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I. INTRODUCTION

The concern of the United Nations with the promotion and protection of human rights and fundamental freedoms is an expression of the ever-increasing interest of the international community in ensuring that these rights and freedoms shall be enjoyed by all human beings everywhere.[1] Although the principle of freedom from discrimination on grounds of race has occupied the attention of the United Nations as only part of its overall concern with the protection of human rights, racial dis-

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1. The roots of the contemporary concern for human rights may be traced to various traditions, philosophical concepts, and events going as far back as, for example, the humanist traditions of the Renaissance and the issuance of the Magna Carta by King John of England in 1215. The twentieth century saw the manifestation of international concern for human rights in international legal documents. In the first half of the twentieth century, international concern with human rights found expression in certain provisions of the Covenant of the League of Nations, as, for example, the obligation to endeavor to secure and maintain fair and humane conditions of labor for men, women, and children, and also to ensure the just treatment of the indigenous inhabitants of colonies. COVENANT OF LEAGUE OF NATIONS art. 23 (a)-(b). In addition, some of the post-1919 peace treaties and declarations created a system for the protection of linguistic, racial, and religious minorities under a guarantee of the League of Nations. *See, e.g.*, Treaty of Peace with Hungary, *signed* June 4, 1920, part III, sec. 6, arts. 54-60; Treaty of Peace with Turkey, *signed* July 24, 1920, part I, sec. III, arts. 37-45; Treaty Between the Principal Allied and Associated Powers and Poland, *signed* June 28, 1919; Treaty Between the Principal Allied and Associated Powers and Czechoslovakia, *signed* Sept. 10, 1919; Declaration by Finland in Respect of the Aaland Islands, June 6, 1921; and the Declaration by Lithuania, May 12, 1922. *See generally* J. GREENVILLE, THE MAJOR INTERNATIONAL TREATIES 1914-1973, ch. 2, *Peace Settlements and The League of Nations, 1919-23,* which discusses these treaties in the context of international human rights.

The Second World War had a major impact on human rights developments in the second half of the twentieth century. The war demonstrated the close relationship between outrageous behavior by the government of a nation toward its own citizens and aggression against other nations as well as the relationship between respect for human rights and the maintenance of international peace and security. The experience of the war was reflected in various human rights clauses of the present U.N. Charter, including the provision that together with its other purposes, the United Nations shall strive to achieve international cooperation in "promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." U.N. CHARTER art. 1, para. 3.

crimination has been and is considered to be one of the most odious of human rights violations.

It comes as no surprise that, in 1948, when the United Nations began using the treaty approach to combat specific human rights violations, the first such treaty was designed to combat a problem essentially racial in character. This was the Convention on the Prevention and Punishment of the Crime of Genocide.[2] Although binding on its parties, this convention contained no machinery for implementation at the national level and no prevision for the United Nations to supervise and evaluate the effectiveness of domestic implementing legislation.[3] The United Nations treaty approach to human rights therefore had a modest, if not timid, beginning.

Subsequent attempts within the United Nations utilizing the treaty approach to combat racial discrimination have been more bold. These treaties are the subject of this article. The substantive law of the treaties and their machinery for implementation and supervision will be examined critically to assess progress made so far, as well as to identify the chief obstacles standing in the way of further progress.

The analysis begins with a discussion, in section two, of the crystallization of the contemporary norm against discrimination. Sections three and four deal in turn with the Convention Concerning Discrimination in the Field of Employment and Occupation,[4] created under the auspices of the International Labour Organisation (ILO), and with the Convention Against Discrimination in Education,[5] a product of the United Nations Educational, Scientific and Cultural Organization (UNESCO). Sections five and six examine the United Nations Declaration on the Elimination of All Forms of Racial Discrimination[6] and the international convention of the same name,[7] while section seven explores the question of international action against apartheid in southern Africa. The conclusion evaluates the effectiveness of the United Nations as an international catalyst

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2. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951). Under article II, the parties agree to prevent and punish acts intended to injure or destroy in whole or in part any national, ethnic, racial, or religious group. The convention marked a significant departure from previous action which was limited to nonbinding resolutions and declarations.

3. The lack of enforcement provisions is ironic in view of the widely shared belief at the time that state opposition to the convention would be minimal since genocide had long before received universal condemnation. *See also* the treaties cited in note 1 *supra*.

4. Convention Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31 [hereinafter cited as Employment Convention].

5. Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93 [hereinafter cited as Education Convention].

6. United Nations Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904, 18 U.N. GAOR, Supp. (No. 15) 35, U.N. Doc. A/5603 (1963) [hereinafter cited as U.N. Declaration on Racial Discrimination].

7. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, *entered into force* Jan. 4, 1969, 660 U.N.T.S. 195 [hereinafter cited as 1965 Racial Discrimination Convention].

for progress and offers suggestions for the course of future action in the worldwide fight against racial discrimination.

II. CRYSTALLIZATION OF THE CONTEMPORARY NORM AGAINST DISCRIMINATION

A. *Primary Instruments*

The contemporary prohibitions against group categorization by "race" originated in the United Nations Charter. Article 1(3) of the Charter provides that one of the purposes of the United Nations is "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." This purpose is reaffirmed in articles 13(1)(b),[8] 55(c) and 56,[9] and 76(c).[10]

Four other major international instruments, together with the Charter, essentially constitute an international bill of human rights. These are the Universal Declaration of Human Rights;[11] the International Covenant on Economic, Social and Cultural Rights;[12] the International Covenant on Civil and Political Rights;[13] and the Optional Protocol to the Interna-

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8. Article 13(1)(b) of the U.N. Charter provides: "1. The General Assembly shall initiate studies and make recommendations for the purpose of: . . . b. 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."

9. Article 55(c) of the U.N. Charter reads:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
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> . . . .
>
> c. universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 reads: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."

10. Article 76(c) of the U.N. Charter provides:

> The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:
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> . . . .
>
> c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world . . . .

11. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948). Article 2 stipulates that the Declaration's protections are to be extended "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 7 provides for equal protection before the law "without any discrimination."

12. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967), *entered into force* Jan. 3, 1976. Articles 2(2) and 12 deal with racial discrimination.

13. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19,

tional Covenant on Civil and Political Rights.[14] These four instruments give detailed expression to those fundamental human rights which the Charter was unable to articulate.

The Universal Declaration of Human Rights is the earliest of the four, and is one of the most comprehensive international statements recognizing human rights in the post-World War II era. The Declaration proclaims that all people are born equal in dignity and right, and that each person has the right to life, liberty and security of the person. It also proclaims the freedom from slavery, torture, and arbitrary arrest, freedom of thought, expression, and association, and the right to education, work, leisure, and a decent standard of living. Under article 2, "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The International Covenant on Economic, Social and Cultural Rights affirms a number of rights, among them the right to work, the right to freely choose one's place of employment, the right to fair working conditions, and the right to form trade unions. Under article 2, all the rights enumerated in the Covenant are declared to belong to all persons "without discrimination of any kind" according to the same criteria appearing in article 2 of the Universal Declaration.

The International Covenant on Civil and Political Rights gives more detailed expression to many of the rights contained in the Universal Declaration. Again, the same formula against discrimination appears. Both Covenants contain procedures for national implementation under the supervision of the United Nations.

The Optional Protocol goes a step further and provides that under certain circumstances an *individual* can complain to the United Nations for the failure of his government to implement the Covenant on Civil and Political Rights.

B. *United Nations Organs with Primary Concern over Human Rights*

Among the organs of the United Nations with primary responsibility in the area of human rights are the General Assembly, the Economic and Social Council, the Commission on Human Rights, the Commission on the Status of Women, and the Subcommission on Prevention of Discrimination and Protection of Minorities. The Security Council and the Trusteeship Council are also concerned with human rights matters. Finally, within the Secretariat of the United Nations, the Division of Human Rights has a continuing responsibility for human rights issues.

The Division of Human Rights provides substantive services and

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1966, *id.* at 52, *entered into force* Mar. 23, 1976. Articles 2, 4, 20, and 26 deal with racial discrimination.

14. Optional Protocol to the International Covenant on Civil and Political Rights, *id.* at 59.

documentation on human rights questions of concern to a number of United Nations organs, including the General Assembly and the Economic and Social Council. It also operates as the working staff of the Commission on Human Rights, the Subcommission on Prevention of Discrimination and Protection of Minorities, the Committee on the Elimination of Racial Discrimination, the Human Rights Committee, and their respective subsidiary bodies. The Division's tasks include the preparation of studies, reports, and publications on human rights, the administration of advisory services, and the implementation of the Program for the Decade for Action to Combat Racism and Racial Discrimination (1973-1983).

Four of the specialized agencies of the United Nations have a special interest in the protection of specific human rights and freedoms: ILO, UNESCO, the World Health Organization (WHO), and the Food and Agricultural Organization (FAO).

In the area of racial discrimination, the primary responsibility falls on the Subcommission on Prevention of Discrimination and Protection of Minorities.[15] The work of the Subcommission has resulted in substantial progress in promoting and implementing the principle of nondiscrimination at the national and international levels. For example, it was on the recommendation of the Subcommission that the ILO studied the question of employment and occupation discrimination, and in 1958, adopted the Convention Concerning Discrimination in the Field of Employment and Occupation. It was also at the suggestion of the Subcommission, and as a result of its Study of Discrimination in Education, that UNESCO adopted the Convention against Discrimination in Education at its General Conference in December 1960.

III. THE CONVENTION CONCERNING DISCRIMINATION IN RESPECT OF EMPLOYMENT AND OCCUPATION

The Employment Convention requires "equality of opportunity and

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15. The Subcommission was established by the Commission on Human Rights in 1947, and was authorized to "undertake studies, particularly in light of the Universal Declaration on Human Rights, and to make recommendations to the Commission on Human Rights concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities." *See* U.N. Doc. E/CN.4/Sub.3/370/Rev.1, at 35 (1970).

Pursuant to the terms of its establishment, the Subcommission has conducted and forwarded to the Commission on Human Rights a number of studies on the problems of discrimination. *See, e.g.*, the Study of Discrimination in Education, the Study of Discrimination in the Matter of Religious Rights and Practices, the Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, Including his Own, and to Return to his Country, the Study of Discrimination against Persons Born out of Wedlock, and the Study of Equality in the Administration of Justice. *See also* the Special Study on Racial Discrimination in the Political, Economic, Social and Cultural Spheres, a revised and updated version of which was published under the title "Racial Discrimination." U.N. Doc. E/CN.4/Sub.2/370/Rev.1 (1977). The latter study was prepared by Hernán Santa Cruz, Special Rapporteur of the Subcommission. On the most recent meeting of the Subcommission, see Hannum, *Human Rights and the United Nations: Progress at the 1980 Session of the U.N. Sub-commission and Protection of Minorities*, HUMAN RIGHTS Q., Feb. 1981, at 1-17.

treatment in respect of employment and occupation"[16] and specifically prohibits any discrimination "on the basis of race, color, sex, religion, political opinion, national extraction or social origin."[17]

The Convention obligates each member of the ILO "to declare and to pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof."[18] In particular, each member undertakes to seek the cooperation of employers' and workers' organizations, enact legislation, promote educational programs, and repeal statutory provisions and modify administrative instructions or practices which are inconsistent with the prescription of equality of opportunity and treatment in employment and occupation.[19]

A. *Supervision of Implementation*

The Employment Convention provides for the regular and systematic monitoring of progress in the implementation of its provisions. Each member undertakes to provide annual reports on the application of the Convention, indicating action taken in pursuance of Convention policy and the results secured by such action.[20] The Convention's annual reporting requirements constitute one of several unique procedural devices in the ILO Constitution[21] designed to allow supervision of the implementation of conventions and recommendations. In addition to the reporting requirements, the ILO conducts regular observation of the activities and obligations of member states through two committees, the Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee.[22] While the Committee of Experts analyzes all reports from governments, the Conference Committee confines itself to consideration of a limited number of cases where the Committee of Experts has noted serious violations of adopted conventions.

The documentation available to the Committee of Experts includes,

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16. Employment Convention, *supra* note 4, art. 2.

17. *Id.* art. 1(1)(a).

18. *Id.* art. 2.

19. *Id.* art. 3. Under article 8, Employment Convention binds only those members of the ILO who have ratified it, not the ILO membership at large.

20. *Id.* art. 3(f).

21. Under article 22 of the Constitution of the International Labor Organization, a member state undertakes to report annually "on the measures which it has taken to give effect to the provisions of Conventions to which it is a party." Under article 19, para. 5(e), a member state has to report at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention.

22. *See* General Introductory Paper Prepared by the Secretary-General, U.N. Doc. A/CONF.924, at 37 (1978), submitted by the U.N. Secretary-General to the World Conference to Combat Racism and Racial Discrimination (Geneva, Aug. 1978).

inter alia, the information supplied by governments, legislative texts, collective agreements or court decisions directly relevant to the implementation of international labor standards (including that of nondiscrimination), comments made by employers' and workers' organizations, and conclusions of other ILO bodies. The Committee sets forth its findings in its reports, which often lead to requests for further information on particular questions. These requests are communicated directly to governments which have either failed to file an annual report or have supplied incomplete information in their reports.

B. *Experience under the Supervisory Machinery*

In its reports, the Committee of Experts publicly names the countries in question and comments on their activities. It will, for example, take note of the fact that a particular government had failed to submit a report and to respond to further requests. In one 1971 case, after determining that the domestic law of a particular government was inconsistent with the Employment Convention, the Committee requested the government in question to indicate what steps it had taken to eliminate the inconsistency.[23] Broad reviews of the progress and obstacles in the implementation of the Employment Convention have also been carried out by the Committee of Experts, with more requests being made directly to governments for further information on implementation at the national level.[24]

Public scrutiny of domestic legislation by an international body, coupled with a correlative international obligation on the part of governments to submit information and justify particular aspects of internal laws, can be a source of political embarrassment to a nonconforming state. Repeated citation by the Committee of Experts of uncooperative behavior can also have a similar impact. In effect, these procedures have their own built-in sanctions to induce national conformity with international instruments. In one example of an impressive result of the Employment Convention's implementation machinery, a 1971 citation by the Committee of Experts to the effect that the domestic law of a member government was inconsistent with the Convention resulted the following year in an announcement that the law would be suitably amended.

While the Employment Convention, read in conjunction with the ILO Constitution, provides a system of international scrutiny of domestic legislation as well as a unique mechanism for persuasive rather that coercive enforcement, it contains automatic safeguards against any kind of supranational tyranny. Since members undertake to pursue by "methods appropriate to national conditions and practice" their general and specific obligations under the Convention,[25] it is presumably the individual state

23. ILO, Report of International Labour Conference, 56th session 175 (1971).

24. *See, e.g.,* ILO, Report of International Labour Conference, 63d session (vol. 3, pt. 4A, 1977).

25. *Supra* note 4, arts. 2 & 3, and the text accompanying note 18 *supra.*

or government that is the sole judge of which implementation methods are "appropriate" to national conditions and practice.

For example, in 1975 the Committtee of Experts expressed its concern with legislation in a member state which required female employees in the public sector to resign upon marriage. The government in question simply informed the Committee of Experts that due to a high level of unemployment, it was unable at that stage to implement a change in this policy. The Committee of Experts thereupon merely expressed its hope "that this matter would be reviewed as soon as possible and that steps would be taken in order to bring the legislation and practice into line with the Employment Convention in this respect."[26]

The effectiveness of the Employment Convention is limited, of course, by the fact that it binds only those states which are members of the ILO and whose ratifications have been registered with the ILO Director-General. Also, member states have the right under article 9 of the Convention to denounce it ten years after its entry into force.

Apart from the ten-year time limit, the Convention does not specify the substantive conditions under which a party may denounce. The act is therefore within the sole discretion of the denouncing state. If a state has not denounced within the year following the expiration of the first ten-year period (that is, by 25 June 1969, since the first period expired on 25 June 1968), it becomes automatically bound for another ten years and may denounce only after the expiration of each ten-year period by registering its denunciation with the Director-General. Following this procedure, denunciation becomes effective one year after the date it was registered.

IV. THE CONVENTION AGAINST DISCRIMINATION IN EDUCATION

As in the case of the Employment Convention, the Convention Against Discrimination in Education[27] (the Education Convention) was the result of the initiative of the Subcommission on Prevention of Discrimination and Protection of Minorities. The purposes of the Education Convention are to eliminate discrimination in education and to ensure equality of opportunity.[28]

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26. ILO, Report of the 60th Session of the Committee of Experts, part 4A, at 165 (1975).

27. Note 5 *supra*.

28. Two provisions in the Education Convention underline the goal of equality of opportunity. Article 1 defines discrimination as including

> Any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth which has the purpose or effect . . . of depriving any person or group of persons of access to education of any type or at any level . . . .

Article 3 obligates states party to the convention to undertake "[t]o ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions . . . [and] [t]o give foreign nationals within their territory the same access to education as that given to their own nationals."

A. *Supervisory Procedures*

UNESCO monitors compliance with the Education Convention under the authority of its Constitution, which obligates member states to report periodically to the organization on the progress they have made.[29]

In addition to monitoring compliance through reporting procedures, UNESCO has taken specific action with regard to the Convention. In a resolution adopted in May 1965, the Executive Board of UNESCO decided that reports of member states should be examined by a Special Committee of the Board and then be transmitted, with the Board's comments, to the General Conference of UNESCO.[30]

B. *Experience under the Supervisory Procedures*

As a result of the 1965 decision, a questionnaire covering all the provisions of the Education Convention was sent to the thirty member states then parties to the Convention. The questionnaire sought information on (a) discrimination, (b) equality of opportunity and treatment, (c) educational activities of national minorities, and (d) aims of education.[31] The Special Committee's first report, issued after an analysis of government replies, did not evaluate the progress made in the implementation of the Education Convention,[32] either because not all questions had been answered by governments or, if answered at all, because the answers were too vague. The Special Committee, now called the Committee on Conventions and Recommendations in Education, thereupon decided to communicate directly with governments to seek clarifications and statistical information where necessary.[33]

Although the second report of the Committee on Recommendations contained some critical remarks,[34] its effectiveness remains questionable due to its general nature. In contrast, the ILO regularly prepares a critical analysis of each country's reports. Such repeated and public criticism of identified countries can operate as an effective sanction. The third report of the Committee was, if anything, even more uninformative.[35]

C. *Difficulties under the Supervisory Procedures*

One reason why detailed analysis of the reports on a country by country basis is not possible is the poor response from governments. The reason for this phenomenon stems from the fact that, unlike the instru-

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29. UNESCO CONST. art. VIII provides:
each member state shall report periodically to the organization, in a manner to be determined by the general conference, on its laws, regulations and statistics relating to educational, scientific and cultural life and institutions, and on the action taken upon the recommendations and conventions referred to in article 4, paragraph 4.

30. U.N. Doc. UNESCO/70.EX/Decisions/5.21 (1965).

31. *Id.*

32. U.N. Doc. UNESCO/C.14/29/Add.1 (1966).

33. *Id.*

34. U.N. Doc. UNESCO/C.17/15, at 41-49 (1972).

35. U.N. Doc. UNESCO/C.18/21-22 (1974).

ments adopted by the ILO, the Education Convention does not require the reports of states party to be communicated first to the competent national professional organizations for verification. Moreover, UNESCO procedures fail to provide effective measures against inadequate reporting. In contrast, ILO procedures provide that when a country fails to supply adequate information, an ILO emissary visits that country to obtain the missing information personally. It is apparent, therefore, that the ILO has the superior information-gathering scheme.[36] The prospect of an international investigation into domestic practices may induce more cooperation in supplying information to the ILO, quite apart from its value as an informal sanction. In other instances, the poor response of states may have been due not to lack of will, but to difficulties created by the unavailability of trained personnel to study individual national problems in implementing the Education Convention, and indeed, to compile statistics and other information in response to the questionnaires of the Committee on Recommendations. In this regard, the Committee's recommendation that member states be free to request the assistance of UNESCO consultants is a constructive one.[37] As the request for assistance comes directly from the country concerned, this procedure would not be used in any manner inconsistent with the government's wishes.

D. *Resolution of Disputes*

1. *I.C.J. Jurisdiction*

Just as the consensual element underlies the recommendation that member states be free to request the assistance of UNESCO consultants, so too is it present in the dispute resolution mechanism provided under the Education Convention. Article 8 deals with procedures for resolving disputes between parties over the interpretation or application of the Convention. The dispute may ultimately be submitted to the International Court of Justice for resolution. But the jurisdiction of the Court can be invoked only "at the request of the parties to the dispute."[38] Thus the article stops short of imposing the Court's compulsory jurisdiction on the disputing parties. Insofar as any one party is incapable of unilaterally submitting a dispute to the Court, the effect of article 8 is diluted

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36. It would, however, be unfair to conclude that the above efforts within UNESCO have not yielded any positive results. In the words of the committee's second report:

> While admitting that the universal right to education is not fully implemented, particularly in working class and rural environments, the replies [of governments] reveal an acute awareness of the problems which exist and a firm resolve to meet the educational aspirations of all young people and even to create conditions which will make life-long education possible for all sections of the population.
>
> The measures already taken or planned for this purpose by the majority of member states whose reports have been studied, represent, without any doubt, a great step forward.

U.N. Doc. UNESCO/C.17/15, at 45 (1972).

37. *Id.* at 48.

38. Education Convention, *supra* note 5, art. 8.

considerably.

In spite of the inherent weakness of article 8, the very fact that this procedure is available (with adequate "safeguards") is an advance. The supervisory mechanism of the ILO-sponsored Employment Convention makes no reference to the World Court.

2. *Alternative Machinery*

In 1962 the General Conference of UNESCO adopted a Protocol creating a Conciliation Commission,[39] to be responsible for settling disputes arising between states parties to the Education Convention. This appeared to be an attempt to provide alternative machinery for dispute resolution in the event that recourse to the International Court of Justice is not possible, due to opposition from one of the disputing parties.

Under article 12(2) of the Protocol, if bilateral negotiations fail to resolve the dispute, either party may unilaterally submit the matter to the Conciliation Commission. The Commission can request such further information from the two parties as it deems necessary. It can then make available its good offices to the states in an attempt to reach an "amicable" solution.[40] The Conciliation Commission is also obliged in every case to draw up a report indicating the facts and its recommendations. The most significant aspect of this procedure is that these reports are to be published following their transmission to the Director-General.[41] As stated earlier, publicity can cause concern on the part of states for their external image, and this may operate as a noncoercive sanction.

An even more significant provision is contained in article 18 of the Protocol: the Conciliation Commission may recommend to the Executive Board of UNESCO or to its General Conference that the matter be submitted to the International Court of Justice for an advisory opinion. Although an advisory opinion is not binding on the parties, the very fact that the judicial process of the World Court has been invoked can exert very persuasive influence on the alleged breaching party to take corrective measures. This procedure is unique to the UNESCO-sponsored Convention and Protocol Against Discrimination in Education.

Finally, another advance under the UNESCO Convention and Protocol is that both are open to accession by UNESCO members and by those non-members who are invited by the Executive Board.[42] In contrast, the Employment Convention is open for ratification only to members of the ILO. If the goal is to promote participation by the maximum number of states, then opening participation to non-members at the invitation of the

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39. Protocol Instituting a Conciliation and Good Offices Commission to the Convention Against Discrimination in Education, *adopted* Dec. 10, 1962, by the 12th General Conference of UNESCO, 651 U.N.T.S. 362, *entered into force* on Oct. 24, 1968 [hereinafter cited as 1962 Protocol]. The Protocol was ratified by 15 states in accordance with article 24 of the Protocol.

40. *Id.* art. 17(1).

41. *Id.* art. 17(2).

42. Education Convention, *supra* note 5, art. 13; 1962 Protocol, *supra* note 39, art. 23.

Executive Board is a useful innovation. The Education Convention also provides that the Executive Board's power to invite non-member participation is not restricted in any way,[43] and it is to be hoped that it will be used liberally.

V. THE UNITED NATIONS DECLARATION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

In addition to the role played by the Subcommission on Prevention of Discrimination and Protection of Minorities in initiating the two conventions discussed above, the Subcommission also took an active part in the preparation of the 1963 U.N. Declaration on the Elimination of All Forms of Racial Discrimination[44] and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.[45]

A. *Limitations on Juridical Force*

The 1963 Declaration confines itself to a broad statement of the principles of nondiscrimination and contains nothing more than moral exhortations to states to take steps to eliminate discrimination.[46] This is attributable to two factors. First, there are inherent limitations on the constitutional powers of the General Assembly as defined by the Charter of the United Nations. The Charter limits these powers to discussion and recommendation.[47] While it is arguable that a "decision" of the Security Council may be binding on all United Nations member states (for example, under article 25), a "recommendation" of the General Assembly is

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43. Education Convention, *supra* note 5, art. 13.

44. Note 6 *supra*. The Declaration was drafted by the Subcommission.

45. Note 7 *supra*. This Convention is discussed in Section VI *infra*.

46. The preamble to the Declaration affirms the necessity of worldwide eradication of all forms of racial discrimination and of securing understanding of and respect for the dignity of the human person. The Declaration, enumerating the principles for the elimination of racial discrimination, states in article 3(2) that all persons shall have equal access to any place or facility intended for use by the general public. It provides in articles 4 and 9 that states shall take effective measures to revise governmental and other public policies, to rescind offending laws and regulations and pass legislation prohibiting discrimination by private persons and groups. Article 5 specifically cites the policy of apartheid as a form of discrimination which should be speedily eradicated.

The Declaration further states in article 6, that no discrimination by reason of race, color or ethnic origin shall be admitted in the enjoyment by any person of political and citizenship rights in his country, in particular the right to participate in elections through universal and equal suffrage. It also declares, in article 7(1), that everyone has the right to equality before the law and to equal justice under the law, and that everyone without distinction as to race, color or ethnic origin, has the right to security of person and protection by the state against bodily harm. Finally, article 7(2) provides that a victim of discrimination "shall have the right to effective remedy . . . through independent national tribunals competent to deal with such matters."

The Declaration, in article 8, urges immediate steps in the fields of teaching, education and information with a view to promoting nondiscrimination and racial tolerance. Articles 9(1) and 9(3) call for the condemnation of all propaganda based on theories of racial or ethnic superiority, and urge states to take "immediate and positive" measures to prosecute or outlaw organizations which promote or incite racial discrimination or racial violence.

47. U.N. CHARTER, ch. IV, art. 10, para. 1; art. 13, paras. 1 & 2.

not considered legally binding.

Second, the 1963 Declaration was not adopted or sponsored by the General Assembly in the form of a treaty or convention that could be made open to states for ratification. The juridical force of the Declaration is, hence, generically different from that of a treaty.

B. *Enhancing the Juridical Force of the Declaration*

While it would be unrealistic to hope that the members will, through a change of heart, confer on the General Assembly powers to bind states, it is conceivable that the 1963 Declaration could be made open for signature in much the same way that the ILO and UNESCO sponsored the two conventions discussed above. If the Declaration were opened for signature as a binding instrument, certain amendments would be required. For example, in order to effectively implement the Declaration on the national level, additional machinery for international supervision would have to be established.

Article 7 of the Declaration could also be improved. Article 7 proclaims the desirability of having an effective remedy against discrimination available "through independent national tribunals."[48] The article could be amended to provide for the inclusion of an international body charged with the responsibility of monitoring policy implementation, or a conciliation commission where individual grievances could be aired, either in confidence or in public.

C. *The Normative Effect of the Declaration*

The moral influence of the Declaration remains undiminished even though it is not in treaty form.[49] Moreover, the Declaration should be viewed in light of the process of crystallization of new norms within the United Nations General Assembly.[50] As one of the principal bodies for

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48. U.N. Declaration on Racial Discrimination, *supra* note 6, art. 7(2).

49. The moral authority of United Nations instruments is not without consequence. An increasing number of problems that, until recently, were considered "national" and therefore beyond the realm of legitimate international concern are becoming recognized as proper areas for international inquiry and action.

50. If a state continues to ignore the fundamental values, beliefs, and laws accepted by the international community, it does so at its own peril. As an eminent judge of the International Court of Justice has warned:

> [I]n doing so it acts at its peril when a point is reached when the cumulative effect of the persistent disregard of the articulate opinion of the [United Nations] Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter. Thus [a] . . . State which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organization, in particular in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness . . . and that it has exposed itself to consequences legitimately following as a legal sanction.

Advisory Opinion on Voting Procedure and Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, [1955] I.C.J. 67 (separate opinion of Lauterpacht, J.), *reprinted in* [1955] INTERNATIONAL LAW REPORTS 651, 687.

the articulation of new desires, new goals and new norms, the Assembly has given expression to a number of newly emergent norms which, through the sheer weight of international public opinion, have acquired the status of *opiniones juris sive necessitatis*. Other organs of the United Nations—its specialized agencies, for example—have also contributed to the emergence of new norms. Action in the General Assembly and other international bodies has resulted in the transformation of international society from a sovereignty-centered system, operating solely through bilateral convention, into a community-centered system, operating through international organizations. As many legal scholars have noted, the emergence of new norms through international organizations has resulted in states incurring international obligations which are not based on a strictly consensual basis.[51]

VI. THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

A. *The Substantive Law*

Unlike the 1963 Declaration, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination goes beyond mere description of prohibited activity. It attempts to deal with the causes of discrimination and to devise procedures which may serve the purposes of preventing and deterring discrimination, while rehabilitating already exacerbated situations.[52]

1. *The Concept of Racial Discrimination*

As defined under the 1965 Convention, the concept of "racial discrimination" is multifaceted.[53] It involves three principal elements: (1) there must occur a certain act or omission involving a distinction, exclusion, restriction, or preference; (2) the act or omission must be based on grounds of race, color, descent, or national or ethnic origin; and (3) the act or omission must have the "purpose or effect" of nullifying or impairing the recognition, enjoyment, or exercise of human rights and fundamental freedoms in virtually any sphere of life. Since the concept of racial

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51. *See, e.g.*, I. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 5-6 (1965); Falk, *The South-West Africa Cases—An Appraisal*, 12 INT'L ORG'N 22 (1967).

The Declaration on the Elimination of All Forms of Racial Discrimination, the Universal Declaration of Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the Proclamation of Teheran, General Assembly Resolution 1803 of December 14, 1962, on Permanent Sovereignty over Natural Resources, and the Lagos Declaration of August 1977 are just a few examples, which, insofar as they have been acclaimed by the near unanimous agreement of the international community of states, may be taken to be authoritative statements of contemporary international customary law.

52. *See* McDougal, Lasswell & Chen, *The Protection of Respect and Human Rights: Freedom of Choice and World Public Order*, 24 AM. U.L. REV. 919, 1061 (1975).

53. Article 1 of the Convention, note 7 *supra*, defines racial discrimination as:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect 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 other field of public life.

discrimination is fundamental to the scope and effect of the instrument involved, the reach of the 1965 Convention is far wider than that of the ILO and UNESCO conventions. While the ILO Employment Convention is limited to discrimination in employment and occupation, and the UNESCO Education Convention to discrimination in education, the 1965 Convention covers discrimination in regard to "human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

With regard to the second element of the concept, after stating its objective as the elimination of "all forms of racial discrimination," the Convention adds to the concept of race the ancillary concepts of "colour, descent, or national or ethnic origin." The use of this formula suggests that the negotiating parties intended that the Convention should embrace biological and cultural classifications. Because the term "colour" is undefined, it should be given the broadest possible interpretation, encompassing all gradations of human complexion. The concept of "national origin," as distinguished from "nationality," has been asserted to include both "politico-legal" and "ethnographical" (or "historico-biological") senses.[54] The concept includes a person's prior identificatiion with larger cultural groups, often described as "nations," which transcend any particular state. As for the term "ethnic origin," this too includes both the biological and cultural aspects. Finally, "descent" is a term unique to the Convention. It does not appear in any of the group characterizations in previous United Nations instruments on the subject, including the Charter, the Universal Declaration, and the two human rights Covenants.

The foregoing observations illustrate that the concept of discrimination is to be given the broadest possible interpretation. The broad formulae used—"colour," "national origin," "ethnic origin," "descent"—all indicate the intention that not a single discriminatory act should escape condemnation on the grounds that it is not "racial discrimination" as defined by the Convention.[55]

It should also be noted that the concept of racial discrimination includes both attempts at discrimination regardless of effect and discriminatory effects regardless of purpose. Article 1(1) contains the phrase "any distinction, exclusion, restriction or preference . . . which has the purpose

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54. P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 3 (1956). *See also* Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996, 1006 (1966).

55. The broad generalizations contained in the definition of racial discrimination are reinforced by article 5, which contains a detailed itemization of the protected rights, intended to be illustrative but not exhaustive, including, for example:

> (a) The right to equal treatment before the tribunals . . . ; (b) The right to security of person and protection . . . against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution; (c) Political rights, in particular the rights to participate in elections — to vote and to stand for election — on the basis of universal and equal suffrage . . . ; [and, (d) and (e)] other civil . . . [e]conomic, social and cultural rights . . . .

or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights . . . ." Mere purpose, without proof of success, may constitute discrimination, and an act or omission whose actual consequence or "effect" is discriminatory is prohibited even if there is no purpose or intention to discriminate.

2. *Scope of the Convention*

Although the Convention does not apply to "distinctions, exclusions, restrictions or preferences made by a State Party . . . between citizens and noncitizens,"[56] aliens are protected by the Convention. Exclusions or restrictions on foreigners due to their race, color, descent, or national or ethnic origin are prohibited. The only exclusions or restrictions permitted under the Convention are those imposed on aliens *qua* aliens.[57] The wide-ranging rights under article 5 of the Convention are declared to belong to "everyone," while under article 6 states are obligated to grant protection and remedies "to everyone within their jurisdiction." These references should be read to include nationals as well as aliens residing within individual state jurisdictions.

3. *Prohibitionary Formulae under the Convention*

a. *Attempts to Incite Discrimination*

Article 4 of the Convention prohibits attempts to incite discrimination.[58] In addition, article 4(a) obliges states parties to the Convention to treat the act of inciting to racial discrimination as "an offence punishable by law."[59] However, the prohibition against incitment is qualified by the requirement that it should operate "with due regard to the principles em-

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56. 1965 Racial Discrimination Convention, *supra* note 7, art. 1(2).

57. *Id.* The same analysis applies to article 1(3), relating to laws of nationality, citizenship, and naturalization.

58. Under article 4, states parties:

> condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination . . . .

This article has caused some controversy because of conflict with the domestic law of some countries. It has been said that the article "flies in the face of [the] First Amendment freedoms" of the Constitution of the United States. Hauser, *United Nations Law on Racial Discrimination*, [1970] PROC. AM. SOC'Y INT'L L. 114, 118. *See also* Reisman, *Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on Elimination of Racial Discrimination*, 1 DEN. J. INT'L L. & POL'Y 29, 49-51 (1971), and McDougal & Arens, *The Genocide Convention and the Constitution*, 3 VAND. L. REV. 683 (1950), for reviews of some pertinent U.S. Constitutional questions arising over the ratification of the Genocide Convention. *See also* R. LILLICH & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS 157, 167 (1979).

59. Article 4(a) obligates parties to:

> declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof . . . .

bodied in the Universal Declaration of Human Rights" and to the detailed list of rights set forth in acticle 5 of the Convention.

b. *Official (Public) and Unofficial (Private) Discrimination*

Consistent with its goal of the total elimination of racial discrimination, the Convention prohibits official (public) as well as unofficial (private) discrimination. For example, the former is covered by article 2(1)(a): "Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation." Article 5(f) prohibits discrimination in public places that may be privately owned, such as hotels, restaurants, theaters, and parks.

Private discrimination—in public as well as non-public places—is covered by the broad reach of article 2(1)(d): "Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization . . . ." This provision is by itself a considerable advance; no other international instrument goes as far in condemning private discrimination.[60]

4. *Positive Obligations*

Among the positive obligations imposed by the 1965 Convention, article 7 deserves special mention. An embodiment of a number of interrelated obligations, article 7 seeks to prevent, deter, and provide remedies for discrimination. Among other things, states parties undertake "to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating

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60. *See, e.g.*, Universal Declaration of Human Rights, *supra* note 11, art. 2, which states in part that everyone is entitled to the rights and freedoms "set forth in this Declaration." Article 26 of the International Covenant on Civil and Political Rights, note 13 *supra*, after declaring the equality of all persons before the law, adds the qualification—tautological though it may appear—that the law shall prohibit discrimination "in this respect." As one authority has observed, this has had the result of rendering the prohibition against discrimination in that article meaningless. Schwelb, *supra* note 54, at 1018-19.

Article 14 of the European Convention on Human Rights, *done* at Rome, Nov. 4, 1950, *entered into force*, Sept. 3, 1953, Europ. T.S. No. 5, also concentrates on protecting only those rights and freedoms contained in that Convention. When the final statement of the Fourth Protocol to the European Convention was being considered, a proposal for the inclusion of a *general* nondiscrimination clause was expressly rejected. Schwelb, *supra* note 54, at 1020. Similarly, the ILO Employment Convention focuses attention on prohibiting discrimination on only those sectors "under the direct control of a national authority." *Supra* note 4, art. 3(d). The UNESCO Education Convention also concentrates on discrimination in public educational institutions. Note 5 *supra*. While under article 3(b) of the Education Convention the prohibition could conceivably be extended to private educational institutions, it is obvious that the ban would, in view of the inherent purpose of the convention, be limited to the field of education only. For these reasons, article 2(1)(d) of the Convention on the Elimination of All Forms of Racial Discrimination, note 7 *supra*, which by its simple and forthright language obliges states to prohibit all forms of discrimination whether public or private, official or unofficial, is a significant advance over previous instruments.

prejudices which lead to racial discrimination . . . ."

5. *Special Protective Measures*

Despite the large span of the prohibitionary formulae in the Convention, it has its own built-in flexibility whereby not all differentiations are unlawful. It has been aptly observed that "discrimination," in international legal usage,

> has come to acquire a special meaning. It does not mean any distinction or differentiation but only arbitrary, invidious or unjustified distinctions, unwanted by those made subject to them. Moreover, it does not forbid special measures or protection designed to aid depressed groups . . . so long as these special measures are not carried on longer that is reasonably necessary . . . .[61]

Thus, under article 1(4) of the Convention, special measures for the sole purpose of securing adequate advancement of certain racial or ethnic groups would not be deemed discrimination if they meet certain conditions: the group requires such protection for the equal enjoyment of human rights; the measures do not lead to the maintenance of separate rights for different racial groups; and the measures are not continued after the objectives for which they were instituted have been achieved.[62]

6. *The Need for a Comprehensive Program*

The need for a comprehensive approach is especially urgent in light of two goals. First, programs must be designed to combat the complex problem of the discriminated minority internalizing beliefs of its own inferiority as a result of longstanding discrimination.[63] Where the discriminated person actually adopts the image the discriminator holds of him, a piecemeal approach will be insufficient. Second, the creation of the optimum state of factual equality further implies equality for *all* in the pursuit of *all* goals of life, whether they be material, spiritual, emotional or

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61. McKean, *The Meaning of Discrimination in International and Municipal Law*, 44 BRIT. Y.B. INT'L L. 177, 185-86 (1970).

62. Article 2(2) of the Convention also addresses the issue of protective measures:

> States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms . . . .

The requirement that the special measures be discontinued once the purpose for which they were instituted has been achieved is part of the overall goal of achieving equal rights for *all*. In a study, Subcommission Special Rapporteur Francesco Capotorti asserted that whereas equality and nondiscrimination imply a formal guarantee of uniform treatment, and protection of minorities implies preferential treatment for members of minority groups, the purposes of both approaches is to institute factual equality between all members of all groups. "This shows that the prevention of discrimination, on the one hand, and the implementation of special measures to protect minorities, on the other, are merely aspects of the same problem: that of fully ensuring equal rights to all persons." Capotorti, The Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, Chapter V, U.N. Doc. E/CN.4/Sub.2/384/Add.5, para. 27 (1974).

63. Reisman, *supra* note 58, at 46.

other.

Hence, the elimination of discrimination requires a comprehensive program of action, the goals of which should include the enlightenment of discriminated minorities so that they not only become aware of their rights and cease to regard themselves as inferior, but also cease to hate their oppressors because of the race of the latter. Moreover, the creation of genuine equality for all requires a comprehensive program of action in areas beyond the immediate purview of the 1965 Racial Discrimination Convention.

7. *Remedies*

Article 6 of the Convention provides for remedial action at the national level. Parties are obliged to "assure to everyone within their jurisdiction effective protection and remedies, through competent national tribunals and other State institutions, against any acts of racial discrimination . . . ." The remedies are to include "the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."

B. *Implementation of the Convention and the Machinery of Supervision*

To supervise the implementation of the Convention at the national level, the Convention established a Committee on the Elimination of Racial Discrimination. The Committee consists of "eighteen experts of high moral standing and acknowledged impartiality" serving in their "personal capacity."[64] The Committee has a four-fold competence: (1) to appraise—in reports to the General Assembly—national action at the legislative, judicial, administrative, or other levels for the implementation of the Convention;[65] (2) to receive and act on complaints brought by one state party against another for noncompliance with the Convention;[66] (3) to deal with petitions by individuals under the conditions specified in article 14; and (4) to cooperate with other United Nations organs in matters concerning petitions from inhabitants of Trust, non-Self Governing, and other dependent territories.[67]

1. *Appraisal of Reports*

The procedure and nature of supervision is not very different from that provided under the other international instruments discussed in this article. However, there are some points of departure.

A significant procedural aspect of the supervisory function of the Committee on the Elimination of Racial Discrimination is contained in

64. 1965 Racial Discrimination Convention, *supra* note 7, art. 8(1).

65. Parties to the Convention are obliged to submit such periodic reports under art. 9(1). For further discussion of the reporting requirements under the Convention, *see* Buergenthal, *Implementing the Racial Convention*, 12 TEX. INT'L L.J. 187, 190-221 (1977).

66. 1965 Racial Discrimination Convention, *supra* note 7, arts. 11-13.

67. *Id.* art. 15.

rule 64(A) of its provisional rules of procedure.[68] Under this rule, the Committee initiated at its sixth session the practice of notifying, through the Secretary-General, the states parties concerned of the dates on which their respective reports are to be considered so that their representatives could participate in the deliberations.[69] The Committee reported in 1975 that a representative of each reporting state was present and participated in the consideration of every report submitted under article 9 of the Convention and considered by the Committee at its eleventh and twelfth sessions.[70]

Encouraging the participation of representatives from reporting states by sending notice of the date for Committee consideration could prove to be an effective procedure in furthering the goals of the Convention. Actual representation may create fears of embarrassment for noncompliance, which may in turn foster a more cooperative attitude on the part of parties in the supply of information to the Committee. Public exposure, or the threat of exposure, may also compel states to take more effective steps to implement the Convention.

Supervision of compliance with the Convention under rule 64(A) could be rendered more effective in two ways: (1) by changing the provisional rules so as to allow representatives of other parties to the Convention to attend the sessions where the reports are considered; and (2) by changing the rules so as to require the attendance of a representative of the party whose report the Committee is to consider.

Permitting one or more representatives from among other parties to attend the Committee sessions where reports are under consideration would mark a change in the current rule, which limits attendance to representatives whose states' reports are being considered on that particular day. If attendance of even one representative from among other parties to the Convention were possible, and even though the representative may be limited to having observer status, the threat of exposure could become a more powerful psychological sanction. A requirement that a representative from the party whose report is scheduled for consideration attend the session would improve the current rule in yet another way: it would strengthen a supervisory system that is otherwise inherently weak, as there can never be certainty of participation under the present voluntary system.[71]

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68. Rule 64(A) of the Provisional Rules of Procedure of the Committee on the Elimination of Racial Discrimination, 27 U.N. GAOR, Supp. (No. 18) 37, U.N. Doc. A/8718 (1972). [The Committee will hereinafter be cited as CERD.]

69. *Id.*

70. 1975 Report of CERD, 30 U.N. GAOR, Supp. (No. 18) 24, U.N. Doc. A/10018 (1975).

71. Experience has demonstrated the pitfalls of purely voluntary representation. At the eleventh and twelfth sessions of the Committee, only 19 of the 28 states whose reports were considered sent representatives. 1976 Report of CERD, 37 U.N. GAOR, Supp. (No. 18) 15, U.N. Doc. A/31/18 (1976). There was, however, a considerable improvement in attendance at the Committee's fourteenth, fifteenth, and sixteenth sessions. *See* 1977 Report of CERD,

To date, the Committee has carefully considered all reports presented to it and has not hesitated to point out deficiencies in the information supplied. It has also pointed out to individual governments the need to take positive steps in certain fields.[72] In numerous instances the Committee sought and received answers from governments concerning their stands on apartheid and their links with South Africa.[73] In many cases the Committee has requested entire texts of legislative provisions and has examined the extent to which they comply with the provisions of the Convention.[74]

2. *Interstate Complaint Procedure*

The interstate complaint procedure under articles 11, 12, and 13 of the Convention can be compared to the 1962 Protocol instituting a Conciliation Commission under the auspices of UNESCO's Education Convention.[75] The Racial Discrimination Convention also provides for a conciliation commission to be set up *ad hoc* for the amicable resolution of disputes between state parties concerning the implementation of the Convention.

Under the 1962 Protocol either party to a dispute can, after failure of bilateral negotiations, submit the matter directly to the Conciliation Commission. Under the 1965 Convention it is the Committee on the Elimination of Racial Discrimination which decides whether it is necessary for the dispute to be decided by a conciliation commission and whether it should appoint such a commission.[76] Under both the 1962 Protocol and the 1965 Convention, this procedure can be invoked only after the exhaustion of all available domestic remedies.[77] This presumably refers to a remedy provided by the municipal law of either party and is accepted by both parties to the dispute as a satisfactory solution.

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37 U.N. GAOR, Supp. (No. 18) 23, U.N. Doc. A/32/18 (1977).

72. In 1975, for example, the Committee criticized the bland statement by Bolivia that "there is no statutory provision sanctioning discrimination since there is no racial discrimination" in that country. The representative of the country was informed that "even a satisfactory *de facto* situation did not remove the need for the sanction of certain laws, particularly in connection with such articles of the Convention (as article 4) which are mandatory in nature and which require positive legislative measures." 1975 Report of CERD, note 70 *supra*. In the following year this country was again cited for not supplying the information required under article 9 of the Convention. 1976 Report of CERD, *supra* note 71, at 16-17.

In the case of Tonga, the Committee asked detailed questions on court procedures, the methods of imposition of fines, the effectiveness of the institution of ombudsmen in cases involving racial discrimination on migrant workers, and the implementation of article 7 of the Convention. The representative of the country in question assured the Committee that these questions would be answered in future reports. *Id.* at 29.

73. *See, e.g.*, 1976 Report of CERD, *supra* note 71, at 18-19, 35-36, 42; 1977 Report of CERD, *supra* note 71, at 27, 31, 36, 38, 49-51, 57.

74. *See, e.g.*, 1976 Report of CERD, *supra* note 71, at 27-28, 31-32; 1977 Report of CERD, *supra* note 98, at 35.

75. *See* text, sec. IV(D)(2) *supra*.

76. 1965 Racial Discrimination Convention, *supra* note 7, art. 12(1)(a).

77. 1962 Protocol, *supra* note 39, art. 14; 1965 Racial Discrimination Convention, *supra* note 7, art. 11(3).

A significant difference is that while under the 1962 Protocol the matter can, at the recommendation of the Conciliation Commission, be submitted to the International Court of Justice for an advisory opinion, there is no such provision under the 1965 Convention. Apart from that procedure, there is provision in the Education Convention itself for invoking the contentious jurisdiction of the International Court of Justice. While this is contingent upon the prior consent of both parties to the dispute, a decision of the court exercising its contentious jurisdiction would be legally binding on the parties concerned, whereas an "advisory" opinion is *ex hypothesi* nonbinding. The 1965 Racial Discrimination Convention does not empower either the Committee on the Elimination of Racial Discrimination or an *ad hoc* conciliation commission to seek an advisory opinion. Nor does the Convention contain any provision for the submission of a dispute directly by the parties to the World Court.

While it is desirable to have specific references in the Convention for international judicial guidance, the absence of any such reference does not negate the possibility of judicial resolution. Under article 96 of the United Nations Charter, the General Assembly, the Security Council, and other organs of the United Nations authorized by the General Assembly can request an advisory opinion of the International Court of Justice. Thus the Committee on the Elimination of Racial Discrimination could be authorized to request an opinion of the Court. Alternatively, the parties to a dispute could directly invoke the contentious jurisdiction of the Court by filing *ad hoc* declarations accepting the Court's jurisdiction in matters related to the implementation of the 1965 Convention.[78]

The express involvement of the World Court would render the overall machinery of supervising the implementation of the Convention more effective, and would at the same time stimulate states to take more active measures to combat racism and racial discrimination. At the same time, however, adequate attention should be given to the problem of maintaining the delicate balance achieved under the system of voluntary reporting, participation, and cooperation as set up in the 1965 Convention as presently worded. The Committee's primary goal must be to guide, counsel, and persuade. Stringent or embarrassing obligations could do more harm than good to the system of consensual reporting. Thus, should present language be revised, any reference of matters to the International Court of Justice must, under the present system of international organization, give adequate attention to the principle of consensus, so that the Court would serve primarily as an auxiliary organ of the Committee rather than assume the role of the Committee itself. As time goes on, the Committee should be encouraged by its superior organs as well as the older and more experienced supervisory agencies of the United Nations to evolve its own standard format of reporting by states. This would minimize instances of inadequate information and establish a practice of di-

78. *See* I.C.J. STAT. art. 36.

rect contact with governments. As a result, the Committee could establish its own *jurisprudence constante*, so as to develop a stable pattern of expectations between the Committee and the reporting states.

C. *Petitions by Individuals*

Under the conditions specified in article 14, the Committee has competence to deal with petitions by individuals. This was a bold though cautious attempt to provide an international forum for the airing of private grievances. The effectiveness of the provision under which the Committee may deal with petitions by individuals is constrained by two qualifications. First, before article 14 operates against any state party, the latter must declare its recognition of the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction. No communication can be received by the Committee concerning a state party which has not made such a declaration.

Second, the Committee can become competent to exercise this particular function only when a minimum of ten states parties have filed declarations under article 14(1). While some ninety-seven states have filed instruments of ratification, accession or succession, only seven states have filed these declarations.[79] The Committee is thus unable to exercise any function under article 14. It is to be hoped that more states will file such declarations in order to utilize this ingenious and promising method of combating racial discrimination.

VII. INTERNATIONAL ACTION AGAINST DISCRIMINATION IN SOUTHERN AFRICA

Apartheid,[80] the policy of strict racial segregation and discrimination,

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79. Report of the Secretary-General on the Status of the International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Doc. A/32/186, at 2-3 (1977). Under article 14(2), a state may set up an internal body to receive petitions. Yet even this provision is of limited value because (a) it applies only to those states which have filed declarations under article 14(1), and (b) compliance [with article 14(2)] is entirely on a voluntary basis. *See* Richardson, *Will the Rapidly Accumulating Body of U.N. Law on Racial Discrimination Truly Be Effective?*, [1970] PROC. AM. SOC'Y INT'L L. 110, 110-14. *See also* R. LILLICH & F. NEWMAN, *supra* note 58, at 173-74.

80. The policy of apartheid is characterized by class division along racial lines. Political and economic power is monopolized by a minority racial class. The majority is denied effective participation in political life not only in terms of holding office but also of voting. Freedom of movement is severely restricted through the system of "pass laws" which results in the denial of the right to choose one's own place of work and residence. This system also results in the fragmentation of families and creates severe social and psychological stress within the deprived class. Inter-racial activity, social and political, is prohibited and enforced through arrest and detention.

Educational institutions are segregated and unequal. Resources expended in providing educational facilities for the privileged minority are grossly out of proportion with corresponding expenditures for the deprived groups. The facilities available to the latter are therefore not only inadequate but vastly inferior. Illiteracy is widespread and there is an almost total absence of opportunity for the development of any kind of organizational and managerial skills among the majority. Apart from a highly discriminatory educational pol-

has been elevated in South Africa to the status of a national ideology. Because of its particularly vicious form of institutionalized repression, coupled with the present state of political ferment in the region, the practice of apartheid in South Africa poses one of the greatest challenges to the organized international community in the present era.

The institutionalized repression of apartheid is based exclusively on racial criteria and involves systematic and total deprivation of individual freedom regarding such fundamental aspects of human existence as choice of residence, employment, education, political participation, marriage, thought, expression, and movement. As a system of entrenching class rule along racial lines apartheid appears not only in South Africa but also, with some modifications, in South African occupied Namibia.

A. *International Action against Apartheid*

1. *Action in the U.N. General Assembly*

The United Nations has been concerned with the problem of apartheid since its inception. In the early years (1946-1952), discussion centered chiefly on the rights of people of Indo-Pakistani origin. Between 1952 and 1959, the General Assembly adopted a number of resolutions condemning the policy of apartheid and declared that governmental policies not directed toward racial equality were inconsistent with article 56 of the United Nations Charter.[81] The tone of the language of the resolutions became progressively sharper as South Africa's intrasigence became manifest.[82] At its fifteenth and sixteenth sessions, the Assembly noted that apartheid endangered international peace and security, and called upon states to take individual and collective measures to bring about an end to that policy.[83] Since 1962, the Assembly has specifically called on states to break off diplomatic relations, close their ports to South African ships, boycott South African goods, and stop trading with South Africa.[84] The Assembly has also condemned the violations of the rights of detain-

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icy, the flow of information and publication of educational and other materials is controlled by rigid censorship.

The cumulative effect of these inequalities results in a considerably lower standard of living for the nonwhite groups when compared with that enjoyed by the ruling class. Malnutrition and disease are common, while inadequate medical facilities and poor housing continue to exacerbate the already unbearable situation.

81. G.A. Res. 616B, 7 U.N. GAOR, Supp. (No. 20) 8, U.N. Doc. A/2361 (1952). On article 56 of the Charter, see note 9 *supra*.

82. *See, e.g.*, G.A. Res. 721, 8 U.N. GAOR, Supp. (No. 17) 6, U.N. Doc. A/2630 (1953); G.A. Res. 820, 9 U.N. GAOR, Supp. (No. 21) 9, U.N. Doc. A/2890 (1954); G.A. Res. 917, 10 U.N. GAOR, Supp. (No. 19) 8, U.N. Doc. A/3116 (1955).

83. G.A. Res. 1568, 15 U.N. GAOR, Supp. (No. 16) 33, U.N. Doc. A/4684 (1960); G.A. Res. 1663, 16 U.N. GAOR, Supp. (No. 17) 10, U.N. Doc. A/5100 (1961).

84. G.A. Res. 2054A, 20 U.N. GAOR, Supp. (No. 14) 16, U.N. Doc. A/6014 (1965); G.A. Res. 2202, 21 U.N. GAOR, Supp. (No. 16) 20, U.N. Doc. A/6316 (1966); G.A. Res. 2307, 22 U.N. GAOR, Supp. (No. 16) 19, U.N. Doc. A/6716 (1967); G.A. Res. 2396, 23 U.N. GAOR, Supp. (No. 18) 19, U.N. Doc. A/7218 (1968); G.A. Res. 2506, 24 U.N. GAOR, Supp. (No. 30) 23, U.N. Doc. A/7630 (1969); G.A. Res. 3055, 28 U.N. GAOR, Supp. (No. 30) 25, U.N. Doc. A/9030 (1973).

ees in South Africa and the exportation of apartheid to Namibia.[85]

2. *Action in the U.N. Security Council*

In addition to the General Assembly, other United Nations organs and sub-organs have examined apartheid. For example, in the wake of the Sharpeville massacre, the Security Council considered the policy of apartheid for the first time in 1960. It deplored the policies of the Union Government which had created the disturbances and recognized that if left unchecked, the situation could endanger international peace and security.[86] Numerous other resolutions were adopted by the Council which, *inter alia,* called upon member states to impose an arms embargo against South Africa.[87]

Following the brutality of police action against school children during the unrest of June 1976 in Soweto and other townships, the Security Council adopted a resolution by which it strongly condemned the police action and recognized the legitimacy of the struggle of its victims.[88] The Council has also severely condemned all the various aspects of apartheid and has requested the Secretary-General, in cooperation with the Special Committee against Apartheid, to monitor the situation and report to the Security Council.[89]

An historic step was taken by the Security Council in November 1977, when it adopted a resolution which expressly invoked Chapter VII of the United Nations Charter.[90] Under Chapter VII of the Charter, the Council has powers to take enforcement measures in the event of a threat to peace, breach of peace, or an act of aggression.[91] The resolution "determined" that the acquisition by South Africa of arms constituted a "threat to the maintenance of international peace and security." Under Chapter

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85. G.A. Res. 2144, 21 U.N. GAOR, Supp. (No. 16) 46, U.N. Doc. A/6316 (1966); G.A. Res. 2439, 23 U.N. GAOR, Supp. (No. 18) 47, U.N. Doc. A/7218 (1968); G.A. Res. 2440, 23 U.N. GAOR, Supp. (No. 18) 48, U.N. Doc. A/7218 (1968); G.A. Res. 2547, 24 U.N. GAOR, Supp. (No. 30) 55, U.N. Doc. A/7630 (1969); G.A. Res. 2671, 25 U.N. GAOR, Supp. (No. 28) 31, U.N. Doc. A/8028 (1970); G.A. Res. 2775, 26 U.N. GAOR, Supp. (No. 29) 41, U.N. Doc. A/8429 (1971); G.A. Res. 2923, 27 U.N. GAOR, Supp. (No. 30) 24, U.N. Doc. A/8730 (1972). On current developments, *see, e.g., Assembly, in Resumed Session, Calls for Total Sanctions against South Africa,* U.N. CHRON., May 1981, at 5.

86. S.C. Res. 134, 15 U.N. SCOR, Supp. (Res. & Dec.) 1, U.N. Doc. S/INF/15/Rev. 1 (1960).

87. S.C. Res. 181, 18 U.N. SCOR, Supp. (Res. & Dec.) 7, U.N. Doc. S/INF/18/Rev. 1 (1963); S.C. Res. 182, 18 U.N. SCOR, *id.* at 8; S.C. Res. 191, 19 U.N. SCOR, Supp. (Res. & Dec.) 13, U.N. Doc. S/INF/19/Rev. 1 (1964); S.C. Res. 282, 25 U.N. SCOR, Supp. (Res. & Dec.) 12, U.N. Doc. S/INF/25 (1970); S.C. Res. 311, 27 U.N. SCOR, Supp. (Res. & Dec.) 10, U.N. Doc. S/INF/28 (1972).

88. S.C. Res. 392, 31 U.N. SCOR, Supp. (Res. & Dec.) 11, U.N. Doc. S/INF/32 (1976).

89. S.C. Res. 417, 32 U.N. SCOR, Supp. (Res. & Dec.) 4, U.N. Doc. S/INF/33 (1977).

90. S.C. Res. 418, 32 U.N. SCOR, Supp. (Res. & Dec.) 5, U.N. Doc. S/INF/33 (1977).

91. Article 39 of the Charter, the first article in chapter XII, provides: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in aaccordance with Articles 41 and 42, to maintain or restore international peace and security."

VII, this "threat" to peace must be accepted as an authoritative finding of fact by a competent United Nations organ charged with the "primary" responsibility for the maintenance of international peace and security.[92] In the same resolution, the Council decided "that all States shall cease forthwith any provision to South Africa of arms and related materiel of all types . . . ." This must be interpreted as a "decision" under article 25 of the Charter and, as such, binding on all states.[93] Under the same resolution, all states are bound to refrain from cooperating with South Africa in the development of nuclear weapons. In December 1977, the Security Council passed another resolution setting up a Committee consisting of all its members to monitor progress in the implementation of the earlier resolution.[94]

3. *Action in Other United Nations Bodies*

Beyond adopting resolutions, the General Assembly and the Security Council have established a number of committees and study groups to report on South Africa and to recommend action against it.[95] The Commission on Human Rights and the Economic and Social Council have played an important part in initiating many studies.[96] Various international seminars on apartheid have been held in response to resolutions of the General Assembly.[97] Seminars have also been held under the auspices

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92. Article 24, paragraph 1 of the Charter provides: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

93. Article 25 of the United Nations Charter provides: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

94. S.C. Res. 421, 32 U.N. SCOR, Supp. (Res. & Dec.) 6, U.N. Doc. S/INF/33 (1977).

95. For a more extensive discussion, see Santa Cruz, note 15 *supra*.

96. *See, e.g.*, the study by Espiell (Special Rapporteur to the Subcommission on Prevention of Discrimination and Protection of Minorities), Implementation of United Nations Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination, U.N. Doc. E/CN.4/Sub.2/390 (1978).

97. Important seminars and conferences on apartheid include: (1) International Seminar on Apartheid, Brasilia, Brazil, Aug. 23-Sept. 4, 1966; (2) Seminar on Apartheid, Kitwe, Zambia, Aug. 1967; (3) International Seminar on the Eradication of Apartheid and in Support of the Struggle for Liberation in South Africa, Havana, Cuba, May 1976; (4) World Conference for Action Against Apartheid, Lagos, Nigeria, Aug. 1977; (5) World Conference Against Apartheid, Racism and Colonialism in Southern Africa, Lisbon, Portugal, June 1977; and (6) World Conference to Combat Racism and Racial Discrimination, Geneva, Switzerland, Aug. 1978.

The latter conference was one of the most important actions taken by the United Nations during the Decade for Action to Combat Racism and Racial Discrimination. On the Decade for Action, see G.A. Res. 3057, 28 U.N. GAOR, Supp. (No. 30) 70, U.N. Doc. A/OR/28/S.30/v.1 (1973). Annexed to this resolution was the Programme of Action for the Decade, which provided:

> As a major feature during the Decade, a world conference on combating racial discrimination should be convened by the General Assembly . . . . The Conference should have as its main theme the adoption of effective ways and means and concrete measures for securing the full and universal implementa-

of specialized agencies such as the ILO and UNESCO. In 1977, UNESCO sponsored a meeting of government representatives in Paris at which it submitted a working paper containing a draft UNESCO Declaration on Peace and Racial Prejudice, which included rules for its implementation by member states.[98]

4. *International Anti-Apartheid Year*

Carrying forward the momentum of these events, the General Assembly on December 14, 1977, adopted a comprehensive resolution on the policies of apartheid of the government of South Africa.[99] This resolution proclaimed the year beginning March 21, 1978, as the International Anti-Apartheid Year, and endorsed the program recommended by the Special Committee Against Apartheid. The program was designed to mobilize world public opinion through increased publicity against apartheid, to discourage any form of collaboration with South Africa, and to increase support for the liberation movements and the victims of apartheid. To these ends, the program set forth a detailed description of measures to be taken by the Secretary-General, governments, specialized agencies, non-governmental organizations, trade unions, and the Special Committee Against Apartheid.

The General Assembly expressed its concern over the detention and treatment of political prisoners in South Africa and urged states to cut ties with the Republic. Specific recommendations were made on the matter of military and nuclear collaboration. The "Bantustan" policy of development of "separate Bantu states" was also condemned.[100] The resolu-

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tion of United Nations decisions and resolutions on racism, racial discrimination, *apartheid*, decolonization and self-determination, as well as the accession to and ratification and enforcement of the international instruments relating to human rights and the elimination of racism and racial discrimination.

Id., Annex, para. 13(a).

At all of these meetings, there was unanimity in the condemnation of apartheid and call for complete isolation of the racist regimes of southern Africa, including the termination of military and economic ties with South Africa. For a review of all the above conferences except the last, see Progress Report of the *Ad Hoc* Working Group of Experts Prepared in Accordance with Commission on Human Rights Resolution 6 and Economic and Social Council Decision 236, U.N. Doc. E/CN.4/1270 (1978) [hereinafter cited as Human Rights Progress Report].

98. UNESCO Meeting of Government Representatives (Category II) to Prepare a Draft Declaration on Race and Racial Prejudice, Working Paper, U.N. Doc. 77/CONF.201/1 (1977). In recent months, extensive hearings have been held in preparation for the May 1981 International Conference on Sanctions against South Africa. Topics discussed include oil shipments and bank loans to South Africa, the South African mining industry, the situation of South African women and youth, and legal aspects of the campaign against apartheid. *See, e.g.*, U.N. CHRON., May 1981, at 16-21. On the action taken at the most recent session of the Human Rights Commission (Feb. 2 to Mar. 13, 1981), *see id.* at 30.

99. G.A. Res. 32/105 B, 32 U.N. GAOR, Supp. (No. 45) 31, U.N. Doc. A/32/45 (1977).

100. In the aftermath of the Sharpeville tragedy, the notion of self-government for separate Bantu states accelerated in South Africa. For a recent discussion of the legal aspects of the "Bantustan" policy, *see* Dugard, *South Africa's "Independent" Homelands: An Exercise in Denationalization*, 10 DEN. J. INT'L L. & POL'Y 11 (1980).

tion declared the Assembly to be "firmly convinced that mandatory economic sanctions, under Chapter VII of the Charter of the United Nations, are essential to facilitate the speedy eradication of apartheid."[101]

On the question of investments in South Africa, the Assembly noted "with regret that the Security Council has been unable to reach agreement on steps to achieve the cessation of such investments . . . ."[102] It further noted that "a number of foreign economic and financial interests have continued and increased their investments [in South Africa]."[103]

B. *The Convention on the Suppression and Punishment of the Crime of Apartheid*

In recent years the United Nations, in a series of bold moves, has been trying to break away from the tradition of condemning apartheid by mere resolution. It has sought to impose more positive obligations on states, while at the same time bringing more pressure on South Africa. Most notably, the General Assembly approved the International Convention on the Suppression and Punishment of the Crime of *Apartheid* (the Anti-Apartheid Convention).[104]

The Convention begins by declaring that apartheid is a "crime against humanity" and a "serious threat to international peace and security."[105] It defines apartheid as including the following deprivations against persons by virtue of their membership in a particular racial group: (a) a denial of life and liberty through murder, bodily or mental harm, and arbitrary arrest; (b) deliberate imposition upon a racial group of living conditions calculated to cause its physical destruction in whole or in part; (c) legislation preventing racial groups from participation in political, social, economic, and cultural affairs, including denial of the right to work, to form trade unions, to education, to have one's own residence, and to express one's opinion freely; (d) measures dividing populations along racial lines, including, the prohibition of mixed marriages, the creation of segregated residential areas, and the expropriation of landed property belonging to members of racial groups; (e) exploitation of the labor of members of racial groups, particularly by subjecting them to forced labor; and (f) persecution of organizations and persons by depriving them of their human rights because of their opposition to apartheid.[106] This enumeration is expanded by the statement that the crime of apartheid "shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa."[107]

The "crime against humanity" declared in the first article is not just

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101. G.A. Res. 32/105 0, 32 U.N. GAOR, Supp. (No. 45) 41, U.N. Doc. A/32/45 (1977).
102. *Id.* part O.
103. *Id.*
104. G.A. Res. 3068, 28 U.N. GAOR, Supp. (No. 30) 75, U.N. Doc. A/9030 (1974) [hereinafter cited as Anti-Apartheid Convention].
105. *Id.* art. I(1).
106. *Id.* art. II.
107. *Id.*

a moralistic condemnation; it is a legal formula describing an international crime. Article III provides that "international criminal responsibility" shall apply regardless of motive to individuals, members of organizations, institutions, and state representatives, whatever their residence, if the acts in question fall within article II or if they directly abet, encourage, or cooperate in the commission of the crime of apartheid.

It is clear that the Convention's prohibitions were intended to be broad in scope. First of all, "motive" is irrelevant; if the act in question results in deprivation of virtually any kind, it is illegal and gives rise to criminal responsibility. This is a unique example of a criminal offense the proof of which does not require specific proof of *mens rea*. It is indeed arguable that the crime of apartheid involves acts which are so blatantly discriminatory that the accused must be deemed to have intended the consequences of his acts. In this sense, focusing on effects and consequences may be a more forceful way to promote the policy and purpose of the Convention than concentrating on the narrower and often problematic questions of motive and intention.

1. *Jurisdiction over the Crime of Apartheid*

Further confirmation of the legal nature of the concept of apartheid as an international crime is contained in the jurisdictional provisions of the convention: persons accused of the crime can be tried by any state party to the Convention or by an international penal tribunal.[108] However, the international penal tribunal can have "jurisdiction [only] with respect to those States Parties which shall have accepted its jurisdiction."[109] Not only is this phrase ambiguous, it is likely to provide a ready loophole for evading the purpose of the Convention. For example, its imprecise language may be construed such that a person who has committed the crime cannot be tried before the international tribunal because the state of the accused person does not accept its jurisdiction. Even if such a person could be tried before the international tribunal, he can be tried before any domestic tribunal regardless of any objection to its jurisdiction.

Under article IV of the Convention, states must take the necessary measures to prosecute persons accused of the crime "whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons." This would suggest that the domestic prosecution of an accused alien cannot be frustrated by jurisdictional objection from the state whose nationality or protection the accused person enjoys. It is unfortunate that such a categorical statement cannot be made in respect of an international criminal prosecution.

2. *Self-Regulation and Reporting Systems of the Convention*

The Convention sets up its own reporting system under which re-

108. *Id.* art. V.
109. *Id.*

ports from states on the implementation of the Convention are examined by a group of three members of the Commission on Human Rights. In order to coordinate its action with that to be taken under the 1965 Racial Discrimination Convention, article X of the Convention authorizes the Commission on Human Rights to request United Nations organs to examine complaints concerning the enumerated acts constituting apartheid.

Also under article X, the Commission on Human Rights is charged with preparing a list of individuals, organizations, institutions, and state representatives which are alleged to have committed prohibited acts. The Commission has indicated that it would soon be in a position to undertake actively and effectively this function,[110] and has noted the preliminary list of persons alleged to have committed the crime of apartheid drawn up by the *Ad Hoc* Working Group of Experts on Southern Africa.[111] The Commission suggested that the names of these persons be widely circulated.[112]

3. *Effectiveness of the Anti-Apartheid Convention*

The machinery created under the Convention is still relatively new and only time will show its effectiveness. However, the constitutive document makes an original contribution to the fight against racism and apartheid at the national and international levels. This, together with the experience over the past quarter century of other institutions and bodies dedicated to similar goals, should enable the Commission on Human Rights to make a promising beginning.

VIII. EVALUATING THE EFFECTIVENESS OF THE UNITED NATIONS: CONCLUDING REMARKS

The international political and legal order, when compared with most contemporary municipal systems, is relatively unstructured. It has no specialized machinery for the creation and enforcement of norms. The machinery that does exist has had a tortuous evolution, due to the vicissitudes of international relations characterized by instances of conflict and competition between states. At the same time, however, there have been opportunities for actual cooperation between states, bilaterally or multilaterally, for the pursuit of exclusive as well as common goals.

In the absence of well-defined standards of international conduct prescribed by a determinate law-making and law-enforcing authority, the external conduct of states has been conditioned primarily by their perceptions of their own interests and of how other states should behave in relation to those interests. When these interests are threatened, states sometimes resort to force to bring about patterns of conduct which either increase their own aggregate security or which at least do not threaten

110. Draft Report of the U.N. Commission on Human Rights, Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid, 34 U.N. ESCOR, U.N. Doc. E/CN.4/L.1370/Add.5 (1980).

111. Human Rights Progress Report, *supra* note 97, at para. 567.

112. Draft Report of the Commission on Human Rights, *supra* note 110, at 3, para. 9.

their existing interests and do not disturb existing power relationships. Preservation of the status quo is thus perhaps the most salient feature of the post-World War II international order. The organization created in 1945 to protect that order, the United Nations, suffers from inherent limitations in its ability to act—limitations that arise not so much from "defects" in its constitutional structure, but from the status quo-oriented nature of the contemporary international order.

The Anti-Apartheid Convention, which came into force in July 1976, is a good illustration of the difficulties faced by the United Nations in proceeding against an objectionable element within the entrenched world status quo. In the face of years of frustration caused by the intrasigence of South Africa and its silent allies, the United Nations, through the Anti-Apartheid Convention, is trying to do indirectly what it cannot do with other sanctions.

Pockets of idealism within the United Nations have always had to be suitably tempered with a sober evaluation of the obstacles to progress. Thus the success of programs motivated by idealism should not be exaggerated, and actions proposed for the future should also reflect a sober awareness of the difficulties involved.

What then is the potential of an organization such as the United Nations in the fight against racism and apartheid? It may be observed at the outset that the fact that the United Nations has been expressly charged with this task, not only by its Charter but by the overwhelming condemnation of racial discrimination and apartheid by the organized community of nations as expressed in various international bodies, augers well for the United Nations as an international instrument for change. As stated above, within the framework of international relations based on conflict and competition, there have been instances of interstate cooperation for the realization of common goals. It can be maintained that the elimination of racism, discrimination, and apartheid is the common goal of an overwhelming majority of states. Yet the opinion of the majority seems to be set on a colllision course with the status quo-oriented regime of the United Nations. Fundamental change, especially in southern Africa, is unlikely without a fairly radical transformation of the existing world power balance. It is a matter of historical record that the powers with economic and military interests in that region have never been particularly enthusiastic about change there, and have resorted to frequent vetoes to prevent the Security Council from taking action.

It may be possible for the force of public opinion to compel the Western powers in the Security Council to adopt a more neutral attitude to certain kinds of non-military measures against South Africa under Chapter VII of the Charter. Evidence of this trend is the 1977 resolution of the Security Council imposing a mandatory arms embargo against South Africa—a resolution which the Western bloc, after years of resis-

tance, finally agreed not to veto.[113] The Council should not retreat from its present posture and it should make every effort to increase pressure to enact further mandatory enforcement measures against South Africa, including the imposition of mandatory economic sanctions. This action could be complemented with the drafting of conventions in the style of the Anti-Apartheid Convention, obliging states to take additional measures against South Africa.

More thought should be given to the question of United Nations-sponsored conventions on sporting, economic, and military links with South Africa. Other conventions could deal with the protection of minorities within nations, including migrant workers and other ethnic, religious, and linguistic minorities. There is also need for a convention on individual access to international tribunals for the airing of individual complaints of discrimination at the national level. An agency could be designated within the United Nations to receive all individual complaints of state violations of any of the U.N.-sponsored conventions discussed above, particularly in the fields of education and employment. This function would complement parallel work already being done by the Commission on Human Rights. In this regard, the final provision in article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination rendering the entire article on individual complaints inoperative is unfortunate.

The United Nations has by no means exhausted all the possibilities of change. The fight against racism, racial discrimination, and apartheid in a systematic way has only begun with the proclamation of the Decade for Action to Combat Racism and Racial Discrimination.[114] The Program of Action for the Decade has two basic aims: isolating racist regimes and combating racial discrimination. These aims could be pursued simultaneously on three fronts: sponsorship of new international instruments, publicity, and continued action by United Nations organs, particularly the Security Council acting under Chapter VII of the Charter. Continued backup support from the Council would add a greater sense of urgency to the calls of the various watchdog organs. The potential of the United Nations in the fight against racial discrimination and apartheid lies in its ability to direct international condemnation against those nations who contribute to apartheid. It is those countries which directly and indirectly support apartheid that must face the moral opprobrium of the international community. In the long run it will be the gradual building of public opinion not so much against apartheid—for that has already crystallized—but against its external economic and military supporters that is most likely to create conditions for peaceful change.

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113. S.C. Res. 418, 32 U.N. SCOR, Supp. (Res. & Dec.) 5, U.N. Doc. S/INF/33 (1977).
114. G.A. Res. 3057, note 97 *supra*.