

Articles

Security Legislation in Namibia: Memorandum of the South West Africa (Namibian) Bar Council†

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Introduction

In January, 1983, the Namibian Bar Council¹ wrote a letter to the Namibian Administrator-General, the head of South Africa's occupation regime in Namibia, urging him to create a judicial commission of inquiry. The purpose of such a commission was to investigate the security legislation in effect in the Territory and the alleged abuses in the application of that legislation.² Given the political situation in Namibia, the request was daring and unprecedented. In South Africa, a call for a commission of inquiry is not ordinarily a party-political gesture. Rather, such a call indicates serious dissatisfaction with some aspect of the state's financial, administrative, or judicial affairs. By its request, the Namibian Bar Council was questioning not just the territorial administration, but the South African regime that ruled Namibia against the will of its inhabitants and in defiance of international law.³ It was seeking, furthermore, a probe of the elements by which the South African government maintained its control.

The Bar Council's request elicited no response for eight months. Finally, in August, 1983, in response to a second request, the Administrator-General issued Proclamation AG 159 of 1983, which created a commission of inquiry. The Bar Council complained that the Commission's terms of reference were too restrictive and that the Proclamation

† Because the proper name for South West Africa is now Namibia, *see infra* note 5, the Bar Council will be referred to throughout this Article as the Namibian Bar Council.

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1. The elected executive body of the territorial Society of Advocates. *See infra* notes 88-91 and accompanying text.

2. *See infra* notes 92-110 and accompanying text.

3. *See infra* notes 30, 54-65 and accompanying text.

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failed in almost every respect to address the basic problems the Bar Council had outlined in January. After a series of letters, sometimes quite acrimonious, resulted in some official "assurances" that these deficiencies would be addressed, the Bar Council reluctantly agreed to submit a memorandum setting out its views and recommendations to the Commission.

The Memorandum of the Namibian Bar Council is an extraordinary document. It portrays daily life under a repressive regime as viewed by the members of a bar who are trying by every legitimate means to vindicate the virtually non-existent rights of political opponents and of affected non-political bystanders. The Memorandum discusses in detail twelve cases, all resolved before its submission,⁴ along with certain questions that they raise. The discussion encompasses events and actions that were common knowledge among local lawyers but that could not be introduced in judicial proceedings, even when the accused had their day in court. Despite the obvious restraints placed on the authors, who are critical of an occupation regime and yet at the same time must work within the legal and political institutions of the regime, the Memorandum provides insights that no academic study can. The Memorandum is set out below, following some background information on Namibia and a short note about the editing of the document. Following the Memorandum is an Addendum that comments on some aspects of the Memorandum.

A. *General Background*

Namibia, a largely desert and semi-desert area, is bounded by Angola and Zambia on the north, by Botswana and South Africa on the east, by South Africa on the south, and by the Atlantic Ocean on the west. As large as Texas and Oklahoma combined, the Territory is rich in valuable minerals, including diamonds, uranium, and copper. Its estimated population is between 1,000,000 and 1,500,000. Most live in the northern third of the country, particularly in the north-central Ovambo area, where it is possible to raise dry-area grains in years of average rainfall. Most of the 75,000 whites live in the capital, Windhoek, in the mining communities, and in the central plateau, where cattle and karakul sheep grazing is predominant.

4. Three of the cases, *U. Kakuva and Another*, see *infra* text accompanying note 129, *Paulus and P. Matheus*, see *infra* text accompanying note 144, and *Kruger and van der Heever*, see *infra* text accompanying note 152, were on appeal when the Memorandum was drafted.

The colonial occupation of Namibia (formerly named South West Africa)⁵ began in 1878, when the Territory's only deepwater port, Walvis Bay,⁶ was annexed by the British as part of the Cape Colony.⁷ Six years later, Imperial Germany claimed the remainder of the Territory as a protectorate.⁸

In 1915, the Union of South Africa occupied German South West Africa on behalf of the Allies.⁹ However, at the end of World War I, Pretoria was not allowed to annex the Territory as it had been promised during the conflict. Instead, Namibia was designated a League of Nations mandated territory, with South Africa as mandatory.¹⁰ The Union was granted "full power of administration and legislation over the

5. The name was changed to Namibia by the UN General Assembly. G.A. Res. 2372, 22 U.N. GAOR Supp. (No. 16A) at 1, U.N. Doc. A/7088 (1968).

6. The area annexed was approximately 434 square miles and was referred to in contemporary documents as the "port or settlement" of Walvis Bay. *See, e.g.*, British Proclamation, 69 BRITISH & FOREIGN STATE PAPERS 1177 (1877-78) (proclamation "taking possession of the Port or Settlement of Walfisch Bay," Mar. 12, 1878).

7. 69 British Letters Patent, 70 BRITISH & FOREIGN STATE PAPERS 495 (1878-79) (Annexation to the Colony of the Cape of Good Hope of the Port or Settlement of Walfisch Bay, Dec. 14, 1878).

8. I. GOLBLATT, HISTORY OF SOUTH WEST AFRICA 84-98 (1971); *see generally* W. AYDELOTTE, BISMARCK AND BRITISH COLONIAL POLICY (1937).

9. Walvis Bay and its Namibian hinterland were brought under a common martial law before the War ended. (Union) Proc. No. 12 of 1915. In 1922, full administrative and judicial amalgamation was effected. South West Africa Affairs Act, No. 24 of 1922; Proc. No. 145 of 1922. When white Namibians received limited home rule in 1925, adult white males in Walvis Bay could vote for representatives to the territorial Legislative Assembly, but were not represented in the South African Parliament. *See infra* note 69.

In 1977, Pretoria took a pre-emptive step to limit the economic independence of any future Namibian government by detaching Walvis Bay from the unified administration of the entire Territory and claiming it as part of the Republic. Proc. No. R. 202 of 1977. The significance of removing Walvis Bay from Namibian jurisdiction can be seen in the observation concerning Walvis Bay that Calvert, an ardent British South African, originally penned while Union troops were occupying Namibia:

[T]he fact must not be forgotten that the natural harbour of Walfisch Bay possesses a geographical and political importance which can scarcely be over-rated. In Keane's *History of Africa* we read: "It gives direct access to the two great water-courses, Tsoakhub and Kuiseb, which here converge from the north-east and south-east; it is thus practically the only natural outlet for a region some 400,000 square miles stretching from the seaboard inland to Zambesia, and from Angola southwards to the Cape. The whole of this region is at the mercy of the political masters of Walfisch Bay, which in the hands of an alien Power might serve as a convenient base of operations directed against the British possessions between the Zambesi and Orange Rivers If Germany cannot retain profitable possession of her . . . South-West African Protectorate without Walfisch Bay, she must abandon it, for Great Britain cannot certainly afford to abandon Walfisch Bay"

A. CALVERT, SOUTH-WEST AFRICA 4-5 (1969) (originally published 1915).

10. The Mandate was formally "conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa" The Mandate for South West Africa, Dec. 17, 1920, Preamble. The Mandate and many other official documents dating between 1920 and 1972 are reprinted in the invaluable text of J. DUGARD, THE SOUTH WEST AFRICA/NAMIBIA DISPUTE (1973).

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territory . . . as an integral portion of the Union of South Africa”¹¹ The Mandate¹² tempered this broad grant of power by a series of specific prohibitions and requirements.¹³ It also required League approval for any modification of the Mandate¹⁴ and recorded South Africa’s agreement to submit disputes over interpretation or application of the Mandate to the Permanent Court of International Justice.¹⁵ The Mandate further specified that the “Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory”¹⁶

Despite the Mandatory’s clear obligation to protect the welfare of all Namibians, South African administration of the Territory consistently favored white settlers over indigenous blacks. South Africa was severely criticized throughout the Mandate period for virtually every aspect of its administration, but particularly for its persistent attempts to assert its sovereignty over Namibia.¹⁷ At the first session of the UN General Assembly, Pretoria requested authorization to incorporate Namibia as a

11. *See id.* art. 2.

12. The agreement between the League and the Union is hereinafter referred to as the Mandate.

13. Specifically, it prohibited the slave trade, forced labor, and the supplying of liquor to “natives,” *id.* art. 3, as well as the military training of “natives” and the establishment of military or naval bases or fortifications in the territory, *id.* art. 4. It required the Mandatory to control the traffic in arms, *id.* art. 3, to ensure freedom of conscience, the free exercise of all forms of worship, and the presence of missionaries, *id.* art. 5, and make annual reports to the “satisfactor” of the League Council providing “full information with regard to the territory,” *id.* art. 6.

14. *Id.* art. 7.

15. *Id.*

16. *Id.* art. 2.

17. For example, Pretoria vested control over Namibian railways and harbors in the Governor-General of the Union of South Africa. South West Africa Railways and Harbours Act, No. 20 of 1922. When the Permanent Mandates Commission, the League body supervising mandatory administration, questioned this action, the Union representative explained that the best way to run Namibian railways and harbors was “as part of the system of railways and harbours which exist in the Union;” therefore, Namibian railways and harbors were vested “in the authority which owns the Union system, . . . the Governor-General” He added that:

full ownership can from the terms of the Treaty [of Versailles] and the mandate only last while the railways and harbours are being worked as part of the combined system. If at any time the combined system should be abolished *or the mandate revoked* Act 20 of 1922 would cease to operate.

6 LEAGUE OF NATIONS O.J. 1048 (1925) (emphasis added). This qualification was incorporated into the South West Africa Railways and Harbours (Amendment) Act, No. 9 of 1930.

This “ancient” Namibian history is relevant today, as the South African government has threatened to close down several “unprofitable” branch railway lines in Namibia and to remove the track from the closed lines, apparently to take it to South Africa. Windhoek Observer, June 30, 1984; Aug. 4, 1984, at 23, col. 4; Aug. 10, 1984, at 3; Aug. 17, 1984, at 11 [certain page and column numbers from Namibian newspapers unavailable; copies of articles on file with the annotator].

fifth province in the Union.¹⁸ The Assembly refused, requesting South Africa to place the Territory under the UN's trusteeship system.¹⁹ When South Africa refused this request in 1947,²⁰ the present conflict began.

Upon the ascendancy of the hardline National Party to power in South Africa in 1948, any hopes of a peaceable resolution of the conflict were dashed. Pretoria refused to honor its obligation under the Mandate to submit annual reports on its administration of the Territory²¹ to the General Assembly, the successor to the League Council.²² Over the objections of the UN, South Africa extended its system of apartheid, and subsequently the system of ethnic "bantustans" or "homelands", to Namibia,²³ and then began a process of de facto annexation.²⁴ Between 1946 and 1966, the UN, increasingly frustrated, attempted negotiation, confrontation, cajolery, and appeals to the World Court to resolve the dispute.²⁵ Nothing could induce Pretoria to recognize the UN's right to supervise South Africa's administration of the Territory.

18. Statement by the Union of South Africa, 1 U.N. GAOR C. 4 Part 3 (Agenda Item 29) (Nov. 27, 1946), at 45, U.N. Doc. A/123 (1946).

19. G.A. Res. 65, U.N. Doc. A/65 (1946).

20. Communication from the Government of the Union of South Africa, 2 U.N. GAOR C. 4 Annex 3a, at 133, 134-35, U.N. Doc. A/334 (1947).

21. In 1950, the International Court of Justice advised the General Assembly that as long as Namibia was not placed under the Trusteeship System, it remained a territory under "international mandate"; that the "supervisory functions" of the League Council should be exercised by the United Nations; and that South Africa could not unilaterally change the international status of Namibia. *International Status of South West Africa*, 1950 I.C.J. 128, 143 (Advisory Opinion of July 11).

22. Mandate, *supra* note 10, art. 6.

23. The blueprint for "separate development" (apartheid) in Namibia is found in the REPORT OF THE COMMISSION OF ENQUIRY INTO SOUTH-WEST AFRICAN AFFAIRS, 1962-1963, R.P. 12 of 1964, referred to as the "Odendaal Report" (or "Plan"), from the name of the Commission chairman. The major legislation implementing the Report as to racial matters was the "Native Nations Act," officially referred to as the Development of Self-Government for Native Nations in South-West Africa Act, No. 54 of 1968.

24. South Africa granted representation in Parliament to white Namibians. South-West Africa Affairs Amendment Act, No. 23 of 1949, §§ 27-31. It also imposed involuntary South African citizenship on most Africans born in Namibia (whites already were citizens). South African Citizenship Act, No. 44 of 1949, §§ 2, 3, 5(1). Finally, it transferred control of "native affairs" from Windhoek to Pretoria (to the then-Minister of Native Affairs, now the Minister of Cooperation and Development) and vested all "native reserves" and funds connected therewith in the South African Development Trust (of which the South African State President is the sole trustee). South-West Africa Native [now Bantu] Affairs Administration Act, No. 56 of 1954, § 4.

25. See *International Status of South West Africa*, *supra* note 21; *South West Africa—Voting Procedure*, 1956 I.C.J. 67 (Advisory Opinion of June 7, 1955); *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, 1956 I.C.J. 23 (Advisory Opinion of June 1).

In 1960, at the urging of the General Assembly, Ethiopia and Liberia instituted a proceeding in the World Court under Article 7, paragraph 2 of the Mandate, in which the Union had consented to the Court's jurisdiction. Elaborating on the complaints that the General Assembly had been unable to resolve, the applicants asked for a ruling on alleged violations of Mandate obligations and appropriate relief. However, after having overruled South Africa's

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In October 1966, when all other recourse appeared to have been exhausted, the General Assembly took the unprecedented step of citing Pretoria's violations of its Mandate obligations as an effective repudiation of the contract of mandate.²⁶ The Assembly revoked the Mandate, called for an end to South Africa's occupation, and undertook to administer Namibia until independence.²⁷ A few months later, it created the UN Council for Namibia to act for it in the interim.²⁸ South Africa did not, however, withdraw from Namibia. Consequently, Namibia was left an international territory legally under UN administration, but illegally occupied by the Republic²⁹ of South Africa.³⁰ This situation continues today. After revocation of the Mandate, new negotiations were undertaken between the UN and Pretoria, aimed this time at getting South Africa out of Namibia. Yet these negotiations were as fruitless as the earlier ones.

In 1976, the UN Security Council adopted Resolution 385, calling for South African withdrawal from Namibia and for an election that the UN would "supervise and control."³¹ When South Africa stalled³² and the

objections to its jurisdiction in 1962, the Court in 1966 refused to decide the substantive issues on the ground that the applicants had no legal right or interest in a dispute over administration of the Territory. *South West Africa Cases (Eth. v. S. Afr., Liberia v. S. Afr.)*, 1962 I.C.J. 319 (Judgment of Dec. 21); *South West Africa Cases, (Eth. v. S. Afr., Liberia v. S. Afr.)*, 1966 I.C.J. 4 (Second Phase Judgment of July 18).

26. The Mandate's status as a contract, a mere statement of desire, or something else, was a hotly debated question over the years. The World Court accepted the concept of obligation inherent in a contract. In its 1962 judgment, *supra* note 25, the Court characterized the Mandate as "a special type of instrument composite in nature and instituting a novel international regime. It incorporates a definite agreement" *Id.* at 331. The Mandate, "in fact and in law, is an international agreement having the character of a treaty or convention." *Id.* at 330.

27. G.A. Res. 2145, 21 U.N. GAOR Supp. (No. 21) at 2, U.N. Doc. A/6316 (1966).

28. G.A. Res. 2248, 5 U.N. GAOR Supp. (No. 1) at 1, U.N. Doc. A/6657 (1967).

29. The Union of South Africa became the Republic of South Africa in 1961. South Africa Constitution Act, No. 32 of 1961.

30. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (Advisory Opinion of June 21). See also J. DUGARD, *supra* note 11, at 447-501.

31. S.C. Res. 385, 31 U.N. SCOR Res. & Decis., at 8, U.N. Doc. S/INF/32 (1976). The phrase "supervise and control" was negotiated with great care and deliberation to ensure that the UN would *run* the election—not merely oversee it. Conversation with the UN Commissioner on Namibia during service as Senior Political Affairs Officer, January, 1976 (notes on file with the annotator).

32. A few days before the Resolution's August 1976 deadline for acceptance by South Africa of its terms, the South African-created, ethnically based "Turnhalle Conference"—so named for the Windhoek *turnhalle* (German for "gymnasium/drill hall") where it met—issued a short statement to the effect that conference members were working on a constitution and hoped for independence within three years. The Western members of the Security Council indicated that in light of this "step forward" they would veto any proposal calling for sanctions for failure to comply with the Council's directive.

Less than a year later, the Turnhalle Conference did produce a draft constitution, but it was such a farce that not even apologists for Pretoria considered it acceptable. A few minor subsequent changes made to try to win international support were enough, however, to split the

African states called for sanctions, France, the United Kingdom, and the United States (the Western permanent members of the Security Council), in conjunction with Canada and the Federal Republic of Germany (the elected Western members of the Security Council at that time), formed the "Contact Group" to take control of the situation. Early in 1978, the Contact Group made a proposal that was later incorporated in Security Council Resolution 435.³³ The proposal provided for withdrawal of all South African troops, save for 1,500 confined to base in Namibia, but allowed the entire South African civil administration, including the South African police, to remain in place and to run the election under UN monitoring.³⁴ This proposal was accepted by South Africa,³⁵ as well as by the South West Africa Peoples Organization (SWAPO),³⁶ which by then had been recognized by the General Assembly as the "sole and authentic" representative of the Namibian people.³⁷ The United Nations Secretary-General appointed a Special Representative to head the UN monitoring force.³⁸

Conference's white delegates. The anti-change faction drove the pro-change whites out of the Territory's National Party, thus setting that Party in opposition to its parent South African National Party, which was seeking international acceptance of an arrangement that would allow South Africa to control the territory behind the scenes. Pro-change whites formed the Republican Party and, with South African support, an umbrella grouping, the Democratic Turnhalle Alliance (DTA), composed of all the ethnic groups (except the anti-change whites) at the Conference. DTA candidates won the 1978 South African-run elections. *See infra* note 34.

33. 33 U.N. SCOR Supp. (Apr.-June 1978) at 17, U.N. Doc. S/12636 (1978). *See also* S.C. Res. 435, 33 U.N. SCOR Res. & Decis., at 13, U.N. Doc. S/INF/34 (1978).

34. Although held out as being in accordance with resolution 385, the Western Plan/resolution 435 in fact undercut every major provision of the earlier resolution: (i) Instead of being required to withdraw immediately, the South African occupation regime would remain in Namibia and run it until independence. (ii) Pretoria was not required to dismantle the bantustans, and other human rights requirements were omitted or made less comprehensive. (iii) The election would be run by South African officials—they would choose the electoral system, register voters, provide ballot boxes, count the votes, etc.—while the UN would be reduced to merely monitoring their conduct. And, (iv) the removal of Walvis Bay from Namibian jurisdiction was tacitly approved

E. LANDIS, *NAMIBIAN LIBERATION: SELF-DETERMINATION, LAW AND POLITICS* 7 (Episcopal Churchpeople for a Free Southern Africa, New York 1982).

35. 33 U.N. SCOR Supp. (Apr.-June 1978) at 40, U.N. Doc. A/S-9/12-s/12567 (1978) (letter from South African foreign affairs minister to the U.N. Secretary-General).

36. 33 U.N. SCOR Supp. (July-Sept. 1978) at 6, U.N. Doc. S/12775 (1978) (communique issued by Contact Group and SWAPO).

37. G.A. Res. 31/152, 31(I) U.N. GAOR Supp. (No. 39) at 130, para. 2, U.N. Doc. A/146 (1976). In paragraph 3, G.A. Res. 152 granted SWAPO observer status at the U.N. *Id.* at 136.

38. As authorized by S.C. Res. 431, 33 U.N. SCOR Res. & Decis., at 12, U.N. Doc. S/INF/34 (1978).

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A few months later, South Africa reneged on its agreement.³⁹ Instead, it ran its own election⁴⁰ to choose “national leaders,” who were then used by Pretoria as a “puppet” administration⁴¹ which ultimately collapsed in disrepute.⁴² Subsequent negotiations between South Africa and the Contact Group resulted in some concessions, gained at the expense of SWAPO.⁴³ These concessions were never enough, however, to persuade South Africa to agree to an election under Resolution 435.

In 1979, South African troops invaded Angola and occupied its southern tier in an attempt to destabilize the Luanda government, or at least to force it to interdict SWAPO in the area.⁴⁴ An agreement negotiated in early 1984 provided for South African withdrawal within three months.⁴⁵ While such a withdrawal was ostensibly completed in mid-1985,⁴⁶ local people say that South African troops still remain.⁴⁷

39. Technically, South Africa has never rejected Resolution 435. But when the Secretary-General issued his report on the implementation of the Resolution, 33 U.N. SCOR Supp. (July-Sept. 1978) at 33, U.N. Doc. S/12827 (1978), which was based on an on-site survey by his Special Representative, Pretoria found fault with nearly every item. 33 U.N. SCOR Supp. (July-Sept. 1978), at 38, U.N. Doc. S/12836 (1978).

40. The election was held in December 1978. See Proc. AG 63 of 1978 (the “Election Proclamation”). Election results are discussed in Wash. Post, Dec. 16, 1978, at A24, col. 1. Security Council Resolution 439, 33 U.N. SCOR Res. & Decis., at 14, U.N. Doc. S/INF/34 (1978), condemned South Africa for proposing such an election, declared such an election and its results “null and void,” and stated that no recognition would be given by the UN or its members to “any representatives or organ established by that process.”

41. Procs. A-G 21 of 1979 and 19 of 1980 transformed the elected representatives into a “National Assembly” and created a “Council of Ministers.”

42. Times (London), Jan. 19, 1983, at 9, col. 3. INTERNATIONAL DEFENCE & AID FUND FOR SOUTH AFRICA, Jan.-Feb. 1983, at 1 [hereinafter cited as IDAF FOCUS]; IDAF FOCUS, Mar.-Apr. 1983, at 10.

43. For example, it was agreed that SWAPO soldiers would not be based in Namibia during the electoral process, Military Deployment Plan for UNTAG, item 7(e), 34 U.N. SCOR Supp. (Jan.-Mar. 1979) at 149, 154, U.N. Doc. S/13172 (1979), although the original understanding was that they would be confined to bases in the Territory under the same circumstances as the 1500 South African troops remaining after the withdrawal of the rest of Pretoria’s army. It was also agreed, inter alia, that certain provisions specified by the United States after consultation with Pretoria would be written into the future constitution of Namibia, even though the election to be held under Resolution 435 was intended to choose members of a “constituent assembly” who would draft a constitution in accordance with the wishes of *their electorate*.

44. M. HOLNESS, APARTHEID’S WAR AGAINST ANGOLA 6-7 (1983) (published by U.N. Centre Against Apartheid and World Campaign Against Military and Nuclear Collaboration with South Africa); *Angola: Engaging the Clutch*, THE ECONOMIST, Mar. 30, 1985, at 18, 19-22.

45. N.Y. Times, Feb. 17, 1984, at A4, col. 3; Wash. Post, Feb. 17, 1984, at A1, col. 1.

46. Guardian (U.K.), Nov. 21, 1985, at 9, col. 1; Guardian (U.K.), Dec. 16, 1985, at 8, col. 1.

47. Guardian (U.K.) Nov. 21, 1985, at 9, col. 1; IDAF FOCUS, Sept.-Oct. 1985, at 11; RESISTER, Oct./Nov. 1985, at 19.

Meanwhile, the United States has taken over the negotiations begun by the Contact Group, shuttling diplomats between Luanda and Pretoria,⁴⁸ and periodically announcing progress towards a settlement based on Resolution 435.⁴⁹ Despite these efforts, South Africa continues to evade any specific commitment to an internationally supervised election. Many observers believe that South Africa fears that its administration of Namibia would be overwhelmingly discredited.⁵⁰ Rather than moving towards a political resolution of this conflict, South Africa continues to build up its military presence in the Territory.⁵¹ In addition, during June 1985, in an effort to put a good face on its continuing occupation, South Africa installed a new Namibian "interim government,"⁵² with which it may ultimately reach an internal settlement that would exclude the entire international community.⁵³

B. *Resistance to South African Occupation*

Namibians have a history of bloody but unsuccessful revolts against their colonial masters.⁵⁴ Undeterred by this history, Namibians began armed resistance anew in the mid-1960's when SWAPO, alone among the liberation movements, decided to use force, in addition to diplomatic and political means, in order to liberate the Territory. The first guerrilla fighters were soon arrested, detained, and tortured. They were then tried in Pretoria, not Namibia,⁵⁵ under the *subsequently* enacted Terrorism

48. As the Memorandum was being annotated, American negotiators were again engaging in discussions with Angolan officials. N.Y. Times, Nov. 29, 1985, at A3, col. 3.

49. "[W]henver there is pressure by the majority of the members of the United Nations on the West, progress in the negotiations is always reported . . ." G. ROCHA, IN SEARCH OF NAMIBIAN INDEPENDENCE: THE LIMITATIONS OF THE UNITED NATIONS 134 (1984).

50. Ivan Himmelhoch, a South African intelligence agent who later fled the country, has revealed that his agency had informed the government that in a democratic election at least 83% of all Namibians would support SWAPO. *Foreign Policy Duality*, NEW STATESMAN, Aug. 22, 1980, at 12. Since that time, SWAPO has come to an understanding with several political parties in Namibia and has thereby increased its support.

51. Windhoek Observer, Jan. 26, 1985 (completion of largest military exercise ever held in Namibia); UN Council for Namibia Press Release NAM/807, Feb. 1, 1985; Guardian (U.K.), Nov. 21, 1985, at 9, col. 1.

52. South West Africa Legislative and Executive Authority Establishment Proclamation, No. R. 101 of 1985 (issued by the South African State President).

53. AFRICA CONFIDENTIAL, Apr. 24, 1985; Press release 10/85, June 17, 1985, of the Permanent Mission of South Africa to the United Nations, at 6 (speech by South African State President Botha to the new National Assembly installed in Namibia).

54. Hereros and Namas rebelled against the Germans in the first decade of this century. Bondelswarts Namas, the Basters of the Rehoboth Gebiet, and the Ovambos rebelled during the first decade of South African administration of the Mandate. See generally J. DUGARD, *supra* note 10.

55. *State v. Tuhadeleni and Others*, 1969 (1) S.A. 153 (S. Afr. App. Div.). For a personal account of the trial and the events leading up to it by one of the defendants, see J. YA-OTTO, *BATTLEFRONT NAMIBIA* 82-136 (1981); for a defense lawyer's perspective, see J. CARLSON, *NO NEUTRAL GROUND* 150-216 (1973).

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Act,⁵⁶ which was made retroactive for five years.⁵⁷ Nevertheless, resistance spread.

The 1970's witnessed both the increasing strength of SWAPO and the tenacious efforts of South Africa to retain control. At the end of 1971, SWAPO mounted a general strike that shut down the Territory for more than two months.⁵⁸ The increasing activity of SWAPO's military arm, the Peoples Liberation Army of Namibia (PLAN), forced Pretoria to counter with military force. Pretoria first sent paramilitary police, and then army units, to keep control in Namibia.

When Portugal ended its rule over Angola in 1974, PLAN, with hidden bases in Angola, became a more serious and immediate threat to Pretoria's control of its former Mandate. Consequently, South African troops invaded the former Portuguese colony in an attempt to install a pro-Western UNITA (National Union for the Total Independence of Angola) government in Luanda that would collaborate with Pretoria.⁵⁹ The attempt was finally thrown back with the help of Cuban soldiers.

Yet, South Africa is believed to have at least 100,000 troops in northern Namibia and Angola today.⁶⁰ This includes the South West Africa Territorial Force (SWATF), which consists of Namibian draftees and other local people driven to soldiering by economic necessity. All Namibian males from age seventeen to age fifty-five are subject to conscription by the occupying South African authorities for service against

56. No. 83 of 1967.

57. *Id.* § 9 (1).

58. J. YA-OTTO, *supra* note 55, at 140-44.

59. J. STOCKWELL, *IN SEARCH OF ENEMIES* 164-165, 185-187 (1978).

60. *Apartheid's Army in Namibia*, IDAF Fact Paper on Southern Africa No. 10, at 3 (London 1983) (copy on file with the annotator). This figure apparently includes paramilitary police and all sorts of special units, including special guards assigned to local dignitaries. *Ja Toivo Calls for Sanctions Against South Africa*, SOUTHERN AFR. REP. Dec. 1985, at 11. *See also SWAPO's Nujoma Denies Sanctions Will Harm Blacks*, Foreign Broadcast Information Service [hereinafter cited as FBIS] (Mid. East), Apr. 15, 1985, at U3 (text from Lusaka Radio Freedom in English to South Africa) (according to Sam Nujoma, President of SWAPO, there are over 110,000 South African troops).

their fellow Namibians in PLAN.⁶¹ In addition, South Africa has created a number of special police and guard units (including Koevoet, discussed in the Bar Council's Memorandum)⁶² which in effect have a license to engage in unchecked killing and mayhem.

Unlike the African National Congress (ANC) and the Pan African Congress (PAC) in the Republic of South Africa, SWAPO has not been banned or declared illegal in the Territory, despite the existence of PLAN.⁶³ However, special local legislation in effect in Namibia forbids SWAPO and other opposition groups from holding political meetings.⁶⁴ All effective opponents of the regime are repeatedly arrested and held

61. Gen. Notice No. 132 of 1984, Off. Gaz. of South West Africa, No. 4973, Nov. 9, 1984. See *Conscription for All Men in Namibia*, Windhoek Advertiser, Oct. 23, 1984, at 1.

In 1983, Eric Binga, a draftee who was a member of SWAPO, brought a proceeding in the Supreme Court in Windhoek for an order exempting him from national service in either SWATF or the South African Defence Force (SADF). In his application he alleged that the South African Parliament had no legal power to make laws for Namibia (conscription is carried out under the authority of the Defence Act, No. 44 of 1957) and further that he had been wrongfully ordered to undergo military training in Walvis Bay, which was not part of the mandated territory of South West Africa. The application was denied. However, leave to appeal was granted. Windhoek Observer, July 21, 1984; Windhoek Advertiser, Sept. 21, 1984. The appeal had not been decided as of mid-December 1985. Although the applicable provision of the South African Defence Act relating to conscription, like the General Notice, applied to white males only, "legality has never been of much consequence to the SADF in Namibia and it is certain that some way will be found around the problem." RESISTER, Feb./Mar. 1985, at 9.

62. Memorandum, *infra* § D.2.2.

63. The Herstigte Nasionale Party (HNP) of Namibia, an all-white right-wing party that opposes Namibian independence, submitted a memorandum to the Commission of Inquiry in November 1984. According to the press, that memorandum attacked the "double standards" applicable to SWAPO. The memorandum complained that SWAPO members were considered "terrorists" in the "operational area" (northern part of Namibia), while at the same time, SWAPO was acknowledged *internally* as a political party, "and its members were even admitted to join the Armed Forces fighting SWAPO's insurgency wing." Windhoek Observer, Nov. 10, 1984. See also *infra* notes 141 & 159.

The emphasis on the differences between the "legal," albeit continually harassed, SWAPO political party in Namibia and the SWAPO "in exile," which directs military and diplomatic action to liberate the Territory, has long been a subject of comment. *The Race against Time and Radicals*, TO THE POINT, Oct. 15, 1976, at 8; von Lucius & Totemeyer, *Namibia: A Regional Conflict and a World Problem*, 30 GERM. FOREIGN AFF. REV. 73, 85-86 (English ed. 1979).

SWAPO headquarters are currently located in Luanda. Between SWAPO congresses, party policy is set by a Central Committee, most of whose members are outside the Territory. Some members, however, such as Henrik Witbooi and Nathaniel Maxuillili, live in Namibia.

64. Prohibition and Notification of Meetings Act, No. 22 of 1981, enacted by the "National Assembly" that was elected in the South African-run election of December 1978. See *supra* note 40. The Act prohibits meetings of any political organization whose constitution "advocates . . . or is in favour of the overthrow of any government or authority in the territory or the bringing about of a political . . . change in the territory . . . by forcible means . . ." Prohibition and Notification of Meetings Act § 2 (a)(i). SWAPO is the only Namibian liberation movement that advocates armed struggle as a means of attaining independence.

All political meetings of more than twenty persons require advance approval of a magistrate. Right-wing parties ignore this requirement with impunity; members of the SWANU (South West Africa National Union) executive were charged with meeting without approval, but the

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under legislation authorizing detention without trial.⁶⁵ Pretoria's frenzied attempts to repress the opposition have led to the extensive abuses which the Bar Council Memorandum details.

C. *Laws Applied in Namibia*

Although Article 2 of the Mandate empowered the Union of South Africa to legislate for the Territory "as an integral portion" of South Africa and to "apply the laws of the Union . . . to the territory,"⁶⁶ South African legislation has never applied automatically in Namibia. Parliament has either legislated expressly for the Territory,⁶⁷ or provided that a specific law should apply in Namibia.⁶⁸ Other acts of Parliament have been applied to Namibia by proclamation of the South African Governor-General (referred to after 1961 as the State President), or by proclamation of the Administrator of South West Africa, Pretoria's governor in Windhoek prior to 1977. Both the Governor-General (State President) and the Administrator had power to legislate by proclamation, and the local Legislative Assembly was empowered to enact laws on a limited range of matters, subject to South African approval.⁶⁹

case did not come to trial. Windhoek Advertiser, Jan. 18, 1982; Rand Daily Mail (Johannesburg), Jan. 20, 1982, at 4, col. 2.

People attending a barbecue held at a Catholic Church farm near Windhoek to celebrate the release from prison of SWAPO hero Toivo ja Toivo were arrested and charged under the Act. The arrests proved politically embarrassing to South Africa, and the charges were dropped before trial. *SWAPO Chiefs Held in Security Raid on Windhoek Party*, Guardian (U.K.), June 11, 1984, at 7, col. 1; The Times (London), June 12, 1984, at 7, col. 3. More recently, three SWAPO officials, including the Acting President Nathaniel Maxuulili, were charged with contravening the Act by holding a meeting in Katutura (the segregated African township outside Windhoek) to celebrate the twenty-fifth anniversary of the founding of the movement. The Namibian, Nov. 22, 1985.

65. The principal measures are the Terrorism Act, No. 83 of 1967, *superseded* by the Internal Security Act, No. 74 of 1982; the Security Districts Proc., *infra* note 85, referred to in the Memorandum, §§ E.6 and E.7; and the Preventive Detention Proc., *infra* note 86, discussed in the Memorandum, § G.3.1.

66. Mandate, *supra* note 11, art. 2.

67. *E.g.*, the South West Africa Affairs Act, No. 25 of 1969; the Coloured Persons in South-West Africa Education Act, No. 63 of 1972.

68. *E.g.*, the Territorial Waters Act, No. 87 of 1963, § 8, reads: "This Act shall apply also in respect of the territory of South-West Africa."

However, any act of Parliament might provide that *another* law should apply to the Territory. In particular, a General Law Amendment Act—one or more laws with such a title are enacted in each session of Parliament—might apply some of the laws amended by its provisions to the Territory.

69. The powers of the Governor-General (later the State President) and of the Administrator were set out in § 44 of the South-West Africa Constitution Act, No. 42 of 1925, as amended, which granted limited "home rule" to the whites (originally white males) of the Territory. For the powers of the Legislative Assembly, see *id.* §§ 25-30, 32-33.

The South West Africa Constitution Act, No. 39 of 1968, repealed and replaced, but substantially re-enacted, the 1925 Constitution. However, the South West Africa Affairs Act, No.

In 1977, in preparation for negotiations with the Contact Group concerning Namibian independence, the South African Parliament yielded its legislative power to the South African Governor-General, vesting him with plenary power to rule the Territory by decree.⁷⁰ Authority to rule is now exercised by the Administrator-General of South West Africa, to whom the State President has delegated his plenary power.⁷¹ In June 1985, the State President installed in Windhoek a "government of national unity" with a legislature of sixty-two nominated members.⁷² On paper, this government has power to legislate on a wide range of matters subject to approval by the Administrator-General.⁷³ Despite this nominal independence, Namibians charge that the Administrator-General calls the tune.

Most South African security laws were enacted after 1948 when the Nationalists came to power. These laws, which for the most part have been applied in Namibia as well,⁷⁴ include the Suppression of Communism Act (later retitled the Internal Security Act),⁷⁵ the Terrorism Act,⁷⁶

25 of 1969, substantially modified the 1968 Constitution, eliminating most of its "home rule" provisions and effectively transforming Namibia into a fifth province of the Republic.

70. South West Africa Constitution Amendment Act, No. 95 of 1977 (adding new subsections (1) and (2) to § 38 of the 1968 South West Africa Constitution Act, No. 39 of 1968).

71. Proc. 181 of 1977.

72. Proc. R. 101 of 1985, *supra* note 52, § 4 (1)(a).

73. *Id.* § 3.

74. Among the South African security laws that did not originally apply in Namibia were the Riotous Assemblies Act, No. 17 of 1956 (applied many years later, however); the "Sabotage Act," General Law Amendment Act, No. 76 of 1962, § 21; and the "90-day detention law," General Law Amendment Act, No. 37 of 1963, § 17.

75. No. 44 of 1950. This Act, *inter alia*, empowered the Minister of Justice, without notice and in his unreviewable discretion: to declare organizations to be unlawful and to disband them, penalizing members for their adherence prior to the date the organizations were declared illegal; to prohibit publications; to "ban" any person by restricting the person's activities (job, memberships, etc.), presence in or absence from specified areas (including imposing house arrest), right to attend "gatherings" (any meeting with two or more other persons), and the person's right to communicate with other "banned" persons; to require banned persons to report regularly (daily or weekly) to the police; to prohibit publication of speeches or writings of a banned person; and to detain persons in prison without trial or sentence. The Internal Security Act of 1950 was amended and consolidated with other security legislation in 1982. Internal Security Act, No. 74 of 1982. *See also infra* note 79 and accompanying text.

76. No. 83 of 1967. Section 2 of the Act created the new crime of "participation in terrorist activities" (terrorism), defined very broadly to include *any act* committed *anywhere* in the world if committed with "the intent to endanger the maintenance of law and order." Any accused person who is shown to have committed such an act is *presumed guilty* of having intended "to endanger the maintenance of law and order in the Republic," and is subject to capital punishment. He or she may rebut this presumption only by showing that the act committed was *not* likely to have *any* of twelve broadly-defined "results," and that he or she did not intend *any* of those "results." The "results" listed in § 2(2) include: encouraging the "achievement of any political aim" or bringing about "any social or economic change" in

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the Official Secrets Act,⁷⁷ and the Public Safety Act.⁷⁸ In 1982, a new consolidated Internal Security Act⁷⁹ replaced the earlier Internal Security Act and the Terrorism Act. In addition, the Protection of Information Act⁸⁰ replaced the Official Secrets Act. Although these 1982 laws were not made applicable to Namibia, and contained no provision saving the repealed legislation as to Namibia, Namibian lawyers treat the repealed laws as still in effect in the Territory.⁸¹ However, it now appears that the State President applied the Protection of Information Act and

cooperation with a foreign government or international body; causing injury to anyone; causing "substantial financial loss;" obstructing traffic; or "embarrass[ing] the administration of the affairs of State."

Thus, for example, among the acts which could constitute terrorism are cooperating with the World Health Organization to end chronic malnutrition among Africans, or running an advertising campaign to persuade housewives to switch from one brand of soap to another. The Reverend Allan Boesak has been charged for, inter alia, advocating divestment under the the equivalent provision of the Internal Security Act of 1982, *supra* note 75. N.Y. Times, Sept. 21, 1985, at A6, col. 1.

Section 6 of the Act provided for the unreviewable, indefinite detention for interrogation of any person believed to have information about a terrorist or a past or potential act of terrorism. Under the Act, the detained person could be held incommunicado, and the detention was not subject to judicial review. *See also* J. CARLSON, *supra* note 55, at 145-46 (reciting a colloquy between himself and a Security Police officer on cross-examination concerning the duration of detention).

77. No. 16 of 1956. This Act, as amended in 1969, was intended to protect South Africa against both foreign espionage and embarrassing revelations as to the operations of its intelligence service. It is characterized by undefined terms, by provisions shifting the burden of proof onto the accused, and by irrebuttable presumptions undercutting the defense of the accused. It outlaws proximity to any officially proclaimed "prohibited place" and penalizes breaches of trust as well as the publication, communication, or receipt of prohibited information. This Act has been consolidated in the Internal Security Act of 1982, *supra* note 75.

78. No. 3 of 1953. The Public Safety Act empowers the State President to declare a state of emergency in South Africa or Namibia and to issue emergency regulations authorizing, inter alia, summary arrest and detention. This Act was the legal basis for the declaration in the summer of 1985 of a state of emergency in thirty-six magisterial districts in South Africa. IDAF, Briefing Paper No. 19, Nov. 1985, at 2.

79. No. 74 of 1982. The 1982 Act repeals and replaces substantial parts of various laws relating to, for example, riotous assemblies, sabotage, and detention without trial. *See also supra* notes 75-77.

80. No. 84 of 1982. The Act, similar in many respects to the law it replaces, forbids anyone from being in a "prohibited place" and from obtaining or disclosing any information affecting state security or "interests." It creates numerous presumptions against an accused person, who has to establish his or her innocence, and it provides for trials in camera.

81. *See* A. Lubowski (a Namibian advocate), Speech at Seminar on Namibia, Sponsored by the South African Institute of Race Relations 12 (Johannesburg, July 2, 1984) (Terrorism Act still in effect in Namibia) (copy on file with the *Yale Journal of International Law*). On December 14, 1984, a Namibian journalist, Gwen Lister, was arrested and charged under the Official Secrets Act, *supra* note 77, and the Post Office Act, No. 44 of 1958, for revealing to the press a confidential police order to the postmaster to intercept her mail; the order had been erroneously addressed to her and placed in her post office box. The charges against her were dropped on the day set for trial. N.Y. Times, Dec. 15, 1984, at A5, col. 1; Rand Daily Mail (Johannesburg), Dec. 15, 1984 at 1, col. 1; Rand Daily Mail (Johannesburg) Dec. 19, 1984, at 2, col. 9; Windhoek Advertiser, Dec. 18, 1984, at 1; Windhoek Advertiser, Jan. 31, 1985, at 1.

certain other South African legislation to the Territory on the eve of installation of the new Namibian "government."⁸²

In addition to the South African security legislation applied in Namibia and the local law restricting political meetings,⁸³ a series of special laws have been promulgated for the Territory to deal with local opposition to South Africa's unlawful occupation of Namibia. These include (South African) Proclamation R. 17 of 1972,⁸⁴ the Security Districts Proclamation of 1977 (popularly known as "AG 9" or "Proclamation 9"),⁸⁵ and the Preventive Detention Proclamation of 1978.⁸⁶ Proclamation 9, like Proclamation R. 17, which it repealed and replaced, subjects most of the Territory to full or modified martial law.⁸⁷

82. RESISTER, Aug./Sept. 1985, at 9.

83. See *supra* note 64.

84. Proc. R. 17 of 1972.

85. No. AG 9 of 1977. The "AG" indicates that it was issued by the Administrator-General rather than by the South African State President. It is referred to in the Memorandum § E *passim*. The Proclamation (repeatedly amended) empowers the Administrator-General or his deputy to declare "security districts" (areas of full or modified martial law); it prohibits public meetings without official permission; and it empowers security forces in the district to search and seize without warrants, to arrest any persons there, and, as amended by Procs. AG 23 and AG 27 of 1979, to detain them incommunicado for interrogation for a period of 30 days, which may be extended *indefinitely* by the Administrator-General. As to detention under the proclamation, see *infra* Memorandum § E. 2 (the *Kakuya* case); Lubowski, *supra* note 81, at 9. The Proclamation also empowers the Administrator-General to declare "prohibited areas" ("no-go" zones) along the Namibian border, from which all civilians are removed. Proc. AG 9, § 3. They may be shot on sight in such areas for violating the night curfew. IDAF FOCUS, Mar.-Apr. 1985, at 9; see also *Repression and Resistance in Namibia*, IDAF Briefing Paper No. 14, Nov. 1984, at 1.

The Proclamation grants full immunity against any civil suit "in respect of a cause of action arising out of or in connection with the operation of the Proclamation." Proc. AG 9, § 8(1). Immunity from criminal prosecution is granted for all actions taken or omitted "in good faith" under the Proclamation. *Id.* § 8(2)(b).

86. Detention for the Prevention of Political Violence and Intimidation Proclamation, Proclamation AG 26 of 1978 (commonly referred to as "AG 26"). It empowers the Administrator-General to order the arrest and detention, for as long as he deems it desirable, *id.* § 3(3), of persons who may obstruct or hinder "peaceful and orderly constitutional development" in Namibia through violence or intimidation. *Id.* §§ 2(1)(a), (2)(b). This Proclamation was issued and first used to detain the entire SWAPO leadership at the time when South Africa was apparently agreeing to a UN-monitored election in Namibia, as proposed by the Contact Group. See *supra* note 35. It is discussed briefly in the Memorandum, *infra* § G.3.1.

87. Full martial law applies in the Kaokoveld ("Kaokoland"), Ovamboland, Kavango, Caprivi, and since March, 1985, in Bushmanland and Hereroland East as well. Govt. Notice AG No. 28 of 1985, S.W.A. Off. Gazette 5012 (Mar. 11, 1985). Modified martial law extends as far south as the Windhoek magisterial district in the center of the Territory. Full or modified martial law applies to more than 50% of the Territory's habitable land area and to some 80% of the Namibian population.

In addition to complying with the provisions of AG 9, residents of the areas to which full martial law applies are required to obtain a police permit to enter the area, and they must be accompanied by a police escort when they travel there. H. Angula, *The Effect of Security Legislation upon the Lives of People in Namibia* 7 (paper presented by Namibian attorney to Seminar on Legal Aspects of Apartheid, held in Washington, D. C. July 6-7, 1985, co-sponsored by the Southern Africa Project of the Lawyers' Committee for Civil Rights under Law

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D. *The Namibian Bar*

Namibia, like England, has a divided bar. "Advocates" are generally equivalent to barristers, and "attorneys" to solicitors. Each group has its own territory-wide professional organization. However, Namibian lawyers are concentrated in Windhoek, the only city of substantial size and the seat of both the territorial government and the white ethnic government.⁸⁸

The northern part of Namibia, where well over half the population lives, is reported to have no lawyers in private practice.⁸⁹ The people are poor and black; they are scattered in tiny hamlets and isolated kraals over a vast area; and the entire area is under full martial law, making the practice of any profession extremely difficult and dangerous.⁹⁰ Both the "Bar" (advocates) and the "Side Bar" (attorneys) are predominantly white, although there is no formal barrier to the admission of blacks.⁹¹ In fact, only one African lawyer is employed by a Namibian law firm. The Namibian Bar Council is the elected executive body of the Society of Advocates.

E. *The Commission of Inquiry*

A series of letters between the Bar Council on the one hand, and the Administrator-General and officials of the Commission on the other, is annexed to the Council's Memorandum and constitutes the body of sections A and B of the Memorandum. The first letter, dated January 25, 1983, urgently requested the Administrator-General to appoint a judicial commission to consider the problems of abuse by the Security Forces, such as deaths in detention facilities and other malpractices relating to

and the Section on Individual Rights and Responsibilities and the Standing Committee on World Order under Law, both of the American Bar Association). These permits are not granted routinely. Gwen Lister, editor-in-chief of *The Namibian*, has been refused a permit despite its importance for her work. Reuters dispatch, March 15, 1985.

88. Ethnic "homelands" were formally established for Africans by the Native Nations Act, *supra* note 23, with all land not allocated to them constituting the "white homeland." Under the controversial Representative Authorities Proclamation, No. AG 8 of 1980, these homelands were transformed into eleven ethnic areas, one for each recognized "population group," including whites, and each was to be governed by a "representative authority." Although such authorities are designated "second tier" governments, i.e., below the central government, they have more functions than the central government, and, in the case of the white representative authority, far more financial resources.

89. H. Angula, *supra* note 87, at 4.

90. *See supra* note 87.

91. Inadequate education, poverty, and continuing discrimination in fact discourage all but a few blacks. There is no university in Namibia, so blacks who wish to study law have to leave the Territory or study by correspondence.

detention without trial. The letter referred to the immunity of South African forces for acts committed in the war zone of Namibia,⁹² pointing out that the principle of immunity was "open to abuse."⁹³ The Council criticized the investigation launched by the heads of the security forces into allegations against their own members as "an exercise in futility."⁹⁴

The Council's second communication, sent after the Council had waited nearly eight months for a response, again asked the Administrator-General to appoint a commission of inquiry. This letter set forth specific abuses in detail and made reference to judicial findings in cases that had reached the courts.⁹⁵ On that same day, the Administrator-General publicly announced that he would set up a such a commission, and a draft proclamation was made public on November 2, 1983.

The draft proclamation was quickly attacked by the Council of Churches of Namibia (CCN). After considering the proposal at an "in-depth consultation of theologians," the church leaders called the proposed proclamation "an insincere and manipulative effort by the authorities to strengthen and justify existing security legislation."⁹⁶ The news account added:

Two employees of the CCN were detained for security reasons soon after the President of the CCN, Rev. Kauluma, and General Secretary, Dr. Abisai Shejavali, issued a statement condemning the terms of the Commission. A Security Police spokesman said the detentions were not aimed at the CCN, although it might be seen as such.⁹⁷

The Bar Council's reaction was similar. On December 9, 1983, it wrote the Secretary of the Commission that, although it welcomed the Administrator-General's decision to appoint a commission, it was forced to dissociate itself from the proposed terms of reference, both the preambular

92. See Proc. AG 9 of 1977, *supra* note 85; see also *Kauluma v. Minister of Defence*, 1984 (4) S.A. 59 (S.W. Afr. Sup. Ct.), Memorandum, *infra* §§ E.2 & E.10 (discussion of § 103ter of the Defence Act, No. 44 of 1957).

93. Letter of Jan. 25, 1983 (copy of letter on file with the annotator and the *Yale Journal of International Law*).

94. *Id.* Lubowski, *supra* note 81, at 13, refers to the statement of Brigadier Roos of the military Board of Enquiry, as reported in the Windhoek Advertiser, May 10, 1983, that "Security Force members used blindfolds when questioning people, and often *had to resort* to 'manhandling' to obtain admissions when . . . the persons involved were unwilling to co-operate while being in possession of certain information about the movement of insurgents in their areas." (Emphasis added.)

95. Memorandum Insake Geregtelike Kommissie Von Ondersock, S.W.A. Balieraad (Bar Council), Sept. 12, 1983 (copy on file with the *Yale Journal of International Law*).

96. Windhoek Advertiser, Sept. 30, 1983. Ultimately, however, the Council of Churches, like the Bar Council, decided to submit a memorandum to the Commission. The text of that memorandum has not been released.

97. *Id.*

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portion and the substantive provisions.⁹⁸ The Bar Council was disturbed that the proclamation establishing the Commission retained unchanged the terms of reference, “without any attempt to address the reservations expressed by the Bar Council and many others.”⁹⁹

The letter warned that the language of the preamble would be considered by many to reflect “the political and sectional value judgment of the government”¹⁰⁰ The Council noted that many Namibians flatly disagreed with that judgment. Consequently, the letter stated, “nothing can be better designed than such words to bring the Commission under suspicion as a mere propaganda instrument of the government of the day.”¹⁰¹ The letter also attacked the restrictiveness of the terms of reference, which appeared to bar the consideration of, in particular, the application of the security laws by the security forces and others. Since the terms of reference appeared to include such a bar, it was argued that witnesses testifying on the issue would not be assured of immunity, and many persons who would otherwise testify would be discouraged from submitting evidence. The letter also challenged the rule that evidence should be heard *in camera*.¹⁰² Further, the Council questioned the composition of the Commission itself,¹⁰³ urging that at least one or two prominent black persons be included. Finally, the Council deplored the lack of adequate protection for witnesses, pointing out that “[evidence] had been given in the Supreme Court where members of Koevet had warned and threatened people not to say anything against the security forces.”¹⁰⁴ The letter concluded:

The Society of Advocates . . . has decided unanimously at its annual general meeting on 2 December 1983, that it will be an exercise in futility for

98. Letter from S.W.A. Bar Council to the Secretary of the Commission of Enquiry into Security Legislation in South West Africa, Dec. 9, 1983 (copy on file with the *Yale Journal of International Law*) [hereinafter cited as Letter of Dec. 9, 1983]. The preambular portion of the terms of reference reads: “In view of the revolutionary onslaught on the territory of South West Africa and the terrorist struggle which is being waged in certain parts of the territory” It was followed by the substantive portion of the terms of reference: “[A Commission of Inquiry is appointed] to inquire into, and to report on and make recommendations as to the internal security of the said territory.”

99. Letter of Dec. 9, 1983, *supra* note 98, at 2.

100. *Id.* at 3.

101. *Id.*

102. *Id.* at 3-4.

103. The Commission was composed of Justice H. P. van Dyck of the Transvaal Bench, Chairman; H. J. Taljaard, territorial Secretary of Justice; Advocates J. D. du Bruyn of the South African Department of Justice and G. S. Coetzee of the Windhoek Bar; and Attorney Gert S. Muller of Windhoek.

104. Letter of Dec. 9, 1983, *supra* note 98, at 4.

the Bar Council, to submit a memorandum and to prepare for giving evidence, unless there is a sufficient response from the Administrator-General and the Commission itself in regard to the problems raised herein.¹⁰⁵

In his response of December 20, 1983, the Secretary to the Commission indicated that it was very unlikely that the terms of reference would be changed. However, he assured the Council that "despite the wording of the regulation, . . . unless the situation merits otherwise evidence will be given in public."¹⁰⁶ He added that the Commission felt that existing regulations adequately protected witnesses who wished to give evidence.¹⁰⁷

A month later, the Bar Council wrote that the Secretary's letter did not address the Council's main concern, which was widening the terms of reference to include the *application of the security laws*, the abuse of power by security forces, and the absence of safeguards and protection for Namibians to whom the laws are applied.¹⁰⁸

The last letter of the series, from the Chairman of the Commission, was dated February 16, 1984. Responding to the Bar Council's indication in its last letter that it wanted the problem resolved, the Chairman held out the possibility (which was not fulfilled) that the terms of reference would be modified.¹⁰⁹ He then added, however:

I am satisfied though, that the terms of reference of my Commission is [sic] wide enough to allow it to investigate and to make recommendations on the application of security laws, the alleged abuse of power and/or lack of adequate control and safeguards from higher authorities. After all, how would my Commission ever be in a position to be able to express its views on the fairness of legislation pertaining to security laws, if it is not presented with first-hand information regarding the application of security laws in practice?¹¹⁰

Ultimately, the Bar Council reluctantly decided to submit a formal memorandum despite the failure to broaden the terms of reference.¹¹¹

105. *Id.* at 4-5.

106. Letter from the Secretary of the Commission of Inquiry into Security Legislation in South West Africa to the Chairman of the South West Africa Bar Council, Dec. 20, 1983, at 2 (copy on file with the *Yale Journal of International Law*).

107. *Id.*

108. Letter from S.W.A. Bar Council to the Secretary of the Commission of Enquiry into Security Legislation in South West Africa, Jan. 24, 1984 (copy on file with the *Yale Journal of International Law*).

109. Letter from the Secretary of the Commission of Enquiry into Security Legislation in South West Africa to the Chairman of the South West Africa Bar Council, Feb. 16, 1984, at 1 (copy on file with the *Yale Journal of International Law*).

110. *Id.*

111. See notes 92-110 and accompanying text.

F. *Editing the Memorandum*

The Memorandum is undated, but was submitted sometime during the month of May, 1984. It is divided into seven sections and lettered alphabetically. In order to focus the discussion on the problems of the legal and political system, the Memorandum has been edited.

Sections A and B of the Memorandum describe the correspondence discussed immediately above, between the Commission, the Administrator-General, and the Bar Council concerning the terms of reference of the Commission. In the edited version below, these sections have been omitted. Section C lists additional sources of information which the Bar Council believes the Commission should consult. Section D states the "general approach" of the Society of Advocates.

Section E is especially important because it describes decided cases and makes suggestions for change based on the perceived abuses evident in the cases. Clearly repetitious material has been abridged, and the facts of some of the more involved cases have been summarized. In some cases, information that is common knowledge in Namibia has been added to clarify the situation for outside readers. Section F lists certain matters that time and space did not allow the Bar Council to discuss. Finally, Section G analyzes conditions in Namibia and presents general conclusions.

The Memorandum contains no footnotes. All footnotes have been added by the annotator.¹¹² In addition, all italics were part of the original Memorandum.¹¹³ All omissions, additions, and summaries are clearly indicated. The meaning of the Memorandum has not been changed, and the Bar Council's conclusions and comments are set out fully.

112. As to the orthography of African names, when the Memorandum contains varying spellings, the annotator has made them consistent. The variants are indicated in brackets.

113. Copies of the original unedited version of the Memorandum and the letters annexed to that version are on file with the *Yale Journal of International Law*.

The Memorandum

Memorandum Of The SWA Bar Council, Acting On Behalf Of The Society Of Advocates, In Regard To The Commission Of Enquiry Into Security Legislation

A. * * *

B. * * *

C. *Further Sources of Information:*

1. In so far as security legislation, principles and practices in the Republic of South Africa are applicable to South West Africa, we wish to refer to a publication entitled "Report on the Rabie Report—An Examination of Security Legislation in South Africa," published by the Centre for Applied Studies of the University of the Witwatersrand in March 1982, reference ISBN 0-85494-729-9. This publication is in fact a report of a seminar in which 36 advocates, attorneys and academic attorneys with experience in the field of security legislation, participated.

2. We adhere also to the view that one of the obvious sources of information, in addition to members of the Security Forces, for establishing the application and practices under security legislation, are detainees themselves, past and present. Without hearing evidence from this side of the spectrum, the truth cannot possibly be ascertained. Unfortunately, many such detainees have fled the country since their release, others live in fear, some are banned persons, some have disappeared and some died in detention. Nevertheless some will be available and may be willing to give evidence.

2.1. We suggest e.g. that the calling of a man such as Mr. Herman Toiva ya Toiva,¹¹⁴ recently released after serving 16 years of his sentence imposed at Pretoria in the trial of the *State v Tuhadeleni en Andere* 1969 (1) SA 153(A)¹¹⁵ will give confidence in the objectivity of the Commission.

114. The Memorandum refers to him as "Herman Toiva ya Toiva." The correct spelling is Toivo ja Toivo. "Ja" and "ya" are alternative spellings, but Mr. Toivo appears to prefer "ja." Since he was released from prison, Mr. Toivo has used Andimba rather than Herman, the name he was known by earlier.

115. 1969 (1) S.A. 153 (S. Afr. App. Div.). See *supra* note 55.

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2.2 Another related source is some banned publications written by people previously detained, but banned before the contents could become widely known.¹¹⁶

We can mention for example a publication containing a large number of affidavits used in an application for an interdict¹¹⁷ in the Supreme Court of South Africa, S.W.A. Division, in the case of *Franciscus Petrus-Applicant vs. the Minister of Police, First Respondent, Col. Wilhelm Fredrick Schoon, Second Respondent*.¹¹⁸

2.3 A large number of detainees, alleged former SWAPO “terrorists” or “guerrillas” are being detained indefinitely and without trial near Mariental¹¹⁹ and probably Oshakati.

116. See, e.g., H. HUNKE & J. ELLIS, TORTURE—A CANCER IN OUR SOCIETY (undated but known to be published in late 1977 or early 1978, Angelus Printing, Dobra, Namibia) (copy on file with the *Yale Journal of International Law*). This sixty-two page booklet consists primarily of sworn statements of persons detained by South African security forces, giving details of the torture they suffered while under interrogation; it also includes medical evidence and photos. Heinz Hunke was a Roman Catholic priest serving in Namibia, and Justin Ellis was a BBC correspondent and Anglican lay official in the Territory. The booklet was deemed “undesirable” and banned at the end of January 1978, and the authors were subsequently expelled from the Territory.

Other publications which deal with abuses of security legislation (or its application) in Namibia and which are not widely known include: Statement of Axel Johannes, Administrative Secretary of SWAPO (Mar. 16, 1979) (discussing an encounter with the police in Ovamboland on Feb. 7, 1979) (copy on file with the *Yale Journal of International Law*); “Namibia — A Nation Wronged,” a mimeographed report on a visit to Namibia by a mission sent by the British Council of Churches 16-28 Nov. 1981, with conclusions and recommendations dated Feb. 1982 (copy on file with the annotator); and South African Catholic Bishops’ Conference, Report on Namibia, May 12, 1982 (copy on file with the *Yale Journal of International Law*).

117. An interdict is substantially equivalent to an injunction.

118. The *Petrus* case is discussed *infra* Memorandum § E.7.

119. The Mariental detainees were captured on May 4, 1978, in a South African raid on Kassinga (Cassinga), a Namibian refugee camp in Angola, at the very moment when Pretoria’s representatives at the UN were announcing their government’s acceptance of the Contact Group’s plan for a UN-monitored election in Namibia. See *supra* note 31.

Some 200 Namibians were abducted and held for a couple months at Oshakati, in northern Namibia. A few were released there, and the rest were taken to the Keikamachab army camp near Mariental, where they were held incommunicado, allegedly under AG 9, until after the Memorandum’s submission.

Eventually the identity of some detainees was established, and a habeas corpus proceeding was brought on their behalf. *Kauluma v. Minister of Defence*, 1984 (4) S.A. 59 (S.W. Afr. Sup. Ct.) (leave to appeal granted according to the Windhoek Advertiser, Nov. 26, 1984). The proceeding was terminated by the invocation of § 103ter (4) of the Defence Act, No. 44 of 1957, which reads:

If any proceedings have at any time been instituted in a court of law against the State, the State President, the Minister [of Defense], a member of the South African Defence Force or any other person in the service of the State and the State President is of the opinion—

(a) that the proceedings were instituted by reason of an act advised, commanded, ordered, directed or done in good faith by the State President, the Minister or a member of the South African Defence Force for the purposes of or in connection with the prevention or suppression of terrorism in an operation area; and

(b) that it is in the national interest that the proceedings shall not be continued,

A veil of secrecy hangs over these detentions and should be probed as a matter of urgency.

D. *General Approach of the Society of Advocates*

1. It is one of the most important aims of the Society of Advocates, incorporated in its constitution, to uphold the Rule of Law, i.e. law and order based on justice, and in accordance with longstanding traditions, precepts and institutions, recognized and upheld in civilised and progressive societies.

We believe that the Rule of Law so defined, is indispensable in the long run for the survival of civilisation itself.

1.1 We realise however that the ideals and norms of the rule of law cannot always be maintained in a war situation or in the case of some other national emergency.

Nevertheless, vigilance is necessary to ensure that modifications are only made when absolutely necessary, and for so long as it is absolutely necessary.

1.2 It is because of human weakness that wide and unrestrained power leads to the abuse of power.

1.3 The abuse of power is apparent in the application of security laws and practices in our country today.

1.4 In Namibia the institutions of the Rule of Law such as the Police, the Courts, the legal practitioners and the law itself are *suspect* in the eyes of the overwhelming majority of our people.

1.5 A *large section* of the population never had any confidence in the security forces and security laws applicable to this country and probably has less confidence in them today.

1.6 This Commission can make some contribution to instil and/or to regain confidence in some of our institutions in this country by a courageous, impartial, and objective search for the truth, analysis and recommendations.

he shall authorize the Minister of Justice to issue a certificate directing that the proceedings shall not be continued.

Cf. The "BOSS Act," discussed *infra* note 132.

However, the outrage occasioned by this interference with the judicial process, as well as the public concern about the detainees, whose existence and incarceration the authorities kept secret, apparently persuaded the South African government to release the detainees. All but one were freed by October 1984. Windhoek Advertiser, Oct 19, 1984, at 1, col. 1; Wash. Post, Oct. 20, 1984, at A6, col. 3.

A month later it was announced that some of the detainees planned to sue the authorities for R 1,000,000 (\$500,000) for wrongful detention. Windhoek Advertiser, Nov. 26, 1984. Legal practitioners are still speculating whether section 103*ter* will be invoked again to quash the suit for damages. As of mid-December 1985, no decision had been handed down.

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2. * * * [The Bar Council criticizes, in whole blocks taken from its correspondences, the Administrator-General for failure to take account of the Council's reservations and criticisms and to amend accordingly the draft proclamation establishing the Commission.]

2.2 The differences between our situation and that in the R.S.A. [Republic of South Africa] and particularly the causes of the armed struggle, have been investigated and debated in trials before the Supreme Court of South West Africa such as:

The State v. Josef Sacharias and Others, 1983 (1) S.A. 833.¹²⁰

The State v. Angula Muvala, Supreme Court of S.W.A., 26.5.1983 unreported.¹²¹

2.2.1 It is a matter of some concern that very few cases of persons charged under the Terrorism Act have been brought before our Courts in recent years. It seems that the policy at present is to *fake [take?] alternative action* against alleged "terrorists" and those who assist them. This matter also deserves the attention of the Commission.

2.3 Many Namibians are caught in the physical and political crossfire between opposing forces. They are threatened by both sides and live in fear from day to day. It is in the face of such division and strife and in such circumstances that there is a need for all those who serve in the administration of justice, whether as State employees, judges, advocates on the staff of the Attorney-General's office or advocates and attorneys in private practice to remain impartial and uphold the ideals of the Rule of Law in so far as circumstances permit.

We are aware of atrocities committed by all sides and some positive contributions made by all sides.

We see the profession of policemen as a noble one without which justice cannot prevail, but then their task must remain the protection of society, the bringing of alleged offenders to trial and not that of licensed and programmed killers.

We must welcome the establishment of our own police force,¹²² but hope that care will be taken to build on sound foundations.

120. 1983 (1) S.A. 833 (S.W. Afr. Sup. Ct.) (original in Afrikaans).

121. S.W. Afr. Sup. Ct., May 26, 1983 (unreported).

122. The control of the police in Namibia has alternated between Pretoria and Windhoek ever since territorial whites obtained limited home rule under the South West Africa Constitution Act, No. 42 of 1925 (*superseded by* South West Africa Constitution Act, No. 39 of 1968). Thus, the reestablishment of the South West African Police on April 1, 1981, provided great nostalgic satisfaction to many old-timer whites. Windhoek Advertiser, April 2, 1981; *S. African Police Give Up Control in Namibia*, Fin. Times (London), Apr. 2, 1981, at 3, col 1.

E. *Comment on some decided cases and submissions flowing therefrom:*

1. Security laws and abuses of power related to them have a long history in this country.

The case of *Wood and Another v. Ondangwa [Ondangua] Tribal Authority and Others*, 1975 SA 294 (A.D.),¹²³ is an example of the abuse of power for political purposes on a massive scale by Tribal authorities.

Although the Appellate Division in this case did not deal with the part played by the government, the security police and others, it was well known at the time and known to some of the members of the Society of Advocates that the government and the Minister of Native Affairs of S.A., were not only aware of the abuse, but approved of it and even encouraged it and that the Security Police in S.W.A. actively aided and abetted the malpractices.

* * * [The case was brought by Anglican Bishop Wood and Lutheran Bishop (of the North) Auala and some victims to enjoin an Owambo "tribal authority" (a governmental body composed of local chiefs selected by Pretoria) from whipping persons handed over to them for punishment as SWAPO supporters.

In a period of great unrest, after more than 98% of eligible Owambos had boycotted tribal elections, persons suspected of political agitation in "Owambo"¹²⁴ were detained by the Security Police under Proclamation R. 17 of 1972. Afterwards they were turned over to the tribal authorities for "punishment." The victims—including political leaders, elderly persons, and women—were ordered stripped and whipped in public without any trial or after a farcical one.]¹²⁵

The consequence was that many more people became disillusioned with our system of justice—fled their country and joined the resistance. In this case the reluctance and/or the inability of the S.W.A. Division of the Supreme Court of South Africa¹²⁶ [to give relief]¹²⁷ was amply

123. 1975 (2) S.A. 294 (S.W. Afr. App. Div.).

124. "Owambo" was for generations known as "Ovamboland," and its inhabitants as "Ovambos." The names were changed, allegedly on the recommendation of anthropologists-linguists, without consulting the people concerned.

125. In the proceeding for an injunction, the applicants' witnesses testified that the victims had committed no crime. Furthermore, tribal custom, which the chiefs were presumably applying, did not sanction the whipping of women or elderly men under any circumstances, or of the *public* whipping of any adults. In addition, the severity of the sentences far exceeded that permitted by tribal custom. This was confirmed to the annotator in a long discussion with Bishop Auala, who had been secretary to a chief when he was young, and who was therefore well-versed in tribal custom.

126. The Supreme Court of Namibia (i.e., the South West Africa Division of the South African Supreme Court) is the territorial court of general jurisdiction, like the New York Supreme Court. It has original jurisdiction and also hears appeals from magistrates' courts.

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demonstrated, as in later cases such as *Franciscus Petrus v. Minister of Police and Another*, and *Ashipembe, Nakaua and Nahanga v. Minister of Police and Others*.¹²⁸

The Appeal Court pointed out the inability of the individual victim in an area such as Owambo to take his case to court timeously.

2. Perhaps the most dramatic exposure of the abuses of security laws and malpractice in S.W.A. appears in the recent case of *U. Kakuva and Another v. Administrator-General and Minister of Police*, presently on appeal.¹²⁹

In this case, which was an application by the wife of one Johannes Kakuva for a declaration presuming his death, his Lordship Mouton J. found that Johannes Kakuva together with a number of other citizens of Kaokoland in S.W.A. were detained by the Security Police at Opuwa.¹³⁰

All were detained in a small room without sufficient light or air. The detainees were blindfolded to disorientate them.

A large number of those detained were detained and blindfolded even though the Security Police knew from the outset that there were no legal grounds for their detention.

When released, after two days or more, those released were left to their own means of returning to their homes approximately 60 kilometres away.

The Court found that several of those detained for longer than two days, including Johannes Kakuva, were beaten by the Security Police and that Johannes Kakuva died at Opuwa in detention.

Those not released at an early stage were held in chains and one was kept in a toilet for days and another in a small cubicle for a gas bottle—where he could only crouch.¹³¹

The respondents' version was that Johannes Kakuva and others were detained under AG 9 of 1977 and that on the first day of questioning, Kakuva had agreed to become a spy for the Security Police. He was

Appeals are taken from it to the Appellate Division of the South Africa Supreme Court, which sits in Bloemfontein. Formerly known as the High Court of South West Africa, for several decades the South West Africa Division lacked jurisdiction over the Eastern Caprivi Zipfel (which was then virtually inaccessible from the rest of the Territory); during that period the Eastern Caprivi Zipfel was under the jurisdiction of the Transvaal Supreme Court.

127. The South West Africa Division found that none of the plaintiffs had standing to bring the action, but the Appellate Division held that the two bishops had a legal interest in the physical and moral welfare of their parishioners and of all Christians in the area.

128. See *infra* Memorandum § E.8 and text accompanying note 149.

129. The appeal was reportedly dismissed. Windhoek Observer, Dec. 15, 1984.

130. Older maps refer to "Ohopoho," instead of "Opuwa" (or "Opuwe"), and to the "Kaokoveld" instead of "Kaokoland."

131. See *infra* Addendum, text accompanying note 193.

taken the day after to some remote spot in Kaokoland to make contact with SWAPO insurgents and then to meet the Security Police subsequently to pass on whatever information he had obtained. The story goes on to say that Kakuva did not keep his appointment and was never seen again and the respondents also accepted that he was dead, but not as a result of any assault by them.

It was common cause that Johannes Kakuva was a person with a strong personality, a relatively rich man and an influential and respected man in his area—with a close and happy family—including wife and about 8 minor children—father—brothers and sisters and so on.

It was common cause that when enquiries were initially made by relatives, friends and even headmen at the Security Branch, Opuwa, members of the Security Branch deliberately lied to those who enquired and for a substantial period persisted with the story that Kakuva was still held at Opuwa.

It was common cause that no members of the security branch ever took the trouble to enquire whether Kakuva had a family, had dependants, and no effort was ever made to inform these people of the circumstances of Kakuva's disappearance and presumed death.

It was common cause that the attorneys for applicant before the institution of legal proceedings informed the Administrator-General of the dissatisfaction of the family at the disappearance of Kakuva, but the Administrator-General merely called in the head of the Security Police and accepted a written report, unverified by affidavits.

It was also common cause that the then head of the Security Police only relied on the mere say-so of Captain King, the most senior of the team of Security Police interrogating the detainees at Opuwa at the relevant time.

When legal proceedings were launched in which grave allegations were made by several surviving detainees, the Administrator-General and the Minister of Police gave instructions to defend the good name of the Police.

Neither the Administrator-General nor the head of Security Police took any further steps to investigate the matter, but left it in the hands of the State Attorney. A member of the Security Police, a non-commissioned officer, was however assigned to assist the aforesaid State Attorney, and he admitted into evidence that he became in effect a mere messenger of the State Attorney.

He explained that he had refrained from questioning the detainees themselves and merely acted under the instructions of the State Attorney.

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It is significant that at no stage was there any indication from the authorities that proper investigation would be instituted with a view to a possible criminal prosecution—not even after the damning evidence in the course of the trial and the clear judgment of the Court on 14 June 1983.

It must be stressed here that even if the story of the Security Police was true, their own story amounted to the gravest abuse of the rights of a detainee, i.e., to send the detainee on a dangerous mission on the basis of a so-called consent obtained in detention when there was no opportunity for the exercise of his own free will. At no stage was any attempt made to compensate the widow and children for the loss of a father on alleged active service of the government.

The Security Police could not produce any record of the detention at Opuwa and explained that they were not required to keep records of *AG 9 of 1977* detainees. They all confirmed that they knew of no standing order, regulation or other instructions from higher authority pertaining to the detention by them of detainees.

However, it was alleged that certain investigation diaries had been kept, that some of these diaries had been destroyed by them after use but that those of Johannes Kakuva and four of the other detainees had been kept.

When Applicant applied for the disclosure of these diaries, the Administrator-General stepped in and issued a certificate in terms of Section 29(1) of Act 101 of 1969 which forbade the disclosure of the said investigation diaries.¹³²

The Court was powerless to question this order.

Prima facie, the disclosure of these documents could only aid the search for the truth.

Again, this particular exercise of the powers of the Administrator-General in terms of the aforesaid General Laws Amendment Act on the

132. Section 29 of the General Law Amendment Act, No. 101 of 1969 (*as amended by the General Law Amendment Act, No. 102 of 1972, § 25*); *superseded by* Internal Security Act, No. 74 of 1982. Section 66 of the 1969 Act is commonly called the “BOSS Act” because it was enacted to protect the Bureau of State Security (since renamed) from exposure of its activities as well as from civil suits for damages. Ostensibly a rule of evidence, the section empowered any cabinet minister (the term now includes the Administrator-General) to intervene in any court or administrative agency to prevent the introduction of any testimony, information, or evidence which would otherwise be compellable or permissible. The Minister or Administrator-General need only present his affidavit to the court or agency stating that he has considered the matter and that, in his opinion, the evidence will prejudicially affect the security of the state. The court or agency may not question the affidavit or the affiant. *Cf.* § 103*ter* (4) of the Defence Act, discussed *supra* note 119.

ground that the security of the State could be prejudiced by the disclosure of the aforesaid investigation diaries, is unacceptable and should be thoroughly investigated by the Commission.

The law should be amended in S.W.A. to at least empower the Court to override the decisions of the executive in certain circumstances.

This law, used in conjunction with security legislation, the Official Secrets Act No. 16 of 1956¹³³ and Section 153 of the Criminal Procedure Act 51 of 1977,¹³⁴ often effectively prevents the exposure of crimes and/or malpractices. By so doing the system of administration of justice becomes suspect.

The case continued for several months before a decision was given.

The Court found that a lot of time and money could have been saved if the Administrator-General had launched an impartial and thorough investigation when requested to do so by attorneys for Applicant.

It was also clearly established that the Administrator-General acted on mere *letters* from the Security Branch without any substantiation on affidavit, . . . [in issuing] orders for further detention of detainees held under Proc. AG 9.¹³⁵

In some cases it approved the documents [to be] presented to Court, that were prepared in advance by the Security Police and were merely rubber-stamped by the representative of the Attorney-General. The explanation for this remained uncertain and confusing throughout the trial.

It was also clearly substantiated at the trial that the letters written by the Security Branch in support of applications for authority for further detentions, were often inaccurate and contained serious misrepresentations.

It was clearly established at the trial that Proc. AG 9 of 1977 was used "*to remove citizens from society*," without trial, and that this interpretation and policy enjoyed the support of the Security Police and the Administrator-General and some members of the Ministers Council.¹³⁶

133. No. 16 of 1956, *superseded by* Protection of Information Act, No. 84 of 1982.

134. No. 51 of 1977. Section 153(2) provides that a court in a criminal case may, if convinced that a witness (other than an accused) would be in danger if he or she testifies, order "(a) that such person shall testify behind closed doors . . . [and] (b) that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court."

135. Under AG 9, as amended, a person may be detained by the arresting officer for thirty days for the purpose of interrogation. Thereafter, the Administrator-General may order the detainee held indefinitely. *See supra* note 85. The Administrator-General normally orders further detention on the basis of representations made to him by the Security Branch.

136. The Ministers Council was a quasi-cabinet in the "government" established by South Africa in Namibia following the 1978 election. *See supra* note 41.

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This was given as the explanation why people detained for months were only questioned on one occasion, on the second day of their detention, and why no written statements were ever taken from them.

It was also common cause that a strange construction existed at the regular place of detention at Opuwa.

The possible inference to be drawn from the mere existence of this structure was that it could be used for irregular interrogation methods.¹³⁷

Whenever the Applicant's Counsel attempted to put questions on the use of this structure, Counsel for the Administrator-General and the Minister of Police objected that it was irrelevant, and the Court upheld this objection.

Nevertheless it is submitted that it will be justified and advisable if this Commission can establish the facts in this connection.

It was also clearly established in this trial that it would be impossible for the ordinary individual to take a matter such as this to Court without financial assistance from others.¹³⁸

It was apparent at the trial that many of the local community, including some headmen, were very unhappy with the conduct of the Security Police.

It is an example of how abuses and malpractices under the shield of security laws, can lead to the alienation of our people, rather than their protection and survival.

It is submitted that the combination of provisions to keep certain facts secret used in conjunction with Security Laws and practices may in some cases assist in the protection of the security of the State, but in others it may serve merely to cover up scandalous actions, and thereby undermine State Security in the long run.

137. The Bar Council's carefully worded suspicion as to the use of the "strange construction" reflects the continuous stream of reports concerning torture by South African security forces. In *Kauluma v. Minister of Defence*, 1984 (4) S.A. 59 (S.W. Afr. Sup. Ct.), the affidavit of Benedictus Shilongo detailed the treatment to which he and other Namibians seized at Kassinga were subjected while they were held at Oshakati. (He was released when most of the detainees were transferred to Mariental). The attorney for the applicants summarized in English the fifth paragraph of Shilongo's affidavit (written in Afrikaans):

[D]uring his detention electric shocks were applied to him and . . . he was assaulted in various ways He saw that one of the detainees . . . Nikodemus Katofa, was suspended for long periods with his arms tied to a pole with his feet off the ground. He further states that the most part he was blindfolded and that he frequently heard screaming in the camp.

(Copy of the application with appended affidavits on file with the annotator.)

138. Many legal proceedings, such as the application for the release of the Mariental detainees, *supra* note 119, have been financed by concerned foreign human rights organizations, such as the Southern Africa Project of the Lawyers Committee for Civil Rights under Law, and various churches.

We are convinced that the review of these provisions is necessary.

AG 9 of 1977 should be drastically amended to provide [detention] only for the purpose of interrogation and not for indefinite detention without trial. Without adequate controls, legislation such as *AG 9 of 1977* cannot stand without abuse and . . . controls even by the highest executives can never protect the citizen.

What is required is access to the detainee by his family and/or a legal representative of their choice and access to the Supreme Court at an early stage.

In addition no prescription should run against any detainee for actions instituted against the State by him or by his dependent for the period in detention and/or the period from detention to the date that his death is established or presumed.

3. A recent case which lifted the veil of secrecy on the activities of the special police unit "Koevoet" must be mentioned.

We refer to the application of *Kandohombe [Kandjohomba] vs Hamakali, Ruben and the Administrator General*, which was heard before the Supreme Court of S.W.A. on 22 July 1983.

In this application applicant, a shopkeeper in Owambo and a man of some means, applied for an interdict against certain members of Koevoet to be restrained from threatening him and from molesting him.

He averred that it served no purpose to lay complaints with the police against Koevoet because the ordinary police were reluctant to interfere in the affairs of Koevoet, and he and the people of Owambo lived in fear of Koevoet.

In support of his allegation that he feared for his life, he stated that another person was shot and killed the previous year at a nearby restaurant at Oshakati by members of Koevoet without reason.

The Supreme Court granted him a rule nisi, serving as an interim interdict and referred the matter to the Attorney General for action and suggested that Counsel for Applicant, B. O'Linn S.C.,¹³⁹ should see the Attorney General and bring to his attention some matters apparent from the papers.

It appeared that the dead man referred to, one Moses Aaron, was apparently removed from hospital by members of Koevoet and buried, without notice to his relatives, in some unknown grave and without any prior investigation or inquest.

139. Chairman of the Bar Council. "S.C." is the abbreviation for State Counsel, the equivalent of Queen's (King's) Counsel in Britain.

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It appeared from the papers *prima facie* that some serious offences had been committed by some senior unknown police officers and/or officials *in allowing or instructing such a course*.

The Attorney General was fully apprized of these facts and informed that not only the client, and the Court, but also the Bar Council, were interested in this matter.

The Attorney General ordered a prosecution against the said Hamakali for *pointing a firearm* at the said Kandohombo, and Hamakali, represented by the State Attorney, was duly convicted and his subsequent appeal to the Supreme Court dismissed.

In the meantime, the said Koevoet policeman, Hamakali, allegedly died after detonating a landmine.

At the criminal trial aforesaid, a senior officer of Koevoet, Major Winter, gave evidence for the accused and stated that he *had sent* the aforesaid Hamakali and another member of Koevoet to go and *warn* the aforesaid Kandohombe for having lodged complaints against Koevoet.

What sort of “*warning*” and his right to do so were not investigated in Court.

Counsel for the Applicant, on behalf of his client and the Bar Council pointed out to the Attorney General, Mr. Brunette, on several occasions the need for investigating and establishing under what right Koevoet was acting when they “warn” citizens and under what right Koevoet buried the man [who was] shot without an enquiry, without an inquest and without notifying the relatives. It was pointed out that *prima facie* offences under the Inquest Act and even the offence of attempting to defeat the ends of justice had been committed.

The Attorney General informed Counsel that he had not power to take any initiative, that he could only take decisions on matters referred to him by the police and that it appeared that no inquest had ever been held and that the police (undisclosed) had given the explanation that the man killed was a terrorist who had tried to escape and that they could apparently not understand why their action should be queried.

Counsel pointed out to the said Attorney General that according to the affidavits supporting the aforesaid application, the deceased, although an alleged “Terrorist” brought back from Angola about two years prior to his death, had been in the pay of the government for a substantial period and that there was no support in the available affidavits for the allegation that the deceased was “*a terrorist shot when attempting to escape.*”

The Attorney General subsequently informed the said Counsel that his successor, Adv. T. Louw, had ordered an *inquest* into the death of the deceased, Moses Aaron.

Counsel, Adv. O'Linn, also explained to the said Adv. Louw, after the latter had become Attorney General, the concern of the Bar Council.

On or about 24 March 1984, the last mentioned *Attorney General* informed the said Adv. O'Linn that an inquest had been held and that it was unsatisfactory and that he had raised certain queries. He was unwilling to allow Counsel insight into the inquest documents at this stage. To date, no investigation has been conducted into possible offences under the Inquest Act, and no prosecutions have taken place in this connection.

It is submitted that the Commission should also as a matter of urgency, investigate the following questions:

(i) The circumstances surrounding the killing and burial of Moses Aaron and particularly whether or not there was a *cover-up* by the police involved

[W]itnesses Ephraim Iyambo and Lebeus Shipoke¹⁴⁰ should be called by the Commission as witnesses.

(ii) In view of the *alleged* allegations by *unknown* members of the Police Force that the deceased Moses Aaron was a *terrorist who had tried to escape*, an investigation is required into the conditions under which "terrorists" are held and particularly who the inmates are of the "police camp" known as "Onaimundi-bases" at Oshakati.

(iii) What are the rights of Security Forces such as Koevoet to kill and bury citizens of Owambo, without informing the relatives, without an open enquiry or inquest and in their unfettered discretion.

(iv) Can Koevoet do this to an *alleged terrorist* killed in a place like Oshakati and not in the heat of battle?

(v) Is the mere say-so of members of Koevoet, that a slain person was a "terrorist," enough?

(vi) Is this a practice?

(vii) In which cases has this practice been followed?

(viii) Where are the graves of the people so killed and buried?

(ix) Why and in terms of which law, does *Koevoet* warn citizens who had complained against them?

(x) Who controls Koevoet, and what are these controls? How do you qualify for membership of Koevoet and what is the need and task of such a unit?

140. This suggests that some prior reference to them was omitted. From the text it seems probable that they were witnesses to the death or burial of Moses Aaron.

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- (xi) What machinery exists for the investigation of complaints against Koevoet?
- (xii) What has happened to prisoners, alleged [to be] SWAPO terrorists, arrested or detained by Koevoet and other units of the Security Forces?
- (xiii) Under what laws are these people detained at Oshakati, Mariental and elsewhere?
- (xiv) What controls are there relating to [the conditions of] detention?
- (xv) For what purposes are these detainees used and what is required from them to qualify for “*rehabilitation*”?¹⁴¹
- (xvi) *The effectiveness and appropriateness of the present inquest procedures, even when applied as a means to establish the truth.*
- (xvii) Whether or not the office of the Attorney-General requires more powers to take initiatives in cases of this nature and to what extent amendments of the law are required.
- (xviii) The need to end the division of the Police Forces into those doing ordinary police work and those special units with a mandate to kill rather than to arrest and charge before the courts of law.

The submission is that there is no need for any police unit with instructions to kill in the first place instead of to arrest and bring to trial.

If the authorities feel the need for such a unit, it should be completely divorced from the Police Force as such and not go under the name and title of police.¹⁴²

141. The Administrator-General has offered amnesty to deserters from PLAN for a number of years; however, all deserters must undergo a period of “rehabilitation” before they are allowed to return home. When they return, their immediate past history may leave them little alternative to the kinds of work undertaken by P. Matheus as a member of Koevoet, *see infra* notes 144-47 and accompanying text, or by the ex-SWAPO member who allegedly spied on passers-by at the Oshivello gate, *see infra* note 151 and accompanying text.

The Namibian, Dec. 13, 1985, at 8, col. 1, reports that a former SWAPO guerrilla was given an R2000 (\$750) bonus for giving himself up under the amnesty proclaimed by the newly installed interim government, superseding that proclaimed by the Administrator-General. The former guerrilla said he would join SWATF, the Territorial Forces, “because I don’t see any other place where I can protect my life.” *Id.*

142. The HNP memorandum, *supra* note 63, reportedly described Koevoet as “extremely successful,” and contributing more to peace and order “than it got credit for.” Windhoek Observer, Nov. 10, 1984, at 26, col. 4; Windhoek Advertiser, Nov. 9, 1984.

In August 1984, the South African Media Council (a self-regulating professional body) considered a complaint by Brig. J. V. van der Merwe, a Police spokesman, against the *Pretoria News* for an editorial entitled “Mad Dogs?,” which referred to the Namibian Bar Council’s Memorandum on the alleged activities of Koevoet as “the most damning indictment yet of this shadowy section of the police” The newspaper defended its editorial as fair comment, but the Brigadier claimed that it had evoked a “feeling of hatred and loathing” by the public towards the Police and argued that the Bar Council’s submissions were one-sided and unsubstantiated. *See Media Panel Discusses Paper’s Criticism of Police*, FBIS (Mid. East), Aug. 7, 1984, at U7 (text from Johannesburg SAPA in English).

4. * * * [*State v. Nagel*¹⁴³ involved a young member of the “police special task unit” who was convicted of culpable homicide for shooting a black civilian “in cold blood” in Windhoek.

Evidence was given *in camera* by the officer in charge of training the unit. The Bar Council stated that they were “reliably informed” that the officer testified that he trained members to be “*programmed* killers” and would like the defendant back in his unit despite his crime. The authors of the memorandum added that a senior officer of the unit had been pictured recently wearing a vest with the motto “*killing is our business—business is good.*”]

The evidence of the officer given *in camera* as well as that of the psychiatrist called to testify in mitigation, should be studied by the Commission to get an insight in the *norms* applied by these units and the effect thereof on the administration of justice and our community. It seems clear that the norm of the “*policemen*” of Koevoet and [of] this special task force is to shoot first and ask questions later—even if the person in front of them is outwardly an *unarmed civilian*.

Instead, therefore, of the first duty to *protect* the *civilian*, the purpose here is to rather protect the “policeman” and sacrifice the *civilian*. Furthermore, the rule is not to *wound* the suspect so that he may be arrested and taken into custody, but to *empty* the magazine and to kill in order to prevent the possibility of the suspect defending himself. The policy and method are even more dangerous and explosive when the elements of “*race*” and ideology are part and parcel of the indoctrination.

The policy and method of “programming” members of these units may certainly enable the security forces to kill more terrorists, but certainly also more civilians.

We believe there is a need for an urgent investigation by the Commission into the methods of training of this unit and to propose ways and means to bring this unit nearer to the tasks and norms of conduct of the true police officer. Alternatively, to abolish it, or, in the further alternative, to separate this unit also completely from the police force as such.

* * * [In *State v. J. Paulus and P. Matheus*] Koevoet members were convicted of murder, rape and robbery.¹⁴⁴

Before joining Koevoet Matheus was a SWAPO guerrilla, and Paulus was a UNITA fighter,¹⁴⁵ who had “seen and experienced violence from

143. S.W. Afr. Div., Aug. 26, 1981 (unreported).

144. The sentences of Paulus and Matheus were confirmed by the Appellate Division. Windhoek Observer, Sept. 19, 1984.

145. UNITA, under Jonas Savimbi, is engaged in civil war against the Angolan government with both covert and overt assistance from the South African government. *Captured*

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an early age.” The judge accepted evidence of a psychiatrist-neurologist that indoctrination by both UNITA and Koevoet had made the defendants “in effect *programmed killers*.”¹⁴⁶

Paulus testified that village people who did not co-operate sufficiently in Koevoet’s view were often assaulted by members of Koevoet. He added that money, described as “*kopgeld* [*“bounty money”*] is paid members of Koevoet for every alleged terrorist killed.”¹⁴⁷

“It was clear,” the Bar Council stated, “from the evidence that the inhabitants of Owambo live in fear of Koevoet.”

State witness Simon Nghoshi, the investigating officer in the case and a warrant officer with 14 years’ service in the South West Africa Police, refused to answer questions about the activities of Koevoet on cross-examination because he feared for his own life should he do so. However, he testified that there was a state of lawlessness in the (segregated black) township of Oneshila, Oshakati, in Owambo, because there was no control over weapons and ammunition issued to Koevoet members; that undisciplined Koevoet members committed crimes of violence against the inhabitants; and that policemen attempting to investigate these crimes were in danger of their lives.

The presiding judge, Strydom J., said in his judgment at p. 250 of the record:

From his evidence and the submissions that were put to him, a disturbing situation has come to light. . . . Before I proceed to sentence the accused, I want to comment on the evidence of Warrant Officer Nghoshi in connection with the problems the police encountered in carrying out arrests in the

RSA Commando Reveals Mission Tactics, FBIS (Mid. East), May 29, 1985, at U1 (text from Luanda Domestic Service Broadcast) (press interview with a member of the South African Special Forces captured while attempting to blow up Gulf refinery at Cabinda, the action to have been attributed to UNITA); *Guardian* (U. K.), Nov. 21, 1985, at 9, col. 1; *Guardian* (U.K.), Dec. 16, 1985, at 8, col. 1. See also J. STOCKWELL, *supra* note 59.

146. Record, at 495 *et seq.* (on file with the *Yale Journal of International Law*).

147. It is commonly supposed that the attitudes engendered by the offer of bounty money affect all security forces. Thus there are repeated questions about the ratio of “terrorists” killed to those captured by the South African army. See KOENIG, *NAMIBIA: THE RAVAGES OF WAR 47* (IDAF 1983) (citing testimony concerning the capture and treatment by South African Forces of combatants of PLAN, given by IDAF to the Ad Hoc Working Group of Experts of the UN Commission on Human Rights, in London, July 12, 1982); see also 1982: *Tighter Restrictions, Continued Repression*, 1982 SOUTHERN AFRICA PROJECT ANNUAL REPORT 25; *Windhoek Advertiser*, Sept. 21, 1983; *Windhoek Observer*, July 30, 1983.

In *S. v. Rabanus Ndara*, Mar. 22, 1984 (S.W. Afr. Div.), the defendant, a section commander, was convicted of murdering his colleague by shooting him between the eyes with a pistol. On cross-examination, Ndara indicated that he had seen people shot in the same way before, explaining, “I have seen that when we have *captured SWAPO* terrorists and the officer commanding says—you must shoot him and usually we aim in this manner, we shoot him in this manner.” Ndara indicated that in such cases the SWAPO captive dies. (Translation from the Afrikaans of the court record by a Namibian lawyer) (emphasis added).

case of crimes committed by members of Koevoet. I find it quite incomprehensible that in such a case there wasn't a greater degree of coordination between commanders of the various units. . . .

Record p. 513. (Unofficial translation from the Afrikaans by a South African lawyer.)

The Bar Council concluded that "the Commission should take a close look at this evidence and even call some of the witnesses to testify before the Commission."]

6. * * * [In *S. v. Mushimba [Muchimba] and Others*¹⁴⁸ the conviction of the defendants for the murder of Owambo chief Elias was reversed on the ground of misconduct on the part of the government: The Security Police had obtained information from a partner of the defending attorneys as to the defense being prepared on behalf of the accused.

The Bar Council commented that "Mushimba's case demonstrates the lengths to which the Security Police are willing to go in order to achieve their objectives."

Subsequently Nkandi and others were charged with the same murder.¹⁴⁹

When the state attempted to introduce several confessions, the defense alleged that they were obtained by "assaults, intimidation and other irregularities." It established that several suspects and potential witnesses, detained under section 6 of the Terrorism Act, were taken by the Security Police to a secluded area for extensive questioning. When the defense asked for records, an officer testified that he had destroyed any that had been made. The prosecution was forced to withdraw the confessions, and its case collapsed.

The memorandum noted that these cases also illustrated the ease with which provisions for magistrates' visits to detainees could be evaded.]¹⁵⁰

7. * * * [In *Franciscus Petrus v. Minister of Police and Col. Schoon*, a father sought an interdict to prevent assaults on his son, who had been detained by the Security Police under section 6 of the Terrorism Act. The application included many affidavits by other detainees who alleged that

148. 1977 (2) S.A. 829 (S.W. Afr. App. Div.).

149. All charges were withdrawn before judgment. Therefore, no official record was made. Notes of conversation with defense counsel on file with the annotator.

150. South African detention laws traditionally contained at least a conditional provision for regular visits to detainees by a magistrate. *E.g.*, § 6(7) of the Terrorism Act, No. 83 of 1967, superseded by the Internal Security Act, No. 74 of 1982, *supra* note 76, provided, "If circumstances so permit, a detainee shall be visited in private by a magistrate at least once a fortnight." (emphasis added.) Such provisions do not specify what a magistrate shall do if a complaint is made. Apparently most magistrates report complaints to the officer in charge of the detainees, who may thereupon "punish" them for complaining—while continuing the conditions or actions complained of.

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they had been tortured and included photos of some of the injuries they sustained.

The respondents replied that the detainee had never complained to a visiting magistrate of any mistreatment.

The Bar Council pointed out that the facts of this case clearly demonstrated again the ineffectiveness of the “safeguard” in the detention laws which provides for periodic visits to detainees by magistrates. The memorandum stated that counsel “agreed” that the absence of complaints to the magistrate was not probative because a detainee would not be likely to complain to a magistrate when he/she knew that the latter would simply report the complaint to the police who had custody. The laws did not give the magistrate authority to protect the detainee or to obtain his/her release; he could not even communicate with the detainee’s (or applicant’s) lawyers.

While the judges of the South West Africa Division were delivering their judgment rejecting the application, a report was received that the detainee had made a report to the magistrate that he had been assaulted. Although informed of this complaint, the Court continued reading their judgment. At the end the Court stated that the new information would not have affected their judgment.

An appeal was taken, but became moot when the detainee was released.]

8. * * * [*Ashipemba and Nakaua [Nakana] v. Minister of Police* was an application for habeas corpus to compel the police to produce applicants’ husbands to Court. The three applicants averred that their husbands had disappeared, and in each case the applicant believed that he had been taken into custody by members of the Security Forces.

According to the second applicant people in camouflage uniform with FM rifles broke into the Nakaua residence, seized Johannes Nakaua, and took him away in a “heavy vehicle which sounded like an Ondjamba (olifant)—a type of vehicle used by the Security Forces.”

Matthias Ashipemba disappeared on his way to Windhoek to meet his wife, Rauha, who was returning from abroad.

Mathias Nkanga [Nakanga], “a plain man, uneducated, apolitical, who only wanted a lift to go and seek work at Tsumeb,” disappeared with Ashipemba, with whom he was riding.

After the hearing on the application, to which formal objections were entered, lawyers on both sides agreed that Brigadier Coetzee, a “high ranking” South African police officer, should conduct an impartial investigation. But the investigation “was unsatisfactory and remained indecisive.”

Army records showed that the vehicle in which Ashipemba and a passenger were driving was last seen and recorded at the Oshivello [Oshivello] gate¹⁵¹ on the road from Ondangwa to Windhoek. Coetzee did not follow up, and the soldier who made the record was never identified. The Bar Council felt, however, that "with some real effort, the soldier who made the note could have been traced."

The missing men were never found. No accident was ever reported, and Ashipemba's vehicle was never found.

The application for habeas corpus was eventually withdrawn. However, Mrs. Ashipemba and her sister, Mrs. Willibaldine Mapupa, subsequently sued the Security Police and the Minister for damages for unlawfully arresting and detaining them while they were inquiring about Mr. Ashipemba's disappearance:

In Oshakati Mrs Ashipemba learned that her husband had indeed driven off in his car to meet her in Windhoek and that he had last been seen at Oshivello. The two sisters therefore went to Oshivello, where they made discreet inquiries.

When they inquired of police stationed at the Oshivello gate about Mrs. Ashipemba's husband, they were told the police knew nothing about the matter. However, the guard thereupon ordered them into a police vehicle and drove them to Oshakati, where they were detained for a month by the Security Police.

The defendants in the civil action said that they had detained the women under A-G 9, based on information—which they would not, however, divulge—that the sisters were SWAPO spies. The Security Police explained that—although detention is authorized by A-G 9 for the purpose of interrogation—they had never questioned the two detainees because they knew that the women would lie! The Bar Council concluded, therefore, that the only purpose of detention was intimidation.

The plaintiffs accepted an offer to settle their suit for R 5000 [then \$2500], and the case was withdrawn.

In discussing the disappearance of Ashipemba and his passenger, the memorandum concluded that "the only reasonable inference is that Ashipemba and Nkanga had been killed by someone and their vehicle destroyed."

151. Oshivello is the name of the hamlet where the paved road north from Windhoek enters Ovamboland. All persons entering or leaving are cleared at the army checkpoint since Ovamboland is under full martial law. *See supra* note 85. Security Council Resolution 435, *supra* note 33, provides that 1500 South African troops may remain in Namibia, after the rest are withdrawn, until the election has been held. These 1500 soldiers are to be confined to base at Grootfontein (the army's main base, farther north) and/or Oshivello.

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This inference was strengthened by the Bar Council's "mention" of an allegation made to two of its members by a lawyer for the respondent in both Ashipemba cases: That lawyer had "heard" that the Security Forces used an ex-SWAPO "terrorist" at the Oshivello gate to point out to the Security Forces SWAPO "suspects" passing through the gate there. The ex-terrorist was said to sit in a tent where he could see outside, but people could not see him. According to the lawyer's account, a person who had been fingered was allowed to pass through the gate, but 20 kilometers or so beyond he was picked up by a vehicle or helicopter—"probably never to be seen again."

The Bar Council offered to disclose to the Commission in confidence the identity of the person who made these allegations and suggested that he be subpoenaed to give evidence about them.

The Council noted that both Nakaua and Ashipemba were suspected by the Security Police of opposition to the regime. It concluded that "the grave suspicion is that Ashipemba, Nakaua and Nkanga were abducted and murdered by people other than SWAPO and that there is a cover-up of the true facts."]

It will be necessary for the Commission to attempt to find answers to the questions left open in this case.

It will be interesting to establish whether any steps were taken by the authorities to discipline the Security Police involved for the abuse of *AG 9 of 1977* and the scandalous treatment meted out to two women who needed sympathy and assistance for the loss of a husband and were instead incarcerated by the very "protectors" of the community.

If not, it will only strengthen the suspicions of many that these practices carry the official approval of the government in high places.

9. *The State v. Stephanus, Matthue and le Roux*, Supreme Court of S.W.A., 11 November 1982 is a case where a nativewoman of Owambo was detained at the army camp and there raped by two black soldiers after suggestion by the white sergeant.

Questions to be examined here are inter alia:

- (i) Why was this woman detained and by whom?
- (ii) What are the powers of army personnel to arrest and detain?
- (iii) What rights and protection have detainees detained by members of the army?

10. * * * [In *S. v. Kruger and van der Heever*¹⁵² the defendants were charged with murder and armed robbery in Ovamboland.

152. S.W. Afr. Div., Feb. 11, 1983.

According to the “undisputed facts,” a group of Defence Force soldiers, who had blackened faces and wore SWAPO or FAPLA¹⁵³ uniforms, went to a kraal¹⁵⁴ and stole a four wheel drive vehicle. When they were discovered by a black guard, they took him and the vehicle to the army camp. There they burned the truck and shot the guard because he was a witness.

The vehicle owner and employer of the guard was a headman, a member of the Owambo Legislative Assembly, and a man of some influence. When he complained, evidence of the crimes was discovered, and the trial followed. The defendants were convicted of murder, but acquitted of robbery when section 103*ter* of the Defence Act of 1957 was invoked.]¹⁵⁵

Some features of this case must be stressed:

- (i) It demonstrates an abuse of Section 103*ter* and the need to amend it. The *minimum* amendment required is the addition of the words “on reasonable grounds” after the words “*bona fide*” and the scrapping of the words “*in connection with*”.¹⁵⁶
- (ii) The question is: how many cases never come to court because of the existence of Section 103*ter*, which provides for absolute *immunity* for members of the Security Forces whenever the deed is done *bona fide* for the purpose of or in connection with the prevention or suppression of terrorism in any operational area.
- (iii) The mentality of many members of the Security Forces is here demonstrated because although only two members were eventually charged—a *third* volunteered to aid in the execution of the “*kaffir*” “terrorist” when volunteers were openly called for this purpose in the army pub.

Apparently none of the other members engaged in the robbery had any objections.

- (iv) The access by members of the Security Forces to SWAPO and FAPLA uniforms and AK 47 rifles and the opportunities to commit crimes in the name of SWAPO.¹⁵⁷

153. FAPLA is the acronym for the Angolan government army.

154. A kraal is an enclosed area; by extension, it also refers to a family home consisting of a group of huts surrounded by a hedge or wall of pales, brush, or similar material.

155. No. 44 of 1957, § 103*ter*.

156. This recommendation refers to subsection (2) of § 103*ter*, which reads:

No proceedings, whether civil or criminal, shall be instituted or continued in any court of law against the State, the State President, the Minister [of Defence], a member of the South African Defence Force or any other person in the service of the State by reason of any act advised, commanded, ordered, directed or done in good faith by the State President, the Minister, or a member of the South African Defence Force for the purposes of or in connection with the prevention or suppression of terrorism in any operational area.

157. According to Lubowski, *supra* note 81, at 18, the inquest into the death of Jona Hamukwaya, *see infra* text accompanying notes 193-94, was the first judicial proceeding in

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11. In the [case of] *State v. Diedericks and Cloete*, S.W.A. Supreme Court 13th April 1982, two members of the army doing duty in Owambo were convicted on two charges of murder of a black civilian.

The accused were members of a group of soldiers who molested and threatened civilians, detained two and eventually beat them to death. One body was concealed in a stormwater drain and one covered under leaves and branches. The one put into the stormwater drain was probably still alive when pushed into the drain.

Here again two members were charged and convicted, but apparently other members of the group did not discourage the accused.

12. * * * [*S. v. du Plessis*¹⁵⁸ involved a white member of the Defence Force who took an army vehicle, a "Buffel", raped the wife of a prominent shopowner, Mr. Eliazer Hambili, and destroyed Hambili's supermarket and bottle store with handgrenades. The damage allegedly ran into hundreds of thousands of Rand.

Du Plessis was duly convicted, but the State refused to compensate Hambili even though his life's work was totally destroyed.]

From information received, it appears that Mr. Hambili is regularly detained under AG 9 of 1977.

It may be a *coincidence* but we submit that the reasons for this victim's repeated detentions should be investigated.

The commission should also investigate the adequacy of provisions for compensation to victims caused by crimes or malpractice of soldiers, whether strictly acting in the execution of their duties or not.

F. [*Special Police*]

Time and space do not allow us to deal with the large number of so-called "special police" and "home guards"¹⁵⁹ charged and convicted by the Supreme Court for murder, culpable homicide, assault, rape, robbery, malicious injury to property, etc.

It seems that "special police" are trained by the regular police forces to hunt down and kill SWAPO insurgents. Often they are uneducated and underdeveloped people with an inferiority complex and a lethal weapon

which it "was accepted as common cause that Koevoet is armed . . . with . . . a wide variety of weapons of communist origin, notably AK 47's," (emphasis in original) and that white members of Koevoet do not wear regular service uniforms "while black members ofte [sic] wear entirely civilian clothing." The purpose of wearing civilian clothing is clearly to cause the victims of Koevoet atrocities to attribute them to SWAPO and thus to enable the authorities to discredit SWAPO in public opinion, particularly in the overseas press.

158. S.W.A. Sup. Ct., Apr. 13, 1982.

159. They include armed bodyguards attached to chiefs and other officials as well as groups that have sprung up with even less plausible claims to authority.

in hand. There is little control over the carrying of firearms and the nearest they come to the profession of "policeman" is *the name*.

Again this *policy* has been the cause of many tragedies and the loss of faith in the willingness and ability of the authorities to protect the citizen.

G. [Conclusion]

1. It is often claimed that [Namibian] law and order and the administration of justice are in a healthy state.

People [who claim this] point to the cases that come before Court and say: "There may be malpractices, but cases are investigated if complaints are made and culprits [are] duly brought before the Court. Just look at the cases heard before the Court."

2. This unfortunately is not the whole picture.

The true test is:

The number and extent of people killed, raped, robbed, assaulted, and extorted that never come before the Court.

2.1. This question cannot be answered without investigation into the number of people who disappear without trace; the number murdered by unknown persons; the number who do not complain because of fear and lack of trust in the institutions of justice; the cases where people are killed and buried without investigation or inquest; the cases where people are not prosecuted because of the shield provided by Section 103*ter* of the Defence Act.

3. Submissions have been made as to laws to be reviewed as part of the analysis of cases dealt with under "E" *supra*.

3.1. Some of the security laws applicable only to South West Africa have not been dealt with specifically as no case relating to them has been brought before our Courts.

One such law which, however, deserves further attention is AG 26 of 1978—"*detention for the prevention of political violence and intimidation.*"¹⁶⁰

We see no justification whatsoever for the wide powers of the Administrator/General, including indefinite detention without trial, the exclusion of access to the Courts of Law and the failure to provide for compensation to a person so detained.

This law should be drastically amended.

3.2. In general we support the *principle* of consolidation of all security laws applicable to South West Africa.

160. See Proc. AG 26, *supra* note 86.

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3.3. We also believe that in the special circumstances of South West Africa, the death penalty should be abolished for all contraventions of security laws.

3.4. In so far as legislation and practices of the R.S.A. are relevant and applicable to S.W.A. our views co-incide substantially with those in the publication entitled "Report on the Rabie Report" referred to in *Section "C"* supra and we ask the Commission to deal with that report as an integral part of our views and submissions.

4. In conclusion we submit:

4.1. Wide powers are often justified on the grounds of State Security and directed at a particular enemy.

But if these powers and the abuse thereof remain unchecked, then nobody will eventually be safe.

4.2. Most observers believe that our country is irrevocably on the road to independence.

We believe that it will not be in the *interest* of Namibians and the new state to inherit the present set of security laws.¹⁶¹

4.3. Finally, in our respectful submission those laws in their present form are *inadequate, unfair* and *ineffective* and may undermine internal security rather than protect it.

[Signed by the Chairman, Vice-Chairman, and Treasurer of the Bar Council]

161. The HNP memorandum submitted to the Commission of Inquiry, *supra* note 63, is said to have given qualified support to existing security legislation as an emergency measure, provided it is applied by a responsible government. "However," as the HNP secretary said in an interview following submission of the document, "should the office of government revert to a communist or power hungry group, the existing security legislation could become a threat rather than a protection to the ordinary citizen." The Party nevertheless felt that there "should be no hesitation to fight terror and communism with all the remedies available to the state to prevent a communist regime from ever taking over in South West Africa." Windhoek Observer, Nov. 10, 1984; *see also* Windhoek Advertiser, Nov 9, 1984.

The HNP memorandum opposed tapping telephones of peaceful opposition parties, as well as other forms of political espionage and the use of radio or television "to abuse the rights of lawful opponents." Windhoek Observer, Nov. 10, 1984.

The memorandum criticized Article 2 of a draft bill entitled "Combatting of Terrorism," which was proposed by the South African-sponsored "government" in 1981 asked that the Commission of Inquiry not recommend its adoption. According to the HNP secretary, the draft made a person committing an act with intent to impede or threaten the constitutional development of the Territory guilty of "terrorism." This was so broad that it might apply to members of his party for peaceably opposing Namibian independence. In fact, he added, the bill "gave the impression as if it were aimed at right-wing political groups while under the guise of combatting communism." *Id.*

Annotator's Addendum

This addendum, written over a year and a half after the submission of the Memorandum to the Commission of Inquiry, examines some of the effects of the Bar Councils's efforts and fills in some facts known to local lawyers in Namibia. It will also discuss some of the lessons the Memorandum offers and will include some developments which have occurred after the writing of the Memorandum.

The Bar Council's request for an inquiry into Namibian security legislation was a *cri de coeur*.

Namibian lawyers, as a group and as individuals, are as conservative as their counterparts elsewhere. Only one of their members claims to be a member of SWAPO.¹⁶² And as a leading firm of attorneys has discovered, it can be dangerous to one's financial health to be too closely associated with the defense of political prisoners.¹⁶³

Nevertheless, the Territory's advocates were driven to act by a combination of factors. These factors certainly included horror at the facts lawyers had learned about the operation of security laws and security forces in all parts of Namibia over many years; professional outrage at executive interference with the judicial process;¹⁶⁴ shame aroused by external criticism; and quite possibly some attempt to position themselves for the coming of an independent Namibian state.

162. That member is Anton Lubowski. He was drafted into the South African army in 1971 and until recently held a reserve officer's commission. It was withdrawn when he stated that he considered it a duty, if called up, to fight for liberation with SWAPO rather than in the South African Defence Force. RESISTER, Aug.-Sept. 1985, at 11.

163. Lorentz & Bone, which had done conveyancing for the City of Windhoek for many years, lost its contract for future work. Ostensibly, the contract was taken away so that the work could be rotated among all local attorneys. The common belief was that the action occurred because of the firm's representation of political dissidents, as in *Kauluma v. Minister of Defence*. Windhoek Advertiser, Oct. 25, 1984 at 1, col. 1; Windhoek Observer, Oct. 27, 1984 at 18, col. 1. A later chapter for Lorentz and Bone may be found in the story *Scandalous Attack by Shipanga*, The Namibian, Feb. 21, 1986, at 1, col. 1. A member of the National Assembly introduced a motion to investigate "anti-government organisations and persons." Among the persons specifically mentioned by the Minister of Mines was David Smuts, a junior partner in Lorentz & Bone. D. Smuts, Executive Interference in the Legal Process in Namibia at 9 (paper delivered by Namibian attorney at the Seminar on the Legal Aspects of Apartheid held in Washington D.C., July 6-7, 1985, under the co-sponsorship of the Southern Africa Project of the Lawyers' Committee for Civil Rights Under Law and the Section on Individual Rights and Responsibilities and the Standing Committee on World Order under Law, of the American Bar Association) (on file with the *Yale Journal of International Law*).

164. Executive interference has included terminating a trial in progress, *Kauluma v. Minister of Defence*, 184 (4) S.A. 59 (S.W. Afr. Sup. Ct.) (invoking § 103ter (4) of the Defence Act); preventing the presentation of evidence, see the *Kakuva* case, *supra* text accompanying note 129 (applying the "BOSS Act" to suppress investigation diaries); preventing certain otherwise actionable claims from being litigated, see *supra* Memorandum § E.10 and note 56 (discussing *S. v. Kruger and van der Heever* and § 103ter (2) of the Defence Act); and denying

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A. *Facts Known to Lawyers*

Years earlier, members of the bar had become aware of many disturbing facts. The Terrorism Act,¹⁶⁵ enacted in 1967 to give the South African government grounds to prosecute rebellious Namibians it had detained several years earlier, provided for indefinite, incommunicado detention and barred any recourse to the courts. Lawyers who defended detainees subsequently brought to court knew to a moral certainty that they had been tortured in detention. It was soon apparent that many of these prisoners had been condemned before they ever were charged. When a "satisfactory" confession had been extracted, the accused was taken into court to be convicted pro forma and to present whatever evidence he could in mitigation of his "offense."¹⁶⁶

Frequently, detention was not used to extract information, but to intimidate, to demonstrate who was boss, or to provide amusement for the torturers.¹⁶⁷

When the Ovambo chiefs began publicly whipping SWAPO supporters in the early 1970's, at least some lawyers knew, as the Memorandum points out in cautiously circumspect language,¹⁶⁸ that the Security Police (presumably with the approval of Pretoria and its Administrator) had encouraged the chiefs and delivered selected victims to them. Certainly, when the chiefs' actions were protested to the (South African) Minister of Bantu Administration and Development,¹⁶⁹ the Minister refused to criticize, let alone act. He claimed that according to the Native Nations Act,¹⁷⁰ the ethnic authority was solely responsible.¹⁷¹

The churches are the best informed group in Namibia about what goes on in the "homelands" and particularly in the "operational area," where pastors and laity alike suffer from the ruthless application of security legislation.¹⁷² Church leaders have repeatedly sought some sort of legal

access to the courts, *see, e.g.*, the Terrorism Act, No. 83 of 1967, § 6. *See Smuts, supra* note 163, at 9.

165. No. 183 of 1967, *supra* note 76.

166. *See* Dugard, *Criminal Procedure*, 1967 ANN. SURV. S. AFR. L. 327-30 (describing § 6 of the Terrorism Act).

167. *Hair Trigger Justice*, NEWSWEEK, Sept. 16, 1985, at 25.

168. *See supra* Memorandum § E.1, text accompanying notes 123-25.

169. This official was formerly called, and is referred to in the Memorandum as, the Minister of Native Affairs.

170. *See supra* notes 23, 88.

171. Ermacora, *Flogging in Namibia*, 9 HUM. RTS. J. 354, 355 (1976); *see also* Landis, *Namibia and Human Rights*, 9 HUM. RTS. J. 283, 289 (1976).

172. A survey of Namibian clergy and laity attending a Lutheran synod in 1982 revealed that 17% of them had been detained at least once by security forces and that most of those detained had been tortured. *Campaign to Abolish Torture*, AMNESTY INTERNATIONAL USA, BULL. No. 5 (Summer 1985), at 3.

relief to protect their parishioners.¹⁷³ Much of their information, even when not relevant to existing or contemplated legal proceedings, is shared with the most concerned members of the bar.

The information that aroused legal ire, horror, dismay, and/or shame could, however, seldom be used in court.¹⁷⁴ On the rare occasions when it could, and when the courts upheld the victims' rights, the outcome seemed to have little or no effect on the subsequent conduct of the Security Forces.¹⁷⁵

B. *The Call for a Commission of Inquiry*

It seemed to the Bar Council that a commission of inquiry, if appointed, would give the bar a forum in which to exercise their powers of persuasion on both the public and officials. No doubt there lingered the hope that the "truth," if exposed, would have to affect the authorities. It would not be surprising if there were a small element of "graymail" as well in the request for an official inquiry. Pretoria, in trying to sell its proposed constitutional reform in South Africa, would prefer a *judicial* inquiry, rather than a public expose to the foreign press by prominent lawyers disturbed about the situation in Namibia. In addition, the bar must have hoped to influence the legal structure of the new Namibian government, whenever it should come into existence.¹⁷⁶ The excesses of the occupation regime should not become the norm for new governors, who would undoubtedly learn more by example than by textbook theory. In any case, it seems certain that a legal system as rigidly circumscribed as is the Namibian legal system did not suggest many other possibilities of reform. Without some method of addressing grievous wrongs, it would become increasingly difficult to argue against extralegal activities.

173. Some examples of church leaders' actions are the attempt to enjoin whipping of political dissidents, *see supra* Memorandum § E.1, and the application to release the detainees from Kassinga held near Mariental, *see supra* note 119.

174. People are too poor, ignorant, afraid, and far away from lawyers to seek relief; the relevant prescriptive periods are too short, often expiring before the facts are known; and executive interference, *see supra* note 164, prevents many cases from being effectively prosecuted. In addition, cases which could set precedents, e.g., the *Ashipemba* case, discussed *supra* Memorandum § E.8., and the *Hamukwaya* case, *infra* text accompanying note 194, are frequently settled out of court without any ruling on the conduct of the Security Forces.

175. *See* D. Smuts, *supra* note 163. Smuts points out that the captain of the Security Police involved in infiltrating the law firm representing the defendants in *S. v. Mushimba*, *see supra* Memorandum § E. 6, has now been promoted to colonel. *See also S. v. Nagel*, *supra* Memorandum § E.4, regarding testimony of the officer in charge, who said that he would like the defendant, convicted of murder, back in his unit despite his crime.

176. The authors of the Memorandum state in § G.4.2 that it is generally believed that Namibia is "irrevocably" on the road to independence.

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When it became apparent that the Bar Council would continue to demand, possibly publicly, an inquiry, the Administrator-General finally established a commission. But he took care to keep control of the situation, behind a facade of responding to the lawyers' requests. The terms of reference, "to inquire into . . . and make recommendations as to the internal security of the said territory,"¹⁷⁷ appeared responsive to the Bar Council's concerns. In fact, however, they did not meet the Council's objective of examining shortcomings and abuses in the *application* of existing security laws.¹⁷⁸

While the leaders of the Society of Advocates urged the appointment of black Africans (who, after all, are the victims of most security law abuses) to the Commission, the Administrator-General loaded the Commission with white South Africans and civil servants.¹⁷⁹ Two (white) Namibians, apparently in private practice, would have to represent territorial opinion. Their presence could be useful, of course, to diffuse the blame if the Commission's conclusions should be subject to criticism.

It was obvious to the lawyers, as it was to the churches, that such a commission, operating as prescribed, was unlikely to achieve what the Bar Council had hoped. But, having called for its creation and unwilling to leave the field to those who called for stronger security legislation, they must have felt that they had little choice but to present testimony. They were allowed to make an oral presentation and submit the Memorandum, but the hearings themselves were held in camera.

C. *The Memorandum*

Undoubtedly, the Commission's restrictive terms of reference, and the unsatisfactory regulations as to its functioning,¹⁸⁰ affected the Memorandum. The Bar Council was also bound by the very strict sub judice rule that applies in Namibia. This rule severely restricts discussion of cases still before a court. The cases that the Council discussed in most detail in the Memorandum are those that had been reported at length in the public press.¹⁸¹

177. *See supra* note 98.

178. *See supra* text accompanying note 98.

179. *See supra* note 103. The posts of the listed members indicate that the members of the Commission are white.

180. *See supra* text accompanying note 101.

181. *See* Wood v. Ondangwa Tribal Authority, Memorandum, *supra* § E. 1, and text accompanying note 123; Kakuva v. Administrator-General, Memorandum, *supra* § E. 2, text accompanying note 129; S. v. Paulua and Matheus, Memorandum, *supra* § E.4, text accompanying note 143; and Ashipemba v. Minsiter of Police, Memorandum *supra* § E.8.

In October, 1984, the Bar Council submitted a supplementary memorandum, which has not been made public. In all likelihood, it contains materials (from one or more cases) that are not part of the public record. According to a Namibian lawyer,¹⁸² the supplementary memorandum refers to persons in power who brand critics or complainants as traitors, and to an attack on the Bar Council by the South African Minister of Police.¹⁸³

The Memorandum was drafted very quickly after the decision was made to present evidence to the Commission of Inquiry. Apart from a recapitulation of the Bar Council's criticism of the Commission's terms of reference,¹⁸⁴ the document itself may be divided into two parts: a summary of decided cases, with recommendations growing out of them (Section E); and general considerations and recommendations (Sections C, D, F, and G). The differences between these two parts are striking.

Section E presents a rough cross-section of the kinds of cases involving abuse of security legislation that have come before the courts. Both the commentary on the cases and the further comments in Section G.2 make it obvious that most instances of abuse remain unknown or untriable.¹⁸⁵

The numerous accounts of intimidation and harassment of victims and investigators, of failure to keep records of detention or of the destruction of those records, and of executive interference with the judicial process,¹⁸⁶ give insight into the ways a sophisticated regime controls the administration of justice without using the crude tools of assassination and "disappearances" against members of the legal profession (at least not against the white members of the profession).¹⁸⁷ At the same time, the accounts of the treatment of black victims demonstrate the depths of racism among the occupiers and the manner in which it is manifested against a population that universally rejects the occupiers' claim to govern.

In general, the recommendations interspersed throughout Section E, whether explicit or implicit in the form of questions, are more pointed and more forceful than those made in the other sections. They seem to gain in urgency by being placed in the context that gives rise to them.

182. See D. Smuts, *supra* note 163.

183. This attack may be related to the complaint made to the South Africa Media Council. See *supra* note 141.

184. Memorandum, §§ A & B (omitted from the Memorandum as reproduced *supra*, but on file with the *Yale Journal of International Law*).

185. See *supra* note 163.

186. *Id.*

187. Hosea Angula, a black attorney practicing in Windhoek, indicates that his profession did not protect him from harassment and detention. See H. Angula, *supra* note 87, at 6.

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Even so, many of the recommendations are cautious: for example, give the courts power to “override the decisions of the executive [to bar evidence] *in certain circumstances*.”¹⁸⁸ The recommendation that AG 9 be amended to provide for detention “only for the purpose of interrogation and not for indefinite detention without trial”¹⁸⁹ is unrealistic and avoids criticizing detention without trial, whatever the purpose. In addition, the recommendation in Section G.3.3, to abolish the death penalty in Namibia, while radical for South Africa, is not unprecedented in Namibia. A Namibian court decided against sentencing a SWAPO guerilla to death on the ground that execution would not act as a deterrent in Namibia and might in fact convert the defendant into a popular martyr.¹⁹⁰

D. Recent Developments

Since the Bar Council drafted its memorandum, the decisions in two cases discussed in Section E that were then on appeal have been affirmed.¹⁹¹ Namibian political prisoners serving life or long term sentences on Robben Island (a jail for “politicals” in the harbor off Cape Town) have been returned to Windhoek and released.¹⁹²

A number of new cases, some as significant as those discussed in the Memorandum, have been brought before the Namibian Supreme Court. In *Nestor v. Minister of Police*¹⁹³ conditions of detention, while less horrifying than the worst instances cited in the *Kakuva* case, were nevertheless held unacceptable. The detainees were held, blindfolded and chained, in tiny cells hardly big enough to lie down in, without adequate air circulation, and were denied the right to exercise.

In 1983, a Kavango schoolteacher, Jona Hamukwaya, was arrested by members of Koevoet and died shortly thereafter in their custody. The court, which had before it affidavits from others detained with him as to the tortures they suffered, found that he died in detention as the result of unlawful conduct by Koevoet members.¹⁹⁴ His widow, joined by detainees who survived the ordeal, sued the Minister of Police. On January 22,

188. Memorandum, *supra* § E.2, text accompanying note 132 (emphasis added).

189. Memorandum, *supra* § E.2, text accompanying note 138.

190. See *State v. Muvala* [or *Muawala*, *Muaala*, *Mawaala*, *Awaala*], Memorandum, *supra* § D.2.2, text accompanying note 121, discussed in *Windhoek Observer*, May 28, 1983, at 37, col. 3; *Windhoek Observer*, May 27, 1983, at 3, col. 5.

191. *U. Kakuva and Another v. Administrator-General and Minister of Police*, appeal dismissed, see *Windhoek Observer*, December 15, 1984; *State v. Paulus and Matheus*, sentence *aff'd*, see *Windhoek Observer*, Sept. 29, 1984, at 11, col. 1.

192. *The Namibian*, Nov. 15, 1985, at 3, col. 1; *The Namibian*, Nov. 22, 1985, at 7, col. 1.

193. 1984 (4) S.A. 230 (S.W. Afr. Sup. Ct.); see also A. Lubowski, *supra* note 81, at 14-25.

194. See IDAF FOCUS, May-June 1985, at 4.

1985 an out-of-court settlement was reached, with R58,000 (then \$45,000) awarded to Mrs. Hamukwaya and R30,701 (\$23,000) to be shared among the other plaintiffs.¹⁹⁵

The Hamukwaya case is also believed to have figured indirectly in the dismissal of a criminal prosecution brought in *South Africa* against Roman Catholic Archbishop Dennis Hurley of the diocese of Natal. He was charged under the Police Act¹⁹⁶ with publishing "false matter" about the police when he referred in a press conference and public statements to atrocities committed by Koevoet in Namibia, based on the report of the South African Catholic Bishops' Conference.¹⁹⁷ Hurley's response was to warn that a "lot of dirt"—believed to include prominently the facts of the Hamukwaya case—would come out at his trial. On the date set for the trial the charges were dismissed on technical grounds. The Archbishop professed himself disappointed that "what the trial could have brought out was not brought out."¹⁹⁸

A number of Namibian lawyers indicated in private conversations during the past year that the territorial Supreme Court, apparently reflecting recent changes in personnel, seemed more responsive to human rights concerns than it had been previously. In the summer of 1985, the territorial Supreme Court upheld the application of Nikodemus Katofa, himself a former Mariental detainee,¹⁹⁹ for the right of his brother, Josef Katofa, who was detained under Proclamation AG 26,²⁰⁰ to have access to a lawyer and to be released.²⁰¹ The Court granted the first part of Nikodemus Katofa's petition, holding that the Proclamation did not deny access to lawyers. The Court then considered the affidavit of the Chairman of the Cabinet of the newly installed government²⁰² to the effect that he was "satisfied" that the continued detention of Josef Katofa was in the interest of state security. The Court held that it was not satisfied by an affidavit that adduced no reasons for the Minister's conclusions, and ordered Katofa's release.²⁰³

195. Windhoek Advertiser, Jan. 28, 1985, at 3.

196. No. 7 of 1958.

197. SOUTH AFRICAN CATHOLIC BISHOPS' CONFERENCE, REPORT ON NAMIBIA, May 12, 1982 (copy on file with annotator).

198. Wash. Post, Feb. 19, 1985, at A14, col. 6.

199. See *supra* notes 119, 136.

200. See *supra* note 86 & Memorandum, § G.3.1.

201. The Namibian, Aug. 30, 1985, at 5, col. 1.

202. See *supra* text accompanying note 52. See also IDAF FOCUS, Sept.-Oct. 1985, at 9 (summary of *Katofa* case).

203. In the Matter between the Cabinet of the Interim Government for South West Africa and the Officer Commanding Windhoek Prison and Nikodemus Katofa, *affirming rule nisi* issued on June 20, 1985, reported in Windhoek Advertiser, Aug. 27, 1985, at 3, col. 1. This case was begun against the Administrator-General and Commanding Officer as respondents

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However, more recently there has been some murmuring (as yet largely *sotto voce*) among lawyers that the *Katofa* decision may have been a fluke, or perhaps the high-water mark of a tide now receding.

A maneuver by Namibia's "interim government," installed by Pretoria, has undoubtedly had its influence: The Constitutional Council Act,²⁰⁴ adopted by the new National Assembly to provide for the drafting of a constitution for a future Namibian state, required that the chairman of the Council be a judge or former judge. A faction of the "cabinet" persuaded the Administrator-General to name a lawyer in the South African Department of Justice as a sixth judge of the South West Africa Supreme Court in order to qualify him as chairman of the Council, a position to which he was immediately named. After a major flap,²⁰⁵ the lawyer was persuaded to withdraw, and the "cabinet" agreed, instead, on the former Judge President of the Transvaal Supreme Court, who had been serving as seconded Chief Justice of the allegedly independent state of Bophuthatswana.²⁰⁶ This use of judicial appointment for political purposes was certainly not designed to encourage judicial independence.

Any possible liberalization in the Supreme Court has not carried over to the magistrates, who conduct the actual inquests. Thus, for example, on January 17, 1985, the Windhoek Advertiser reported the finding of an inquest court that there was insufficient evidence to hold anyone criminally liable for a death, allegedly by assault, that had occurred in Kavango the year before. The evidence, according to the news story, showed that on February 18, 1984, an eight-year-old boy was playing near the victim's hut when a Casspir armored vehicle arrived. The article stated that "[f]our Koevoet Policemen dragged Mr. Kashe [the victim] from his hut about 50 metres into the bush. The boy saw one of the men striking Mr. Kashe to the ground and kicking him in the stomach when he stood up." Kashe's common-law wife stated that he had been in good health when she left in the morning; but when she returned, he could not eat and complained of pain. The news story quoted her as saying "[h]is face and stomach were swollen and there were abrasions on his abdomen." He died soon after in a clinic.²⁰⁷

(later respondents-appellants), but the Cabinet of the newly installed government was eventually substituted for the Administrator-General. See IDAF FOCUS, Nov.-Dec. 1985, at 9.

204. See IDAF FOCUS, Mar.-Apr. 1983, at 10.

205. Windhoek Observer, Apr. 12, 1984.

206. IDAF FOCUS, Nov.-Dec. 1985, at 11.

207. Windhoek Advertiser, Jan. 17, 1985.

Similarly, when six soldiers under the command of a rifleman fired a hail of bullets at a truck, killing the black driver, the magistrate at the inquest ruled no one was criminally liable for the death.²⁰⁸

The name of Koevoet was changed to COIN, the acronym for "Counter Insurgency Unit," when it was put under the command of the Commissioner of South West Africa Police, on May 1, 1985.²⁰⁹ The old name continues to be used in popular parlance, however, and there appears to be no change in its functioning.²¹⁰

E. Bar Council Accomplishments

Insofar as the Bar Council sought real changes in existing security legislation and in its application, the establishment of the Commission of Inquiry and the representations made to the Commission on behalf of the Society of Advocates would appear to be a failure. The Commission has not yet issued any findings, and as of December 6, 1985, there was no indication as to whether or when it would.²¹¹

The new Namibian "government" has shown no interest in repealing or even reforming security legislation. Although it was created by a proclamation²¹² that contained a "Bill of Fundamental Rights and Objectives," barring arbitrary arrest and detention,²¹³ the Chairman of the Cabinet completely ignored this provision in the *Katofa* case when he insisted on continuing detention without trial.²¹⁴ Since then, the interim government's Minister of Justice has announced that the government intends to retain AG 9.²¹⁵

208. *Id.*

209. COIN is reported to have a strength of around 1000. The organization consists mainly of black Namibian police officers, recruited from the ranks of special constables, and commanded by white South African police or mercenaries (many of the latter former Rhodesian Selous Scouts). It has groups based at Opuwe (where Kakuva was detained), at Oshakati in Ovamboland (its headquarters), and at Rundu, the capital of Kavango. COIN is one of several elite, specialized, and highly secret police and military units in northern Namibia that are referred to collectively as Special Forces. They include, in addition, the 32 Buffalo Battalion, based in Rundu, which operates almost entirely in Angola; the South West Africa Special Task Force; and the South West Africa Specialists, the latter two being engaged primarily in frontline operations. See *S. v. Nagel*, Memorandum, *supra* § E.4; IDAF FOCUS, Nov.-Dec. 1985, at 11.

210. See IDAF FOCUS, Nov.-Dec. 1985, at 11.

211. The Namibian, Dec. 6, 1985, at 8, col. 2 (interview with Minister of Justice of interim government installed on June 17, 1985).

212. See South West Africa Legislative and Executive Authority Establishment Proclamation, *supra* note 52.

213. *Id.* at Annexure 1, art. 2, para. 1.

214. Applicant's lawyers cited the Bill of Fundamental Rights, *id.*, in arguing for Katofa's release.

215. The Namibian, Dec. 6, 1985, at 8, col. 2. The Minister of Justice suggested that to remove Proc. AG 9 would adversely affect the morale of the police. *Id.*

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Atrocities continue unabated. The Catholic Bishops' Conference has recently released a new report on another tour of Namibia, undertaken as part of an ecumenical delegation in October 1984. This report contains allegations concerning new killings and assaults similar to those referred to in the 1982 report.²¹⁶ The Namibian press continues to report atrocities in every issue,²¹⁷ and the Lutheran Bishop of the North has pleaded for an end to the killings, which he claims are destroying his people.²¹⁸

Amnesty International's latest bulletin on Namibia²¹⁹ recites one of the most grisly stories of torture in the Territory: two security agents beat 63-year old Ndara Kapitango, a political detainee, then roasted him alive over an open fire. He was so severely burned that he required lengthy hospitalization, and one arm had to be amputated. According to news from Namibia, he has since died. A military tribunal fined the soldiers R50 each (less than \$25 at the time) for their excessive zeal.²²⁰ It is assumed that they appear in the statistics as military personnel punished for mistreating the local populace.

Amnesty International also cited the then-current case of Thomas Nikanor, who died in a detention center at Ondangua, allegedly by "hanging himself with his socks." The authorities indicated that they did not intend to conduct an inquest into his death.²²¹ When they finally yielded to the demands for an official inquiry, the body, which had been in their keeping since the purported suicide, was too decomposed for either the state pathologist or the family's expert to determine the cause of death.²²² Another technique for thwarting justice.

The number of Namibians *known* to be in detention varies from around thirty to sixty or more, depending on the events of the

216. Windhoek Advertiser, Jan. 28, 1985.

217. See, e.g., The Namibian, Dec. 6, 1985, at 8, col. 2. The lead story in this issue of The Namibian reported the death of Frans Uapota, "allegedly beaten to death by soldiers of the South African Defence Force" the preceding Thursday. "[T]hey attacked my husband like a pack of wild dogs," his wife claimed. Hardly a week passes without one or more similar reports issued by the Namibian Communications Centre in London.

218. *Namibian Bishop Calls for 'Quick Steps' to Free His Country*, Namibian Communications Centre, Sept. 18, 1985.

219. *Campaign to Abolish Torture*, *supra* note 172, at 1.

220. *Id.*; Windhoek Advertiser, Feb. 27, 1984.

221. *Campaign to Abolish Torture*, *supra* note 172, at 4. Eventually, one session of an inquest court was held, but further sessions were postponed for three months. See *South African Inquest into Death in Detention Adjourned; Cause of Death Called 'Inconclusive.'* Namibian Communications Centre, Oct. 7, 1985. The NCC, based in London, is a project of the Namibia Christian Communications Trust, an ecumenical agency working in cooperation with churches in Africa, Europe, and North America. The NCC makes available relevant information about Namibian religious and secular affairs to the international community.

222. *Id.*; IDAF Focus, Mar.-Apr. 1985, at 9.

moment.²²³ The Minister of Justice in the transitional government was recently reported as stating that there were some fifty in detention as far as he knew.²²⁴ Since the population of Namibia is roughly one-twentieth that of South Africa, the number of detentions in the Territory is equivalent to some 600-1200 detained in the Republic—about the number of those held in South Africa under the present state of emergency.

The ban on travel to the north without a police permit has been used to make it impossible to follow reports on atrocities.²²⁵ Thus, a lawyer appointed by the Roman Catholic Church to investigate seven bodies found in a shallow ditch near a police base in the “operational area” was unable to act because he was refused a permit.²²⁶ Similarly, the indefatigable Hans Rohr²²⁷ has finally been stopped from investigating alleged atrocities in the Kavango area by being denied a pass.²²⁸ Over a period of years he had reported, with attendant publicity, dozens of shocking cases, many attested by affidavits and photos. Few resulted in court proceedings, however, or in disciplinary actions against their perpetrators.

Despite the Bar Council’s failure to achieve its primary objectives, the exercise has nevertheless not been in vain. It has forced the legal profession, including those who have steered clear of “political” cases, to look at the security legislation in the Territory and to take a stand on it—however cautious. It has provided some human rights guidelines—however limited—for a government of a future independent Namibia.

The Bar Council has, moreover, helped to establish the credentials of the legal profession so that its advice may be considered after independence, and so that it will have moral standing to challenge any violations of human rights if they occur under a new government. Further, it has accumulated considerable evidence concerning specific unpunished violators of human rights (and of Namibian laws). Such evidence may be used in criminal or civil proceedings at some future date in Namibia and/

223. From time to time lists are compiled and issued by any or all of the following, who freely share information: Episcopal Churchpeople for a Free Southern Africa, New York, N.Y.; NCC, London; Amnesty International, London and United States; IDAF, London; and the Southern Africa Project of the Lawyers Committee for Civil Rights under Law, Washington, D.C.

224. *The Namibian*, Dec. 6, 1985, at 8, col 2. The Minister of Justice made it clear that the South West Africa Security Forces, which are under nominal Namibian control, are not, in fact, accountable to the interim government.

225. *See supra* note 87.

226. *RESISTER*, Aug.-Sept. 1985, at 9.

227. Mr. Rohr has been leader of the small Namibian Christian Democratic Party.

228. *RESISTER*, Aug.-Sept. 1985, at 9.

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or South Africa, similar, perhaps, to those now occurring in Argentina.²²⁹

Finally, the Memorandum has provided foreign lawyers and policy-makers with substantiated information concerning the true situation in Namibia. If this information is factored into the considerations guiding other states' policy towards South Africa, Namibia, and the rest of southern Africa, the resulting decisions ultimately may be more realistic and wiser.

229. See Mignone, Estlund, Issacharoff, *Dictatorship on Trial: Human Rights Violation in Argentina*, 10 YALE J. INT'L L. 118 (1984).