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International Human Rights Law, South Africa and Racial Discrimination

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INTERNATIONAL HUMAN RIGHTS LAW, SOUTH AFRICA AND RACIAL DISCRIMINATION*

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INTRODUCTION

World attention has been focused on South Africa mainly because of its practice of "apartheid," a word which it has contributed to the international vocabulary. Nations have made various attempts of late to persuade South Africa to dismantle this system of government which is based on racial and ethnic "separateness."[1]

The question of whether South Africa has incurred any obligation not to promote racial discrimination as its official state practice can be answered by referring to article XXXVIII of the Statutes of the International Court of Justice.[2] This statute provides for such decisions to be made by applying international conventions, international custom, general principles of law and judicial decisions.[3]

With regard to "international conventions," South Africa is a party to only two multilateral treaties: namely, the United Nations Charter[4] and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.[5] As far as "international custom" or state practice accompanied by *opinio juris*[6] is concerned, legal writers are divided into two schools of thought; the strict constructionists and the advocates of the "new" international law.

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1. This is the literal translation of the Afrikaans word "apartheid."
2. Charter of the United Nations and Statute of the International Court of Justice, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (1945).
3. The Charter provision reads:
   (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   (b) international custom as evidence of general practice accepted by law;
   (c) the general principles of law recognized by civilized nations;
   (d) . . . judicial decisions and the teachings of the most qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.
   Charter of the United Nations and Statutes of the International Court of Justice, 59 Stat. 1031 at 1060 (1945).
4. 55 Stat. 1600; E.A.S. No. 236; 3 Bevans 697 (1945) [hereinafter U.N. CHARTER].
5. 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 31, 4 Bevans 853 (1949).
6. *Opinio juris* is a sense of a legal duty of states as to what the law is. It is usually borne out by the words and practices of the states through their representatives. *See generally* Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 ILL. L.F. 609 (1979).

In *North Sea Continental Shelf Cases*[7] the International Court of Justice said the following with respect to *opinio juris*:

> Not only must the acts concerned amount to settled practice, but they must be such, or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.[8]

Thus, for state practice to become customary international law, two conditions must be fulfilled. First, the acts concerned must amount to settled practice. Second, the states concerned must feel they are conforming to a legal obligation. South Africa is the only state that has claimed the right to discriminate on racial grounds through its practice of apartheid as official state practice. However, the recent "commitment to reform"[9] may indicate that it is conforming to a legal obligation. It is too early to conclude this with any degree of certainty.

This article will examine the provisions of the United Nations Charter, the Universal Declaration of Human Rights,[10] the International Covenant on Civil and Political Rights[11] and other specific covenants on racial discrimination to determine the extent, if any, of South Africa's obligation with regard to racial discrimination. In the course of this examination, "judicial decisions and the teachings of the most qualified publicists of the various nations" are discussed because they play a role, albeit subsidiary, in the formation of international law. Study of these source materials leads to the conclusion that South Africa has breached its international legal obligation not to promote racial discrimination as its official state practice.

THE U.N. CHARTER AND HUMAN RIGHTS

South Africa is one of the founding states of the United Nations and is bound by the provisions of the Charter.[12] Human rights are defined in the Charter only in the preamble and in article LV. The Preamble states that the founding parties reaffirmed their "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women of nations

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7. North Sea Continental Shelf Cases (W. Ger. v. Den; W. Ger. v. Neth.) 1969 I.C.J. 4, at 44 (Judgment of Feb. 20). The issue in this case was whether the boundaries of the continental shelf of Denmark and Netherlands, on the one hand, and the area claimed by the Federal Republic of Germany, on the other, should be determined by the principle of equidistance as set forth in art. VI of the Geneva Convention of 1958 on the Continental Shelf. 499 U.N.T.S. 311. Art. VI had then been ratified or acceded to by 39 states, but Germany was not a party.
8. 1969 I.C.J. 44. The Court continued:
   > The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of *opinio juris sive necessitatis*. The States concerned must therefore feel they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

   Id.
9. New York Times, August 16, 1985, at A6, col. 2 (quoting South African President P.W. Botha's "Rubicon I" speech to the opening session of Parliament). *Compare* "Rubicon II" speech by Botha given in Durban on February 7, 1986, at a National Party meeting.
10. G.A. Res. 217, 3 U.N. GAOR at 71-77, U.N. Doc. A/810 (1948).
11. U.N. GAOR XXI Supp. (No. 16) at 52-58, U.N. Doc. A/6316.
12. *See supra*, note 3.

large and small." Article LV, paragraph (c) contains the Charter's most direct statement of human rights. It requires the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." The word "observance" was added at the San Francisco Conference in order to imply active implementation.[13] Linked to article LV is article LVI, which states that "all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in article LV."[14]

Article LXII, paragraph 2 of the Charter empowers the Economic and Social Council to make recommendations "for the purposes of promoting respect for and observance of, human rights and fundamental freedoms for all."

One of the purposes of the United Nations Organization is "to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[15] In pursuit of the these purposes, the Organization and its members are required to act in accordance with certain principles enumerated in article II, which include, *inter alia*, that "all Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter."[16]

Article XIII, paragraph 1(b) empowers the General Assembly to initiate studies and to make recommendations for the purposes of "promoting international co-operation in the economic, social, cultural, educational and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

Whether the Charter imposes obligations on state parties with respect to human rights is a controversial topic that has occupied scholars for the past forty years.[17] South Africa's stance is in accord with the strict constructionist view best articulated by Hans Kelsen:[18]

> The Charter does not impose upon the Members a strict obligation to grant their subjects the rights and freedoms mentioned in the Preamble or in the text of the Charter. The language used by the Charter in this respect does not allow the interpretation that the Members are under legal obligations regarding the rights and freedoms of their subjects. . . . Besides, the Charter does in no way specify the rights and freedoms to which it refers. Legal obligations of the

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13. L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 511 (1973).
14. For a discussion of the meaning of the word "pledge" see Schacter, *The Charter and the Constitution: The Human Rights Provision in American Law*, 4 VAND. L. REV. 643 (1951). *See also* Judge K. Tanaka's dissenting opinion in South West African Cases (Second Phase) 1966 I.C.J. 6, 289 (1966).
15. U.N. CHARTER art. I, para. 3.
16. U.N. CHARTER art. II, para. 2.
17. Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INT'L. L. 337 (1972).
18. Kelsen is noted for the positivist jurisprudence of his "pure theory of law" in which he maintains that the sovereignty of a state can only be waived by consent, *e.g.*, by ratifying a treaty, expressly or implicitly. H. KELSEN, PURE THEORY OF LAW 215-17 (1967).

> Members in this respect can be established only by an amendment to the Charter or by a convention . . . ratified by Members.[19]

Another student of the same school of thought was Manley O. Hudson. A member of the International Law Commission, Hudson believed that the Charter was a program of action which should not be distorted by reformists, however well-meaning their intention. He said, "A frame for a picture must not be mistaken for the picture itself."[20]

Advocates of interracial law, who could hardly be described as "new" international law advocates, included Sir Hersh Lauterpacht, Q.C.,[21] Philip C. Jessup,[22] Quincy Wright,[23] George Scelle[24] and F. Baine Sloan,[25] whose submissions Egon Schwelb discusses in his article on the human rights clauses of the Charter.[26] Their stand in the debate can be summarily articulated in the following:

> The absence of a definition of these rights and of provisions for their enforcement, far from detracting from the obligatory nature of these Articles, imposes upon the members a moral—and, however imperfect, probably a legal—duty to use their best efforts, either by agreement or, whenever possible, by enlightened action of their own judicial and other authorities, to act in support of a crucial purpose of the Charter.[27]

The position of the recent "new" international law advocates has sharpened. They maintain that it is clear that the Charter, being a multilateral treaty, imposes duties and obligations on the State parties with respect to human rights. L. M. Goodrich's comments reflect this view:

> [T]he Charter reflects a new approach to the protection of liberty and freedom born of the experience of World War II and years immediately preceding it when flagrant violations of human rights and denial of the basic dignity of man were hallmarks of the regimes challenging and violating international peace and security. This approach is a denial of the proposition that the way a state treats its own nationals is of no concern to the outside world and therefore beyond the proper competence of international agencies.[28]

Eric Lane, a "recent" strict constructionist, believes that while "the Charter does contain human rights references, they are at least aspirational in nature and generally presented in a prevention of violence context."[29]

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19. H. KELSEN, THE LAW OF THE UNITED NATIONS 29-30 (1950) (footnotes omitted). *See also* H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 226 (1966).
20. Hudson, *Integrity of International Instruments*, 42 AM. J. INT'L. L. 105, 108 (1948).
21. H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 147-149 (1950). *See also* Lauterpacht, "Human Rights, the Charter of the United Nations, and the International Bill of Human Rights of Man" *reprinted in* Report of the 43rd Conference (Brussels) of the Int'l Law Assoc. at 80 *et. seq.* (1948).
22. P. C. JESSUP, A MODERN LAW OF NATIONS—AN INTRODUCTION 91 (1948).
23. Wright, *National Courts and Human Rights—The Fujii Case*, 45 AM. J. INT'L. L. 62, 68.
24. *See* 1949 INT'L. L. COMM'N. Y.B. 169 para. 76 (23rd Meeting).
25. Sloane, *Human Rights, the United Nations and International Law*, 20 NORDISK TIDSSKRIFT FOR INT'L RES, ACTA SCANDINAVICA JUIS GENTIUM 30, 31 (1950).
26. *See* Schwelb, *supra*, note 17.
27. OPPENHEIM'S INTERNATIONAL LAW 740 (H. Lauterbach ed. 1950).
28. L.M. GOODRICH, THE UNITED NATIONS IN A CHANGING WORLD 159 (1974).
29. Lane, *The Human Rights Within the World Legal Order: A Reply to Sohn and McDougal*, 10 HOFSTRA L. REV. 747, 755 (1982).

Louis B. Sohn is another "charterist" whose opinions are similar to Goodrich's:

> The provisions express clearly the obligations of all members and the powers of the organization in the field of human rights. While the provisions are general, nevertheless they have the force of positive international law and create basic duties which all members must fulfill in good faith. They must co-operate with the United Nations in promoting both universal respect for all without distinction as to race, sex, language, religion. For this purpose, they have pledged themselves to take joint and separate action as may be necessary.[30]

From the outset, South Africa responded to United Nations' criticisms by maintaining that it had not violated any human rights or fundamental freedoms.[31] In 1946, prior to the National Party regime, the position taken by South Africa was that the Charter did not define human rights obligations.[32] Rights such as the right to exist, the right to freedom of conscience and freedom of speech and the right to free access to the courts existed in South Africa.[33]

South Africa's arguments grew more and more tortured during the period from 1946 to just before the adoption of the Universal Declaration of Human Rights. These arguments relied principally upon the domestic jurisdiction clause contained in article II, paragraph 7 of the Charter:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter. . . .

Since South Africa's practice of racial discrimination affected none of the fundamental freedoms which its government inferred from the charter, the right to implement discriminatory legislation was essentially a South African internal matter—or so the argument went.

J.S. Watson, another member of the "recent" school of strict constructionists, believes that writers such as Sohn refuse to acknowledge that state sovereignty is still a great political and legal barrier that needs to be cleared for the successful protection of human rights beyond the nation state.[34] Sohn concedes, in reply, that there are minor violations of human rights which remain a matter for domestic jurisdictions unless states have accepted supplementary agreements creating such international obligations. But, "gross violations of human rights have

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30. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L. J. 131 (1977).
31. Letter from the Indian Delegation to the Secretary General of the U.N., June 22, 1946.
32. 1 U.N. GAOR 52-53, U.N. Doc. A/149 (Joint Committees of C1 and C6). *Cf.* Memorandum by the Government of the Union of South Africa, October 31, 1946, 1 U.N. GAOR 110-111, U.N. Doc. A/167. *See also* Discussion in Joint Committee of the First (Political) and Sixth (Legal) Committees, November 21-23, 1946, 1 U.N. GAOR 1-51.
33. The South African government gave these reasons in order to answer complaints made by the Govermnent of India regarding racial discrimination against people of Indian origin in South Africa. *See* Schwelb, *supra* note 14, for practices of the U.N. and of member states with regard to the apartheid issue in South Africa. Also, for a revealing discussion of the rights which South Africa claimed to exist, *see* J. DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 53 (1978).
34. *See* Watson, *supra* note 6, at 610.

become matters of international concern and no state can hide behind the domestic jurisdiction shield."[35]

In raising the domestic jurisdiction clause South Africa did not recognize the right of the United Nations Organization to discuss matters that concerned its internal policy after 1948, when the National Party came into power. As far as it was concerned, to submit such a topic to international discussion would be tantamount to yielding its sovereignty.[36] While South Africa applied strict construction to the domestic jurisdiction clause, it invoked one specific provision of the Charter—domestic jurisdiction—to attempt to negate many other provisions lying down fundamental principles. As one scholar noted, "[A] broad interpretation of 'intervention' and domestic jurisdiction would make virtually the whole Charter, except article II, paragraph 7 a waste of words . . . and governments do not commit themselves to collaborative effort to promote the universal enjoyment of human rights, if they adhere to the belief that every state has the sovereign right to treat its citizens as arbitrarily as it pleases."[37]

Numerous discussions in the United Nations General Assembly, Economic and Social Council and Security Council have addressed South Africa's alleged failure to uphold human rights and freedoms. These organizations have drawn South Africa's attention to the impropriety of a situation which may not conform to its obligations under the Charter. According to Lauterpacht, these efforts do not amount to intervention because they do not constitute preemptory, dictatorial interference; they do not subject to coercion, or to the threat thereof, the unwilling determination of a state.[38]

Lane believes that the inclusion of article II, paragraph 7 in the Charter was "an expression of state determination from which the decentralized world legal order perspective cannot be overcome except by clear state consent."[39]Judge K. Tanaka, dissenting in *South West African Cases*,[40] argued the existence of human rights obligations in the Charter and concluded by saying:

> . . . . the Charter presupposes the existence of such rights and freedoms which shall be respected; the existence of such rights and freedoms is unthinkable

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35. Sohn, *The International Law of Human Rights: A Reply to Recent Criticisms*, 9 HOFSTRA L. REV. 347, 349-50 (1981). *See also* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 27 at 313 and Lauterpacht's discussion of the domestic jurisdiction clause in INTERNATIONAL LAW AND HUMAN RIGHTS, *supra* note 21 at 213-214, where one of the conclusions he reaches is that "matters essentially within the domestic jurisdiction of a State do not comprise questions which have become a subject of international obligations by custom or treaty or which have become of international concern by virtue of constituting an actual or potential threat to international peace and security. . . ."

36. Report of the Security Council 1963-1964, 19 U.N. GAOR Supp. (No. 2) at 20-43, U.N. Doc. A/5802 (1963).

> South Africa decided not to participate in the discussion by the Security Council of matters which it considered to be solely within the domestic jurisdiction of a Member State. . . . The African States were trying to justify their interference in South Africa's internal affairs by the totally unfounded allegation that South Africa was a threat to international peace and security.

SOHN & BUERGENTHAL, *supra* note 13, at 699.

37. O. Ozgur, APARTHEID, THE UNITED NATIONS AND PEACEFUL CHANGE IN SOUTH AFRICA 123 (1982). *See also* L. M. GOODRICH, E. HAMBRO & A. P. SIMONS, CHARTER OF THE UNITED NATIONS 34-35 (3d ed. 1969).

38. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS, *supra* note 21, at 169.

39. Lane, *supra* note 29, at 751.

40. 1966 I.C.J. 6 at 289. *See supra* note 14.

without corresponding obligations of persons concerned and a legal norm underlying them. Furthermore, there is no doubt that these obligations are not only moral ones, and that they also have a legal character by the very nature of the subject matter.[41]

Perhaps the biggest problem with the Charter is the absence of any clear definition of human rights. No framers showed any intention that the Charter would be a document to contain such definitions.[42] However, when the Universal Declaration of Human Rights is read as an interpretation of the Charter's human rights provisions, it resolves the problem of the Charter's vagueness.[43]

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Preparatory Commission of the United Nations recommended that the Economic and Social Council should immediately establish a Commission on Human Rights to prepare studies and recommendations "which would encourage the acceptance of higher standards in this field and help to check and eliminate discrimination and other abuses."[44]

The Universal Declaration was passed by the General Assembly by a vote of forty-eight to zero with eight abstentions, South Africa being among the abstainers.[45] The South African representative to the United Nations said that the list of rights included in the Declaration was too wide and that it should be limited to those fundamental rights which are universally recognized as authoritative definitions of the rights and freedoms mentioned in the Charter.[46] He also expressed the view that states voting for the Declaration would be bound, in time, in the same manner as if they had signed a convention.[47]

The objections of South Africa to the list of rights contained in the Declaration were not without foundation. For instance, the Declaration contained some second generation rights such as article XXIV's provision for periodic holidays with pay. Still, the Declaration did provide for certain substantive rights and freedoms. Articles I and II provide for universal equality for all and the right not to be discriminated against on racial grounds. Of course, South Africa could be expected to object to provisions such as these, for they reverse the principles which form the cornerstone of its apartheid system.

In its preamble, the Declaration states that "the recognition of the inherent dignity of and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Article I states that "all human beings are born free and equal in dignity and rights." Article II provides that "everyone is entitled to all the rights and freedoms set

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41. *Id.*
42. GOODRICH, HAMBRO & SIMONS, *supra* note 37, at 34-35.
43. Goodrich maintains that "[b]y the Universal Declaration of Human Rights the General Assembly gave substance to the Charter commitment by defining the human rights for which respect was to be sought." GOODRICH, *supra* note 28, at 28. *See also* Sohn, *supra* note 35, at 347.
44. Sohn, *A Short History of United Nations Documents on Human Rights*, in COMM'N TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND HUMAN RIGHTS (Eighteenth Report) 37, 56 (1968).
45. *See supra* note 10.
46. Humphrey, *The Memoirs of John P. Humphrey, the First Director of the United Nations Division of Human Rights*, 5 HUM. RTS. Q. 434 (1983).
47. *Id.*

forth in this Declaration without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status."

Although the Declaration was adopted to elaborate on the general principles of human rights and fundamental freedoms of the Charter, the question is whether it was legally binding on member States. When it was passed it was accepted that it did not create a legal obligation.[48] But the fears expressed by the South African representative at the time of the adoption of the Declaration may have been prophetic. Lane believes that the Declaration merely states goals and aspirations and not legally binding obligations.[49] Sohn, however, disagrees:

> There seems to be agreement that the Declaration is a statement of general principles spelling out in considerable detail the meaning of the phrase "human rights and fundamental freedoms" in the Charter of the United Nations. As the Declaration was adopted unanimously without a dissenting vote, it can be considered as an authoritative interpretation of the Charter of the highest order. While the Declaration is not directly binding on the United Nations Members, it strengthens their obligations under the Charter by making them more precise.[50]

In the International Court of Justice advisory opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia*,[51] Judge F. Ammoun held that the principles enunciated in the Universal Declaration could be considered binding because "they have acquired the force of custom through a general practice accepted as law."[52] South Africa regards this interpretation as unacceptable. Absent any assent, it does not hold itself bound by the Declaration.[53] It feels that international concern for the way it treats its nationals is unwarranted and often exaggerated. Such concern, it feels, constitutes unnecessary interference in its domestic affairs.[54]

Watson maintains that international law relies on reciprocity for its operations and it stems from the Golden Rule of "a desire to be treated in a like manner should one find oneself in the same situation at some future time."[55] A failure to comply with international norms results in the denial of reciprocal privileges enforced by the interested party. If, however, the subject matter of a norm does not affect another state to a sufficient extent to make it willing to act upon the violation, then there is no motivation for compliance with international law beyond pure self-limitation on the part of the violator or potential violator.

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48. *See generally* B.G. RAMCHARRAN, HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 32-33 (1979).
49. Lane, *supra* note 9, at 775.
50. Sohn, *supra* note 30, at 131.
51. Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (1970). *See also* de Arechaga, *General Course in Public International Law*, 1 RECUEIL DES COURS 31 (1978) for a discussion of customary international law and Declarations of the General Assembly. De Arechaga says that such "declarations may constitute a source of rules of international law in a way similar to the formation of a consensus in conferences for the codification and progressive development of international law." *Id.*
52. 1971 I.C.J. 76.
53. *See supra* note 46.
54. *See supra* note 36.
55. Watson, *supra* note 6, at 619.

Therefore, one state's treatment of its citizens should be of little or no interest to other states.[56]

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights[57] was adopted in 1966 and took force in 1976. It provided for implementation of human rights law among at least eighty-one states which have ratified it. South Africa is not a party to the Covenant. It is hardly likely it would be after its expressions of fear about the Universal Declaration.[58]

Similar to the Universal Declaration, the Covenant provides for similar protection of human rights and fundamental freedoms in article II.[59] Newman believes that the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and its Optional Protocol,[60] and the International Covenant on Economic, Social and Cultural Rights,[61] which have given form and content to the general human rights provisions of the Charter, are general instruments of positive international human rights law.[62] These instruments make up the International Bill of Human Rights.

SPECIFIC CONVENTIONS ON RACIAL DISCRIMINATION

The International Convention on the Elimination of All Forms of Racial Discrimination[63] was adopted on December 21, 1965 and took effect on January 4, 1969. With 124 ratifications this "makes the Convention the most widely ratified United Nations human rights treaty in force today."[64]

In *North Sea Continental Shelf Cases*[65] the International Court of Justice ruled that "before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of states whose interests were specifically affected."[66] Because South Africa is not a party to the Convention on Racial Discrimination and is a specially affected country, it is probable that the requirements of first, "without the passage of any considerable period of time" and second, "a very widespread and representative participation" might be sufficient to create a customary international law norm.

Article I of the Convention on Racial Discrimination defines racial discrimination as "any distinction, exclusion, restriction or preference based on race,

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56. *Id.*
57. *See generally* 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966) [hereinafter Covenant on Rights].
58. *See supra* note 46.
59. *See supra* note 10.
60. Covenant on Rights at 59.
61. *Id.*
62. Newman, *Interpreting the Human Rights Clause of the U.N. Charter*, 5 HUM. RTS. J. 285 (1972).
63. 60 U.N.T.S. 195 (1965) [hereinafter Convention on Racial Discrimination].
64. Final Act of the International Conference on Human Rights 3 at 4, U.N. Doc. A/Conf. 32/41, U.N. Sales No. E.68.IX.V.2 (1968).
65. *See supra* note 7.
66. 1969 I.C.J. 73.

colour, descent or national or ethnic origin which has the purpose of nullifying or impairing the recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any field of public life."[67]

Schwelb points out that the language of *Legal Consequences for States of the Continued Presence of South Africa in Namibia*[68] resembles language of Article 1 of the Convention on Racial Discrimination. As Schwelb points out,

> this means that the International Convention on the Elimination of Racial Discrimination is, to a large extent, declaratory of the law of the Charter, or, in other words, the basic principles of the convention lay down the law which binds also states which are not parties to the convention, but as Members of the United Nations, are parties to the Charter.[69]

In article II of the Convention on Racial Discrimination, the signatories undertake to review their legislation, repeal objectional laws and regulations and adopt legislative and other measures to eliminate racial discrimination.[70]

The advocates of the "new" international law would argue that this Convention is a codification of custom as evidence of general practice accepted as law. That the Charter lists racial discrimination in its preamble and in article LV may be a further argument raised in support of this contention. South Africa, on the other hand, objects to the Convention on the grounds that it feels some nations are attempting to legislate for its territory, invading its sovereignty.[71] It similarly objects to the International Convention on the Suppression and Punishment of the Crime of Apartheid.[72]

The Convention on Apartheid was adopted on November 30, 1973 and came into force on July 18, 1976. Seventy-nine states have ratified this Convention, a large number of those states being from the Third World. South Africa is not a party to the Convention.

The Convention on Apartheid establishes criminal responsibility for individual members of organizations and institutions as well as representatives of states, who commit or are involved in the crime of apartheid.[73] Many states see the provisions of this Convention as being too broad. Article I declares that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of racial segregation and discrimination are crimes violating the principles of international law, in particular the purposes of the Charter, and constitutes a serious threat to international peace and security. Article II defines the inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.

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67. 60 U.N.T.S. 195.
68. *See supra* note 51 and accompanying text.
69. Schwelb, *supra* note 7, at 351.
70. *Cf. infra* note 69.
71. The South African delegation to the United Nations has raised this argument with almost monotonous regularity. *See supra* note 32.
72. G.A. Res. 3068, 28 U.N. GAOR Annex Supp. (No. 20) at 1965 (1973) [hereinafter Convention on Apartheid].
73. Convention on Apartheid art. III.

State parties also undertook in the Convention to adopt legislative, judicial and administrative measures to prosecute and punish persons charged with acts enumerated in article II. Offenders may be tried by a competent tribunal of any state party to the Convention.[74] This provision has created much controversy, making many Western states reluctant to become parties to the Convention.

MULTILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW

According to R.R. Baxter, "rules found in treaties can never be conclusive evidence of customary international law. The multilateral law declaring treaty reflects only the views entertained by the parties to that instrument. The law creating multilateral treaty is received as evidence of the law only when states not parties adopt it in their own practice."[75] Since South Africa has begun a "program of reform"[76] recently after having declared apartheid an "outmoded system," it can be concluded that this is an admission by the South African government that apartheid as a system is inherently discriminatory. On that premise, it may be concluded that South Africa has violated international law by practicing apartheid.[77]

Tunkin holds that the "existence of a considerable number of multilateral treaties to which all or almost all states are parties (i.e. general or universal international treaties) and also extensive efforts in the field of codification of international law have led to a situation where international treaties become a direct means of changing, developing and creating new norms of general international law."[78]

Judge Eduardo Jimenez de Arechaga, a former President of the International Court of Justice, analyzed the methods and legal techniques followed by the International Court with regard to the evolution of customary international law. He feels that the Court "has searched for the general consensus of states instead of adopting a positivist insistence on strict proof of the consent of the defendant state, thus sounding the death-knell of the voluntarist conception of custom. . . ."[79] In *Legal Consequences for States of the Continued Presence of South Africa in Namibia*[80] the Court looked to article LX of the Vienna Convention on the Law of Treaties[81], and applied the general principles of interna-

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74. Convention on Apartheid art. III(b) and art. V.
75. Baxter, *Treaties and Customs*, 25 RECUEIL DES COURS 99, 100 (1970).
76. *E.g.*, repealing, as objectionable to Art. 2 of the Convention on Racial Discrimination, several apartheid-related statutes such as the Prohibition on Mixed Marriages Act No. 55 of 1949, the Immorality Act No. 23 of 1957 § 16 and the so-called "pass" laws.
77. In the U.K. case of Trendex Trading Corporation v. Central Bank of Nigeria, 1 All E.R. 881, at 888-90 (1971), Lord Denning, M.R., discussed the place of customary international law in English law and drew attention to the two schools of thought on this matter. The doctrine of incorporation favored the view that international law was in its full extent part of the law of England, even without Parliamentary approval. The doctrine of transformation held that, without an Act of Parliament, international law had no validity for this would usurp the province of the legislature. Lord Denning concluded that, since 1) the rules of international law are always in flux, and 2) English courts had given effect to international changes without any Act of Parliament, international law—"[which] knows no stare decisis"—was part of English law. However, he concluded, it remains positivistic with regard to state consent.
78. Tunkin, *Coexistence and International Law*, 1 RECUEIL DES COURS 21-22 (1958).
79. De Arechaga, *General Course in Public International Law*, *supra* note 51, at 11.
80. 1971 I.C.J., *supra* note 51, at 47.
81. 1969 U.N. JURID. Y.B. 140, U.N. Doc. A/Conf. 39127.

tional law with regard to the termination of treaties even though the Vienna Convention was not then in force nor was it "accepted by all the states appearing before that Court in that case."[82]

Further support can be found in Judge Tanaka's dissent in *South West African Cases (Second Phase)* where he posits that the consent of states was not required for the recognition of the general principles of law recognized by civilized nations:

> States which do not recognize this principle or even deny its validity are nevertheless subject to its rules. From this kind of source international law could have the foundation of its validity extended beyond the will of States, that is to say, into the sphere of natural law and assume an aspect of its supra-national and supra-positive character.[83]

Judge de Arechaga also asserts that the International Court of Justice "has recognized that the customary law does not necessarily grow up independently of treaties, but may also be expressed in general multilateral conventions or in widely attended codification conferences . . . ."[84]

Watson believes that a Convention creates *de lege ferenda*.[85] There is no absolute certainty as to what time period has to elapse before *de lege ferenda* becomes *lex lata*—that is, a rule of customary international law.[86] However, Judge de Arechaga in his discussion of the time required for the elaboration of a customary rule refers to *North Sea Continental Shelf Cases*.[87] After stating that the "requirement of the traditional doctrine was that a long and protracted practice was necessary for the emergence of a customary rule: some authorities even referred to 'a continuous practice from time immemorial,' he points out that the International Court of Justice "accepted that State practice of around fifteen years was sufficient . . . ."[88] It has been over forty-two years since South Africa was first confronted in the United Nations about its discriminatory practices, over nineteen years since the Convention on Racial Discrimination came into effect and over eleven years since the Convention on Apartheid came into effect. Through the mere effluxion of time, a customary international law norm of racial non-discrimination has been formed. Besides, about seventeen years ago *Legal Consequences for States of the Continued Presence of South Africa in Namibia* held that ". . . no factual evidence is needed for the purpose of determining whether the policy of apartheid . . . is in conformity with the obligations assumed by South Africa under the Charter of the United Nations."[89] Thus the Court took judicial notice of the detrimental effects of apartheid on

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82. De Arechaga, *supra* note 51, at 11. *See also* Judge Tanaka's dissenting opinion in South West African Cases (Second Phase), 1966 I.C.J. 291. *See supra* note 14.
83. 1966 I.C.J. 298.
84. De Arechaga, *supra* note 51, at 11. *Compare* Baxter, *supra* note 75 and Tunkin, *supra* note 78.
85. That is, norms that are not yet part of international law but are a progressive development of what the law ought to be. *See* Watson, *supra* note 6, at 631.
86. "The process of the formation of a customary law in this case may be described as individualistic. On the contrary, this process is going to change in adapting itself to changes in the way of international life." 1966 I.C.J. 291 (Tanaka, J., dissenting).
87. *See* note 7.
88. De Arechaga, *supra* note 51, at 25 (footnotes omitted).
89. 1971 I.C.J. 57.

the inhabitants of Namibia. The Court found that the practice of apartheid in Namibia was a "flagrant violation of the purposes and principles of the Charter."[90] Schwelb draws the following conclusion: "What is a flagrant violation of the purposes and principles of the Charter when committed in Namibia, is also a violation when committed in South Africa proper or, for that matter, in any other sovereign Member State or in a non-self-governing or Trust Territory."[91]

JUS COGENS

The Vienna Convention on the Law of Treaties,[92] which came into effect on January 27, 1980 and has forty-nine member states, deals with *jus cogens* in Article LIII:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a form from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[93]

The advocates of the "new" international law believe that the principles of the Charter in regard to human rights have now moved into *jus cogens*.[94] Sohn holds:

> [T]he Charter is the cornerstone of international *jus cogens*, and its provisions prevail over all international and domestic legislative acts. Should a state conclude a treaty or issue a legislative act or regulation which constitutes a gross violation of human rights, such a treaty or act would be clearly invalid as contrary to a basic and overriding norm of the Charter, and any tribunal, international or domestic, which might be asked to apply such a treaty, act or regulation, should refuse to do so. In addition, the provisions of the Charter and the continuous world wide debate about their implementation have brought a change in the moral and political climate, making it easier for public opinion to press for change in old customs that are no longer consistent with the public policy enunciated in the Charter.[95]

Judge Tanaka did not go as far as Sohn, but stated that "the law concerning the protection of human rights may be considered to belong to the *jus cogens* . . . ."[96] In discussing the essence of the rules of *jus cogens* Judge de Arechaga explains that:

> The international community recognizes certain principles which safeguard values of vital importance for humanity and correspond to fundamental moral principles: these principles are of concern to all States and "protect interests which are not limited to a particular State or group of states, but belong to the community as a whole." They include the prohibition of the use of force and of aggression,

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90. *Id.*
91. Schwelb, *supra* note 17 at 351.
92. *See supra* note 81.
93. *Id.*
94. A peremptory norm from which there can be no derogation; that is, a rule of international law from which states cannot of their own free will contract out of.
95. Sohn, *supra* note 30, at 131.
96. 1966 I.C.J. 298.

> the prevention and repression of genocide, piracy, slave-trade, racial discrimination, terrorism or the taking of hostages. The observance of these principles, firmly rooted in the legal conviction of the community of States, is required from all members of that community and their violation by any State is resented by all.[97]

He continues by saying that "even if 'apartheid' is accepted by the laws of one State, a treaty providing for racial discrimination would constitute a violation of *jus cogens* . . . ."[98]

HUMAN RIGHTS AND HUMANITARIAN LAW

South Africa is, however, a party to another multilateral convention, namely, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War,[99] which came into force on October 21, 1950 and presently has 160 states as parties. After the atrocities committed on civilians in World War II the Red Cross attempted to codify humanitarian laws with respect to the protection of civilians in wartime. The Convention contains "precise judicial guarantees of human dignity, for persons in occupied territories and on the national territory of a belligerent."[100]

Article XXVII, paragraph 3 forbids any discrimination among persons protected "on the grounds of race, religion, or political opinion." The human rights provisions in this Convention apply expressly only in time of war. But if South Africa is willing to observe fundamental human rights standards in time of war, what expectation can be made of it in time of peace? Surely, the human rights provisions would apply with greater force then.

South Africa abstained from voting for the Universal Declaration of Human Rights in 1948 because it objected to the wide range of human rights it guaranteed.[101] Yet the assent in 1949 to a racial non-discriminatory provision in a convention on the protection of civilians in time of war indicates that South Africa was willing to abide by the fundamental human rights principles referred to in the Charter in article LV even though it claimed that these rights were not clearly spelled out.[102] Thus South Africa accepted its obligations, both under the Charter and the Geneva Convention not to discriminate against persons on the grounds of race—but only in regard to certain rights in certain circumstances.

A. H. Robertson disagrees that humanitarian law is made up of two branches; namely, the law of war and the law of human rights.[103] He contends that human rights afford the basis for humanitarian law. The reason for the contrary view, he maintains, is that the development of humanitarian law antedates that of human rights law. Historically, humanitarian law was already codified when the development of human rights law began with the Universal Declaration in 1948:

> But when we look at the substance of the two disciplines, it is apparent that human rights law is the genus of which humanitarian law is the species. Human

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97. De Arechaga, *supra* note 51, at 64-65.
98. *Id.*
99. *See supra* note 5.
100. A.L. DEL RUSSO, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 52 (1971).
101. *See supra* note 46.
102. *See supra* note 32.
103. A.H. ROBERTSON, HUMAN RIGHTS IN THE WORLD 226 (1972).

> rights law relates to the basic rights of all human beings everywhere at all times; humanitarian law relates to the rights of particular categories of human beings—principally, the sick, the wounded, prisoners of war—in particular circumstances, that is during periods of armed conflict.[104]

In keeping with the general principle of *pacta sunt servanda*,[105] South Africa is obliged to honor the species; that is, not to discriminate against civilian persons in time of war. Yet it may choose to ignore the genus; that is, not to discriminate on the basis of race at any other time.

The words of Judge Tanaka are apposite:

> The principle of the protection of human rights is derived from the concept of man as a *person* and his relationship with society which cannot be separated from the universal human nature. The existence of human rights does not depend on the will of a State; neither internally on its law or any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a State constitutes the essential element. A State or States are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. The role of the State is no more than declaratory.[106]

CONCLUSION

Since 1946, more than one hundred resolutions in relation to apartheid have been passed.[107] The status of United Nations resolutions under international law is that they have been considered to be of a highly probative value in determining how nations feel about a matter.[108] Watson believes that the advocates of the "new" international law use a variant of *opinio juris* instead of general state practice.[109] He is of the opinion that General Assembly resolutions are such variants of *opinio juris*. Since the *opinio juris* required for the creation of custom is a sense of legal duty of states as to what the law is, the use of resolutions as a basis for custom is twice removed from what is required for custom. The resolutions are only statements about desired future conduct: they are not statements of what the law is, but rather what it ought to be.

However, Sohn points out that modern diplomats have abandoned the formal ways of reaching agreement.[110] He cites the example of the rules of the international law of outer space being formulated by this method. Judge de Arechaga illustrates the same point by refering to the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations[111] which "may be considered

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104. *Id.*
105. "Promises given through the signature of treaties are binding."
106. 1966 I.C.J. 297.
107. M.S. RAJEN, THE EXPANDING JURISDICTION OF THE UNITED NATIONS 112-119 (1982).
108. "A State, instead of pronouncing its view to a few states directly concerned, has the opportunity, through the medium of an organization, to declare its position to all members of the organization and to know immediately their reaction to the same matter." 1966 I.C.J. 291 (Tanaka, J., dissenting). *See also* de Arechaga, *supra* note 51, at 30-31.
109. Watson, *supra* note 6, at 633.
110. Sohn, *supra* note 35, at 252-253.
111. 25 U.N. GAOR 2625.

as declaratory of existing rules of international law."[112] Another example he gives is the Declaration on the Granting of Independence to Colonial Countries and Peoples[113] which "was described in the Namibia Advisory Opinion as an important part of customary law."[114]

A large majority of the United Nations' membership regards state-sanctioned racial discrimination such as apartheid as a violation of the Charter and the Universal Declaration. Most states have taken steps individually and collectively to eradicate racial discrimination; however, the South African Government, while talking of reform, continue to consolidate the system of apartheid.

In *Barcelona Traction, Light & Power Company*[115] the International Court of Justice included among the obligations of states *erga omnes*[116] "the principles and rules concerning the basic rights of the human person including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . ., others are conferred by international instruments of a universal or quasi-judicial character."[117]

It can be concluded that the practice of racial discrimination by South Africa violates its obligations under the United Nations Charter, especially article LV. International custom, as general practice accepted as law, indicates that a norm of racial non-discrimination exists and that such a norm may be part of *jus cogens*. Therefore, South Africa is in violation of international law. The judicial decisions and teachings of the most qualified publicists support this conclusion. The positivist defense built by South Africa in defense of its practice of apartheid has not accounted for the rapid development in international human rights law. Concepts of "State consent," "domestic jurisdiction" and "intervention" have been whittled away by the utterances of the International Court of Justice and the most qualified legal scholars of all civilized nations.

112. De Arechaga, *supra* note 51, at 32.
113. 25 U.N. GAOR 1514.
114. De Arechaga, *supra* note 51, at 33.
115. Barcelona Traction, Light & Power Co. (Second Phase) (Bel. v. Spain), 1970 I.C.J. 3 (1970).
116. "As applicable to all."
117. 1970 I.C.J. 32.