed by Dr. Edgar Brookes, strongly attacked the apartheid enactments of the ruling party. See E. BROOKES, *supra* at 27-39.

The United Party, the Progressive Party, and the Liberal Party came out with policies designed to neutralize the apartheid laws. The Progressive Party for instance has always favored the sharing of authority by all without the distinction as to race or language.

28. From the EROSION OF THE RULE OF LAW IN SOUTH AFRICA, *supra* at 59. Nelson Mandela, former Secretary-General of the African National Congress (A.N.C.) who was sentenced to life imprisonment on June 12, 1964 also made a similar statement to the South African Court in April, 1964:

B. *International Opposition to Apartheid.*

Because *apartheid* is not solely of domestic concern, international attention has appropriately been focused upon it. This is as it should be; for, as will be shown, fundamental international community values are involved and threatened to be negated by the contrary doctrines and practices of *apartheid*. Thus either the international community defends its values or else condones violations through the manifestations of *apartheid* and its other associate evils. This latter course is too ghastly even to contemplate and has at any rate been rejected by the international community as a tolerable alternative.

One of the most articulate and far-reaching statements concerning *apartheid* within the international arena came from the General Assembly of the United Nations in 1970. It was not merely a condemnation of the policies of *apartheid*, but it went further to describe *apartheid* as a crime:

We, the representatives of the States Members of the United Nations, assembled at the United Nations headquarters on the 24th October, 1970 on the occasion of the twenty-fifth anniversary of the coming into force of the Charter of the United Nations, now solemnly declare that . . . *We strongly condemn the evil policy of apartheid, which is a crime against the conscience and dignity of mankind and, like Nazism is contrary to the principles of the Charter.* We re-affirm our determination to spare no effort, including support to those who struggle against it, in accordance with the letter and the spirit of the Charter, to secure the elimination of *apartheid* in South Africa. We also condemn all forms of oppression and tyranny wherever they occur and racism and the practice of racial discrimination in all its manifestations.²⁹ [Emphasis added.]

Actions taken in South Africa to strengthen the policies of *apartheid* have usually attracted almost universal condemnation. When South Africa created the so-called African homelands the General Assembly in its resolution "condemn(ed) the establishment of Bantustans in the so-called African Reserves as fraudulent, a violation of the principle of self-determination and prejudicial to the territorial integrity of the state and the unity of its people."³⁰ General Assembly resolution³¹ of October 11, 1963, called on South Africa to abandon forthwith the arbitrary trial against the politicians who had been arrested. *The year 1971 was another strongly worded resolution by the General Assembly on the racial*

I do not, however, deny that I planned sabotage. I did not plan it in the spirit of recklessness, nor because I have any love of violence. I planned it as a result of a calm and sober assessment of the political situation that had arisen after many years of tyranny, exploitation and oppression of my people by the Whites.

29. G.A. Res. 2626 (XXV)(1970). A 1966 Resolution had also been put in similar words: The Assembly ". . . condemns the policies of apartheid practiced by the Government of South Africa as a crime against humanity." G.A. Res. 2202 (XXI)(1966) - The Assembly on October 26, 1966 condemned apartheid and urged all states to take effective measures to suppress apartheid and segregation and eliminate racial discrimination. G.A. Res. 2074 (XX)(1965) also described apartheid as a crime against humanity. As far back as 1959 the General Assembly had expressed deep regret and concern that South Africa had not discarded its apartheid policy. G.A. Res. (Nov. 17, 1959).

30. G.A. Res. 2671 (XXV) (1970).

31. G.A. Res. 1881 (XXII) (1963). Voting was 106 in favor and only South Africa voted against it. The *General Assembly Resolution 2324 (XXII) of December 16, 1967* called on South Africa in connection with the Terrorism Act. The Security Council followed the Assembly with two other resolutions calling on South Africa to release the prisoners. S.C. Res. 245 (1968); S.C. Res. 246 (1968). In a Resolution of December 18, 1960 by the General Assembly, South Africa was urged to cease the arbitrary imprisonment and deportation of Africans in South West Africa and to ensure free exercise of political rights and freedom of expression for all sectors of the population. G.A. Res. 1564 (XV)(1960).

policies of South Africa. The Assembly expressed "grave indignation and concern over any and every act of maltreatment and torture of the opponents of *apartheid* in South Africa and the increased persecution of religious leaders opposed to that policy."³² A decade before, the General Assembly had deplored the South African determined aggravation of racial issues by enforcement of more discriminatory measures accompanied by violence and bloodshed and had noted with concern that *apartheid* endangered international peace and security.³³

When South Africa was found to have failed to fulfill its obligations under the mandate over Namibia the General Assembly in 1966 terminated the Mandate.³⁴ One of the reasons for the termination of the Mandate was the exportation of *apartheid* policies into the territory.³⁵

Apart from the General Assembly of the United Nations, other U.N. agencies as well as private international organizations have also expressed disapproval of *apartheid*. The Security Council in 1964, adopting the Report of the Group of Experts on South Africa, "condemned the *apartheid* policies of the Government of the Republic of South Africa and the legislation supporting those policies, such as the General Law Amendment Act, and in particular its ninety-day detention clause."³⁶ The Economic and Social Council (ECOSOC), by a resolution of 1969, recommended that the General Assembly call on South Africa "to rescind immediately the 'Banning Orders' issued under the Suppression of Communism Act against the opponents of *apartheid*."³⁷

The Secretary-General to the International Commission of Jurists, in the introduction to a 1967 Study on South Africa and Namibia, wrote:

Whether it be in regard to the rule of law or to the rules of humanity, the policies of racial discrimination practiced in Southern Africa are indefensible.

32. G.A. Res. 2764 (XXXI) (1971).

G.A. Res. 2439 (XXIII) of December 19, 1968 called on South Africa to repeal and amend all laws relating to *apartheid*. On the same day the General Assembly called on the Secretary-General to submit measures to the Assembly for combating racism and other racial practices, such as *apartheid*.

33. G.A. Res. 1598 (XVI) (1961).

There have been several resolutions in which the General Assembly in one way or the other has condemned the practice of *apartheid* and called on South Africa to give up her *apartheid* policies. See G.A. Res. 2647 (XXI) (1970); G.A. Res. 2396 (XXIII) (1968).

Other resolutions called on Member States either to persuade South Africa, or to intensify their efforts, to end the race problem in Southern Africa: G.A. Res. 1593 (XV) (1961); and G.A. Res. 1978 (A) (XVIII) (1963).

34. G.A. Res. 2145 (XXI) (1966). Voting was 144 for, 2 against and 3 abstentions.

35. In relation to the termination of the Mandate, the I.C.J. in its judgment of the Namibian Case, 1971, said: "South Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal, has obligation to put an end to it." I.C.J. 54 (1971).

36. S.C. Res. 5773 (1964). In its Resolution on December 4, 1963 the Security Council called on South Africa to liberate all political prisoners in South Africa. It further requested the Secretary-General to find means of solving the *apartheid* problem in South Africa. See S.C. Res. 5471 (1963).

The Council had in 1960 recognized that "the racial situation in South Africa has led to international friction" and had called on South Africa "to abandon *apartheid* and reverse its policies to bring about racial harmony based on equality." It had also requested the Secretary-General to make such arrangements as would adequately help in upholding the purposes and principles of the U.N. Charter. S.C. Res. 4300 (1960).

37. ECOSOC Res. 1415 (XLVI) June 6, 1969, The Council on May 2, 1971, condemned the policies of racial discrimination in South Africa, Rhodesia and territories under Portuguese domination and called upon the Security Council to find means of eradicating the problem. On the same day the Council by another resolution strongly condemned "the repression and detention of Trade Union Leaders in South Africa" and called for their immediate and unconditional release.

In areas where racial discrimination is the basis of society and is supported by otherwise formally valid laws, the legislation ceases to be based on justice. Discriminatory laws both in principle and practice lead inevitably to the erosion of the Rule of Law This, a policy of racial, or religious, discrimination ultimately results in the destruction of all legal safeguards including those which are not directly related to discriminatory laws.³⁸

Similarly the International Seminar on Apartheid meeting in Brasilia in 1966 unanimously condemned *apartheid*. The seminar specifically declared that the policy of *apartheid* was "a flagrant denial of fundamental human rights, and that it contravenes the Charter of the United Nations, the Universal Declaration of Human Rights, and the Convention on the Elimination of All Forms of Racial Discrimination."³⁹ After the trial of the 37 Africans for the alleged acts of terrorism, the Bar of the City of New York came out with a statement indicating their objection to the sentencing of the Africans involved. It stated:

. . . that the Association of the Bar of the City of New York hereby records its deepest concern and its protest over the actions of the Republic of South Africa in applying its habitants of South West Africa by prosecuting thirty-seven South West Africans under South Africa's Terrorism Act of 1967, in that: The Terrorism Act of 1967 offends basic concepts of justice, due process, and the rule of law accepted by civilized nations, and violates the Universal Declaration of Human Rights⁴⁰

The International Labor Organization at its Conference of the 8th July 1964, unanimously adopted a Declaration concerning the policy of *apartheid* in the Republic of South Africa. The Declaration has since become the I.L.C. Programme for the Elimination of Apartheid in South Africa.⁴¹

Finally, in a statement to the Security Council, Mr. U Thant, then Secretary-General of the United Nations, described *apartheid* as:

The most conspicuous and anachronistic mass violation of Human Rights and fundamental freedoms.⁴²

II. *The Competing Claims as to the Legality of Apartheid*

There are two competing claims over *apartheid*—the one proclaiming its unlawfulness, the other upholding its lawfulness. On the one hand is the majority of participants in the world constitutive process trying to outlaw *apartheid*; and, on the other hand, the government of South Africa adopting every available strategy to defend *apartheid*.

Actually, the principal defense of *apartheid* advanced by the South African government is one resting on a technical premise. It is no more than that *apartheid* is a matter within South Africa's domestic jurisdiction, so as to bring it

38: MacBride Sean, Secretary-General to the Commission:

Respect for, and the observance of, the *Rule of Law* is very necessary for the protection of human rights. The Commission has defined the Rule of Law as: 'The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic background, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.' [Emphasis added], 1960 Report.

39. In Brasilia, Brazil, between August 23 - September 5, 1968.

40. *Erosion of the Rule of Law in South Africa*, *supra* at 61.

41. 45 I.L.O. 1 (1961).

42. U.N.SCOR 1052nd Meeting (1963).

within the meaning of Article 2(7) of the Charter of the United Nations.⁴³ This argument has accompanied every South African atrocity. Ironically it does not consist of a defense of the merits of the event which is called into question but of the assertion that the merits of the event, or the lack thereof, should bear no scrutiny. For instance, four days after the Sharpsville incident, 29 Africans and Asian countries requested "an urgent meeting of the Security Council to consider the situation arising out of the large-scale killings or unarmed and peaceful demonstrators against racial discrimination and segregation in the Union of South Africa."⁴⁴ The response of South Africa was to challenge the right of the Security Council to consider the issue:

. . . the way the functions of the Security Council are defined in Articles 34 and 35 makes it obvious that the Council has the right to discuss only disturbances and situations arising directly between sovereign states themselves.⁴⁵

In a letter addressed to the Secretary-General of the United Nations, South Africa stated that it regarded the Security Council Resolution of June 9, 1964, urging South Africa to end *apartheid* trials and set free all those imprisoned under *apartheid* policy, as an interference in its internal affairs.⁴⁶ Mr. Vorster, pursuing the defense, keeping the world out of the internal affairs of South Africa once said:

I maintain the standpoint at all times—the correct standpoint—that I do not interfere in the internal affairs of Britain and Rhodesia because I do not want anybody to interfere in my internal affairs.⁴⁷

Apart from South Africa's defense of *apartheid* as an internal affair, the other form of defense relates to the merits of *apartheid* as such. *Apartheid* is projected merely as a form of differentiation and in no way tantamount to human rights. In his first radio broadcast, Mr. B.J. Vorster, as the new Prime Minister for South Africa, said in 1966:

I say to the Coloured people, as well as to the Indians and the Bantu that the policy of separate development . . . is not a denial of the human dignity. . . . On the contrary, it gives opportunity to every individual within his own sphere, not only to be a man or woman on every sense, but it also creates the opportunity for them to develop and advance without restriction or frustration as circumstances justify, and in accordance with the demands of developments achieved.⁴⁸

This same belief underlay the passage of the Bantu Education Act in 1953 to provide separate education for Africans in so-called "homelands."⁴⁹ It was

43. The Article states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Member to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

44. U.N. Doc. S/479 (1960).

45. U.N. SCOR 855th Meeting (1960).

46. INT. REV. SERV., *supra*, at 88. The letter was dated July 13, 1964. A similar letter to the Secretary-General, dated November 16, 1964, stated that the Security Council Resolution of June 18, 1964 was "far-reaching," example of attempted intervention in matters falling within domestic jurisdiction of sovereign Member of the U.N." It went further that, "What in effect is being sought is that a Member State should abdicate its sovereignty in favor of the U.N." *Id.* at 89.

48. *South African Scope* 31 (Dept. of Info. 1966).

49. There were other enactments which were based on the same notion of setting aside separate developments for different peoples on the grounds of race. *See, e.g.*, Extension of University Education Act, 1959.

therefore in tune that the Minister for Native Affairs, in presenting the Bill in Parliament explained that the underlying reason for the Bill was that "the Bantu must be guided to serve his own community in all respects."

The opponents of *apartheid* in the world community deny that the practice of *apartheid* falls within the contemplation of Article 2(7) of the Charter of the United Nations, and characterize it as a matter of international concern appropriate for discussion in the international arena. For instance, when South Africa in 1960 challenged the right of the Security Council to discuss the explosive situation in South Africa resulting from the Sharpville massacre, Poland replied that:

We are not dealing with a dispute involving two nations, but in fact, with a dispute between one member State and all the other member States.⁵⁰

Initially several countries within the United Nations had supported the South African defense that the *apartheid* problem was a matter essentially within her domestic jurisdiction. But by 1963 even these recognized that the doctrine of domestic jurisdiction was being unduly distorted to subserve *apartheid* interests and provide legitimacy for them. Thus the United Kingdom, for one, changed her previous stand on the issue:

We continue as we have always done, to attach the greatest importance to the improper observance of Article 2(7). *But we regard the case of apartheid in the circumstances which now exist as of such an extraordinary and exceptional nature as to warrant out regarding and treating it as sui generis.*⁵¹ [Emphasis added.]

It has already been demonstrated that the relevant juridical postulate that confronts, and is tested by, the policy and practice of *apartheid* is the protection and promotion of certain fundamental human rights. In order therefore for the conclusion to follow that *apartheid* is unlawful in the international law sense, it must be demonstrated (1) that it contravenes some clearly evolved juridical prescription and (2) that such prescription has emanated from some recognized authoritative law-making process.

Philosophical accounts of the essence of human rights have been elaborately attempted in the past. One writer called them:

. . . a twentieth-century name for what has been traditionally known as natural rights or, in a more exhilarating phrase, the rights of man. Much has been said about them, and yet one may still be left wondering what they are.⁵²

Another writer held that:

Human rights are the common denominator of modern civilization. Experience has shown that disregard of human rights is generally a stepping stone on the path of domestic dictatorship, and foreign war, and in any event, is a source of moral and political international tension. From the point of view of both politics and ethics, therefore, it is not only warranted, but imperative that the international community should consider itself on duty bound to be the guardian of the human rights of the individuals of whom, in the last analysis, this community consists.⁵³

50. See 12 INT. REV. SERV., *supra*, at 53.

51. U.N. SCOR 1054th Meeting (1963).

52. M. CRANSTON, WHAT ARE HUMAN RIGHTS, (1962).

53. *Implementation of an International Covenant of Human Rights*. A Memorandum submitted to the Human Rights Commission at its 4th Session by the Consultative Council of Jewish Organizations.

The designation of all or some of these rights as "fundamental," although sometimes not unreasonably susceptible to question, contains the sociological truism that viable social and political organization predicate a certain level of deference to them. What these rights are is relative to the society in question and to the stage of its development, but their lowest denominator, which comprises the specifications now set forth in the Universal Declaration of Human Rights, can be applied as a thermometer without distinction.

It is not surprising that the dynamics of political organization, at both the national and the international level, have consisted at core of concerted efforts to promote the observance of human rights.

On the national level, it suffices to recall the Magna Carta of 1215, the French proclamation of the Rights of Man of 1789 and the American Declaration of Independence.⁵⁴ Today, it has become universal practice, and politically expedient too, for states to at least pretend to embedding human rights in their national constitutions.⁵⁵

In the international scene, instruments protective of human rights predate international law itself. The following casual instances may be cited:

1. Treaty of Augsburg, known as the Religious Treaty of Augsburg, 1555.
2. Treaty between the Holy Roman Empire and Sweden at Osnabruék (Westphalis), October 24, 1648.
3. Article VII of the Treaty of Kuetchik Kairnardje, 1774, between the Russian Empire and the Sultan.
4. The Congress of Vienna inserted a provision on civil rights of the Jews in the newly created German Confederation in the Congress Treaty of Vienna, June 9, 1815.

54. The provisions on Human Rights were inserted in the American Constitution after the first ten Amendments in 1791. Other countries followed the American example in the 19th Century: the Swedish Constitution of 1809; the Spanish Constitution of 1812; Belgium in 1831; Norway in 1814; the Kingdom of Sardinia in 1848; Denmark in 1849; Prussia in 1850; Switzerland in 1874; Liberia in 1847; the first Article stated, "All men are both equally free and independent and have certain natural, inherent and inalienable rights."

55. In January, 1918, the All Russian Congress proclaimed "a declaration of the rights of the toiling and the exploited peoples" which became part of the 5th July, 1918 Constitution. Other countries (in the twentieth Century) have also inserted elaborate provisions into their Constitutions: The Weimer Constitution of 1919; the Austrian and the Czechoslovak Constitutions of 1920; Poland in 1921; Portugal in 1933; the Russian Constitution of 1936 with its famous Chapter 10; the Irish Constitution of 1937; the Provisional Constitution of China of 1931; the Kingdom of Siam in 1932; the Fundamental Principles of Afghanistan, 1931; Turkey in 1928; the Preamble to the French Constitution of 1946, re-stating the words of 1789, declared: "every human being without distinction of race, religion or belief, possesses inalienable and sacred rights."

Article 2 of the Fundamental Principles of the Italian Constitution of 1947 provided that, "The Republic recognizes and guarantees the inviolable rights of man." Article II of the Japanese Constitution of 1946 provided that, "the people shall not be prevented from enjoying the fundamental rights which 'guaranteed to the people by the Constitution shall be conferred upon the people of this and future generations as eternal and inviolable rights.'"

The newly independent African countries have equally followed the example. For example, Article 12 of the suspended Ghana Constitution of 1969 provided that:

Every person in Ghana shall be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, color, creed, or sex, . . . to each of the following, that is to say,

- (a) Life, liberty, security, of the person, the protection of the law and unimpeached access to the courts; and
- (b) Freedom of conscience of expression and of assembly and association; and
- (c) Protection of privacy of his home, correspondence and other property and from deprivation of property without compensation.

5. By Annex 10 of the Vienna Treaty, (incorporated in the Treaty), an agreement was reached between the powers and the Ruler of Netherlands whereby the latter agreed to protect Human Rights in the area.

6. At the Treaty of Berlin, July 13, 1878, elaborate obligations concerning human rights were imposed on the Sultan, see especially Articles 5, 27, 35, and 44.

7. At the Geneva Convention, May 15, 1922, German and Poland, in response to the League Council Resolution of October 12, 1921, took measures to protect minorities and to remedy matters of economic character resulting from the partition of the area.

But the 20th Century particularly has bred most international consensus on the need to respect and protect human rights and fundamental freedoms. The Paris Treaty of 1919, ending World War I, saw the emergence of such phrases as the "rights of small nations," "self-determination," and the protection of "minorities." These were in effect the aims of the Minorities Treaty, signed by Poland on June 28, 1919, simultaneously with the German Peace Treaty at Versailles. The League of Nations Covenant itself expressed, in addition to its Article 22 attempts to safeguard the rights of "peoples not yet able to stand by themselves under the strenuous conditions of the modern world," the felt need to attend to the function of human rights protection. Article 23 of the Covenant provided:

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

(a) will endeavour to secure and maintain fair and humane conditions of labor for men, women, and children both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations;

(b) undertake to secure just treatment of the native inhabitants of territories under their control;

(c) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs;

(d) will entrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest;

(e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connection, the special necessities of the regions, devastated during the war of 1914-1918, shall be borne in mind;

(f) will endeavour to take steps in matters of international concern for the prevention and control of disease.

Events after the end of World War II ushered in more intensive steps on the international plane for a universal protection of human rights and fundamental freedoms. The Charter of the United Nations has a number of provisions on human rights.⁵⁶ Article 1, paragraph 1, lists among the purposes of the United Nations the promotion of respect for human rights. And Article 13 expressly empowers the General Assembly to make recommendations for the observance of human rights. Article 55(d) provides that the United Nations shall promote

56. For the Articles where Human Rights are mentioned see Articles 1(3), 13(1)(b), 55(2), 62(2) 68, 76(c). Subsequent statements and the Declaration should be examined.

“universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” This is followed by Article 56 in which “All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.” Also under Article 13(b), the General Assembly is required to make recommendations for “promoting international co-operation . . . and assisting the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Furthermore, a main function of the Economic and Social Council, established under Article 61, is to “make recommendations for the purposes of promoting respect for, and observance of, human rights and fundamental freedoms.”

In fulfilling its functions under the Charter, the Economic and Social Council (ECOSOC) appointed the Commission on Human Rights⁵⁷ from whose works resulted the Universal Declaration of Human Rights. This Declaration which spells out in great detail the extent of obligation which members of the United Nations undertook in the above Charter provisions, was adopted unanimously but not in a legally binding form, which does not minimize its importance. It serves as a universal yardstick by which states must measure the fulfillment of their Charter-based obligations in respect of human rights.

Within the United Nations several other steps have been taken to give concrete meaning to human rights, and to ensure their protection. In 1946 the General Assembly, in a unanimous resolution, declared that:

. . . it is the highest interest of humanity to put an end to religious and so-called racial persecution and discrimination, [and called on] the government and responsible authorities to conform both to the Charter of the United Nations and to take the most prompt and energetic steps to that end.⁵⁸

A General Assembly Resolution of 1952 also declared that there was the need for the respect for human rights in any society and that a Member State which failed in this regard was not fulfilling its obligation under Article 56 of the Charter.⁵⁹ In 1966 the U.N. went a step further in its commitment to protect human rights. The General Assembly adopted the two Covenants: The International Covenant on Economic, Social and Cultural rights, and the International Covenant of Civil and Political Rights. The Covenants indicate the need for the protection and guarantee of political, economic, social and cultural rights to the individual in his country.

The year 1965 saw a number of resolutions all designed to give effect to aims and objectives of the Declaration of Human Rights. By a unanimous resolution of November 1, 1965, the General Assembly recognized the necessity of taking measures to implement the U.N. Declaration on the Elimination of All Forms of Racial Discrimination.⁶⁰ On December 20, by a unanimous vote, the Assembly

57. A Sub-Commission on Prevention of Discrimination and Protection of Minorities was set up by the Commission on Human Rights in 1946. In February, 1947, when the Economic and Social Council defined the task of the Sub-Commission, it laid down, *inter alia*, that it was “(a) to examine what provisions should be adopted in the definition of the principles which are to be applied in the field of the prevention of discrimination on grounds of race, sex, language, or religion”

58. G.A. Res. 103 (I) (1946).

59. G.A. Res. 616B (VII) (1952).

60. G.A. Res. 2017 (XX) (1965).

On the same day the General Assembly adopted a Draft Declaration on the Elimination of All Forms of Religious Intolerance, and a Draft International Convention on the Elimination of All Forms of Religious Intolerance. G.A. Res. 2020 (XX) (1965).

adopted a Draft International Covenant on Human Rights.⁶¹ This was followed by another resolution on December 21, when a Draft International Convention on the Elimination of All Forms of Racial Discrimination was adopted.⁶² The year 1965 was also declared an International Year for Human Rights by a General Assembly's unanimous Resolution.⁶³ March 21, 1965, was set aside as a Commemoration of the International Day for the Elimination of Racial Discrimination. This coincided with the 20th Anniversary of the Declaration of Human Rights. As a follow-up, an International Conference on Human Rights was held in Teheran, Iran, between April 22-May 13, 1968, which declared the Universal Declaration of Human Rights as legally binding.

The protection of human rights has been directed against the practice of *apartheid* in South Africa. In 1962, the General Assembly established the Special Committee on the Policies of *Apartheid* of the Republic of South Africa.⁶⁴ The functions of the Committee were "(a) to keep the racial policies of the Government of South Africa under review; (b) to report either to the Association or to the Security Council or to both as the need may arise." The General Assembly also proclaimed March 21, as an International Day for the Elimination of Racial Discrimination to commemorate the anniversary of the Sharpsville Massacre of 1960.⁶⁵

The General Assembly in 1965 called for the convening of an International Seminar on *apartheid* scheduled for 1966.⁶⁶ In response to this call a United Nations Human Rights Seminar was held in Brasilia, Brasil, between August 23 and September 5, 1966. On the Agenda were "measures to be taken for the elimination of *apartheid* and the achievement of a society free from racial discrimination." In 1966 the Secretary-General of the U.N. was called upon to establish a unit within the United Nations Secretariat *to deal exclusively with apartheid and to bring its evils to publicity.*⁶⁷ As a result of this request the "Unit of *Apartheid*" was established in 1967. The Secretary-General, in response to a Security Council Resolution of December 4, 1963,⁶⁸ appointed four experts, (the 5th person appointed on the 27th), on January 13, *to examine the problem of apartheid in South Africa.*

One might argue that, in the case of the General Assembly Resolutions, and the Declaration of Human Rights, States have explicitly declined any legally binding commitments. The absurdity of such contention lies in the fact that these instruments relate to human rights; and that under Article 56 of the U.N. Charter "all members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." One of the purposes set forth in Article 55 is precisely the commitment of the United Nations to the promotion of "universal respect and observance of

On November 18, 1965, the General Assembly resolved to take measures to accelerate the promotion of respect for Human Rights and Fundamental Freedoms. G.A. Res. 2027 (XX) (1965). The General Assembly Resolution 2060 (XX) of December 16, 1965 established Advisory Services in the field of Human Rights.

61. G.A. Res. 2080 (XX) (1965).

62. G.A. Res. 2106 (XX) (1965).

63. G.A. Res. 2081 (XX) (1965). 1968 was also declared an International year on Human Rights.

64. G.A. Res. 1761 (XVII) (1962).

65. G.A. Res. 2142 (XXI) (1966).

66. G.A. Res. 2060 (XX) (1965).

67. G.A. Res. 2144A (XXI) (1966).

68. S.C. Res. (1963).

human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." It cannot be imagined how a Member of the U.N. can accept and uphold the principles of the U.N. Charter, and pledge itself to honor the objectives of Article 55, and at the same time argue that it is not under legal obligations to respect its pledge. In this connection Judge Tanaka had this to say:

. . . those who pledge themselves to take action in cooperation with the United Nations in respect of the promotion of universal respect for, and observance of, human rights and fundamental freedoms cannot violate, without contradiction, these rights and freedoms. How can one, on the one hand, preach respect for human rights to others and, on the other hand, disclaim for oneself the obligation to respect them? From the provisions of the Charter referring to the rights and fundamental freedoms it can be inferred that the legal obligation to respect human rights and fundamental freedoms is imposed on member States.⁶⁹

Not only the United Nations but also other international organizations have taken positive steps in the direction of observing human rights. The clearest example of such an international body is the Council of Europe. One of the major achievements of the Council is the production of the European Covenants for the Protection of Human Rights and Fundamental Freedoms. In addition, the Council has been able to establish the European Commission for Human Rights, and the European Court for Human Rights. Attempts at similar achievements have been recorded with the Organization of American States as well as on the African continent.

The following conclusions can be deduced from the foregoing analysis. Firstly, the idea of protecting human rights is not recent. Secondly, beyond the stage of recognition, general international law has propagated attempts, at both global and national levels, to actually protect human rights, notwithstanding the sovereignty of the state. Finally, the United Nations has emerged and assumed the role of a human rights guarantor both as an end in itself and as an essential constituent in the quest for international peace and security.

The Declaration may not, as usually suggested, be formally binding, not being a treaty, but this does not undermine its major importance. As Mr. Dag Hammarskjöld, a former Secretary-General of the U.N., commented in 1958:

The Declaration has acquired authority of growing importance. As a living document, it has had a considerable impact and its influence is

69. South West African Cases, [1966] I.C.J. 289 - (Dissent). He argued further:

" . . . There is little doubt of the existence of human rights and fundamental freedoms; if not, respect for these is logically inconceivable; the Charter presupposes the existence of human rights and freedoms which shall be respected, the existence of such rights and freedoms is unthinkable without corresponding obligations of persons concerned and a legal norm underlying them. Furthermore, there is no doubt that these obligations are not only moral ones, and that they also have a legal character by the very nature of the subject matter." *Id.* at 289-90.

The General Assembly itself in its resolution of 1961 clearly pointed out that *apartheid* "is totally inconsistent with South Africa's obligations as a Member State and that continuance of *apartheid* seriously endangers international peace and security." G.A. Res. 1663 (XVI) (1961).

The Assembly has on a number of occasions called on South Africa to fulfill its obligations under Article 56 of the Charter by renouncing its racial policies: G.A. Res. 917 (X) (1955); G.A. Res. (1016)(XII) (1957); G.A. Res. 1248 (XIII) (1958); G.A. Res. (XIV) (1959).

Judge Tanaka again says:

"From the provisions of the Charter referring to the human rights and fundamental freedoms it can be inferred that the legal obligation to respect human rights and fundamental freedoms is imposed on member states." *Id.* at 289.

reflected not only in the work of the United Nations itself, but in international treaties and national legislation.⁷⁰

The United States Supreme Court has relied on the Declaration in its judgment of the case, *Lincoln Union v. Northwestern Co.*,⁷¹ to up-hold the validity of state laws guaranteeing a person an opportunity to obtain or retain employment whether or not he is a member of the labor organization. Mr. Justice Frankfurter, concurring, observed that Article 20(2) of the Universal Declaration of Human Rights had declared that no "one shall be compelled to belong to an association" and concluded that it would therefore be contrary to the aims of the Declaration to compel one to be a member of a labor union.

Among the categories of resolutions agreed upon as binding are: resolutions of a constitutive nature; resolutions that relate to the internal organization and functioning of the United Nations of any of its organs; resolutions that interpret or implement the provisions of the United Nations; and more generally, General Assembly resolutions which reflect customary rules of international law either at the time of adoption or by reason of subsequent developments. Quite apart altogether from these instances, General Assembly resolutions may have other law-making attributes.

The world social process has undergone such a tremendous evolution within the past quarter of a century with the establishment of the United Nations that it will be out of tune with the social advancements of the global community for us to continue to rely on the traditional notions of international law.⁷² If the United Nations, at this present stage of human history, cannot, through the General Assembly, prescribe binding norms, then it is imperative that new theories about international law must be developed.⁷³

70. Annual Report by the Secretary-General on the Work of the Organization, 13 U.N. GAOR Supp. 1A at 5, U.N. Doc. A/3844/Add., (1958).

Ten years later Mr. U Thant also made a similar statement at the International Conference on Human Rights, Tehran, Iran. He observed that 43 recently enacted Constitutions had clearly been inspired by the Universal Declaration of Human Rights.

71. 335 U.S. 525, 695 S.Ct. 251, 93 L.Ed. 212 (1949).

72. Traditionally, international law is supposed to be of a binding effect through *consent*. But consent is such a slippery word that it is very difficult, (probably, apart from the signing and ratification of a treaty), to claim that a state has fully consented to be bound by a particular prescription of international law. The usual method adopted in determining whether consented to be bound by any such prescription is an inference from behavior or conduct. In this field the words of Raman are cogent: . . . although the participants involved in a practice may not have any intention of establishing a legal prescription, their behavior may yet leave that impression on the community affected by the practice and accordingly determine what is lawful in similar future situations.

73. A number of writers have suggested that the General Assembly Resolutions should be considered as capable of creating a prescription of International Law. See, e.g. *The Adequacy of Contemporary International Law — Gaps in Legal Thinking*, 50 Va. L. Rev. 246 (1964). Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 A.J.I.L. 782-791 (1966); O. Asamoah, *THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS*. (1966); R. Higgins, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS*. (1963). Falk writes:

To find that a rule of international law has emerged from the acts of condemnation and declaration by the General Assembly is to endorse and augment the trend toward substituting *consensus* for *consent* as the basic law-creating energy in international law.

Judge Tanaka in his dissenting opinion in the South West African Cases, (2nd phase) said:

. . . The method of generation of customary international law is in the state of transformation from being an individualistic process to being a collective process. 1966 I.C.J. 294.

He had earlier stated:

The appearance of organizations such as the League of Nations and the United Nations with their agencies and affiliated institutions, replacing an important part of the tradition individualistic method of negotiation by method of "Parliamentary diplomacy" . . . is bound to influence the mode of generation of customary international law. *Id.* at 291.

From the Charter of the United Nations, the Universal Declaration of Human Rights, the General Assembly Resolutions, the establishment of various organs and agencies to deal with human rights, the actions and statements by United Nations' agencies and organizations, and the behavior of states, it cannot be denied that there is a general flow of communication geared towards establishing a prescription of customary international law for the protection of human rights and fundamental freedoms. As Asamoah observed:

The practice of the United Nations shows that the principle of non-discrimination expressed in the Charter and the Universal Declaration of Human Rights has become accepted. The overwhelming number of Members consider racial discrimination as an infringement of the Charter obligations. If the power of the Organs to interpret the Charter has any significance, it can legitimately be claimed that the practice has established the illegality of racial discrimination in the enjoyment of political and civil rights as expressed in the Declaration.⁷⁴

This prescription of international law which is deemed to have emerged from the behavior of nation states in the U.N. and other arenas in respect to human rights is of such a great magnitude that it deserves to be classified as a "ius cogens." In the past quarter of a century deference for human rights has been generated to such an extent that any violation of them has attracted condemnation from the international community acting as a body, or from individual nation states acting on their own. It is this sacred and enviable position that human rights enjoy which entitles it to the status of "ius cogens."

Furthermore, the Universal Declaration of Human Rights and the pertinent other General Assembly resolutions can be regarded as binding in another sense. Under Article 38, the Statute of the International Court of Justice, the Court is required to rely on the "general principles of law recognized by civilized nations" as a source of international law.⁷⁵ The better view seems to be that reference to "general principles of law recognized by civilized nations" contemplates other than domestic law, i.e. to principles which states in their external behaviors—either by affirmative votes or by toleration—have given currency to. A resolution adopted, especially unanimously, qualifies as a general principle of law in this sense. However, even if the reference contemplated domestic law, the Universal Declaration of Human Rights could claim the status of law under its aegis.

There is ample evidence in national constitutions and in decisions of national courts to show that states object to the violation of the principles guaranteeing

Asamoah declares:

The membership of the Assembly consists of states which are the recognized subjects and makers of international law. International law is basically the product of state acts consisting of practice developing into custom and the adoption of conventions . . . The resolutions of the General Assembly represent the collective acts of states, acts capable of creating customary international law. O. ASAMOAH, *supra* at 212-213.

74. The U.S. Supreme Court in the case of *Oyama v. California*, 332 U.S. 633, 68 S. Ct. 269, 92 L. Ed. 249 (1948) relied on the U.N. Charter as creating a source of legal obligation. Mr. Justice Murphy said:

Moreover this nation has recently pledged itself through the United Nations Charter to promote respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified by the United States is but one more reason why the statute must be condemned.

75. I.C.J. Stat., Art. 38(1)(c).

human rights on the basis of law. Almost all the states with written Constitutions have provisions guaranteeing human rights and fundamental freedoms.⁷⁶

III. INCOMPATIBILITY WITH UNIVERSAL DECLARATION

Once the concept of human rights is put on a legal footing, the conclusion is inevitable that *apartheid* doctrine and practice undermine and contradict it.

As one writer stated:

Invoked in the U.N. over the treatment of Indians, and *apartheid* in South Africa, and over Soviet labor camps; and over the restriction of movement of the Soviet wives of foreigners, *the Declaration has established the principle that the denial of human rights is a matter of international concern* and has gone far to remove Article 2(7) of the U.N. Charter as an obstacle to U.N. action.⁷⁷ [Emphasis added.]

More explicitly the International Court of Justice in its advisory opinion of 1971 on Namibia, observed:

Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations or national or ethnic origin which constitutes a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.⁷⁸

Any attempt to examine how the practice of *apartheid* in South Africa has violated all the provisions of the Declaration will be endless. It suffices to rely on a few to establish the fact that the respect for human rights and fundamental freedoms required by the Declaration and the U.N. Charter have no place in South Africa.

Articles 1 and 2 of the Declaration recognize the equality of all human beings and exclude distinctions based on race, color, sex, language or religion. But the very nature of South Africa's *apartheid* is violently opposed to these principles. The Population Registration Act of 1950, and the Provisions of Separate Amenities Act of 1953, for example, are geared towards inequality in the treatment of the African peoples. The right to life, liberty and security of person provided under Article 3 of the Declaration is also denied in South Africa. In South Africa, one can easily be detained under house arrest under the General Amendment Act of 1962, and also under the 180-day detention law, provided in the Criminal Procedure Amendment Act, 1965.⁷⁹ Freedom of movement and residence set out under Article 13(1) of the Declaration is another right which cannot be exercised freely in South Africa. The Native Law Amendment Act, No. 36 of 1957, forbids Africans from entering certain areas for the purposes of attending church services. Under the Bantu (Urban Areas) Consolidation Act, No. 25 of 1945, (as amended), an African loses his area of residence if he leaves

76. See *supra*, note 55.

77. Article by Fawcett, *Protection of Human Rights on a Universal Basis: Recent Experience and Proposals*, in HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW 290 (1968).

78. Namibia Case [1971] I.C.J. 57.

The Commission on Human Rights in its Resolution 3 (XXIV) of 1968 denounced the laws and policies of *apartheid* and condemned ". . . the Government of South Africa for its perpetuation and intensification of the inhuman policy of *apartheid*, in complete and flagrant violation of the Charter of the United Nations and the Universal Declaration of Human Rights."

79. Proclamation 400 also authorizes the arrest and detention of persons for any indefinite period in the Transkei Province, under the Native Administration Act of 1927.

the area for specific periods laid down in the Act; or he may be compelled to surrender his place of residence when he is required to move to a different residential place. The creation of the Bantustans, or the so-called African Homelands, compels Africans to live in specific areas only.

The Population Act offends the equality-before-the-law principle provided in Article 7 of the Declaration. The Natives (Prohibition of Interdicts) Act also denies Africans equal protection before the law. This particular Act takes away from Africans, threatened with forcible removal, the right to apply to the courts for an interdict restraining illegal removal. The provision against arbitrary arrest and detention under Article 9 of the Declaration is violated in many instances. Under the Pass Laws Africans can be arrested at any time and at any place for failure to produce their reference cards. The 180-day clause offers another example of cheap detention of people, even, incommunicado, without trial and for long periods. Section 36 of the Native Laws (Amendment) Act authorizes the arrest and detention of Africans, "without warrant," suspected of being idle or undesirable.

Article 16(1) of the Declaration guarantees the right of marrying somebody of one's own choice; but in South Africa one does not have the absolute choice of whom to marry. Under the Prohibition of Mixed Marriages Act, 1949, marriages between whites and non-whites are prohibited. Even those who contracted any such marriage before the passage of the Act, become guilty of an offense under the Immorality Acts, if they continue to cohabit.

Apartheid policy denies freedom of expression as is required by Article 19 of the Declaration. Newspaper may be banned under the Suppression of Communism Act of 1950. Sections 10 and 20 of the General Laws Amendment Act also deny freedom of expression.⁸⁰ The freedom of association provided for in Article 20(1) of the Declaration is severely restricted by the Suppression of Communism Act and the Unlawful Organizations Act. By these two enactments, Africans are debarred from organizing themselves politically. In 1953 the Government prohibited any meeting involving more than 10 Africans. Nor are Africans, under the Native Laws Amendment Act of 1957, entitled to attend church services in certain residential areas.

The Africans in South Africa have no representation in the government of the country, and therefore have no say in the prescription process of the Land. The Promotion of Bantu Self-Government Act, No. 46 of 1959, which repealed the Representation of Natives Act of 1936, abolished African Representation in Parliament,⁸¹ in violation of Article 21(1) of the Declaration, according to which

80. The International Commission of Jurists in its Bulletin No. 8 summarizes the situation: Burning problems exist in South Africa. Differences of opinion naturally follow, but only certain groups of the population are permitted to hold and express their views. The overwhelming majority, the so-called Blacks and Coloreds, are not allowed to have or to hold any political views. To express a view contrary to the ruling minority of the privileged race may constitute a crime for which a heavy penalty may be paid. The law does not provide a way in which a different opinion can be registered. It cannot be expressed outside of Parliament because that would constitute treason. Nor can it be voiced inside Parliament, because the people who are likely to hold a different opinion have no direct representation in Parliament. The law does not afford equal protection. There appears to be one law for the whites and another for the non-white.

81. The South African Government terms this "Bantustan" or the so-called African Homelands. The International Commission of Jurists in its 1960 Report, *South Africa and the Rule of Law*, said: What the Bantustan plan does is to remove finally all existing political rights based on parliamentary representation, however disproportionate and inadequate they may have been, and to offer nebulous premises for the future in their stead.

“everyone has the right to take part in the government of his country directly or through freely chosen representatives.”

IV. FUTURE PROSPECTS

We have attempted to show that the world community favors respect for and the protection of human rights and fundamental freedoms. Apart altogether from its legal posture *apartheid* poses problems, not only for its victims, but for the world as a whole. In its 1967 study on *apartheid* in South Africa, the International Commission of Jurists observed that:

The disregard for human rights in South Africa emphasizes the need for effective international machinery for the protection of human rights throughout the world. The task of substituting the rule of law for racial intolerance, arbitrariness and force is vital and urgent in Africa and in the rest of the world.

Also, U Thant once said:

The proponents of racial discrimination have historically been the most emotionally backward and most spiritually bankrupt members of the human race There is the clear prospect that racial conflict, if we cannot curb and finally eliminate it, will grow into a destructive monster compared to which the religious and ideological conflicts of the past and present will seem like small family conflict. Such a conflict will eat away the possibilities for the good of all that mankind has hitherto achieved and reduce man to the lowest and most bestial level of intolerance and hatred. This, for the sake of our children, whatever their race or color, must not be permitted to happen.⁸²

The Report of the Special Committee on *Apartheid* submitted to the 18th Session of the General Assembly, also stated:

. . . in the context of the historic developments in Asia and Africa since the establishment of the U.N. the policies and actions of the Republic of South Africa have . . . become a constant provocation to peoples beyond the borders of the Republic who feel an affinity with the oppressed people of South Africa, and to all opponents of racism everywhere. *They constitute a serious threat to international peace and security.*⁸³ [Emphasis added.]

In the light of the real and present danger the threat that *apartheid* poses to international peace and security requires the dismissal of arguments based upon Article 2(7). Article 2(7) of the U.N. Charter does not exist in a vacuum. It must be read together with the other provisions of the Charter, otherwise the construction of it will defeat the very purpose of the Charter as a whole.

Any construction of the Charter according to which Members of the U.N. are, in law, entitled to disregard and to violate human rights and fundamental freedoms is destructive of both the legal and the moral authority of the Charter as a whole. It runs counter to a cardinal principle of construction according to which treaties must be interpreted in good faith.⁸⁴

The General Assembly has described the establishment of the Bantustan as “fraudulent.” G.A. Res. 2671 (XXV) (1971).

82. Address before the Algerian National Assembly, February 4, 1964. See 1 OBJECTIVE JUSTICE 2 (U.N. 1964).

83. 12 INT. REV. SERV. *supra*, at 58-59.

84. H. LAUTERPATCHT, INTERNATIONAL LAW AND HUMAN RIGHTS 149 (1950).

He adds:

. . . that a matter is essentially within the domestic jurisdiction of the state only if it is not regulated by international law or if it is not capable of regulation by international law. There are few of such matters, if any. *op. cit.*, p. 175.

Furthermore, the prominence accorded to fundamental human rights in the U.N. Charter is not compatible with a characterization of *apartheid* as an internal affair. On the contrary, it is a repudiation of a Member's obligations under the Charter.

. . . [I]n interpreting Article 2, paragraph (7) of the Charter the Members and the organs of the U.N. ought to act on the view that in adopting Article 2 paragraph (7), the authors of the Charter did not, either inadvertently or by design, introduce a disintegrating element into the Charter; that in excluding matters which are essentially within the domestic jurisdiction of states they did not include within that exception matters which are subject of international obligations (for these are not essentially within the domestic jurisdiction of states); that these international obligations include the observance of and respect for human rights and fundamental freedoms—on the fundamental principles of the Charter; and that as the practice of the U.N. has shown, a matter is no longer essentially within the domestic jurisdiction of a state if it has become a matter of international concern to the extent of becoming an actual or potential danger to the peace of the world.⁸⁵

In light of the foregoing, the remaining relevant question appears to be: What tools are available to the international community for combating *apartheid*? Within the operative constraints in the international legal system, the following four methods of redressing the gross violations of human rights that *apartheid* entails may be considered:

First, the United Nations could conceivably use force. Legal authority to do so exists under Chapter VII of the Charter, should the Security Council determine a threat to the peace, breach of the peace or act of aggression on the part of South Africa. Also precedent for such a course can be found in the Korea and the Congo questions where armed force was used by the United Nations in the face of threats to the peace from within a state. This course, however, is the least likely. There is no doubt that it would be forestalled by the use of the veto power in the Security Council. At any rate, it is perhaps also the least commendable. In view of South Africa's massive defense arsenals, attempted force by the United Nations would in all probability most hurt the very people whose rights are intended to be vindicated by it.

Second, the United Nations could intensify and continue its use of economic sanctions for which Chapter VII again provides legal authority. Such sanctions could have marked effects on the South African economy and constrain its government to defer to world public opinion. Although economic sanctions would undoubtedly, at least initially, be most injurious to the African, it is doubtful that the country as a whole could continuously weather their long term impact. On the contrary, in long term considerations, it cannot be excluded that a prolonged economic squeeze at the lower social strata might be most conducive to discontent, disorder, and resolution. However, the problem with economic sanctions is that lip service commitment at most would be paid to it. The major trading partners of South Africa whose contribution would be indispensable to the success of sanctions are unlikely to be persuaded by appeals to human rights concerns. Britain, for instance, has never minced words in exposing how dearly her own economy depends upon that of South Africa. In her view, sanctions

85. Lauterpatcht, *supra* at 177-78.

would create extensive unemployment in British industry . . . and would mean heavy loses at a moment when it was essential for the United Kingdom to increase its exports. It might mean a worsening of approximately 300 million a year in the balance of payments.⁸⁶

Thus, while sanctions may continue to be attempted, they are by themselves an insufficient means to the ends and must be coupled with other tools.

A third method consists in the continued application of political and diplomatic pressure by the international community of both states and non-state organizations. There is evidence of South African sensitivity to isolation from world forums. For instance: threats of exclusion from some international sports have not infrequently resulted in the presentation of an integrated South African team. This attitude is particularly characteristic of the tactics that country displays in respect to Namibia. In this connection should be appraised the moves by some African states to expel South Africa from all international organizations—including the United Nations itself. The on-going process of exclusion and isolation need not be confined to the intergovernmental sphere but can conceivably be pursued by private individuals with respect to products of South African origin or connection.

A fourth method is to encourage solution from within. Barring evidence of a willingness to adopt the necessary reform measures, this could consist of aid to groups in active opposition to the *status quo* along the traditional lines of support to national liberation or resistance movements. Actually, this appears to be an inevitable alternative in the face of the South African ultimatum that "either the White man dominates or the Black man does so."⁸⁷ More importantly, its necessity seems well within the grasp of the people most proximately affected. As a Namibian liberationist put it:

I have come to know that our people cannot expect progress as a gift from anyone, be it the United Nations or South Africa. Progress is something we shall have to struggle and work for. And I believe that the only way in which we shall be able and fit to secure that progress is to learn from our own experience and mistakes.⁸⁸

86. Statement to the General Assembly Special Special Political Committee, December 6, 1965. U.N. Doc. A/SPC/SR. (1965) (10).

87. Human Rights are commonly associated with the right to life, liberty, freedom of speech, freedom of association, etc. In the Virginian Bill of Rights of June, 1776, it was stated:

. . . that all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity: namely, the enjoyment of life, and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness.

Similarly the Declaration of the American Independence in July, 1776 saw the following declaration:

We hold these truths to be self-evident: that all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.

The famous three words of the French Revolution were "*Life, Liberty and Fraternity.*"

88. Statement by Toivo Herman Ja Toivo during the Terrorism Trial of 1967, *EROSION OF THE RULE OF LAW IN SOUTH AFRICA*, *supra*, at 58.

Professor Falk in his Report on the Terrorism trial wrote:

Evidence was presented while I was in court suggesting that several of the defendants turned toward insurrectionary violence in 1966 soon after discovering that the International Court of Justice would not provide them with any prospect of redress of their grievances. Several of the defendants were actually listening to the judgment "in the bush" and were evidently led to pursue "illegal" and violent remedies after this last prospect of international relief was brought to an end. *Id.* at 50.

Not a single one of these methods may alone suffice to bring about the desired and overdue change. Change too can probably not be realistically expected overnight. Nonetheless the ultimate stakes at issue are so compelling as to justify the resources and perserverance requisite for combating *apartheid*. But in the final analysis, it is the African upon whom much depends. Either he eliminates *apartheid* or *apartheid* eliminates him.

