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(M.S. BHAM)

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INTRODUCTION

The challenges to the traditional international legal system, developed, interpreted and applied by Western states, has come from the new African, Asian and Latin American states that have emerged from the colonial yoke. These states, which represent the majority of mankind, were not associated with the development of the Eurocentric legal system that sought to legitimise Western colonial and imperialist policies. These new states, commonly referred to as the Third World, have asserted their political presence in international affairs and have collectively exercised a considerable influence in the reshaping of the international order. Their participation in international forums, in particular the United Nations, has enabled them to redress some of the political, economic and legal inequities that have developed historically from Western colonial domination. From the General Assembly of UN has emerged the demand for a New International Economic Order (NIEO), a New International Information Order (NIIO), a revision of the 1958 Law of the Sea Conventions and the 1948 Geneva Conventions relating to international armed conflicts. The efforts of the Third World to reform the existing international legal order to reflect, and give greater protection to, their interests have been most evident in the role they have played collectively as the 'Group of Seventy Seven' in the UN General Assembly, specialised agencies and other international fora. These efforts have

resulted in the reformulation of a number of obsolete legal principles.

The effort to reform the present international legal order has found concrete expression in the field of eradication of colonialism and racism in all its forms and the recognition of the rights of people to self-determination and national liberation. Since 1960, when the General Assembly passed the historic Declaration on the Granting of Independence to Colonial Peoples[1], states comprising the Third World have been determined to eliminate all vestiges of colonialism. They have condemned the colonial regimes in Africa and elsewhere and have provided material assistance to national liberation movements in their struggle for the right to national dependence and self-determination.

The South African policy of apartheid has been of particular concern to the international community. The colonial aspects of South African society, together with its system of institutionalised racism and the brutal suppression of political freedom, has been the cause of grave concern to the UN, the Organisation of African Unity (OAU) and other international bodies opposed to racial discrimination practised in South Africa. Both the UN and the OAU have been seized of the question of apartheid since their inception in 1945 and 1963, respectively. Numerous resolutions have flowed from

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1. General Assembly Resolution 1514(xv), 14 December 1960.

these bodies condemning South Africa's internal policies and urging states to sever all diplomatic, political, economic, sporting, educational and cultural links with the Pretoria regime. These resolutions have, however, gone unheeded by many states that continue to bolster the regime by maintaining links and collaborating with it. The regime has defied international opinion by continuing to perpetuate its racist policies and denying the black people of their fundamental political rights.

A cursory examination of South Africa's policies in the light of contemporary international law will reveal that they are totally repugnant to principles of governing the protection of human rights. Under the provisions of the Convention on the Suppression of the Crime of Apartheid[2], this policy has been declared a crime against humanity[3] and persons practising or aiding in the enforcement of this policy will be held criminally responsible[4] and may be tried by a competent tribunal.[5] The Convention came into force on 18 July 1976, and by November 1980, 66 states have ratified it.[6]

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2. For text, UN Charter against apartheid notes and No. 1/81, January 1981.

3. Article 1(1).

4. Article III.

5. Article V.

6. See Introduction, p. 2.

Apart from this Convention there are numerous international agreements, resolutions of the General Assembly, Security Council and Economic and Social Council, the judgements of the International Court of Justice (ICJ) for which the apartheid regime has shown blatent disrespect and continues to violate daily. Some of the more important conventions which are relevant to the South African situation include the provisions of the Universal Declaration of Human Rights, the Charter of the UN, the Genocide Convention, the Convention on the Elimination of all forms of Racial Discrimination and the two Covenants on Political and Civil Rights and Economic, Social and Cultural Rights. The consistent violation of these provisions of these documents by the apartheid regime surely ranks that country first in the list of states that have no regard for international law.

Whilst there has been almost universal condemnation of South Africa's policies, there is lack of understanding of the legal implications arising from the continued existence of apartheid in South Africa. Such an understanding, it is believed, is essential for a better perspective in which to view developments in South Africa and its relations with international community. It is towards this understanding that the present study is devoted, although the scope of the subject is limited to the understanding of wars of national liberation in the context of international law. The aim of this study is to examine some of the legal principles and

their application to the conflict in Southern Africa. These wars of national liberation are being headed by two organisations that have both received international recognition, namely, the African National Congress (ANC) and the South-West Africa Peoples' Organization (SWAPO). Since the Geneva Protocols of 1977 are of particular importance to these national liberation movements, it is proposed to examine various issues in the light of the provisions of these Protocols. It may be pertinent to make certain observations to stress the importance of the study from the point of view of international law.

In view of the political intransigence of the apartheid regime it is inevitable that the national liberation movements have and will continue to divert their energies increasingly to the armed struggle, which is perceived as the only effective means to bring about meaningful changes in South Africa and Namibia, the territory which is occupied illegally by the regime. The ANC and SWAPO have resorted to armed struggle as a result of the failure of both national and international efforts to secure a non-violent transition of South African society from the existing system of apartheid to the attainment of national liberation. The ANC since its inception in 1912 attempted to induce political change through non-violent constitutional means but these efforts had no significant impact on the regime. Efforts made through the UN between 1946 and 1961 have likewise failed to persuade the regime to change its policies.

The Western powers share no small responsibility for the crimes of the apartheid regime as a result of their complicity and unashamed political, economic and military support for the regime. The exercise of veto by the USA, United Kingdom and France in the Security Council against resolutions calling for concrete action against South Africa clearly indicates Western support for the regime. Mandatory economic sanctions and a total oil and arms embargo against the regime have not received the full support of the West. These measures provide the only real alternative to the UN in its efforts to bring about perceptive change in South Africa. As the President of the ANC, Oliver Tambo, stated in his speech to the International Conference on Sanctions Against South Africa, which was held in Paris in May 1981:

> Action under Chapter 7 is the ultimate peaceful sanction provided for in the UN Charter. If sanctions are not imposed on so blatent an offence and so persistent a violator of the Charter as apartheid South Africa, then the efforts of the international community towards a peaceful resolution of international problems would have proved an exercise in futility. (7)

The progressive evolution of the laws relating to armed conflict in general and the development of humanitarian law applicable to these conflicts in response to the changing forms and content of warfare has compelled the international community to review international legislation in this regard. The rules applicable to conventional warfare, given expression

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7. Sectola, July 1981, p. 16.

in the Hague Regulations of 1899 and 1907 and the Geneva Conventions of 1949, have little application to the modern forms of conflict such as the guerrilla campaigns waged by national liberation movements and the possibility of the nuclear war. A significant step in this direction was taken when the Swiss Federal Council convened the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable to Armed Conflicts in Geneva in 1974. This conference held three sessions between 1974 and 1977 in the course of which issues pertaining to the adoption of humanitarian rules to govern international and non-international armed conflicts were debated. The outcome of the conference was the adoption of two Protocols attached to the Geneva conventions. These protocols are of utmost significance in that they give explicit recognition to the international nature of wars of national liberation and to the rights of combatants fighting on behalf of these movements. Protocol I also provides for the accession to the Geneva Conventions and the additional Protocol by national liberation movements by means of a unilateral declaration to the International Committee of the Red Cross (ICRC). The ANC acceeded to the conventions and Protocol I in November 1980. The declaration of the ANC stated that:

> ... the African National Congress of the South Africa hereby declares that in the conduct of the struggle against apartheid and racism and for self-determination in South Africa it intends to respect and be guided by the general principles of humanitarian

laws applicable in armed conflicts.[8]

This study has been given added importance as a result of the proceedings and findings of the International Commission of Inquiry into the Crimes of the Apartheid and Racist Regimes of Southern Africa. This Commission which was established in 1977 at the initiative of the Afro-Asian Peoples' Solidarity Organisation (AAPSO) has thus far held two sessions in the course of which it received evidence of the crimes committed by the South African regime under international law. It also sent a fact finding mission to Angola in August 1980 to report on the acts of aggression and military invasion by South Africa against that country in June-July 1980. The Commission has been able to assess South Africa's criminal responsibility in international law against the sovereign states of Angola and Mozambique and against the people of Namibia and South Africa. The nature of the crimes committed by the regime is reminiscent of those perpetrated by the Nazi leadership during Hitler's rule.

The present study is concerned with the legal rather than political issues related to the wars of national liberation in Southern Africa. This study will seek to highlight some of the major legal issues of the conflict with reference to general principles of international law, UN resolutions and international conventions. However, the

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8. Sectola, February 1981, p. 29.

political context within which these issues will be discussed cannot be ignored. Law and politics are inextricably linked and it is therefore not possible to examine law independently of political issues. There is a tendency amongst legal writers to ignore the essential correlation between legal and political interests, to discuss legal issues in the abstract and to emphasise the primacy of law over politics. This tendency is especially prevalent amongst the Western writers and seems to suggest that law has an independent existence without any political or social foundations.[9] In order to appreciate the proper function of law in any given social system it is important to posit the legal structure within the broader social framework and to establish the fundamental relationship between law and society.[10]

The conflict in Southern Africa is essentially political, but law has its own place and function within this political framework. In order to understand the function of law in this conflict, we will trace the political roots of the conflict in the first chapter of the study. This chapter will also examine some of the ways in which the national liberation movements and the international community have attempted to resolve the conflict.

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9. This tendency is most evident in the writings of the positivist school represented by H. Kelsen.

10. Sociology of Law, Penguin (Middlesex, 1969).

Chapter II examines the question of national liberation and wars of national liberation in the light of contemporary principles of international law and relevant international agreements/resolutions and pronouncements. Chapter III deals with the resolutions and judicial pronouncements and significant changes in international humanitarian law that have been introduced by the Geneva protocols. Chapter IV will look at the demand made by the national liberation movements for the recognition of the right of its combatants to be treated as prisoners of war under the Geneva Conventions. Chapter V examines the crimes committed by the apartheid regime on international criminal law with reference to the findings of the International Commission of Inquiry. The conclusion contains some reflection on the prospects for peace and security in Southern Africa and for international peace in general arising out of the militarisation of the South African state and South Africa's nuclear programme.

Chapter I

BACKGROUND TO THE CONFLICT

South Africa and its policy of apartheid has been the concern of many writers from all disciplines.[1] These writers have focussed on the evolution of the struggle for political power between the white minority and the indigenous African population. After 1910 when the British passed the Act of Union in terms of which political authority was transferred into the hands of the local white settlers the conflict assumed a different form. The situation remained in essence colonial, in which the white settler community continue to exercise political domination over the Africans depriving them of their legitimate political rights. With the introduction of the policy of apartheid by the Nationalist Party in 1948, the conflict assumed a definite racial character and the colonial element tended to recede into the background. It has therefore been the tendency among some writers to emphasise the racial issues as being central to the whole conflict.[2] It would be wrong to think of the conflict purely in racial terms and to ignore the colonial basis which has

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1. See, in particular, Brian Bunting, The Rise of the South African Reich (London, 1961); Alex Hepple, South African Political and Economic History (London, 1966); Heriberd Adams, Modernising Racial Discrimination (California, 1971). See also bibliography.

2. See G. Carter, "South Africa: Growing Black-White Confrontation", in G. Carter and O'Meora (eds.), The Continuing Crisis (Bloomington, 1979), pp. 93-140.

been at the core of the historical battle for national liberation in South Africa.

Adams and other writers have pointed out that the form in which colonialism exists in South Africa is of a special kind owing to the fact that the colonial rulers and the colonised are inhabitants of the same territory.[3] Mazrui has described apartheid in the following terms:

> The system in South Africa is an amalgam of slavery and colonialisation. Apartheid shares with slavery the assumption of hereditary caste role, a status based partly on descent and partly on the ascriptive role of masters and servant, just as racism and contempt for black people were at the core of apartheid. (4)

The ANC has described the South African situation as follows:

> (South Africa) is not a colony, yet it has in regard to the overwhelming majority of its people, most of the features of the classical colonial structure: conquest and domination by an alien people, a system of discrimination and exploitation based on race, techniques of indirect rule; these and more are the traditional trappings of the classical colonial framework. (5)

Apartheid is a political, economic and social system which constitutes the framework within which colonialism, oppression and exploitation are being perpetuated.

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3. Adams, n. 1, p. 30; Brian Bunting, "The Origins of Apartheid", in Alex La Guma (ed.), Apartheid (Berlin, 1971).

4. Ali Mazrui, Reith Lectures, 1979. Quoted in J. Barber, "Zimbabwe's Southern Africa Setting", in W.H. Morris Johns (ed.), From Rhodesia to Zimbabwe (London, 1980).

5. Strategy and Tactics of the ANC, Sectala, July 1969.

Both ruler and the ruled perceived apartheid from opposing ideological standpoints. From the perspective of the former it is essentially a philosophy which seems to testify the maintenance of white supremacy. The underlying assumption held by the architects of apartheid, Malan, Verwoerd and other white nationalist thinkers, is that whites are culturally superior to blacks and blacks only exist to minister to and serve the needs of whites. A further assumption on which these thinkers based their philosophy is that blacks and whites cannot coexist in a multi-racial society since cultural differences would give rise to conflict. Verwoerd, addressing the all-white parliament on their policy, asserted that:

> Reduced to its simplest form the problem is nothing else than this: We want to keep South Africa white ... 'keeping it white' can only mean one thing, namely, white domination, not 'leadership', not 'guidance', but 'control', 'supremacy'. If we are agreed that it is the desire of the people that the White man should be able to protect himself by retaining White domination, we say that it can be achieved by separate development. (6)

There are a number of contradictions in this approach to South Africa's racial problems. One of these is obviously the fact that the white minority cannot exist economically without the presence of black majority whose labour is vital to the South African economy. To overcome this contradiction the white regime has resorted to the policy of establishing

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6. Quoted in B. Bunting, n. 3, p. 28.

the homelands or Bantustans for the resettlement of the eight ethnic African groupings. The homeland policy has become central to the apartheid structure since it is these areas to which the regime intends relegating the majority of the African people, thus depriving them of the right to South African citizenship. Mecki has described the function of the homeland policy as follows:

> ... the purpose of maintaining the reserves (homelands) is to provide a source of cheap labour for white agriculture, mining, and industry ... (they) have served as ... camps for the production of migrant labourers, (and) have proved suitable dumping grounds for the physical wrecks whom industry discards in the same way as waste fibre is thrown away after its juice has been extracted. (7)

From the perspective of the oppressed, the system of apartheid is seen not only as an instrument to perpetuate white supremacy but also as a highly exploitative and ruthless dictatorship which seeks to deny them fundamental human rights and to preserve the economic wealth of the country in the hands of a minority. Neither the regime nor its policies enjoy any measure of support from the black majority that is being oppressed.

The rationality behind the policies of the white regime can only be explained historically and within the context of the transition from a largely rural economy to a highly

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7. Govon Mecki, The Peasants Revolt (Middlesex, 1964), p. 67.

industrialised capitalistic economy. Historically, the colonial domination by the Dutch and subsequently the British was based on the need to maintain a master-servant relationship which enabled the colonial rulers to gain access to the vast economic wealth of the country. With the discovery of gold in 1864 and diamonds in 1886, the old colonial relations between master and servant gave way to capitalistic relations in which the black worker became the instrument of severe exploitation. Invariably, these relations were given racial expression, since whites have the monopoly over skills and resources and blacks were forced as a result of the dispossession of their land to sell their labour to the mining industries and later on to the rapidly developing manufacturing sectors of the economy. Magobane and Hepple have both lucidly described this historical process which led to the total subjection of the African population to the white political and economic power structures.[8] These writers have expressed the view that racial inequality is rooted in the economic structure and organisation of the state. Hepple suggests that "the real issue is in fact an economic one ... most of the racial discrimination practiced in South Africa is to do with the exploitation of non-white labour.[9]

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8. Bon Mogulane, The Political Economy of Race and Class in South Africa (New York, 1979); see also, Hepples, n. 1.

9. Ibid., preface.

The policy of apartheid is therefore motivated by both a desire to institutionalise racism and to maintain economic privilege at the expense of discrimination against people on the basis of race and colour and exploitation of black labour. Both racism and economic exploitation are perpetuated through a legal system that give formal legitimacy to these practices. Legislation in South Africa has evolved in response to the need for justifying existing political and economic inequality. As Dugard has stated, "the apartheid legal order serves both to institutionalize racial discrimination and to obstruct evolutionary social change".[10]

Some of these legislative measures include the Native Land Act which made provision for the territorial division of 87 per cent of the land for white occupation and ownership and 13 per cent for Africans: the Group A Areas Act which provided for the establishment of separate residential areas for the different racial groups: the Population Registration Act that provided for the racial classification of South Africans with reference to their racial origins: the Separate Amenities Act that provides for separate public facilities for different racial groups: the Extension of Universities Act in terms of which university education was segregated: the Industrial Conciliation Act which denied African workers the right to collective bargaining and trade union organi-

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10. John Dugord, Human Rights and the South African Legal Order (Princeton, 1978), p. 106.

sation: the Bantu (urban areas) Consolidation Act that made compulsory for every African over the age of 16 years to carry an identity document commonly known as "the pass book", which had to be produced on demand by a policeman.

To maintain the status quo and to suppress all political opposition against apartheid the regime has enacted a series of what in official parlance are called "security legislation", but what in fact are laws aimed at terrorising the opposition. Collectively these laws constitute what is probably the most sophisticated system of political control and oppression in the world. These laws, in particular the Terrorism Act of 1967 which provides for indefinite detention without trial of a political suspect, subverts the entire basis upon which the rule of law is based and invalidates any claim that the South African legal system abides by internationally acceptable legal norms relating to the fair trial and procedural safeguard for accused persons. We will deal with some of these laws that affect the activities of liberation fighters in a later chapter.[12]

Having briefly discussed the nature of apartheid we will now trace the historical evolution of the national movements against the South African regime by noting some of the salient events which took place in that country.

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11. See, International Commission of Jurists, The Erosion of the Rule of Town in South Africa (Gerero, 1968).

12. See Chapter IV.

For this purpose we will adopt Barbar's periodisation[13] of the conflict. Barbar has distinguished three phases of the national movement in South Africa:

1. the elite reformist period which began with the foundation of the agency in 1912 and continued to around 1948;
2. the revolutionary non-violent period from 1949 to 1961 when the agency decided to take up arms; and
3. the violent revolutionary phase from 1961 to the present.

Soon after the 1910 Convention in which white political parties took the decision to form the Union of South Africa, uniting the four provinces of Transval, The Cape, The Orange Free State, and Natal, the ANC was founded to voice the grievances of the African people. During this period the ANC leadership represented by distinguished figures, such as Plaatje, Moroka, Matthews and others, sought to induce political change by applying political pressure in the form of deputations, formal protests against unjust laws, petitions and the submission of memoranda to the minority regime. Through the use of these measures the ANC hoped to persuade Smut's government to improve the political status of African people. The thrust of the ANC opposition was aimed at the removal of injust and discriminatory legislation, such as

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13. Barter, n. 4, p. 79.

the Native Law Act of 1913 and the Native Trust Act of 1936, coupled with the demand for direct political representation in parliament. The ANC at that time strongly emphasised the racial discrimination suffered by Africans and demanded that all racial laws be scrapped from the statute book.

This period was also characterised by the use of and participation in government institutions designed to perpetuate apartheid policies which were created to serve as channels through which the views of the Africans could be communicated. In the Cape province a small number of Africans continued to exercise the vote, until they were removed from the voters' role and were instead asked to vote for a limited number of white representatives in parliament. In the 40's, the ANC participated in the Native Representative Council that was established to serve the government in an advisory capacity. Such participation indicated ANC's willingness to cooperate with the government in bringing about peaceful change.

These efforts, however, were not successful in persuading the minority regime to change its policies. Instead of the progressive dismantling of racist policies and the relaxation of political subjection, we witness the strengthening and expansion of these policies. In 1948 the predominantly Afrikaner Nationalist Party was swept into power with the overwhelming support of the white electorate. The Nationalist Party, which continues to govern to this day, officially introduced the policy of apartheid and expressed its determi-

nation to maintain white domination and the separation of racial groups. With this intent it enacted a series of legislative measures which were to erode whatever little rights blacks enjoyed before 1948. The policies of this party were to lead to rapid deterioration of the political situation and to a crisis in South Africa.

The ANC was forced to review its political strategies in the light of this right wing upsurge in order to meet the challenges and the onslaught against people's rights. In 1949, the ANC together with the South African Indian Congress (SAIC), which have been formed at the initiative of Mahatma Gandhi during his stay in South Africa, entered into a pact in which they pledged mutual cooperation in the struggle against the apartheid regime. The two organisations adopted a programme of action in which they announced the new strategy of civil disobedience and passive resistence against unjust laws, a strategy which owed its inspiration to Gandhi. In the first half of 50's, the ANC and the SAIC initiated a campaign of defiance against the following unjust laws: The Group A Areas Act, The Suppression of Communism Act, The Separate Amenities Act, and the pass laws. During this campaign thousands of people courted arrest, disobeyed these laws and paid fines after appearing in court.

In 1955, the historic Congress of the People was held at Kliptown near Johannesburg and the freedom charter of South Africa was unanimously adopted by the 2,838 delegates represented

there. This document was also formally approved by five national organisations that constituted the Congress Alliance, the ANC, the SAIC, the Congress of Democrats, the Colour Peoples' Organisation and the South African Congress of Trade Unions. The preamble of the Charter proclaimed:

> that South Africa belongs to all who live in it, black and white and that no government can justly claim authority unless it is based on the will of the people. (14)

The defiance campaign and the Kliptown Congress led to a strong reaction from the regime, which promptly arrested 156 leaders and charged them with committing high treason. The trial of these leaders which began in 1956 went on for the next four years. Owing to the paucity of evidence against the accused all were eventually acquitted.

Towards the end of 50's, disillusionment with the constitutional and non-violent strategies as a means of inducing political change began surfacing within the ranks of the national movement. An event in 1960 was to dispel any illusions about the utility of these strategies against the regime. In March that year, the police opened fire on peaceful demonstrators that had gathered to protest against the pass laws at Sharpville and killed 69 persons. These killings evoked national and international outrage and condemnation. Soon after, the regime declared a state of

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14. Preamble to Freedom Charter, quoted in Alex la Guma, n. 3, p. 23

emergency and banned the ANC and the Pan Africanist Congress (PAC) under the Unlawful Organisactions Act. This situation once again compelled the ANC to reassess its political strategies.

In 1961 Nelson Mandela, the president of ANC, together with the ANC leadership, resolved after a careful assessment of the prevailing situation to embark upon an armed struggle. A military arm, called 'Umkhonto Wa Sizwe' was formed with the objective of initiating guerrilla attacks against strategic installations and outposts designed to serve notice to the regime of the determination of the ANC to continue its legitimate struggle against apartheid. In its manifesto issued on the 16 December 1961, the military wing declared:

> The time comes in the life of any nation when there remains only two choices -- submit or fight. That time has now come in South Africa. We shall not submit and we have no choice but to fight back by all means in our power in deference of our people, our future and our freedom. (15)

Mandela in his address to the pan-African Conference held in Addis Ababa in 1962 justified the ANC's decision to take up arms in the following terms:

> South Africa is now a land ruled by the gun ... hence it is understandable why today many people are turning their faces away from the path of peace and non-violence. They feel that peace

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15. Quoted in Nelson Mandela, No Easy Walk to Freedom (London, 1965), p. 169.

> in our country must be considered already broken when a minority government maintains its authority over the majority by force and violence. (16)

Between 1961 and 1976, Unkhonto De Sizwe has been engaged in a guerrilla offensive against the regime. It has been able to develop into a strong guerrilla army which has over the years struck at some of the most vulnerable military and economic targets. Together with the forces of SWAPO, the Patriotic Front of Zimbabwe, Frelimo of Mozambique and the MPLA forces of Angola, the military onslaught against the colonial regime of Southern Africa has gained ascendancy. With the independence of Mozambique in 1974, Angola in 1975 and Zimbabwe in 1980, the forces of the ANC and SWAPO have been able to inflict greater losses against the regime with the support of these liberated territories.

In the aftermath of the 1976 Soweto students' revolt[17] against the system of racist education, thousands of students were compelled to seek refuge in the neighbouring countries owing to state persecution. A great number of these young students found their way into the ranks of ANC and its military wing. With the increase in numbers the liberation movements have been able to intensify their guerrilla efforts in the last five years. In the course

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16. Ibid., p. 120.

17. See, B. Hirron, Year of USA, Year of Fire, (London, 1979).

of 1980 no less than 9 major incidents of guerrilla attacks took place in the country.[18]

The most significant of these attacks was the one on the strategic oil and coal complex at Sasol in June 1980; the estimated damage caused to the complex has been reported to be around 58 million rands (around 58 crore rupees). The regime was taken aback by the well calculated and planned attack so much so that it has denied that the ANC could have been responsible for such an attack. The ANC has shown that it is well placed to carry out the most severe attacks against the regimes' strategic installations.

The Namibian struggle for independence has a long turbulent, political and legal history.[19] Originally called South-West Africa, it had been a former German colony until after World War I when it was placed under the control of South Africa as a League of Nations mandate. The League entrusted the territory to South Africa with the ultimate objective of ensuring independent status for the people of the territory when they had attained a degree of development and the people were in a position to govern themselves. After the demise of the League and the formation of the UN in 1945, South Africa continued to exercise control and

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18. Arrud Suney, South African Institute of Race Relations, pp. 279-80.

19. S.W.A. Cases, ICJ Reports; Dugard John, The SWA/Namibia Dispute.

administer the territory as an integral part of that state. The UN has firmly declared that the territory falls under the trusteeship system and, therefore, Namibia remains an international territory. It has entrusted the Council for Namibia with the responsibility of administering the territory until independence is achieved. It is also recognised that SWAPO is the sole authentic representative of the People of Nambia and it must therefore be a party to any negotiations for an independence plan. In 1978, the Security Council passed resolution 435 in which it called for the holding of free and fair elections under UN supervision with the participation of SWAPO. This independence plan has been subverted by the Western Group of five nations which include the USA, the United Kingdom, France, West Germany and Canada which have been attempting to work out their own proposals obviously with a view to ensuring the protection of their own interests in the region.[20]

South Africa has also ignored the judgement of the International Court of Justice (ICJ) which declared in 1970 that South Africa's presence in Namibia was illegal under international law and called upon the regime to terminate its mandate and withdraw from the territory.[21]

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20. See, E. Londis and M. Davis, Namibia - Impending Independence, in Carter and O'Meora, n. 2, pp. 141-74.

21. See, Kades Amol, Walis Boy - Self-Determination and International Law, paper submitted to seminar on 10th anniversary of the nomitor opinion, The Hague, 22-24 June 1981.

The ICJ had delivered an earlier judgement in 1963 in which it asserted that the parties which had brought the matter to the Court, namely, Libya and Ethiopia had no special interest in the matter and were therefore not competent to ask the Court for a verdict. This judgement was severely criticised as being wrong in law, although the 1970 judgement has been widely acclaimed by the international community.[22]

SWAPO, which was formed in 1960 with the aim of uniting the Namibian people and fighting for political independence for the territory, had likewise attempted to resolve the conflict peacefully and through constitutional channels. The judgement of the ICJ in 1963 and South Africa's intransigent attitude towards independence compelled the organisation to take up arms in 1966. The armed struggle led by the Peoples' Liberation Army of Namibia (PLAN) has escalated in the last fifteen years and SWAPO has repeatedly expressed its determination to intensify the struggle until full independence was attained. In its commitment to continue the armed struggle, SWAPO has been supported by the international community, as expressed in the resolutions of the General Assembly. The declaration issued by the International Committee against Racism, Colonialism in Southern Africa (ICSA) at its annual conference in 1980 represents the attitude of the SWAPO:

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22. Ibid.

> If /the/ peaceful road to liberation is frustrated by the South African regime the conference recognizes that real freedom of Namibia can only be achieved through intensification of armed struggle of the people of Namibia led by SWAPO. (23)

At the international level the struggle against apartheid has taken many forms and has been supported by numerous international, regional and national organisations. Foremost amongst these have been the UN[24] and the OAU. The UN has been seized of the South African issue since 1946, in which year India referred the matter concerning the treatment of Indians by the South African regime to the UN General Assembly. The Assembly called upon South Africa to conduct negotiations with the government of India with a view to reaching a settlement on that question. Despite attempts by the Indian government to open negotiations, South Africa refused to respond to these initiatives alleging that the treatment of its own citizens is a domestic affair within the meaning of article 2(7) of the UN Charter. South Africa has repeatedly used this argument in order to resist international efforts to secure a peaceful solution to the conflict and to avoid international criticism and condemnation of its internal policies. It is necessary therefore to examine in greater detail whether this argument has any basis in international law.

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23. ICSA Bulletin, July 1980, p. 7.

24. Indian Express, 10 April 1981.

Under classical international law the way in which a state treats its own citizens was entirely its own concern. This meant that a state could pursue the most inhuman policies and commit atrocities against its citizens without any regard for international opinion. The post-1945 period has witnessed the growing concern of the international community at the violations of human rights in undemocratic or fascist states. This concern arose out of the atrocities committed by Hitler against jews in Germany and has been given expression in a number of international agreements to which many states have acceded. The most noteworthy is the Universal Declaration of Human Rights, the Convention on Genocide, the International Convention on the Elimination of all forms of Racial Discrimination, the International Covenants on Human Rights. These documents reflect a consensus amongst states that the issue of a state's treatment of its own citizens is a matter of international concern. While article 2(7) strictly prohibits UN intervention in matters which are within the domestic jurisdiction of a state, intervention in policies which constitute a gross violation of human rights is an exception to this prohibition. If such interventions were not permitted in international law the objectives of the UN Charter would be defeated and the progressive development of international law in terms of individual rights would be difficult to explain.

Between 1946 and 1961, debates in the UN centred largely on the question of the treatment of South Africans of Indian origin. In 1961 the General Assembly merged this issue with the broader question of apartheid. This issue has been discussed at every Assembly meeting since 1946. Between 1946 and 1980, the General Assembly passed 130 resolutions ranging from support of the liberation movements to calls for economic, diplomatic, cultural and sports boycotts of South Africa.[25] In the same period, the Security Council adopted only 12 resolutions. The most significant of which was the resolution calling for a mandatory arms embargo against South Africa in 1978. Many of these resolutions, however, have not been implemented as many states, particularly in the West, have failed to comply with them. The Security Council has not as yet declared South African policies to be a threat to international peace under Chapter VII of the Charter which would justify military intervention by the UN. The West has consistently vetoed many of the positive resolutions put forward by the Third World and Socialist States. In May, this year, a proposal to implement mandatory economic sanctions was met with a tripple veto by USA, United Kingdom and France.[26]

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25. Ibid.

26. Indian Express, 24 May 1981.

Apart from the efforts of the UN, its specialized agencies and committees of the General Assembly, such as the Special Committee Against Apartheid, have played a significant role in the international anti-apartheid movement. The agencies such as the International Labour Organization (ILO), the UN Educational, Scientific and Cultural Organisation (UNESCO) and the World Health Organisation (WHO) have through their programmes exposed the effects of apartheid on workers and other segments of society. Under the auspices of these bodies the international isolation of South Africa has been strengthened.

The OAU and the front-line states, namely, Angola, Mozambique, Zambia, Tanzania and Botswana have also contributed significantly to the isolation of South Africa. The OAU has, since its formation in 1963, repeatedly condemned South Africa's policies and has declared that Africa's relation with South Africa would remain strained as long as apartheid continued. The OAU established a Liberation Committee in 1963 to assist the liberation movements financially and to coordinate the liberation struggles.[27] Much of the OAU's posturing against South Africa remains rhetorical since a number of African states continue to have economic and other ties with South Africa and are not

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27. See, HML Ben, Liberation Committee in World Focus, vol. 2, no. 5, May 1981, pp. 16-19.

prepared to sacrifice the advantages that accrue from this relationship. As Nolutschungu has pointed Out -

> The question of Southern African liberation would never again be divorced from the ideological discussion which advocates of African unity could never quite subdue and for that reason African solidarity over apartheid could never again be taken for granted. (28)

Of all the member states of OAU, it is the five front line states that have borne the brunt of the African opposition to apartheid. These states have been largely responsible for the implementation of UN and OAU resolutions against South Africa. Tanzania has been host to the liberation movements and has provided extensive material and educational assistance. The states have also provided military bases and training facilities to the liberation movements in accordance with their international obligations. South Africa has repeatedly carried out military invasions into these territories causing serious damage to property and loss of life.[29] Despite these repraisals the states have continued their firm support for the liberation movements.

In conclusion, it can be said that external efforts to bring about political change in South Africa have by and

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28. Som Nolutschungu, South Africa in Africa (Mass., 1975), p. 295.

29. See, Chapter 5.

large been of limited success. This is so far because of two important reasons. Firstly, these efforts have fallen far short of military intervention which would seem to be the only alternative if the crisis in South Africa continues. Secondly, effective measures against South Africa proposed by the UN or other international forums have met with resistance from the Western powers that have always placed their economic relations with the regime above all other considerations. Continued Western support in the form of economic investment, bank loans, supply of oil and armaments, nuclear collaboration, bilateral trade etc. have been the pillars upon which the apartheid structures have been built. As former Prime Minister, John Vorster, said in 1972 -

> Each trade agreement, each bank loan, each new investment is another break in the wall of our continued existence. (30)

As long as Western support continues, South Africa and apartheid will survive. That this criminal partnership will continue to gain in strength has been made quite explicit by the new Reagan administration.

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30. Quoted in B. Klein, Bricks in the Wall, UN Centre against apartheid, Notes and Documents, 15/81, May 1981, p. 1.

Chapter 2

APARTHEID, NATIONAL LIBERATION AND INTERNATIONAL LAW

In this chapter we propose to examine the system of apartheid and the struggle for national liberation in the light of international legal principles that have developed through international consensus and custom. Before we proceed, it is relevant for this discussion to trace the political origins of the concept of national liberation. The cry for national liberation emerged largely as an outcome of the anti-colonial struggle of the people of Africa, Asia and Latin America. The colonial history and the resistance against colonial rule has been the subject of numerous writings by Third World leaders.[1] The political subjection and economic exploitation suffered by people under colonial rule gave rise to national movements in these territories independence and self-determination. The right to self-determination was manifested in their political programmes.

But the concept of national liberation owes its origins to the writings of Lenin, Mao-Tse-Tung and other Marxist thinkers that have attempted to articulate a demand for national independence as a transition stage to a socialist

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1. See in this connection, the writings of Jawaharlal Nehru, Kwame Nikrumah, Julius Nyerere.

transformation of colonial territories. Lenin in his writings evolved a synthesis of the struggle of colonial peoples for the right to self-determination with the struggle for social and economic emancipation.[2] The right to self-determination entails the right to be free from colonial rule and foreign domination and the right to national independence. In Lenin's words, self-determination means -

> the political separation of ... nations from alien national bodies and the formation of independent national states. (3)

Lenin's formulation of the concept and Soviet interpretation thereof has no doubt exercised an influence on the thinking of Third World leaders in their struggle against colonialism. These leaders have included the demand for national liberation in their political programmes and have emphasised their right to self-determination in their own countries. It was inevitable, therefore, that these concepts were later to find expression in the resolutions and declarations of the UN during the anti-colonial struggles. The most significant expression of these rights is contained in the Declaration on the Granting of Independence to Colonial Countries and Peoples which was adopted by the United Nations

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2. V.I. Lenin, "The Right to Self-Determination" in Selected Works, vol. 1, pp. 567-614.

3. Ibid., p. 569.

General Assembly on 14 December 1960.[4] Eighty-nine states voted in favour of the declaration, none voted against, and there were nine abstentions. This declaration has been considered to be the most authoritative statement on the question of colonialism and the right to self-determination to come from the UN. The declaration states that -

> the subjection of people to alien subjucation, domination and exploitation constitutes one of the fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation. (5)

The declaration gives legal recognition to the right of self-determination in the following terms:

> All people have the right to self-determination and by virtue of that right are free to determine their political status and free to pursue their economic, social and cultural developments. (6)

The adoption of this declaration came at a time when the movement against colonialism had reached its peak with the independence of a number of African and Asian states. It reflects a resolve on the part of these newly independent states to continue to oppose colonialism wherever it still existed in the non-independent territories. The presence of a large number of new states as members of the UN ensured

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3. Ibid., p. 569.
4. General Assembly Resolution 1514 (xv).
5. I. Brownlie, "Basic Documents on Human Rights" (London, 1972), p. 189.
6. Ibid.

that the international effort to eradicate colonialism and the support for national movement would be intensified within the framework of UN Charter.

Following upon this declaration the Assembly proceeded to pass a series of resolutions and declarations in which it sought to gain legal recognition to the principle of self-determination. The thrust of these resolutions was aimed at condemning existing colonial regimes in Southern Africa and elsewhere and obtaining recognition and assistance for national liberation movements. The right to self-determination was firmly embeded as a legal principle in the Declaration of principles of International Law concerning Friendly Relations and Cooperation among states adopted by the Assembly on 24 October 1970.[7] The Declaration said:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of this Charter. (8)

This declaration was adopted by consensus. The other principles contained in the declaration include the prohibition of the threat of or use of force by states, the peaceful settlement of international disputes by states, the duty of

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7. General Assembly Resolution 2625 (xxv).

8. Text in Brownlie, n. 5, pp. 31-40.

states to cooperate with one another in accordance with the Charter, non-intervention in the domestic affairs of any state, the principle of sovereign equality of states, and the affirmation that states shall fulfil in good faith the obligations assumed by them in accordance with the Charter.

Armed with these instruments, the Assembly has relentlessly opposed the policies of the apartheid regime and has strengthened the legitimacy of the struggles of the people of Namibia and South Africa. It has recognised the national liberation movements as authentic representatives of the peoples of these territories[9] and has declared the South African regime to be an illegal government. Initial efforts were aimed at bringing pressure to bear upon the regime to change its policies through strategies of isolation and the severance of all diplomatic, economic and other links. In the seventies, however, the strategy adopted by the Assembly has been to secure increasing support and aid for the national liberation movements and the armed struggles.

A noteworthy achievement of the Assembly in regard to apartheid has been the adoption of the International Convention on the Elimination of all Forms of Racial Discrimination on the 21 December 1965.[10] This Convention

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9. General Assembly Resolution, 31/61, dated 9 November 1976.

10. General Assembly Resolution 1904 (xviii).

condemns racial discrimination which is defined as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of multiplying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in political, economic, social, cultural or any other field of public life".[11] Article 3 of the Convention emphatically condemns apartheid and calls upon state parties to prevent, prohibit and eradicate all practices of this nature.

On 30 November 1973, the General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid.[12] This Convention came into force on the 18 July 1976 after the twentieth instrument of ratification or accession was deposited. Under this Convention apartheid is defined to include similar policies and practices of racial segregation and discrimination as practised in South Africa.[13] Article 1(1) declares that apartheid is a crime against humanity and that the policies and practices of apartheid are crimes violating the principles of international law. The same article under paragraph 2 declares criminal those organisations, institutions and individuals committing the crime of apartheid.

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11. Article 1.

12. General Assembly Resolution 3068 (xxviii).

13. Article II.

A significant feature of the Apartheid Convention is the individual liability of individuals, members of organisations and institutions and representative of states that are responsible for committing, participating in, directly inciting or conspiring, abetting, encouraging or cooperating in the commission of the crime of apartheid.[14]

Apart from the above direct references to apartheid as an international crime, there are a number of legal documents and agreements that support the view that apartheid and the policies emanating therefrom are totally inconsistent with international legal principles. These include the Universal Declaration of Human Rights[15], the Genocide Convention[16], and the International Covenants on Human Rights.[17] Article 2(2) common to both Covenants call upon states to guarantee the rights contained therein to all individuals without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other grounds.

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14. Article III(a) and (b).

15. Universal Declaration of Human Rights, article 3-17, 22 and 23.

16. Genocide Convention, article I, II and III.

17. Communist Party of the Soviet Union, History of the CPSU, quoted in Ginsberg, George, "Wars of National Liberation", and the Modern Law of Nations - The Soviet Theses, Law and Contemporary Problems, vol. 29, 1964, p. 910.

The above discussion has attempted to illustrate how the principle of self-determination, the fundamental objective of the struggles for national liberation has been accepted as a basic principle of international law, and how the policy of apartheid has been prescribed and declared a crime. We will now turn our attention to the question of wars of national liberation and their status under international law.

The concept of wars of national liberation is also associated with Soviet writings on colonialism. From the Soviet point of view, wars of national liberation are the means to defend the people from foreign attack and also from attempts to enslave them; or to liberate the people from capitalist slavery or to liberate colonies and dependent territories from the yoke of imperialism.

In the sixties, this concept came in vogue as a reference to the anti-colonial struggles in which force was used to oust the colonial power. It was recognized by the General Assembly that these armed struggles were of a special character and needed to be distinguished from internal conflicts. The struggle for the elimination of colonialism was seen as international in character through the Declaration on the Granting of Independence to Colonial Countries and Peoples and other UN resolutions.

Under Article 2(4) of the Charter the threat or use of force has been prohibited. There has been considerable

debate over the interpretation of this prohibition and whether there are any circumstances under which the use of force may be legitimate. It has been argued that the prohibition is an absolute one with the exception of the right to self-defence permitted under article 51 and acts sanctioned by the UN. Briefly stated:

> the broad effect of article 2(4) is ... that it entirely prohibits the use or the threat of armed force against another state excepting self-defence or in execution of collective measures authorised by the Council and Assembly. (18)

However, it has been argued that wars of national liberation constitute an exception to this prohibition and that these wars are essentially acts of individual self-defence.[19] The exception in favour of these wars are justified on the basis of the legitimate cause, namely, the right to self-determination, for which they are being waged. It is further argued that if this exception to the general prohibition against the use of force were not recognised, one of the fundamental objectives of the Charter, namely, the promotion of the principle of equal rights between States and the right to self-determination[20] of peoples would be defeated.

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18. J.L. Brierly, The Law of Nations (London: Oxford University Press, 1963), p. 45.

19. R. Crorelick, "Wars of National Liberation", IJIL, vol. 18, 1978, p. 364.

20. Article 55, UN Charter.

Skubiszewski has also argued in favour of wars of national liberation by suggesting that the prohibition against the use of force applies only to relations between states and does not affect the right of peoples to resort to force to attain political independence or overthrow an oppressive regime. He asserts:

> ... the right of the people to fight the government under which they happen to live, be it their own, foreign ... is not to be deduced from the law on the use of force but rather from the principle of self-determination and the political right of revolution and to have a government of the peoples' own choice. Oppression whether foreign or domestic can always be fought by the oppressed. (21)

A further argument in support of this contention which was put forward by India in defending the invasion of Goa in 1961 is that colonialism is itself an act of aggression committed by the colonial power against the colonised. The aggression is perpetuated through colonial domination and continues for the duration of colonial rule. Therefore, people subjected to colonial rule are within their right to use force to expel the aggressor.

The General Assembly has through a number of resolutions given express support to the armed struggles waged by national liberation movements like SWAPO, the ANC and the

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21. K. Skubiszewski, "Use of Force by States", in Max Sorensen (ed.), Manual of Public International Law (Hong Kong, 1978), p. 774.

Palestine Liberation Organisation (PLO).[22] The Assembly has repeatedly affirmed the legitimacy of the struggle of the oppressed people of South Africa and Namibia to eradicate apartheid by all available means and has also called upon states to render every possible assistance to these movements in their struggles. In 1976 the Assembly in a resolution recognised:

> In particular /that/ the consistent defiance by the racist regime of South Africa of UN resolutions on apartheid and the continued brutal repression including indiscriminate mass killings by that regime leave no alternative to the oppressed people of South Africa but to resort to armed struggle to achieve their legitimate rights. (23)

These resolutions, although not formally binding, have generally been considered to have some legal effect which can lead to binding relations once incorporated into the body of customary international law. According to Prof. Umozoriki:

> The General Assembly resolutions reflect the view of the great majority of states and indicate the trend in the development of state practice and of customary law and are, as a minimum, pursuasive. (24)

Further support for the legitimacy of wars of national liberation may be found in the Definition of Aggression.

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22. General Assembly Resolutions 3151 (xxviii), dated 14.12.73; 2923EE (xxviii) dated 15.11.72; 3411C (xx) dated 28.11.75; 3030 (xx) dated 18.12.75; 3411G (xx) dated 10.12.75; 35/206J(xxv) dated 16.12.80.
23. General Assembly Resolution 31/61 (xxxi) dated 9.11.76.
24. Prof. Umozorike, U.O., The General Conventions and Africa, proceedings of the international Conference on Humanitarian Rules and Military Instructions, 2-4 Sept. 1971, International Institute of Humanitarian Law, p.150.

The Definition sets out the acts which constitute aggression under international law and specifically excludes from the definition acts which are committed in furtherance of the right of self-determination, freedom and independence of people forcibly deprived of their right, particularly people under colonial and racist regimes or other forms of alien domination.[25] Nor does the definition cover acts aimed at supporting peoples struggling toward that end in accordance with the Charter and the Declaration on Principles of International Law Governing Friendly Relations and Cooperation among States.[26] States rendering such assistance are not guilty of aggression but will be fulfilling an international duty imposed upon them by the UN.

It has been argued that assistance must be confined to material assistance only, but it is clear from the wording of the resolutions, such as: "The provision of humanitarian, educational, financial and other necessary assistance"; and from the legitimacy of the armed struggle that military assistance is also included.[27] Two further questions remain to be considered in regard to wars of national liberation: firstly, the legal character of these wars and secondly, the form of warfare namely, guerrilla

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25. Article 7.

26. Ibid.

27. General Assembly Resolution 35/206 dated 16.12.1980.

warfare used by national liberation movements as a means to overcome the superior military might of the colonial power.

Under the Geneva Conventions a distinction is drawn between international wars and wars not of international character. Article 2 common to the four Conventions declares that:

> the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the high contracting bodies, even if the state of war is not recognized by one of them. (28)

Article 3 common to the Conventions speaks of armed conflicts not of an international character and enumerates the minimum provisions which shall apply in such situations.

This distinction has not been clearcut and there has been considerable debate over the circumstances under which wars may be international or internal.[29] Particularly what is not too clear is when an internal conflict led by a movement which gains broad support of the people and is in occupation of large areas of a territory becomes internationalised.

In regard to wars of national liberation it was at one time considered that these were strictly internal

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28. Geneva Conventions, I, II, III and IV, text in Friedman, "The Law of War", vol. 1, Random House, (New York, 1972), pp. 525-691.

29. See, E. Luard (ed.), International Regulation of Civil Wars (Great Britain, 1972).

conflicts, which gave the right to the colonial power to suppress any military opposition. It must be remembered that the Geneva Conventions were negotiated by the European powers in the aftermath of the World War II and were largely concerned with mitigating the sufferings of partisan movements and civilians that were most seriously affected by the excesses of the war. The emergence of national movements is a post-1949 development to which the Conventions did not address. The states that emerged from these colonial shackles were committed to bring an end to colonialism through the maximum internationalisation of the continuing colonial struggles.

Professor Umozorike has argued that colonial wars are international because:

(i) Colonialism violates the principles of non-aggression and self-determination;

(ii) wars aimed at ending colonialism are protected under international law; and

(iii) colonial conflicts are waged between alien and indigenous groupings.[30]

The General Assembly resolved in 1973 that armed conflicts involving the struggles of peoples against colonial and alien domination and racist regimes are to be regarded

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30. Umozorike, N., n. 24.

as international armed conflicts in the sense of the 1949 Geneva Conventions and the legal status envisaged to apply to the combatants in the Conventions and other international instruments are to apply to the persons engaged in armed struggles against colonial and alien domination and racist regimes.[31]

The whole question of the status of wars of national liberation was reviewed in the course of negotiations conducted in the Diplomatic Conference on the Development and Reaffirmation of International Humanitarian Law Applicable to Armed Conflicts held in Geneva between 1974 and 1977. This Conference adopted a Protocol dealing with international and non-international armed conflicts.[32] The central debate during the negotiations concerned the acceptance of article 1(4) which was proposed by a number of Third World states as an amendment to article 1 of the draft protocol submitted by the International Committee of the Red Cross (ICRC). Article 1(3) and 1(4) of Protocol 1 read as follows:

> This Protocol, which supplements the Geneva Convention of 12th August 1949 for the protection of war victims, shall apply to the situation referred to in article 2 common to that Conventions. The situation referred to in the preceeding paragraph include armed conflicts in which people fighting against colonial domination and alien occupation and against racist regimes in the

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31. General Assembly Resolution 3103 (xxviii).

32. Protocols I and II.

> exercise of their right to self-determination, as enshrined in the UN Charter and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation between States in accordance with the Charter of the UN. (33)

Article 3 of the Protocol makes it clear that wars of national liberation are international in character, when such wars are waged in any one of the three situations mentioned above, namely, where people oppose either colonial domination, or alien domination, or racist regimes. It is not a necessary condition that these situations be present simultaneously.[34]

In order that national liberation movements may take advantage of the protection afforded by the Geneva Conventions for their combatants, Protocol 1 makes provision for the issue of a declaration to the ICRC Executive Committee proclaiming their commitment to abide by and respect the rules of the Geneva Conventions.[35] The ANC issued such a declaration in November 1980 in which it agreed to abide by the rules of Geneva Conventions and Protocol I.

Many writers have expressed different views on the legitimacy of guerrilla warfare under international

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33. Protocol I, articles 1(3) and (4).

34. K. Asmal, "The Status of Combatants of the Liberation Movement of South Africa under the Geneva Conventions of 1949 and Protocol 1 of 1977", UN Centre Against Apartheid, Notes and Documents, 10/80, June 1980, p. 5.

35. Article 96, Protocol I.

law.[36] Oppenheim has opined that guerrilla warfare is a recognized form of warfare and that Geneva Convention III has application in such methods of warfare provided that guerrilla fulfil the four conditions stipulated in article 4 of that Convention, namely,

(i) that they are commanded by a person responsible for his subordinates;

(ii) that they have a fixed distinctive sign recognizable at a distance;

(iii) they carry arms openly; and

(iv) they conduct their operations in accordance with the laws and customs of warfare.

Levie has argued that the above provision does not protect guerrilla fighters and that such fighters cannot claim any protection under the Geneva Conventions.[37] Khan has, however, argued in favour of the legitimacy of guerrilla warfare and the right of guerrilla fighters to prisoners-of-war status.[38] After examining the guerrilla attack by Kashmiri insurgents in 1965, Khan comes to the conclusion that "there is nothing in the guerrilla form of warfare

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36. See, G.I.A.D. Draper, "The Status of Combatants and the Question of Guerrilla Warfare", BYIL, vol. XLV, 1971, pp. 173-218, and R. Khan, "Guerrilla Warfare and International Law", International Studies, vol. 9, July 1967-April 1968, pp. 103-127.

37. Levie, Haward, "POWs in International Armed Conflict", International Law Studies, Naval War College, vol. 59, 1976.

38. R. Khan, n. 36.

which contravenes the norms of international law".[39] In defence of the right of guerrilla fighters to be regarded as combatants and prisoner of war status, Khan asserts that:

> A fighter who has been promised the privileges of the norms of war will heed the rules of war more than one foredoomed. This ... would be in effect to legalise lawlessness but rather to bring the law into closer conformity with the facts of international life. (40)

From the above discussion we can conclude that guerrilla warfare enjoys legitimacy under international law and that national liberation movements engaged in guerrilla warfare to end colonialism and oppression act in full conformity with international law.

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39. Ibid., p. 113.

40. Ibid., p. 127.

Chapter III

WARS OF NATIONAL LIBERATION AND INTERNATIONAL HUMANITARIAN LAW

Throughout the history of warfare the parties to the conflict have shown an interest in not only regulating the course and conduct of warfare (Law of Armed Conflict), but also in the mitigating the suffering of those participating in the conflict, that is, the combatants as well as those not directly involved in the hostilities, that is, the civilian population. (International Humanitarian Law).[1] The former has been codified in a number of treaties and conventions, the most important of which are the Hague Regulations of 1899 and 1907 and the Geneva Conventions of 1949. This law has also been the subject of serious study by writers such as Lieber[2], Grotius[3], Oppenheim[4] and others. The fundamental problem of distinguishing between military and non-military objects (i.e. between combatants and civilians) remains central to the law of

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1. See, L. Friedman, "The Law of War", vol. I and II, Random House (New York, 1972); Oppenheim, L., "International Law", vol. II, Longman (London, 1970); Schindler, S. and Toman, J., "The Laws of Arm Conflicts", Sidzho (Geneva, 1978).

2. See Lieber's Code in Friedman, pp. 158-186.

3. See, Grotius, H., "The Law of World Peace", in Friedman, pp. 16-148.

4. Oppenheim, "International Law", vol. II. n.1.

armed conflict. The other major concerns of this part of the law has been the prohibition of the use of inhuman weapons and the limitation of force that is considered cruel and excessive. It has always been considered necessary to place limitations upon the methods, and the means of weakening the enemy. The Lieber Code spells out this need in the following terms:

> Military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering and for revenge, nor maiming or wounding except in fight, nor torture to extort confession ...

While the efforts to codify the law of armed conflict can be traced to the 19th century, international humanitarian law gained serious momentum only after the Second World War. The main concern of this part of the law has been to balance military necessity with humanitarian needs. While on the one hand, states have recognised the need to regulate a treatment and protection of combatants as well as non-combatants, at the same time they have been keen to secure the best possible advantages under international law to exercise their military might. Many writers have been sceptical of the efforts to develop international humanitarian law and they believe that such efforts cannot bear fruit. Wright has expressed his sceptisicm as follows:

> When war is fought for broad ideological objectives, such rules have tended to break down because the end is thought to justify all means and war has

tended to become absolute.[6]

Despite this criticism the efforts of the international community in this field has shown some positive results. The first such attempts were made in 1929 when the Convention on Treatment of Prisoners of War was signed by the major European powers. This Convention provided for the protection of the prisoners of war and called upon state parties to treat them humanely and protect them against acts of violence, insults and public curiosity.[7] In the same year the Red Cross Convention, which provided for the treatment of the wounded and sick and deceased held that officers, soldiers and other persons who are wounded or sick shall be humanely treated and cared for without distinction of nationality.[8] But these conventions fell far short of the needs of prisoners of war, wounded, sick and other casualties of war.

It took another twenty years and a World War in which millions of lives were lost before any major effort was made to codify international humanitarian law. The ICRC summoned a diplomatic conference in 1949 in which it initiated representations of states to discuss further codification of law. This Conference produced four Conventions, relating to:

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6. Q. Wright, "A Study of War", vol. 1, p. 160, quoted in Friedman, p. 5.

7. Convention on Treatment of Prisoners of War (1929), in Friedman, pp. 467-470.

8. Article 1, Red Cross Convention, 1929 in Friedman, p. 471.

(1) the condition of the wounded and sick in armed forces in the field;

(2) the wounded, sick and ship-wrecked members of armed forces at sea;

(3) treatment of prisoners of war; and

(4) protection of civilians.

These conventions represent the most significant contribution to the development of humanitarian law in International Armed Conflict. The Conventions, however, covered, with the exception of Article 3 which makes reference to non-international armed conflict, only international armed conflict in which state parties are involved. No provision was made for the protection of combatants of non-state entities such as liberation movements. These movements and their combatants were without legal redress until 1969 when the UN General Assembly resolved to urge states, in consultation with ICRC, to study the steps which could be taken to improve the existing humanitarian law and to look into the need for additional conventions to ensure the better protection of civilians, prisoners (of war) and combatants in all armed conflicts.[9] In a subsequent resolution the Assembly requested the Secretary-General to give special attention to the protection of combatabts of movements fighting against colonial or alien domination.[10] In the

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9. General Assembly Resolution, 2444 (xxiii), 13.1.1969.

10. General Assembly Resolution, 2597.

same year the Executive Committee of the KRC meeting held in Istanbul resolved to invite governmental, Red Cross and other experts representing the principal legal and social systems of the world to meet for consultation with the ICRC and to recommend the appropriate authority to convene one or more diplomatic conferences of state parties to Geneva Conventions for the purpose of expanding the existing humanitarian law.[11]

Between 1969 and 1971 the Secretary-General of the UN had also prepared reports in which he recommended the reforms or additions to the existing humanitarian law.[12] Inspired by the above resolutions, the KRC convened two conferences in 1971 and 1972 in which government experts deliberated proposals to improve the Geneva Conventions. From these conferences emerged the Two Draft Protocols attached to Geneva Conventions.[13] The first Draft contained proposals to regulate international armed conflicts while the second dealt with internal conflicts. These Draft Protocols provided the basis for negotiations in the Diplomatic Conference convened by the Swiss Federal Council in 1974.

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11. ICRC Resolution, xiii, Eastern Bill Conference (xxi), September 1969.

12. Report on Human Rights in Armed Conflicts, 1969, 1970 and 1971 in Friedman, pp. 701-754.

13. Protocols I and II, 1977.

The invitation issued by the Council was addressed to the States but not liberation movements. The ICRC at its Teheran Conference in 1973, while welcoming the decision of the Swiss Federal Council to convene the Conference, urged that consideration should be given to inviting representatives of national liberation movements recognised by regional or inter-governmental organisations to participate in the work of the conference as observers in accordance with UN practice.[14] The first session of the conference which began on 20 February 1974 was, therefore, confronted with the question of whether or not to invite representatives of national liberation movements. The US strongly opposed the participation of these movements which it considered to be "terrorist movements". The Third World and Socialist states, in keeping with their policies of supporting and giving these movements every opportunity of presenting their view points, welcomed their participation in the conference. After some debate the conference resolved to invite these movements including the ANC, SWAPO and the Pan Africanist Congress (PAC) to participate fully in its deliberations but without the right to vote.

In what follows we will concern ourselves only with those issues discussed - relevant to wars of national national liberation - in order to illustrate the important

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14. ICRC Resolution, xiii, Teheran Conference, 1973.

changes that the conference and the Protocols have introduced in relation to these wars. It will not be an exaggeration to say that the whole conference hinged on the question of recognising the international character of these wars and the protection to be given to combatants of national liberation movements. We will confine ourselves to discussions of the controversial articles 1(4), 44 and 51 of the final act which dealt directly with wars of national liberation. The remaining draft articles were approved by consensus with some modifications made during the priliminary committee sessions.

Article 1(4) proposed the internalization of wars of national liberation with the aim of securing for the combatants of liberation movements the full protection of Geneva Conventions. The ICRC draft article 1 made no reference to wars of national liberation. During the first session of the committee entrusted with the task of examining the general provisions of the draft protocols, a number of Third World states including Egypt and Tanzania proposed an amendment to article 1 to include the present formulation of Article 1(4). The Egyptian delegate, speaking in support of the amendment, expressed the view that the inclusion of wars of national liberation under the category of international liberation wars was not a new phenomenon but simply a re-affirmation of existing international law embodied in General Assembly resolutions. He asserted that:

> the question before the Conference is not whether it could do away with wars of national liberation by ignoring them or denying them the benefit of humanitarian law but rather how relevant ... international humanitarian law ... of the last quarter of the 20th century could be if it chose to ignore wars of national liberation. (15)

The Tanzanian delegate expressed the view that wars of national liberation were a post-1949 phenomenon which the Geneva Convention took no account of. It was therefore necessary to impress upon the conference so as to give effect to post-1949 developments.

The Western delegates expressed criticism of Article 1(4). The Belgium delegate thought that wars of national liberation were "anachronisms which would soon be ended"[17] while the US delegate described these wars as acts of international terrorism "which could not be made legitimate merely by calling it international conflict".[18] Also opposing the amendment the delegate of United Kingdom suggested that the acceptance of such an amendment would disrupt the entire basis of humanitarian law based on the distinction between international and internal conflicts, which he believed had to be maintained.[19]

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15. CDDH/

16. CDDH/

17. CDDH/

18. CDDH/

19. CDDH/

In the plenary session held in 1977 the Israeli delegate called for a vote on Article 1(4). The vote produced the following results: 87 for, 1 against (Israel) and 14 abstentions. The Syrian delegate replying to Israel's sole dissenting vote stated that it was no "surprise" that such a country would vote for an Article which protected the people whose territory it was occupying.[20]

The Nigerian delegate, speaking on the significance of the acceptance of the majority of participant states of Article 1(4), stated that:

> It was of extreme significance that the increasingly intensive armed struggle for independence in Namibia ... and South Africa could now be recognised by the World as an international conflict under international humanitarian law. (21)

The second issue which raised some controversy related to the definition of combatants. The status of combatants is dealt with under Article 43, which reads:

> The armed forces of a party to a conflict consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognised by an adverse party. (22)

Article 43(2) continues to describe members of the armed forces of a party to a conflict as combatants having the

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20. CDDH/

21. CDDH/SR 36-40, p. 48.

22. Article 44(2).

right to participate directly in hostility. The Nigerian delegate stated that the adoption of the article "was a victory of justice because it recognised the right of freedom fighters engaged in the liberation movement in Namibia ... South Africa and other areas fighting against a militarily superior adversary in special combat situation".[24]

Even in the absence of the application of the above provision, combatants of national liberation movements are protected by the fundamental guarantees provided for in Article 75. This article stipulates that in the case of nationals or states not bound by the Convention, the parties or nationals shall, in all circumstances, be treated humanely and shall enjoy, as a minimum, the protection provided by the Article without any adverse distinction based upon race, colour, sex, language, religion and belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criterion, embarking upon any guerrilla operation.

The only official South African response to the conference and the Protocols was a reply to the President of the Conference who had been requested to communicate with

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23. CDDH/SR 40, p. 145.

24. CDDH/SR 40, p. 125.

25. Article 85(4c), Protocol I.

26. CDDH/SR 41, p. 17.

the regime informing it of the resolution passed by the conference in 1975 seeking a guarantee that the regime would abide by the Geneva Conventions to which it is a party.[27] In reply, the South African Foreign Minister stated:

> ... I wish to point out that the Republic of South Africa has always honoured the precepts of international law and its obligations under treaties to which it is a party. In regard to the resolution I ... decline to comment. (28)

The crimes and violations perpetrated by the regime, which we will examine in a latter chapter, will reveal the extent to which it respects international law.

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27. DCHL/, Resolution on South Africa, 5.2.1975.

28. DCHL/, p. 358.

Chapter IV

PRISONERS OF WAR OR TERRORISTS?

It has been customary for parties engaged in armed conflict to grant captured combatants a privileged status different from that of ordinary criminals imprisoned for contravening criminal legislation of the captor state party.[1] From this practice emerged the concept of prisoners of war (POW). Traditionally, this status has been conferred upon those members of the armed forces of a state participating directly in the conflict. The Geneva Conventions, however, recognised the right of members not belonging to the armed forces of a state to be protected under the Prisoners of War Convention provided that they fulfill four conditions, namely, being commanded by a superior responsible for their conduct, carry arms openly, have a fixed distinctive sign recognizable at a distance and conduct their operations in accordance with laws and customs of war.[2]

The UN General Assembly[3], national liberation movements and lawyers have repeatedly urged recognition of combatants engaged in wars of national liberation as being entitled

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1. L. Friedman (ed.), The Law of War (Randoum House, New York, 1972), vol. I and II.

2. Article IV, Geneva Convention III.

3. General Assembly Resolution, 2506A (WHIB, dt. 21.11.69).

to prisoners of war status. In particular, the call has been directed to the grant of prisoner of war status to captured combatants of ANC and SWAPO. A number of organizations, including the OAU, and the non-alignment movement, have supported this campaign and have urged the regime to give due recognition to the rights of these combatants under international law. In recent years this campaign has been intensified and the demand for prisoner of war status for ANC and SWAPO guerrillas has assumed an urgency in view of the continued harsh treatment of captured guerrilla fighters by the South African regime through the use of its draconian laws such as the Terrorism Act. One such guerrilla, Solmen Mahlangu, has been sentenced and hanged to death for his participation in the war. Six other guerrillas presently face the death sentence passed upon them by the regime's courts. The regime, assisted by its judiciary, had no consideration for the legitimate defence put up by the accused that they were fighting a national liberation war and that they were entitled to the right of self-determination. The attitude of the regime has been to regard these guerrillas as terrorists and criminals. This attitude has been reflected in the judgements handed down by South African judges in the prosecution of guerrillas captured before, during or after having engaged in a military attack against the regime. The South African judiciary has repeatedly expressed the view that its function is to enforce the will of parliament

expressed in statutory legislation passed by it, irrespective of the ethical or legal merits of those laws. As one judge commented:

> Parliament may make any encroachment it chooses upon the life, liberty and property of any individual subject to its sway and ... it is the function of the courts to enforce its will. (4)

The judges have, therefore, taken a very complacent view of the infringments of human rights by the regime and have given the impression of complicity in the crimes committed by the regime. In this chapter we will examine firstly the accusation levelled against combatants of liberation movements that they were terrorists, to see whether there exists any basis in law justifying such an allegation; secondly, we will briefly note some of the important South African laws that are used in the prosecution of liberation combatants; thirdly, we will examine a few cases in which guerrillas have been prosecuted for their legitimate participation in wars of national liberation; and finally, we will look at the relevant provisions of the Geneva Conventions and Protocol I dealing with prisoners of war.

Terrorists?

Terrorism has been described as : "The method or the

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4. V. Sachs, Minister of Justice, 1934, AED, 11.8.37, quoted in Dugard, Human Rights and South African Legal Order (Princeton University Press, Princeton, 1978).

theory behind the method whereby the organised group or party seeks to achieve its avowed aims chiefly through the systematic use of violence".[5] Essentially, terrorism is a method employed by political groups to achieve their political objectives. It is a method which has been adopted by diverse political organisations to draw attention to their cause and to give expression to their political demands which could not otherwise be achieved through constitutional or legal means.

History has seen the use of this form of political action by many movements ranging from the Soviet harodricks during the Russian Revolution, the anti-colonial Indian revolutionaries during the independence struggle to the British Army, the Baader-Meinhof gang of Germany and the Red Army of Japan. These movements have all shared the common objective of winning recognition for their political demands. In recent years we have witnessed the rise of terrorist movements in Western democracies as well as the emergence of what is being called International Terrorism. The latter phenomenon which has been described as the transnational cooperation between various national terrorist groups has caused increasing international concern because of the consequences for a number of states simultaneously. Of particular concern has been the hijacking of aircraft,

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5. Hardman, JBS in Lacqur, W., The Terrorism Reader, (Wildwood House, London, 1978), p. 223.

the disruption of air services, the kidnapping and killing of diplomats, the taking of hostages etc. This concern has led to attempts to formulate and draft international agreements to regulate and control the actions of terrorist groups. A number of conventions have already been agreed upon particularly in relation to the regulation of international hijacking of aircraft and the disruption of air services. However, efforts at concluding agreements on other matters related to terrorism have not been successful largely because of disagreement over the definition of international terrorism. The West has taken the attitude that all violent acts committed by movements which were not recognised by it and which threaten their own interests constitute terrorism. On the other hand, the Third World States distinguished between acts committed in furtherance of national liberation or revolutionary social change and acts of deliberate and irrational anarchism.

This distinction is vitally important for a proper understanding of terrorism. It is upon such a distinction that terrorist movements and movements for national liberation can be differentiated. While the former have no basis for political legitimacy nor enjoy the support of people they profess to be fighting for, the latter enjoy both political legitimacy and the support of the concerned people as well as a large section of the international community.

Given this essential distinction, it would be absurd to label the ANC or SWAPO as terrorist movements. These movements represent a cause which has been recognised as legitimate by the international community. The means which these movements adopt to further their political aims, that is, the armed struggle, has also been recognised as being justified in the absence of any legal channels available to them to bring about change. Both for the ANC and SWAPO there was no alternative left but to resort to arms to continue the struggle for national liberation. Those who accuse these movements of being terrorists tend to ignore both the historical and political realities which have shaped the kind of struggle that is taking place today in Southern Africa as well as the legal obstacles to non-violent change.

As the Libyan delegate to the Diplomatic Conference stated in his response to the description of liberation combatants as terrorist:

> Any one who employed that false and arbitrary description failed to understand the sacred character of the freedom of peoples ... Such a speaker ... failed to understand the historical truth that the barbarous and illegitimate activities of the colonialist forces has justified their expulsion by armed struggle from the territories they were occupying however long that struggle might last. (6)

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6. CDDH/SR 40, p. 143.

Political Legislation

With a view to suppressing all political opposition and controlling the political activities of opponents to its policies, the regime has enacted a number of repressive laws during the last three decades. These laws govern the political movements and activities of all those that oppose the apartheid policies of the regime. With the growing discontent in the country and the increasing activities of the guerrilla press, the regime has strengthened its legal apparatus to reinforce its repressive machinery. One of the first such laws to be introduced was the Suppression of Communist Act of 1950. This Act, which was amended in 1976, and renamed the Internal Security Act, was introduced to suppress activities of the Communist Party of Southern Africa, in particular, and to control political opposition in general. Article 1(2) defines communism to mean:

> the doctrine of Marxism Socialism as expounded by Lenin, Trosky, the third Communist International (Comintern) and the Communist Information Bureau (Conform) or any related form of that doctrine expounded and advocated in the Republic for the promotion of the fundamental principles of that doctrine.

Under this definition, communism includes (i) any doctrine aimed at bringing about political, industrial, social or economic change by any means, including: "the promotion of disturbance and disorder", (ii) in accordance with the direction or under the guidance of and in cooperation

with any foreign government or international institution; (iii) through the encouragement of feelings of hostility between the White and Black races.[7] A further provision of the Act empowers the President to declare any organisation unlawful if it furthered the aims of communism through promotion or propagation of or the spread of communism or through engaging in such activities calculated to further those ends.[8]

Under Section 9, the Minister may prohibit any person from attending any gathering or any particular gathering of a particular nature, class or kind at any place or in any area during any period or on any day or during specified times or periods within any period. This provision has the effect of totally isolating any person from other persons and from society at large. At present there are over 200 persons that have been banned under this provision.[9] Section 40 provides for the penalties for violating any of the provisions of the Act and this may include sentences ranging from one year to life imprisonment.

The other Act which has been liberally used by the regime particularly against combatants of the liberation movement, is the Terrorism Act of 1967. This Act, which

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7. Internal Security Act, 44, 1950. See, UN Centre Against Apartheid, Notes and Documents, 3/18, March 1978.

8. Times of India, 30.8.81.

9. The Terrorism Act, 83 of 1967, Section II.

was made retroactive to 1961, defines terrorism as including any act intended to threaten the security of the state and endangers law and order.[10] The Act declares unlawful any attempt to receive military training outside the country or resist any person in making such attempt to receive military training with the purpose of overthrowing the government.[11]

Section 6 of the Act provides for the indefinite detention without trial of any person suspected of having committed any act of terrorism for the purpose of answering all questions put to him by the public prosecutor. No person may visit the detained person during his detention. The detenue may only be released after he has satisfactorily answered all questions or he may be charged with committing certain offences under the Act or some other law in which case he will be brought to trial.[12]

Of all the legislations passed by the regime this is indeed the most formidable in its effect on political activists. The Act legalises interrogation of a person detained and authorizes his indefinite detention. In most cases the detenue is subjected to mental, physical and psychological torture by his interrogators in order to induce

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10. Ibid.

11. Ibid.

12. See, Antony Mathews, Law and Order and Liberty in South Africa (University of California Press, Berkeley, 1972).

a confusion to facilitate legal proceedings. Both witnesses and accused that have been detained under this Act have given evidence of the most cruel and inhuman forms of torture and ill-treatment such as electric shocks, physical assaults, being forced to stand for long hours or being seated with knees bent, burning, etc.[13] The courts have in general tended to accept the confessions despite overwhelming evidence of forced confessions induced through torture and interrogation.

In addition to the above a number of other laws including the Riotous Assemblies Act[14], the General Law Amendment Act[15], the Criminal Procedure Act[16], the Unlawful Organisation Act[17], etc. exist on the Statute book which constitute the legal framework within which the opponents of the Apartheid regime are silenced. We will now look at specific cases in which combatants of the liberation movements have been prosecuted under one or other of these Acts.

Political Trials

South Africa has a long record of political trials,

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13. See, Indian Express, 7 March 1981; Sechaba, July 1980, pp. 11-16; UN Centre Against Apartheid, Notes and Documents, 26/77.

14. Act 17 of 1956.

15. Act 37 of 1963.

16. Act 51 of 1977.

17. Act 34 of 1960.

that is, trials in which persons or groups opposed to the policies of the apartheid regime have been prosecuted under the political law of the country. The trials were exceptional and differ largely from the ordinary criminal trials. The characteristics of these trials include: the extraordinary procedures adopted for conducting the trials, the detention of many of the accused and witnesses for long periods ranging from two weeks to three years before appearing for trials, the measures adopted by the police to secure confessions from the accused, the shifting of trials from urban centres to small towns to avoid publicity, the absence of or belated legal representation. In sum, the political trials in South Africa involve the disregard of many of the established legal norms and procedures generally applied to criminal cases.[18]

In recent legal history there have been many significant political trials involving leaders of the National Liberation Movements. These include the Treason Trial of 1956, the Rivonia Trial of 1963 in which Nelson Mandela and eight others were tried for treason, the SWAPO Trial of 1967 in which the SWAPO leader Toiyo Ja Toivo was sentenced to life imprisonment, the South African Students Organisation Trial of 1976; the SOWETO Trial of 1977. In these trials the accused were charged with attempting to overthrow the

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18. See Dugard, n. 4, pp. 205-273.

state by violent means and threatening national security and were all sentenced to terms of imprisonment varying from five years to life imprisonment.[19] During 1979-80 the following persons were charged under various political laws.[20]

	No.of Trials	No.of accused	Convicted	Cases Proceeding	Acquitted or charges withdrawn	Years of Imprisonment for Convicted
Terrorism Act	21	65	36	3	19	227
Sabotage	4	20	4	2	3	14
Internal Security	4	11	2	2	-	3 years, 9 months
Internal security/ Unlawful Organisations	1	1	1			5
High Treason	1	6	6			90
High Treason/ Attempted Murder and Robbery	(as above)	3	3			Death
Total	31	106	52			339 years, 9 months

19. Ibid., pp. 208-227.

20. Survey of Race Relations in South Africa, South African Institute of Race Relations, 1980, p. 247.

What we are concerned with here is those trials in which the combatants of National Liberation Movements have been charged with attempting to overthrow the government through the use of force and guerrilla warfare. Since 1976 there has been an increasing number of combatants charged under the Terrorism Act more than there has ever been in the previous fifteen years. This can be explained by the exodus of a large number of young students that fled the country in the wake of the SWETO students demonstration against racist education. It is estimated that well over one thousand students left the country and ultimately joined the ANC. A large number of them received military training from ANC bases after which they were instructed to return to the country to accomplish military missions. Some of these young combatants were arrested prior to or in the course of executing their tasks and appeared before the South African courts to face charges under the provisions of Terrorism Act or related laws. Significant among these trials were that of the young ANC combatants, Solomon Mahlangu, James Mange, Nailedi, Tsiki and Mosima, Sexwala and that of Lubisi, Manana and Mashigo. More recently the trial of three more combatants, Antony Stsotsole, Johannes Shabangu and David Moisi, who were sentenced to death, has been concluded.[21] Below, we will briefly discuss the main features of these trials.

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21. The Guardian, 20th August 1981.

James Mange and Eleven Others

These accused were charged with high treason on forty three alternative counts for participating in terroristic activities and on one count of conspiring to commit murder. The charges related to military training which the accused were alleged to have undergone outside South Africa, the possession of arms and amunition and committing acts of terrorism. The trial was held in camera in order to, according to the judge, protect and conceal the identity of witnesses giving evidence in the trial. In the course of the trial, the accused dispossed of their defence counsel and refused to co-operate in the proceedings. The judge charged some of the accused with contempt of the court and ultimately sentenced all the accused, except Mange, to periods of imprisonment ranging upto eighteen years. Mange was the only one to receive the death sentence for which he was allowed leave to appeal. After submitting an appeal and as a result of international campaign demanding the commutation of the sentence, he was sentenced to twenty years.

Justice Hefer, announcing the judgement, stated that he considered that the ANC was at war with South Africa, but, he, added, the court could not permit resort to unconstitutional means to achieve political ends.[22]

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22. Annual Survey of Race Relations in South Africa, 1979, pp. 128-130.

The Prtoria ANC Trial

In this case, twelve members of the ANC, including Naledi Tsiki and Mosima Sexwala, were charged with conspiring to overthrow the government by violent means. Tsiki was accused of having sabotaged a railway line after receiving military training in Russia. Sexwala was charged with throwing a grenade into a police vehicle near the Swaziland border injuring two policemen in the vehicle and receiving military training in Mozambique and Russia. A third accused, Mohlangenj, was charged with entering South Africa illegally from Swaziland and attempting to recruit persons for military training. The accused were sentenced to eighteen, fourteen and ten years respectively.[23]

It is interesting to note Tsiki's statement in court: "One thing most paramount in what I was taught, that the lives of innocent civilians of whatever colour, should not be placed in jeopardy".

Solomen Mahlangu and Two Others

These accused were charged with the illegal possession of fire arms and the murder of two white civilians in 1978. The accused had entered South Africa with a cache of arms after receiving their military training and were apprehended by the police while carrying these arms. In a shootout that

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23. Annual Survey of Race Relations in South Africa, 1978, p. 73.

took place in central Johannesburg the accused took refuge in a warehouse in the course of the crossfire and in the process two white civilians were fatally injured. The court found the accused guilty of the charges alleged against them and sentenced Machlangu to death while the other accused received prison sentences. In sentencing Machlangu to death the court found that he had been responsible for the death of civilians, although he had not actually fired those shots. The court reached this conclusion on the basis of the doctrine of common purpose which affirms that the guilt of several accused in a crime is equal if they pursued a common purpose. Despite appeals on behalf of Machlangu, including an appeal from the UN General Assembly, the regime went ahead with the execution in 1979.[24]

The Trial of Anthony Tsetsole and Two Others

These three accused were charged with high treason early this year (1981). The charge arises out of allegations that the accused were responsible for the sabotage of the oil and coal complex in June 1980, and an attack on the Johannesburg police station, the sabotage of the railway line and an attack on a policeman's house. On the 19 August 1981, the accused were found guilty and sentenced to death. The ANC and the POAU strongly condemned the judgement of

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24. Annual Survey of Race Relations in South Africa, 1979, SAIRR.

the court and have appealed for the remission of the sentences and the granting of prisoners of war status to these accused.[25]

In the above cases, the court has taken no account of international law, the Geneva Conventions and the two Protocols. Despite statements by South African courts that they do respect international law and that it is the duty of the courts to take account of the changes in international law.[26] In practice the courts have ignored the principles of international law relative to armed conflict and international humanitarian law. The courts have applied the criminal laws of South Africa rigidly and have taken no stand on the important rights of the combatants under international law. The imposition of death sentence upon combatants of the ANC shows quite clearly the total disregard for international law and the role of the courts in suppressing political liberty by the South African government and its judiciary.

The Geneva Conventions and the Protocols

The treatment of prisoners of war is dealt in Geneva Convention - III and certain provisions of the Protocols. Convention III provides for the treatment of prisoners of

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25. The Guardian, 20 August 1981.

26. See Kafforaria, Property vs Government of Republic of Zambia, 1980, (2), SA 719 (E), discussed in CILSA, vol. 13, no. 2, July 1980, pp. 230-231.

war from the time they are captured to the time of their release or repatriation. The Convention defines prisoners of the armed forces of state parties to the conflict. The Protocols stipulate that any combatant as defined in Article 43 who falls in the power of an adverse party shall be a prisoner of war.[27] We have seen that combatants in terms of Protocol include members of the national liberation movement provided that they obey the rules of armed conflict.[28] Therefore, it follows logically from their status as combatants that they are entitled to prisoner of war status.[29]

Article 45 makes a presumption in favour of any person that falls into the power of the adverse party and declares that he shall be a prisoner of war. The Article further provides that such a person shall be protected by the III Convention if he states that he is a prisoner of war or if he appeals to be entitled to such a status or if the party which he defends claims such status on his behalf. Where there is any doubt about his status the Article provides that he shall continue to enjoy such status until such time that his status has been determined by a competent tribunal. The Protocol is, however, silent on what constitutes a competent tribunal, nor does it make any provision

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27. Article 44, Protocol I.

28. See Chapter II.

29. Article 44(1).

for such a tribunal. Article 44(2) provides that a combatant that violates the rules of international law applicable to armed conflict shall not loose his right to be treated as a prisoner of war if he is captured.

Article 96 which provides for the acceptance of the Geneva Convention and the Protocols by national liberation movements by means of a unilateral declaration to the ICRC stipulates that such a declaration shall have the following effects:

(1) The Convention and the Protocol are brought into force with immediate effect for the national liberation movements.

(2) The national liberation movements assume the same rights and obligations as those which have been assumed by a high contracting party to the Convention and the Protocol, and

(3) The Convention and the Protocol are equally binding upon all parties to the conflict.

This provision makes it clear that South Africa is legally bound to abide by the Geneva Convention and Protocol I. It is, therefore, bound to grant prisoner of war status to combatants of the liberation movement and to treat them in accordance with the provisions of the III Convention.

It is also clear that in continuing the policy of the prosecuting combatants of ANC and SWAPO under South

African laws South Africa is in violation of international law applicable to armed conflicts. Every effort should therefore be made by the international community to ensure that the regime abides by its legal obligations and recognises the legal status of combatants of the national liberation movements.

Chapter V

SOUTH AFRICA'S INTERNATIONAL CRIME

In the post-war years there has been an unusually rapid growth of international crimes which has necessitated the development and legal codification of international criminal law. The growth of internal crime committed by states has been of increasing concern to the United Nations and to lawyers committed to securing justice for the millions of victims that have suffered as a result of these criminal acts. The General Assembly, in particular, has played a significant role in identifying these crimes, giving legal substance to them and condemning criminal acts committed by states. Since the inception of the United Nations, the General Assembly has been responsible for initiating moves in formulating conventions condemning acts such as apartheid, racial discrimination, genocide which are considered to be repugnant to civilised legal systems.

Of particular significance has been the role of the General Assembly in formulating principles of international law outlawing crimes against humanity. At the conclusion of the War, the Allied powers agreed upon prosecuting war criminals of the Nazi regime who were responsible for some of the greatest excesses known to humanity. With that objective in mind the London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, was signed by the Allied powers on 8 August 1945. This

agreement established an International Military Tribunal for the trial of war criminals for offences which had no particular geographical location. The Charter of the International Military Tribunal lists three kinds of crimes for which individuals can be held responsible.[2]

Crimes Against Peace

These included the planning, perpetrating, initiating or waging of wars of aggression or wars in violation of international treaties. (2) War crimes which included violation of the laws and customs of war, such as murder, ill-treatment of prisoners of war, plundering of properties, wanton distruction of cities, towns and villages; and (3) Crimes against humanity; which related to persecution of persons on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal.

Article 9 of the Charter provided for the declaration of an organisation as criminal if individual criminals were members thereof. The Charter provided the legal framework within which the German and Japanese war criminals were prosecuted at Nuremburg and Tokyo. The judgements of the Tribunal have been regarded as authoritative of the statements

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1. Article I, London Agreement.

2. Article VI, Charter of the International Military Tribunal.

on international criminal law. The Tribunal delivering its judgements on German war criminals stated that -

> The Charter is not an arbitrary exercise of power on the part of the victorious nations but in the view of the Tribunal ... it is the expression of international law at the time of its creation and to that extent it is itself a contribution to international law. (3)

The General Assembly in resolution 95(1) affirmed the principles of international law recognised by the Charter of the Nuremburg Tribunal and the judgements of the Tribunal.[4]

In 1950 the International Law Commission adopted the following seven principles which gave legal recognition to both the Nuremburg judgements and General Assembly resolutions:

1. the individual is responsible for crimes against and under international law;
2. the individual remains responsible even in the absence of any law defining his act as criminal;
3. heads of states and government officials are not absolved from responsibilities for committing international crimes;
4. the orders of superiors will not be excused in the commission of international crimes provided that the individual had a moral choice before committing the act;

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3. Quoted in S. Bassiouni and V. Nanda, A Treaties on International Criminal Law, p. 113.

4. General Assembly Resolution, 95(1), 11.12.1946.

5. all persons responsible for international crimes will have a right to a fair trial;

6. crimes to which persons may be responsible include crimes against peace, war crimes and crimes against humanity;

7. any act of complicity in carrying out a crime will constitute a crime.

In further elaboration of these principles, the Commission prepared a Draft Code on Offences against Peace and Security of Mankind in 1954. This code covered a limited range of crimes and has not yet come into force.

Related to the development of international criminal law has been the question of criminal jurisdiction. Ever since the establishment of the Nuremburg and Tokyo Tribunals attempts have been made to establish an international criminal court which would have jurisdiction to try international crimes but no significant progress has been made. In 1948 the General Assembly recognised -

> that in the course of the development of the international community there will be an increasing need for an international judicial organ for the trial of certain crimes against international law. (5)

The Assembly appointed a committee to prepare a draft statute for such a court in the same resolution. This

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5. General Assembly Resolution 260B(iii).

committee submitted a draft statute of an international criminal court in 1951, which made provision for the hearing of trials of accused charged with international crimes. However, the ambition remains unfulfilled till today. Given the above legal background, we can now examine the international crimes committed by the South African regime and the procedures whereby persons responsible for this crime may be prosecuted.

We have to note, however, that international crimes are committed by individuals or parties or organisations to which invididuals belong under international criminal law. It is, therefore, individuals who must bear the responsibility for their actions. It was doubted at one time that individuals could be subjects of international law, but it is now clearly established that individuals do have rights and duties under international law.[6] In this regard one may note the following statements of the Nuremburg Tribunal:

> Crimes of International law are committed by men, not by abstract entities and only by punishing individuals who commite such crimes can the provisions of international law be enforced. (7)

In accordance with this principle it is the political, military and other leaders of the apartheid regime that

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6. See Oda Shigeru, "The Individual in International Law", in Max Sorensen (ed.), Mannual of Public International Law, Macmillan (Hong Kong, 1978), pp. 469-530.

7. Quoted in Bassiouni and Nanda, n. 3.

must be held primarily responsible for the following crimes.

The Crime for Apartheid

We have already noted that apartheid constitutes a crime against humanity under the provisions of the international Conventions on the Suppression of the Crime of Apartheid. Under Article 3 of the Convention, individuals, members of organisation and institutions and representatives of states are held responsible under international law for crimes which they directly commit or participate in indirectly, incite or conspire in. These individuals are also responsible if they abet, encourage and cooperate in the commission of the crime of apartheid.[8]

Article 5 of the Convention provides that such persons may be tried by a competent tribunal of any state party to the Convention or by an international tribunal having jurisdiction over the crimes committed by these individuals. Article 9 establishes a group of three members of the Commission on Human Rights to consider reports submitted by state parties in accordance with Article 7. State parties empower the Commission on Human Rights to prepare a list of individual organisations, institutions, or representatives of states alleged to be responsible for crimes designated as apartheid[9], and to request information

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8. Article III(c).
9. Article X(b).

from competent United Nations organisations with regard to measures taken against such individuals who are under the jurisdiction of authorities responsible for the killing and murder of detained persons through the use of physical torture.

Thus far a number of states including India "have taken steps to give effect to the provisions of the Convention, but there have been no prosecutions yet by state parties. Nor has any attempt been made to establish an international tribunal for the purpose of prosecuring persons alleged to have committed or assisted in the commission of the crimes of apartheid.

The Crime of Genocide

In 1948 the General Assembly took a major step in outlawing genocide when it declared genocide to be an international crime.[12] The main principles underlying the Convention on Genocide are:

(a) state parties must enact laws to give effect to the crimes;

(b) states must prosecute those persons responsible for committing the crime;

(c) the acts which constitute genocide are not political crimes and thus extradiction of persons responsible

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10. Article X(c).

11. Indian Express, 1.9.1981.

12. General Assembly Resolution, 90 (1), 11.12.1946.

for these acts must be granted.[13]

The policies of the South African regime in creating the homeland and forcibly removing people from the urban areas and settling them in their homelands certainly constitute an act of genocide.[14] This policy has had the effect of staving people to death as there is no possibility of earning a livelihood or continued existence in these underdeveloped areas. Children, in particular, suffer from diseases like malnutrition and kwashiokor which considerably shortens their life-span. In addition to this policy the regime has resorted to mass resettlement of populations[15], forced labour,[16] denial of adequate housing, health and other facilities.[17] All these acts taken collectively are directed at gradually eliminating large sections of the black population. It is clear that the regime is in breach of the provisions of the Convention of Genocide.

Aggression

Ever since the independence of Mozambique in 1974 and Angola in 1975, the regime has resorted to acts of aggres-

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13. S. Bassionni, "Genocide and Racial Discrimination", in Bassiouni and Nanda, n. 3, p. 522.

14. See UN Centre Against Apartheid, Notes and Documents, 26/76, October 1976, and 28/76 (October 1976).

15. UN Centre Against Apartheid, Notes and Documents, 27/80 (November 1980) and 44/78 (November 1978).

16. UN Centre Against Apartheid, Notes and Documents, 13/76 (May 1976).

17. UN Centre Against Apartheid, Notes and Documents, 8/79 (May 1979) and 17/80 (May 1980).

sion against the territorial integrity and national independence of these states. In fact the entire periphery of nation states bordering on South Africa are threatened by South Africa's attacks against both military and civilian targets. Apart from Angola and Mozambique, Botswana, Lesotho, Swaziland, Zimbabwe and Zambia have been subjected to South African intervention. We will only examine the acts of aggression committed against the Republic of Angola which has been repeatedly attacked by South African armed forces in recent years. Special reference will be made to the findings of and the evidence presented to the international Commission of Inquiry into the Crimes of the Apartheid and Racist Regimes of Southern Africa.[18]

The Commission was established in 1977 through the initiative of the Afro-Asian Peoples' Solidarity Organisation and as a result of a resolution passed by the Emergency International Conference of Solidarity with the Peoples of Southern Africa held in October 1976 in Addis Ababa. The aim of the Commission according to the preamble of its Charter is to facilitate the implementation of the United Nations and Organisation of African Unity resolutions on the elimination of colonialism in Southern Africa by investigating and exposing the crimes of the colonialist and racial regime. The Commission is composed of legal

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18. UN Centre Against Apartheid, Notes and Documents, 1/79 (February 1979); 2/81 (January 1981) and 14/81 (March 1981).

and other representatives from different countries who take part in the work of the Commission in their individual capacities.[19]

The task of the Commission is to investigate the crimes committed against the people of Southern Africa as a result of the policy of colonialism and racist oppression. The Commission has held two sessions since its formation in the course of which it has received evidence of the crimes committed by the regime. The first session was held in 1979 in Brussels and the second in Luanda in early 1981. In August 1980, the Commission sent an international committee of inquiry into Angola to investigate the crimes committed by South Africa as a result of its invasion of that country in June-July 1980. The Commission has been able to draw up a report on the crimes committed by South Africa on the basis of evidence received and observations of members of the Inquiry Committee. According to the above report, during the first three years of Angolan independence, that is between March 1976 and June 1979, the South African forces were responsible for the following actions against Angola.[20]

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19. Charter of International Commission of Enquiry into the Crimes of the Racist and Apartheid Regimes of Southern Africa, UN Centre Against Apartheid, Notes and Documents 14/81 (March 1981), Annex. II.

20. Report of the International Mission of Enquiry, UN Centre Against Apartheid, 2/81 (January 1981).

- 193 military mine-laying operations.
- 21 border provocations.
- 7 serial bombardments.
- 1 large-scale combined operation involving both air and land forces.
- 570 confirmed deaths of Angolan citizens.
- 594 Anglolan citizens wounded.
- 612 Namibian refugees killed.
- 611 wounded.
- 198 Zimbabwean refugees killed and 600 wounded.
- 3 South African refugees killed and 80 wounded.

The value of the material damage caused is estimated at approximately 2,93,304,000 dollars (U.S.).

From 11 June 1979 to 31 December 1980, the South African forces carried out 13 major actions, 925 violations of air space, 81 artillery bombardments and 33 attacks by holicoptored troops causing damage estimated at 230,996,805 dollars (U.S.).[21] The loss of human lives were as follows:[22]

- 400 civilians killed.
- 640 civilians wounded.
- 85 FAPLAL soldiers killed.
- 95 FAPLAL soldiers wounded.
- an incalculable number of dead and wounded Namibian refugees.

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21. Ibid.

22. Ibid.

In addition to the above testimony given by the Angolan government to the Commission at its second session, evidence was also received from a number of witnesses describing the use of mercanaries in South African armed forces, abduction of Angolan citizens, torture and cruelty inflicted upon Namibians, including beatings, standing for long hours, being threatened and bitten by snakes, being left without food for days, electric shocks.[23]

The members of the Commission were also able to visit places to observe the destruction caused to Angolan property by the Southern African forces. The Commission visited a factory, "Madieras de Thrial" in Lubango, which was completely destroyed by South African air forces in an attack on 9 August 1980. On the same day South African troops numbering about 100 to 130 entered Angola and lay in ambush on a highway between the cities of Lubango and Mocamedas. They stopped civilian cars, ejected passengers, and executed them on the spot. Approximately 20 persons were killed, including women and three infants of less than one year. The Commission also visited the Central Military Hospital in which persons wounded in the South African acts of aggression were being housed. The Commission received the following statements from some of the victims:

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23. See Testimony of Rouna Nambinga to the International Commission in Focus, Sptl, Issue 2, April 1981, pp. 11-12.

(1) One SWAPO member had his right foot injured on 24 June 1980, while he was on Angolan territory. He was wounded during the South African airborne attack.[24]

(2) A FAPLA member and had his leg wounded by a mine explosion at Dale (Kunona province) some 100 km. from the Namibian border. He was wounded on 6 July 1980, when the vehicle he rode in was blown up by mines laid by South Africans.

(3) Another FAPLA member, riding in the same car, was also wounded.

(4) A FAPLA member was wounded at Rivingo near the Zambian border, some 50 km. from the Namibian border. He had a wound that was inflicted by a gun shot splinter.

On the basis of the above evidence and observations to Commission, it came to the conclusion that South Africa was responsible for acts of aggression against Angola and that these actions constituted a serious threat to world peace and international security.[25]

Since March 1976 the Security Council has on five occasions, condemned "the South African racist regime for its premeditated, prolonged and sustained armed invasions against the People's Republic of Anglola which constitute

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24. Report of the People's Republic of Anglola to the Second Session of the International Commission of Enquiry into the Crimes of the Racist and Apartheid Regimes in Southern Africa in above.

25. Ibid., pp. 6-7.

a flagerant violation of the sovereignity and territorial integrity of the country and a serious threat to international peace and security".[26]

In 1981, the South African regime continued its violent aggression against Angola. In July 1981, South African armed forces invaded Angolan territory and occupied seven Angolan towns[27], throughout August the South African forces continued to occupy, ravage, and cause destruction in Angolan territory despite statements by South African defence minister that the 40 thousand invading troops had been withdrawn.[28] The Angolan government once again referred the matter to the Security Council demanding immediate withdrawal of South African troops. A resolution condemning South Africa's military incursion into Angola and demanding immediate withdrawal of troops was vetoed by United States.[29]

The latest invasion adds a very serious dimension to South African aggression against Angola. It is clear that South Africa aims to split Angola by occupying the Southern provinces and by giving support to the Angolan rebel group, UNITA.[30]

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26. Security Council Resolutions, S/387 (1976), S/428 (1978), S/447 (1979), S/454 (1979), and S/475 (1980).
27. Times of India, 31.7.1981.
28. Times of India, 30.8.1981.
29. Indian Express, 2.9. 1981.
30. Times of India, 17.9.1981.

Other Crimes

During the second session the Commission also received evidence from the representatives of SWAPO and ANC. In his report to the Commission, the SWAPO representative provided the following information:[31]

- the increasing incidence of rape by members of the South African armed forces;
- the formation of the "Koeveet" murder squad, a criminal gang whose members are believed to masquerade as SWAPO guerrillas for purpose of abducting or assassinating genuine SWAPO supporters and sympathisers;
- the reconnaissance and spying activities among the civilians population of the Special Constable Units and Tribal Home Guards;
- the use of prisons and other covert actions against SWAPO supporters;
- the torture of Namibian prisoners abducted from Kassingo refugee camp in Angola during the South Arfican raid on May 1978 and still detained at Tenegal military base near Hardap Dam, Maricutal;
- the large number of people in detention, many of whom in secret camps believed to be located in

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31. SWAPO Report to the Commission of Enquiry into the Crimes and Atrocities committed by the Racist Regime of South Africa, Luada, 30 January 1981, taken from Focus, Spl., Issue 2, April 1981, p. 10.

thick forests in the Otavi and Grootfontein district;

- the military conscription of male Namibians of all races, reportedly from age 13 upwards;
- the amputation of limbs and disfigurement of SWAPO supporters captured by South African troops.

In its report to the Commission, the ANC submitted that:[32]

- at least 965 people detained in 1980 included 341 school pupils, 117 college and university students, 67 political leaders, 39 journalists and 21 trade unionists and workers;
- 36 people sentenced to a total of 227 years of imprisonment for offences under the Terrorism Act;
- 14 people banned.

The Commission on the basis of its findings of aggressions armed attacks, torture, the conditions of 50 thousand Namibian refugees in Angola, the attacks on civilians, the supply of arms and equipment by USA, France, Belgium, Israel, and NATO and Latin American countries concluded that:[33]

(1) South Africa by its acts of armed aggression systematically and on an immense scale violates the sovereignty of the People's Republic of Angola and the integrity of that territory.

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32. Speech by ANC Representative to the International Commission of Enquiry, in Focus, above.

33. Report of the Second Session of the International Commission of Enquiry, UN Centre Against Apartheid, Notes and Documents, 14/81 (March 1981), p. 2.

(2) The Government of South Africa has no right to justify its military actions by means of the rule of "hot pursuit" in search of SWAPO and ANC.

(3) The recognized rights of the Namibian people are violated in outrageous fashion by the South African occupation.

(4) The repression of South Africa's majority population within the framework of apartheid, considered by international law to be a crime against humanity, expresses in the clearest form South Africa's colonialist nature and violates the right of peoples to self-determination.

(5) The systematic and open violations of international law by the South African regime are only possible because of the direct and indirect complicity of a certain number of states which respect neither the spirit nor the letter of the United Nations resolutions and decisions, nor those of various international conventions.

The above crimes against humanity, against peace and war crimes committed by the South African regime evoked the following comment from one of the members of the Commission, Ramsay Clark, former US Attorney-General and Secretary of Law:[34]

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34. Focus, April 1981, p. 6.

> There is a deliberate use of all the violent capacity of technology, in most sophisticated forms, against life, and in violation of international law and of fundamental human rights that have been recognized by all people in all times.

In conclusion, the following recommendations made by the Commission need to be noted:[35]

(1) Strict respect for the principles and rules of general international law, particularly those concerning the sovereignty and territorial integrity of Angola and of the other front-line states and the protection of humanitarian law and rights in Southern Africa;

(2) The carrying out of resolutions concerning the right of the Namibian people, whose authentic representative is SWAPO, to self-determination, a requirement established by the United Nations since 1973 at the recent Geneva Conference on Namibia (January 1981); the carrying out of resolutions in favour of the right to self-determination of the people;

(3) Effective application of sanctions already decided by the Security Council against South Africa i.e. severing of economic relations and of all connexion by rail, sea, air, post, telegraph, radio and other means of communication, as well as diplomatic relations; the oil embargo and forbidding of all nuclear collaborations having priority;

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35. Report of the Second Session of the International Commission of Enquiry, p. 6.

(4) Payment of indemnity by South Africa for all losses and damage caused by its acts of aggression against the People's Republic of Angola and the front-line states;

(5) Pursuant to decisions taken by the Security Council, effective aid to the front-line states and national liberation movements to be guaranteed and increased as an international right and duty for all.

The Commission finally appealed to governments, governmental and non-governmental international organisations, particularly the International Red Cross and other humanitarian organisations, to intensify their solidarity work with the struggle against the crimes and acts of aggression of the apartheid regime.[36]

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36. Ibid., p. 5.

CONCLUSION

In this study we have attempted to examine the system of apartheid and the wars of national liberation in the light of international legal principles. Specifically, we have tried to show how the wars being waged by the ANC and SWAPO are totally legitimate under international law. International law has developed progressively in this direction, but it has yet failed to persuade the South African regime to ban its policies and had been of little impact on the collaborationist policies of the Western powers. The West has clearly showed its unwillingness to abide by resolutions of both the General Assembly and Security Council such as the 1977 arms embargo, the 1978 independence plan for Namibia and the calls for a total diplomatic, cultural, economic and sporting isolation of the regime.[1] It is correctly been stated that "the international legal system has been unwilling to adopt measures to sensure South Africa and instead has permitted only a modicum of change".[2]

The limitations of international law are most evident in the crimes committed by the regime which we described in Chapter V. That drastic action needs to be taken by the

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1. See UN Centre Against Apartheid, Notes and Documents 9/78 (May 1978), 12/78 (June 1978), 26/78 (September 1978), 27/78 (September 1978), 18/80 (May 1980), 23/80 (August 1980), 28/80 (November 1980).

2. Hearing on Legal Aspects of Campaign Against Apartheid, UN Chronicle, May 1981, vol. XXIII, no. 5, p. 20.

international community in order to stop the violence committed by the regime against its citizens, the people of Namibia and the Frontline States is clearly reflected in the threat to regional and international peace that the continued existence of apartheid constitutes. A brief description of South Africa's military and nuclear build-up in recent years will suffice to convey the real threat to peace that the apartheid regime is to the world.

South Africa's military budget represented 14.3 per cent of the total budget and stood at 2 million rands.[3] Out of this sum, 40 per cent was spent on "operating costs" which included training of 30 thousand conscripts, refresher course for 300,000 citizen force and commanders and maintenance of 150,000 troops.[4] The remaining 60 per cent is spent on the purchase of arms from France, USA, West Germany, Israel and other Western States.[5] The conscription period for the armed forces, which was nine months in 1967, was increased to 12 months in 1972 and to 2 years in 1977.[6] Between 1974 and 1979 South African defence forces regular troops rose from 200,000 to 450,000.[7] To supplement the defence force, there are 75,000 South African police and

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3. Sechaba, July 1980, p. 28.

4. Ibid.

5. Ibid.

6. Sechaba, April 1980, p. 21.

7. Ibid.

600 civil defence organisations in the country, which play a para-military role in the event of internal disturbances.[8]

South African armaments are largely purchased from the Western States, some of which include the following:[9]

(a) 52 m. missiles with a range of 3,500 kms. and with a capacity to wipe out major Southern African cities such as Luanda, Salisbury, Maputo, if the missile is fitted with a warhead.

(b) a G5 cannon with a range of 30 km.

(c) 127 m. artillary rockets capable of a marine strike.

In addition to acquiring arms, from abroad, South Africa has developed its own armaments industry capable of producting three quarters of local weapons and 80 per cent of heavy amunition. The State owned Armaments Corporation (drumseon) has played a significant role in this development. The Corporation distributed work to 1200 private contractors in 1976 and a total of 25,000 contracts were handed over to local and multinational contractors.[10]

The above military build-up is but the tip of the iceberg compared to South Africa's rapid nuclear build-up. South Africa has been able to acquire nuclear technology

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8. Ibid.

9. Sechaba, September 1980, pp. 31-32.

10. Sechaba, July 1980, p. 29.

from West Germany during early seventies.[11] This collaboration has enabled South Africa to develop its own nuclear reactors and a uranium enrichment plant.[12] There is also clear evidence to provide that South Africa has exploded two devices in July 1977 and September 1979, although it is not clear whether those were in fact nuclear explosions.[13] Other nuclear collaborators according to Barnaboi include Belgium, Britain, Canada, France, Japan, Netherlands, Switzerland and the US.[14] Barnaboi's analysis of South Africa's efforts in the nuclear field leads to the conclusion that "even if South Africa has not made nuclear weapons, it could do so very rapidly, once the decision was taken. For this reason South Africa should, for all political interests and purposes, be regarded as a nuclear weapon power.[15]

This alarming militarisation of the South African State has dire consequences for the liberation of Peoples of Namibia and South Africa and demands the urgent attention of the UN and international community. The effect of these militarisation has been described as ..."the essence of the modern militarised white laager is to be found in the

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11. See Z. Cervenka and Rogers Borbara, The Nuclear Axis, Julian Friedman (London, 1978).

12. See Frank Barnaby, "South Africa and the Bomb", in South, September 1981, pp. 32-38.

13. Ibid.

14. Ibid., p. 33.

15. Ibid., p. 36.

transformation of military and para-military forces from being tools of oppression to becoming the central decision-making force within all facets of the government of the apartheid state. This is the crux of the transformation of the regime from the police to a military state.[16]

Sachs has described the institutionalisation of violence in South Africa as having three important consequences:[17]

(1) The continued indiscriminate violence against the people of South Africa;

(2) The extension of this violence to the neighbouring states; and

(3) The need for restructuring of the social and economic basis of South African society to eliminate racial domination.

In his view it is only through eliminating the legal and economic structures of exploitation that these violence can be terminated.[18]

If meaningful change were to be introduced in South Africa and Namibia, every effort must be made to enforce the recommendations made by the international commission of

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16. Sechaba, April 1980, p. 20.

17. Sechs, Albie, State Criminality in South Africa, UN Centre Against Apartheid, Notes and Documents, 2/79, March 1979, p. 2.

18. Ibid., p. 6.

enquiry described above. Increasing pressure must also be exercised against South Africa's Western collaborators that are maintaining the status quo in the region. In these efforts, the UN, the OAU and other international organisations have a significant role to play through isolating the regime totally giving all possible assistance to the national liberation movements and through campaigning rigorously for the enforcement of the provisions of the Geneva Conventions and Protocol I, in particular, the recognition of prisoners of war status for combatants of the national liberation movement.

In fostering the liberation of Namibia and South Africa, international law can play a "tangible but modest role".[19] This role has been made possible owing to the significant changes that international law has undergone. As Asmal has pointed out -

> International law is no longer the monopoly or perserve of a small group of states from Western Europe and the Americas. In recent times, under the inspiration of new pressures, it has begun to respond to the needs, desires and aspirations of a larger community of peoples and states, many of whom have recently undergone the humiliation, violence and racism inherent in Colonialism. (20)

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19. Asmal, K., Walvis Bay, "Self Determination and International Law", Paper delivered to seminar on 10th Anniversary of the Namibia Opinion, The Hague, 22-24 June 1981, p. 37.

20. Ibid., p. 37.

It is towards such a response that international law and lawyers must address themselves to if law were to remain relevant to contemporary international problems.

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