

# COMMENTARY

## The Status of Apartheid under International Law\*

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Apartheid is an Afrikaans word which, literally translated into English, means "apartness." This term is used to describe a body of law enacted by the South African government to bring about legal separation among white, black and Asian peoples of South Africa. Apartheid is a legal system which, in the opinion of many, violates fundamental principles of international law. This paper evaluates leading instruments of international law relevant to apartheid, including the Charter of the United Nations, the Universal Declaration of Human Rights, and Covenants, Conventions and Declarations adopted pursuant to them. From this body of international law, one can determine those human rights which each nation, at a minimum, must protect for the benefit of those who live within its borders. Those principles of international law are then used to test whether, and in what ways, apartheid denies South Africans legal protections for universally recognized human rights. Last, this paper evaluates whether the United Nations has the power to recommend the abolition of apartheid and to adopt sanctions against South Africa intended to bring about that result.

### I. Fundamental Human Rights Recognized by International Law

The U.N. Charter is the starting point for any inquiry into what constitutes the minimum human rights guarantees each state owes its citizens. The Preamble to the Charter clearly states that one of its princi-

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ple objectives is "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person."<sup>1</sup> The first chapter of the Charter, devoted to purposes and principles, explains in greater detail this fundamental goal: "The Purposes of the United Nations are . . . to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . ."<sup>2</sup> The Charter also states its intention to aid "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. . . ."<sup>3</sup>

These principles were enunciated with greater specificity in the Universal Declaration of Human Rights, which was adopted and proclaimed by the U.N. General Assembly in 1948. The Declaration was intended, as its Preamble states, "as a common standard of achievement for all peoples and all nations. . . ."<sup>4</sup> Article I of the Declaration proclaims as a basic principle that "all human beings are born free and equal in dignity and rights."<sup>5</sup> Article II defines the grounds on which those rights must be extended: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>6</sup>

The Declaration is a statement of what the General Assembly believed the international law to be. The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both of which entered into force in 1976, gave legal effect to the Declaration. With only minor changes, those two Covenants recognized the same human rights as did the Declaration. Those Covenants make up the core of international human rights law and it is to them that we must look for guidance about the specific protections for human rights that each nation must provide its citizens.

Part I, Article I, of the Covenant on Economic, Social and Cultural Rights states that, "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." This right, like all others recognized by the Covenant, must "be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other

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1. U.N. CHARTER preamble.

2. *Id.* art. 1, para. 2.

3. *Id.* para. 3.

4. G.A. Res. 217 A, preamble, U.N. Doc. A/810, at 72 (1948).

5. *Id.* art. 1

6. *Id.* art. 2.

status.”<sup>7</sup> The Covenant on Civil and Political Rights echoes the wording of those two provisions verbatim. They are fundamental principles of international law which form the basis from which follow the other rights enumerated in both Covenants. Those rights include, among others, the right of everyone to:

1. the opportunity to gain his living by work which he freely chooses or accepts;<sup>8</sup>
2. the enjoyment of just and favourable conditions of work;<sup>9</sup>
3. form trade unions and join the trade union of his choice;<sup>10</sup>
4. an adequate standard of living and . . . to be free of hunger . . .;<sup>11</sup>
5. education . . . directed to the full development of the human personality and the sense of its dignity;<sup>12</sup>
6. life and to liberty and security of person;<sup>13</sup>
7. due process when accused of committing a crime;<sup>14</sup>
8. freedom of thought, conscience and religion;<sup>15</sup>
9. assemble peacefully and associate freely;<sup>16</sup>
10. vote, to take part in the conduct of public affairs, to be elected to public office, and to have equal access to public service.<sup>17</sup>

These are the human rights which under international law, each nation must guarantee for its citizens. Apartheid must be evaluated against those standards to determine whether it violates international law. In making that evaluation, we will be guided by relevant U.N. conventions and declarations. Many of them clarify what constitutes a denial of fundamental human rights. Several of these U.N. instruments contain provisions which indicate in what ways apartheid denies the fundamental rights I have enumerated.

The first of these documents is the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>18</sup> The Convention defines as a crime under international law, any of the following acts committed with intent to destroy, in whole or part, a national, ethnical, racial or

7. G.A. Res. 2200 A, Part II, art. 2, para. 2, 21 U.N. GAOR Supp. (No.16) at 49, U.N. Doc. A/6316 (1966).

8. *Id.* Part III, art. 6, para. 1. .

9. *Id.* Part III, art. 7.

10. *Id.* Part III, art. 8, para. 1(a).

11. *Id.* Part III, art. 11, para. 1, 2.

12. *Id.* Part III, art. 13, para. 1.

13. International Covenant on Civil and Political Rights, G.A. Res. 2200 A, Part III, art. 6, para. 1, art. 9, para. 1. U.N. GAOR Supp. (No.16) at 49, U.N. Doc. A/6316 (1966).

14. *Id.* Part III, art. 14.

15. *Id.* Part III, art. 18, para. 1.

16. *Id.* Part III, art. 21, 22.

17. *Id.* Part III, art. 25.

18. G.A. Res. 260 A, U.N. Doc. A/810, at 174 (1948). The Senate ratified this on February 19, 1986, with reservations. 132 CONG. REC.

religious group, as such: Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part.<sup>19</sup>

The second especially relevant document we must consider is the Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>20</sup> That instrument declares that "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 cooperation."<sup>21</sup>

These two U.N. instruments were followed in 1963 by the Declaration on the Elimination of All Forms of Racial Discrimination and an International Convention bearing the same title in 1965. Those two documents were aimed directly at apartheid, which the General Assembly viewed as in conflict with principles of international law enunciated in the Charter and the other pronouncements we have already examined. The Declaration on Racial Discrimination expressed the alarm of the General Assembly at "the manifestations of racial discrimination still in evidence in some areas of the world, some of which are imposed by certain governments by means of legislative, administrative or other measures in the form, inter alia, of apartheid."<sup>22</sup> The first article of the Declaration condemns racial discrimination as:

an offence to human dignity . . . [which] shall be condemned as a denial of the principles of the Charter of the United Nations, as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, as an obstacle to friendly and peaceful relations among nations and as a fact capable of disturbing peace and security among peoples.<sup>23</sup>

The International Convention on the Elimination of All Forms of Racial Discrimination, adopted two years later, reaffirmed the earlier Declaration in provisions intended to give it legal effect.<sup>24</sup> Article III of the Convention elaborated on the Declaration's apartheid provision by requiring that: "States Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction."<sup>25</sup>

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19. *Id.* art. II(c).

20. G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960).

21. *Id.* para. 1.

22. G.A. Res. 1904, preamble, 18 U.N. GAOR Supp. (No. 15) at 35, U.N. Doc. A/5515 (1963).

23. *Id.* art. 1.

24. G.A. Res. 2106 A, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1965).

25. *Id.* Part I, art. 3.

This specific commitment to eradicate apartheid wherever present in territories governed by signatories of the Convention was followed in 1968 by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.<sup>26</sup> That Convention listed apartheid as a crime against humanity to which "no statutory limitation shall apply . . . irrespective of the date of . . . commission."<sup>27</sup>

Four years after the adoption of that Convention, the General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid.<sup>28</sup> The Convention cited as bases for its provisions the U.N. Charter and the five instruments adopted pursuant to it discussed above, as well as Security Council Resolutions to the same effect.<sup>29</sup> The Convention purported to outlaw apartheid as violating principles of international law expressed in all of those instruments.<sup>30</sup> The Apartheid Convention has been followed by other declarations, the most important of which are: the International Declaration Against Apartheid in Sports;<sup>31</sup> the Declaration of the World Conference to Combat Racism and Racial Discrimination;<sup>32</sup> the Declaration of the Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War;<sup>33</sup> the Declaration on Race and Racial Prejudice;<sup>34</sup> and the Declaration on South Africa.<sup>35</sup> All of them expand upon the earlier instruments that we have examined. None of the Conventions and Declarations above-mentioned unwarrantedly categorize Zionism as racism. Our country has joined with other countries justifiably in characterizing such a condemnation as without justification.

From the reasoning of this body of international law, we can discern certain principles against which apartheid must be tested:

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26. 754 U.N.T.S. 74 (1970).

27. *Id.* art. I, para. (b).

28. G.A. Res. 3068, 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973).

29. *Id.* Annex.

30. *Id.* art. 1.

31. G.A. Res. 32/105, Part M, 32 U.N. GAOR Supp. (No. 46) at 149, U.N. Doc. A/32/45/ (1977).

32. Endorsed by G.A. Res. 33/100, 33 U.N. GAOR Supp. (No. 46) at 147, U.N. Doc. A/33/45 (1978).

33. Adopted by the General Conference of UNESCO on November 22, 1978.

34. Adopted by the General Conference of UNESCO on November 27, 1978.

35. G.A. Res. 34/93, Part O, 34 U.N. GAOR Supp. (No. 46) at 36, U.N. Doc. A/34/46 (1979).

First, discrimination based on race, color, national or social origin is illegitimate in almost all circumstances.<sup>36</sup>

Second, such discrimination is illegitimate both because it denies the fundamental right of self-determination;<sup>37</sup>

Third, because it denies the principle of equality in dignity and rights to which every human is entitled.<sup>38</sup>

Fourth, recognition of these universally recognized fundamental principles imposes on States living in accordance with international law the obligation to eradicate such discrimination from their legal and economic systems;<sup>39</sup> and

Fifth, to take positive steps against such discrimination.<sup>40</sup>

The body of South African law known as apartheid is inconsistent with all five of these principles. Apartheid as public policy is founded on the premise that discrimination based upon race or color is legitimate precisely because human beings of different races and colors are unequal and thus not entitled to equality before the law. Under that rationale, black South Africans are segregated, subject to the notorious "pass" requirements, and denied the right to vote, to hold office, and to take part in the affairs of the South African government.<sup>41</sup> Those laws, in and of themselves, work a denial of the right of self-determination and fundamental human rights. The government of South Africa has failed to eliminate such discrimination from its legal system and has forbade communication of doctrines contrary to the idea of separation based upon spurious racial inequality,<sup>42</sup> including teaching of such doctrines in the schools. Further, the iniquitous pass system is clearly in violation of the norms of international law.

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36. Exceptions to this principle are allowed only "[t]o secure adequate development or protection for individuals belonging to certain racial groups with the object of ensuring the full enjoyment . . . of human rights and fundamental freedoms." Convention on Elimination of Racial Discrimination, *supra* note 24, art. 1, para. 4.

37. International Covenant on Economic, Social and Cultural Rights, *supra* note 7, art. 1, para. 1. International Covenant on Civil and Political Rights, *supra* note 13, art. 1, para. 1.

38. The Universal Declaration of Human Rights, and each of the Covenants cited herein affirm this principle.

39. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 24, art. 2, para. 1, 2.

40. International Covenant on Economic, Social and Cultural Rights, *supra* note 7, art. 13, para. 1.

41. Republic of South Africa Constitution Act, No. 110 of 1983, ¶ 52 (right to vote restricted to white persons, coloured persons and Indians).

42. *See, e.g.*, Publications Act, No. 4 of 1974, ¶ 47.

## II. U.N. Jurisdiction to Impose Sanctions Against South Africa

Having established that apartheid violates fundamental principles of international law, our next inquiry is whether the U.N. has the jurisdiction necessary to recommend apartheid's abolition and to adopt sanctions intended to achieve that result. Article 14 of the U.N. Charter provides that so long as the Security Council is not exercising any of its functions with respect to a particular dispute, the General Assembly "may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it considers likely to impair general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations."<sup>43</sup>

South Africa's apartheid policies, as we have seen, clearly violate provisions of the U.N. Charter and instruments adopted pursuant to it. Apartheid has also impaired friendly relations between the Republic of South Africa and India due to the subordinate status assigned to those South Africans of Indian descent. The General Assembly recognized this for the first time in 1946.<sup>44</sup> Apartheid today impairs friendly relations between South Africa and many nations, especially relations with the neighboring states of Zimbabwe, Mozambique, and increasingly many other countries. Thus the General Assembly clearly has jurisdiction under Article 14 to recommend measures, including sanctions, which it believes will lead to peaceful resolution of the conflict between South Africa and those other nations.<sup>45</sup>

The Republic of South Africa has objected to such General Assembly recommendations. South Africa's leaders have argued that Chapter I, Article 2, Section 7 of the Charter clearly denies the General Assembly jurisdiction to recommend measures intended to dismantle apartheid. Section 7 provides that:

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 Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

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43. U.N. CHARTER, art. 14.

44. See G.A. Res. 44, U.N. Doc. A/64/Add. 1, at 69 (1946).

45. Every indication is that despite President Reagan's reservations, Congress will enact, and the President will sign, imposition of sanctions.

The South African government contends that its apartheid policies fall within its domestic jurisdiction and thus are outside the U.N.'s competence to address by resolution or sanction. However, there is the Chapter VII exception to Article 2, Section 7. Chapter VII deals with actions undertaken by the Security Council with respect to threats to the peace, breaches of the peace and acts of aggression. We have established that apartheid impairs friendly relations among nations and poses a continuing threat to peace in southern Africa. Indeed, the Security Council recognized that South Africa poses such a threat and for that reason adopted a mandatory arms embargo against that country on November 4, 1977.<sup>46</sup> Thus the Security Council has jurisdiction under Articles 39 through 41 of Chapter VII to impose sanctions upon South Africa until that state abandons its apartheid policies which endanger peace in southern Africa. Under those provisions of the Charter, the General Assembly is limited to making recommendations for sanctions, but the threat to peace, under the long standing General Assembly's Uniting for Peace Resolution, clearly provides it with the competence to advise such measures.

### Conclusion

Should the South African government eliminate apartheid, root and branch, there would be no basis to impose either an arms embargo or other sanctions. Cosmetic changes alone, however, will not be enough. The South African government has, in the past few years, claimed that it has made significant changes in the apartheid system. But even a cursory review of the South African statute books indicates that little has changed. The bulk of apartheid legislation remains in force. All of those laws find their basis in a conception of humans differing in race, color or ethnicity as inherently unequal and as meriting unequal treatment under law. That belief contradicts one of the fundamental principles enumerated in the Charter of the United Nations and the Universal Declaration of Human Rights, that such discrimination violates international law. Until the government of South Africa accepts that principle of international law and repeals those of its laws which contradict it, the South African legal order will remain one which operates outside and against the body of international law codified by the United Nations and accepted norms of international law.

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46. 32 U.N. SCOR (2046th mtg.) at 5, U.N. Doc. S/INF/33 (1977).