

Fordham International Law Journal

Volume 19, Issue 4

1995

Article 8

Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid

Ibrahim J. Gassama*

*

Copyright ©1995 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid

Ibrahim J. Gassama

Abstract

This Article explores serious questions that remain about the U.N. role in human rights struggles following the South African elections. Are there structural barriers that prevent the United Nations from acting more rapidly and decisively on human rights matters? What role does the United Nations have in the human rights struggle beyond the mechanics of electoralism and attainment of formal political equality? How can human rights non-governmental organizations (“NGOs”) help the United Nations become more effective in its human rights work? The fifty-year global campaign against state-directed racial oppression in South Africa provides lessons that help answer such questions. This Article is divided into two parts. Part One reviews five decades of the U.N.-centered global campaign for human rights in South Africa. The campaign was built around dismantling apartheid and replacing it with a new political order, legitimized through elections. The review reveals the general inadequacy of the formal United Nations structure and processes and highlights the effectiveness of the international anti-apartheid movement, human rights NGOs who employed U.N. resources to reach across sovereign boundaries and mobilize popular support against apartheid. This Article’s evaluation focuses on the enduring nature and comprehensiveness of the global response to apartheid and suggests that the campaign should be used as a standard for judging global responses to other human rights violations. Part Two of this Article identifies the domestic and international aspects of the global campaign against apartheid that can effectively be applied in other human rights struggles. Part Two of the Article critiques the institutional deficiencies of U.N. intervention, which involved little effort to deal with the underlying socio-economic disparities that pervade South Africa. Part Two also explores how the United Nations’ lack of influence on international economic matters undermines the efficacy of popular efforts to address vast economic disparities that characterize societies like South Africa. This Article concludes by discussing how human rights NGOs could further the human rights mission of the United Nations by interpreting their work in light of ideas developed in the critique and defense of rights-discourse. In particular, it discusses the promise of the “jurisprudence of reconstruction,” which is committed to both a radical and critical posture toward power even as it seeks to transform power relationships by appealing to ideas like truth and justice.

ARTICLES

REAFFIRMING FAITH IN THE DIGNITY OF EACH HUMAN BEING: THE UNITED NATIONS, NGOs, AND APARTHEID

*Ibrahim J. Gassama**

CONTENTS

Introduction.....	1465
I. The United Nations Against Apartheid 1946-90: A Human Rights History.....	1471
A. Establishing U.N. Competence to Intervene in Support of Human Rights: The General Assembly Considers Apartheid 1946-60	1472
B. From Rhetoric to Sanctions: The General Assembly Confronts the Security Council 1961-79 ..	1480
1. The United Nations Responds to Sharpeville ..	1482
2. The Special Committee Against Apartheid ...	1484
3. A Voluntary Arms Embargo	1485
4. Promoting a Global Grass Roots Campaign ...	1488
5. Soweto.....	1491
C. Total Strategy, Constructive Engagement, and Mass Mobilization 1980-89	1496
1. Total Strategy: Reform, Repression, and Regional Hegemony	1497
2. Constructive Engagement and the Free South Africa Movement	1500
3. Sanctions at Last	1509

* Assistant Professor of Law, University of Oregon, School of Law; J.D., Harvard Law School; B.A., Virginia Tech. From 1985 to 1990, the Author held various staff positions at TransAfrica, a U.S. foreign policy organization that played a leading role in the international campaign to end apartheid. From January, 1994 to June, 1994, the author coordinated the recruitment, training, and deployment of non-governmental observers to the South African elections on behalf of the Southern Africa Project of the Lawyers Committee for Civil Rights Under Law ("LCCRUL"). In memory of Haywood Burns and Muhammed Kenyatta. I am deeply indebted to Gay McDougall and Randall Robinson for their encouragement and support over the years. I would like to thank Keith Aoki, Mike Axline, Nathaniel Berman, George Bisharat, Garrett Epps, L. Hope Lewis, and H.G. Prince for their insightful comments and suggestions. Jim Beard, Kevi Brannelly, Ryan Wilson, and Cory Zion provided invaluable research help.

D. Negotiating a Revolution 1990-94.....	1512
1. Negotiations and Violence.....	1514
2. Observation and Legitimation.....	1518
II. Beyond Political Participation.....	1522
A. Strengthening the U.N. Commitment: The Institutional Lessons.....	1523
1. U.N. Emphasis on Prevention of Conflict over Promotion of Human Rights Values.....	1524
2. General Assembly Opposition to Apartheid Contradicts Domestic Practices of Majority of U.N. Members.....	1526
3. NGOs Must Continue to Pressure the U.N. System to Expand and Deepen Human Rights Values.....	1528
B. The Achievements and Limits of Rights Struggle..	1530
1. Separating Politics from Economics.....	1531
2. Rights: Indeterminate and Inspirational.....	1536
Conclusion.....	1541

INTRODUCTION

The old woman walked slowly, haltingly into the polling station in Mmabatho, a city about four hours drive northwest of Johannesburg. She wanted to vote for "the famous one." She was virtually blind, could hardly walk and needed assistance to "mark her cross." As an observer, I could only refer her to the station's presiding officer, a young woman with a lot of enthusiasm, one of about 200,000 hastily trained election officials overseeing South Africa's first democratic election open to all races.

I watched as the presiding officer tried to help the old woman clarify her choice by dutifully reading all the names on the ballot. There were nineteen of them but the presiding officer did not have to go past Mandela's, because at the mention of his name, the old woman's face brightened and she said softly in her native Tswana, "him."

A little later, another woman came in, decades of hard farm labor reflected on her body. She would whisper "Mandela," as she approached any of the many official-looking types scattered around the polling station. It was both a question and a statement, and each time she said his name she would pause as if expecting to be challenged or chastised. Instead she was directed to a voting booth.

These two women were among the thousands of voters who went through that polling station over the three days of the election. I met

many others in other polling stations throughout the region in the heart of the Transvaal. They came in spite of the great distances many had to travel, the physical toll, the threats, and the violence. They had waited all their lives for this opportunity and some had to wait for hours more in long lines to exercise what they had long considered their right. But wait they did, with dignity, determination, patience and it seemed, with faith that this process, this exercise of marking a few Xs on pieces of paper, would be worth all those decades of struggle and sacrifice. I had my doubts, but mesmerized by the spectacle, I kept them to myself.

On April 26, 1994, approximately twenty million South Africans, most for the very first time, voted in the country's first general elections open to all South Africans without regard to their race. On May 10, 1994, Nelson Mandela, once one of the World's most famous political prisoners, took office as State President of South Africa and head of an interim Government of National Unity ("GNU").¹ The GNU will govern the country until the next national elections in 1999, by which time the newly elected parliament should have drafted a permanent national constitution.²

At a time of extraordinary and too often, violent, political and social changes in many areas of the world,³ the relatively peaceful transition from apartheid to liberal democratic governance occurring in South Africa has been received throughout the World with gratitude and praise.⁴ Most of the credit for the

1. Nelson Mandela was unanimously elected President of South Africa on May 9, 1994, by the newly elected National Assembly at its first session in Cape Town. Thabo Mbeki and Pieter Willem De Klerk were elected First Deputy President and Second Deputy President respectively. The oaths of office were not administered until the next day in Pretoria. See U.N. DEP'T OF PUB. INFO., *THE UNITED NATIONS AND APARTHEID, 1948-1994*, at 124-25, U.N. Doc DPI/1568, U.N. Sales No. E.95.1.7 (1994) [hereinafter *THE UNITED NATIONS AND APARTHEID*].

2. Parliament, composed of a National Assembly and a Senate, will serve as the Constitutional Assembly under the Interim Constitution, and is charged with coming up with a permanent constitution within guidelines specified in the Interim Constitution. See *REPUBLIC OF SOUTH AFRICA CONST.* (1993).

3. The popular press does not lack for reports of these tragedies. See Chris Hedges, *Second Safe Area in Eastern Bosnia Overrun By Serbs*, N.Y. TIMES, July 20, 1995, at A1; Kelley Couturier, *Turkey Says Operation Against Kurds Inside Iraq Is a Success*, WASH. POST, July 7, 1995, at A27; Paul Lewis, *U.N. Council Urged to Weigh Action on Rwanda*, N.Y. TIMES, April 30, 1994, at A1; William Drozdiak, *Noted Jurist Says Bias Contains 'Seeds of Genocide': South African Who Probed Police Abuses at Home Turns to War Crimes in Balkans*, WASH. POST, July 2, 1995, at A24.

4. See, e.g., Secretary General Applauds Election Process in South Africa, as Peaceful Expression of People's Aspirations to Better Future, U.N. Press Release SG/SM/

transition in South Africa and the much less-than-anticipated level of violence that has accompanied it, has gone to the people of South Africa. South Africans have pulled back from the precipice of racial and ethnic conflagration and found creative political compromises. Though the country continues to suffer from violence,⁵ it now appears politically inspired to have avoided a more destructive and unstable future.

Credit for the South African outcome, however, does not end with the South African people. Substantial credit is also due to many in the international community.⁶ Racial injustice in South Africa was a matter of international concern and mobilization even before the Afrikaner-dominated National Party⁷ came to power in 1948 on an apartheid platform that promoted a vision of society built on institutionalized, government-enforced racial segregation and discrimination.⁸ In subsequent decades,

5282-SAF176 (1994) (reciting statement by spokesman for Secretary-General Boutros-Ghali applauding election process in South Africa); *Chairman's Statement at Halifax G-7 Summit*, JAPAN ECON. NEWSWIRE, June 17, 1995, available in LEXIS, World Library, Jen File; *South Africa: A Peaceful Election Bodes Well For New Era*, DALLAS MORNING NEWS, May 4, 1994, at A32. Welcoming President Mandela on his first visit to the United States after his inauguration, President Clinton remarked, "[n]ow, all over the world, there are three words which, spoken together, express the triumph of freedom, democracy and hope for the future." "They are President Nelson Mandela." *South African President Nelson Mandela's Visit to the United States*, FOR. POL'Y BULL., Nov./Dec. 1994, at 52.

5. For comprehensive reports on violence and other human rights issues in South Africa, see publications of the Human Rights Committee of South Africa ("HRC") including, *Human Rights Review-South Africa, 1994 and HRC Monthly Reports*. HRC is an independent non-governmental human rights organization. The reports are compiled from various official, press, and grassroots sources.

6. See *Report of the Special Committee against Apartheid*, U.N. GAOR, 48th Sess., Supp. No. 22A, U.N. Doc. A/48/22/Add. 1 (1995).

7. Afrikaners generally trace their heritage to early Dutch, German, and French settlers, who began to arrive in South Africa in the mid-17th Century under the sponsorship of the Dutch East India Company. These settlers gradually developed a simplified form of Dutch, incorporating words from other languages, as a medium of communication that eventually competed with English. Afrikaner nationalism was constructed out of a complex of beliefs and grievances, including resentment of the political and economic power of English speaking whites, opposition to British imperialism, desire for a separate identity, belief in racial inferiority of non-whites, and fear of competition and domination by native Africans. The Boer War (1899-1902) solidified Afrikaner national identity. The National Party was founded in 1918 to defend rising Afrikaner nationalism. It developed the policy of apartheid in the mid 1940s, and employed it to win political power in the 1948 whites only election. For more on Afrikaners, Afrikaner nationalism, and the National Party, see LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* 32-35, 154-200 (1990); WILLIAM MINTER, *KING SOLOMON'S MINES REVISITED* 37-46, 54-59, 94-98 (1986).

8. South Africans opposed to racial domination in the country sought interna-

cries of "Free South Africa," "Free Mandela," and "Death to Apartheid" were uttered and repeated on countless occasions in diverse corners of the world. For many people, these cries were the beginnings of lifelong covenants against the state-directed racism and violence that characterized the apartheid system and so profoundly offended post-World War II sensibilities and norms.⁹ The plight of oppressed South Africans galvanized diverse individuals and groups into action across nations, race, gender, and class, as much as any other international issue over the last fifty years.

The work of the United Nations and its various organs and units was critical to mobilizing international concern against apartheid.¹⁰ Much of this work was prompted by Third World nations,¹¹ which insisted that the United Nations give substantive

tional support since the early part of the twentieth century. See PETER WALSH, *THE RISE OF AFRICAN NATIONALISM IN SOUTH AFRICA: THE AFRICAN NATIONAL CONGRESS 1912-1952*, at 89-106 (1970). In 1946, India complained about treatment of persons of Indian origins.

9. It should be acknowledged that many other societies in that period were characterized by racist policies and practices. South Africa stood because of its open attempt to institutionalize and defend explicit racism as national policy. Apartheid was a blunt rejection of racial equality rhetoric and aspirations. See GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* (1981) (comparing race relations in United States and South Africa); GARY P. FREEMAN, *IMMIGRATION LABOR AND RACIAL CONFLICT IN INDUSTRIAL SOCIETIES* (1979) (discussing British and French immigration and racial policies from 1945 to 1975); 'RACE' IN BRITAIN (Charles Husband ed., 2d ed. 1987) (giving historical discussion of British racial policies and practices).

10. The United Nations came into existence on June 26, 1945, when the U.N. Charter was signed in San Francisco by representatives of 50 countries, including the Union of South Africa, an original Member who had met from April 25 to June 26 to negotiate the final version of the Charter. The Charter came into force on October 24, 1945, and the General Assembly, the U.N. organ that took the lead against racial domination in South Africa, held its first meeting in London on January 10, 1946. U.N. CHARTER; LELAND M. GOODRICH & EDWARD HAMBRO ET AL., *CHARTER OF THE UNITED NATIONS* 4-9 (1949) [hereinafter GOODRICH & HAMBRO]. International discussions on establishing an international organization had begun even before the United States entered the Second World War in December 1941. *Id.* at 2-4; DANIEL P. MOYNIHAN, *ON THE LAW OF NATIONS* 73-79 (1990). The Charter's basic proposals were developed at a conference that met at Dumbarton Oaks in Washington, D.C., from August 21 to October 7, 1944. *Id.* For more on the negotiations leading to the founding of the United Nations, see ROBERT C. HILDERBRAND, *DUMBARTON OAKS: THE ORIGINS OF THE UNITED NATIONS AND THE SEARCH FOR POSTWAR SECURITY* (1990).

11. The Author uses the term "Third World" to refer to developing countries when the context of such usage is not directly related to economic matters. Other synonyms include the South, the G-77, and the Non-aligned Movement (although many developing or Third World Countries aligned with Western countries or Eastern countries dur-

meaning to human rights principles proclaimed in the U.N. Charter and other international documents. When the General Assembly failed to convene the Security Council to impose broad economic sanctions, the General Assembly turned to national and international human rights groups for assistance. It was the participation of these national and international anti-apartheid groups that made possible the difficult task of translating vague, indeterminate human rights principles and promises into usable tools for mobilizing against racial injustice.

The 1994 South African election can be seen as an important moment in the global advancement of "the emerging right to democratic governance"¹² and, indeed of the broad liberal democratic vision outlined in the U.N. Charter and the principal international human rights instruments that together make up the International Bill of Rights.¹³ The South African election confirmed the widespread acceptance, at least on a formal level, of a key component of the International Bill of Rights: political participation by citizens in national affairs, measured by the yardstick of "free and fair elections."¹⁴ This right of political participation is increasingly seen, in the global community, as fundamental to every individual and the *sine qua non* of governmental political legitimacy.¹⁵ Support for free and fair elections now

ing the Cold War). The term "Third World" is widely accepted and used by scholars and government officials from developing countries. See, e.g., Mohammed Bedjaoui, *No Development Without Peace, No Peace Without Development*, in UNITED NATIONS AND A JUST WORLD ORDER 178-83 (1991).

12. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992).

13. See John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 529 (1976); LOUIS HENKIN, INTRODUCTION TO THE INTERNATIONAL BILL OF RIGHTS (1981).

14. The Universal Declaration of Human Rights uses the phrase, "periodic and genuine elections" to describe this component. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948). The International Covenant on Civil and Political Rights also uses the "genuine periodic elections" formulation. International Covenant on Economic, Social, and Cultural Rights, art. 25 § b, Dec. 16, 1966, 993 U.N.T.S. 3, 1977 Gr. Brit. T.S. No. 6 (Cmd. 6702). The Author makes no distinction in this Article between these formulations and the more popular "free and fair elections" usage that appears to have originated in U.N. practice.

15. Franck, *supra* note 12, at 46. United Nations support for the right to free and fair elections as the central measure of political participation is founded not only upon provisions in the International Bill of Rights; various U.N. Charter provisions promoting human rights, equal rights, self-determination, and other similar values may also be invoked to justify U.N. actions. U.N. Charter Article 1(3) lists some of the purposes of the United Nations as: "[t]o achieve international cooperation . . . in promoting and

represents the most concrete and visible aspect of the United Nations's support for political participation and other fundamental human rights.

This Article explores serious questions that remain about the U.N. role in human rights struggles following the South African elections. Are there structural barriers that prevent the United Nations from acting more rapidly and decisively on human rights matters? What role does the United Nations have in the human rights struggle beyond the mechanics of electoralism and attainment of formal political equality? How can human rights non-governmental organizations ("NGOs") help the United Nations become more effective in its human rights work? The fifty-year global campaign against state-directed racial oppression in South Africa provides lessons that help answer such questions.

This Article is divided into two parts. Part One reviews five decades of the U.N.-centered global campaign for human rights in South Africa. The campaign was built around dismantling apartheid and replacing it with a new political order, legitimized through elections. The review reveals the general inadequacy of the formal United Nations structure and processes and highlights the effectiveness of the international anti-apartheid movement, human rights NGOs who employed U.N. resources to reach across sovereign boundaries and mobilize popular support against apartheid.¹⁶ This Article's evaluation focusses on the enduring nature and comprehensiveness of the global response to apartheid and suggests that the campaign should be used as a standard for judging global responses to other human rights violations.

Part Two of this Article identifies the domestic and international aspects of the global campaign against apartheid that can effectively be applied in other human rights struggles. Part Two of the Article critiques the institutional deficiencies of U.N. in-

encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." U.N. CHARTER art. 1, ¶ 3; *See also* U.N. CHARTER arts. 1, ¶ 7, 55, 56, 62, 64, 68. For a brief discussion of how the U.N. Charter provides a foundation for the promotion of human rights generally, see IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 569-71 (4th ed. 1990).

16. Article 71 of the U.N. Charter authorizes the Economic and Social Council to "make suitable arrangements for consultations with non-governmental organizations which are concerned with matters within its competence." U.N. CHARTER art. 71.

tervention, which involved little effort to deal with the underlying socio-economic disparities that pervade South Africa. Part Two also explores how the United Nations' lack of influence on international economic matters undermines the efficacy of popular efforts to address vast economic disparities that characterize societies like South Africa.

This Article concludes by discussing how human rights NGOs could further the human rights mission of the United Nations by interpreting their work in light of ideas developed in the critique and defense of rights-discourse. In particular, it discusses the promise of the "jurisprudence of reconstruction,"¹⁷ which is committed to both a radical and critical posture toward power even as it seeks to transform power relationships by appealing to ideas like truth and justice.

I. THE UNITED NATIONS AGAINST APARTHEID 1946-90: A HUMAN RIGHTS HISTORY

We are here today to convey to you, who are the representatives of the peoples of the world, the profound gratitude of the people of South Africa for your engagement, over the decades, in the common struggle to end the system of apartheid.

— Nelson Mandela¹⁸

Third World nations and international anti-apartheid movements played a critical role in helping the United Nations give some substantive content to the post-World War II human rights ideals and guarantees contained in the U.N. Charter and subsequent human rights instruments. For much of this period, these nations and human rights movements labored without the support of major world powers such as the United States, the United Kingdom, and France. This section examines four pivotal developments during this period: (1) the early establishment of the United Nations' competence to intervene in South Africa, starting with the 1946 United Nations' consideration of discrimination against Asian nationals in South Africa and concluding with

17. See Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 766-67 (1994).

18. Summary Record of the 668th Meeting, Held at Headquarters, New York, on Friday, September 24, 1993, U.N. Special Committee Against Apartheid, 48th Sess., 668th mtg., U.N. Doc. A/AC.115/SR.668 (1993) (reciting Nelson Mandela Address before United Nations Special Committee Against Apartheid).

the official condemnation of apartheid as state policy in the 1950's; (2) the post-Sharpeville, U.N.-centered campaign to adopt comprehensive sanctions against South Africa as a means of promoting an end to the apartheid system; (3) the 1980's grassroots campaigns in Western countries, which accomplished within national structures many of the goals of the comprehensive anti-apartheid program developed by the U.N. Special Committee Against Apartheid;¹⁹ and (4) U.N. and NGO contributions to the de Klerk-era negotiations for a post-apartheid political order, and the role in monitoring and legitimizing South Africa's first democratic elections. This review shows that the level of U.N. involvement depended on pressure from both human rights NGOs and Third World nations.

A. Establishing U.N. Competence to Intervene in Support of Human Rights: The General Assembly Considers Apartheid 1946-60

The United Nations campaign against apartheid began shortly after its establishment. The campaign began as a limited clash over South Africa's treatment of Indian and other Asian nationals²⁰ but expanded to become a comprehensive global campaign against apartheid as an ideological basis of legitimate governance.²¹ The U.N. General Assembly first considered South Africa's racial discrimination and segregationist policies when India asked it to examine South Africa's treatment of persons of Indian origin in 1946.²² At that time, South Africa was

19. This Article focusses on the U.S. Free South Africa Movement ("FSAM"), which played a critical role in getting the U.S. Congress to pass comprehensive sanctions legislation against South Africa in 1986. For a brief discussion of the development and tactics of FSAM in the eighties, see PAULINE H. BAKER, *THE UNITED STATES AND SOUTH AFRICA: THE REAGAN YEARS* 22-53 (1989).

20. Kenneth B. Noble, *Fearing Domination by Blacks, Indians of South Africa Switch Loyalties*, N.Y. TIMES, Apr. 22, 1994, at A8; *Indians Fate in South Africa: They are Trapped in Middle*, N.Y. TIMES, Aug. 10, 1985, at 4.

21. Apartheid's central elements were white purity and white supremacy. It was first elaborated in a 1946 report by Paul Sauer, a senior National Party official. The Afrikaner-dominated National Party campaigned vigorously on an apartheid platform and won a narrow victory in South Africa's 1948 general election over the Smuts government. LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* 185-86 (1990). For more on the origins of apartheid as state policy, see HERMANN GILIOME & LAWRENCE SCHLEMMER, *FROM APARTHEID TO NATION-BUILDING* (1989).

22. See 1946-47 U.N.Y.B. 144-49, U.N. Sales No. 1947.I.18; 1947-48 U.N.Y.B. 52-59, U.N. Sales No. 1949.I.13; 1948-49 U.N.Y.B. 304-10, U.N. Sales No. 1950.I.13; see also LELAND M. GOODRICH, *THE UNITED NATIONS IN A CHANGING WORLD* 174-75 (1974); THOMPSON, *supra* note 21, at 185. Nelson Mandela credits the resistance of the Indian

still two years away from apartheid as official state policy, but it was in every sense a harsh and comprehensively segregated society where whites exercised control over all aspects of national life.²³

India's complaint concerned discriminatory legislation passed by the pre-apartheid but pro-segregationist South African government of Prime Minister Jan Smuts²⁴ that limited the rights of Indian merchants in Natal and the Transvaal.²⁵ The Indian Government cited three legal grounds for its complaint:²⁶ (1) that South Africa's actions clearly violated its obligations under the U.N. Charter relating to human rights and fundamental freedoms; (2) that South Africa's actions amounted to a unilateral repudiation of "The Cape Town Agreement,"²⁷ an international agreement, between the two countries; and (3) that as a

community to official discrimination with having profoundly influenced his political activism. NELSON MANDELA, *LONG WALK TO FREEDOM* 90-91 (1994).

23. For an excellent account of the pre-apartheid segregationist period in South Africa, see THOMPSON, *supra* note 21, at 154-86.

24. Leonard Thompson wrote that the internationally renowned Field Marshall Smuts "never wavered in his belief that Africans were an inferior people; his was at best a paternalistic attitude." *Id.* at 182. The Smuts' administration which ruled South Africa from the eve of the Second World War until it was defeated by the Afrikaner-dominated National Party in the 1948 election, made a few tentative but ultimately inconsequential efforts at ameliorating the harsh circumstances of the non-white population. Expectations of change raised by these efforts were quickly replaced by growing frustrations and militancy among non-whites. At the same time, the White population, Afrikaners especially, became increasingly disenchanted with his administration's racial policies. The Afrikaners in particular wanted stronger actions to maintain white supremacy and a tougher attitude toward international interference. For more on the transition from the Smuts administration to the first National party government, see *id.* at 162-63, 177-86.

25. The key legislation at issue was the Asiatic Land Tenure and Indian Representation Act of 1946 which segregated Indians in South Africa in their residence and trade. Pakistan joined India's complaint after it became an independent country in 1947, since many of the affected had emigrated to South Africa from parts of India that later became Pakistan. See 1946-47 U.N.Y.B. 144-46, U.N. Sales No. 1947.I.18; 1948-49 U.N.Y.B. 304-10, U.N. Sales No. 1950.I.11.

26. See 1946-47 U.N.Y.B. 144-45, U.N. Sales No. 1947.I.18 (citing draft resolution of November 20, 1946).

27. See 1946-47 U.N.Y.B. 144-46, U.N. Sales No. 1947.I.1 The Capetown Agreement of 1927 (renewed in 1932) between the governments of India and South Africa was a response to anti-Asian agitation in South Africa. White settlers who needed indentured Asian laborers were hostile to free Asian immigrants who wanted to settle and trade in the country. Their hostility prompted discriminatory measures and repatriation efforts. The Capetown Agreement sought to balance repatriation efforts with better treatment of remaining settlers. Earlier hostility and discrimination against Indian settlers led to the Gandhi passive resistant movements of 1907 and 1913. *Id.*

result of South Africa's actions, friendly relations between the two countries had been placed in jeopardy.

India's complaint triggered a bitter conflict over the extent of the United Nations' competence to intervene in matters occurring entirely or predominantly within national borders.²⁸ This conflict threatened the very concept of a global institution dedicated to promoting international peace and security as well as promoting global human rights. The safest course for the United Nations, as urged by South Africa and many of the United Nations' leading powers, would have been to minimize the dispute. The United Nations' decision to pursue the complaint and, later, to expand the investigation proved to be very important for advancing political participation rights in particular, and human rights generally, both in South Africa and elsewhere.

In responding to the complaint, South Africa challenged the United Nations' competence to deal with what it considered its domestic affairs.²⁹ The South African Government viewed U.N. discussion of the treatment of the Indian nationals in South Africa as an improper intervention in its domestic jurisdiction in violation of Article 2(7) of the U.N. Charter.³⁰ The

28. India submitted its complaint to the General Assembly under Articles 10 and 14 of the U.N. Charter.

Article 10 states that:

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

U.N. CHARTER art. 10. Article 14 states that:

Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation regardless of origin, which it deems likely to impair the general welfare of friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

U.N. CHARTER art. 14.

29. See GOODRICH & HAMBRO, *supra* note 10, at 64-65; 1946-47 U.N.Y.B. 145-46, U.N. Sales No. 1947.I.18.

30. Article 2(7) of the U.N. Charter states that:

Nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter: but the principle shall not prejudice the application of enforcement measures under Chapter VII.

South African Government's opposition to United Nations jurisdiction over the complaint included three non-jurisdictional points: (1) that the Cape Town Agreement did not give rise to treaty obligations; (2) that the South African Government had not violated any fundamental human rights guaranteed by the U.N. Charter because international agreement had not yet been achieved about the formulation or definition of such rights within or outside the Charter; and (3) that political participation rights and freedoms were, in any case, not fundamental, and in a multi-racial society where the "less progressive races" are in the majority, it should be permissible, in the interest of achieving equality, to discriminate against the majority where non-fundamental rights are concerned.³¹

The U.N. General Assembly never explicitly resolved South Africa's jurisdictional challenge to its competence. Its subsequent U.N. actions confirmed, however, that most U.N. Members believed that South Africa's racial policies violated the country's international human rights obligations.³² On each and every occasion when the issue of South Africa's treatment of its non-whites came before it, the General Assembly overrode objections to its competence and considered the issue on its merits. This unyielding view of the General Assembly on this issue should be credited with helping to establish the position that is well accepted today; that sovereign borders will not isolate gross violations of human rights from international scrutiny.

On December 8, 1946, the U.N. General Assembly took a historic first step against racial discrimination in South Africa. By a vote of 32 in favor, 15 against, and with 7 abstentions, the General Assembly passed a resolution acknowledging merit in India's claim and asking the two governments to report on pres-

U.N. CHARTER art. 2, ¶ 7.

31. See 1946-47 U.N.Y.B. 145-46, U.N. Sales No. 1947.I.18.

32. GOODRICH & HAMBRO, *supra* note 10, at 65, 70-71, 113, 144, 175. South Africa's proposal that the General Assembly ask the International Court of Justice for an advisory opinion on whether the treatment of the South Africans of Indian origin was a matter essentially within South Africa's domestic jurisdiction received significant support, including that of the United States, but was eventually defeated by a vote of 31 to 21 with 2 abstentions. 1946-47 U.N.Y.B. 146-48, U.N. Sales No. 1947.I.18. Most General Assembly Members concluded that the political aspects of the issue far outweighed its legal aspects. *Id.* at 65. In addition to Articles 10 and 14 of the U.N. Charter specifically cited by the Indian Government, U.N. consideration of the issue has also been justified under Articles 1, 2, 55, and 56 of the Charter. *Id.* at 113, 144; U.N. CHARTER arts. 1, 2, 55, 56.

tures to correct the situation. This resolution turned out to be the first step toward legitimizing international concern with the treatment of South Africa's non-white peoples.³³ The resolution made the United Nations, almost from its inception, the principal international forum for addressing racial discrimination in South Africa. This first step is particularly significant because it preceded both the adoption of apartheid as official state policy in South Africa and the adoption of the Universal Declaration of Human Rights³⁴ by the United Nations.³⁵

The United Nations subsequently broadened its consideration of the treatment of the Indian nationals to include treatment of other Asian nationals in South Africa. In 1949, the General Assembly asked South Africa, India, and newly independent Pakistan to "enter into discussion at a round-table conference,"³⁶ and negotiate an amicable settlement consistent with the principles of the U.N. Charter and the recently adopted Universal Dec-

33. The resolution was passed only after a lengthy debate. U.N. General Assembly Resolution 44(I) stated that:

THE GENERAL ASSEMBLY, HAVING taken note of the application made by the Government of India regarding the treatment of Indians in the Union of South Africa, and having considered the matter:

1. STATES that, because of that treatment, friendly relations between the two Member States have been impaired, and unless a satisfactory settlement is reached, these relations are likely to be further impaired;
2. IS OF THE OPINION that the treatment of Indians in the Union should be in conformity with the international obligations under the agreements concluded between the two Governments, and the relevant provisions of the Charter;
3. THEREFORE REQUESTS the two Governments to report at the next session of the General Assembly the measures adopted to this effect.

G.A. Res. 44(I), U.N. Doc. A/44(I) (1946).

34. G.A. Res. 265, U.N. GAOR, 3d Sess., Supp. No. 20, U.N. Doc. A/RES/265 (1949).

35. Apartheid became South Africa's official state policy in 1948, the same year that the U.N. General Assembly adopted the Universal Declaration of Human Rights. Apartheid constituted the political platform of the Afrikaner-led National Party government that defeated the Smuts administration in South Africa's whites only general election in 1948. The new government rapidly built apartheid upon the racist infrastructure that was already in place. See THOMPSON, *supra* note 21, at 184-220. For a detailed and controversial discussion of the development of apartheid, see GILMEE & SCHLEMMER, *supra* note 21. For an examination of the legal structures and the abuse of human rights in apartheid South Africa, see INTERNATIONAL COMMISSION OF JURISTS, SOUTH AFRICA: HUMAN RIGHTS AND THE RULE OF LAW (Geoffrey Bindman ed., 1988).

36. G.A. Res. 265, U.N. GAOR, 3d Sess., Supp. No. 20, ¶ 2, U.N. Doc. A/RES/265 (1949).

laration of Human Rights.³⁷ This request was not implemented as the parties clashed over additional racially discriminatory measures taken by the South African Government. In 1950, South Africa enacted the Group Areas Act,³⁸ one of the corner stones of Apartheid, which required strict racial segregation for residence and work in urban areas.³⁹

The General Assembly responded to the adoption of the Group Areas Act with a resolution criticizing the racist underpinnings of the law, and urged South Africa to refrain from implementing the law while engaged in negotiations with India and Pakistan.⁴⁰ U.N. Members who voted in favor of the resolution made it clear that "the defence of fundamental human rights was one of the primary duties and obligations of the United Nations, and concern for the observance of fundamental human rights in a country did not mean interference in the domestic affairs of that country."⁴¹ According to many of these Members, South Africa's racially discriminatory system was a threat to "democratic principles and world peace."⁴² One should note that South Africa's argument that international law made the relationship between a state and its nationals "a matter exclusively of domestic jurisdiction,"⁴³ where the state has not expressly waived its sovereign rights, received very little support.⁴⁴

37. See G.A. Res. 265, U.N. GAOR, 3d Sess., Supp. No. 20, U.N. Doc. A/RES/265 (1949).

38. Act 41 of 1950 (S. Afr.). See JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 79-83 (1978). For accounts of the history, implementation and importance of The Group Areas Act of 1950 to the structure of apartheid see INTERNATIONAL COMMISSION OF JURISTS, *supra* note 35, at 15-18; THOMPSON, *supra* note 21, at 194-95.

39. Act 41 of 1950 (S. Afr.).

40. See G.A. Res. 395, U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/RES/395 (1950); 1950 U.N.Y.B. 407, U.N. Sales No. 1951.I.24.

41. 1950 U.N.Y.B. 407, U.N. Sales No. 1951.I.24.

42. *Id.*

43. *Id.* at 398.

44. *Id.* The General Assembly revisited South Africa's discriminatory policies against Asian nationals on January 12, 1952, when it again rejected strenuous objections to its competence. The General Assembly adopted a resolution calling for an international commission consisting of three Member nations to assist the parties with negotiations. The resolution asked South Africa to suspend implementation of the Group Areas Act. South Africa rejected the terms of the resolution, however, and the commission was never constituted. G.A. Res. 511, U.N. GAOR, 6th Sess., Supp. No. 20, U.N. Doc. A/RES/511 (1951); 1941 U.N.Y.B. 353, U.N. Sales No. 1952.I.30.; see also *Special Report of the U.N. Secretary-General*, 7th Sess., U.N. Doc. A/2218 (1952). As 1952 drew to a close, the General Assembly established a "United Nations Good Offices Commission,"

A much more fundamental U.N. challenge to South Africa emerged in 1952 when the United Nations began to condemn the country's general racial policies. Prior to 1952, United Nations criticisms of South Africa's racial policies arguably transcended purely domestic concerns because of the acknowledged interest of India and other Asian countries in the treatment of their citizens or nationals. On the other hand, discrimination against South Africa's large African population could hardly be characterized, under traditional interpretations of international law, as other than a purely domestic issue. These "native" Africans held allegiance to no other sovereign power at the time. U.N. intervention on behalf of the African population could hardly be justified on grounds of international peace and security or violations of specific treaty obligations. Moreover, the absence of traditional legal rationale did not deter Third World nations from raising the question in late 1952, calling the South African Government's policy of racial discrimination and segregation "an offense to human dignity and a clear violation of the Charter and the Universal Declaration of Human Rights."⁴⁵ South Africa vehemently objected to the United Nations' competence, reasserting the arguments it had made against U.N. consideration of the treatment of Indian nationals. Support for the South African position was actually stronger in this instance than in 1946, with many Western nations agreeing that an "expanded" involvement in South Africa's "domestic" affairs violated the prohibition contained in Article 2(7).⁴⁶

The General Assembly, however, overrode the procedural objections, rejecting even a request to seek an advisory opinion

with three members to be nominated by the President of the General Assembly. G.A. Res. 615, U.N. GAOR, 7th Sess., Supp. No. 20, U.N. Doc. A/RES/615 (1952). Only South Africa voted against this resolution. Cuba, Syria and Yugoslavia were appointed to the commission. 1952 U.N.Y.B. 297, U.N. Sales No. 1953.I.30.

45. 1952 U.N.Y.B. 294, U.N. Sales No. 1953.I.30. Thirteen countries, Afghanistan, Burma, Egypt, India, Indonesia, Iran, Iraq, Lebanon, Pakistan, the Philippines, Saudi Arabia, Syria, and Yemen asked that the question of apartheid and its consequences be placed on the agenda of the General Assembly. *Id.* at 297-98.

46. *Id.* at 298-304. The United Kingdom, France, Belgium, and Australia were the strongest supporters of the South African position. The Socialist countries supported the Third World position while the United States and the Scandinavian countries led a block of countries that supported the United Nation's competence to consider the issue without doing more than making an appeal to South Africa to change its racial policies. *Id.*

from the International Court of Justice.⁴⁷ Thus began, for the first time in the United Nations, a direct and open consideration of South Africa's overall racist policies and their consequences.⁴⁸ After a protracted debate, the General Assembly passed a two-part resolution, restating its previous criticisms of racial discrimination in South Africa and establishing a three-person commission to study the racial situation in South Africa.⁴⁹

The new U.N. Commission⁵⁰ submitted a report highly critical of South Africa's racial policies to the Eighth Session of the General Assembly on October 3, 1953.⁵¹ The report described apartheid as "injurious to human dignity,"⁵² and "likely to impair the general welfare or friendly relations among the nations."⁵³ More importantly, it concluded that apartheid violated international law, citing several provisions of the U.N. Charter, the Universal Declaration of Human Rights, and several U.N. resolu-

47. See *id.* at 297-306; see also GOODRICH & HAMBRO, *supra* note 10, at 65. The International Court of Justice ("ICJ"), was established by the U.N. Charter as the principal judicial organ of the United Nations. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 [hereinafter STATUTE OF THE INTERNATIONAL COURT OF JUSTICE]. All U.N. Members are automatically parties to the Statute. See U.N. CHARTER art. 7, ¶ 1.

48. GOODRICH, *supra* note 22, at 175. Many U.N. Members justified the special attention paid to South Africa, even though racial discrimination was by no means limited to that part of the world, by stressing the role of the South African state in codifying and promoting racial segregation and discrimination. The United States, for example, described apartheid as contrary to "world trends" and "incompatible with the generally accepted interpretation of the obligations of the Charter." 1952 U.N.Y.B. 303, U.N. Sales No. 1953.I.30.

49. This commission, the United Nations Commission on the Racial Situation in the Union of South Africa, was distinct from the commission dealing with the treatment of Asian nationals. G.A. Res 616, U.N. GAOR, 7th Sess., U.N. Doc. A/RES/616 (1952). Part A was sponsored primarily by Third World and Socialist members and it included the call for the Commission to study South Africa's racial situation. The mandate for the study specifically required the Commission to consider several provisions of the U.N. Charter, including Article 2(7). Part B, sponsored by the Scandinavian countries, noted the race conflict in South Africa, but made only a general call for all U.N. Members to support human rights and to adopt policies consistent with their Charter obligations. 1952 U.N.Y.B. 305-06, U.N. Sales No. 1953.I.30.

50. See THE UNITED NATIONS AND APARTHEID, *supra* note 1, at 229.

51. *Report of the United Nations Commission on the Racial Situation in the Union of South Africa*, U.N. Commission on the Racial Situation in the Union of South Africa, U.N. GAOR, 8th Sess., Supp. No. 16, U.N. Doc. A/2505/Add.1 (1953) [hereinafter *Situation Report*]. The Commission was composed of Dante Bellegarde, Henri Laugier, and Hernan Santa Cruz serving in their personal capacities. See 1953 U.N.Y.B. 187, U.N. Sales No. 1954.I.15; THE UNITED NATIONS AND APARTHEID, *supra* note 1, at 228-31.

52. *Situation Report*, *supra* note 51, at 1.

53. *Id.*

tions.⁵⁴ Unsurprisingly, South Africa refused to recognize the Commission or to consider its recommendations.⁵⁵

Throughout the 1950's, South Africa remained firm in its objections to U.N. jurisdiction and rejected all criticisms and appeals.⁵⁶ South Africa could not, however, discourage the United Nations from addressing its racial policies. South Africa's search for refuge in formalistic incantation of international legal doctrine failed against the determination of many U.N. Members to give substance to the human rights promises of the era. The inability of the General Assembly to take punitive actions against South Africa should not obscure or devalue the powerful human rights precedent established by the Assembly's willingness to breach tradition and assert its responsibility for monitoring and criticizing violations of human rights in South Africa.

The General Assembly's recognition that human rights violations merited international consideration, laid the foundation for the more concrete steps taken over the next three decades to promote human rights in South Africa. Others would also benefit from this human rights precedent. Citizens of other countries, whose leaders were eager to condemn apartheid but remained doggedly reluctant to confront injustices in their own countries, laid claims to the fruits of this precedent as they too later demanded international human rights assistance.⁵⁷

B. *From Rhetoric to Sanctions: The General Assembly Confronts the Security Council 1961-79*

For years after the United Nations first considered the apartheid question, South Africa and a group of open supporters pressed their challenge to the United Nation's competence

54. The Commission specifically cited the Preamble and Articles 14, 55, and 56 of the U.N. Charter. *Id.* The specific U.N. resolutions cited were General Assembly Resolution 103(I) of 1946, General Assembly Resolution 377E(V) of 1950 (Uniting for peace); General Assembly Resolution 616B(VII) 1952. G.A. Res. 103(I), U.N. GAOR, 2d Sess., U.N. Doc. A/RES/103I (1946); G.A. Res. 377E(V), U.N. GAOR, 5th Sess., U.N. Doc. A/377EV (1952); G.A. Res. 616B(VII), U.N. GAOR, 7th Sess., U.N. Doc. A/RES/616BVII (1952); see 1953 U.N.Y.B. 187-89, U.N. Sales No. 1954.I.15.

55. See 1953 U.N.Y.B. 187, U.N. Sales No. 1954.I.15. Despite South Africa's lack of cooperation, the Commission continued studying the South African situation under mandate from the General Assembly. G.A. Res. 721, U.N. GAOR, 8th Sess., Supp. No. 17, U.N. Doc. A/RES/721 (1953).

56. GOODRICH & HAMBRO, *supra* note 10, at 174.

57. See, e.g., AMNESTY INTERNATIONAL, THE 1994 REPORT ON HUMAN RIGHTS AROUND THE WORLD (1994).

to address the country's racial policies. For most U.N. Members, however, the jurisdictional issue was settled. From the early 1960's until Nelson Mandela left prison in 1990, the United Nation focused on the issue of how to persuade South Africa's leaders to abandon apartheid.⁵⁸ Because the General Assembly's power to force a change in the behavior of its members was limited, South African intransigence, therefore, necessitated the support of the Security Council.

The U.N. Charter gives the Security Council "primary responsibility for the maintenance of international peace and security."⁵⁹ Only the Security Council, under Chapter VII of the Charter, has the power to determine when international peace and security is threatened and what binding measures may be taken to restore peace and security.⁶⁰ General Assembly resolutions generally lack the binding legal force that Security Council actions can generate. Indeed, while the U.N. Charter requires its members to "accept and carry out the decisions of the Security Council,"⁶¹ no such obligation is imposed upon U.N. Members with regard to General Assembly actions. Under the U.N. Charter, the General Assembly's powers are essentially limited to discussion, study, and recommendation.⁶² At its best, the General Assembly operates as a highly visible international forum for focusing global attention and moral outrage. Where it fails to persuade U.N. Members to act voluntarily in accordance with its resolutions, the General Assembly must depend on the Security Council for more concrete actions under its maintenance of peace and security responsibilities.⁶³

Many Members, including many who claimed to be very much opposed to government-sanctioned racial discrimination, balked at efforts to move the United Nations beyond General Assembly-initiated discussions and studies to concerted punitive

58. Beginning in 1962, the United Nations began considering discrimination against Indian and Pakistani nationals and the question of apartheid jointly. See 1962 U.N.Y.B. 93, U.N. Sales No. 63.I.1.

59. U.N. CHARTER art. 24.

60. See generally *id.* chs. VI, VII.

61. *Id.* art. 25.

62. *Id.* ch. IV.

63. Article 25 obligates U.N. Members to carry out the decisions of the Security Council. See U.N. CHARTER arts. 33-49 (describing specific Security Council powers to resolve international peace and security disputes).

action under Chapter VII.⁶⁴ These Members claimed to be troubled by the prospect of creating a precedent for U.N. intervention in the traditionally domestic sphere of human rights, especially with regard to political participation matters.⁶⁵ Perhaps there was also an underlying recognition among them that the basic difference between South Africa and several other U.N. Members was largely one of form, not substance; many U.N. Members at the time practiced *de facto* race or ethnic discrimination even as they objected to codification of such practices.⁶⁶

The strong support that South Africa's objections to the United Nation's competence received from many Western nations during General Assembly debates made it clear that gaining Security Council support for punitive international action would be difficult.⁶⁷ Even if a majority of the Security Council's Members supported actions against South Africa, any one of the permanent Members could veto such actions.⁶⁸ Still a decade of institutional condemnation had failed to change South Africa's racial policies and this failure was beginning to discredit the United Nations.

1. The United Nations Responds to Sharpeville

The effort to get Security Council intervention received a dramatic, albeit short-lived, impetus in early 1960. On March 21, 1960, sixty-nine Africans were killed when South African police opened fire on a crowd of several thousand people who were peacefully protesting against pass laws.⁶⁹ The tragedy made

64. Some General Assembly Members, including the United States, felt that sanctions or expulsion would worsen the situation in South Africa, while others felt that sanctions should be reserved for more immediate threats to international peace and security. 1961 U.N.Y.B. 111-12, U.N. Sales No. 62.I.1.

65. See 1961 U.N.Y.B. 109, U.N. Sales No. 62.I.1.

66. The South African Foreign Minister, during debate of this issue before the Special Political Committee of the U.N. General Assembly, accused other members of not having "clean hands." The response of other delegates emphasized their objections to the enshrinement of apartheid in South Africa's constitution and laws. 1961 U.N.Y.B. 110, U.N. Sales No. 62.I.1.

67. The United Kingdom and France, both permanent members of the Security Council, were especially strong in their support.

68. See U.N. CHARTER arts. 23, 27.

69. Pass laws, like other key components of apartheid, antedated apartheid. These laws restricted the right of most blacks to remain in white areas for more than 72 hours. Blacks were required to carry passbooks and to show them on demand. Over the years, millions of blacks were arrested for pass law violations. See INTERNATIONAL COMMISSION OF JURISTS, *supra* note 35, at 12-13.

Sharpeville, a small township near Johannesburg, a global symbol of apartheid's illegitimacy and inhumanity.⁷⁰ The massacre and the resulting Government crackdown on the anti-apartheid opposition, focused international attention on apartheid, and brought a deluge of condemnation on the racist regime.⁷¹ The Security Council, forced to address South Africa's racial policies,⁷² adopted a resolution deploring "the policies and actions of the Government of the Union of South Africa,"⁷³ and called upon it to abandon racial discrimination and apartheid.⁷⁴ The Resolution boosted the pro-interventionist tendency in the United Nations, especially that the continuation of apartheid might endanger international peace and security.⁷⁵ This initial linking of South Africa's racial policies to the *sine qua non* of U.N. intervention, international peace and security, was an important turning point in the international effort against apartheid. In addition to demonstrating the flexibility or manipulability of concepts like international peace and security, the link also evidence the growing role of Third World nations and the international human rights movement within the United Nations. The link asserted the importance of African lives and interests at a time when colonial rule was just ending for most Africans.

70. See THOMPSON, *supra* note 21, at 210; see generally MANDELA, *supra* note 22. For a description of the events and politics surrounding the Sharpeville tragedy, see *id.* at 197-208. The anti-pass demonstration in Sharpeville was part of a nationwide anti-pass campaign led by the Pan Africanist Congress ("PAC"), a rival offshoot of the African National Conference ("ANC"). Nelson Mandela asserts that the PAC knew of ANC plans for a nationwide anti-pass campaign and sought to sabotage the ANC by launching its own campaign 10 days earlier. MANDELA, *supra* note 22, at 206. Nelson Mandela noted that the Sharpeville massacre "created a new situation in the country." *Id.* at 207.

71. Alan Cowell, *Sharpeville, 25 Years Later, Recalls a Fateful Day*, N.Y. TIMES, Mar. 21, 1985, at A2; *Sharpeville: Symbolism Burns Anew*, N.Y. TIMES, Sept. 4, 1985, at A10.

72. The meeting took place at the urgent request of a group of 29 African and Asian members. The Security Council considered the issue at six meetings between March 30, and April 1, 1960. See 1960 U.N.Y.B. 142-43, U.N. Sales No. 61.I.1.

73. THE UNITED NATIONS AND APARTHEID, *supra* note 1, at 244-45.

74. See *Resolutions Adopted and Decision Taken By The Security Council in 1960*, U.N. SCOR, 15th Sess., 851st mtg. at 1-2, U.N. Doc. S/4300 (1960) (citing Security Council Resolution 134). Ecuador sponsored the Resolution that was adopted 9 votes to 0, with France and the United Kingdom abstaining. 1960 U.N.Y.B. 146-47, U.N. Sales No. 61.I.1.

75. A finding of a "threat to international peace and security" is an essential rationale for any punitive intervention under the U.N. Charter. See U.N. CHARTER arts. 39, 41, 42.

2. The Special Committee Against Apartheid

As time passed, memories of Sharpeville held less and less force. The Security Council did not address South Africa's racial policies again until 1963. The General Assembly, however, persisted with its annual consideration of complaints against South Africa's policies. During its Seventeenth Session in 1962, the General Assembly affirmed its support of international efforts to bring about the end of apartheid by adopting Resolution 1761 (XVII).⁷⁶ Sponsored by thirty-four Asian and African Members, the Resolution asked the Security Council to consider sanctions against South Africa, including expelling it from the United Nations for its failure to comply with U.N. resolutions.⁷⁷

Resolution 1761's most important contribution, however, was the establishment of a Special Committee on Apartheid.⁷⁸ The Special Committee was charged with maintaining international focus on South Africa's racial policies when the General Assembly was not in session. In subsequent years, reports of the Special Committee formed the foundations for U.N. debates and actions dealing with apartheid. As early as 1966, the Special Committee recommended a sophisticated, multifaceted program of action against apartheid that emphasized a global information and grassroots campaign, focused on nongovernmental organizations, to build international support for comprehensive sanctions against South Africa.⁷⁹ The comprehensiveness, persistence, and focus of the later international response to apartheid

76. G.A. Res. 1761, U.N. GAOR, 17th Sess., 1165th mtg., U.N. Doc. A/RES/1761 (1962).

77. The Resolution also spelled out a series of actions that U.N. Members could take "separately or collectively" to promote the end of apartheid. These included ending diplomatic relations, boycotting South African goods, and refusing landing and passage facilities to South African aircraft. *Id.*

78. The fifth paragraph of Resolution 1761 described the terms of reference of the Special Committee on Apartheid, initially called the "Special Committee on the Policies of Apartheid of the Government of the Union of South Africa," ("Special Committee") as:

(a) To keep the racial policies of the Government of South Africa under review when the Assembly is not in session;

(b) To report either to the Assembly or to the Security Council or to both, as may be appropriate, from time to time.

See id. ¶ 5; 1962 U.N.Y.B. 100, U.N. Sales No. 63.I.1.

79. *See Report of the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa*, 21st Sess., U.N. Docs. A/6486 and S/7565 (1966), in *THE UNITED NATIONS AND APARTHEID*, *supra* note 1, at 291.

must be credited in large part to the work and influence of the Special Committee.

3. A Voluntary Arms Embargo

In August 1963, a Security Council resolution, based in part on the work of the Special Committee, described the situation in South Africa as "seriously disturbing to international peace and security"⁸⁰ and asked all U.N. Members to stop the sale and shipment of arms to South Africa.⁸¹ Call for a voluntary arms embargo developed after the Security Council received a the Special Committee report, which documented increasing repression in South Africa.⁸² The report described the South African Government as intransigent and urged the Security Council to take urgent action to encourage the end of apartheid.⁸³ As the situation deteriorated further, the Security Council unanimously adopted another resolution in early December 1963, which urged compliance with the arms embargo, and authorized the creation of another "group of recognized experts to examine methods of resolving the present situation in South Africa through full, peaceful and orderly application of human rights and fundamental freedoms to all inhabitants, regardless of race,

80. *Resolutions Adopted and Decisions Taken By the Security Council in 1963*, U.N. SCOR, 18th Sess., 1041st mtg. at 6, U.N. Doc. S/5386 (1963) (citing Security Council Resolution 181). Security Council Resolution 5386 fell short of calling the situation in South Africa a threat to international peace and security. The situation in South Africa at this point was particularly grave. Nelson Mandela, who had been in custody for about a year, was now facing more serious charges together with much of the anti-apartheid leadership and the state was seeking the death penalty. See MANDELA, *supra* note 22, at 271-306.

81. Resolution 5386, *supra* note 80. France and the United Kingdom abstained. The United States, while supporting the final wording of the resolution, successfully objected to the inclusion of a provision calling for a boycott of South African goods and a ban on export of strategic materials to South Africa. The resolution noted "with appreciation the two interim reports of the Special Committee on the policies of apartheid . . ." *Id.*; 1963 U.N.Y.B. 20, U.N. Sales No. 65.I.1.

82. See *Interim Report of the Special Committee on the Policies of Apartheid of the Government of The Republic of South Africa*, U.N. SCOR, 18th Sess., U.N. Doc. S/5310 (1963) (Letter dated May 6, 1963 from Chairman of Special Committee on Policies of Apartheid to Chairman of Security Council) [hereinafter *Interim Report*]; *Second Interim Report of the Special Committee on the Policies of Apartheid of the Government of The Republic of South Africa*, U.N. SCOR, 18th Sess., U.N. Doc. S/5353 (1963) (Letter dated July 17, 1963 from Chairman of Special Committee on Policies of Apartheid to Chairman of Security Council) [hereinafter *Second Interim Report*].

83. See *Interim Report supra* note 82 at 1.

color or creed."⁸⁴ While Western nations on the Security Council generally expressed support for the resolution, several indicated strong reservations about the arms embargo.⁸⁵ The General Assembly's response to the Special Committee reports was clearer. It passed three draft resolutions in 1963, putting the General Assembly squarely on the side of those fighting against apartheid.⁸⁶

Debate continued between those who wanted to take further and more punitive actions to end apartheid and those who opposed such actions and preferred no more than moral suasion.⁸⁷ The call for further action was loudest in the General Assembly as Third World nations began to dominate its agenda; condemnations of apartheid and demands for concrete actions to bring about its demise escalated. Frustrated with the inaction of the Security Council, the General Assembly tried to go beyond rhetoric. In particular, the General Assembly developed programs to provide legal, educational, and humanitarian assistance to internal and external victims of apartheid, and supported diverse international civic, labor, cultural, religious, and education groups working against apartheid.⁸⁸ In another very important step, the General Assembly adopted by a vote of 106 to 0, with

84. *Resolutions Adopted and Decisions Taken by the Security Council in 1963*, U.N. SCOR, 18th Sess., 1073d mtg. at 8, U.N. Doc. S/5471 (1963) (citing Security Council Resolution 182); see 1963 U.N.Y.B. 18-23, U.N. Sales No. 64.I.1.

85. The United Kingdom and France expressed the greatest reluctance to be bound by the resolution. 1963 U.N.Y.B. 18, U.N. Sales No. 64.I.1.

86. G.A. Res. 1881, U.N. GAOR, 18th Sess., 1238th mtg., U.N. Doc. A/RES/1881 (1963); 1963 U.N.Y.B. 21, U.N. Sales No. 64.I.1.; G.A. Res. 1978A, U.N. GAOR, 18th Sess., U.N. Doc. A/RES/1978A (1963).

87. In April 1964, the Group of Experts established by the Security Council in 1963, issued a set of recommendations which, among other things, urged the United Nations to assist the people of South Africa in establishing a fully representative national convention that would consider and decide the future of the country. The group also recommended that economic sanctions be applied if the Security Council was unable to gain the cooperation of the South African government. The Western nations opposed the imposition of sanctions, and continued to do so even when, in 1964, the South African government proceeded with the executions of political opponents and sentenced Nelson Mandela and the many of the leaders of the anti-apartheid struggle to life terms. 1964 U.N.Y.B. 106-16, U.N. Sales No. 65.I.1. As a compromise, a commission to study the "feasibility, effectiveness, and implications" of economic sanctions was authorized on June 18, 1964. *Resolutions Adopted and Decisions Taken by the Security Council in 1964*, U.N. SCOR, 19th Sess., 1135th mtg. at 12, U.N. Doc. S/5773 (1964) (citing Security Council 191).

88. See e.g., G.A. Res. 282, U.N. GAOR, 20th Sess., U.N. Doc. A/RES/282 (1965), (establishing voluntary U.N. trust fund to assist apartheid victims).

I abstention, the International Convention on the Elimination of All Forms of Racial Discrimination on December 21, 1965.⁸⁹ The United States, France, and the United Kingdom, however, stood fast in the Security Council against efforts to institute actions more drastic than the clearly ineffective 1963 voluntary arms embargo.

On July 23, 1970, in the face of tremendous worldwide pressures, the Security Council passed Resolution 282 which condemned violations of its voluntary arms embargo against South Africa and took steps to strengthen it.⁹⁰ This action followed a damning report from the Special Committee on Apartheid detailing the ineffectiveness of the embargo.⁹¹ Perhaps of greater long-term significance than the Security Council's plea for compliance with its voluntary arms embargo was a statement in the Resolution 282 that essentially undermined any remaining legitimacy that the apartheid regime may have had under international law. For the first time, the Security Council:

[R]ecogniz[ed] the legitimacy of the struggle of the oppressed people of South Africa in pursuance of their human and political rights as set forth in the Charter of the United Nations and the Universal Declaration of Human Rights.⁹²

However, the Resolution 282 was not made under authority of Chapter VII of the U.N. Charter and was thus deprived of the unquestioned authority and substantial force of Chapter VII actions.⁹³ The Security Council would not characterize the South

89. G.A. Res. 2106A, U.N. GAOR, 20th Sess., U.N. Doc. A/RES/2106A (1965).

90. See *Resolutions Adopted and Decisions Taken By the Security Council in 1970*, U.N. SCOR, 25th Sess., 1549th mtg. at 12, U.N. Doc. S/9882/Rev.2 (1970) (citing Security Council Resolution 134 adopted by vote of 12 to 0, with abstentions by United States, France, and United Kingdom).

91. 1970 U.N.Y.B. at 119-20, U.N. Sales No. E.72.I.1. Some violators, for example, made distinctions between arms for internal repression and external defence and justified supplies as spare parts or in fulfillment of pre-embargo contracts. The report stated that several Western nations, France and the United Kingdom in particular, had continued to supply arms and military technology to South Africa. These nations justified their actions by citing loopholes in the Security Council resolution. U.N. Security Council Resolution 282 sought to close the loopholes by calling for the implementation of the embargo without conditions or reservations. S.C. Res. 282, U.N. SCOR, 35th Sess., 1549th mtg. at 12, U.N. Doc. S/RES/282 (1970) [hereinafter Resolution 282]. The resolution proceeded to list in paragraphs (b) through (g) a series of other actions that should be taken to properly effectuate the embargo. *Id.* ¶¶ b-g.

92. Resolution 282, *supra* note 91, at 12.

93. Yet, the symbolic or propaganda value of Security Council's recognition of the

African situation as an "actual threat to international peace and security," referring to it as only a potential threat.⁹⁴

The General Assembly was far more explicit in its attacks on apartheid during its 1970 Session, passing a total of six resolutions on the issue.⁹⁵ The most noteworthy and controversial was Resolution 2671F (XXV), which declared apartheid a "negation of the Charter of the United Nations and . . . a crime against humanity."⁹⁶ The Resolution also reaffirmed "recognition of the legitimacy of the struggle of the people of South Africa to eliminate, by all means at their disposal, apartheid and racial discrimination, and to attain majority rule in the country as a whole, based on *universal suffrage*."⁹⁷ Furthermore, it detailed a comprehensive regime of diplomatic, cultural, military, and economic sanctions that should be taken against South Africa. Western nations strongly opposed the demand for comprehensive sanctions as well as the intimation of support for armed struggle. Major Western powers made it clear that they were neither ready to cut off their lucrative ties to South Africa nor endorse the use of violence by opponents of apartheid, regardless of the acknowledged legitimacy of the anti-apartheid struggle.⁹⁸

4. Promoting a Global Grassroots Campaign

In the early 1970's, the United Nations was at an impasse on the South African question.⁹⁹ While there was general agree-

anti-apartheid struggle and its attachment of the United Nation's human rights values should not be undervalued.

94. Resolution 282's sponsors chose the language deliberately in an effort to obtain unanimity. The effort failed to gain the support of the United States, United Kingdom, and France. Curiously, the Resolution went on to describe South Africa's arms build-up as posing "a real threat to the security and sovereignty of independent African states opposed . . . to South Africa, in particular the neighboring states." Resolution 282, *supra* note 91, at 212. Given the lack of opposition to this language by the Western powers on the Security Council and their subsequent opposition to language evoking Chapter VII, this language cannot be seen as a finding equivalent to a threat to international peace and security. See 1970 U.N.Y.B. 122-24, U.N.Sales No. E.72.I.1.

95. See 1970 U.N.Y.B. 122, U.N. Sales No. E.72.I.1.

96. See G.A. Res. 2671F, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/RES/2671 (1970).

97. 1970 U.N.Y.B. 139, U.N. Sales No. E.72.I.1.

98. See 1970 U.N.Y.B. 13, U.N. Sales No. E.72.I.1; THOMPSON, *supra* note 21, at 218-20.

99. Largely because of the impasse, the Security Council made only two pronouncements on the South African situation between 1971 and 1976. First, on Febru-

ment that the apartheid system was a blight on the United Nation's human rights agenda, a major divide had developed over how to end it. The United States, France, and the United Kingdom, with veto powers in the Security Council and with the support of other Western nations, held fast against punitive economic or military measures, while a majority in the General Assembly, composed primarily of Third World nations and socialist allies, continued passing resolutions demanding such actions.¹⁰⁰

Though frustrated by the refusal of the Security Council to act, the General Assembly frequently returned to the apartheid question in a determined effort by African and other Third World nations to use the international forum to mobilize global support for a comprehensive anti-apartheid campaign.¹⁰¹ The

ary 4, 1972, the Security Council reiterated its condemnation of apartheid and reminded General Assembly Members to strictly comply with the arms embargo. S.C. Res. 311, U.N. SCOR, 27th Sess., 1639th mtg. at 1, U.N. Doc. S/RES/311, 1972 U.N.Y.B. 91, U.N. Sales No. E.74.I.1. This pronouncement reaffirmed the "legitimacy of the struggle of the oppressed people of South Africa" and expressed grave concern "that the situation in South Africa seriously disturbed international peace and security in southern Africa." *Id.* The second pronouncement came on October 30, 1974, when the United States, the United Kingdom, and France jointly vetoed a draft resolution recommending that the General Assembly expel South Africa from membership in the United Nations. The resolution to expel South Africa was made by several Third World countries under Article 6 of the U.N. Charter which states that: "a Member . . . which has persistently violated the principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council." U.N. CHARTER art. 6; G.A. Res. 3324E, U.N. GAOR, 29th Sess., U.N. Doc. A/RES/3324 (1974); *see also* ANNUAL REVIEW OF UNITED NATIONS AFFAIRS 116 (1974).

100. The fact that many of those calling for economic measures against South Africa maintained important trade and other links with the country is now well accepted. Some nations, particularly those neighboring South Africa, had very little choice. Their colonial past ensured that their economies were tied to South Africa's. *See* Moelitsi Mbeki & Morley Nkosi, *Economic Rivalry and Interdependence in Southern Africa*, in ROBERT JASTER ET AL., *CHANGING FORTUNES: WAR, DIPLOMACY, AND ECONOMICS IN SOUTHERN AFRICA* 28-33, 69-107 (Ford Foundation-South Africa Update Series, 1992); UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA, *SOUTH AFRICAN DESTABILIZATION* (1989) [hereinafter U.N. ECONOMIC COMMISSION FOR AFRICA].

101. *See, e.g.*, G.A. Res. 3324D, U.N. GAOR, 29th Sess., Supp. No. 31-A/9631, U.N. Doc. A/RES/3324D (1974); G.A. Res. 3324E, U.N. GAOR, 29th Sess., Supp. No. 31-A/9631, U.N. Doc. A/RES/3324E (1974); G.A. Res. 3411E, U.N. GAOR, 30th Sess., 2421st mtg., U.N. Doc. A/RES/3411E (1975). With the exception of a few Western nations like Denmark, Finland, Norway, and Sweden, these resolutions received very little support from Western nations. *See, e.g.*, G.A. Res. 3411C, U.N. GAOR, 30th Sess., 2421st mtg., U.N. Doc. A/RES/3411C (1975). General Assembly Resolution 3411C proclaimed that the United Nations and international community have special responsibilities towards oppressed people of South Africa and their liberation movements, and towards those imprisoned, restricted or exiled for their struggle against apartheid. *Id.*

General Assembly succeeded in encouraging and supporting a worldwide international grassroots campaign against apartheid that eventually outflanked and defeated the anti-sanctions opposition represented by Western nations in the Security Council.¹⁰² The International Convention on the Suppression and Punishment of the Crime of Apartheid,¹⁰³ adopted by the General Assembly on November 30, 1973, and a resolution establishing the Decade of Action to Combat Racism and Racial Discrimination,¹⁰⁴ adopted on November 6, 1974, were two of the powerful symbolic measures taken by the General Assembly to stoke the fire of global anti-apartheid propaganda and activism.¹⁰⁵

By the mid-1970's, the gulf between the tough anti-apartheid rhetoric of the General Assembly and the unwillingness of the Security Council to take punitive action against South Africa had widened considerably.¹⁰⁶ Developments inside South Africa in 1976 and 1977 brought the two organs closer by forcing

102. The demise of Portuguese colonial rule in Africa during this period also contributed to an atmosphere of inevitable victory among those opposing apartheid. In particular, the political independence of Mozambique and Angola, in 1974 and 1975 respectively, provided significant opportunities for the ANC and PAC forces to build up their forces in these neighboring states. Of course, events would later temper the early optimism as these nations came under concerted direct and indirect South African attacks and destabilization campaigns. See MINTER, *supra* note 7, 260-304.

103. International convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, U.N. GAOR, 28th Sess., Agenda Item 53, U.N. Doc. A/RES/3068 (1973); See G.A. Res. 3068, U.N. GAOR, 31st Sess., U.N. Doc. A/RES/3223 (1973). The Convention came into force on June 18, 1976.

104. G.A. Res. 3223, U.N. GAOR, 29th Sess., Supp. No. 31-A/9631, U.N. Doc. A/RES/3223 (1974). Resolution 3223 was a prime example of the General Assembly extending its ties outside the U.N. network to build support for its positions on South Africa. *Id.*

105. See *1966 Comprehensive Program Against Apartheid By The Special Committee*, 1966 U.N.Y.B. 79, U.N. Sales No. E.67.I.1. When the Security Council rejected the expulsion of South Africa in 1974, the General Assembly voted forthrightly to reject the credentials of the South African delegation, calling it unrepresentative of the majority of the South African population. South Africa was thus kept from participating in General Assembly affairs even though the country remained a U.N. Member. See G.A. Res. 3324E, U.N. GAOR, 29th Sess., U.N. Doc. A/RES/3324 (1974); See 1974 U.N.Y.B. 23-24, U.N. Sales No. E.76.I.1.

106. During this period, the General Assembly criticized several Western countries and Security Council Members by name for preventing actions against apartheid. See, e.g., G.A. Res. 3411G, U.N. GAOR, 30th Sess., Supp. No. 34-A/10034, mtg. 2435, U.N. Doc. A/RES/3411 (1975). At General Assembly Meeting 2435, on December 10, 1975, the Assembly accused France, the United Kingdom, and the United States for having prevented the imposition of mandatory sanctions against South Africa, "by an abuse of their veto." *Id.*

the Security Council to take the most significant punitive step it was to ever take against the apartheid regime.

5. Soweto

In June 1976, the frustration, bitterness, and anger of black South Africans, effectively suppressed since the early 1960's, exploded in protests centered in the huge township of Soweto.¹⁰⁷ The protests, led predominantly by schoolchildren rebelling against Bantu education,¹⁰⁸ lasted several months and resulted in the deaths of hundreds of people nationwide.¹⁰⁹ The South African regime responded with increased repression. It detained thousands of schoolchildren, banned civic organizations and newspapers, and forced thousands of young South Africans to flee into exile.¹¹⁰ The international media, fascinated by the spectacle of young demonstrators challenging deadly force, evaded Government censorship and captured some of the confrontations for a transfixed media-sensitized world. By the time South African authorities were able, in 1977, to contain the nationwide protests with a massive and brutal campaign of repression, a new hero and martyr for the anti-apartheid cause, Steve Biko,¹¹¹ had been introduced to the world media stage. The gruesome circumstances of his death in police custody further

107. The protests became nationwide after police shot and killed thirteen year-old Hector Peterson, an image captured and transmitted worldwide by the media. See THOMPSON, *supra* note 21, at 212-13.

108. Under the Bantu Education Act (1953), the Central Government assumed control of public education for blacks, making it virtually impossible for nongovernmental schools to continue. Bantu Education Act (1953) (S. Afr.). While attendance did increase for black children, it was not mandatory. Furthermore, most who did attend school did so at the pre-primary and primary levels. Few passed the matriculation examination or its equivalent, and even fewer still went on to college after the Government took control of the few schools that did admit black students. THOMPSON, *supra* note 21, at 196-97.

109. "By February 1977, according to an official commission of inquiry, at least 575 people had been killed . . . [of which] 134 were under age eighteen." THOMPSON, *supra* note 21, at 213.

110. Many young South Africans joined the ranks of the exiled guerrilla armies. *Id.* at 213.

111. Steve Biko, founder of the Black Consciousness Movement, was killed while in police custody. A public inquest revealed that he had been kept naked in police cells for 18 days and driven hundreds of miles in a semicomatose condition. His death led to considerable international criticism of the South African regime and was a major factor in the imposition of mandatory international sanctions. See THOMPSON, *supra* note 21, at 213-14; Nicholas Haysom, *The Total Strategy: The South African Security Forces and the Suppression of Civil Liberties*, in JOHN DUGARD ET AL., *THE LAST YEARS OF APARTHEID: CIVIL*

highlighted apartheid's brutality and illegitimacy to the international community.

After receiving reports from the Special Committee against Apartheid, both the Security Council and the General Assembly invited representatives from the principal anti-apartheid liberation movements, the African National Congress¹¹² ("ANC") and the Pan Africanist Congress of Azania ("PAC"),¹¹³ to give testimony.¹¹⁴ The Security Council then passed a resolution that, "strongly condemned the South African government for its resort to massive violence against and killing of the African people, including schoolchildren and students."¹¹⁵ The Resolution harshly described apartheid as "a crime against the conscience and dignity of mankind"¹¹⁶ and a serious disturbance to interna-

LIBERTIES IN SOUTH AFRICA 64-65 (Ford Foundation-South Africa Update Series, John Dugard ed., 1992).

112. The African National Congress ("ANC"), Africa's oldest liberation movement, was founded in 1912 as the South African Native Congress. Its principal aim was to unite all the African people of South Africa in opposition to racial discrimination. The inaugural conference brought together African chiefs and intellectuals, many of whom had received some of their education overseas. It was largely ineffective until a group of younger members, including Oliver Tambo and Nelson Mandela, pushed the organization to take more militant positions beginning in the late 1940's. It was banned by the South African Government in 1960 after the Sharpeville massacre and many of its members went into exile. After the banning, the ANC promoted internal resistance and an armed campaign, led by its military wing, Umkhonto we Sizwe, against apartheid. After it was unbanned and its jailed members freed in 1990, the ANC quickly became South Africa's dominant political movement. See *THE WEEKLY MAIL & GUARDIAN, A-Z OF SOUTH AFRICAN POLITICS, THE ESSENTIAL HANDBOOK* 159-63 (1994); PETER WALSH, *THE RISE OF AFRICAN NATIONALISM IN SOUTH AFRICA, THE AFRICAN NATIONAL CONGRESS 1912-1952* (1970).

113. The Pan Africanist Congress of Azania ("PAC"), was formed in 1959 by disgruntled ANC members led by Robert Sobukwe. It played a key role in organizing the 1960 anti-pass campaign which led to the Sharpeville massacre. It was also banned in 1960, and like the ANC, many of its members went into exile from which they encouraged internal resistance and formented armed struggle against apartheid. The PAC was noted for a deep suspicion of all whites, calling them settlers. Its armed wing, Poqo, attacked white civilians on several occasions. The PAC never developed a large following in South Africa and this was reflected in its dismal showing in the 1994 elections. See *THE WEEKLY MAIL & GUARDIAN, supra* note 112, at 215-17.

114. The United States and several European countries expressed reservations about appearances of these representatives before the General Assembly, noting that the plenary session was traditionally reserved for the views of General Assembly Members. South Africa, of course, had been denied its seat in the General Assembly. 1976 U.N.Y.B. 124, U.N. Sales No. E.78.I.1.

115. *Resolutions Adopted and Decisions Taken by the Security Council*, U.N. SCOR, 31st Sess., 1929th mtg. at 11, U.N. Doc. S/12103 (1976).

116. *Id.* ¶ 1.

tional peace and security.¹¹⁷ The Security Council, however, refused to go beyond condemnation. Indeed, the United States and the United Kingdom took the position that the Resolution did not authorize further intervention and asserted that the killings in South Africa were still matters "essentially within the domestic jurisdiction" of South Africa.¹¹⁸

During its 1976 Session, the General Assembly passed more than a dozen resolutions dealing directly with apartheid.¹¹⁹ While these resolutions hardly broke new ground in terms of substantive content, their scope demonstrated a broad and sophisticated understanding of the underpinnings of the apartheid system.¹²⁰ Supporters of the resolutions were clearly engaged in a concerted campaign in which resolutions were employed periodically for propaganda and other tactical or strategic reasons.¹²¹

Most significantly, these resolutions expanded the arena of international confrontation with apartheid by forging closer ties between U.N. structures and NGOs fighting apartheid worldwide.¹²² The General Assembly resolutions penetrated and col-

117. *Id.* The Security Council again refused to describe the situation as a "threat to peace" in the context of Chapter VII of the U.N. Charter. See 1976 U.N.Y.B. 121, U.N. Sales No. E.78.I.1.

118. The Security Council was prevented from sanctioning South Africa even when South Africa escalated its attacks on neighboring states. On July 30, 1976, the Security Council condemned a South African attack on a Zambian village as a flagrant violation of Zambian sovereignty, without taking any punitive action. S.C. Res. 393, U.N. SCOR, 31st Sess., 1946th mtg. at 1, U.N. Doc. S/RES/393 (1976).

119. See 1976 U.N.Y.B. 117-46, U.N. Sales No. E.78.I.1.

120. For example, Resolution 31/6A attacked South Africa's efforts to strip millions of Africans of their citizenship by granting "independence" to Homelands or Bantustans, while Resolution 31/6F outlined a campaign to isolate South Africa from international sporting events. G.A. Res. 31/6A, U.N. GAOR, 31st Sess. at 126, U.N. Doc. A/RES/31/6A (1976); G.A. RES. 31/6F, U.N. GAOR, 31st Sess. at 127, U.N. Doc. A/RES/31/6F (1976).

121. See, e.g., G.A. Res. 31/6H, U.N. GAOR, 31st Sess. at 128, U.N. Doc. A/RES/31/6H (1976). This Resolution condemned economic collaboration with South Africa and commending anti-apartheid movements by U.N. Members. *Id.* Resolution 31/6D called on all States to cease the supply of all military equipment to South Africa. G.A. Res. 31/6F, U.N. GAOR, 31st Sess. at 127, U.N. Doc. A/RES/31/6F (1976). Resolution 31/6I called for Chapter VII sanctions and for France, the United Kingdom, and the United States to stop misusing their veto power on the Security Council to block sanctions. G.A. Res. 31/6I, U.N. GAOR, 21st Sess. at 129, U.N. Doc. A/RES/31/6I (1976). Resolution 31/6J stated that apartheid, like slavery, must be eradicated because it is a crime against humanity. G.A. Res. 31/6J, U.N. GAOR, 21st Sess. at 130, U.N. Doc. A/RES/31/6J (1976).

122. See, e.g., G.A. Res. 31/6H, U.N. GAOR, 31st Sess., U.N. Doc. A/RES/31/6H

lapsed, at least rhetorically, the traditional barriers to human rights work created by legal concepts such as domestic jurisdiction¹²³ and sovereign equality.¹²⁴ The General Assembly resolutions spoke directly to ordinary citizen activists, encouraging them to organize and act against apartheid.¹²⁵ The resolutions enabled the General Assembly to provide information and other resources that NGOs and other civic groups could use in challenging actions of their governments, when those actions protected or promoted apartheid.¹²⁶ Not surprisingly, many of the resolutions were vigorously criticized by several nations and powerful economic interests on various grounds: intemperate, unrealistic, ineffective, *ultra vires*, and contrary to the U.N. Charter.¹²⁷ Indeed, the resolutions reopened the gulf of misunderstanding, distrust, and disagreement between the large majority of nations in the General Assembly that promoted Chapter VII measures against South Africa and a solid group of mainly Western nations that rejected such measures. In time, however, the resolutions succeeded immensely in their propaganda, solidarity, and motivational goals as they helped to energize a worldwide grassroots anti-apartheid movement.

(1976). Resolution 31/6H requested "all agencies within the United Nations system to refrain from any dealings with corporations which loaned to or invested in South Africa." *Id.* ¶ 6. Resolution 31/6H also called on various U.N. bodies and affiliated bodies, such as the Economic and Social Council, the Commission on Human Rights, to take action against apartheid. Another resolution, 31/6G, authorized the creation of "an award to be presented to persons who had, in cooperation with the United Nations and in solidarity with the South African liberation movements, contributed significantly to the international campaign against apartheid." G.A. Res/31/6H, U.N. GAOR, 31st Sess. ¶ 7, U.N. Doc. A/RES/31/6G (1976).

123. U.N. CHARTER Article 2(7) states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." This provision is often cited by those who would limit the jurisdiction of the United Nations to deal with allegations of human rights abuses by Members. South Africa had raised this objection to U.N. consideration of its racial policies. *See id.* Part I(A); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 553-54 (4th ed. 1990).

124. U.N. CHARTER Article 2(1) states that the United Nations is based on the principle of sovereign equality of all its members. In substance, this concept is similar to that of domestic jurisdiction. However, it is cited as having broader application. Sovereign equality is frequently cited to limit interference from the United Nations as well as from other states acting unilaterally or in combination. *See GOODRICH & HAMBRO, supra* note 10, at 36-40.

125. *See, e.g.*, G.A. Res. 31/6H, *supra* note 122, at 128-29.

126. *See, e.g.*, G.A. Res. 31/6G, U.N. GAOR, 31st Sess. at 128, U.N. Doc. A/RES/31/6G (1976).

127. *See* 1976 U.N.Y.B. 125-30, U.N. Sales No. E.78.I.1.

The pro-sanctions group in the United Nation achieved a significant breakthrough in late 1977. By this time, South Africa was engulfed in the protests that had begun in Soweto a year earlier.¹²⁸ In response to international demands for action and perhaps in an effort to deflect demands for more comprehensive economic sanctions, the Security Council voted on November 4, 1977, to make the 1963 voluntary arms embargo mandatory under Chapter VII of the U.N. Charter.¹²⁹ This was the first time that the Security Council took such action under Chapter VII against a Member State. This sharp departure from the long-standing position of most Western Members did not quell demands for broader sanctions,¹³⁰ but it did give Western nations and economic interests in South Africa some breathing room.¹³¹ Proponents of comprehensive economic sanctions against South Africa could at least take solace in the fact that the taboo against taking Chapter VII action against apartheid South Africa had been broken. As it turned out, the arms embargo was to be the only mandatory Chapter VII action that the United Nations would take against South Africa.

The arms embargo was the high point of the global anti-apartheid campaign in the 1970's. Together with the forced resignation of South African Prime Minister John Vorster in

128. See THOMPSON, *supra* note 21, at 212-13; THE UNITED NATIONS AND APARTHEID, *supra* note 1, at 33-34.

129. S.C. Res. 418, U.N. SCOR, 32nd Sess., 2046th mtg. at 1, U.N. Doc. S/RES/418 (1977). The extraordinary turn around was justified because, as the resolution puts it, the "acquisition by South Africa of arms and related material constituted a threat to the maintenance of international peace and security." *Id.* A few days earlier, the Security Council attempted to deal with the governmental crackdown with a resolution that harshly condemned the "racist regime for its resort to massive violence," while appealing to cease its repression and abandon apartheid. S.C. Res. 417, U.N. SCOR, 32nd Sess., 2045th mtg. at 1, U.N. Doc. S/RES/417 (1977). This was the first time that the Security Council described the South African Government as "racist." THE UNITED NATIONS AND APARTHEID, *supra* note 1, at 39.

130. 1977 U.N.Y.B. 146, U.N. Sales No. E.79.I.1. While many U.N. Members, in particular the Western nations, emphasized the importance of the action, a few nations nonetheless noted that it was a compromise action that did not go as far as the comprehensive economic sanctions sought by many Member States. *Id.* at 146-47.

131. In late November, 1977, the General Assembly condemned by name several nations: Belgium; Germany; France; Israel; Italy; Japan; the United Kingdom; and the United States, for their relationship with South Africa. THE UNITED NATIONS AND APARTHEID, *supra* note 1, at 38. In December, the General Assembly passed another set of resolutions renewing its comprehensive campaign against apartheid. 1977 U.N.Y.B. 151-60, U.N. Sales No. E.79.I.1.

1978,¹³² it seemed for a brief moment as the decade ended that anti-apartheid forces had built up momentum for combating apartheid in the 1980's. Two international developments, the election of Margaret Thatcher, in the United Kingdom and that of Ronald Reagan, in the United States, would quickly undercut all grounds for optimism.¹³³

*C. Total Strategy, Constructive Engagement, and Mass Mobilization
1980-89*

The 1980's began with little evidence of the amazing unravelling of apartheid that would take place by the end of the decade. The early years were characterized by considerable difficulties for opponents of apartheid, as the racist system fought ruthlessly to survive. Buoyed by the sympathetic attitudes of the Reagan and Thatcher Governments,¹³⁴ and powerful military and security forces¹³⁵ willing and able to act with impunity inside and outside its borders, the apartheid regime embarked upon a concerted military-political offensive to destabilize and seize the initiative from its domestic and international opponents.¹³⁶ The

132. Vorster, in office since 1966, and considered one of the most vigorous champions of apartheid, resigned from office after he was implicated in a scandal over misuse of government funds intended for clandestine counter anti-apartheid propaganda. He was replaced by Pieter Willem Botha, elected by Parliament on September 28, 1978. THOMPSON, *supra* note 21, at 223. Nelson Mandela later made this observation about Vorster's departure: "We were not sorry to see Vorster go. He had escalated the battle against freedom to new heights of repression." MANDELA, *supra* note 22, at 435.

133. Margaret Thatcher took office in Great Britain on May 4, 1979, and Ronald Reagan was inaugurated as the U.S. President on January 20, 1981. For discussion of British policy toward South Africa under Thatcher, see, e.g., *Thatcher Rails at Sanctions on South Africa*, L.A. TIMES, Oct. 19, 1989, at 13; Tyler Marshall, *Howe Departing on South Africa Mission Many Call Futile*, L.A. TIMES, July 22, 1986, at 9. For discussion of American policy toward South Africa under Reagan, see Baker, *supra* note 19; MINTER, *supra* note 7, at 310-41; see also CHESTER CROCKER, *HIGH NOON IN SOUTHERN AFRICA* (1993).

134. See THOMPSON, *supra* note 21, at 232-34.

135. The South African Police ("SAP") which numbered 34,271 in 1981 grew to about 81,000 by 1990. The South African Defense Force ("SADF") totalled about 569,000 in 1985, with a permanent professional force of about 43,000. DUGARD, *supra* note 111, at 62, 71. Theoretically, the SAP and SADF had separate roles in maintaining internal order and defending South Africa's borders respectively. Since 1960, however, the SADF has also had a policing role. *Id.* at 69.

136. By 1984, all 19 divisions of the SAP had specialized riot squads to deal with anti-apartheid demonstrations. DUGARD *supra* note 111, at 62. Furthermore, South African commandos raided or carried out other covert operations in the territory of all its neighbors between 1981 and 1983. THOMPSON, *supra* note 21, at 231-32.

regime's approach was dubbed "Total Strategy."¹³⁷

1. Total Strategy: Reform, Repression, and Regional Hegemony

Total Strategy had three basic components, which have been described as reform, repression, and regional hegemony.¹³⁸ Reform was a response to the failure domestically and internationally of the original conception of apartheid.¹³⁹ Complete separation of the races succumbed to the realities of a growing economy dependent on cheap black labor and Western investment, as well as to a total international rejection of Bantustans.¹⁴⁰ To the surprise of few people, white supremacy simply did not sell in a largely non-white country and post-colonial world. Reform's principal aim, therefore, was to reconstruct and reinterpret apartheid to make it easier "to coopt leaders in the African, Asian and colored communities, and to build South Africa's international legitimacy"¹⁴¹ Reform did not mean giving up white supremacy or countenancing majority rule. Because apartheid's putative reformers did not plan to challenge its fundamental architecture and beliefs, and because apartheid's opponents at this point would settle for nothing short of its complete dismantling, the reform efforts impressed few and were unsuccessful.

137. Total Strategy was developed under the direction of P.W. Botha during the period he served as Defense minister. For comprehensive discussions of Total Strategy, see Haysom, *supra* note 111, at 55-94; ROBERT M. PRICE, *THE APARTHEID STATE IN CRISIS*, 85-97 (1991).

138. See PRICE, *supra* note 137, at 87-98.

139. Domestic pressures were reflected in increased labor strife, student militancy, and general civic unrest, while international pressures came from international condemnations, a troubled national economy, and growing popular agitation within South Africa's leading economic partners for economic and cultural sanctions. THOMPSON, *supra* note 21, at 221-42. These pressures necessitated reform. *Id.*

140. Bantustans or Homelands or Native Reserves were a critical element in the apartheid regime's program for depriving Africans of South African citizenship. The regime designated often fragmented pieces of territory to which Africans were consigned according to rough tribal affiliation. Hundreds of thousands of Africans were forcibly removed from their land and relocated to commercially worthless land. Eventually, the government came up with 10 Bantustans and unsuccessfully tried to separate them and their populations from South Africa by granting them independence. The international community refused to recognize the Bantustans. See THOMPSON, *supra* note 21, at 190-95; INTERNATIONAL COMMISSION OF JURISTS, *supra* note 35, at 22-37.

141. STANLEY B. GREENBERG, *LEGITIMATING THE ILLEGITIMATE* (1987); see also PRICE, *supra* note 137, at 88.

Repression went hand in hand with reform.¹⁴² Often, it was justified as necessary to give reform a chance and to protect from attacks those who responded positively to reform efforts. The overriding purpose of repression, however, was to maintain control of the process of change: to keep expectations of the oppressed within reasonable bounds as defined by the regime and to reassure regime supporters that it was in control. The strategy failed on both counts. Militancy grew in the 1980's and mass anti-apartheid movements appeared above ground, uniting diverse civic organizations.¹⁴³ Nonviolent and violent responses to the Government grew, and the Government gradually lost the ability to govern much of the country and to control the pace of change.¹⁴⁴

Regional hegemony extended South Africa's domestic policy of reform and repression to its neighbors.¹⁴⁵ South Africa's aims were to bind its neighbors economically to it, and discourage them from supporting the domestic resistance.¹⁴⁶ Regional hegemony directly responded to two hostile developments on South Africa's borders. First, the Portuguese colonial empire in Africa collapsed in the mid-1970's, bringing independence and revolutionary, anti-apartheid regimes to power in neighboring Angola and Mozambique.¹⁴⁷ Then in 1980, a liberation movement hostile to South Africa replaced friendly, white-minority

142. After the enactment of the Internal Security Act of 1982, for example, the minister of law and order issued directions for the treatment of detainees in the Government Gazette, including indefinite detention without charge or trial for interrogation and no access to a legal adviser or any other person other than a government official. Internal Security Act 74 of 1982; Government Notice 877, REPUBLIC OF SOUTH AFRICA GOVERNMENT GAZETTE 8467 (1982). Elements in the South African Defense Force were suspected of participating in various assassinations of anti-apartheid activists. DUGARD, *supra* note 111. During the 1986 state of emergency, at least 1424 children were detained. *Id.* at 41.

143. The UDF was formed in 1983 to coordinate opposition to apartheid. It represented hundreds of labor, youth, women, religious, cultural and sports groups. UDF leaders were generally pro-ANC and it appeared to have revived support for the ANC within the country. THOMPSON, *supra* note 21, at 228-30; TOM LODGE & NASSON, ALL, HERE, AND NOW: BLACK POLITICS IN SOUTH AFRICA IN THE 1980'S (Ford Foundation—South Africa Update Series, 1991).

144. THOMPSON, *supra* note 21, at 228-30.

145. See PRICE, *supra* note 137, at 92-95.

146. *Id.* at 94-95; see also, U.N. ECONOMIC COMMISSION FOR AFRICA, *supra* note 100, at 3-11.

147. For an extended discussion of developments during the period, see MINTER, *supra* note 7, at 260-304.

rule in Zimbabwe.¹⁴⁸ These new governments strengthened the international campaign against South Africa, providing additional political, military, and moral support to apartheid's opponents.¹⁴⁹

Regional hegemony was designed to be a "carrot and stick policy," although it often was difficult to see the "carrot." South Africa demanded that neighboring countries accept it politically, cooperate economically, and restrict opponents operating within their borders. South Africa threatened economic¹⁵⁰ and military¹⁵¹ reprisal against neighboring states that refused these demands. South Africa's formidable military force, its considerable wealth, its clear technological superiority, and its control of transportation and communication networks vital to its neighbors bolstered its threats.

Regional hegemony extracted a huge price from South Africa's neighbors, who generally maintained their opposition to apartheid.¹⁵² All of them suffered economic destabilization and armed attacks from South African forces and South African-supported insurgent movements. Angola and Mozambique, in particular, were devastated by South African-supported rebels.¹⁵³ The response of the United Nations and other international

148. See *id.* at 298-304; PRICE, *supra* note 137, at 92-97.

149. The degree of support provided by neighboring governments for South Africa's domestic opponents can be measured by the extent and frequency of destabilization campaigns pursued against them by South Africa. See PRICE, *supra* note 137, at 92-95; U.N. ECONOMIC COMMISSION FOR AFRICA, *supra* note 100.

150. THOMPSON, *supra* note 21, at 230. "South Africa's economic leverage over the region was formidable . . . South Africa controlled the supply of oil and electricity to its neighbors . . ." *Id.*

151. "Between 1981 and 1983, South African commandos raided or carried out undercover operations against every one of its neighbors. In addition, the South African armed forces continued to occupy Namibia, and South Africa intervened substantially in both of the former Portuguese territories." *Id.* at 231-32.

152. See U.N. ECONOMIC COMMISSION FOR AFRICA, *supra* note 100; ROBERT S. JASTER ET AL., CHANGING FORTUNES: WAR, DIPLOMACY, AND ECONOMICS IN SOUTHERN AFRICA (Ford Foundation Update Series, 1992).

153. In Angola, South Africa provided substantial direct and indirect assistance to the insurgent National Union for the Total Independence of Angola ("UNITA"). UNITA also received assistance from the United States. In Mozambique, South Africa's support for the rebel Mozambique National Resistance ("RENAMO") helped make it so destructive that the Mozambiquan Government was forced to reach an accommodation with South Africa in 1984. The 1984 Nkomati Accord between South Africa and Mozambique represented the high point of South Africa's regional hegemony. THOMPSON, *supra* note 21, at 232; see also, U.N. ECONOMIC COMMISSION FOR AFRICA, *supra* note 100, at 3-16, 19-27.

agencies came nowhere close to ameliorating the horrible consequences of South Africa's regional policy.¹⁵⁴

South Africa's regional policy also benefitted from strong U.S. and British support, as the Reagan and Thatcher Governments pursued policies openly more sympathetic to the aims of South Africa's white minority Government than to those of its opponents.¹⁵⁵ It appeared in the early 1980's that South Africa could withstand the still largely propaganda oriented global campaign against apartheid and dictate the pace and quality of change.¹⁵⁶ Its failure to do so must be credited to the work of energized grassroots opposition within and outside South Africa.

2. Constructive Engagement and the Free South Africa Movement

The Free South Africa Movement ("FSAM") in the United States, an NGO-led movement, grew in the early 1980's out of the combination of three developments: (1) a stalemate between pro- and anti-apartheid groups in the United Nations; (2) a mass anti-apartheid mobilization in South Africa; and (3) a grassroots opposition to Reagan's Southern Africa policy.¹⁵⁷

Reagan's Southern Africa policy, called "Constructive En-

154. The Southern African Development Coordination Conference ("SADCC") was formed in April, 1980 by several southern African states to promote their economic and political independence from South Africa in the face of South Africa's policy of regional hegemony. The original members of SADCC were Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia, and Zimbabwe. Namibia became a member in 1990 and South Africa joined shortly after the 1994 election. For various reasons, including far from adequate international support, SADCC has not lived up to expectations. See U.N. ECONOMIC COMMISSION FOR AFRICA, *supra* note 100; Mbeki and Nkosi, *supra* note 100. For U.N. condemnations of South Africa's destabilization campaign against SADCC states, see, e.g., S.C. Res. 385, U.N. SCOR, 31st Sess., 1885th mtg. at 1, U.N. Doc. S/RES/385 (1976) (Namibia); S.C. Res. 393, U.N. SCOR, 31st Sess., 1948th mtg. at 1, U.N. Doc. S/RES/393, (1976) (Zambia); S.C. Res. 475, U.N. SCOR., 31st Sess., 1906th mtg. at 1, U.N. Doc. S/RES/475 (1980); S.C. Res. 402, U.N. SCOR, 31st Sess., 1982d mtg. at 1, U.N. Doc. S/RES/402 (1976) (Lesotho); S.C. Res. 527, U.N. SCOR., 37th Sess., 2407th mtg. at 1, U.N. Doc. S/RES/527 (1982) (Lesotho).

155. See MINTER, *supra* note 7, at 313-25; THOMPSON, *supra* note 21, at 232-34.

156. THOMPSON, *supra* note 21, at 230-35.

157. The Author uses the phrases, "Southern Africa policy" or "South African policy" interchangeably in this Article. The Reagan Administration's policy toward Southern Africa was centered around South Africa. In this regard, the policy, constructive engagement, was not fundamentally different from those of past administrations. constructive engagement proceeded from the perspective that South Africa was the key to peace and economic development for the whole region. South Africa's economic dominance of the region, its military capabilities which allowed it to threaten its neighbors,

agement" by its chief architect, Assistant Secretary of State for African Affairs Chester Crocker,¹⁵⁸ was rejected by anti-apartheid activists as a crudely disguised effort to preserve white domination and Western corporate interests in South Africa.¹⁵⁹ Constructive Engagement, in substance was not a major departure from past U.S. policies toward South Africa. Previous U.S. administrations had done very little to significantly weaken apartheid or support its opponents.¹⁶⁰ Even the Carter Administration, which made human rights a key aspect of U.S. foreign policy, did not go much beyond routine condemnations of apartheid.¹⁶¹ Nonetheless, Constructive Engagement was more aggressively solicitous of the concerns of the apartheid regime and more openly hostile to the South African liberation movements than previous U.S. administrations.

Constructive Engagement was founded upon the belief that the white minority in South Africa held the key to any change that could take place, and that it could only be gradually encouraged away from apartheid.¹⁶² In implementing the policy, the Reagan Administration bluntly rejected calls for sanctions and other punitive measures against South Africa, maintained close ties with the apartheid regime, and kept domestic anti-

ad the presence of South African opposition movements in these countries necessitated a regional approach. See MINTER, *supra* note 7; BAKER, *supra* note 19.

158. For a brief but incisive account of the development and early years of "Constructive Engagement," see MINTER, *supra* note 7, at 305-19. For a relatively benign review of the rise and fall of Reagan Administration's South Africa policy, see BAKER, *supra* note 19. For a rather self-serving attempt at rationalizing and revising Reagan's central role in the development and implementation of the discredited policy, see CROCKER, *supra* note 133. For a sharply different assessment of Reagan's Southern African policy and Reagan's role, see Makau wa Mutua, *Reagan's Man in Africa*, WASH. POST, Jan. 10, 1993, at x05.

159. See CROCKER, *supra* note 133; see generally BAKER, *supra* note 19; MINTER, *supra* note 7; Makau wa Mutua, *supra* note 158.

160. See SOUTH AFRICA AND THE UNITED STATES: THE DECLASSIFIED HISTORY (Kenneth Mokoena ed., 1993). This book provides an excellent summary of United States policy toward South Africa beginning with the Kennedy administration. *Id.* Minter gives an account that goes back to the Truman administration. Minter, *supra* note 7. See generally BAKER, *supra* note 19, at xi-xiii, 81-84.

161. The Carter Administration supported the 1977 mandatory U.N. arms embargo. See Mokoena, *supra* note 160, at xxiii-xxiv; MINTER, *supra* note 7, at 280-83.

162. This view was, in essence, a continuation of earlier American policy developed under Secretary of State Henry Kissinger and was outlined in the infamous national security study in response to National Security Study Memorandum 39 ("NSSM 39"). See MINTER, *supra* note 7, at 220-25.

apartheid organizations at a distance.¹⁶³ The fact that the first official public meeting between the Reagan Administration and the ANC did not occur until 1987 testified to the strength of the U.S.-South Africa relationship during the Reagan era.¹⁶⁴

The Thatcher Government's attitudes paralleled those of the Reagan Administration in all significant respects.¹⁶⁵ A major consequence of their policies was that every effort to institute or expand mandatory U.N. measures against South Africa during the 1980's was blocked by the two administrations and their allies on the Security Council.¹⁶⁶ Thus, no new Chapter VII actions were taken against South Africa even as the regime waged domestic repression and regional destabilization.¹⁶⁷

Constructive Engagement was, in an important respect, an

163. THOMPSON, *supra* note 21, at 292, 312-13. Constructive engagement was an important application of Reagan administration's Third World policies which gave top priority to countering the spread of communism. *Id.* at 310-311. For a general critique of the Reagan administration's foreign policy as it affected human rights in the Third World, see Jerome Shestack, *An Unsteady Focus: The Vulnerabilities of the Reagan Administration's Human Rights policy*, 2 HARV. HUM. RTS. Y.B. 25 (1989); MOYNIHAN, *supra* note 10, at 120-77 (setting forth incisive critique of Reagan doctrine). U.S. support for Third World governments was conditioned almost exclusively on their fidelity to this priority. President Reagan reflected this perspective in one of his speeches:

Around the world, in Afghanistan, Angola, Cambodia, and yes, Central America, the United States stands today with those who would fight for freedom. We stand with ordinary people who have had the courage to take up arms against communist tyranny, this stand is at the core of what some have called the Reagan Doctrine.

President Reagan's Remarks to the students, faculty and guests of the National Defense University, and the signing of the Department of Veteran Affairs Act, Oct. 25, 1988, 24 WKLY. COMP. PRES. DOC. 1368 (Oct. 31, 1988), *quoted in* MOYNIHAN, *supra* note 10, at 122; *see also* BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 1312 (2d ed. 1995). This fit well with the perspective of the South African regime which vigorously championed anti-communism and wasted no opportunity to point out that its domestic opponents received support from the Soviet Union and other socialist countries. *See, e.g.*, MINTER, *supra* note 7, at 312; BAKER, *supra* note 19, at 25. Baker quotes President Botha responding to support from President Reagan: "It is good to know that the leader of the free world acknowledges and appreciates the strategic importance of South Africa." *Id.*

164. TransAfrica served as host for the ANC delegation that included its acting president Oliver Tambo and international affairs director Thabo Mbeki. *See Visit by S. Africa's 'Arafat' Hit Conservatives Urge Shultz to Cancel Talks with Tambo*, CHICAGO TRIB., Jan. 20, 1987, at 8.

165. *See* MINTER, *supra* note 7, at 324-25; PRICE, *supra* note 137, at 138.

166. *See* BAKER, *supra* note 19, at 52-53; *see also* KUMIKO MATSUURA ET AL., *CHRONOLOGY AND FACTBOOK OF THE UNITED NATIONS* (1992).

167. *See* MATSUURA, *supra* note 166. Security Council vetoes were cast by the United States of the United Kingdom twice in 1985, twice in 1987, and 1988. *Id.*

extraordinary challenge to the decades-long direction of U.N. policies toward apartheid. It went beyond the traditional reluctance of the Security Council to punish South Africa. For at least two decades before Reagan and Thatcher, the United Nations, especially the General Assembly, focused on and validated the aspirations, demands, and needs of the African majority. Constructive Engagement reversed this course and sought better relations with the South African regime in order to reduce the sense of international isolation being felt by the white minority. Constructive Engagement thus gave hope to apartheid and ensured paralysis in the United Nations, effectively ending the brief period of cooperation among U.N. Members that had led to the 1977 mandatory arms embargo.

In the wake of this U.N. paralysis, direct citizen action against apartheid became the fulcrum of international anti-apartheid efforts.¹⁶⁸ International anti-apartheid movements had been in existence since the early 1950's,¹⁶⁹ and their vitality and influence tracked the ebb and flow of resistance within South Africa. These movements, as noted earlier, benefitted from the comprehensive and sophisticated U.N. program of action against apartheid developed since the 1960's by the Special Committee on Apartheid.

FSAM was by far the most effective of the international anti-apartheid movements in the 1980's. FSAM targeted Western political, economic, and cultural relations with South Africa. FSAM's aim was a complete isolation of South Africa until it abandoned apartheid, and its methods were radical and eclectic. FSAM members educated the public, lobbied governments, public institutions, and corporate leaders, built coalitions with other civic organization and pressure groups, organized demonstrations, and raised funds for victims of apartheid. However, until 1984, it was hardly more than a low profile left-of-center movement. Two developments in 1983 and 1984 helped propel the movement into the center of U.S. national consciousness, where it was to remain until the release of Nelson Mandela in 1990.

The first development was an explosion of nationwide un-

168. For a short discussion of the role of the U.S. anti-Free South Africa Movement ("FSAM"), see BAKER, *supra* note 19, at 30-47; PRICE, *supra* note 137, at 221-25; MINTER, *supra* note 7, at 335-39.

169. The American Committee on Africa ("ACOA" or "Africa Fund"), for example, was founded in 1953. BAKER, *supra* note 19, at 31.

rest in South Africa in response to one of the regime's reform efforts.¹⁷⁰ In 1983, the white electorate approved a new constitution that included Asians and Coloureds¹⁷¹ as junior partners to whites in the governing process.¹⁷² The obvious aims of the regime were to coopt the Indian and Colored minority communities, thereby maintaining white minority power, while also isolating the majority African population.¹⁷³ Since the Colored and Indian populations were smaller than the white population,¹⁷⁴ the regime could maintain white domination under the new dispensation, justifying it as the normal consequence of proportional representation.¹⁷⁵

The regime first tried to justify the exclusion of the African majority by restating its policy as one of separate development

170. See PRICE, *supra* note 137, at 176-80; LODGE & NASSON, *supra* note 143, at 34-35, 58-63.

171. Coloured was one of the racial categories created under apartheid. The Population Registration Act of 1950 effectively classified every South African at birth into one of four racial groups: white, coloured, Asian (Indian), or African. This was the foundation of apartheid. People considered under this scheme to be of mixed racial heritage were assigned to the Coloured category. Under apartheid, the coloured population received a certain amount of preferential treatment over the African community, and most had strong ties to the Afrikaner community. A key aim of the anti-apartheid movement was to transcend these racial categories and it was common for activists to refer to all non-whites as blacks. See GILLOMEE & SCHLEMMER, *supra* note 21, at 82-94; THOMPSON, *supra* note 21, at 65-66, 113, 171, 190-97.

172. See Republic of South Africa Constitution Act, Act No. 110, (1983), *reprinted* in L.J. BOULLE, *CONSTITUTIONAL REFORM AND THE APARTHEID STATE* 231 (1984) [hereinafter 1983 CONSTITUTION]; see also PRICE, *supra* note 137, at 135-38; LODGE & NASSON, *supra* note 143, at 47.

173. The 1983 Constitution, for example, gave the parliamentary chamber representing whites, the House of Assembly, 178 seats, while the chambers representing Coloreds, the House of Representatives, and Asians, the House of Delegates, had a total of 130 seats. Africans received no representation. See 1983 CONST. §§ 41-43; see also PRICE, *supra* note 137, at 135-38; LODGE & NASSON, *supra* note 143, at 47. This Article uses the term Africans as it is often used in South Africa, in the narrowest of senses, to differentiate those in the non-white communities of South Africa who were not classified as either Coloreds or Asians.

174. According to 1980 census information, Coloreds numbered 2.6 million, representing nine per cent of the total population and Asians 0.8 million, representing 3% of the total population, while Whites numbered 4.5 million, representing 16% of the population. THOMPSON, *supra* note 21, at 243. Africans, who were excluded, numbered 20.8 million and represented 72% of the population. *Id.*

175. The 1983 Constitution severely constrained the exercise of authority by newly elected representatives of the two communities. The Constitution established, for example, a separate legislative chamber for each of the three groups, distinguished between "Own Affairs" and "General Affairs" and ensured that the chamber representing whites control the election of the national executive, the State President who was given virtual dictatorial powers over all aspects of political life. See 1983 CONST. chs. III-VI.

without domination by any group. That this claim was essentially a reiteration of the false characterization long put on apartheid by some of its defenders seemed lost on the new reformers. When the new constitution failed to attract significant support, the regime recharacterized it as only a starting point for discussion, disingenuously suggesting that a new, more encompassing dispensation that included Africans was forthcoming.¹⁷⁶

The 1983 constitution galvanized opposition inside and outside South Africa.¹⁷⁷ Within South Africa, organized demonstrations and other forms of civil challenges to apartheid grew and took on new forms. The reform efforts had indeed created space and opportunities for mass political organization and coordination within the overarching atmosphere of repression. The United Democratic Front ("UDF"), a broad-based multiracial coalition of civic organizations, was established in 1983 and played the principal role in coordinating the new round of opposition.¹⁷⁸ The UDF coalition aggressively and creatively challenged the regime's tentative reform efforts and made much of the country effectively ungovernable. UDF members, with full recognition of the importance of the international media, waged a war of civil disobedience, confronting apartheid's representatives and structures at all levels.¹⁷⁹ Strikes and boycotts became common-place.¹⁸⁰ Violence increased, much of it, but certainly not all of it, perpetrated or encouraged by the Government.¹⁸¹

As the domestic challenges to apartheid and state-directed repression escalated, a second development, which provided renewed energy and focus to international anti-apartheid efforts, occurred thousands of miles away in Washington, D.C. On November 25, 1984, Thanksgiving eve, three prominent African-Americans, Randall Robinson, Mary Frances Berry, and Congress-

176. PRICE, *supra* note 137, at 138-40.

177. The U.N. General Assembly denounced the 1983 Constitution even before it was enacted. See *Proposed New Racial Constitution of South Africa*, G.A. Res. 38/11, U.N. GAOR, 38th Sess., U.N. Doc. A/RES/38/11 (1983). The Security Council followed the General Assembly's lead the next year. S.C. Res. 554, U.N. SCOR. 39th Sess., 2551st mtg. at 1, U.N. Doc. S/RES/554 (1984).

178. See PRICE, *supra* note 137, at 177-78. For a thorough treatment of the development and contributions of the United Democratic Front ("UDF") to the anti-apartheid resistance see generally, LODGE & NASSON, *supra* note 143.

179. LODGE & NASSON, *supra* note 143, at 58-140.

180. *Id.* at 65-86.

181. *Id.* at 87-109.

sional Delegate Walter Fauntroy, staged a sit-in at the South African embassy.¹⁸² Their act of civil disobedience and subsequent arrests received widespread media coverage and a new, more enduring phase of the U.S. anti-apartheid movement was launched.¹⁸³ Randall Robinson and the organization he headed, TransAfrica,¹⁸⁴ quickly became the central inspirational and organizing force for the new FSAM.¹⁸⁵ Over several years, Tran-

182. According to Minter:

A decisive moment in the response [to South African repression] came in November 1984 when Randall Robinson of TransAfrica, Dr. Mary Berry of the U.S. Civil Rights Commission, and D.C. Congressional representative Walter Fauntroy sat in at the South African Embassy in Washington. Their arrest marked the beginning of daily demonstrations at the embassy by the Free South Africa Movement. The symbolic action, with arrests day after day for an entire year, sparked and sustained an upsurge of anti-apartheid opinion and demonstrations in dozens of cities and universities around the country.

MINTER, *supra* note 7, at 335; see also BAKER, *supra* note 19, at 29-30; Ronald W. Walters, *African-American Influence on U.S. Foreign Policy*, in *ETHNIC GROUPS AND U.S. FOREIGN POLICY* 76 (1987); Kenneth Bredemeier & Michel Marriott, *Fauntroy Arrested in Embassy; Delegate, 2 Others Protest S. African Acts*, WASH. POST, Nov. 22, 1984, at A1; Phillip Smith, *Fauntroy Released in Sit-In Case; He Pleads Innocent In Arrest at Embassy*, WASH. POST, Nov. 23, 1984, at B1.

183. The U.S. act of civil disobedience was welcomed by the United Nations. See Telegram from the Chairman of the Special Committee against Apartheid to Mr. Walter Fauntroy, Mrs.[sic] Mary Frances Berry and Mr. Randall Robinson, Washington, D.C. (Nov. 27, 1984) (commending non-violent direct action in support of oppressed people of South Africa). *Id.*

184. TransAfrica was founded in 1977 with the encouragement of the Congressional Black Caucus to be a foreign policy lobby that would serve as a vehicle for African American interests and concerns about U.S. policy toward Africa and the Caribbean. See Paul Shepard, *After Apartheid, Activist Still Fights; TransAfrica Head City Apathy, Racism*, PLAIN DEALER, Mar. 30, 1996, at 4B. While TransAfrica lobbied the U.S. Government on various issues ranging from increased developmental and humanitarian assistance to African and Caribbean countries, to maintaining sanctions on Rhodesia, U.S. policy toward apartheid South Africa was its principal focus until 1994. For more on TransAfrica, the Free South Africa Movement, and African-American influence on U.S. policy toward South Africa, see Walters, *supra* note 182, at 65-82; see also TRANSAFRICA FORUM, *A RETROSPECTIVE: BLACKS IN U.S. FOREIGN POLICY* (L. Hope Lewis, ed., 1987).

185. Randall Robinson had actually been promoting the idea of civil disobedience at the South African embassy for some time before he was able to attract support in 1984. See David Remnick, *Randall Robinson, From Boyhood Pain to a Crusade Against Apartheid*, WASH. POST, Feb. 2, 1985, at E1. The arrests, subsequent demonstrations, sit-ins and press coverage were carefully planned by a core group of African Americans with a long history of activism on U.S. policy toward Africa. *Id.* Three who were particularly prominent were Sylvia Hill, Cecelie Counts and Sandra Hill. Free legal assistance for many of the arrestees was provided by local attorneys organized by Washington D.C. Attorneys John Payton and Charles Ogletree. Karlyn Barker & Ed Bruske, *Charges Against 11 Arrested in Embassy Sit-In Dropped*, WASH. POST, Dec. 1, 1984, at B1; see Edward Walsh, *Grass-Root Pleas Stir Lawmakers GOP Conservatives Demanded Reagan Shift on South Africa*, WASH. POST, Sept. 16, 1985, at A1.

sAfrica coordinated demonstrations and arrests at the South African embassy. Arrests at the embassy as a means of protesting apartheid became a national spectacle. Prominent U.S. citizens including: members of Congress; celebrities; educators; civil rights activists; and religious leaders, vied with ordinary citizens for an opportunity to be arrested at the embassy.¹⁸⁶ TransAfrica provided the mechanics, the publicity, and the legal representation.¹⁸⁷ The police, and for a considerable period of time the national media, cooperated in bringing the spectacle of demonstrations and arrests to U.S. citizens.

Anti-apartheid civil disobedience spread throughout the country. In the past, the majority of such actions had been confined to college campuses. Now banks, currency traders, oil companies, computer-makers, and many other businesses with ties to South Africa came under pressure.¹⁸⁸ Pressure against pension funds, universities, and other institutions for divestment also grew.¹⁸⁹ Heightened media interest in the anti-apartheid

186. See, e.g., Sandra Saperstein & Michel Marriott, *Protest Grows at Embassy, South African Hits Anti-Apartheid Acts*, WASH. POST, Nov. 28, 1984, at A1 (Congressman John Conyers, Jr. Of Detroit and William Simons, President of the Washington Teachers Union, arrested); Michel Marriott & Martin Weil, *S. African Protest Continues-Congressman, SCLC Leader Arrested at Embassy*, WASH. POST, Nov. 27, 1984, at B1 (Congressman Charles Hayes of Chicago and Rev. Joseph Lowery, Head of the Southern Christian Leadership Conference, arrested); Karlyn Barker & Michel Marriott, *1960s Tactics Revived for Embassy Sit-Ins*, WASH. POST, Nov. 29, 1984, at A1 (Congressman Ron Dellums of California and United Auto Workers Union Vice President Marc Stepp arrested); Karlyn Barker & Ed Bruske, *Charges Against 11 Arrested in Embassy Sit-In Dropped*, WASH. POST, Dec. 1, 1984, at B1 (Congressman Don Edwards of California, Congressman George W. Crockett, Jr. Of Michigan, and Leonard Ball, National Coordinator of the Coalition of Black Trade Unionists, Arrested); Peter Perl & Karlyn Barker, *Unions Join Protests of Apartheid*, WASH. POST, Dec. 5, 1984, at A1, (AFL-CIO held demonstrations); Sandra Saperstein & John Ward Anderson, *Nobel Winner, Bishop Arrested in Protests, Jackson announces Trip to S. Africa*, WASH. POST, Dec. 6, 1984, at A16; Karlyn Barker, *Rosa Parks, New Groups Join Protest: 3 Jewish Leaders Among 6 Arrested*, WASH. POST, Dec. 11, 1984, at A22; *More Protesters Arrested*, WASH. POST, Dec. 12, 1984, at A19 (Judy Goldsmith, President of National Organization for Women arrested, and Tony Randall, actor, joined protest); John Ward Anderson, *Clergy, Boxer Protest at Embassy*, WASH. POST, Dec. 14, 1984, at A44 (Sixty clergymen and boxer Larry Holmes join protest); Edward D. Sargent, *Steinem Arrested at Embassy-Protest Leader Hails Day of 'Victories'*, WASH. POST, Dec. 20, 1984, at C5; Karlyn Barker, *Belafonte Is Arrested at S. African Embassy-Singer-Activist Rebukes Press*, WASH. POST, Feb. 3, 1985, at C3 (Harry Belafonte Arrested); Karlyn Barker, *Stevie Wonder Arrested in Apartheid Protest*, WASH. POST, Feb. 15, 1985, at A8.

187. See Michel Marriott, *TransAfrica in the Eye of the Storm Young Activists on Hill Organize Antiapartheid Protests*, WASH. POST, Dec. 12, 1984, at A19.

188. See PRICE, *supra* note 137, at 221-25; Walters, *supra* note 182, at 76-78.

189. See Walters, *supra* note 182, at 76-77. TransAfrica was not the only organization helping to support and coordinate this national movement. The American Com-

resistance within South Africa boosted popular interest and support for the U.S. anti-apartheid movement, in turn elevating the standing of its leaders before members of Congress.¹⁹⁰ FSAM took advantage of its increased popularity to push Congress for comprehensive economic sanctions against South Africa.¹⁹¹ The Reagan Administration, which had helped to stave off such demands at the United Nations, was hostile to the movement and its goals.¹⁹² Members of Congress, on the other hand, became generally more disposed to consider sanctions because they came under pressure from their constituents.¹⁹³ In essence, FSAM succeeded in "Americanizing" the struggle for human rights in South Africa. The fact that the traditional U.S. civil rights coalition had mobilized in support of a free South Africa aided this "Americanizing" process.¹⁹⁴ Distinctions between the struggle for civil rights in the United States and the human rights struggle in South Africa were creatively and effectively blurred.¹⁹⁵ The jurisdictional barrier between the domestic and the international, rhetorically erased earlier by General Assembly actions, was now concretely, even if only temporarily, put aside as U.S. legislators cited race relations as a major reason for supporting sanctions against South Africa.

mittee on Africa, the Interfaith Center on Corporate Responsibility, the Lawyers Committee for Civil Rights Under Law, Southern Africa Project, the American Friends Service Committee, and the Washington Office on Africa also played important roles in reinvigorating the U.S. anti-apartheid movement in the 1980's. See BAKER, *supra* note 19, at 30-34.

190. See Edward Walsh, *Grass-Root Pleas Stir Lawmakers-GOP Conservatives Demanded Reagan Shift on South Africa*, WASH. POST, Sept. 16, 1985, at A1.

191. *Id.*

192. Reagan's Assistant Secretary of State, Chester Crocker's revisionist account of his dealings with FSAM contains remnants of this hostility, albeit in softer more condescending tone. See CROCKER, *supra* note 133, at 257-78, 313.

193. Support for sanctions came from nearly all quarters of the U.S. Congress, including conservative Republican House members like Newt Gingrich and Vin Weber, and Senators like Alan Simpson and Nancy Kassebaum. See BAKER, *supra* note 19, at 36-37.

194. Jesse Jackson made South Africa a major issue in his 1984 presidential campaign. Civil Rights leaders like Coretta Scott King, Dorothy Height of the National Council of Negro Women, Benjamin Hooks of the National Association for the Advancement of Colored People, and Joseph Lowery of the Southern Christian Leadership Conference, embraced the anti-apartheid struggle. See BAKER, *supra* note 19, at 30-32; Walters, *supra* note 182, at 65-82.

195. Senator Dole stated: "Let's face it, there's a lot of politics involved . . . this has now become a domestic civil rights issue." Pauline Baker, *The Sanctions Vote: A G.O.P. Milestone*, N.Y. TIMES, Aug. 26, 1986, at A17.

3. Sanctions at Last

The U.S. FSAM in the mid-1980's was focused, relentless, and creative. These qualities could be seen in its responses to Reagan Administration efforts to defend Constructive Engagement from congressional attacks. In September 1985, President Reagan issued an executive order containing largely symbolic measures against apartheid.¹⁹⁶ The executive order was designed to forestall congressional enactment of comprehensive sanctions.¹⁹⁷ However, the President's actions merely stoked the fire for comprehensive sanctions.¹⁹⁸ The executive order was vigorously denounced by FSAM leaders and pressure for comprehensive congressional sanctions was maintained.¹⁹⁹ Thus, in October 1986, as unrest and Government repression continued in South Africa, and with unyielding pressure from the opponents of apartheid, the U.S. Congress passed the Comprehensive Anti-Apartheid Act,²⁰⁰ overriding a presidential veto.²⁰¹ Among

196. Exec. Order No. 12532, 15 C.F.R. 769, *reprinted in* 50 U.S.C. app. at 2401 *et seq.* (1994). The Executive Order was issued only after strong pressure was exerted by Republican leaders in Congress. *See* BAKER, *supra* note 19, at 40; MINTER, *supra* note 7, at 338-39; *see also* CROCKER, *supra* note 133, at 276-78.

197. Pauline Baker provides an interesting account of how President Reagan rejected the pleas of congressional Republicans and adopted a position strongly supportive of the South Africa regime. BAKER, *supra* note 19, at 40; *see* CROCKER, *supra* note 133, at 276-78.

198. Advocates of comprehensive sanctions interpreted the Executive Order as a concession to be exploited for more sanctions. *See* David B. Ottaway, *Reagan Action Signals Reversal of Policy Toward Southern Africa*, WASH. POST, Sept. 11, 1985, at A21.

199. Randall Robinson, TransAfrica's executive director, called President Reagan's actions "inadequate and toothless," and criticized "the de facto alliance" between South Africa and the Reagan Administration. Karlyn Barker, *Sanctions Called 'Inadequate,' Apartheid Protest Leader Backs Tougher Measures in Congress*, WASH. POST, Sept. 11, 1985, at A20; *see also*, Edward Walsh & Helen Dewar, *Reagan Prevails in Early Senate Showdown Vote on Sanctions*, WASH. POST, Sept. 10, 1985, at A11; William Raspberry, *Sanctions "Defanged,"* WASH. POST, Sept. 11, 1985, at A15.

200. 22 U.S.C. §§ 5001-117 (1994).

201. This was a thoroughly bipartisan victory as conservative Republicans joined liberal Democrats in rejecting the Administration's position. In the Senate, the vote was 78-21 in favor of override. One of the Senators who voted in support of the President's veto, Senator Jesse Helms (R-NC), raised the spectre of world communism as he argued that, "this legislation makes a decisive choice for tyranny, and we all know, or should know who is orchestrating it." Edward Walsh, *Sanctions Imposed on S. Africa As Senate Overrides Veto, 78-21*, WASH. POST, Oct. 3, 1986, at A1. This was the first time a U.S. president's veto on a foreign policy issue was overridden by Congress. BAKER, *supra* note 19, at 44-47; Richard Lugar & Nancy Landon Kassebaum, *Override the President's Veto; And Get on With Peaceful Change in South Africa*, WASH. POST, Sept. 30, 1986, at A15 (reporting by Republican leaders on the Senate Foreign Relations Committee); Patrice

other things, this law banned new investments and bank loans to South Africa, prohibited a range of South African exports to the United States, and ended landing rights for South African airlines.²⁰² European governments took parallel actions in the same year.²⁰³ Thus, by late 1986, grassroots organizations in many parts of the world had bypassed U.N. paralysis over comprehensive economic sanctions. The United Nations, by the mid-1980's no longer the locus of global anti-apartheid efforts, nonetheless could take considerable credit for the dynamic and effective anti-apartheid movements in Member States. Many of these organizations were integrally connected to the decades-long U.N. campaign against apartheid.²⁰⁴ The comprehensive anti-apartheid program developed by the U.N. Special Committee in the mid-1960's, with its emphasis on developing global public opinion against apartheid, had borne fruit in the invigorated anti-apartheid movements of the mid-1980's.²⁰⁵ These movements succeeded in getting national governments to impose comprehensive sanctions similar to those the General Assembly had repeatedly urged the Security Council to impose.²⁰⁶

As the 1980's came to a close, South African and international anti-apartheid campaigns were accomplishing their objectives. The South African regime was losing control, support, and confidence.²⁰⁷ Repressive actions such as a declaration of a state

Gaines-Carter, *Triumphant moment for TransAfrica; Sanctions Approval Elates Lobbyists*, WASH. POST, Oct. 4, 1986, at A16.

202. 22 U.S.C. §§ 5051-53, 5055, 5056a, 5059, 5066, 5069-70 (1994). See BAKER, *supra* note 19, at 138-45; THOMPSON, *supra* note 21, at 234; PRICE, *supra* note 137, at 223-25.

203. PRICE, *supra* note 137, at 223-25.

204. Several of these organizations received funding or other support from the United Nations. The Special Committee against Apartheid, for example, worked with TransAfrica and other American organizations to institute and promote cultural boycott campaigns such as "Artists and Athletes against Apartheid," which was staffed by TransAfrica and chaired by Harry Belafonte and Arthur Ashe. See United Nations Centre Against Apartheid, Introduction to the First Register of Entertainers, Actors, and Others Who Have Performed in Apartheid South Africa, Notes & Documents, No. 20/83, October 1983.

205. See 1966 *Program of Action Against Apartheid*, U.N. GAOR, 21st Sess., U.N. Doc. A/6486 (1966).

206. See PRICE, *supra* note 137, at 220-25. Price notes that, "[a]t the same time that the U.S. Congress was program up the economic pressure on Pretoria, the European countries and the Commonwealth of Nations were doing likewise." *Id.* at 223.

207. See generally PRICE, *supra* note 137, at 249-86; THOMPSON, *supra* note 21, at 240-41.

of emergency, mass arrests, bannings, treason charges, and assassinations failed to stop the opposition.²⁰⁸ Prominent South Africans like Archbishop Desmond Tutu, Frank Chikane, Beyers Naude, and Allan Boesak openly challenged the regime's authority, courting arrest and imprisonment.²⁰⁹ Gradually, the opposition achieved its primary goal of making South Africa ungovernable.

The regime's inability to halt the unrest led to a loss of business confidence in the South African economy.²¹⁰ Prominent white South Africans, including many Afrikaners, began publicly questioning the Government's policies and calling for negotiations with the opposition.²¹¹ Several of them visited the exiled leadership in open violation of security laws to discuss the country's future.²¹²

Soon even leaders of the National Party began to publicly disagree on how to respond to the crisis. Still when the decisive split within the guardians of apartheid occurred in 1989, it came as a surprise to most observers. National Party leader and State President Pieter Willem Botha was unceremoniously replaced by one of his key ministers, Frederoc Willem De Klerk.²¹³ Botha at the time was suffering the effects of a stroke and his administration seemed incapable of moving beyond the tentative reformist steps which had failed to generate significant domestic or inter-

208. PRICE, *supra* note 137, at 249-66.

209. Archbishop Tutu was awarded the Nobel Peace Prize in 1984. His buoyant and telegenic personality, together with his emphasis on religion and nonviolence, made him an impressive and popular spokesperson for the anti-apartheid cause in Western countries. Reverend Allan Boesak was president of the World Alliance of Reformed Churches and a founder and a patrons of the UDF, the mass movement that was formed to coordinate the anti-apartheid protests. Beyers Naude, an Afrikaner theologian, served as general secretary of the South African Council of Churches until he was succeeded by Reverend Frank Chikane, also a founder and leader in the UDF. See BAKER, *supra* note 19, at 30; THOMPSON, *supra* note 21, at 239; LODGE & NASSON, *supra* note 143, at 47-55.

210. The annual rate of inflation rose from 11% in 1983 to 13.25% in 1984, 16.2% in 1985, and 18.6% in 1986. Race Relations Survey, 1983-86, *quoted in* THOMPSON, *supra* note 21, at 234. Real growth per capita declined in 1985 and 1986. *Id.*; see PRICE, *supra* note 137, at 225-33, 274-75.

211. See ROBERT SCHRIRE, ADAPT OR DIE: THE END OF WHITE POLITICS IN SOUTH AFRICA 83-84 (Ford Foundation-South Africa Update Series, 1991).

212. See *id.*; ALLISTER SPARKS, TOMORROW IS ANOTHER COUNTRY 75-87 (1995).

213. Botha voluntarily relinquished his position as head of the National Party in February, 1989, after he suffered a stroke. He was succeeded by de Klerk, who took over as acting State President in August. For a brief account of circumstances surrounding Botha's downfall, see SPARKS, *supra* note 212, at 68-71, 88-90.

national support after several years.²¹⁴ Within months of taking over the leadership of the party and regime, de Klerk began the final unravelling of apartheid. In February 1990, he released jailed anti-apartheid leaders, including Nelson Mandela, and removed bans on their organizations.²¹⁵ In June, the state of emergency was lifted in all provinces except Natal, and by the end of June 1991, laws that had served as the cornerstones of apartheid were repealed.²¹⁶

Anticipating de Klerk's actions, the U.N. General Assembly, in a special session on December 14, 1989, adopted a Declaration on Apartheid and its Destructive Consequences in Southern Africa ("1989 Declaration on Apartheid").²¹⁷ The declaration called for negotiations to end apartheid, emphasizing the development of a post-apartheid constitution and the holding of elections.²¹⁸ It would take four years of excruciating negotiations, conducted in an atmosphere of extreme hostility and violence, before agreement on South Africa's first democratic constitution and procedures for its first free and fair election could be achieved.

D. *Negotiating a Revolution 1990-94*

The General Assembly's 1989 Declaration on Apartheid marked the beginning of the final phase of U.N. intervention in pre-democratic South Africa. In contrast to earlier phases, U.N. intervention during this final phase had the support of all the main parties to the conflict. The United Nations' first priority was to help end the violence and get the various parties to nego-

214. *Id.* at 68-71.

215. The principal organizations unbanned were the African National Congress ("ANC"), the South African Communist Party, and the Pan Africanist Congress of Azania ("PAC"). Restrictions on several other organizations were removed. See SCHRIRE, *supra* note 211, at 3, 131-34; *see also* President F.W. De Klerk Address of February 2, 1990, *reprinted in* SCHRIRE, *supra* note 211, at 160-75. Nelson Mandela's release was televised around the world and shortly thereafter, he embarked on a global goodwill and fundraising tour where he was greeted by adoring crowds. For Mandela's own account of his release and his reception during those first foreign trips, see MANDELA, *supra* note 22, at 489-509.

216. SCHRIRE, *supra* note 211, at 134; THE UNITED NATIONS AND APARTHEID, *supra* note 1, at 92, 97-98.

217. Declaration on Apartheid's Destructive Consequences in South Africa, G.A. Res. S-16/1, 16th Spec. Sess., 6th plen. mtg. at 1, U.N. Doc. A/S-16/1 (1989); *see also*, THE UNITED NATIONS AND APARTHEID, *supra* note 1, at 88-90.

218. *Id.*

tiate a post-apartheid order.²¹⁹ After the South African parties reached agreement on interim democratic structures and the first post-apartheid election in late 1993, the United Nations's attention turned to providing technical and monitoring assistance.²²⁰ The United Nations expanded the United Nations Observer Mission in South Africa's ("UNOMSA") mandate to include election monitoring and substantially increased the number of observers and other technical personnel in the country.²²¹

U.N. intervention during this final phase provided essential international legitimacy for the negotiating process and the political outcome. However, the United Nations success during this final phase should be understood in its limited context. As long as the issues were the legitimacy of apartheid and solidarity with representatives of the oppressed, fighting for universally recognized human rights, the United Nations was an essential, global forum. Once the parties reached the decision to negotiate among themselves, the United Nations' role changed dramatically. In particular, the General Assembly's role as champion of the oppressed in South Africa was constrained as discussions moved from the general to the specific, as the number of quarreling parties and disputed issues multiplied, and as the focus moved from the political to the economic.

Once the parties began their slow movement toward negotiation, the United Nations easily accepted a role on the sidelines, content with occasional efforts to jump start or push the process, coupled with offers of assistance. This was in keeping with the desires of the major South African parties for face to face, unmediated negotiations. For the South African Government, any more intrusive U.N. role would have removed whatever was left of its sense of legitimacy as the Government of a sovereign nation. Constitutional legitimacy and continuity were important to South Africa, as it wanted change to result from internal negotia-

219. Political violence was the primary factor threatening the success of negotiations among the parties. *THE UNITED NATIONS AND APARTHEID*, *supra* note 1, at 107-08.

220. The South African Government made the request for U.N. monitoring on behalf of the interim Transitional Executive Council ("TEC"). *Id.* at 115.

221. *Id.* at 123. IEC monitors, unlike the domestic and international observers, had authority to intervene and resolve disputes. See *INDEPENDENT ELECTORAL COMMISSION, HANDBOOK FOR OBSERVERS* (1994); Stephen Ellman, *Lawyers Committee for Civil Rights Under Law (Southern Africa Project)*, *South Africa: The Countdown To Elections*, SPECIAL EDITION (1994).

tions that lacked any shadow of capitulation or revolutionary transformation. For the main opposition, the ANC, deeper involvement by the United Nations presented the danger that it could be forced to make greater concessions by the international community as the ANC took on the mantle of power.

1. Negotiations and Violence

The 1989 Declaration on Apartheid was actually the product of an ANC strategy designed to push President de Klerk into going beyond the limited reforms championed by his predecessor, Botha.²²²

The ANC had no difficulty obtaining U.N. support, because the ANC's position on negotiations and its constitutional goals were consistent with the United Nations' longstanding positions on apartheid.²²³ In addition to putting pressure on the apartheid regime to negotiate in good faith, the 1989 Declaration on Apartheid authorized the U.N. Secretary-General to assist with the negotiations and report periodically to the General Assembly and the Security Council.

Once negotiations began, the ANC and the Government dominated the process. The other parties, with the exception of

222. After de Klerk replaced P.W. Botha in 1989, he outlined a reform program that accelerated the abandonment of apartheid. He initially rejected calls for a genuine non-racial democracy, however, and urged retention of an ethnic-based political system. The ANC responded to this by soliciting international support for its own vision of a united, democratic South Africa. The ANC's first step was to get African states on record supporting its position. On August 21, 1989, in Harare, Zimbabwe, the Organization of African Unity ("OAU"), adopted the Harare Declaration, endorsing the ANC position on negotiations and a constitutional order. See Harare Declaration, *reprinted in* JASTER ET AL., *CHANGING FORTUNES: WAR, DIPLOMACY AND ECONOMICS IN SOUTHERN AFRICA* 174-80 (1992). The Harare Declaration was then endorsed at a Conference for a Democratic Future in South Africa by representatives of more than two thousand South African civic organizations on December 9, 1989. The principles of the Harare Declaration were also marketed to international anti-apartheid organizations, which then lobbied their governments for support. The Harare Declaration later formed the basis of the U.N. General Assembly Declaration on Apartheid and its Destructive Consequences in Southern Africa. See *THE UNITED NATIONS AND APARTHEID*, *supra* note 1, at 89.

223. The 1989 General Assembly declaration emphasized that South Africa must be transformed through direct negotiations into a new constitutional order founded upon principles contained in the U.N. Charter and the Universal Declaration of Human Rights. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948). The 1989 General Assembly declaration supported a new constitutional order based upon equal citizenship, a bill of rights, an independent judiciary and free and fair elections. See JASTER, *supra* note 222; *THE UNITED NATIONS AND APARTHEID*, *supra* note 1, at 89-90.

the PAC, generally joined forces with the Government in an effort to deny the ANC complete control of the post-apartheid government. The anti-ANC coalition did not survive the process because several parties, including the Inkatha Freedom Party²²⁴ ("IFP"), the Conservative Party,²²⁵ and various homeland governments, became increasingly suspicious of the Government's willingness to compromise with the ANC. Eventually the Government abandoned its allies and reached an agreement with the ANC. The PAC flirted briefly with forming a negotiating front with the ANC before taking a sharply independent stance in the negotiations.²²⁶

Discussions about the structure and process of negotiations began in May, 1990, when the ANC and the Government held their first meeting in Cape Town.²²⁷ These initial discussions continued until late 1991, and focussed on four main issues: (1) the release of remaining political prisoners and the granting of immunity for political offenses; (2) the return of refugees; (3) containing political violence; and (4) the repeal of remaining apartheid laws. The Cape Town meeting resulted in the adoption of the Groote Shuur Minute,²²⁸ which set up a working group to recommend ways of dealing with the release of political prisoners and immunity for political offenses.²²⁹ The next meeting in August, resulted in the Pretoria Minute,²³⁰ in which the

224. The Inkatha Freedom Party ("IFP") began as a Zulu cultural organization in 1975 by Chief Mangosuthu Buthelezi. At the time Buthelezi, who headed the KwaZulu homeland formed under apartheid, was close to the ANC. The relationship soon deteriorated and ANC and IFP supporters began to attack each other. The conflict between the two organizations has resulted in thousands of deaths all over South Africa and has the potential to destabilize the country. The IFP won control of the KwaZulu-Natal province in the 1994 elections amid charges of vote fraud. Buthelezi and the IFP have demanded more autonomy for the KwaZulu-Natal Province in constitutional negotiations. Eddie Koch & Mehlo Mvelase, *Kipha Nyawosa's Sad Prophecy*, WKLY. MAIL & GUARDIAN, Jan. 5, 1995, at 6-7; Ann Eveleth, *The IFP Gives a Kingdom for the Constitution*, WKLY. MAIL & GUARDIAN, Oct. 20, 1995, at 6.

225. The Conservative Party was founded in 1982 by former members of the National Party who thought that the National party was weakening in its commitment to pure apartheid. It quickly became an important voice for right-wing South Africans but lost some support after de Klerk's reforms of 1990.

226. SPARKS, *supra* note 212, at 129.

227. THE UNITED NATIONS AND APARTHEID, *supra* note 1, at 92; *see* SPARKS, *supra* note 212, at 123-24.

228. *See* THE UNITED NATIONS AND APARTHEID, *supra* note 1, at 92-93.

229. *Id.* at 92; *see* SPARKS, *supra* note 212, at 124.

230. *See* THE UNITED NATIONS AND APARTHEID *supra* note 1, at 92-93.

parties agreed to a timetable for the release of political prisoners and solutions to various other issues delaying the start of negotiations.²³¹ Subsequent disagreements over implementing these agreements as well as sharp divisions over responsibility for escalating violence in the country caused a breakdown in the initial talks, delaying the start of formal negotiations.

The United Nations took several steps to resuscitate the negotiating process. First, the U.N. High Commission for Refugees ("UNHCR") helped to organize repatriation of refugees and other political exiles.²³² The agency opened offices in South Africa and provided humanitarian assistance to returning refugees.²³³ Secondly, the United Nations sent several high level delegations to the South Africa to meet with the various parties and to keep international focus on the negotiating process. The General Assembly blamed the South African regime for the violence and breakdown in the negotiations and urged international moral and material support for the Government's opponents.²³⁴

Formal talks eventually began in late 1991 in the form of a Convention for a Democratic South Africa ("CODESA"), which brought together representatives of the Government and nineteen political groups.²³⁵ U.N. observers to CODESA's first plenary session in Johannesburg on December 20 and 21, 1991, gave an optimistic assessment of the session's progress.²³⁶ U.N. observers were also present during the second plenary ("CODESA II"), held on May 15, 1996 and May 16, 1996.²³⁷ CODESA II, however, ended on a negative note when working parties set up after CODESA failed to reach a consensus on the

231. For example, the ANC agreed to suspend armed struggle and the government agreed to review concerns about security and violence. *THE UNITED NATIONS AND APARTHEID*, *supra* note 1, at 92-93; SPARKS, *supra* note 212, at 124.

232. A Memorandum of Understanding between the South African Government and the United Nations High Commission for Refugees ("UNHCR") was signed on September 4, 1991. See *THE UNITED NATIONS AND APARTHEID*, *supra* note 1, at 96.

233. *Id.*

234. See G.A. Res. 44/244, U.N. GAOR, 45th Sess., U.N. Doc. A/RES/44/244 (1990); G.A. Res. 45/176A, U.N. GAOR, 45th Sess., U.N. Doc. A/RES/45/176A (1990).

235. See *THE UNITED NATIONS AND APARTHEID*, *supra* note 1, at 99-100. For a detailed discussion of CODESA and its failure, see CENTRE FOR POLICY STUDIES, *THE LONG JOURNEY: SOUTH AFRICA'S QUEST FOR A NEGOTIATED SETTLEMENT* (Steven Friedman ed., 1993).

236. *THE UNITED NATIONS AND APARTHEID*, *supra* note 1, at 99-101.

237. *Id.* at 101.

percentage of votes necessary for adopting or amending the proposed constitution.²³⁸ The failure of CODESA II worsened the violent climate and instability that the country was experiencing.²³⁹ The ANC and many other opponents of the government charged the police or a "Third Force"²⁴⁰ with responsibility for perpetrating or encouraging much of the violence.²⁴¹

By June 1992, South Africa was in the midst of a deep political crisis; the ANC and the Government ceased formal discussions, and the ANC threatened mass political action. The U.N. Security Council, which had stayed on the sidelines since 1988, took up the matter at the request of African states on July 15 and 16, 1992. The Security Council unanimously adopted Resolution 765, which emphasized "the responsibility of the South African government" to do more to stop the violence.²⁴² The Reso-

238. The ANC objected to the proposal requiring more than a two-thirds majority in order to adopt key parts of the new constitution. CENTRE FOR POLICY STUDIES, *supra* note 235, at 60-85.

239. During this period, clashes between the ANC and its opponents became more frequent and ferocious. See THE UNITED NATIONS AND APARTHEID, *supra* note 1, at 101-02; see also SPARKS, *supra* note 1212, at 138-52.

240. Opponents of apartheid placed primary responsibility for the so-called black on black violence that escalated after 1989, on elements within South Africa's military and police forces whom they termed a "third force." They believed the goal of this "third force" was to weaken the ANC and prevent it from coming to power. See, e.g., SPARKS, *supra* note 212, at 139, 153-78.

241. The issue of the apartheid's regime involvement in the so-called black on black violence is one of ongoing debate and investigations in South Africa. No one today seriously doubts the involvement of military and security force members in the violence. There is overwhelming evidence of various efforts to wage war on ANC members and structures throughout the country. It has also been acknowledged that the regime funded and armed members of the IFP as part of an anti-ANC program. South African newspapers have carried extensive reports of revelations by former members of the units that carried out assassinations, massacres, and other activities directed against ANC supporters and officials. See, e.g., Ann Eveleth, *Long History of Third Force Allegations*, 11 WKLY. MAIL & GUARDIAN, Oct. 20, 1995, at 7; *Christmas Killings Signal ANC Defeat in KwaZulu*, WKLY. MAIL & GUARDIAN, Jan. 5, 1996, at 6-7. There is, however, some debate as to how far up the chain of command knowledge or authorization for these activities extended. The ANC and its supporters have frequently placed responsibility on former President de Klerk and his top aides. For two different perspectives on government involvement in these activities, see SPARKS, *supra* note 212, at 153-78 (raising serious questions about President de Klerk's denial of knowledge or involvement); see JOHN KANE BERMAN, *POLITICAL VIOLENCE IN SOUTH AFRICA* (1993) (accepting some degree of official involvement but stressing role of climate favoring revolutionary violence or "people war" in fueling cycle of violence). See also ADAM & MOODLEY, *THE OPENING OF THE APARTHEID MIND* 121-48 (1993) (examining issues including intra Zulu conflict).

242. S.C. Res. 765, U.N. SCOR., 47th Sess., 3096th mtg. at 1, U.N. Doc. S/RES/765

lution also called for the appointment, "as a matter of urgency, [of] a Special Representative for South Africa,"²⁴³ to help end the violence and provide solutions to other problems blocking discussions among the parties.²⁴⁴ The Secretary-General appointed former U.S. Secretary of State Cyrus Vance as his Special Representative and sent him on an urgent mission to meet with the parties.²⁴⁵

The Vance mission led the Security Council to approve the creation of a full fledged U.N. observer mission.²⁴⁶ The UNOMSA was established in September, 1992, and by the end of the year, it had fifty observers stationed throughout the country.²⁴⁷ The presence of U.N. observers at demonstrations and other public events, together with political intervention by U.N. representatives at higher levels, reflected the priority the international community placed on political progress in South Africa. By bringing the presence and concern of the international community to the local level, U.N. observers may have helped to reduce tension among the parties and emphasized international expectations for the resumption of talks.

2. Observation and Legitimation

Throughout the rest of 1992 and into 1993, the United Nations applied pressure on the major South African parties. It issued regular appeals for resumption of negotiations, offered

(1992). The Security Council urged the international community to maintain the sanctions in place against South Africa. *Id.*

243. *Id.*

244. *Id.*

245. The Vance mission appeared to have been well received; it was immediately followed by a team of ten observers to monitor an ANC mass action campaign in early August. The Secretary General's report on the Vance mission recommended various steps to strengthen the work of two newly created South African bodies: the Goldstone Commission of Enquiry into Public Violence and Intimidation and the National Peace Secretariat, responsible for implementing the National Peace Accord signed on September 14, 1991. The report called for the deployment of a larger contingent of U.N. observers to work closely with South African and other international observers. *Report of the Secretary-General to the Security Council in pursuance of Security Council Resolution*, U.N. SCOR, 47th Sess., 3095th & 3096th mtgs. at 1, U.N. Doc. S/24389 (1992).

246. S.C. Res. 772, U.N. SCOR, 47th Sess., 3107th mtg., U.N. Doc. S/RES/772 (1992); Letter from the Secretary-General to Abdou Diouf, President of Senegal and Chairman of the Organization of African Unity, *reprinted in* THE UNITED NATIONS AND APARTHEID, *supra* note 1, at 448.

247. This number was increased gradually over the course of the next 12 months. THE UNITED NATIONS AND APARTHEID, *supra* note 1, at 107.

technical assistance, and dispatched high-profile fact-finding missions.²⁴⁸ Eventually, negotiations between the ANC and the Government resumed in August 1992.²⁴⁹ However, formal talks between the ANC and the Government did not end the violence; on the contrary, it fueled concern and suspicion on the part of some in the state security establishment and others belonging to smaller parties that they were being excluded.²⁵⁰

In March 1993, a new round of formal negotiations involving representatives from twenty-six groups began with a planning conference. In July, the parties agreed on a date for the country's first democratic election and approved a bill of rights and twenty-seven constitutional principles.²⁵¹ The IFP and the Conservative Party were prominent among those parties that objected to the approval of a date for the election, and withdrew from the talks.²⁵² In early September 1993, the ANC, the Government, and the remaining parties agreed on terms establishing a Transitional Executive Council ("TEC"), to oversee South Africa's transition to democracy.²⁵³ Speaking at the United Nations the next day, Nelson Mandela, proclaimed that "the countdown to democracy in South Africa has begun,"²⁵⁴ and asked the organization and its Members to end sanctions imposed on South Africa.²⁵⁵

On November 18, 1993, the negotiating parties adopted an

248. In 1992, the United Nations sent several Special Envoys to South Africa and a major U.N. delegation visited the country in March, 1993. *Id.* at 110-11.

249. Secret discussions between the two parties helped reduce their differences. SPARKS, *supra* note 212, at 108 (providing best available account of secret discussion between ANC and Government). The Government also held bilateral discussions with the PAC and some of the other parties, but these discussions were clearly less significant than the discussions between the Government and the ANC. *See id.* at 108-15.

250. For a discussion of how the violence affected the negotiations, see SPARKS, *supra* note 212, at 153-93.

251. The parties agreed that the bill of rights and the constitutional principles would be included in both the interim and the final constitutions. THE UNITED NATIONS AND APARTHEID, *supra* note 1, at 111-12.

252. The IFP and some smaller hardline white minority parties agreed to take part in the election after receiving various pledges from the ANC. *See* Eric Ransdell, *Pretoria's Roller-Coaster Politics*, U.S. NEWS & WORLD RPT., Feb. 14, 1994, at 37.

253. The South African parliament approved legislation establishing the Transitional Executive Council ("TEC") on September 23, 1993.

254. *See* Nelson Mandela, *Address to the Special Committee against Apartheid*, U.N. GAOR, 48th Sess., 669th mtg., U.N. Doc. A/AC.115/SR.669 (1993); U.N. Centre Against Apartheid, Notes and Documents, No. 8/93, September 1993.

255. The United Nations acted rapidly on Mandela's requests, urging its members to do the same. *Id.*

interim constitution, which among other things, required the establishment of GNU that would govern the country after the election.²⁵⁶ The parties also established several election-related institutions including an Independent Electoral Commission ("IEC"), an Independent Media Commission ("IMC"), and an Independent Broadcasting Authority ("IBA").²⁵⁷ In early December 1993, the TEC formally invited the United Nations to observe the election and assist the IEC in coordinating deployment of the thousands of other expected governmental and non-governmental international observers.²⁵⁸ The United Nations responded by expanding UNOMSA's mandate to encompass monitoring the electoral process and began recruiting and training hundreds of additional international observers.²⁵⁹ The United Nations established a formal coordinating body with the other intergovernmental organizations including, the European

256. The Government of National Unity ("GNU") will govern until a new permanent constitution is written and approved. REPUBLIC OF SOUTH AFRICA CONST.; *see also*, Ellman, *supra* note 221.

257. The Independent Electoral Commission ("IEC") was an 11 member body charged with the conduct of South Africa's first non-racial democratic election. The members, including several non-South Africans, were appointed by President de Klerk upon the advice of the TEC. The chairman was South African supreme court Judge Johann Kriegler and the vice chairman was advocate Dikgang Moseneke. Independent Electoral Commission Act, 1993, Act No. 150 of 1993, 340 Republic of South Africa Government Gazette, No. 15183 (1993). The Independent Media Commission was established to promote political participation and fairness toward all political parties in the government-controlled media. Independent Media Commission Act, Act No. 148 (1993) (S. Afr.). The Independent Broadcasting Authority was established to regulate broadcasting activities in the public interest. Independent Broadcasting Authority Act, 1993, Act No. 153 of 1993. Independent Broadcasting Authority Act, Act No. 153 (1993) (S. Afr.).

258. THE UNITED NATIONS AND APARTHEID, *supra* note 1, at 115. From January to June 1994, the Author coordinated the recruitment, training, and deployment of non-governmental observers to the election on behalf of the Southern Africa Project of the Lawyers Committee for Civil Rights Under Law ("LCCRUL"). The director of the Southern Africa Project, Gay McDougall, who conceived and obtained U.S. funding for the observer program, could not coordinate the observer program after she was selected to serve as one of the eleven electoral commissioners. As coordinator, the Author travelled extensively in South Africa and worked with various individuals and groups involved in the electoral process. The views expressed in this Article do not represent those of the Southern Africa Project or LCCRUL. On the work of LCCRUL election observers, see MAKAU WA MUTUA, LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, SOUTH AFRICA PREPARES FOR THE DEMOCRATIC CHALLENGE (1994); FRANCESCA E. FARMER, LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, OBSERVER DELEGATION TO SOUTH AFRICA'S FIRST NON-RACIAL ELECTION, WITNESSES TO THE BIRTH OF A NEW SOUTH AFRICA (1994).

259. THE UNITED NATIONS AND APARTHEID, *supra* note 1, at 117-19.

Union, the British Commonwealth, and the Organization of African Unity and developed less formal relations with observer teams from individual governments as well as non-governmental organizations.²⁶⁰ In all, over 2500 U.N. observers joined more than 4000 other international observers, representing governmental and non-governmental organizations, and thousands of domestic observers fielded by various South African civic organizations, in monitoring and evaluating the electoral process.²⁶¹ The IEC fielded about 9000 monitors among its 200,000 plus electoral workers.²⁶²

It appeared in the days leading up to the election that most of the parties were already reconciled to an ANC victory with their primary concern being the size of the victory. It was unsurprising, therefore, that shortly after the polls closed, leaders of the United Nations and other international observer delegations quickly pronounced themselves satisfied with the process, making only passing references to the considerable administrative problems their observers had encountered.²⁶³ There were few objections from any quarter as ANC supporters led most of the rest of the world in celebrating the end of apartheid. Mandela took office as head of the ANC-dominated GNU and South Africa's first president elected in a non-racial democratic election.

In time, South Africans finished celebrating their negotiated revolution and began to take a harder look at the many problems still plaguing their country. By then, the United Nations and the other international electoral missions had already

260. *Id.* at 116, 118-19.

261. International observers generally had no serious complaints about how they were treated as they performed their duties. These observers visited thousands of polling stations over the course of the election and observed some of the vote counting process. Indeed, outside of the well-noted areas of violence in Kwa Zulu and the East Rand, observers mainly contended with problems rooted in inexperience on the part of electoral authorities. See *Final Report of the Secretary-General on the Question of South Africa*, S/1994/717 (1994), reprinted as Document 216 in *THE UNITED NATIONS AND APARTHEID*, *supra* note 1, at 521-36 [hereinafter *Report of the Secretary-General*].

262. "In addition to some 9,000 monitors trained by the IEC, some 6,000 international observers monitored the elections." *THE UNITED NATIONS AND APARTHEID*, *supra* note 1, at 107-08. Monitors were generally South Africans employed by the IEC to observe the electoral process and where possible, to help resolve disputes. Observers were not authorized to intervene. See *INDEPENDENT ELECTORAL COMMISSION, HANDBOOK FOR OBSERVERS* 3, 15 (1996).

263. *THE UNITED NATIONS AND APARTHEID*, *supra* note 1, at 124; *Report of the Secretary-General*, *supra* note 261, at 528.

declared victory and moved on to the next election.²⁶⁴

II. BEYOND POLITICAL PARTICIPATION

*But I have discovered the secret that after climbing a great hill,
one only finds that there are many more hills to climb.*

— Nelson Mandela²⁶⁵

Part I of this Article discussed the sustained U.N.-centered campaign against apartheid, an extraordinary global effort that tracked the evolution of the United Nations as a global human rights institution during its first fifty years of existence. The anti-apartheid struggle helped to define and test the limits of the human rights vision of those who, in the writing of the U.N. Charter, sought to elevate respect for human rights to the same level as the organizations's other main purpose, the maintenance of international peace and security. The tremendous sacrifices of the South African people in the face of state-directed oppression, the energy and commitment of human rights non-governmental organizations all over the world, and the persistent anti-apartheid efforts, for whatever reasons, in the General Assembly, were all important aspects of a post-World War II global movement to reaffirm faith in the dignity of each human being. The joy shared by South Africans and the international community at the demise of apartheid in 1994 testified to the enormous value the world community placed on this historic human rights struggle. Nonetheless, without unduly minimizing the accomplishments of the anti-apartheid struggle, including the very important changes that have occurred in South Africa over the past five years, it is necessary to properly contextualize and understand them.

This section of this Article offers two sets of lessons learned

264. The U.N. Special Committee against Apartheid reported, for the last time on June 14, 1994, that: "With the entry into force, on April 27, 1994, of South Africa's first non-racial and democratic constitution, and the holding of the first non-racial elections from April 26, 1994 to April 29, 1994, apartheid came to an end." *Report of the Special Committee Against Apartheid*, U.N. GAOR., 49th Sess., U.N. Docs. A/48/22/Add.1 and S/26714/Add.1 (1994).

The report continued: "The system of apartheid having been brought to an end, the Special Committee against Apartheid established by the General Assembly on November 6, 1962 . . . has fulfilled its mandate . . . and has successfully concluded its work." *Id.*

265. MANDELA, *supra* note 22, at 544.

from the anti-apartheid campaign. The first set of lessons relates to the institutional structure of the United Nations and highlights the importance of human rights NGOs in getting the organization to act meaningfully in support of global human rights values. The second set of lessons concerns the nature and limits of human rights struggles, again focusing on the role NGOs play in expanding and deepening global commitment to human rights values. These lessons should prove instructive not only to those who seek human rights-friendly changes in the institutional structure of the United Nations, but also to those engaged in the struggle for human rights in other settings.

A. *Strengthening the U.N. Commitment: The Institutional Lessons*

The United Nations has developed an impressive formal structure to promote the advancement of human rights.²⁶⁶ While much of its human rights responsibilities are housed within the Economic and Social Council, virtually every organ of the United Nations has significant human rights responsibilities.²⁶⁷ However, this impressive evidence of formal commitment to human rights has not spared the United Nations criticisms for ineffectiveness in either protecting people from abuse or bringing to account gross violators of human rights. In the post-Cold War World, pleas for U.N. humanitarian rights assistance and humanitarian intervention have risen even as the volume of ridicule and scorn heaped on the institution has increased.

The United Nations' historical confrontation with apartheid provides both confirmation of the worst fears about its institutional weaknesses as well as glimmers of the possibilities that the organization holds for more effective global intervention against human rights violations. The institutional lessons form the United Nations campaign against apartheid include: (1) the

266. See UNITED NATIONS, *THE UNITED NATIONS AND HUMAN RIGHTS 1945-1995* (1995); UNITED NATIONS, *HUMAN RIGHTS MACHINERY, FACT SHEET NO. 1* (1987); ALSTON, *THE UNITED NATIONS AND HUMAN RIGHTS* (1993).

267. See U.N. CHARTER chs. IX, X. The Security Council's human rights role which has grown immeasurably in the post-Cold War era, is somewhat constrained by the requirement of an international peace and security nexus. See *id.* chs. V, VI, VII. Arguably, the International Court of Justice would have a larger human rights role if individuals could be parties before the court. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 47, art. 34.

United Nations prioritization of war prevention and international conflict management over promotion of human rights values undermined the struggle against apartheid; (2) the General Assembly's strong and persistent opposition to apartheid must be extended to other forms of human rights violations if the United Nations is to become more effective in its human rights mission and (3) nongovernmental organizations were critical to the development and implementation of the U.N.-centered campaign against apartheid and must receive greater support within the U.N. system if the United Nations is to expand and deepen human rights values.

1. U.N. Emphasis on Prevention of Conflict Over Promotion of Human Rights Values

The United Nations was created "to save succeeding generations from the scourge of war" and "to reaffirm faith in fundamental human rights"²⁶⁸ As such, promoting human rights was always part of the U.N. mission. In practice, however, this dimension of the U.N. mission has received a lower priority than war prevention and international conflict management. Despite frequent affirmations of the United Nations' commitment to human rights and widespread recognition of the intimate connections between violation of human rights by governments and their international behavior, the United Nations continues to give human rights a lower priority.

It was not an accident that the human rights principles contained in the Universal Declaration of Human Rights were left out of the U.N. Charter.²⁶⁹ Human rights was considered by many a controversial area to be left for future development and incorporation.²⁷⁰ In contrast, the U.N. Charter is explicit about the United Nations' responsibilities to reduce international con-

268. U.N. CHARTER pmbi; see RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER* (1958).

269. RUSSELL, *supra* note 262, at 323-29.

270. The drafters of the Charter, however, left sufficient language in the text to enable the General Assembly to expand its human rights role, even if the role was limited to initiating studies and making recommendations. *Id.* at 329. See U.N. CHARTER art. 13, ¶ 1; see also U.N. CHARTER chs. IX, X. This fact became critical to the U.N. campaign against apartheid where the powers of the General Assembly to study and recommend was translated into an immense propaganda war against South Africa and the Western countries blocking sanctions against apartheid.

flicts and prevent war.²⁷¹

The composition and powers of the Security Council, the United Nations' most powerful organ, have served to widen the gap between the United Nations' war prevention and conflict management mission and its human rights mission. The Charter's description of Security Council functions and powers also devalues human rights values. One will search the relevant provisions in vain for an explicit authorization for Security Council actions in support of human rights.²⁷² Human rights play no role in Security Council membership. In fact, throughout its history, the Security Council has always had at least one powerful member whose understanding of human rights was decidedly different from that espoused by most human rights advocates. The Security Council's focus, its deliberately unrepresentative composition, and its considerable powers, effectively wielded by the permanent members with their veto, have ensured that even when confronted with gross violations of human rights, the United Nations remains oriented predominantly toward conflict management between nations.

As discussed in Part I, apartheid South Africa benefitted immensely from this bias as the United States, the United Kingdom, and France used their veto powers to thwart sanctions against South Africa. Clearly, human rights was not the priority. Economic self-interest, South Africa's militarily capacity, fear of communist expansion in the region, and concern over regional stability took precedence. The United Nations as an institution was forced to go along with this perspective because its existence was contingent on this sort of control by a Security Council which placed too low a value on human rights. This pattern of sacrificing human rights in the interest of maintaining international peace and stability continues today. In the Balkans, Russia has prevented or limited actions by the United Nations against its Serbian allies. China has also helped foil actions against Nigeria in the aftermath of gross violations of human rights, including the executions of human rights activist Ken Saro-Wiwa and others.²⁷³

271. See U.N. CHARTER arts. 1, 2, chs. V-VII.

272. See *id.*

273. See Thomas L. Friedman, *U.N. Human Rights Resolution*, N.Y. TIMES, Dec. 27, 1995, at A15; Barbara Crossette, *Russia Balks at a U.N. Move to Tighten Serbia Border Ban*, N.Y. TIMES, Apr. 21, 1995, at A8.

The dispute between the General Assembly and the Security Council from 1946 to 1961 over intervention in apartheid South Africa took the theoretical proposition that how a government treats its citizens is a matter of international concern into the realm of the practical. Those who argued that certain human rights violations rise to the level of, or could be interpreted as, threats to international peace and security, thus, justifying Security Council authorization for U.N. intervention, eventually won the debate.²⁷⁴ But it was a victory that would have had very limited practical significance had NGOs not pressured Western governments into imposing sanctions on South Africa.²⁷⁵

The United Nation's willingness to intervene in support of human rights lacks much depth. The priority of the United Nations is still war prevention, the maintenance of international peace and security rationale, not human rights promotion or protection. The Yugoslav and Rwanda war crimes tribunal notwithstanding,²⁷⁶ there is still considerable inclination to leave former dictators, war criminals, and their likes in peace; all in the interest of maintaining international peace and stability. The anti-apartheid campaign helped elevate the human rights mission of the U.N. but the underlying state-centered structure of the organization still prioritizes war prevention and international conflict management over promotion of human rights values.

2. General Assembly Opposition to Apartheid Contradicts Domestic Practices of Majority of U.N. Members

The General Assembly's strong opposition to apartheid does not reflect institutionalized consistent practices on the part of this organ or the majority of U.N. Members. Neither the General Assembly nor the Security Council should be counted on to give top priority to human rights in the post-Cold War, post-apartheid era. The persistent demand for punitive actions

274. Of course, recent tragedies in Somalia, Bosnia, Rwanda, and other places show that anyone who counts on such authorizations does so at their peril.

275. See *supra* notes 15-47 and accompanying text (discussing role of anti-apartheid NGO in getting sanctions imposed on South Africa in mid-1980's).

276. See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1983), *reprinted in* 32 I.L.M. 1203, 1204 (establishing Yugoslav war crimes tribunal); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg. at 1, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 (establishing ad hoc international tribunal to prosecute genocide in Rwanda).

against South Africa by a large majority of U.N. Members was a truly remarkable aspect of the U.N. anti-apartheid campaign. Scores of Member States rejected the argument that South Africa's treatment of non-whites was a purely internal matter. Neither South Africa's status as a founding member of the United Nations nor its assertion that the U.N. Charter prohibits interference in Members' internal affairs, shielded it from international reproach and meddling. Unfortunately, the strong position of the General Assembly during the anti-apartheid campaign offers very little evidence of an enduring commitment to human rights values on the part of the majority of its Members.

Although the anti-apartheid struggle yielded important gains for human rights struggle generally, these broader gains were not necessarily among the aims of many of the U.N. Members who supported tough action against South Africa. The fact is that most U.N. Members who supported extreme intervention against apartheid South Africa have not shown a similar willingness to abandon the shield provided by sovereignty on human rights issues generally. In fact, most of South Africa's opponents in the General Assembly saw apartheid as a special case of human rights violations quite removed in kind and degree from their own internal practices. The explicit involvement of the state in racial discrimination in South Africa made it easy for even those whose human rights practices rivaled South Africa's to condemn it. Neither the General Assembly nor the Security Council has since demonstrated much willingness to tackle violations of human rights by other U.N. Members with the same zeal that the General Assembly demonstrated on the apartheid question. If the institutional gains for human rights from the apartheid campaign is to be strengthened, the impetus must come from outside the U.N. structure. The evidence presented from Part I is that human rights NGOs were critical to the anti-apartheid campaign. Their continuing engagement with the U.N. structure is likely the most efficacious way to broaden and deepen the United Nations' institutional commitment to human rights values by proposing the United Nations and its members develop consistent practices protective of fundamental human rights.

3. NGOs Must Continue to Pressure the U.N. System to Expand and Deepen Human Rights Values

The vital role NGOs play in furthering global human rights aspirations is one of the most important lessons of the U.N.-centered campaign against apartheid. The historical review presented in Part I of this Article highlighted the role played by human rights NGOs in resolving the stalemate between the Security Council and the General Assembly over imposing economic sanctions to end apartheid.²⁷⁷ If the U.N.-centered campaign against apartheid is to have lasting positive human rights impact on the U.N. system, human rights NGOs must continue to pressure the U.N. structure to make it live up to its human rights mission.

The anti-apartheid campaign began with South Africans themselves reaching out to the rest of the world, a process that began long before the United Nations was established.²⁷⁸ Obtaining the support of diverse governments and intergovernmental structures was essential to the success of the campaign. It was the human rights NGOs all over the world who helped to develop and implement the comprehensive U.N. anti-apartheid program that made the critical difference in the 1980's. NGOs served as essential links between the U.N. structures and national political structures, translating and reformulating the U.N. anti-apartheid program to fit national realities. Without FSAM, for example, U.S. citizens would, in all likelihood, have been successfully insulated by the Reagan Administration from demands for sanctions sought by the General Assembly while the Administration blocked similar actions within the U.N. system. FSAM successfully in gained the passage of comprehensive economic sanctions over a presidential veto despite President Reagan's high domestic popularity.

Human rights NGOs today represent a vibrant variety of the

277. See *supra* notes 140-99 and accompanying text (discussing constructive engagement, free South African movement and sanctions)

278. See, e.g., PETER WALSHE, *THE RISE OF AFRICAN NATIONALISM IN SOUTH AFRICA: THE AFRICAN NATIONAL CONGRESS 1912-1952* (1970). Missionary-educated Africans began to seek international support against racial discrimination before the end of the nineteenth century and the rise of Afrikaner nationalism. *Id.* at 1-15. For a gripping account of Mandela's travels outside South Africa seeking support for the ANS's campaign against apartheid, see MANDELA, *supra* note 22, at 250-67.

“new kind of antisystemic movements.”²⁷⁹ They have transcended the tragic obsession of old social movements with state power, and avoided the trap of prescribing comprehensive alternatives to structures of oppression. Human rights NGOs have focussed on critiquing state or institutional power.²⁸⁰ In practice, they are infused with the spirit of what one scholar has called the “jurisprudence of reconstruction;” espousing the transformative ideals of modernism while retaining a “certain suspicion of the romantic excesses of modernist faith.”²⁸¹

Modern human rights NGOs, like those who fought apartheid, generally need to operate at both national and global levels, and remain both romantic and skeptical. They mobilize popular support by championing universality, indivisibility and interdependence of all human rights while making strategic choices among issues, forums, and governments. These NGOs labor in the amorphous zone between the traditional imperatives of state sovereignty and the modernist aspirations outlined in the U.N. Charter and other human rights instruments. In the campaign against apartheid, these NGOs had to overcome the disabilities engendered by the Cold War. Today and in the foreseeable future, they must operate in a post-cold war environment characterized by numerous conflicts of complex origins, rampant human rights violations, and a growing worldwide sense of frustration and helplessness. Because the U.N. structure contin-

279. See Giovanni Arrighi et al., *Dilemmas of Antisystemic Movements*, reprinted in RICHARD FALK, *THE UNITED NATIONS AND A JUST WORLD ORDER* 16-22 (1991). The authors trace the origins of these movements to the middle of the 19th century when groups of people opposed to capitalism as a system, “began to create a new institution: the continuing organization with members, officers, and specific political objectives.” *Id.* at 16. This Author uses the phrase “antisystemic movements” to refer to organized opposition to any system of national or international control.

280. *Id.* These new social movements share, among other things, a deep appreciation of “the limits and dangers of the establishment and consolidation of bureaucratic structures by the movements themselves.” *Id.* at 20.

281. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 766-67 (1994). Nathaniel Berman makes a similar point in favor of sophistication and disenchantment in critiquing the role of Modernist lawyers as “specialized adviser, sophisticated judge, comprehensive constitutional designer.” *Id.* Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, in *AFTER IDENTITY* 229, 246 (Dan Danielsen & Karen Engle eds., 1995). His plea that “we can only avoid being deafened by the universal clamor for reconstruction by a vigilant historical critique of its rhetoric,” fits well with the critical, non-prescriptive and independent orientations of human rights NGOs like TransAfrica, the Africa Fund, Amnesty International, and Human Rights Watch. *Id.*

ues to prioritize international conflict management over human rights values, human rights NGOs must remain the principal voices of conscience and criticism.

The contributions of human rights NGOs to the 1993 U.N. World Conference on Human Rights in Vienna²⁸² and the 1995 Fourth World Conference on Women in Beijing²⁸³ confirm the important role they play in strengthening U.N. commitments to human rights. These NGOs were able through sheer persistence to influence the organization, conduct, and output of these conferences. The parallel sessions they organized brought together people from diverse backgrounds and provided the U.N. structure to resist efforts to weaken human rights guarantees. It is hardly surprising, therefore, that some governments have sought to dilute or restrict the NGO role within the U.N. structure.²⁸⁴ The successful collaboration between the Special Committee against Apartheid and various human rights NGOs in waging the global struggle on apartheid provides more than a sufficient reminder of why efforts to restrict the role of NGOs should be resisted. This extraordinary anti-apartheid collaboration established a model for providing the peoples of the United Nations another layer of protection from the principal sources of human rights violations today: governments. No more important lesson came out of the international anti-apartheid campaign than that an expanded role for NGOs within the U.N. structure should make them and the United Nations more effective in defending human rights.

B. *The Achievements and Limits of Rights Struggle*

The lessons discussed above addressed the weaknesses of the U.N. structure in promoting human rights values and suggested that NGOs could contribute more positively to the process if their role is expanded within the U.N. structure. The les-

282. See *THE UNITED NATIONS AND HUMAN RIGHTS*, *supra* note 266, at 92-111.

283. U.N. MONTHLY CHRONICLE, Sept. 1995, Vol. Xxxii, No. 3, at 66-67.

284. See Ellen L. Lutz & Martha L. Schweitz, *ECOSOC Review of NGO Consultative Arrangements*, in *ASIL NEWSLETTER*, Nov.-Dec. 1995, at 22-23. The writers also point out that "until a few years ago the behind-the-scenes influence and of nongovernmental organizations (NGOs) on international policy-making was ignored by academics." *Id.* Recent reports by Amnesty International and Human Rights Watch describe resistance and hostility of various governments to work and to the role of human rights NGOs in general. See AMNESTY INTERNATIONAL, *THE 1994 REPORT ON HUMAN RIGHTS AROUND THE WORLD* (1994); HUMAN RIGHTS WATCH *WORLD REPORT* (1994).

sons discussed here concern the nature and limits of human rights struggles. Human rights NGOs invested in the anti-apartheid struggle because of the belief that human rights are "universal, indivisible, and interdependent and interrelated."²⁸⁵ FSAM, in particular, was successful because it connected with the civil rights struggle in the United States, and built alliances with American labor, religious communities, women, students, and other groups. The campaign against apartheid was, in this sense, a campaign for universal human rights. Thus, by examining what was achieved by this campaign and what was left unresolved, we may derive lessons that should resonate outside the anti-apartheid setting.

1. Separating Politics from Economics

During the five decades of the U.N.-centered campaign against apartheid, the international focus was on changing the political system by extending the right of political participation to all South Africans. While there was a general recognition of the economic inequality that existed in the country and a vague understanding that something must be done about it, much of the international attention was narrowly focused on achieving democratic governance, with the expectation that a freely-elected government would tackle the issues of economic inequality. Principal anti-apartheid groups like the ANC and the PAC, even outlined radical approaches to economic or social justice issues. But these efforts received little international support and, in some cases, incurred outright hostility.²⁸⁶ By the time the apartheid state began to crumble in the late 1980's, the ANC in particular had begun to adjust its economic program in light of Western criticisms and pressure.

Thus, the 1994 elections gave South Africans democratic governance without concretely addressing the underlying gross economic inequalities, originating in colonialism but nurtured and exacerbated by apartheid.²⁸⁷ In the course of the negotia-

285. See The Vienna Declaration and Program of Action, *reprinted in* THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 266, at 448, 450, ¶ 5.

286. See, e.g., *Freedom Charter of the Congress of the People, June 26, 1955*, *reprinted in* DUGARD, *supra* note 111; see also, *ANC Constitutional Guidelines For a Democratic South Africa, 1988*, *reprinted in* LODGE & NASSON, *supra* note 143, at 352.

287. Fredrickson argues that white employers and workers in South Africa involved the government actively in "efforts to further their own interests at the expense of black

tions and during the electoral campaign, the ANC in fact devoted considerable energy toward reassuring South African and international investors and financial institutions about its socio-economic plans. The ANC made it clear that it would take no radical steps to change the economic conditions it would inherit. To some extent then, economic inequalities were ratified or legitimated by the very process of negotiations and the subsequent elections.²⁸⁸ The South African civil service, the foreign service, the police, the military, and the business sector are still dominated by the very people who presided over or prospered under apartheid, their jobs and privileges protected under the new arrangement. Perhaps more disturbingly, it appears that Western cooperation and support for the negotiations and elections were predicated on an outcome that made minimal changes to the socio-economic *status quo*.²⁸⁹ This contention receives some support from Mandela's choice of conservative white businessmen to be the top managers of the country's economy.²⁹⁰

In a 1995 report presented to the U.N. World Summit on Social Development,²⁹¹ President Mandela documented the ex-

labor." Fredrickson, *supra* note 9, at 237. See SPARKS, *supra* note 212, at 234-35; Richard Alm, *Mandela Shows Caution in Approach to Rebuilding*, DALLAS MORNING NEWS, June 13, 1994, at 1D; see also generally GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN & SOUTH AFRICAN HISTORY* 199-238 (1981).

288. The disturbing fact is that ratification of economic inequality, which in the South African context translates into racial inequality, was an essential element of the negotiations. According to one commentator:

Much of the new constitution was devoted to reassuring the white minority that the tables would not be turned on them in a regime of vengeance. It promised cabinet seats to minority parties for the first five years, and it protected the jobs and pensions of white soldiers, police and civil servants.

SPARKS, *supra* note 212, at 194; see also Jonathan Steele, *Commentary: Slave Mentality Dictates Mandela's Pace of Change*, GUARDIAN, Aug. 3, 1994, at 18. A South African journalist observed that the election "liberat[ed] white people from guilt." Bafana Khumalo, 11 WKLY. MAIL & GUARDIAN, Mar. 24, 1995, at 26.

289. See Dele Olujede, *South Africa: Mandela Speech Aims to Reassure Investors*, NEWS-DAY, May 25, 1994, at A8; Patti Waldmeir, *Mandela Pleases Business*, FIN. TIMES, May 25, 1994, at 4.

290. Shortly after the election, Chris Stals was made head of the central bank and Chris Liebenberg, a former banker, was chosen to replace another conservative white businessman as Finance Minister. See *Mandela Will Retain Two Financial Officials*, J. OF COM., May 9, 1994, at A3; David Beresford, *Mandela Unveils Modest Plans*, GUARDIAN, May 25, 1994, at 22; Bill Keller, *Business Leader to Leave Cabinet in South Africa*, N.Y. TIMES, July 5, 1994, at A4; *New South African Finance Minister 'Solid but Colourless'*, GUARDIAN, July 6, 1994, at 13.

291. See *U.N. Summit Balks on Aid for the Poor / Refusal to Set Targets for Spending*, S.F. CHRON., Mar. 10, 1995, at B3.

treme economic and social inequalities in South Africa.²⁹² However, his Government's response, exemplified in its first budget, has been strikingly conservative.²⁹³ The ANC's "Reconstruction and Development Program," was scaled back significantly in an explicit effort to reassure domestic and international investors.²⁹⁴ The "success" of this conservative, pro-business, anti-redistributive direction may be gleaned from the praises heaped on the Government by members of the business community.²⁹⁵ A 1995 poll of top South African business executives showed a high degree of support for Mandela at the end of his first year in office.²⁹⁶ In a *New York Times* editorial, a South African businessman praised Mandela for having outgrown his anti-business attitude and for avoiding "the constant temptation to make unrealistic promises" to his supporters.²⁹⁷

The negotiated revolution in South Africa could be seen as a Faustian bargain, whereby representatives of the victims of colonial rule and apartheid first accepted a distinction between the economic or private on one hand and the political and public on the other, and then traded acceptance, legitimation, and perpetuation of economic or private privileges for political or public power.²⁹⁸ In fact, the ANC-led Government accepted a sharp

292. See also Richard Alm, *Mandela Shows Caution in Approach to Rebuilding*, DALLAS MORNING NEWS, June 13, 1994, at 1D.

293. See Jonathan Steele, *Commentary: Slave Mentality Dictates Mandela's Pace of Change*, WKLY. MAIL & GUARDIAN, Aug. 3, 1994, at 18.

294. The Reconstruction and Development Program ("RDP") was developed by the ANC and its allies prior to the 1994 election to represent "an integrated, coherent socio-economic policy framework . . . to mobilize all our people and our country's resources toward the final eradication of apartheid and the building of a democratic, non-racial and non-sexist future." AFRICAN NATIONAL CONGRESS, THE RECONSTRUCTION AND DEVELOPMENT PROGRAM, A POLICY FRAMEWORK 1 (1994). The RDP is the heart of the ANC's response to the socio-economic legacy of white supremacy and apartheid. *Id.* at 2-4. A cabinet member in the GNU is responsible for implementing the RDP. See Michael Hamlyn, *Mandela Launches Pounds 500m Fund for Rebuilding Nation*, THE TIMES (London), May 25, 1994 available in LEXIS, Nexis Library, PAPERS File; Patrick Laurence, *Mandela Signals a Cautious Approach to Reconstruction*, IRISH TIMES, May 25, 1994, at 8.

295. See Patti Waldmeir, *Mandela Pleases Business*, FIN. TIMES, May 25, 1994, at 4. It seems that the unreservedly pro-business position has not attracted the expected investors. See Bill Keller, *In Mandela's South Africa, Foreign Investors are Few*, N.Y. TIMES, Aug. 3, 1994, at A1.

296. See *Business, Unions Rate GNU*, 11 WKLY. MAIL & GUARDIAN, Oct. 20, 1995, at 5.

297. Clive Menell, *How Mandela Wooed Businessmen*, N.Y. TIMES, May 8, 1995, at A13.

298. The United Nations' role in this trade-off was limited. This limitation, how-

and, in terms of post-1948 South African history, unprecedented restriction on its powers to restructure the economy in return for the abandonment of political apartheid by the white minority regime.²⁹⁹ This was the core of the doubts that filled the Author as he watched the old women and thousands of other South Africans vote in April 1994. The Author wondered whether it would have been possible to better incorporate issues of economic inequality into the global consensus against apartheid. Perhaps the focus on "political" rights and democratic governance was a necessary step toward establishing a just society. Was the outcome in South Africa a separation of the liberation struggle into two phases, with the "political" being the first phase, or was it essentially capitulation on economic issues? Making the Author's concern urgent was recognition that African-Americans, who had played such a pivotal role in FSAM, were themselves dealing with similar doubts about the gains of the civil rights movement thirty years after the passage of the Voting Rights Act.³⁰⁰

The politics-economics, public-private dichotomy reflects a traditional split in international human rights law between "civil and political rights" on the one hand and "economic, social and cultural rights on the other."³⁰¹ This dichotomy is traceable to at

ever, was deliberate and the consequence of an international order that enforces a distinction between the political-public-rights sphere and the economic-private-market sphere. For all practical purposes the United Nations was confined to the public sphere of political participation while the private sphere and matters dealing with economic rights were reserved for intervention or mediation by other less accessible international institutions or actors such as the International Monetary Fund, the World Bank, GATT/WTO, and the OECD. These global institutions dominate economic relations and are structured to keep power and influence in the hands of the wealthier industrialized nations. See, e.g., *NGOs Call for 'Greening' of Economic Institutions*, *THIRD WORLD ECON.-TRENDS & ANALYSIS*, No. 24, Sept. 15, 1991 at 8; John Cavanagh & Cameron Duncan, *Free Trade For Whom*, *THIRD WORLD ECON.-TRENDS & ANALYSIS*, No. 19, June 30, 1991, at 14-16; Chakravarthi Raghavan, *The Final Uruguay round Package: Thin Gruel for South, Rich Pickings for North*, *THIRD WORLD ECON.-TRENDS & ANALYSIS*, No. 33, Jan. 31, 1992, at 2-8.

299. White supremacy, especially in its apartheid formulation, promoted economic inequality between the races. Many of the policies of apartheid: land reservation, residential segregation, job discrimination, Bantu education, and pass laws, shifted economic wealth from non-whites to whites in general, and Afrikaner speakers in particular. Successive apartheid regimes also made the civil service into an Afrikaner preserve. See generally MINTER, *supra* note 7; PRICE, *supra* note 137.

300. Voting Rights Act, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1973 *et seq.* (1995)). For a powerful examination of the accomplishments and failures of the civil rights movement, see DERRICK BELL, *AND WE ARE NOT SAVED, THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1989).

301. See David Trubek, *Economic, Social and Cultural Rights in the Third World:*

least President Franklin D. Roosevelt's 1941 Four Freedoms Speech, which appeared to rank "freedom from want" after freedoms of speech, expression, and worship.³⁰² The Universal Declaration of Human Rights, addressed both "civil and political rights" and "economic, social and cultural rights," but it also arguably gives priority to the former set of rights. Furthermore, disputes over the nature and meaning of "rights" as well as unwillingness on the part of some nations to guarantee economic, social, and cultural rights, led to the development of two separate rights covenants, one for each category of rights.³⁰³ Western nations have historically been the most skeptical about obligating a government to provide economic, social, and cultural rights. Indeed, they have been lukewarm to efforts to expand rights guarantees beyond the civil and political category. One consequence of the Western attitude is that economic, social, and cultural rights are generally only "recognized" and perceived as aspirational, unlike civil and political rights, which are "declared" matter of factly or "ensured in confrontational documents."³⁰⁴

The ANC came under strong pressure to separate its revolutionary post-apartheid goals into those that are political and, thus, achievable through negotiations, and those that are economic and, thus, significantly outside political intervention. Mandela for example, was frequently asked before the election whether the ANC planned to nationalize the South African economy. Given the crucial importance of Western support for a peaceful transition from apartheid and the absence of practical alternatives to negotiations, it is not surprising that the ANC succumbed, and went from championing nationalization and redistribution conservative economic policies. Those within the ANC-led government who understand the public-private split as

Human Rights Law and Human Needs Programs, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 205 (Theodor Meron ed., 1984).

302. Franklin D. Roosevelt, Annual Message to Congress, State of the Union Address (Jan. 6, 1941).

303. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 1977 Gr. Brit. T.S. No. 6 (Cmnd. 6702); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 1977 Gr. Brit. T.S. No. 6 (Cmnd. 6702); See also Trubek, *supra* note 301.

304. See Trubek, *supra* note 301; see generally, Alston & Quinn, *Nature and Scope of Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156 (1987).

fundamentally a tactical accommodation to Western demands, must now begin to address economic disparities in South Africa. They might discover, however, as the next section of this Article argues, that the very characterization of the anti-apartheid struggle as one for "rights" may have made their task of fundamentally changing society more difficult.

2. Rights: Indeterminate and Inspirational

*The Atlantic Charter of 1941, signed by Roosevelt and Churchill, reaffirmed faith in the dignity of each human being and propagated a host of democratic principles. Some in the West saw the charter as empty promises, but not those of us in Africa. Inspired by the Atlantic Charter and the fight of the Allies against tyranny and oppression, the ANC created its own charter, called the African Claims, which called for full citizenship for all Africans, the right to buy land, and the repeal of all discriminatory legislation.*³⁰⁵

— Nelson Mandela

As the Mandela statement suggests, the idea of rights has been a powerful source of inspiration to those engaged in liberation or anti-oppression struggles. In this, the experience of those mirrors that of civil rights activists in the United States.³⁰⁶ Whether it is the American Declaration of Independence, the South African Freedom Charter,³⁰⁷ the civil rights struggle, the anti-apartheid struggle, or laying the foundation of government in a written constitution and a "bill of rights," rights-discourse has been central to the politics of each country and to political organizing and empowerment among the oppressed.

As someone who participated for many years in the struggle for a "Free South Africa," the Author fully understands the value, indeed the necessity, of having emancipatory or self-empowerment goals expressed as a struggle for "rights." Such appeals have the power to motivate people to reject and combat oppression, even at tremendous costs. Patricia Williams has made a similar point about the experience of African-Americans in stating that: "For blacks, the prospect of attaining full rights under

305. MANDELA, *supra* note 22, at 83-84.

306. See Patricia Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 417 (1987).

307. See Freedom Charter of the Congress of the People, June 26, 1955, *reprinted in* DUGARD, *supra* note 38, at 162-66.

the law has always been a fiercely motivational, almost religious, source of hope."³⁰⁸ This characterization is consistent with the orientation of Mandela and most of the people who campaigned inside and outside South Africa against apartheid.³⁰⁹

Peter Gabel has captured the power of rights in the life and development of social movements like the ANC. As he puts it, rights-talk binds members of the group together by "affirming a contingent and culturally produced particularity that [though] a badge of alienation itself," is initially, the first step toward "reciprocal recognition of a Universal need;" a need that in turn gives the movement the sustaining energy required to transform "the hierarchical conditions that caused it to come into being."³¹⁰ The Author does not shy from acknowledging a profound respect for the sacrifices and aspirations of those whose anti-oppression struggles have been sustained by the hopes, images, or fantasies of rights.³¹¹ Moreover, from the tactical perspective of political organizing, a sharp focus on the potential positive outcomes of struggle within a given national or international structure is entirely defensible. It may sometimes

308. Williams, *supra* note 306, at 401, 417.

309. See NELSON MANDELA, *THE STRUGGLE IS MY LIFE* (rev. ed. 1990); WALSH, *supra* note 278.

310. Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1587 (1984). Gabel also argues that "rights" need not by their very nature have an alienated meaning. *Id.* at 1563. He cautions, however, that:

[T]he disalienating meaning of a right can survive only to the degree that the movement itself retains its vitality, and while a rights-victory can both strengthen the movement's confidence and awaken a feeling of possibility among a great many people, it can for these very reasons work to contain the movement and ultimately contribute to subduing its transformative potential.

Id. at 1590.

311. In any case, it would be an act of extreme arrogance to tell Nelson Mandela or Father Aristide and the movements they lead that their struggle for political participation and other rights were built upon false premises about the nature of these rights. Indeed, one should expect that Mandela, Aristide, and others championing the attainment of these "rights" are fully cognizant of the limited utility of such objectives given the biases and inequities that characterize the present international political and economic order. See MANDELA, *supra* note 309. Haitian President Jean-Bertrand Aristide has been described as a committed "liberation theologian—one among that progressive breed of Latin priests who use their pulpits to preach social justice for the poor," who was allegedly expelled by "his Salesian order . . . for fermenting class warfare." Bella Stumbo, *From Horror to Hope—for the first time in Decades, Haiti Has a Popularly Elected President: Can He Steer His Country Away From Its Bloody Past?*, L.A. TIMES MAG., Apr. 21, 1991, at 8. See also Jessica Lee & Marie Puente, *Haiti's Aristide a man with multiple faces; Savior to Some, Curse to Others*, USA TODAY, Oct. 22, 1993, at 6A.

be necessary to put in abeyance questions that would raise paralyzing disputes over ultimate goals at a time when all energies should be focused on eliminating a fundamental threat. Arguably, this is what happened in the global campaign against apartheid when issues dealing with economic redistribution were put aside. With apartheid eliminated, the questions about what strategies to pursue in the next phase of the human struggle for self-empowerment and emancipation now come to the fore.

The history of the global campaign against apartheid argues for a perspective on rights discourse that incorporates both a strong attachment to its powerful motivational value in the period of political organizing and caution about its ultimate utility especially when rights are defined narrowly to include only the public and the political.³¹² This perspective reflects an application of what critical race theorists have called the "jurisprudence of reconstruction."³¹³ The jurisprudence of reconstruction is first and foremost a simultaneous commitment to the promises of modernist ideals of enlightenment, empowerment, liberation, and the demands of a radical critique.³¹⁴ The jurisprudence of reconstruction attempts to reconcile the modernist, civil rights, and emancipatory origins of critical race theory with a commitment to being critical, inherited from the critical legal studies movement.³¹⁵ In a sense, the jurisprudence of reconstruction attempts to reconcile Martin Luther King's "I have a dream" with

312. For a critique of rights discourse, see Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Essay*, 23 *HARV. C.R.-C.L. L. REV.* 295, 331 (1988). One commentator develops four critiques of rights discourse which he summarizes as follows:

(1) Once one identifies what counts as a right in a specific setting, it invariably turns out that the right is unstable; significant but relatively small changes in the social setting can make it difficult to sustain the claim that a right is implicated.

(2) The claim that a right is implicated in some settings produces no determinate consequences.

(3) The concept of rights falsely converts into an empty abstraction (reifies) real experiences that we ought to value for their own sake.

(4) The use of rights in contemporary discourse impedes advances by progressive social forces, . . . the party of humanity.

Id.

313. Harris *supra* note 281, at 743-44. Professor Harris credits Mari Matsuda with introducing the term at the first Critical Race Theory workshop in 1989. *Id.*

314. *Id.* at 743-44.

315. *Id.*

Derrick Bell's "the permanence of racism."³¹⁶ It requires an ability to live "in the tension" between modernism and postmodernism, to "continually rebuild modernism in light of postmodernist critique."³¹⁷

A strong commitment to making the promises of the Enlightenment real was reflected in the persistence of anti-apartheid activists all over the world. It was commitment to these promises that kept Mandela from abandoning the struggle in prison, that motivated the pass laws-protesters in Sharpeville, and infused the schoolchildren of Soweto, the striking mine-workers in the Rand, FSAM demonstrators outside the South African embassy in Washington, D.C., and countless others, with the fortitude to brave apartheid's brutality. It was a similar commitment that made thousands of NGO observers travel to South Africa to monitor the country's first democratic elections. Certainly, it was commitment to these promises that brought out millions of South Africans to the polls despite threats of violence and uncertainty about the future.

The jurisprudence of reconstruction,³¹⁸ however, requires that such commitments be tempered by sophistication and disenchantment, that romantic faith in "struggle," or in the heroic progress from enlightenment to empowerment to emancipation, not obscure the complexity of the problems or the necessity for skepticism about modernism's capacity to deliver true social justice.³¹⁹

Arguably, the aspiration to "sophistication" was present in the work of anti-apartheid activists who transcended traditional categories of race, class, gender, sexual orientation, and nationality, and pushed the universality, indivisibility, interdependence, and interrelatedness of rights. These activists recognized

316. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992). Bell offers a harsh, pessimistic vision in which racism will never be eradicated from American society. Bell argues that recognition of the permanence of racism, however, should free Americans to develop strategies to alleviate its burdens.

317. *Id.* at 744.

318. Professor Harris describes the aspiration to sophistication as "a response to the clash between modernist and postmodernist narratives." *Id.* at 766-67. It may also be described as an effort to bring more sophistication to the modernist commitment to concepts like enlightenment, empowerment and emancipation. *Id.* at 750-54. Disenchantment means a mood always "conscious of the limits of rational reason," and "implies a certain suspicion of the romantic excesses of the modernist faith." *Id.* at 767.

319. *Id.* at 743-45, 766-67; see BELL *supra* note 316.

the complex origins of apartheid, its intimate connections to their own political and economic conditions, and they transformed the demand for a "Free South Africa" into a demand for "Free Humanity."

Disenchantment echoes the critique of rights discourse's double-edged quality: rights can be deployed to protect the powerful and the *status quo* just as easily as they can be wielded to advance the interests of the weak and excluded. The power of this observation should be increasingly apparent to rights activists in South Africa. It is not altogether surprising that even as the attainment of political participation rights by blacks in South Africa is celebrated, rights-rhetoric is being successfully deployed to protect the economic *status quo* — the private property rights — of the white minority in the country.³²⁰ This development again parallels the U.S. experience where, as Morton Horwitz puts it, "for most of American constitutional history, rights theories have been associated with the protection of property against a more just distribution of wealth and privilege."³²¹ To mitigate this development and to help ensure that rights-gains are employed on behalf of the socially weak, Horwitz argues that rights theory must be grounded in a "substantive theory of social justice," or a "substantive conception of the good society."³²² South African rights activists will find out, if they do not already know, that recognition of this ambiguous quality of formal rights discourse hardly begins to solve with the extraordinarily complex task of keeping such rights grounded in an affirmative vision of social change and justice, in order to protect them from unrelenting assaults.

320. Horwitz has argued that grounding rights theory in a "substantive conception of the good society," or in "ideals of substantive equality," is the most promising way to ensure that "rights may be used on behalf of the socially weak." Morton J. Horwitz, *Rights*, 23 HARV. C.R. C.L. L. REV. 295, 404 (1988). The opponents of apartheid, especially the ANC, reflected an understanding of this perspective in their early demands on the apartheid system. Their demand for political participation was always grounded in their substantive social justice claims against white minority rule. See FREEDOM CHARTER, JUNE 26, 1955, MANIFESTO OF THE AZANIAN PEOPLE, JUNE 12, 1983; ANC CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA, 1988, *reprinted in* LODGE AND NASON, *supra* note 143, at App. A, D, E. The negotiations' leading to the election severely constraining the power of the new democratic government to make radical socio-economic changes to the society is both evidence of the malleability of rights rhetoric and the dominance of anti-redistributive perspectives in the present international order.

321. Horwitz, *supra* note 321, at 404-05.

322. *Id.* at 404-06.

Aspiring toward sophistication and disenchantment would also allow human rights advocates to utilize the powerful inspiration-to-resistance potential of rights struggle and modernist ideals without replicating their excesses or replacement-of-one-form-of-oppression-with-another history. Such aspiration allows for struggle against oppression even when emancipation is not within the orbit of achievement.³²³ Paraphrasing Mandela, those who aspire to sophistication and disenchantment will climb the great hill even though they understand that there are many more hills to climb.

CONCLUSION

The U.N.-centered campaign against apartheid paralleled the development of human rights values within the United Nations over the past fifty years. This campaign helped establish the principle that how a government treats its citizens is a matter of international concern that could justify international sanctions and other punitive measures. The campaign also highlighted the structural weaknesses of the United Nations that have prevented the organization from living up to its human rights obligations, and the critical role that human rights NGOs have played in getting the United Nations to give substance to these commitments. Without the continued engagement of these NGOs, the future for U.N. human rights promotion and protection is uncertain at best.

NGOs cannot, however, afford an uncritical perspective toward human rights struggles. They must temper their modernistic faith in enlightenment, empowerment, and emancipation with a sophisticated understanding of the complexity of the problems they face as well as a commitment to radical critique. The jurisprudence of reconstruction, developed by critical race theorists, offers a useful perspective through which they can pursue their commitment to the universality, indivisibility, and interdependence of human rights without succumbing to the dangers of oversimplification, cooptation, and disillusionment.

323. See BELL, *supra* note 306, at 317.