

International Legal Action Against *Apartheid*

Professor David Weissbrodt*
and Georgina Mahoney**

Apartheid in Southern Africa represents one of the greatest challenges, one of the greatest success stories, and one of the most frustrating defeats of the international human rights movement. This article *first* introduces international human rights and the international law of human rights—particularly as they relate to *apartheid*. *Second*, the article sketches the work of the International Court of Justice, which has rendered three significant human rights decisions concerning Namibia. Having begun to discuss Namibia, the article also examines the work of the Security Council, General Assembly, and other United Nations bodies concerning Namibia.

Third, having discussed Namibia, it is logical to consider the other geographical areas where there have been significant and successful international action against *apartheid* in the southern African region: Rhodesia/Zimbabwe. *Fourth*, the article reviews international legal action in regard to South Africa itself. The presentation on South Africa has been organized around the institutions which have helped to establish the international legal consensus that *apartheid* is a criminal offense against humanity. Accordingly, this fourth section starts with treaties, then moves on to the Security Council, the General Assembly, other United Nations bodies, and finally a brief view of United States court activity.

I. Human Rights and the International Law of Human Rights

One can trace the origins of the international human rights movement back to the nineteenth century efforts to abolish slavery¹ and to the formation of the Red Cross to give relief to the

* Professor of Law, University of Minnesota. This brief article was initially presented as introductory remarks for a program on October 11, 1985, entitled "Apartheid and American Lawyers" sponsored by the Minnesota Minority Lawyers Association. The author wishes to express his gratitude to Theodore J. May for his help in preparing this article.

** University of Minnesota Law School, class of 1986.

1. Sherman Carroll, *The Nineteenth-Century British Anti-Slavery Movement*

wounded and prisoners of war.² One can even look back to declarations such as the United States Bill of Rights in the eighteenth century.³ Nevertheless, most observers point to the formation of the United Nations as the beginning of the modern struggle to implement international human rights.⁴ Since then, as Harlan Cleveland of the University of Minnesota Humphrey Institute has pointed out, international human rights has become the world's first universal ideology.⁵ Religions, political philosophies, and economic ideas have adherents in various parts of the world, but human rights represents an idea which now has worldwide acceptance.

In joining the United Nations, every government undertook to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."⁶ The prominence of the prohibition against racial discrimination is noteworthy in this seminal provision of the U.N. Charter.⁷

Soon after the formation of the United Nations forty years ago, a group of delegates headed by Eleanor Roosevelt sought to clarify this international obligation by promulgating the Universal

(1977) (on file with *Law & Inequality*); Shridath Ramphal, 'Some in Light and Some in Darkness': The Long Shadow of Slavery (1983).

2. See David Forsythe, *Humanitarian Politics: The International Committee of the Red Cross* (1977); Richard Perruchoud, *Les Resolutions des Conferences Internationales de la Croix-Rouge* (1979).

3. See Louis Henkin, *International Human Rights and Rights in the United States*, in *Human Rights in International Law: Legal and Policy Issues* 25, 27-31 (Theodor Meron ed. 1984) [hereinafter Meron]; Louis Henkin, *Constitutional Fathers—Constitutional Sons*, 60 Minn. L. Rev. 1113, 1114-15 (1976).

4. See Richard Bilder, *The Status of International Human Rights Law: An Overview*, in *International Human Rights Law and Practice* 1, 1 (James Tuttle ed. 1978) [hereinafter *International Human Rights*].

5. See *Reconciling Human Rights and U.S. Security Interests in Asia: Hearings Before the Subcomms. on Asian and Pacific Affairs and on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 485, 492 (1982) (statement of Harlan Cleveland, Director of the Hubert H. Humphrey Institute of Public Affairs, University of Minnesota).

6. U.N. Charter art. 55.

7. See Jack Greenberg, *Race, Sex, and Religious Discrimination in International Law*, in Meron, *supra* note 3, at 307, 309; Karl Partsch, *Fundamental Principles of Human Rights: Self-Determination, Equality and Non-Discrimination*, in 1 *The International Dimensions of Human Rights* 61, 70, 73, 75-81 (Karel Vasak ed. 1982). The drafters of this provision listed racial discrimination first and found discrimination such a significant violation of human rights that it deserved proscription in the UN Charter itself. See Warwick McKean, *Equality and Discrimination Under International Law* 54-55 (1983); see also Marc Bossuyt, *L'Interdiction de la Discrimination dans le Droit International des Droits de l'Homme* 12-13 (1976). The prominence of this prohibition against racial discrimination is, of course, very relevant to the situation in South Africa.

Declaration of Human Rights.⁸ The Declaration represents the most authoritative definition of human rights in existence: it has found its way into many national constitutions⁹ and parts have become recognized as international customary law.¹⁰ Article one of the Declaration states: "All human beings are born free and equal in dignity and rights."¹¹ Article two states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinctions of any kind, such as race, colour, sex, language, religion, etc. . . ."¹² Again, the issue of racial discrimination is given prominence.

In addition to the Charter and the Universal Declaration, the United Nations and other bodies have proceeded to develop further international standards in the area of human rights—more than exist in any other area of international law.

Those lawyers schooled principally in the United States might object: "What good are these international standards if there is no way to enforce them? We do not have an international police force or army." The answer to this question is that international human rights can be achieved through the techniques of advocacy, persuasion, threats of public exposure, embarrassment, and ultimately, political and economic isolation of the violator. Although these techniques are not commonly used in the United States legal system, where courts have power to punish and enjoin, these international human rights techniques can be effective. Thanks to these techniques, some death sentences are voided,¹³ some "disappeared" persons re-appear,¹⁴ some persons receive

8. *Universal Declaration of Human Rights*, G.A. Res. 217 (III), U.N. Doc. A/810, at 71 (1948), reprinted in *Human Rights: A Compilation of International Instruments* at 1, U.N. Doc. ST/HR/1/Rev.2, U.N. Sales No. E.83.XIV.1 (1983) [hereinafter *Human Rights Compilation*].

9. Egon Schwelb, *Human Rights and the International Community* 50-55 (1964); Egon Schwelb, *The Influence of the Universal Declaration of Human Rights on International and National Law*, 53 Am. Soc'y Int'l L. Proc. 217, 223-26 (1959).

10. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

11. *Universal Declaration of Human Rights*, *supra* note 8, at 72, in *Human Rights Compilation*, *supra* note 8, at 1.

12. *Id.*

13. *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories: Report by the Special Rapporteur, Mr. S. Amos Wako*, 40 U.N. ESCOR (Agenda Item 12) at 9, U.N. Doc. E/CN.4/1984/29 (1984) (Guatemala suspended the death sentences imposed by courts of special jurisdiction).

14. See *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Question of Enforced or Involuntary Disappearance: Report of the Working Group on Enforced or Involuntary Disappearances*, 42 U.N. ESCOR (Agenda Item 10(c)) at 105-06, U.N. Doc. E/CN.4/1986/18 (prov. ed. 1986).

fairer trials¹⁵ or escape torture,¹⁶ and some oppressive governments fall.¹⁷

II. Actions Against *Apartheid*: The International Court of Justice and Namibia

It seems best to begin with the International Court of Justice (I.C.J.), or World Court, not only because the Court has received considerable media attention, but also because the Court does its work through the adversarial model which United States lawyers know better than other international procedures.¹⁸ The I.C.J. cooperates with other UN bodies in settling a variety of legal questions, including many human rights issues. In fact, several human rights treaties expressly confer jurisdiction on the I.C.J.¹⁹

The International Court of Justice decided several significant cases involving the former German colony of South West Africa,

15. See David Weissbrodt, *International Trial Observers*, 18 Stan. J. Int'l L. 27, 112-14 (1982).

16. Amnesty International, *Torture in the Eighties* 27-76 (1984).

17. With regard to all aspects of human rights implementation, it is particularly difficult to demonstrate the causal connection between efforts and actual improvements. Nevertheless, it is noteworthy that countries such as Uruguay have credited international human rights pressure with helping to establish new governments which are more respectful of human rights norms. See David Weissbrodt, *Report on the Forty-First Session of the U.N. Commission on Human Rights*, AIUSA Legal Support Network Newsl., Mar. 1985, at 8, 13-14.

18. The International Court of Justice (I.C.J.) is the successor to the Permanent Court of International Justice (P.C.I.J.), established in 1921 by the Assembly of the League of Nations. With the advent of the United Nations, the I.C.J. took over the functions of the P.C.I.J. See U.N. Charter art. 92. The I.C.J. possesses four types of jurisdiction: (1) advisory jurisdiction to consider issues where the views of the Court are requested by the General Assembly, Security Council, or other U.N. bodies. See U.N. Charter art. 96; (2) contentious jurisdiction whereby the parties to an international legal dispute bring a matter to the Court by *compromis* or specific agreement. Statute of the International Court of Justice art. 36, para. 1; (3) contentious jurisdiction whereby a party to an international convention brings a dispute against another party to that treaty which provides for references of matters to the I.C.J. *Id.*; and (4) contentious jurisdiction whereby a state which has accepted the compulsory jurisdiction of the Court brings a case against another country which has accepted the Court's compulsory jurisdiction. *Id.* at para. 2. See also Shabtai Rosenne, *The Law and Practice of the International Court* 292-331, 364-421, 698-757 (1975). The Court has recently received public attention because the United States has recently withdrawn its acceptance of the I.C.J.'s compulsory jurisdiction. See *United States: Department of State Letter and Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction*, 24 Int'l Legal Materials 1742 (1985).

19. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, *approved and proposed for signature* Dec. 9, 1948, art. XI, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter *Genocide*], reprinted in *Human Rights Compilation*, *supra* note 8, at 56; see also *Highlights of Forty Years of United Nations Efforts on Behalf of Colonial Countries and Peoples*, Objective: Justice, June 1985, at 11-12 [hereinafter *Highlights of Efforts*].

which is now known as Namibia. The first case arose from a request in 1949 by the General Assembly²⁰ of the United Nations for an advisory opinion as to the legal status of the territory of South West Africa.²¹ The case dealt with the League of Nations' 1920 decision to give South Africa an international mandate to administer South West Africa.²² After the formation of the United Nations and the dissolution of the League of Nations, the U.N. General Assembly invited states administering territories under the League of Nations mandates²³ to submit trusteeship agreements for the General Assembly's approval.²⁴ South Africa asked the General Assembly if it could take this land and make it part of South Africa.²⁵ The General Assembly refused and requested that South West Africa be placed under the international trusteeship system.²⁶ In response, South Africa refused to comply with the reporting requirements of the trusteeship system, whose goal is to end colonialism and allow new nations to achieve independence.²⁷

In 1949, the General Assembly asked the I.C.J. to render an advisory opinion on the status of South West Africa and on the ob-

20. G.A. Res. 338 (IV), U.N. Doc. A/1251, at 45 (1949). The General Assembly consists of representatives from all the member states of the United Nations. U.N. Charter art. 9, para. 1. The General Assembly and, under its authority, the Trusteeship Council, receive reports and generally supervise the administration of trust territories with a view to "progressive development towards self-government or independence." U.N. Charter arts. 16, 76, 87.

21. International Status of South West Africa, 1950 I.C.J. 128 (Advisory Opinion of July 11).

22. *Id.*

23. Under the League of Nations mandate, South Africa undertook to "promote to the utmost the material and moral well-being and the social progress of the inhabitants" of South-West Africa. *Id.* at 133. See generally Louis Sohn & Thomas Buergenthal, International Protection of Human Rights 337-504 (1973).

24. G.A. Res. XI (I), U.N. Doc. A/64, at 13 (1946). The trusteeship agreements would comply with the provisions of article 76 of the United Nations Charter, including such objectives as "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement." U.N. Charter art. 76(b). Trusteeship agreements would also "encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world." U.N. Charter art. 76(c).

25. South Africa was probably motivated by the many natural resources including copper, diamonds, lead, lithium, silver, and zinc, which are found in Namibia. See *U.S. Interests in Africa: Hearings before the Subcomm. on Africa of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. app. 2 at 504 (1980) [hereinafter *Africa Hearings*].

26. G.A. Res. 65 (I), U.N. Doc. A/64/Add.1, at 123-24 (1946).

27. See Sohn & Buergenthal, *supra* note 23, at 374.

ligations of South Africa in regard to the territory.²⁸ The following year, the I.C.J. decided that South Africa's obligations under the mandate were still in force and that the General Assembly was competent to discharge the supervisory functions previously exercised by the League of Nations.²⁹

South Africa refused to submit to UN supervision in its administration of South West Africa. It continued to practice *apartheid* in the region. Ethiopia and Liberia instituted proceedings in the I.C.J. against South Africa for its failure to fulfill its obligations under the mandate it had received from the League of Nations and assumed by the United Nations.³⁰ This time the World Court found that the League of Nations Covenant had made no provision for state versus state actions.³¹ Hence, Ethiopia and Liberia were held to have no standing.

The ensuing world outcry against the World Court's unpopular decision had a very negative effect upon its stature.³² Since Ethiopia and Liberia lacked standing, the General Assembly asked the I.C.J. for an advisory opinion on the status of Namibia.³³ This time, in 1971, the I.C.J. declared South Africa's presence in Namibia to be illegal.³⁴ The court affirmed that distinctions based on race violate the UN Charter and that all member states of the UN had an obligation to refrain from supporting South Africa's illegal presence in Namibia.³⁵ Since the time of that historic decision, the World Court's decision has been cited for the proposition that the Charter imposes obligations on the member states to support human rights.³⁶ Indeed, as one reviews the history of the in-

28. International Status of South-West Africa, 1950 I.C.J. 128, 129 (Advisory Opinion of July 11).

29. *Id.* at 143-45.

30. South West Africa (Ethiopia v. South Africa; Liberia v. South Africa) 1966 I.C.J. 5 (Judgment of July 18); cf. U.N. Charter art. 77 (trusteeship system applies to territories under mandate).

31. South West Africa, 1966 I.C.J. at 29-33.

32. See Bin Cheng, *The 1966 South West Africa Judgment of the World Court*, 20 Current Legal Probs. 181 (1967). The decision caused violence in northern Namibia. John Dugard, *South West Africa and the "Terrorist Trial,"* 64 Am. J. Int'l L. 19, 21 (1970).

33. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 15 (Advisory Opinion of June 21).

34. *Id.* at 46.

35. *Id.* at 45, 46.

36. *Id.* at 57. See, e.g., Egon Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 Am. J. Int'l L. 337 (1972); Richard Lillich & Frank Newman, *International Human Rights: Problems of Law and Policy* 33-34 (1979); Richard Lillich, *The Role of Domestic Courts in Enforcing International Human Rights Law*, in *Guide to International Human Rights Practice* 223, 227-28, 241 (Hurst Hannum ed. 1984); 1974 Digest of the United States Practice in

ternational legal activity against *apartheid*, one is struck not only by the diversity of efforts but also by the way the case of South Africa has been used to develop very important international human rights law precedents which have been helpful with respect to countries in all parts of the world.³⁷

Even before the I.C.J. decision in 1971, the United Nations General Assembly in 1966 had terminated South Africa's mandate over South West Africa on the ground that South Africa had already disavowed the mandate by failing to fulfill its obligations thereunder.³⁸ The General Assembly decided that henceforth the territory would come under the direct supervision of the United Nations. Pursuant to Resolution 2248,³⁹ the UN established the Council for Namibia as the legal authority administering Namibia. The General Assembly proclaimed that, in accordance with the wishes of its people, South West Africa would henceforth be known as Namibia. The General Assembly then integrated under one trust fund—the UN Educational and Training Program for Southern Africa—the assistance funds for Namibia, South Africa, Rhodesia, and the Portuguese territories of southern Africa.⁴⁰

For the first six months, the Council for Namibia tried to operate in Namibia and work toward a smooth transition of governments. The Council soon decided, however, that the South African authorities simply were not going to cooperate.⁴¹ Hence, since 1967, the Council has essentially been working as a government in exile, with one office in New York City and another in Lusaka, Zambia.

In 1969, the Security Council condemned South Africa for its defiance of the authority of the United Nations.⁴² The Council recognized the legitimacy of the struggle of the Namibian people against the illegal presence of the South African authorities. The

International Law 125 (quoting address by George H. Aldrich, Acting Legal Advisor of the Department of State).

37. See John Carey, *United Nations' Double Standard on Human Rights Complaints*, 60 Am. J. Int'l L. 792 (1966); Howard Tolley, *The Concealed Crack in the Citadel: The United Nations Commission on Human Rights' Response to Confidential Communications*, 6 Hum. Rts. Q. 420, 442, 446 (1984).

38. *Highlights of Efforts*, *supra* note 19, at 21.

39. G.A. Res. 2248 (S-V), 5 U.N. GAOR Special Session Supp. (No. 1) at 1, U.N. Doc. A/6657 (1967). See also G.A. Res. 2145 (XXI), 21 U.N. GAOR Supp. (No. 16) at 2, U.N. Doc. A/6316 (1966).

40. *Highlights of Efforts*, *supra* note 19, at 22.

41. *Id.* The South African government has resisted the efforts of the United Nations to achieve independence for Namibia and to end the illegal South African occupation of that territory. *Report of the United Nations Council for Namibia*, 39 U.N. GAOR Supp. (No. 24) at 10, U.N. Doc. A/39/24 (Part I) (1984).

42. *Highlights of Efforts*, *supra* note 19, at 22-23.

Council requested member states to lend moral and material assistance to the armed struggle of the Namibian people.⁴³

In 1974, the Council for Namibia enacted the Decree on the Natural Resources of Namibia.⁴⁴ Under the decree, no person, corporation, or entity may search for, take, or distribute any natural resource, animal or mineral, found in Namibia. Any vehicle, ship, or container found to be transporting such resources is subject to seizure. Any person or entity violating the decree may be held liable for damages by the future government of an independent Namibia.⁴⁵

In 1976, the Council for Namibia established the Institute for Namibia.⁴⁶ The purpose of the Institute is to provide Namibians with education and training to help them in the struggle for independence and to administer the government once independence is won. The Institute is also located in Lusaka "until South Africa's illegal occupation of Namibia is terminated."⁴⁷

Between 1976 and 1978, the General Assembly and the Security Council drew up a program of action for Namibia's independence.⁴⁸ The program demanded free elections in Namibia, as well as universal suffrage. South Africa, however, proceeded with its own unilateral elections, the results of which were declared null and void by the General Assembly.⁴⁹

The United States has taken the position that South Africa illegally occupies Namibia. The United States filed a brief in the International Court of Justice arguing that South Africa possessed no right to continue its occupation of Namibia.⁵⁰ Nevertheless, the present United States Administration has introduced a new, rather extraneous, issue into the effort to achieve Namibian independence. The United States now contends that Cuban military advisors must depart from Angola before there can be independence for Namibia. In 1983, the General Assembly rejected these at-

43. *Id.*

44. Decree on the Natural Resources of Namibia, 29 U.N. GAOR Supp. (No. 24A) at 27-28, U.N. Doc. A/9624/Add. 1 (1974). *See also* G.A. Res. 3295 (XXIX), 29 U.N. GAOR Supp. (No. 31) at 106, 107, U.N. Doc. A/9631 (1974).

45. *Id.* This decree was probably intended not only to declare that South African mining and similar operations in Namibia were illegal, but also to discourage companies from exploiting or trading in these Namibian raw materials.

46. *Highlights of Efforts, supra* note 19, at 32.

47. *Id.* at 28-29.

48. *Id.* at 33-36.

49. *Id.* at 36.

50. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Pleadings vol. I at 843, 874 (Advisory Opinion of June 21) (Written Statement of the Government of the United States).

tempts to condition Namibia's independence on such extraneous issues.⁵¹ South Africa, however, has grasped at this single issue to excuse its continued presence in Namibia. Nevertheless, UN Secretary-General Javier Perez de Cuellar has indicated his willingness to go forward with the United Nations Plan for Namibian independence "without any preconditions."⁵²

Namibia has not yet gained independence. South Africa has made it clear that it has no intention of complying with either the letter or the spirit of the United Nations plan for Namibia. Namibian independence will be achieved only if the United States places sufficient political pressure on South Africa or if the South African government decides, as it did in regard to Rhodesia, that the defense of its parochial interests requires that it concentrate limited energies on South Africa alone.

III. Rhodesia/Zimbabwe

Lest one despair over Namibia, it is useful to keep in mind that international pressures were more successful in ending *apartheid* in another country—Southern Rhodesia. There UN sanctions, together with the pressure of internal armed conflict, finally brought down the racist government of Ian Smith and led to the formation of Zimbabwe.

The Rhodesia/Zimbabwe case may be the one in which, to date, sanctions were applied with the widest international support. Of course, it is difficult to gauge the effect of sanctions with precision. The impact of sanctions must be considered along with other factors affecting the economy and political strength of the sanctioned government.

In 1965, a white supremacist government in Rhodesia Unilaterally Declared its Independence (U.D.I.) from Britain.⁵³ The United Kingdom responded by imposing immediate sanctions and by asking the Security Council to support these sanctions. The following year, through Resolution 216, the Security Council declared

51. G.A. Res. 38/36 (B), 38 U.N. GAOR Supp. (No. 47) at 30, U.N. Doc. A/38/47 (1983). At the 1986 session of the United Nations Commission on Human Rights, a resolution was adopted which declared "the universal and categorical rejection of 'linkage' advanced by South Africa and her allies between the independence of Namibia and irrelevant and extraneous issues, such as the presence of Cuban forces in Angola." *Violations of Human Rights in Southern Africa: Report of the Ad Hoc Working Group of Experts*, 42 U.N. ESCOR (Agenda Item 6) at 4, U.N. Doc. E/CN.4/1986/L.18 (1986).

52. *Secretary-General Ready to Implement Namibian Independence Plan*, UN Monthly Chron., Apr. 1986, at 42.

53. Pieter Kuyper, *The Implementation of International Sanctions: The Netherlands and Rhodesia* 43 (1978).

U.D.I. to be illegal and a threat to the peace.⁵⁴ The Security Council then imposed a selective non-mandatory arms embargo.⁵⁵ This action was followed by more comprehensive mandatory sanctions (Resolution 253).⁵⁶ This resolution, explicitly based on Chapter VII of the Charter,⁵⁷ provided for a complete ban on all imports originating in Rhodesia, as well as imports to and investments in Rhodesia. Airlines were prohibited from flying there. Security Council Resolution 277 obligated member states to sever all diplomatic and military ties as well.⁵⁸

For a while, Rhodesia withstood the sanctions fairly well, thanks to countries such as South Africa, who did not comply with sanctions.⁵⁹ In the mid-seventies, however, Rhodesia began to feel the effects of the world economic recession and the dramatic rise in oil prices.⁶⁰

During the mid-seventies, Rhodesia was increasingly affected by the war for independence within its own borders. Before it was over, the war took 27,000 lives, most of them Blacks.⁶¹ When genuine majority rule was achieved in 1980, the consensus was that the sanctions, despite all their loopholes and violations, had a severely limiting effect on the Rhodesian economy.⁶²

IV. South Africa

Many ask whether the qualified success of international pressure against Rhodesia could be repeated elsewhere—in South Africa. Today, South Africa experiences greater world condemnation

54. S.C. Res. 216, 20 U.N. SCOR (1258th mtg.) at 8, U.N. Doc. S/INF/20/Rev.1 (1965).

55. S.C. Res. 217, 20 U.N. SCOR (1265th mtg.) at 8-9, U.N. Doc. S/INF/20/Rev.1 (1965).

56. S.C. Res. 253, 23 U.N. SCOR (1428th mtg.) at 5-7, U.N. Doc. S/INF/23/Rev.1 (1968). See also S.C. Res. 232, 21 U.N. SCOR (1340th mtg.) at 7, U.N. Doc. S/INF/21/Rev.1 (1966); S.C. Res. 388, 31 U.N. SCOR (1907th mtg.) at 6, U.N. Doc. S/INF/32 (1976).

57. U.N. Charter arts. 39-51.

58. S.C. Res. 277, 25 U.N. SCOR (1535th mtg.) at 5-6, U.N. Doc. S/INF/25 (1970). See also Margaret Doxey, *Economic Sanctions and International Enforcement* 67-79 (1980).

59. Doxey, *supra* note 58, at 67-79.

60. *Id.* at 78.

61. David Crary, *Whites Prosper Under Black Rule*, St. Paul Pioneer Press Dispatch, Oct. 6, 1985, at 11A, col. 1.

62. Robin Renwick, *Economic Sanctions* 56-58 (1981). See Lillich & Newman, *supra* note 36, at 421-58 (1979). The United States, which had adhered to UN sanctions against Rhodesia for six years, violated the embargo in 1972. It did not resume compliance with the Rhodesian sanctions until 1977 when it stopped importing chrome. See Act of Mar. 18, 1977, Pub. L. No. 95-12, 91 Stat. 22; Exec. Order No. 11,978, 42 Fed. Reg. 15,403 (1977); Student & Young Adult Div., UN Ass'n of the U.S.A., *Rhodesian Chrome* 27-30 (rev. ed. 1974).

for its human rights violations than any other nation. That condemnation is grounded principally upon international treaties and the decisions of United Nations bodies.

A. Treaties

Various international treaties have helped to establish the international legal consensus that *apartheid* is a criminal offense against humanity. Treaties form an important substantive body of international law; they directly create obligations for the state parties. Treaties may also create obligations for non-parties if they become part of customary law, as have several provisions of human rights treaties.⁶³ Hence, even though South Africa has not ratified any of the treaties discussed below except the United Nations Charter, it is affected by the collective actions of states which have ratified them, and South Africa may have obligations under such treaties if they are deemed to be part of international customary law.

Most relevant to the subject of this article is the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, promulgated by the General Assembly in 1973.⁶⁴ It condemns *apartheid* as a crime against humanity and obliges state parties to pass laws and other measures against *apartheid*. It obliges states to prosecute individuals who practice and promote *apartheid*. The treaty's definition of *apartheid* includes denial of life and liberty to persons because of their race, creation of ghettos for members of a particular racial group, and exploitation of the

63. Two criteria are used to determine whether a principle has attained the status of a rule of customary international law. First, there must be evidence of state practice, e.g., physical acts, claims, national laws, to show that the norm has been generally adopted by nations. See Michael Akehurst, *Custom as a Source of International Law*, 1974 Brit. Y.B. Int'l L. 1, 18, 53; Anthony D'Amato, *The Concept of Custom in International Law* 87-92 (1971). Second, the state practice should be accompanied by *opinio juris* or statements that certain conduct is required or forbidden, giving rise to an international legal obligation. See Akehurst, *supra*, at 31, 53. Treaties constitute a part of state practice, especially if accompanied by *opinio juris* or claims in the treaty or in the *travaux préparatoires* indicating that a treaty provision is a restatement of preexisting customary law. *Id.* at 53. Indeed, treaties provide the most accessible and authoritative source of customary international law. The Vienna Convention on the Law of Treaties recognizes in article 38 that a treaty may become "binding upon a third State as a customary rule of international law, recognized as such." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 38, 8 I.L.M. 679, 694 (*entered into force* Jan. 27, 1980).

64. International Convention on the Suppression and Punishment of the Crime of *Apartheid*, *opened for signature* Nov. 30, 1973, 1015 U.N.T.S. 243 (*entered into force* July 18, 1976) [hereinafter *Apartheid*], *reprinted in* Human Rights Compilation, *supra* note 8, at 29. See G.A. Res. 3368 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973).

labor of members of a particular racial group.⁶⁵ Seventy-seven governments have ratified the *Apartheid* Convention. Significantly, the United States has neither signed nor ratified this treaty, most likely because of United States concern about the possibility that its corporations doing business in South Africa might be violating the treaty.

More than 120 governments have ratified the International Convention on the Elimination of All Forms of Racial Discrimination, which specifically condemns *apartheid*.⁶⁶ In addition, under the Convention on the Prevention and Punishment of the Crime of Genocide,⁶⁷ certain acts which constitute *apartheid* also constitute the crime of genocide.⁶⁸ Similarly, under 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 included as crimes against humanity for which there can be no statute of limitations.⁶⁹ *Apartheid* also involves slavery-like practices and forced labor prohibited by the Slavery Convention⁷⁰ and the Forced Labor Convention.⁷¹

65. *Apartheid*, *supra* note 64, at 245-46, in Human Rights Compilation, *supra* note 8, at 29-30.

66. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 3, 660 U.N.T.S. 195, 218 (*entered into force* Jan. 4, 1969), *reprinted in* Human Rights Compilation, *supra* note 8, at 23, 25.

67. Genocide, *supra* note 19, at 277, in Human Rights Compilation, *supra* note 8, at 56.

68. The Genocide Convention forbids a number of acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such. These acts include killing members of the group, causing serious bodily or mental harm to members of the group, and deliberately inflicting group conditions of life calculated to bring about its physical destruction in whole or in part. *Genocide*, art. 2, *supra* note 19, at 280, in Human Rights Compilation, *supra* note 8, at 56. The *Apartheid* Convention forbids "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." *Apartheid*, art. 2, *supra* note 64, at 245, in Human Rights Compilation, *supra* note 8, at 29-30. The acts include denial to racial group members the right to life and liberty of person by murder, infliction of serious bodily or mental harm, arbitrary arrest or illegal imprisonment, and "deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part." *Id.*, in Human Rights Compilation, *supra* note 8, at 30.

69. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *adopted* Nov. 26, 1968, art. I, 754 U.N.T.S. 73, 75 (*entered into force* Nov. 11, 1970), *reprinted in* Human Rights Compilation, *supra* note 8, at 57.

70. Slavery Convention, Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253 (*entered into force* Mar. 9, 1927), *reprinted in* Human Rights Compilation, *supra* note 8, at 65.

71. Forced Labor Convention, *adopted* June 28, 1930, 39 U.N.T.S. 55 (*entered into force* May 1, 1932), *reprinted in* Human Rights Compilation, *supra* note 8, at 65.

B. Other UN Action Against South Africa

1. The Security Council.

The Security Council, General Assembly, and other UN bodies have taken repeated action against South Africa.⁷² The Security Council considered the question of *apartheid* for the first time in 1960, prompted by large-scale killings in South Africa of unarmed and peaceful demonstrators against *apartheid*. In Resolution 134, the Council called upon South Africa to abandon *apartheid*.⁷³ A few years later in 1963, the Security Council called upon South Africa to stop killing anti-*apartheid* leaders (Resolution 181)⁷⁴ and upon member states to observe a non-mandatory arms embargo. The same year, the Security Council established a group of experts "to examine methods of resolving the present situation in South Africa through full, peaceful, and orderly application of human rights . . . and to consider what part the United Nations might play in the achievement of that end."⁷⁵ Based on subsequent recommendations by the group of experts, the Security Council in ensuing resolutions soon strengthened the economic sanctions.⁷⁶ In Resolution 311 (1972), the Security Council expressed its grave concern that the situation in South Africa constituted a breach of the peace.⁷⁷ This finding was important because it established the basis for the UN to take measures against South Africa under Chapter VII of the Charter,⁷⁸ such as imposing a mandatory arms embargo against South Africa.⁷⁹ No such mandatory and comprehensive arms embargo has been imposed because of opposition by the United States, France, and the United Kingdom.⁸⁰

72. See generally United Nations Action in the Field of Human Rights at 41-46, 201-12, U.N. Doc. ST/HR/2, U.N. Sales No. E.74.XIV.2 (1974).

73. S.C. Res. 134, 15 U.N. SCOR (856th mtg.) at 1, U.N. Doc. S/INF/15/Rev.1 (1960).

74. S.C. Res. 181, 18 U.N. SCOR (1056th mtg.) at 7, U.N. Doc. S/INF/18/Rev.1 (1963).

75. See *Annual Report of the Secretary General on the Work of the Organization, 16 June 1963 - 15 June 1964*, 19 U.N. GAOR Supp. (No. 1) at 22, U.N. Doc. A/5801 (1964).

76. *Id.* at 23.

77. S.C. Res. 311, 27 U.N. SCOR (1639th mtg.) at 10, U.N. Doc. S/INF/28 (1972).

78. U.N. Charter ch. VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression).

79. See Ahmed Khalifa, *Assistance to Racist Regimes in Southern Africa: Impact on the Enjoyment of Human Rights* at 8, U.N. Doc. E/CN.4/Sub.2/383/Rev.2, U.N. Sales No. E.79.XIV.3 (1979) [hereinafter *Assistance*]; *Special Reports of the Special Committee against Apartheid*, 36 U.N. GAOR Supp. (No. 22A) at 11, U.N. Doc. A/36/22/Add.2 (1982).

80. See G.A. Res. 40/97, 40 U.N. GAOR Supp. (No. 53) para. 13, U.N. Doc. A/40/53 (1985).

Two problems have arisen under the non-mandatory arms embargo imposed by the Security Council. The first is the dual use problem; for example, a helicopter can be used for war or for peace. The second problem is that some major world powers are violating the embargo, namely France, Italy, the United Kingdom, and the United States.⁸¹

The United States' violation of the embargo and its voting pattern on the Security Council have not been progressive. The U.S. has voted in the United Nations, often alone, against efforts to end *apartheid*. The United States takes this position for three reasons. First, it is concerned that a new government in South Africa will be less friendly to U.S. interests. The U.S. is particularly concerned about a Marxist or pro-Soviet government take-over. Second, the U.S. wants to preserve its access to raw materials in South Africa, including manganese, platinum-related minerals, gold, diamonds, and chromium.⁸² Third, the United States government has traditionally sought to protect U.S. companies doing business in South Africa, including the plants and assets of those companies.⁸³

In February 1986, the Security Council condemned South Africa for recent threats and acts of aggression against other states in southern Africa.⁸⁴ The Resolution demanded an end to the state of emergency in South Africa and an end to *apartheid*. In voting on the Resolution, thirteen members of the Security Council voted in favor, none against, with the United States and the United Kingdom abstaining.⁸⁵

2. The General Assembly.

The General Assembly has taken numerous other actions against *apartheid*. In the General Assembly, the voice of the U.K. and the U.S. is proportionally less than in the Security Council, while the voice of the Third World is much stronger. Perhaps it is

81. See *World Armaments and Disarmaments*, 1974 Stockholm Int'l Peace Res. Inst. Y.B. 281; *Assistance*, *supra* note 79, at 4-8.

82. The U.S. imports significant portions of the South African output of antimony, chromite, ferrochromium, ferromanganese, platinum metals, diamonds, and fluorospar. *Africa Hearings*, *supra* note 25, at 496-97.

83. See *U.S. Policy Toward South Africa: Hearings Before the Subcomms. on International Economic Policy and Trade, on Africa, and on International Organizations of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 477-657 (1980).

84. S.C. Res. 581, 13 U.N. SCOR (2662d mtg.) at 1, U.N. Doc. S/RES/581 (1986).

85. *Security Council Warns South Africa Against Committing 'Aggression, Terrorism and Destabilization' Against African States*, UN Monthly Chron., Apr. 1986, at 36.

for this reason that the General Assembly has voted early and often against *apartheid*.

The question of *apartheid* was raised at the General Assembly's first session in 1946. India complained about the treatment of people of Indian origin in South Africa. In Resolution 395 (1950), the General Assembly found that *apartheid* was necessarily a policy of racial discrimination within the meaning of the Charter's prohibition.⁸⁶ The General Assembly therefore ordered the government of South Africa to suspend implementation of the infamous "Group Areas Act."⁸⁷ In Resolution 616A (VII) (1952),⁸⁸ the General Assembly formally condemned *apartheid* and established a commission of three members to monitor the situation in South Africa.⁸⁹ Resolution 1761 (XVII) (1962) requested member states to sever all diplomatic and trade relations with South Africa.⁹⁰ In 1974, the General Assembly rejected the credentials of the South African delegation.⁹¹ South Africa was no longer permitted to vote. Because of Security Council inaction, however, South Africa was not technically expelled from the United Nations.⁹²

From the viewpoint of placing pressure on the South African government, probably the most effective international action has been the international sports boycott.⁹³ The international boycott against athletic competition either against South African teams or in South Africa has really brought home the world's abhorrence of

86. G.A. Res. 395 (V), 5 U.N. GAOR Supp. (No. 20), at 24, U.N. Doc. A/1775 (1950).

87. Group Areas Act, No. 41 of 1950, as amended by Act No. 65 of 1952 & amending Acts of 1955, cited in Henry May, *The South African Constitution* 506 n.13 (1955). See also Consolidated Acts, No. 77 of 1957 & No. 36 of 1966, cited in Muriel Harrell, *Laws Affecting Race Relations in South Africa: 1948-1976*, at 71 (1978). The goal of the Act was to divide towns and districts into separate areas for the different racial groups. May, *supra*, at 506.

88. G.A. Res. 616 A (VII), 7 U.N. GAOR Supp. (No. 20) at 8, U.N. Doc. A/2361 (1952).

89. See *Reports of the United Nations Commission on the Racial Situation in the Union of South Africa*, 10 U.N. GAOR Supp. (No. 14), U.N. Doc. A/2953 (1955); 9 U.N. GAOR Supp. (No. 16), U.N. Doc. A/2719 (1954); 8 U.N. GAOR Supp. (No. 16), U.N. Docs. A/2505 & A/2505/Add.1 (1953).

90. G.A. Res. 1761 (XVII), 17 U.N. GAOR Supp. (No. 17) at 9-10, U.N. Doc. A/5217 (1963).

91. G.A. Res. 3207 (XXIX) (1974), summarized in *Report of the Secretary-General on the Work of the Organization, 16 June 1974 - 15 June 1975*, 30 U.N. GAOR Supp. (No. 1) at 33-34, U.N. Doc. A/10001 (1975). See also Alden Abbott, Filiberto Augusti, Peter Brown & Elizabeth Rode, *The General Assembly, 29th Session: The Decredentialization of South Africa*, 16 Harv. Int'l L.J. 576 (1975) [hereinafter *Decredentialization*].

92. *Decredentialization*, *supra* note 91, at 577.

93. See Centre Against Apartheid, UN Dep't of Political & Security Council Affairs, *Register of Sports Contacts with South Africa*, Notes & Documents, Dec. 1982, at i.

apartheid to the average white South African. Since many South African whites are avid sports enthusiasts, the sports boycott, which has been quite well enforced, has been a useful international measure. Most recently, the General Assembly has been considering an international Convention Against *Apartheid* in Sports, which will give further legal support to the General Assembly's initial actions establishing the sports boycott.⁹⁴

Incidentally, the United States's policy of "constructive engagement"⁹⁵ with South Africa has not gone unnoticed in the General Assembly. On December 10, 1985, the General Assembly condemned "the policies of 'constructive engagement' and active collaboration with the *apartheid* régime followed by the Governments of certain Western and other States which give encouragement to the racist régime in its repression of the people's legitimate struggle."⁹⁶

3. Other UN Bodies.

Other UN bodies have also taken action against South Africa. For example, the Commission on Human Rights in 1967 established an ad hoc working group of experts to investigate charges of violations such as arbitrary killings and torture in South Africa.⁹⁷ The working group issues major factual reports following its investigations.⁹⁸ These investigations can be an effective means of protecting human rights. As the Montreal Statement of the Assembly for Human Rights correctly observed, "[t]he mere existence of an official and impartial fact-finding body might deter violations of human rights."⁹⁹

94. See *Sanctions Against South Africa: A Selective Bibliography* at 11-12, U.N. Doc. ST/LIB/SER.B/32, U.N. Sales No. E/F.81.I.13 (1981).

95. "Constructive engagement" is the Reagan Administration's term for a policy toward South Africa that is less confrontational than a policy that includes sanctions. Constructive engagement is based on the philosophy that continued U.S. economic interests in South Africa could subtly affect *apartheid*. Reagan's view is that constructive engagement is more effective than sanctions, as it continues U.S. involvement in South Africa, rather than abandon that country to its internal politics. See N.Y. Times, Mar. 15, 1981, at 11, col. 1; *id.*, May 23, 1981, at 7, col. 1.

96. G.A. Res. 40/64 A, 40 U.N. GAOR Supp. (No. 53) para. 4, U.N. Doc. A/40/53 (1985). See also *Calls for Comprehensive Sanctions against South Africa Made by Assembly*, UN Monthly Chron., Number 10/11 1984, at 16, 17.

97. Commission on Human Rights Res. 2 (XXIII), 42 U.N. ESCOR Supp. (No. 6) at 76-78, U.N. Doc. E/CN.4/940 (1967).

98. See, e.g., *Violations of Human Rights in Southern Africa: Report of the Ad Hoc Working Group of Experts*, 41 ESCOR (Agenda Item 6) at 1, U.N. Doc. E/CN.4/1985/14 (1985); see also Hernán Santa Cruz, *Racial Discrimination* at 148-213, U.N. Doc. E/CN.4/Sub.2/307/Rev.1, U.N. Sales No. E.71.XIV.2 (1971).

99. John Carey, UN Protection of Civil and Political Rights 84 (1970) (quoting the Montreal Assembly for Human Rights). Some helpful fact-finding has been done in South Africa. See, e.g., Centre for Applied Legal Studies, University of the

The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities has also played an investigatory role. Its Special Rapporteur, Ahmad Khalifa, has ambitiously compiled a list of banks and firms who have helped South Africa's economy.¹⁰⁰ The Sub-Commission has also made direct appeals on behalf of individuals, such as Nelson Mandela.¹⁰¹ It called upon the government of South Africa to conduct a meaningful investigation into the true cause of the death of Stephen Biko.¹⁰² In 1985, the Sub-Commission decided to open all future sessions with a moment of silence to demonstrate solidarity with the victims of *apartheid*.¹⁰³

The 1985 World Conference on the United Nations Decade for Women also called for economic sanctions against South Africa.¹⁰⁴ Only the U.S., represented by Maureen Reagan, voted "no." The non-governmental organizations forum of that conference conducted numerous workshops on the status of women under *apartheid*.

The UN Commission on Transnational Corporations monitors the effects of corporate policies, particularly in the Third World. In 1985, the Commission issued a report criticizing voluntary corporate codes such as the Sullivan Principles for not helping the

Witwatersrand, Report on the Rabie Report: An Examination of Security Legislation in South Africa (1982).

100. *The Adverse Consequences for the Enjoyment of Human Rights of Political, Military, Economic and Other Forms of Assistance Given to the Colonial and Racist Regime in South Africa*, 38 U.N. ESCOR (Agenda Item 5(b)) at 10-21, U.N. Docs. E/CN.4/Sub.2/1985/8 & Add. 1-2 (1985); 37 U.N. ESCOR (Agenda Item 5(b)) at 1, U.N. Doc. E/CN.4/Sub.2/1984/8/Rev.1 (1984); 32 U.N. ESCOR Annex 1 (Agenda Item 5) at 1, U.N. Doc. E/CN.4/Sub.2/425 (1979); *Assistance*, *supra* note 79, at 8-17; see also *Transnational Corporations in South Africa and Namibia*, 11 U.N. ESCOR Annex 1 (Agenda Item 6(a)) at 13, U.N. Doc. E/C.10/1985/7 (1985).

101. Nelson Mandela is the head of the African National Congress who is serving a sentence of life imprisonment under maximum security at Pollsmoor prison near Cape Town. *Violations of Human Rights in Southern Africa*, 40 U.N. ESCOR (Agenda Item 6) at 27, 37, U.N. Doc. E/CN.4/1984/8 (1984).

102. Stephen Biko was the leader of South Africa's Black Consciousness Movement. He was arrested on August 18, 1977, and died in a Port Elizabeth prison on September 12, 1977, as a result of brain injury inflicted by one or more members of the South African Security Police Force. See Louis Pollak, *The Inquest into the Death of Stephen Barty Biko: A Report to the Lawyers' Committee for Civil Rights under Law* 3, 7, 29 (Feb. 24, 1978) (unpublished report on file with *Law & Inequality*).

103. 38 U.N. ESCOR (37th mtg.) at 122, U.N. Doc. E/CN.4/Sub.2/1985/57 (1985).

104. *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace* at 60-62, U.N. Doc. A/CONF.116/28/Rev.1, U.N. Sales No. E.85.IV.10 (1986); see also *Report of the World Conference to Combat Racism and Racial Discrimination* at 99, U.N. Doc. A/CONF.92/40, U.N. Sales No. E.79.XIV.2 (1979).

Black majority in a meaningful way.¹⁰⁵ This report should provoke controversy and critical self-examination within the corporate community. The report takes the general view that economic and military support for South Africa accrues to the white minority—not to the Black majority.¹⁰⁶ Nevertheless, such support for South Africa is frequently labeled as being “good” for Blacks. Perhaps, one must ask: to whom shall we listen? To those who have an obvious stake in the status quo or to members of the Black majority?

4. The Declaration on Colonialism.

While the struggle in South Africa is against racism, it is also against colonialism. The white minority's presence and power in South Africa certainly is a colonial phenomenon. The policy of restricting Blacks to the so-called “homelands” is a colonial practice.¹⁰⁷ It was this kind of group-based oppression that the General Assembly addressed when, in 1960, it passed Resolution 1514(XV): Declaration on the granting of independence to colonial countries and peoples.¹⁰⁸ “Recognizing the passionate yearning for freedom in all dependent peoples . . . in the attainment of their independence” and “[b]elieving that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,” the General Assembly declared that “[t]he 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.”¹⁰⁹ Accordingly, liberation movements in South Africa are eligible for some of the trust fund assistance mentioned earlier in regard to Namibia.

C. Recent Developments in United States Policy

The changes in United States policy toward the government of South Africa made in the summer and autumn of 1986 will no

105. *Examination of the Activities of Transnational Corporations in South Africa and Namibia*, U.N. ESCOR (Agenda Item 3) at 10, 12-14, 20-21, U.N. Doc. E/C.10/AC.4/1985/5 (1985).

106. *Id.* at 10.

107. See Apartheid: The International Legal Implications 1-2 (Millard Arnold ed. 1978).

108. G.A. Res. 1514 (XV), 15 U.N. GAOR Supp. (No. 16) at 66-67, U.N. Doc. A/4684 (1961). See also *Highlights of Efforts*, *supra* note 19, app. I at 43-44, for the text of the resolution.

109. G.A. Res. 1514 (XV), *supra* note 108.

doubt be discussed for some time. Only time will tell whether those changes were mostly symbolic or substantive, whether they were wise or foolish, whether they went too far or were too little too late.

The United States Senate and House of Representatives voted to override President Reagan's veto and impose economic sanctions against South Africa. These sanctions prevent any new U.S. investment in or bank loans to South Africa, ban the import of iron, steel, coal, textiles, uranium, and agricultural products, place an embargo on oil products, ban all non-emergency landings and take-offs of South African airliners in the United States, and create new economic assistance for South African Blacks.¹¹⁰

This new United States policy grew out of an increasingly tense atmosphere about *apartheid* both in South Africa and in world opinion. Recent attempts at mediation by Commonwealth leaders between Black leaders and the South African government had failed.¹¹¹ Amid strikes by Blacks in South Africa and thousands of arrests by South African police, Pretoria once again imposed a state of emergency, this time on the tenth anniversary of the Soweto uprisings.¹¹² The government reserved the right to make warrantless searches, control essential services, close businesses, and censor domestic and foreign press. In response to Pretoria's action, Canada and France talked of supporting trade sanctions, and Canada revoked the credentials of four South African diplomats.¹¹³ At a UN conference, representatives from a hundred nations turned out to hear Rev. Jesse Jackson urge economic sanctions.¹¹⁴ Jackson's talk was boycotted by the United States, the United Kingdom, and the Federal Republic of Germany.¹¹⁵ When the UN Security Council attempted to impose economic sanctions against South Africa for its aggression against Angola, the resolution was vetoed by the United States and the United Kingdom.¹¹⁶

President Reagan attempted to put more subtle political pressure on Pretoria by using the leverage of congressional pressure to adopt economic sanctions.¹¹⁷ Reagan had proposed excepting South African companies adhering to anti-discrimination princi-

110. See Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086; N.Y. Times, Sept. 30, 1986, at A1, col. 1; *id.*, Oct. 3, 1986, at A1, col. 6.

111. N.Y. Times, June 7, 1986, at A1, col. 4.

112. See *id.*, June 13, 1986, at A1, col. 4; *id.*, June 19, 1986, at A1, col. 4, 5.

113. See *id.*, June 13, 1986, at A13, col. 1; *id.*, June 15, 1986, at A10, col. 5.

114. *Id.*, June 17, 1986, at A10, col. 4.

115. *Id.*

116. *Id.*, June 19, 1986, at A10, col. 3.

117. See *id.*, June 20, 1986, at A10, col. 1.

ples and compensating United States companies suffering disadvantages in international competition as a result of the sanctions.¹¹⁸ Also, Reagan would have banned the import of iron and steel, but not of coal, textiles, uranium, or agricultural products.¹¹⁹ Perhaps, in hope of avoiding more severe congressional actions, Reagan fulfilled his commitment to name a Black envoy to South Africa by appointing veteran diplomat Edward J. Perkins to the post.¹²⁰ Congress was not satisfied with such measures, however, and easily overrode Reagan's veto of the sanctions bill.¹²¹

The issue remains whether these sanctions are more symbolic than actually punitive. Coal imports from South Africa, now banned, amounted to \$43 million last year. South African coal output, however, totaled \$50 billion.¹²² In anticipation of sanctions, United States business investments in South Africa had already declined.¹²³ Bank loans were also declining because of a decision by the American Bank Association opposing further bank loans to South Africa. Similar measures had also been taken by state and local governments. Due to this pre-sanction investment decrease, about two percent of South Africa earnings will be affected by the federal sanctions.¹²⁴ Furthermore, because the Anti-Apartheid Act is meant as a comprehensive statement of U.S. policy towards South Africa, it may preempt state, county, and municipal actions, requiring divestment. Therefore, the Anti-Apartheid Act could actually decrease the cumulative economic sanctions against South Africa.¹²⁵ Nevertheless, if Western Europe and Japan increase

118. *Id.*, Sept. 30, 1986, at A6, col. 6.

119. *Id.*

120. *Id.*, Oct. 1, 1986, at A6, col. 1.

121. *Id.*, Sept. 30, 1986, at A1, col. 1; *id.*, Oct. 3, 1986, at A1, col. 6.

122. *Id.*, Oct. 4, 1986, at A1, col. 5.

123. *See id.*; *id.*, July 5, 1986, at A4, col. 5; *id.*, June 19, 1986, at A1, col. 4.

124. *Id.*, Oct. 4, 1986, at A3, col. 1.

125. The purpose stated in section 4 of the Act is "to set forth a comprehensive and complete framework to guide the efforts of the United States in helping to bring an end to apartheid in South Africa." Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 4, 100 Stat. 1086, 1088. There was considerable debate in Congress regarding whether this language is meant to indicate a congressional intent to preempt local actions. *See generally* 132 Cong. Rec. E3104 (daily ed. Sept. 12, 1986) (statement of Rep. Leland) (quoting Los Angeles Times, Sept. 12, 1986, at I15, col. 3). Representative Leland did not view the Act as preemptive. Senators Kennedy, Proxmire, and Cranston took the same position. Senator Lugar, one of the main proponents of the Act, however, did consider it as preempting non-federal action. *Id.* Although investment decisions are clearly local in nature, that characterization may not save state actions from being preempted. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Local actions that affect foreign relations have been found unconstitutional in the past. *See, e.g., Zschoernig v. Miller*, 389 U.S. 429 (1968); *Hines v. Davidowitz*, 312 U.S. 52 (1941); *New York Times Co. v. City of New York Comm'n on Human Rights*, 79 Misc. 2d 1046, 362 N.Y.S.2d 321 (N.Y. Sup. Ct. 1974), *aff'd*, 49 A.D.2d 851, 374 N.Y.S.2d 9

their own sanctions against South Africa, the cumulative effect of economic sanctions may be enough to bring about some substantive changes in South African racial policies.

D. Other Legal Action

There has been international legal action against *apartheid*, not only in the United Nations, but also in both United States and South African tribunals. In *New York Times Co. v. City of New York Commission on Human Rights*,¹²⁶ both the American Committee on Africa and other plaintiffs argued that advertisements for employment in South African countries constituted discrimination under New York law because Black applicants would not be considered for those positions. The New York Human Rights Commission was persuaded by the plaintiffs' argument and ordered the *New York Times* to cease and desist from publishing ads for South African positions.¹²⁷ The New York Supreme Court overturned the Commission's order on freedom of speech grounds¹²⁸ and later, the Court of Appeals affirmed.¹²⁹ In the early 1970's, the *New York Times* had used great energy and skill to defend its right to advertize jobs in the South African government and industry for white workers. One wonders whether the *Times* would take the same position today. In any case, the *Times* case set the stage for other creative uses of United States courts to bring pressure on the South African government.

In another domestic lawsuit, the American Committee on Africa, the Congressional Black Caucus, and other groups intervened before the Civil Aeronautics Board (C.A.B.) when the South African Airways applied for a new route permit in the United States.¹³⁰ The plaintiffs argued that because the government-owned airline discriminated against Blacks in employment and travel facilities, the C.A.B. could not find, as is necessary under Sections 404(b) and 411 of the Federal Aviation Act of 1958, that the proposed route would be "in the public interest."¹³¹ Although the hearing examiner was not persuaded by this argument, and although then-President Nixon signed the order granting the per-

(N.Y. App. Div. 1975), *aff'd*, 41 N.Y.2d 345, 361 N.E.2d 963, 393 N.Y.S.2d 312 (1977). Further discussion of this problem is beyond the scope of this article.

126. 41 N.Y.2d at 345, 361 N.E.2d at 963, 393 N.Y.S.2d at 312.

127. *Id.* at 348, 361 N.E.2d at 965, 393 N.Y.S.2d at 315.

128. 79 Misc. 2d at 1046, 362 N.Y.S.2d at 321.

129. 41 N.Y.2d at 345, 361 N.E.2d at 963, 393 N.Y.S.2d at 312.

130. *Diggs v. Civil Aeronautics Bd.*, 516 F.2d 1248 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 910 (1976).

131. 49 U.S.C. §§ 1372, 1374(b) (1982).

mit, the action accomplished two things: (1) before the permit was granted, South African Airways hired several Black employees for its United States offices, and (2) the airline discontinued racial discrimination in seating on its flights inside South Africa.¹³²

In 1974, the Lawyers' Committee for Civil Rights Under Law represented the United Mine Workers in an administrative complaint before the U.S. Commissioner of Customs to stop the importation of South African coal into the United States.¹³³ South African law in effect at the time compelled indentured labor under penal sanction for all Black workers in the coal industry.¹³⁴ Blacks constituted the majority of the labor force in South African mines.

The complaint arose under Section 307 of the Tariff Act of 1930, which prohibits the importation of goods produced or manufactured by forced labor, indentured labor under penal sanctions, or convict labor, provided that United States consumptive demand for the particular item can be satisfied from domestic sources.¹³⁵ Evidence revealed that the United States could easily satisfy its own domestic demand for coal and was, in fact, a net exporter of coal.¹³⁶

Although the Customs Service was not ultimately persuaded by the plaintiffs' argument, the filing of the complaint had direct consequences: the South African Parliament repealed forty-one laws and sections of laws imposing criminal sanctions for the violation of labor contracts in mining, manufacturing, and other sectors of its economy.¹³⁷ Indeed, the repeal of those laws strengthened the efforts to establish Black trade unions in South Africa. Those Black unions—particularly in the mining industry—today represent one of the most significant independent political forces against racial oppression in South Africa. Hence, the legal action in the United States indirectly led to significant pressures against *apartheid*.

These three cases show that creative U.S. lawyers can bring about changes in South Africa even if their actions do not prevail

132. Douglas Wachholz, *International Legal Assistance and the Utilization of Domestic Legal Techniques in Support of Human Rights in Southern Africa: Lawyers' Committee for Civil Rights Under Law 14* (1975) (unpublished manuscript on file with *Law & Inequality*).

133. Douglas Wachholz, *The Utilization of Domestic Legal Techniques to Give Effect to U.N. Anti-Racist Measures*, in *Africa Legal Assistance Project*, Lawyers' Committee for Civil Rights Under Law, attachment II at 3 (1974).

134. *Id.*

135. 19 U.S.C. § 1307 (1982).

136. Wachholz, *supra* note 132, at 17.

137. *Id.* at 18.

in U.S. courts and tribunals.¹³⁸ These cases also show that to bring about more direct change, lawyers and would-be policy makers must go to the legislatures and to international legal fora. Indeed, measures for divestment have been adopted or are under consideration in the U.S. Congress, state legislatures, city councils, and universities throughout the United States.¹³⁹

U.S. lawyers have also helped South African lawyers working in the South African courts trying to secure the rights of those whom the South African government would like to silence. In South Africa, anti-apartheid speech or political activity is a crime.¹⁴⁰ Persons have been imprisoned, tortured, and arbitrarily killed for attending or organizing peaceful demonstrations or funerals.¹⁴¹

South African lawyers who represent such activists are by no means immune from arbitrary arrests and killings. For example, South African civil rights attorney Victoria Mxenge was killed outside her home, allegedly by government security forces.¹⁴² She was killed just weeks before she was to represent twelve United Democratic Front activists who were charged with treason.

In spite of the repressive nature of South Africa's government, competent, well-funded lawyers can make a difference in ensuring a degree of due process for the accused. In August 1986, the American Bar Association protested the arrests of South African lawyers who were defending Black minority members against state charges.¹⁴³ United States lawyers, individually and collec-

138. Timothy Smith, *The Role of Concerned Shareholders: The Proxy Resolution and Other Shareholder Action*, in *International Human Rights*, *supra* note 4, at 143, 148.

139. See, e.g., Exec. Order No. 12,535, 50 Fed. Reg. 40,325 (1985) (prohibition of importation of Krugerrands); Minneapolis, Minn., Resolution 85R-44 (Nov. 21, 1985); Minnesota State Board of Investment, Resolution (Oct. 2, 1985); Bureau of Public Affairs, U.S. Dep't of State, *South Africa: Presidential Actions*, Current Pol'y No. 735, Sept. 9, 1985 (quoting Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (1985)); Jennifer Davis, James Cason & Gail Hovey, *Economic Disengagement and South Africa: The Effectiveness and Feasibility of Implementing Sanctions and Divestment*, 15 Law & Pol'y Int'l Bus. 529 (1983); Letter from University of Minnesota President Kenneth Keller to the University of Minnesota Board of Regents, Sept. 5, 1985, *reprinted in* Minn. Minority Lawyers Ass'n, *Apartheid and American Lawyers* (1985) [hereinafter *American Lawyers*].

140. See Amnesty International, *Political Imprisonment in South Africa 18-36* (1978) [hereinafter *Political Imprisonment*]; see also Oral Statement by Amnesty International to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Situation of Human Rights in South Africa* (Aug. 9, 1985) [hereinafter *Situation of Human Rights*], *reprinted in* *American Lawyers*, *supra* note 139.

141. See generally *Political Imprisonment*, *supra* note 140.

142. *Situation of Human Rights*, *supra* note 140.

143. N.Y. Times, Aug. 9, 1986, at A3, col. 3.

tively, have provided invaluable assistance to local counsel in South Africa by directing funding where it is required, offering legal assistance when it is requested, and observing trials and inquests where public attention may be beneficial. Lawyers' organizations which have worked in these ways to help South African lawyers include the American Bar Association, Amnesty International legal groups, the International Commission of Jurists, the International Defence and Aid Fund, the International Human Rights Law Group, the Lawyers' Committee for Civil Rights Under Law, the Lawyers Committee for Human Rights, the Minnesota Lawyers International Human Rights Committee, and the NAACP Legal Defense and Education Fund.¹⁴⁴

Conclusion

United States policies toward South Africa have long been short-sighted. Perhaps 1986 will be remembered as the year the United States began a significant change in its response to *apartheid*. The question remains: What should United States lawyers do about *apartheid*? In this regard, Robert McNamara's statement of 1982 has the ring of prophesy:

The most underrated danger of human events is prolonged procrastination. And the greatest tragedies of history have occurred, not so much because of what was finally done, but because of what had earlier foolishly been left undone. In the matter at hand, to fail to act wisely now is only to ensure having to act desperately later.¹⁴⁵

Perhaps, if lawyers and others act promptly and in good faith, it is not too late.

144. See David Abramowitz, *Safeguarding Due Process in a Hostile Environment: Foreign Lawyers in South Africa*, in *Issues of Transnational Legal Practice*, 1985 Mich. Y.B. Int'l Legal Stud. 253, 253 n.1.

145. Robert McNamara, Chancellor's Lecture, University of Witwatersrand, Oct. 21, 1982, *quoted in* University of Minnesota Advisory Committee on South Africa, Report to President Keller 29 (June 5, 1985).