

**AGAINST THE WORLD  
SOUTH AFRICA AND HUMAN RIGHTS AT THE UNITED NATIONS 1945-1961**

by

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**Declaration:**

I declare that *Against the World : South Africa and human rights at the United Nations* is my own work and that the sources that I have used or quoted have been indicated and acknowledged by complete references.

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**Date:**

## SUMMARY

At the United Nations Conference on International Organization in April 1945 South Africa affirmed the principle of respect for human rights in a Preamble it proposed for inclusion in the Charter of the United Nations. The proposal was approved and the Preamble was accorded binding force. While South Africa participated in the earliest attempts of the United Nations to draft a bill of rights, it abstained on the adoption of the Universal Declaration of Human Rights because its municipal legislation was incompatible with some articles. Similarly, South Africa did not become a party to the international human rights instruments the declaration inspired, and avoided an active role in their elaboration. Subsidiary organs of the General Assembly undertook several studies on discrimination in the field of human rights. They provided evidence that racial discrimination in South Africa intensified after the National Party came to power in May 1948 on the platform of apartheid and diverged from global trends in humanitarian law. The gap between the Union and the United Nations widened.

At the first General Assembly in 1946, India successfully asked that the treatment of persons of Indian origin in South Africa be inscribed on the agenda. The Indian question was later subsumed in the charge that South Africa's racial policies violated the Charter and in 1952 the General Assembly began to discuss apartheid. South Africa protested that these actions contravened Charter Article 2(7), which prohibited intervention in matters of domestic jurisdiction, and were *ultra vires*. Criticism of the Union increased in intensity, until in 1960 it culminated in calls for economic and diplomatic sanctions.

Research shows that South Africa was the main architect of its growing isolation, since it refused to modify domestic policies that alienated even its potential allies. Moreover, it maintained a low profile in United Nations debates on human rights issues, abstaining on all substantive clauses in the two draft covenants on human rights. These actions were interpreted as lack of interest in global humanitarian affairs. South Africa had little influence on the development of customary international law in the field of human rights but was a catalyst in the evolution of international machinery to protect them.

*Key terms:*

South Africa; Apartheid; South African Indians; Racial discrimination; United Nations; International law; State Sovereignty; Domestic jurisdiction; Self-determination; Commission on Human Rights; International Court of Justice.

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## INTRODUCTION

*What we have lost is all the more reason for cherishing what survives.<sup>1</sup>*

### (i) Aim

Through the person of General J.C. Smuts, its representative in the British War Cabinet of 1918, South Africa was intimately connected with preparations for the Covenant of the League of Nations in 1919. As a founding member South Africa played a valuable role in the work of the League during the between-war years and was thrice elected to preside its Assembly. During the 1935 debates on the imposition of sanctions against Italy after the invasion of Abyssinia, it even claimed to speak on behalf of the African continent.<sup>2</sup> The regard in which the Union was held, was dampened only by the criticism it sometimes endured over its administration, under mandate, of South West Africa.

The history of South Africa's later relations with the United Nations, after the demise of the League, can be divided into several phases. This thesis is limited to the first phase, 1945-1961, while the Union was a member of the British Commonwealth. It traces and comments on South Africa's decline in prestige in the United Nations after 1945, its failure to adapt to post-war global trends promoting human rights and fundamental freedoms and the strengthening of discriminatory legislation after the advent of the National Party to power in 1948. It records the Union's steady alienation within the international community, the initial impact of the new members of the United Nations and the involvement of the Security Council in the aftermath of the March 1960 Sharpeville demonstrations. South Africa's decision thereafter to become a republic and its withdrawal from the Commonwealth in 1961, which lead to its isolation in the General Assembly, provide a logical cut-off date.

Finally, the thesis considers what effect South Africa's role in the United Nations and its domestic legislation may have had on the formulation of international human rights law in the early years of the organization. It is in essence an historico-legal survey,

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<sup>1</sup> Richard Barber *British Myths and Legends* (Folio Society London 1998) 17

<sup>2</sup> F.J. Nöthling 'Chapter 7: The Second World War' in *History of the Department of External Affairs 1927-1993* Tom Wheeler (ed) (South African Institute of Internal Affairs 2005) 116

specifically aimed at ascertaining the thinking of South African government members and administration officials behind events whose public face has often been chronicled. Its purpose is to contribute to the ‘external’ study of the history of human rights law by considering the constitutional, political, economic and social factors which have impacted on the development of that law and in which South Africa might have played a part.<sup>3</sup>

**(ii) Research procedure**

Apart from consulting works of relevant scholars on the United Nations Charter and its provisions, an effort has been made to limit the historico-legal research for this thesis to primary sources. They include for the most part documents resting on files of South Africa’s Department of External (later Foreign) Affairs,<sup>4</sup> of some of its missions abroad, and of the Department of Justice. Contemporaneous debates in the House of Assembly and original United Nations documents are also quoted. It was on many occasions an arduous, not to say dusty, task for it was clear that these records are not frequently consulted. Use was also made, as a secondary source, of United Nations *Yearbooks*, its *Yearbooks on Human Rights*, and two related volumes in its Blue Book Series.

A serious complicating factor was that files were incomplete and worse that some had been destroyed in terms of a National Archives authority 4-B12T of 14 November 1995. Volumes 1 to 25 of the Department of External (Foreign) Affairs’ files in the series 136/4/1 are amongst hundreds marked ‘D’, an indication that they no longer exist. They cover South Africa’s relations with the United Nations Commission on Human Rights for the years 1948 to 1964. Their value to any study of South Africa and human rights at the United Nations at that time can hardly be overstated.

The procedure seems to be that a government department sends a list of its terminated correspondence files to the National Archives together with an indication of the subject

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3 For a further explanation of the ‘internal’ and ‘external’ study of legal history, see D.H van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (Butterworth 1979) 2 and W. de Vos *Regsgeskiedenis* (Juta and Co. 1992) 18.

4 The title External Affairs was changed to Foreign Affairs after SA withdrew from the Commonwealth on 31 May 1961.

matter or title of each. The list is professionally appraised with a view to selecting the files that warrant preservation. The functional department retains those files considered to have archival value until they are 20 years old, when they may be transferred to the National Archives Repository. It must also decide on the disposal of the rest, bearing in mind its financial accountability, functional needs and other legislative requirements. The procedure has weaknesses, since a title by itself or even a brief summary of the contents cannot always give an adequate indication of its likely value to the researcher.<sup>5</sup>

The Department of Foreign Affairs appears to have interpreted this carefully worded limited authority as a mandate to destroy the records not destined for safekeeping by the National Archives. One probable reason for this interpretation, as in all archives, was limited storage space. In January 1997, Foreign Affairs forwarded a consignment of files covering other aspects of South Africa's relations with the General Assembly over much the same period to the National Archives. These were available for consultation and have proved to be of great interest, although they do not, of course, fully repair the damage.

The National Archivist has explained that the approval for the destruction of the files was part of a larger appraisal process. The decision not to select them for archival preservation was based on 'the principle that records reflecting the line function of [the department] and its direct involvement in or contribution to international relations, or reflecting matters specifically relating to South Africa should be selected'. Files containing complaints of human rights violations against the Union Government, were retained, the others not. At the time the incumbent expressed concern about the criteria.

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<sup>5</sup> Obviously the departmental archivist can consult desk officers but they will often be too preoccupied to consider a request with the care and attention it deserves. Twenty-year-old or even older records will enjoy a low priority in the mind of a harassed official executing his daily tasks under the pressure of his seniors' immediate demands. All too often it is left to the archivist, who unavoidably lacks the necessary political background and expertise, to take the final, irrevocable decision.

As a result new guidelines have been adopted. Special care is now taken to preserve any records that document human rights or their infringement, 'even if the content concerned would not in itself normally warrant archival preservation'.<sup>6</sup>

An attempt has been made to mitigate the effects of the lacunae by seeking letters originating from the lost files in some of the other sources that have been retained in the National Archives. To an extent this has been possible. What is lacking, are the internal memorandums, the context in which they were drafted and the interplay between senior officials, the rationale leading to the instructions or enquiries they contain and the extent to which other departments or cabinet ministers were consulted. The mission files which are still extant, do not contain this information, except on very rare occasions. The discussions which South African delegations held, normally on a daily basis, during sessions of the General Assembly were not minuted. Letters and instructions from Head Office were rarely annotated. Given the stress under which the delegation officials worked, this omission was hardly surprising. Some additional background can, however, be gleaned from their progress reports.

### **(iii) Method**

Two possible approaches to the subject matter of the thesis were considered. The first was to proceed on a purely chronological basis by analyzing events relating to human rights at each successive session of the General Assembly and to link them with relevant developments in the intervening months. The drawback to this procedure was that the issues became fragmented. It was therefore considered preferable to devote separate chapters to specific themes and follow each during the period 1945-1961. This procedure seemed to offer the advantage of greater clarity. Where necessary, sub-topics related to the main themes have been included as part of the relevant chapter. The procedure is explained in more detail in the following section.

Occasional reference is made, unavoidably and very superficially, to the Territory of South West Africa. The essence of that dispute, which does not form part of this thesis,

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6 Letter to the author ref. 7/7/2/8/4 15 September 2005

was the continued existence of the League of Nations Mandate. Its only relevance is that South Africa's refusal to negotiate a trusteeship agreement with, or after 1947 to submit reports to, the United Nations, made it vulnerable to allegations that it applied racial discrimination there as well. Thus South West Africa proved an Achilles' heel and weakened the Union's arguments on purely South African questions, with this difference that human rights violations that were criticized there were debated for the most part within the context of a breach of the mandate. National sovereignty was not at stake.

As frequent use is made of departmental files and United Nations documents, they are referred to by number only, for example PM 136/4/1 for an External Affairs file or A/577 for a United Nations document. Details of such references are contained in Appendix I.

#### **(iv) Framework of thesis**

Chapter one of the thesis looks at the way in which emerging ideas on the nature of international relations in a post-war world were debated and developed at the United Nations Conference on International Organization in San Francisco from 25 April to 26 June 1945. It examines the attitude of the South African delegation towards such issues as state sovereignty, domestic jurisdiction, fundamental human rights including self-determination and non-discrimination and the relationship between the General Assembly and the Security Council. It analyzes the background to the country's support for the Great Powers and its divergence from the criticism the smaller nations expressed about the preponderant role assigned to the Great Powers in the Security Council. Finally, it records the signature and ratification of the Charter and the impact of the latter on constitutional procedure in the Union Parliament.

The second chapter concentrates on the handling of a complaint in the General Assembly about the treatment of persons of Indian origin in South Africa. Having both human rights and international treaty obligation overtones, the complaint helped to initiate United Nations practice on the interpretation of those elements of the Charter relating to the conflict between the promotion of human rights and the limits of domestic jurisdiction. Of importance was Smuts's willingness to participate in the discussions at

the first two General Assembly sessions, even on matters of substance, without waiving his government's claim to the protection offered by Article 2(7) of the Charter. Chapter two records the preference for political decision-making over legal analysis, as exemplified by the unwillingness of the General Assembly to submit South Africa's assertion of domestic jurisdiction to the International Court of Justice for an advisory opinion. It reflects South Africa's growing suspicion that purely juridical analyses might be obscured by the political orientation of the judges elected to its Bench. The avoidance of legal solutions, in the context of the cold war and the emergence of anti-colonial sentiment, which would be a mainspring of debates on many issues during the period under review, is shown to have divided member states in the early years and is developed in later chapters.

The chapter continues with the attitude of the National Party administration towards the complaint until the Indian question was absorbed into the wider issues of racial policy and apartheid. It encompasses the more pugnacious attitude of the new government both in Parliament and at the General Assembly, as well as its decision to limit the defence of South Africa's racial policy to the bar imposed by Article 2(7) on intervention in the domestic affairs of member states, until the Union withdrew from the debate altogether.

Chapters three and four cover the adoption of the Universal Declaration of Human Rights and the long-drawn out negotiations for the two human rights covenants, measures for their implementation and the emphasis laid on the right to self-determination. They examine the effect of these international instruments and compare them, in limited detail, with South African legislation as interpreted by the country's law advisers.

They are followed by a chapter on the work of the Commission on Human Rights, its Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, the contents of the *Yearbook of Human Rights*, insofar as they were considered relevant, and questions examined directly either by the Economic and Social Council or the General Assembly. South Africa's early cooperation with the Secretariat and its contributions, however unwilling, to the *Yearbook* are chronicled. They display the

widening rift between the Union's statute law and trends in the development of international human rights law and custom. Initial willingness to collaborate in general enquiries and studies initiated by these organs yielded to suspicions of their motives and fears for the erosion of the principle of domestic jurisdiction.

Chapter six amplifies the three previous chapters and examines the adoption of declarations and international instruments on human rights issues, culminating in the Declaration on the Granting of Independence to Colonial Countries and Peoples. It records the declining South African involvement in these developments. With the influx of former colonial territories into the United Nations as sovereign states, the thrust of the United Nations had begun to shift from peace and security towards the independence of dependent territories and, as a corollary, economic and social development. The shift was accompanied by a decline in the support Western nations gave South Africa.

Chapter seven supplements the thesis with a look at disputes related to claims by some other countries to the protection afforded them under Article 2(7) of the Charter. It traces the isolation of South Africa in its obstinate adherence to the domestic jurisdiction principle, as fellow member states recognised the erosion of that principle in the face of the growing importance of human rights in United Nations resolutions and accepted the need to temporize with the expanding voting strength of the developing nations. The chapter concludes, however, that the Union's support for domestic jurisdiction was both inconsistent and self-serving.

Chapter eight deals with apartheid, the repression of the indigenous South African population and the three year study by the United Nations Commission on the Racial Situation in the Union of South Africa after its establishment in 1952 at the 7<sup>th</sup> General Assembly, the year apartheid was first included on the agenda as a separate item. It ends with the calls for sanctions after the admission in the later 1950's of a number of new member states, mostly from developing nations. Chapter nine reviews the impact of the Sharpeville demonstrations, which brought the Security Council into the equation. The

referendum on the establishment of a republic led to South Africa's departure from the Commonwealth and its exclusion from the Commonwealth bloc at the United Nations.

A general survey of South Africa's deteriorating relations with the World Body based mainly on the evidence of the General Debates in the General Assembly and of the departmental files follows in chapter ten. It covers the separation of the Department of External Affairs from the Prime Minister's office, its acquisition of its own Minister, the restiveness of officials unable to play a full role in the United Nations or explain their country's policies in that public forum. The Union government's increasingly vehement rejection of its critics both at home and at the United Nations is contrasted with its later decision to participate more fully in the work of the organization and to explain the basis of its domestic policies. The historico-legal study ends at that stage.

The final chapter draws conclusions from the foregoing themes, based on the events, debates, departmental files and academic contributions described in the earlier chapters. It is no part of this thesis to analyze or judge the issues of 1945-1961 in the light of the experience of the 21<sup>st</sup> century. However, in order to highlight the relevance of the review period, some reference is made, albeit cursorily, to subsequent events and developments in the field of international law as they relate to human rights in the United Nations.

## CHAPTER 1

### *QUOD SEVERIS METES:*<sup>1</sup> BIRTH OF THE UNITED NATIONS

#### 1.1 International organization for a post-war world

From the outbreak of the Second World War, it was abundantly clear that the League of Nations Covenant would not be adequate to meet the needs of a post-war world. Although the League continued to function nominally, most Allied combatants opposed its resuscitation and agreed that new arrangements were essential to maintain global peace and security. This entailed the continuing co-operation of the Great Powers, specifically the United Kingdom (UK), the United States of America (US) and the Union of Soviet Socialist Republics (USSR or Soviet Union), of which the second never joined and the third had been expelled from the League. Field Marshal J.C. Smuts, the South African (SA) Prime Minister during the war years, was kept fully briefed on and frequently consulted about practical negotiations for a new organization by the UK Prime Minister, Winston Churchill. His participation in the final discussions to create the new body was taken for granted and he would be elected to a high profile if rather honorific post when they were inaugurated at San Francisco.

The first public mention of a new arrangement was in the seventh clause of the Atlantic Charter, negotiated and signed on 12 August 1941 by US President F.D. Roosevelt and Mr. Churchill, which referred to the ‘establishment of a wider and more permanent system of general security’ than the League of Nations had provided. The Atlantic Charter itself could be said to hark back to two seminal documents.<sup>2</sup> The first, containing the notion of a general association of nations ‘affording mutual guarantees of political independence and territorial integrity to great and small states alike’, was the last of President Wilson’s Fourteen Points speech to the United States Congress on 8 January 1918. In it he affirmed the principle of adjusting colonial claims on the basis of sovereignty, equal weight being given to ‘the interests of the populations concerned’.

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1 ‘As you sow, so shall you reap’: motto carved at the entrance to the Dumbarton Oaks mansion, Washington D.C.

2 I. Glusker and R.M. Ketchum (eds) *American Testament* (American Heritage Publishing Co. Inc. New York 1971) 173 and 216

The second, which implicitly raised the question of fundamental human rights, was a speech distinguishing the Four Freedoms delivered 23 years later in the same forum by President Roosevelt. The rights Roosevelt emphasized were those SA would maintain to be the fundamental rights implied in the United Nations Charter. They were freedom of speech and expression, freedom of religion or the ‘right to worship God in his own way’,<sup>3</sup> freedom from want and freedom from fear.

The Atlantic Charter built on both these documents.<sup>4</sup> Although, like them, it did not use the term ‘human rights’, its third and fifth principles pointed in that direction. The third principle enjoined respect for the right of all peoples to choose the form of government under which they would live and the restoration of ‘sovereign rights and self-government...to those who have been forcibly deprived of them’. The fifth principle called for the ‘fullest collaboration between all nations in the economic field, with the object of securing for all improved labour standards, economic advancement and social security’. Read together, they provided the rationale for later calls for independence, self-determination and the promotion of economic and social rights.

On New Year’s Day 1942, 26 nations subscribed to the common programme of purposes and principles enshrined in the Atlantic Charter. SA was an original signatory. First called the ‘Declaration of Associated Powers’ the title was soon changed to the ‘Declaration of the United Nations’ on the initiative of President Roosevelt. On 30 October 1943, the US, the UK, the USSR and China issued the Moscow Declaration, in which they stressed the need to establish an international organization, which would enshrine the principle of the sovereign equality of all peace-loving states. Open to membership of all such states, it would be devoted to maintaining international peace and security.

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3 An example of the limitation the Union government imposed on these freedoms was the National Party’s requirement that a person applying to immigrate to South Africa profess a religion. Lack of belief in a deity was normally a bar to admission. Thus a fundamental freedom became an obligation.

4 For text of the Atlantic Charter see W.S. Churchill *The Second World War* Vol. 3 *The Grand Alliance* (Easton Press 1989) 443.

## 1.2 Convocation

Early in 1945, on behalf of four ‘sponsoring nations’, itself, the Republic of China, the UK and the USSR, the US invited some 46 Allied governments to a conference at San Francisco on 25 April 1945 to prepare a Charter for a general international organization for the maintenance of international peace and security.<sup>5</sup> The agenda for the conference, which became known as the United Nations Conference on International Organization (UNCIO), was based on proposals agreed to in 1944 by the four nations at Dumbarton Oaks, a 19<sup>th</sup> century mansion in Georgetown, Washington D.C.

The initial agenda was supplemented in the invitation by an item on voting, which had been approved at Yalta in February 1945 and provided for unanimity amongst the Permanent Members of the proposed Security Council on issues of major importance. President Roosevelt had originally opposed a veto power in principle. Churchill, however, consulted his SA colleague, who replied on 20 September 1944 that ‘the principle of unanimity amongst the great powers has much to recommend it...[it] will at the worst only have the negative effect of a veto, of stopping action when it may be wise or even necessary’.<sup>6</sup> It would, he added, block precipitate action by the Soviet Union. While his Australian and Canadian colleagues were less enthusiastic,<sup>7</sup> Smuts’s argument apparently convinced Roosevelt, who then proposed the plan at Yalta.

The Dumbarton Oaks proposals were concerned with maintaining international peace and security and skewed in favour of the five Great Powers, France having been included in their number. Matters like economic and social development, with which human rights and fundamental freedoms were grouped under the term ‘other humanitarian problems’, were included but not fully spelt out. The proposals were circulated in advance to the signatories of the Declaration of the United Nations, giving the participants time to make

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<sup>5</sup> *UNCIO Documents 1945* Vol.1 1. The League of Nations was asked to send not more than three representatives on an unofficial basis. This is an argument in support of the SA view that the UN was not the League’s successor, as that body had not been disbanded by the time the UN came into existence.

<sup>6</sup> PM 136/1 vol.1; Churchill *op. cit.* Vol. 6 *Triumph and Tragedy* 210-211

<sup>7</sup> PM 136/1 vol.1

comments and submit amendments.<sup>8</sup> The sponsoring nations later made additional suggestions, which they circulated to the conference on 5 May 1945. These were based largely on submissions received from the other participants.

This chapter is mainly concerned with those aspects of the conference debates relating to human rights, domestic jurisdiction and state sovereignty, all of which impacted on SA from the outset, the unanimity issue and the roles assigned to the main organs of the new body. It also examines SA's ratification of the Charter.

### **1.3 Commonwealth consultations**

The SA government took a very specific attitude towards the conference, which its officials spelt out at a Commonwealth discussion in London from 4 to 13 April 1945. The primary aim, the government believed, was to create an organization to provide the machinery for a working arrangement between the Big Three: the UK, the US and the Soviet Union. All other considerations were subordinate, with the exception that 'our concessions or commitments should not be such as to undermine the structure of the British group, which, though not the most powerful, is certainly the most responsible in its approach to the problems of peace and security'.<sup>9</sup> Recognizing that the preservation of Great Power unity would require major concessions from the middle and smaller powers, the government felt it should be enough to reach agreement on the fundamentals; details could be worked out in due course. This meant promoting the Security Council at the expense of other organs.

A report on the Commonwealth discussion noted the Union's view that it was necessary to write into the Charter 'something which would touch the heart of the common man and which would make him feel that he had fought not simply to set up a mere piece of political machinery'. It was agreed that a Preamble drafted by Smuts contained adequate provision to guarantee human rights and fundamental freedoms.<sup>10</sup> The meeting considered two drafts he had prepared, the second being an amalgamation with a UK

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8 *UNCIO Documents* Vol.3 Chapter I.2 and Chapter IX Section A.1

9 PM 136/1 AJ

10 PM 136/1 vol.1

Foreign Office text. The latter was accepted with an Australian and New Zealand caveat that the final text should preserve ‘the warmth and idealism’ of the first version and carry a message of hope to the world.<sup>11</sup>

The draft selected as a basis for the Preamble stressed the determination of the High Contracting Parties to re-establish faith ‘in fundamental human rights, in the sacredness, essential worth and integrity of the human personality, in the equal rights of individuals and of individual nations, large and small, in the enlargement of freedom and the promotion of social progress and the possibility of raising the standard of life everywhere in the world’. The other human rights references in the draft were to ‘the establishment of conditions under which justice and respect for the obligations of international law and treaties and fundamental human rights and freedoms can be maintained’ and to ‘the employment of international machinery for the promotion of the economic and social advancement of all peoples’.<sup>12</sup>

No one at the Commonwealth discussion in April liked the Yalta formula incorporating the unanimity principle (commonly called the veto), which hung ‘like a dark cloud over the whole Charter’, but hoped it would be a transitory measure. SA said that ‘if the Big Three thought it essential to have this veto, [it] would not stand on its objection’.<sup>13</sup> However, SA argued, non-members should not be obliged to act in accordance with a Security Council decision unless they had concurred with, or been consulted about, it. New Zealand thought along similar lines but other officials at the Commonwealth meeting felt it would be dangerous to introduce an element of such uncertainty.<sup>14</sup>

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11 Sir Charles Webster *The Art and Practice of Diplomacy* (London 1960) 10-12 has described how he had suggested a Preamble at Dumbarton Oaks. It was not taken up. Shortly afterwards, Smuts made his suggestion at a Commonwealth meeting in London. His draft was overlong and when Webster produced his, they worked on a joint text – there is the hint of a suggestion that all Webster’s ideas were included and many of Smuts’s omitted – which the South African presented the next day, giving his collaborator appropriate credit. The fact remains that the proposal approved at the April 1945 meeting was Smuts’s, whose delegation presented it at San Francisco, making SA its official progenitor.

12 *UNCIO Documents* Vol. 3 474

13 It was fortunate that Smuts took this line, for which he later incurred the publicly expressed criticism of the Opposition, since SA would rely on the protection of certain nations with special voting rights in the Security Council for many years to come.

14 This was a remarkable exception to the Union’s general approach, since its effect would have been to expand the role of the GA at the Security Council’s expense.

## 1.4 Drafting of Charter

The San Francisco conference opened on 25 April 1945 with a welcome from President H.S. Truman, who had succeeded Roosevelt on the latter's death ten days before. He emphasized: 'The Conference will devote its energies and its labors exclusively to the single problem of setting up the essential organization to keep the peace. You are to write the fundamental charter.' The US Secretary of State, Mr. E.R. Stettinius, stressed that the new body would have to be able to rely on the voluntary co-operation of all peaceful nations to promote international justice, pay 'full respect for equal sovereignty', foster respect for 'basic human rights' and resolve the global problems of security and economic and social development. For the UK, Sir Anthony Eden left the possibility of developing the Charter open. '[I]f we can now draw up a Charter within the framework of our principles, the details can then be left to be filled in the light of experience.' Many delegations recognized that the Charter was a dynamic document that would have to be adapted from time to time to keep pace with a changing world.<sup>15</sup>

For organizational purposes, Plenary established four commissions to examine and report on various aspects of the draft Charter. Commission I dealt with general provisions, namely Preamble, Purposes and Principles. Commission II dealt with the General Assembly (GA), Commission III with the Security Council and Commission IV with legal issues and the International Court of Justice (ICJ). Each commission sub-divided into technical committees and sub-committees to study specific tasks and to carry out the detailed work. The commissions met only to approve their reports, before transmitting them to Plenary for final consideration and adoption.

### 1.4.1 Preamble

On 26 April 1945 SA advised UNCIO that the leader of its delegation, Field Marshal Smuts, would make a far-reaching proposal for a Preamble to the Charter (not provided for by the Great Powers at Dumbarton Oaks or Yalta). Smuts did so on 2 May using the

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<sup>15</sup> Plenary speeches are recorded in *UNCIO Documents* Vol. 1. Adaptation was not a view that SA would evoke in the years to come, except insofar as it entailed amendment of the Charter by due process.

text approved at the April Commonwealth discussion.<sup>16</sup> The following day his delegation circulated a slightly revised version. It read:

The High Contracting Parties:

Determined to prevent a recurrence of the fratricidal strife which twice in our generation has brought untold sorrow and loss upon mankind and to re-establish faith in fundamental human rights, in the sanctity and ultimate value of the human personality, in the equal rights of men and women and of nations large and small,

and to promote social progress and better standards of life in larger freedom, and for these ends to practise tolerance and to live together in peace with one another as good neighbours,

In order that nations may work together to establish international peace and security,

By the acceptance of principles and the institution of methods to ensure that armed force shall not be used save in the common interest,

By the provision of means by which all disputes that threaten the maintenance of international peace and security shall be settled,

By the establishment of conditions under which justice and respect for the obligations of international law and treaties and fundamental human rights and freedoms can be maintained,

By the employment of international machinery for the promotion of the economic and social advancement of all peoples,

*Agree to this Charter of the United Nations.*

The draft was harshly criticized in both Committee I of Commission I (Committee I/1) and Commission I itself. The US delegate, Dean Virginia Gildersleeve, said the text was ‘somewhat complicated and difficult to follow. The phrasing is sometimes awkward, and it repeats itself a bit. Worst of all the English words and rhythm rarely stir the heart.’<sup>17</sup> Others commented in similar vein but the SA delegate on Committee I/1, H.T. Andrews, was able to say that Smuts had remarked of the end result that ‘it was very nice as father of the baby still to recognize it after others had had the handling of it’.<sup>18</sup> In his report of 20 July 1945, Andrews confirmed that the final text emerged substantially as it had been introduced. Despite attempts by other delegations to improve on it, the version adopted in Plenary contained only slight textual and grammatical alterations, ‘changes which in fact

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16 The SA proposal for a Preamble preceded the other formal amendments relating to human rights. These were only circulated on or after 5 May 1945.

17 *UNCIO Documents* Vol. 6 8

18 *Idem* 365

brought it back very much to the Prime Minister's original draft'. Even the portions excised found a place in the first two articles of the Charter.<sup>19</sup>

The Preamble left the definition of human rights in the air.<sup>20</sup> Kelsen offered a devastating critique in which he asserted that it did not aim to establish obligations by itself. The obligations on members were to be found in other portions of the text. The Preamble was as legally binding as any other part of the Charter; even Committee I/1 at San Francisco had found it impossible to draw a clear-cut distinction between Purposes, Principles and Preamble. The Preamble, Kelsen complained, was not in harmony with the rest of the Charter. 'It fails primarily because in the matter which was supposed to appeal most to the hearts of the common man: the fundamental human rights, the Preamble can make no impressive declaration without being backed by the substantial provisions of the Charter.' Because the Charter failed to provide that backing, the words of the Preamble 'remain empty phrases'.<sup>21</sup> Goodrich, Hambro and Simons noted that little use had since been made of the Preamble; it 'reinforces, without being essential to' the ideas put forward in other articles. The reference to fundamental human rights served to buttress in particular Articles 1 and 55, which 'have been principally relied upon in efforts to eliminate racial discrimination'.<sup>22</sup>

#### 1.4.2 *Domestic jurisdiction*

Committee I/1 also dealt with domestic jurisdiction. The Dumbarton Oaks text had not prescribed whether individual states could or could not decide the limit, or lack thereof, of domestic jurisdiction. The sponsoring nations, who had noted the calls for a clause of this nature from most participants, even prior to the start of the conference, included one in their 5 May 1945 amendments. It was based on Article 15(8) of the Covenant of the League of Nations: 'If the dispute between the parties is claimed by one of them, and is

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19 PM 136/1 vol. 5 29 July 1945. The principal alterations were the removal of the slightly modified reference to 'respect for the obligations of international law and treaties' to the aims of the Charter and the deletion of the sentence on the settlement of international disputes, which was a Foreign Office addition.

20 The Charter was equally lax. Its Preamble and articles cited in the text are quoted in Appendix III.

21 H. Kelsen *The Law of the United Nations* (Stevens and Son London 1951) 11 fn. 4

22 L. Goodrich E. Hambro A. Simons *The Charter of the United Nations* (Columbia University Press 1969) 23-28

found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.’ At San Francisco it received a wider interpretation and was removed from the sole purview of the Security Council. The text finally approved by Plenary as Article 2, paragraph 7, read:

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

Placed in Chapter I, it became part of the overall Purposes and Principles of the United Nations. No indication was given as to who would decide on whether a matter fell ‘essentially’ within the sovereignty of a member state.<sup>23</sup>

Most participants appeared to welcome the paragraph: the Latin American states, despite strong advocacy of human rights otherwise, claimed domestic jurisdiction when objections were raised to an invitation to Argentina to attend the conference on the grounds of its fascist orientation. They argued that the UN could not judge governments on their domestic policy. The dichotomy between the two principles, domestic jurisdiction and human rights, was already apparent and would become a constant refrain once they were put into practice.

#### *1.4.3 Relationship between GA and Security Council*

Commission II, which Smuts presided, dealt with GA issues. It allocated questions of structure and procedures, political and security functions, economic and social cooperation and trusteeship arrangements to four technical committees. Commission III dealt with the Security Council. L. Egeland, then SA envoy to Stockholm, commented that most amendments submitted in Committee II/1 were aimed at widening the powers

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<sup>23</sup> H. Lauterpacht (*International Law and Human Rights* (Stevens and Son 1950) 173-183 complicated subsequent debate arguing that most questions which appeared to be ‘essentially’ domestic were ‘essentially’ international. In practice, he wrote, the word could be considered a lesser imposition on the UN than the word ‘solely’ was on the League. ‘The more accurate explanation of the change is probably

of the GA beyond those envisaged by the sponsoring nations at Dumbarton Oaks. He said that SA supported the extensions of the GA's powers as a world forum, provided they did not counter any proposals, 'which one or more of the Sponsoring Great Powers might regard as fundamental'.<sup>24</sup>

Andrews' report on Committee I/1 mentioned an Egyptian-Latin American proposal that Article 1(1) on the maintenance of peace and security be amended by the inclusion of the phrase 'in conformity with the principles of justice and international law'. The sponsoring nations argued that the phrase would limit the effectiveness of the Security Council, which would in any case determine the facts of disputes in conformity with justice and international law. It was hinted, said Andrews, that international law was too vague, while the concept of justice was subject to varying interpretations. SA voted unsuccessfully against the amendment, in accordance with its brief 'to place no obstacle in the way of formulating a Charter and a World Organization in which the Great Powers might be afforded the best opportunity to function in unity'.<sup>25</sup>

#### 1.4.4 Powers of GA

SA's alignment with the Great Powers often meant voting with Eastern Europe, which followed the lead of the Soviet Union. SA deserted the Commonwealth and the middle order nations in its opposition to the extension of the powers of the GA vis-à-vis the Security Council. Australia, New Zealand and India took the lead with the nations of Latin America in attempting to enlarge the GA's role. They proposed ideas of ways in which the GA might act if the Security Council were paralyzed. These ideas were not approved and had to await the Uniting for Peace resolution of 1950 to start taking effect.<sup>26</sup> The New Zealand Prime Minister, Mr. Peter Fraser, gave insights into the

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that it is merely verbal and devoid of legal consequences.' The remark seems to dismiss the intentions of the drafters as reflected in the debate on the text of the article at UNCIO.

<sup>24</sup> PM 136/1 vol. 5 24 September 1945

<sup>25</sup> *Idem* vol. 5 29 July 1945. Art. 2(1), Andrews wrote, called for little comment. The term it enshrined, 'sovereign equality of all its Members', was criticized as less scientific than 'juridical equality' and not being a concept in international law. It was approved on the insistence of the sponsoring nations. The SA delegation did not seem to appreciate the importance the Union government would soon attach to sovereign equality.

<sup>26</sup> See para. 7.4 for details.

thinking of smaller nations. He criticized the excessive authority conferred on the Great Powers. ‘On matters of peace and war, no responsible government, large or small, can sign away its right to pass judgment itself in its own Parliament and through its own constitution and forms.’<sup>27</sup> The GA should be empowered to consider any matter affecting international relations, even to endorse any vote for sanctions in the Security Council.<sup>28</sup>

Commission II finally recommended that the GA have the right to discuss any questions or any matters within the scope of the Charter but not to make any recommendations on matters of which the Security Council was seized. ‘In other respects, however, its right of recommendation to the Security Council, the Member States or both, is as broad as its right of discussion.’ This right included ‘wide powers of recommendation in economic, social, cultural and humanitarian matters’.<sup>29</sup> Dr. Evatt of Australia explained that this recommendation meant that no one would block discussion or free criticism in the GA of any matter within the scope of the Charter. Subject to the Security Council proviso, he said, the GA’s power of recommendation was unlimited. ‘Of course these recommendations will have no operative effect in any country.’<sup>30</sup> This interpretation differed widely from that SA placed on it at the GA but no one objected to it in Commission II, which Smuts presided, when the report was adopted, or in Plenary.

#### 1.4.5 Veto

Collective security and sovereignty were the *Leitmotiv* of UNCIO. The sponsoring nations’ proposal in their invitation to San Francisco, providing for unanimity amongst the five Permanent Members of the Security Council (the so-called veto)<sup>31</sup> did not evoke general support among the middle order nations. Like many others, Mr. Fraser of New Zealand called the veto ‘unfair and indefensible’. There was a great difference between a nation defying its pledge to abide by a decision of the Security Council and ‘a nation

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27 *UNCIO Documents* Vol. 1 508-512. Several countries made such remarks at San Francisco, on the authority of the Great Powers and in other contexts. There is no record that SA protected its position in this way, even on the issue of domestic jurisdiction.

28 Some delegations suggested leaving amendments to the GA, to reduce (and eventually eliminate?) Great Power dominance.

29 *UNCIO Documents* Vol. 8 266

30 *Idem* 208

31 Art. 27 of the Charter, see Appendix III.

being legally empowered to defy the Security Council, and that is what the provisions mean at the moment'. If a Permanent Member were to use the veto to protect a client nation that did not have it, 'the work of the Security Council would be reduced to futility'.<sup>32</sup>

Smuts diverged from many fellow delegates in his defence of the unanimity rule. Calling the absence of the US a reason for the failure of the League of Nations, he feared that similar absences or later disagreements amongst the Great Powers might lead to the failure of the UN and concluded: 'I cannot say that the Yalta recommendation is too heavy a price to pay for the new attempt to eliminate war from our human affairs'.<sup>33</sup>

#### 1.4.6 *Human rights*

Sir A. Ramaswami Mudaliar of India, which had yet to achieve sovereign independence, made the first notable reference to human rights at the conference. 'There is one great reality, one fundamental factor, one eternal verity which all religions teach...the dignity of the common man, the fundamental human rights of all beings all over the world.' Smuts, too, made an impassioned plea for the protection of human rights:

I would suggest that the Charter contain at its very outset and in its preamble, a declaration of human rights and of the common faith which has sustained the Allied peoples in their bitter and prolonged struggle for the vindication of those rights and that faith...Let us, in this new Charter of humanity, give expression to this faith in us, and thus proclaim to the world and to posterity...that for us, behind the mortal struggle, was the vision of the ideal, the faith in justice and the resolve to vindicate the fundamental rights of man, and on that basis to found a better, freer world for the future.<sup>34</sup>

Other references to human rights included Panama's assertion that 'the Charter must contain an International Bill of Rights, that is to say, a statement of the essential freedoms and rights of the individual, which is after all the supreme value of international life and

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32 *UNCIO Documents* Vol. 1 508-512. This was a restatement of his argument on the powers of the GA, for nothing prevented it from designating any country an aggressor, even if the Security Council was not hamstrung.

33 *Idem* 425

34 *Idem* 245 and 425

*of all human relationships*'.<sup>35</sup> It made a comprehensive submission, also circulated on 5 May, containing a Declaration of Essential Human Rights to be included in the Charter. Made up of 17 articles, it covered freedom of religion, opinion, speech, assembly, to form associations, from wrongful interference, the right to a fair trial, protection from arbitrary detention, non-retroactivity of laws, property rights, rights to education, work, conditions of work, food and housing, social security, participation in government, and equal protection before the law without discrimination. Each right was accompanied by a concomitant state obligation. An 18<sup>th</sup> article spelt out the limitations. The text later served as a basis for a draft bill of rights in the UN Commission of Human Rights (CHR).

In his closing remarks President Truman, too, evoked the adoption of an international bill of rights. He said the Charter was dedicated to the achievement and observance of human rights and fundamental freedoms. 'Unless we can attain those objectives for all men and women everywhere – without regard to race, language or religion – we cannot have permanent peace and security in the world.'<sup>36</sup>

#### 1.4.7 *Economic and social issues*

Amongst their 5 May 1945 amendments the sponsoring nations suggested amplifying the Purposes of the UN '[t]o achieve international cooperation in the solution of international economic, social, cultural and other humanitarian problems and promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, language, religion or sex'. It became Article 1(3) of the Charter. They also inserted a statement, that friendly relations between states were based on equal rights and self-determination of peoples, into the preamble of what would become Article 55.<sup>37</sup> These additions introduced concepts that were lacking in the original text, notably non-discrimination and, in Article 1(2), equal rights and self-determination of peoples. All these additions contradicted SA legislation and compounded the problems the Union

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35 *Idem* 554

36 *Idem* 683

37 *Idem* Vol. 3 622-633

faced once the UN was established. The SA delegation could not have failed to appreciate the dangers but, in the light of its own emphasis on fundamental rights, was in no position to oppose.

The role of an Economic and Social Council (ECOSOC) in international cooperation was highlighted by speakers, including Smuts, and in the report of Commission II, with the implication that this innovation over the League Covenant would become a major factor in the preservation of peace, human rights and fundamental freedoms. Originally foreseen simply as a subsidiary organ of the GA, its role was recast to that of a major component of the UN, spawning many lesser bodies and acting as a link between the GA, on which it is still dependent, and the Specialized Agencies. The summary records of Committee II/3 on economic and social cooperation contain no indication of SA participation, with the exception of a statement in support of a Brazilian declaration recommending the establishment of a special commission of women, whose task would be to report on ‘the political, civil, and economic status and opportunity of women with special reference to discrimination and limitations placed on them on account of their sex’. Support for this declaration was general.<sup>38</sup>

The Union’s position on other issues was not recorded but its delegation must have attended some, if not all, meetings and was associated with the decisions reached. In particular this applies to the debate on a draft prepared by a sub-committee of Committee II/3 of the pledge in Article 56 to take joint and several action in cooperation with the organization to achieve the economic, social, cultural and humanitarian purposes of Article 55. Australia and Belgium felt that the sub-committee had exceeded its mandate. Belgium argued that ‘separate action means that national action should be taken to give effect to international purposes. [It] might imply interference with domestic affairs but adequate protection is given elsewhere in the Charter.’<sup>39</sup> This remark went unchallenged and the draft was approved unanimously. When the Committee II/3 draft was submitted to his commission, Smuts affirmed that it applied to dependent peoples all over the world. The UN would, he emphasized, ensure that that these principles would be carried out for

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38 *Idem* Vol. 10 212-214

the benefit of peoples not yet advanced enough to look after themselves. The draft was accompanied by a statement in the report of Commission II that nothing contained in Chapter IX of the UN Charter, in which both Articles 55 and 56 fell, affected the domestic jurisdiction principle.

### **1.5 Ratification of Charter**

Although it was not an ideal document, Smuts believed the UN Charter was a testament that could be handed down to succeeding generations. He signed it on behalf of his country.<sup>40</sup> The SA Parliament was not in session on his return. The Clerk of the Senate, Mr. S.F. du Toit, wrote to External Affairs on 15 August 1945 to enquire what form ratification would take. His research into the way in which international agreements had previously been brought before Parliament revealed a lack of uniform practice. Considering the likelihood of new international treaties coming into being and the growing interest in foreign relations, it would be timely to consider future practice.<sup>41</sup>

Smuts thought that it would be an unnecessary expense to summon a special session of Parliament on his return home for the sole purpose of ratifying the Charter and intended to consult it when it convened the following year. He had a draft motion prepared, on the precedent of the Covenant of the League of Nations, for the House of Assembly to pray His Majesty to be ‘graciously pleased to ratify and exchange ratification of the Charter, with annexed statute (of the International Court of Justice), on behalf of the Government of the Union of South Africa’. The SA High Commissioner, London, however, cabled that the preparatory commission established at San Francisco was to meet in the UK and would probably resolve itself into the 1<sup>st</sup> GA during the second half of November. This ‘would presumably mean that South Africa, not having ratified the Charter, would not be able to speak or vote on any decisions taken by the Assembly’.<sup>42</sup>

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39 *Idem* 139

40 Unless otherwise indicated this section is based on PM 136/1/1 vol. 1.

41 The 1919 Peace Treaty with Germany, Du Toit noted, had come before both Houses. The 1921 Peace Treaty with Turkey was presented to neither. The 1929 Treaty of Commerce and Navigation was submitted only to the House of Assembly; the 1935 Treaty on Commercial and Shipping Relations with the Netherlands went to both Houses.

42 Tel. 1326 7 September 1945

The state law adviser, Mr. R.E.G. Rosenow, expressed the opinion on 25 September 1945 that a ratification must be signed by the person invested with the supreme treaty-making power, namely the King who acted executively on the advice of his Ministers of State. He could act in SA through the Governor-General. Were either to sign the ratification, nothing in the Charter would render SA's participation invalid, subject to the caveat that the government would require the support of Parliament to carry out certain obligations under the Charter, such as participation in UN and ICJ expenses. 'It would be futile, therefore, to advise the King to ratify, if there were no real assurance that the Parliament would support this ratification, so as to enable the Union to implement its undertaking.' Without the urgency, it would be better to consult Parliament as in the case of the Covenant. The Prime Minister would have to decide whether he could rely on *ex post facto* approval. This opinion was taken to justify ratification by executive action.

Further investigation led to an internal manuscript opinion (author's initials illegible) dated 29 September 1945 that the Charter differed from the Covenant. The latter had been adopted on a Head of State basis, the former was intergovernmental, as confirmed by the opening phrase: 'We, the peoples of the United Nations'. The Full Power cabled to Smuts to sign the Charter stated that: 'whatever things shall be so agreed upon and concluded by the said Plenipotentiary and Representative, shall, subject to ratification by the Government of the Union of South Africa, be agreed to, acknowledged and accepted by the said Government'. A submission to the King was accordingly unnecessary.

To ensure the Union's inclusion as a founding member, Smuts decided to ratify his signature by executive action. After further consultation with the Law Advisers, he submitted an urgent Ministers Minute to the Officer Administering the Government, who signed it on 9 October 1945 in anticipation of the next meeting of the Executive Council, authorizing the Minister of External Affairs to take all the necessary steps to ratify. Smuts signed the instrument of ratification on 10 October 1945, preceding his action with a press communiqué in which he promised to consult Parliament at the earliest possible date after commencement of the next session. The Secretary for External Affairs, D.D. Forsyth, informed the Clerks of both Houses that the Prime Minister would seek

parliamentary concurrence. ‘You will, of course, understand that legally there can be no such thing as approval of ratification; once the Government has ratified, that ratification is final. The reference to Parliament will be purely a matter of policy.’<sup>43</sup>

The instrument of ratification was forwarded via the US legation diplomatic pouch, which seems to have been delayed in transit. It reached the depository power in Washington only after the Charter came into force. The Union shared this ‘distinction’ with other Commonwealth members, Australia, Canada and India. Its membership dated from the day of deposit by the SA Legation, 7 November 1945, in time for SA to attend the first part of the 1<sup>st</sup> GA as an original member in terms of Article 110.

### 1.5.1 Criticism of Smuts

Dr. D.F. Malan issued a strong critical reply to Smuts’s press communiqué. ‘*Die waarheid is dat genl. Smuts bang is om die Volksraad te ontmoet...[Hy weet] dat hy die kleinere lande met inbegrip van Kanada, Australië en Nieu Seeland in die steek gelaat het.*’<sup>44</sup>

When Smuts did seek *ex post facto* approval from Parliament on 6 February 1946 he ran into a storm of criticism from the Opposition. Much of it was based on the argument that, on this precedent, the Executive could commit SA to war without domestic consultation. Dr. Malan said his party was not opposed to membership of a world organization. In 1944 it had proposed a motion stating that world peace could not be maintained without territorial demarcation ‘which above all takes into consideration ethnographical and geographical boundaries and the right of self-determination of the peoples concerned’. It added that international co-operation would have to be promoted by a union of free nations in which the small nations of the world will have equal status with the great nations. SA could join such a union. The UN was ‘a bad thing’ and the Charter was simply an alternative to no international arrangement at all. If it came to power, the National Party would try to improve the new world body.<sup>45</sup>

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43 PM 125/4 13 October 1945

44 *Die Vaderland, Die Transvaler* 11 October 1945

45 *House of Assembly Debates* Vol. 55 6 February 1946 cols. 1181-1183 and 1189

Malan's major criticisms were that the Union had allied itself with the Great Powers at the expense of the smaller nations and that it had supported the principle of the veto but not the extension of the powers of the GA to monitor the Security Council. Another serious objection was the inclusion in the Charter of a matter not contained in the Dumbarton Oaks proposals: discrimination. It meant that the UN could call for an enquiry into the treatment of non-Europeans in the Union and meddle in the country's internal affairs. If the UN did so, white civilization would come to an end in SA. 'Before it is swept away by the non-European in this country, before its future is destroyed, there will be a fight to the death here in South Africa. There will be a blood bath. This is a rupture of world peace, not the other thing.' Dr. T.E. Dönges obtained from the Prime Minister the assurance that Article 2(7) overrode the rest of the Charter. 'I am glad', he said, 'that the Prime Minister agrees that we are not obliged to submit our internal affairs to any international court'.<sup>46</sup>

The Opposition's proposed amendment to the ratification motion, which was defeated on party lines, had overtones for the future. It read that the House of Assembly:

expresses its disapproval of the arbitrary acceptance of the Charter of the United Nations on behalf of the Union without the prior concurrence of Parliament in its ratification and considers such action as constituting a serious disregard of our rights of popular government. It further records its protest against the exclusive character of the United Nations Organisation, against the right of veto reserved for certain great powers individually in respect of the measures to be taken for the preservation and maintenance of world peace and against the inferior and dependent position assigned on the other hand to the association of small nations. It also expresses its deep disappointment at the Prime Minister's failure at the San Francisco Conference to support the small nations in their strong and almost unanimous protest (i.e. excluding the Soviet bloc) against this undesired and unhappy arrangement and because he thus acted contrary to the true interests of South Africa as one of the small nations of the world.<sup>47</sup>

## 1.6 Charter provisions in municipal legislation

The first indication of the problem the Charter might pose for municipal legislation of member states arose in 1946. The UK asked the Dominions whether they were in a

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46 *Idem* 7 February 1946 cols. 1254-1256

47 *Idem* 6 February 1946 col. 1191

position, without further legislation, to fulfil the Chapter VII obligations under Article 41 of the Charter and support measures short of armed force adopted by the Security Council. On the advice of the SA Law Advisers, the Department of External Affairs returned a negative reply to the High Commissioner, London.<sup>48</sup> It was decided to keep the issue in consideration until the following session. No action was taken and the following year D.B. Sole, an External Affairs official, passed a note to the Secretary,<sup>49</sup> in which the question was again raised. He suggested that, considering the frailty of the Security Council, it would not be advisable to introduce enabling legislation, which would in any case provoke criticism locally. The Secretary agreed to wait until the next session of Parliament but, with the defeat of the United Party at the polls, the matter seemed to die a natural death.<sup>50</sup>

## 1.7 Conclusions

### 1.7.1 Smuts's dilemma: human rights and domestic policy

A reading of the relevant *travaux préparatoires* for UNCIO suggests that SA's assertion that Article 2(7) overrode the rest of the Charter was too rigid. Nevertheless the Union's argument at subsequent meetings of the GA that, without the restrictive interpretation placed on it at the time, many smaller states would have hesitated to ratify the Charter, appears reasonable. The parliamentary Opposition in the Union had already revealed its concern. Dr. A.J. Stals asked in the House of Assembly on 10 April 1945 whether the inclusion of the former Secretary for Native Affairs, Mr. D.L. Smit, on the SA delegation meant that the Union would accept that its internal affairs (segregation policy) could be discussed at San Francisco. Smuts denied this. He did not, however, take the Opposition into account in preparing for the meeting. Possibly he considered that their views and his would *grosso modo* have coincided, not least on the major issues of domestic jurisdiction

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48 PM 136/1/1 vol. 2 tel. 742 8 May 1946

49 *Idem* annotation on minute C.83 18 August 1947 from the SA Legation Washington

50 The issue lay dormant for almost the next 50 years, until the Security Council imposed sanctions on Yugoslavia in 1990 and pressure was exerted on SA to conform to this decision, as it was required to do in terms of Art. 25 of the Charter. As a result Parliament adopted Act 172 of 1993 enabling the State President to incorporate resolutions of the Security Council by proclamation but the Act has yet to be put into effect. Thus neither the Charter nor any Security Council resolution adopted under it has as yet been incorporated into SA municipal law.

and trusteeship. More likely, he felt that the new body would be an extension of the League of Nations, with whose conception he had been so intimately involved. The UN was in some ways his metaphysical baby.

From the outset it was clear that Smuts intended to rely on the responsibility of one or more Permanent Members on issues of importance to SA. The reasons are fairly clear: in the Security Council they were in command; in the GA a majority could be achieved by the votes of the smaller nations, at least in theory. Whether this was Smuts's larger, global view, or his recognition that the future for SA was not bright, is unclear. One is inclined to opt for the former. Smuts accepted the veto as a temporary expedient to prevent the USSR forming its own organization. He was blinkered by his faith in the Commonwealth and presumably believed that, with the UK as its motive force, a united Commonwealth would have a veto in the Security Council.<sup>51</sup>

It is hard to reconcile Smuts's international persona with his domestic policy. His proposal for the Preamble was grounded in an appreciation of global politics not the situation at home. One has the impression that Smuts was living in another world. He had just affirmed a thesis, the effect of which was that the whole of colonial and mandated Africa would fall to a greater or lesser extent within the ambit of the UN. Yet SA alone would stand against this development, even before the electoral defeat of the United Party. He expressed his concern about developments to his deputy at home. A 'vague humanitarianism' over trusteeship matters had decided him against requesting the UN to approve the incorporation of South West Africa (SWA) into the Union. He later observed the same trend in ECOSOC, of whose creation he had approved however.<sup>52</sup>

Smuts recognised the dilemma. He wrote: 'The Preamble of the Charter is my own work, and I also mean to protect the European position in a world that is tending the other way.' He was aware that many white South Africans found his dual attitudes contradictory and responsible for the criticism the country endured at the UN. 'Here is the author of the

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51 See para. 1.3

52 PM 136/1 vol. 3 tel. to J.H. Hofmeyr 4 June 1945

great Preamble of the Charter, exposed as a hypocrite and a double-faced time-server!'<sup>53</sup> But he was unable to offer a solution and tried unsuccessfully to follow the two divergent paths. It is significant that SA was not selected as a member of the Human Rights Commission that the GA created the following year, *inter alia*, to draft a bill of rights. The SA delegation's concerns that it would not enjoy the same prestige in the UN as it had in the League of Nations were revealed in a comment by Forsyth on 1 January 1946 to the effect that SA would have liked to stand for ECOSOC 'but not at the risk of defeat'.<sup>54</sup> That was its last opportunity for election to a major body for some five decades; the writing was already on the wall.

### 1.7.2 *Ratification debate*

The parliamentary debate on ratification was instructive. There was some merit in the Opposition's argument, although it might have been overstated, that Smuts wanted kudos for himself and chose to circumvent Parliament until ratification was a *fait accompli*. His concern that the recall of Parliament was unnecessarily expensive was equivocal, particularly in the light of the Article 110(1) stipulation that ratification was to be in accordance with member states' constitutional procedures. However, a special session for that alone would indeed have been costly and, judging from the later debate, would have led to the ratification ringing hollow. Moreover, Smuts was under pressure to act and there would have been a delay while the matter was considered in the House of Assembly before the necessary constitutional steps were taken. The evidence suggests that he had not intended to bypass Parliament but was overtaken by events.

H. J. May wrote: 'Where the treaty making power vests in the Executive, parliamentary approval for the conclusion of a treaty or its ratification is not sought unless the treaty specifically so provides...If it is drawn up in "inter-governmental" form it is ratified by the Cabinet.'<sup>55</sup> He made no reference to the Charter, not regarding it, presumably, as

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<sup>53</sup> W.K. Hancock *Smuts: 2. The Fields of Force 1919-1950* (Cambridge University Press 1968) 450-451

<sup>54</sup> PM136/1 vol. 6

<sup>55</sup> H.J. May *The South African Constitution* (Juta 3rd ed. 1955) 213

sufficiently significant to warrant special treatment. Smuts can be said to have followed correct procedure, as May explained it. Nonetheless, his decision, while neither illegal nor unprecedented, left him open to all the accusations levelled at him, political as well as juridical. If he did not create it, he enshrined a precedent for bypassing Parliament in future. This was clear from Forsyth's letter to the Clerks of the two Houses.

The Opposition seems to have foreseen coming problems, yet ignored the fact that SA might have to rely on the exercise of the veto by a friendly Permanent Member of the Security Council to protect it. The National Party also failed to recognize the strength of anti-SA sentiment amongst the smaller members; otherwise it was simply making debating points. The Charter was a two-edged sword for there was no doubt that SA racial policy flouted the post-Dumbarton Oaks amendments. Hence the importance to it of Article 2(7). The National Party's expression of the apartheid philosophy as early as 1946 showed, however, that it was ready to court the dangers of expulsion. Malan's strictures that Smuts had let smaller nations down had elements of speciousness, particularly in the light of his (Malan's) total rejection of the UN's right to interfere. Interference was more likely to be recommended by the GA, where the lesser nations were in the ascendant, than the Security Council.

Neither party raised human rights or fundamental freedoms. There was no criticism of the Preamble of the Charter. Possibly it was a sensitive matter for the Opposition, possibly Smuts himself might have foreseen, once the debates in San Francisco took flight, that it would rebound on him. Racial discrimination appears to have interested the 1946 House of Assembly only as a possible conflict with Article 2(7).

### *1.7.2 Effect of ratification*

In terms of international law, ratification of the Charter meant that SA had assumed all the obligations of a peace-loving state and was liable to be examined at the bar of international opinion. It failed, however, to incorporate the Charter into its municipal legislation. In particular it failed to incorporate Article 25, in terms of which 'the Members of the United Nations agree to accept and carry out the decisions of the

Security Council'. It could have done so without incorporating the Charter as a whole but, as it ratified the latter without reservation, the omission did not exempt it under international law from honouring its obligations. The Union remained bound internationally, as the National Party took no action, despite its criticism, to disavow the ratification. Internally, however, the Charter and its resolutions were applicable in SA law, like customary international law, only to the extent they did not conflict with a valid Act of Parliament.<sup>56</sup>

That a precedent for bypassing Parliament had been highlighted both by the debate and by the motion adopted was probably not to the chagrin of the either party, so long as it was not in opposition. The point was illustrated in 1964 when the National Party was in power and ignored Parliament when considering ratification of amendments to the UN Charter to enlarge the membership of both the Security Council and ECOSOC.

The necessary documents for ratification of the proposed amendments were prepared and signed by the Minister of Foreign Affairs, Dr. H.G. Muller during 1964. The instruction to submit them was drawn up in July 1965 but was held up by the Minister, who could not recall having discussed them with Prime Minister Verwoerd (my emphasis). The Minister advised Foreign Affairs that the Prime Minister's reaction to the draft instruction was '*dat ons buite stemming (sic) moet bly – met of sonder opgawe van redes*'.<sup>57</sup> The instruction to ratify was cancelled.

Admittedly the topic was of lesser importance, but the principle was the same and implied a disregard for parliamentary prerogative.

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<sup>56</sup> See para. 1.6.

<sup>57</sup> M.B. 5/1 24 August 1965. This was a curious document. South Africa had voted in favour of the enlargement of the two organs at the previous GA session, which the Minister of Foreign Affairs had attended. Neither he nor the Prime Minister seems to have appreciated the legal nuance that they were dealing with ratification, not a voting procedure.

**CHAPTER 2**  
**SOUTH AFRICAN INDIANS**

## **2.1 1<sup>st</sup> General Assembly**

### *2.1.1 Indian complaint*

In June 1946, shortly before the opening of the second part of the first session of the GA, the government of India requested the UN Secretary-General to include an item in the agenda on the treatment of Indians in South Africa. India submitted a long memorandum containing an historical survey of events from the 1850's to the adoption of the SA Asiatic Land Tenure and Indian Representation Act.<sup>1</sup> The memorandum claimed that the two countries had entered into an agreement in Cape Town in 1927, which they had confirmed in a joint statement of 1932, on the upliftment of Indian migrants in the Union and their possible return home. These instruments amounted to valid international understandings, which, India alleged, SA had not honoured. SA was also in breach of its obligations under the UN Charter, notably in respect of equal rights and non-discrimination.<sup>2</sup>

Prime Minister J.C. Smuts led the SA delegation to the GA,<sup>3</sup> where he objected in the General Committee to the inscription of the Indian complaint, which dealt, not with Indian nationals, but 'with Indians, nationals of the Union of South Africa'. This made it an internal matter within the purview of Article 2(7) of the Charter.<sup>4</sup> India believed the question did not fall under Article 2(7), as its complaint sought only discussion under Article 10 of the UN Charter, not intervention. The UK, with Smuts's tacit support, proposed referring the domestic jurisdictional aspects to the Sixth (Legal) Committee. The USSR thought the First (Political) Committee more appropriate since a breach of

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1 28 of 1946. Although it provided for a qualified franchise on a separate voters' roll, allowing Indians to be represented in Parliament, the Act placed restrictions on their residential and land purchase rights.

2 A/149 June 1946

3 He took with him, as a legal adviser, Dr. L.C. Steyn of the Department of Justice, who was later appointed Chief Justice by the National Party.

4 GAOR 2nd part 1st sess. Gen. Cttee. SR 22 October–13 December 1946 70ff. Chaired by the GA President, the General Committee examines all items proposed for inclusion in the Agenda prior to their approval by Plenary. Once approved, the items are allocated to relevant committees for debate before being returned to Plenary for final approval in GA resolutions.

agreements was involved and ‘the oppression of minorities of any kind whatsoever was a matter for the States as a whole’.<sup>5</sup> After the US proposed that both committees examine the complaint separately, the UK withdrew its suggestion and the US proposal was carried by the margin of one vote. Not having voted, the Ukraine demanded a fresh vote but the committee chairman rejected its plea. Nevertheless Ukraine’s proposal that the item be referred to a Joint Committee was forwarded to Plenary.

In his report, the SA Secretary for External Affairs, D.D. Forsyth, said the SA delegation intended to make a full statement to the GA on domestic jurisdiction and ask that the item be referred to the ICJ for an advisory opinion.<sup>6</sup> Plenary allocated the item to a joint meeting of the First and Sixth Committees. Forsyth said both chairmen were unfavourably disposed to the Union. ‘It is unlikely’, he added, ‘that we shall be able to avoid a full discussion on the merits of the Indian case, nor do we consider it tactically wise to give the impression of wanting to avoid a debate.’ Accordingly SA asked the Secretary-General to distribute a memorandum drawn up by Senator G. Heaton Nicholls, a member of the delegation, in reply to the Indian memorandum. Two weeks later SA submitted a second memorandum. The first dealt with political issues and the second with details of the charges India had made in its original complaint. Both denied that the 1927 agreement in Cape Town had given rise to treaty obligations or that SA contravened fundamental human rights.<sup>7</sup>

Smuts cabled the Acting Minister of External Affairs in Pretoria, J.H. Hofmeyr, that the Union’s colour policies ‘are most unpopular...in a World Assembly like U.N.O., and the atmosphere is chilly all round’. The best course, he thought, was to have the Indian complaint referred to the ICJ. ‘There is of course no certainty whether the Court will

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5 Manuilski(Ukraine) chaired the Political Committee, his Panamanian colleague the Legal. They would alternate as Chairman of a Joint Committee.

6 PM 136/2 vol. 1 tel. No. 3 Safdel New York to SEA 26 October 1946

7 A/167 and A/167 Add.1. PM 136/2 tel. 12 Safdel New York to SEA 4 November 1946 and tel. 432 Saleg Washington to Primesec 19 November 1946. The Indian allegations were thus allowed to go unrefuted until the GA had decided to include the item.

declare the Indian question an essentially domestic issue. But on balance the Court may be our safer course.’<sup>8</sup>

### 2.1.2 *Racial discrimination and competence*

Mrs. V.L. Pandit of India told the Joint Committee that SA had reneged on the undertakings it had given when Indian workers were first recruited for Natal. India had a moral obligation towards them since their forefathers had migrated in terms of these promises. The Cape Town Agreement of 1927 was never abrogated and, although the Indians were SA citizens, discrimination violated the Charter, whose Preamble justified her claim that the GA was competent to consider the complaint.

Smuts criticized the political exploitation of domestic issues by foreign states. Article 2(7), he claimed, overrode the entire Charter except for enforcement measures. Another exception could arise from treaty obligations. It did not apply in this case, as the so-called Cape Town Agreement and the joint communiqué of 1932 had not given rise to treaty obligations. A third possible exception might be found in the direction of human rights and fundamental freedoms, such as the right to exist, the right to freedom of conscience, and freedom of speech, and the right of free access to the courts. SA had not infringed such elementary legal rights. In any case, until they were properly formulated, the Charter placed no legal obligations on member states, whatever the moral position.

India, said Smuts, had resuscitated matters that had ceased to be at issue for many years. He had no objection to free discussion but did object to action that might be considered intervention. A recommendation amounted to intervention, since it was the furthest the GA could go. The debate would set a precedent. Once it was concluded, he would

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<sup>8</sup> PM 136/2 tel. 18 Saleg Washington to Primesec 13 November 1946. Dr. C.B.H. Fincham of External Affairs highlighted the problem (PM136/2 vol.3 25 January 1952). He said that the GA could not consider legal issues *in vacuo*; although discussing matters of substance could lead to overlapping and provide opportunities for obstructive tactics. As its recommendations, decisions *et cetera* were a source of international law, the UN should not be tied down by legalistic considerations. ‘Vague and woolly drafting is frequently due not to the incompetence of the Political and other Committees but to the need to avoid precision in the interests of reaching a compromise.’ Thus, while SA’s agreement to a joint meeting might appear a tactical error in the light of events, the end result would probably have been little different.

propose that the matters set out by India and the SA reply be submitted to the ICJ for an advisory opinion ‘as to whether they fell within the limits of domestic jurisdiction’.<sup>9</sup> Forsyth reported that ‘the keynote of the debate was the issue of colour discrimination, which cannot but provoke an unfavourable reaction in an assembly, a very large number of which is composed of non-Europeans...[making] it difficult to secure objective concentration on the facts in the dispute’.<sup>10</sup>

The UK felt India would benefit from a juridical solution. A political decision would be open to grave doubts and, if the ICJ agreed with the Indian case, SA would be obliged to take political action. The UK called for a swift conclusion to the drafting of a declaration on human rights, a covert reference to Smuts’s point that the definition of fundamental human rights lacked clarity.

Recalling Smuts’s admission that treaty obligations might limit domestic jurisdiction, India said that the Cape Town Agreement had been approved by the Governors-General of both countries and ratified by their legislatures. India added that Smuts himself (it is not clear where) had said signature of the Charter resulted in the contraction of the domain of essentially domestic matters. The Charter’s references to human rights and fundamental freedoms were explicit and SA could not escape its obligations. The Union was also a party to the GA resolution adopted that same session condemning racial persecution and discrimination.<sup>11</sup> India did not consider the ICJ qualified to give an opinion. ‘If the resolution submitted by his country were defeated, it would mean that the

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9 GAOR 2nd part 1st sess. Joint Cttee. SR 21-30 November.1946 3-4

10 PM 136/2 vol. 3 unnumbered tel. Saleg Washington to SEA 26 November 1946. Evidently the SA delegation did not appreciate the dangers to its legal argument of joining a political discussion on the facts.

11 Adopted unanimously in December 1946, without reference to a Committee, as GA Res. 103(I), the resolution read:

*The General Assembly declares* that it is in the higher interests of humanity to put an immediate end to religious and so-called racial persecution and discrimination, and calls on the Governments and responsible authorities to conform both to the letter and the spirit of the Charter of the United Nations, and to take the most prompt and energetic steps to that end.

SA was present and voted in favour.

United Nations was prepared to tolerate the doctrine of a master race.’<sup>12</sup>

Heaton Nicholls, a former Administrator of Natal, responded on SA’s behalf. Without conceding the GA’s right to consider purely SA matters, he made a factual speech to supplement both Smuts’s statement and the SA memorandums.<sup>13</sup> Political rights, he asserted, were not fundamental. ‘The only definition of fundamental human rights and fundamental freedoms of which the UN could at present take cognizance was the four freedoms set out in the Atlantic Charter’, which were honoured in SA. There was nothing in the Panama document, except the question of political rights, which was not already in practice in the Union.<sup>14</sup>

Smuts intervened at the end of the debate to repeat that he had no desire to prevent an enquiry into or study of the position of Indians in the Union. Although the matter was one of domestic jurisdiction, his government had consented to it being referred to the ICJ and would agree to that reference being enlarged to include facts as well as law. After an attack that included a suggestion that the SA government’s position was comparable to that of Nazi war criminals, the Union could not agree to an enquiry by any political body.

India withdrew its draft resolution in favour of a Franco-Mexican proposal asking the two governments to report to the next GA. The text called for a settlement and said the GA was ‘of the opinion that the treatment of Indians in the Union should be in conformity with the international obligations under the agreements reached between the two Governments and the relevant provisions of the Charter’.<sup>15</sup>

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12 GAOR 2nd part 1st sess. Joint Cttee. SR 21-30 November 1946 8-11

13 See para. 2.1.1.

14 GAOR 1st part 2nd sess. Joint Cttee. SR 17-21. The Atlantic Charter (para. 1.1) referred to only two freedoms: ‘freedom from fear and want’. Heaton Nicholls obviously had Roosevelt’s ‘Four Freedoms’ speech to the US Congress in January 1941 in mind. The ‘Panama document’, A/148, was a repeat of the proposal for a declaration of essential human rights Panama had submitted to UNCIO, see para. 1.4.6.

15 The SA Chargé d’Affaires, Paris, reported (SPRINGBOK 11 January 1947) that a member of the French Foreign Ministry had expressed astonishment at the action of its delegate, whom the Ministry had instructed in writing to support the Union’s argument, because ‘the position in certain French colonies was not at all dissimilar’. The French delegation might have been acting on its own initiative. Its tactic can indeed be considered surprising in view of France’s own problems as a colonial power and the importance it attached to Art. 2(7).

Summing up, Forsyth reported that the overwhelming majority of delegates was convinced that SA practised racial discrimination contrary to UN Charter provisions. There was, he complained, no thorough or objective examination of the facts. Most of the debate surrounded human rights. ‘Amid the procedural confusion preceding the final vote, [Chairman] Manuilsky succeeded in overruling the arguments put forward by the Belgian delegation that, since the question of competence of the Assembly should be adjudicated upon first, the resolution relating to reference to the Court should be adjudicated on before the resolution of substance.’<sup>16</sup> The Franco-Mexican proposal, which the Chairman then put to the vote, passed by simple majority.<sup>17</sup> Despite objections, he did not put the proposal to request an advisory opinion to a vote.

### *2.1.3 Refusal to seek advisory opinion*

When the issue was taken up in Plenary,<sup>18</sup> Smuts moved that the draft resolution be amended to include a GA request for an advisory opinion from the ICJ. SA had a clear legal right to consult it on issues of law. The Joint Committee had not voted on the proposal but the GA could not ignore it. Several Western delegates agreed that the ICJ was the appropriate organ to consider important legal matters. India based itself on the vote in the Joint Committee, which it accepted. The facts were not in dispute since SA had admitted discriminatory measures. The Union was a signatory to the Charter, ‘and the head of that Government the reputed author of the Preamble’. He and his government were ‘deeply committed to honour the obligations that both the spirit and the letter of the Charter impose’. The essence of the SA case, India said, was that ‘segregation is essential to the maintenance of western standards of life’.<sup>19</sup>

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16 PM 136/2 vol. 3 tel. 45 Saleg Washington to SEA 5 December 1946

17 For: Byelorussian SSR, Chile, China, Colombia, Cuba, Czechoslovakia, Egypt, Ethiopia, France, Guatemala, Haiti, India, Iran, Iraq, Mexico, Philippine Republic, Poland, Saudi Arabia, Syria, Ukrainian SSR, USSR, Uruguay, Venezuela, Yugoslavia. Against: Australia, Belgium, Canada, Costa Rica, Dominican Republic, El Salvador, Greece, Iceland, Luxembourg, Netherlands, Nicaragua, Norway, Paraguay, Peru, Sweden, Union of South Africa, UK, USA. Abstentions: Denmark, Ecuador, Honduras, New Zealand, Panama, Turkey. France was alone of the Western nations to support it.

18 GAOR 2nd part 1st sess. Plenary 23 October–16 December 1946 1006-1061

19 GAOR 2nd part 1st sess. Plenary October-December 1946 1016-1019. The use by SA of this argument alienated many who might otherwise have voted for an advisory opinion.

China was amongst those who, supporting India, opposed obtaining an advisory opinion. If the ICJ found for SA, it would not help the Indians. In a matter that affected ‘the honour of a whole continent, the pride of half the human family, the dignity of man himself’ the ICJ might not be unanimous. If it were divided, the opinion would expose the ICJ to criticism. ‘Are we justified, in this early stage of the existence of the Court, in putting such a heavy strain on that tribunal?’<sup>20</sup>

The Soviet Union asked how it could be said that the Indian complaint was a domestic matter ‘and that it is not one of those questions which must be included in the international category’. Reference to Article 2(7) was unjustified. The article did not say that it forbade the submission of such matters only that it did not ‘require’ it. India had rightly appealed to the GA. The Soviet delegation thought justice should be secured by an international court; ‘but this international court is here...it is our organization which should deliver its verdict’.<sup>21</sup> Belgium insisted that the role of the ICJ was to state the law and, if it were divided, it could only be because the law itself was in doubt.

The SA amendment that the ICJ be asked for an advisory opinion was voted on first and rejected by 31 votes to 21 with two abstentions. The Franco-Mexican draft was then adopted by 32 votes to 15 with seven abstentions as GA Res. 44(I). Of those who had supported the SA amendment, Australia, Brazil, Denmark, Ecuador, Sweden and Turkey opted to abstain on the second text, thus enabling the two-thirds majority. Greece, Iceland and Norway, who had opposed the draft in Committee, now chose to vote in favour. The GA had its positive outcome but the majority was slender.<sup>22</sup> The Indian draft resolution presented to the Joint Committee, but later withdrawn, had been condemnatory

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20 *Idem* 1019-1023. China’s representative was Wellington Koo, formerly (like Smuts) a member of his country’s delegation to the Paris Peace Conference of 1919, later a Judge of the ICJ.

21 GAOR 2nd part 1st sess. Plenary 1044-1045. It would not use the same argument when a member of the Soviet bloc was under scrutiny.

22 Kelsen *op. cit.* 28-32 thought the resolution exceeded the Charter provisions. The Charter, he wrote, failed to impose legal obligations on members to grant to their subjects the rights and freedoms contained in its text: mere mention of a right was not enforcement. The debates on the Indian question and the resolution adopted at the 1st GA left room for doubt that the ‘relevant provisions of the Charter’ constituted international obligations. The resolution, therefore, amounted to intervention in SA’s domestic affairs.

in tone. It called on the Union to bring its legislation into conformity with the principles of the Charter. This text undoubtedly amounted to interference.

Georges Kaeckenbeeck, a legal adviser on Belgian delegations to UNCIO and the GA, accused the 1<sup>st</sup> GA of a lack of faith in the law, when it went so far as to avoid appealing to the ICJ for an interpretation of Article 2(7). The SA-Indian dispute, he said, had provided a good example of how, although the ICJ was ready to function and had no work, the GA had failed to follow the judicially correct procedure under international law. SA had requested an advisory opinion and Kaeckenbeeck believed that clarity on that article was essential. *‘Si nous avons un pouvoir quelconque...ce pouvoir résulte de la Charte, et nous ne le possédons que dans les limites dans lesquelles la Charte nous les confère.’*<sup>23</sup> The ICJ was the appropriate forum to interpret the Charter.

## 2.2 2<sup>nd</sup> General Assembly

### 2.2.1 Prelude

The Secretary-General conveyed the text of GA Res. 44(I) on the treatment of SA Indians to both governments in a letter dated 21 January 1947. India replied on 24 April 1947 that it was fully prepared to act in accordance with the terms and spirit of the resolution and offered to co-operate with SA. During the next two months both governments corresponded on the ‘subject of implementing the Assembly’s resolution’ and sent the Secretary-General copies of their correspondence.<sup>24</sup>

H.G. Lawrence, Minister of Justice, was appointed to replace Smuts as leader of the SA delegation to the 2<sup>nd</sup> GA in September 1947. A proposal was then under consideration that the Union enter into talks with India on the basis of the 1927 Cape Town Agreement. It was ‘conditional upon such discussions not resulting from an Assembly resolution’ as this would imply the Union’s recognition of the GA’s jurisdiction, while the legal issues

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23 G. Kaeckenbeeck ‘La Charte de San Francisco dans ses Rapports avec le Droit International’ *Recueil des Cours* I (ADI 1947) 113-320 at 139-140

24 *United Nations Yearbook (UNYB)* 1946-7 148

were not resolved. The SA delegation was accordingly instructed to delay seeking an ICJ advisory opinion. Considering the composition of the ICJ and the ideological approach of some judges, requesting an advisory opinion had its drawbacks. Not all judges would examine the case on legal merits alone. Only if the conditional offer to enter into discussions with India proved unacceptable, would the SA government consider the legal avenue.<sup>25</sup> Thus, arguing from different premises, both sides to the dispute had reached a tacit consensus that reference to the ICJ would not serve their needs.

That this was not clear at the time to all External Affairs officials appears from a memorandum prepared by J.R. Jordaan, a member of the SA delegations to UNCIO and the GA. He suggested earlier that SA propose an amendment to Article 96 of the Charter, which would extend the right to request an advisory opinion from the ICJ to all states members of the UN or the Specialized Agencies. 'If the rule of law is an objective of national policy in civilized nations', he submitted, 'it should *a fortiori* be so when any instrument limiting national sovereignty' governed relations between states and international organizations.<sup>26</sup> Members should be able to test the extent to which they surrendered national sovereignty when becoming party to the Charter. The memorandum was submitted to the Prime Minister who, noted Forsyth in the margin, did not favour it.

In September 1947 India and SA submitted reports to the Secretary-General, India in accordance with paragraph 3 of GA Res. 44(1), SA without prejudice to its stance on domestic jurisdiction. India cited Smuts as having said that the resolution had been adopted through ignorance and a 'solid wall of prejudice' against the SA government's policies and that the refusal of his request for an ICJ advisory opinion had been unfair. India also reported that the SA leader of the Opposition had moved in Parliament that the Union should not discuss its internal measures with the Indian government and should withdraw Indian parliamentary representation. Dr. Malan had proposed the creation of a

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25 PM 136/2/8 vol. 1

26 PM 136/1/1 vol. 2 14 July 1947. The Minister in Washington, G.P. Jooste, later Secretary for External Affairs, made a similar suggestion in 1949 in a letter to the Prime Minister. The UN should, he felt, be obliged when requested by a state to refer any question of competence to the ICJ. Malan was no more persuaded than his predecessor to carry this suggestion further.

bipartisan committee to consider a general colour policy 'based on the principle of separation of Europeans and non-Europeans politically, residentially and, as far as practicable, also industrially, and to be constructive and equitable in respect of the specific interests of each population group'.<sup>27</sup>

The Opposition motion was, the Indian report continued, defeated and replaced by one expressing conviction 'that a conciliatory policy is best calculated to conduce to the peaceful and co-operative progress of South Africa as a whole and to the goodwill of world opinion generally'. In the Senate, it said, Smuts had opposed a motion from Senator Basner, a Native Representative, calling for a national convention of all races, whose findings would be submitted to the UN, which in turn should be asked for political and material aid. In Smuts's counter-proposal, the Senate reaffirmed its belief in the UN, 'based on the principle of the San Francisco Charter'.<sup>28</sup> India appended the correspondence between Smuts and his Indian counterpart, Pandit Nehru, culminating in Nehru's note that no common basis for negotiations had been found. India had insisted on the GA resolution serving as the basis for discussions. SA had responded that this would have the effect of making it admit to a breach of treaty obligations and a violation of the Charter, both of which it denied. Neither would budge.

The SA report pointed out that much of the legislation complained of was passed before the 1927 agreement. All of it, with the exception of the Asiatic Land Tenure and Indian Representation Act of 1946, was in force before the adoption of the Charter. Acceptance of the GA resolution implied that prior Acts still in force could violate treaties adopted afterwards.<sup>29</sup> The report renewed Smuts's references to human rights. 'The Charter concerned only fundamental human rights and did not invalidate all distinctions based on race, sex, language or religion.' SA did not believe the GA condemned any country that distinguished between people on the grounds of race, sex, language or religion. These

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<sup>27</sup> A/373 2 September 1947. Later in Pretoria Smuts was quoted as denouncing the UN as a body dominated by people of colour. This may have been his first public reference to the racial composition of the UN. Eric Louw would go further on his return from the 3rd GA and the problem would loom ever larger as new members were admitted.

<sup>28</sup> *Ibid.* The SA delegation reported that Senator Basner appeared to act in New York as an adviser to the Indians at the UN.

distinctions could not be abolished ‘without jeopardizing the natural development, if not the survival, of the races concerned, especially the less advanced races’.<sup>30</sup>

### 2.2.2 *GA fails to agree*

The 2<sup>nd</sup> GA included the Indian item on the agenda and referred it to the First Committee, where the debate took place in the light of GA Res. 44(I) and the reports the two governments had submitted during September 1947. From the outset each side held to its initial position, India saying SA had not brought any new arguments. SA had mentioned in its report that, on gaining independence, Hindus and Moslems had split into two separate countries, India and Pakistan. Mrs. Pandit dismissed the remark as irrelevant. ‘It might’, she said, ‘be admissible if South Africa would agree to partition into one or more dominions on a racial basis. That might well offer another method for the harmonious development of different racial cultures (my emphasis).’<sup>31</sup>

For SA, Lawrence said that the Union’s problems were misunderstood. There was no question of racial superiority or inferiority. The system recognized the right of Europeans and non-Europeans alike, ‘to maintain [their] own ethos and to develop [their] own characteristic potentialities in co-operation and harmony with the other races’.<sup>32</sup> The Pakistani representative commented that Indians had made more progress in SA in 50 years than in India in 500. If ‘the Indians had managed to assimilate Western civilization so rapidly, what need was there for continuing discriminatory measures’?<sup>33</sup>

India proposed a draft resolution which, in essence, amounted to a repeat of GA Res. 44(I). However, it contained a clear provocation by expressing regret at the SA government’s refusal ‘to accept the implementation of the resolution of the General Assembly dated 8 December 1946 as a basis of discussion with the Government of India,

29 A/387 15 September 1947; *UNYB* 1947-8 54

30 Malan and Louw made the point later but such positive discrimination was hardly compatible with the argument that separation was essential to preserve Western civilization in Southern Africa. Since apartheid was not believed to benefit other racial groups, both arguments would work against the SA case.

31 GAOR 2nd sess. 1st Cttee SR 469

32 *Idem* 473ff. It was a valid argument from the SA government’s vantage point, but no other delegation would associate itself publicly with the SA view of discrimination.

33 *Ibid.*

and at its failure to take any other steps for such implementation'. After the provocative paragraph was deleted, the First Committee adopted the amended draft by a simple majority. A resolution proposed by Belgium, Brazil and Denmark that the ICJ be asked for an opinion was rejected.<sup>34</sup> SA did not comment on this proposal. When the debate transferred to Plenary, Brazil submitted a draft resolution, which it co-sponsored with Cuba, Denmark and Norway, calling on SA and India to continue their efforts and to submit the dispute to the ICJ if they failed to reach agreement. SA stressed that it sought a settlement but not on the basis of an admission of guilt. Hence it could not support the draft resolution proposed by the First Committee. If no resolution were passed, that is if there were no requirement that GA Res. 44(I) form the basis of talks, the way would be open to agree on the basis for future discussions. SA was, however, ready to vote for the joint Brazilian draft. India refused to alter its stance; it rejected the joint draft, which it called an invitation to SA to take no action, making recourse to the ICJ inevitable.

Neither the Indian nor the Brazilian resolution achieved a two-thirds majority in Plenary. India then submitted another slightly less provocative proposal asking the two governments to hold round table discussions and to report on them to the Secretary-General, who would in turn report to the next GA. SA, supported by the UK and the US, argued that the matter had been disposed of. After some discussion India decided to withdraw the new text and the 2<sup>nd</sup> GA adopted no resolution. This enabled Lawrence to tell Parliament rather disingenuously that the SA slate was 'clean' at the UN.<sup>35</sup>

### 2.2.3 *Analyses of 2<sup>nd</sup> GA*

Jordaan ascribed much of the Union's success to the unease many delegations felt about the previous year's resolution. SA gained much credit for its decision not to attack India over the racial disturbances between Hindus and Moslems that had occurred there before and after independence. Behind the scenes talks were held between the SA and Indian delegations. They broke down and the news was leaked but the fact that they occurred indicated SA's desire to reach a settlement. Although he reported that many delegates felt that, had India's legal case been strong, it would have accepted an advisory opinion,

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34 A/C.1/267

Jordaan insisted that none of them accepted arguments from SA in favour of discrimination.<sup>36</sup>

He said that New Zealand and Australia took a different line. ‘You people,’ Sir Carl Berendsen of the former told him, ‘have been in the dock on two successive occasions. On each occasion you expect your friends to rally round you, without you yourselves doing anything about settling the dispute with India.’ A US delegate had gone further. The GA’s failure to adopt a resolution might benefit SA but damaged the UN. The pendulum had swung in SA’s favour. The US was content with the result only because it had faith in the Union government. ‘But you have to justify that faith...and if next year you arrive here with the matter still unsettled, you may tell your Government that they should not rely on any American support.’ This, Jordaan thought, was the view of many delegations. G.P. Jooste, then a senior External Affairs officer in Pretoria, to whom Jordaan’s report was addressed, agreed and passed it to the Secretary with an annotation that the government would have to take note of what Jordaan had said.<sup>37</sup>

On 30 April 1948, shortly before the general election, Dr. L.C. Steyn, who acted as legal adviser to the SA delegation, addressed the Jurist Society of the University of Pretoria.<sup>38</sup> He explained that in 1946 the Union government had been charged with discriminating against SA Indians in breach of an alleged obligation under the Charter to draw no racial distinctions. SA claimed domestic jurisdiction. It pleaded that the rights in the Charter did not cover all forms of racial discrimination and were still undefined. The charge raised legal issues. These should be referred to the ICJ but the GA preferred to make its own decision and called for joint discussions in terms of treaty obligations and Charter provisions. As the GA’s powers were limited, *‘[kon] die aanbeveling dus geen nuwe regsverpligting skep nie’*. The UN, where these charges were brought, had 57 members, of whom only the 15 countries of the old Commonwealth, the US and Western Europe

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35 *House of Assembly Debates* Vol. 68 1948 col. 5675

36 PM 136/2/8 vol. 2 Jordaan to Jooste 20 December 1947. Jordaan said the Pakistani speech had helped to counter the Indian allegations but he played down its critical aspects.

37 Clearly the report was buried when the National Party came to power.

38 L.C. Steyn ‘Suid-Afrika en die Verenigde Volke’ 1949 *THRHR* 1-18 provides a clear exposition of official SA thinking prior to the victory of the National Party at the polls.

could be considered a group into which SA fell. The others were either Communist, people of colour, or mixed as in Latin America. The Indian item gave them all an opportunity to attack SA's racial policies. They were impervious to explanations, perceiving references to differences as an insulting symptom of white supremacy. Reasons considered irrefutable in SA, such as different levels of civilization, the need for a Christian Western philosophy, avoidance of racial friction *et cetera*, fell on deaf ears.

However, Steyn conceded, criticism of the Union was not solely based on opposition to Western domination of non-European regions. It was part of a wider reaction against the rape of human rights in general during the recent past. '*Aan die Jode in Europa bv. is daar daadwerklik geen bestaan gegun nie. Daar is rede om te glo dat hulle stelselmatig vernietig is.*'<sup>39</sup> The world was still in the grip of Roosevelt's four freedoms, freedom of speech and expression, freedom of religion, freedom from want and freedom from fear. Emotions ran high at the UN, as they did for any kind of idealism. It was impossible to defend SA in such circumstances, or to convince fellow delegations that the UN was not competent to deal with these complaints. The non-Western world was closing its ranks against exploitation. SA's racial problems could no longer be locally circumscribed.

### **2.3 National Party assumes power**

In May 1948 the United Party was defeated at the polls and the National Party under Dr. D.F. Malan assumed office on the platform of apartheid. Field-Marshal Smuts, now leader of the Opposition, asked Malan in Parliament how the government would approach the forthcoming session of the GA in Paris.<sup>40</sup> On the Indian issue Smuts commented that the introduction of the Indian Bill, which would have the effect of repealing the political representation of Indians in SA, would be seen as an act of defiance.<sup>41</sup> His administration had stressed repatriation rather than their right to vote. The Prime Minister replied that there was little difference between the parties on the

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39 *Idem* 15. The point was important and he went into detail but it seems strange that it had to be spelt out to that audience as late as 1948.

40 *House of Assembly Debates* Vol. 64 31 August – 2 September 1948 cols. 1270-1487

41 Adopted as Asiatic Laws Amendment Act 47 of 1948

Indian item. He had been Minister of the Interior at the time of the original discussions in 1927 and had drawn up the documents concerned himself. They had been based on reducing the immigrant Indian population and on how India could assist with their repatriation. The Cape Town Agreement, providing for a five-year suspension of new legislation, had been described as an experiment. Measures proposed at that time were to be communicated to India to give it a chance to make representations. His administration was again prepared to hold a round-table meeting with India, provided there was no question of interference in SA's domestic affairs.

J.H. Hofmeyr remarked that Dr. T.E. Dönges, now Minister of the Interior, had stated that no domestic matter would be discussed with another government. Yet in the communiqué issued after the 1927 meeting in Cape Town the government had agreed to a round-table conference to explore 'all possible methods of settling the Indian question in a manner which would safeguard the maintenance of Western standards of life', not just repatriation. On what basis, Hofmeyr asked, would a new conference be held? The Prime Minister replied that the initial discussions on domestic matters had been minor; steps to improve the lot of the Indians were taken because they were necessary, not because they were mentioned in the agreements. Because India had failed to assist with repatriation, the basis of the Cape Town Agreement had petered out; it was no longer in operation.

## **2.4 3<sup>rd</sup> General Assembly**

### *2.4.1 Prelude*

Before the 3<sup>rd</sup> GA, the first part of which was held in Paris, India wrote to the Secretary-General to say that as SA had not changed its discriminatory legislation or practices, the GA should take appropriate action in terms of Articles 10 and 14 of the Charter.<sup>42</sup> India therefore asked that the treatment of SA Indians be included on the provisional agenda. The UN Secretary-General, Trygve Lie, expressed surprise that India had renewed its

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42 A/577 12 July 1946. Arts. 10 and 14 form part of Chapter IV of the Charter, which defines functions and powers of the GA. They are quoted in Appendix III.

complaint: ‘Unless, however, parties to dispute agree otherwise, matter is bound to be considered in Assembly and duly exploited by Soviet and other unfriendly powers.’<sup>43</sup>

E.H. Louw, the new Minister of Economic Affairs and of Mines, was appointed to lead the SA delegation. Just before leaving for Paris to attend the session, he wrote to the Prime Minister that SA should not allow itself to be put in the accused box again. ‘*Wat by die nie-blanke tel, en deur hom uitgebuit word, is die feit dat die meerderheid van die lede-state teen ons gekant was.*’ Since the Soviet bloc and a few white states would join the non-white and mixed states, a majority of members would always oppose the Union’s case. Louw said he would avoid the mistakes of his predecessors and refuse to discuss domestic policy, *a fortiori* because India had expanded its complaint to embrace the treatment of ‘Asiate’ and ‘nie-blankes’. He confessed that Smuts and Lawrence had already used up all the arguments; there was little to add (my emphasis).<sup>44</sup> It would be enough to deny the competence of the UN outright. Furthermore, SA should oppose any reference to the ICJ. The Indian complaint raised emotionally charged racial issues. ‘*Selfs ‘n “regverdige” regter sou dit moeilik vind om homself “los te maak” van sy inherente liberalistiese gevoelens.*’ Before a bench of all races and nations, SA would lose its case before a word was spoken.

#### 2.4.2 Louw asserts domestic jurisdiction

SA objected in both the General Committee and in Plenary to the inclusion of the Indian item. Louw’s decision to speak in the latter had not had the full support of his officials but, thinking the First (Political) Committee would argue that the jurisdiction issue had been decided if he had failed to raise it, he went ahead. His delegation had not prepared a formal statement for Plenary but Louw claimed there that the item not only impacted on SA’s internal situation; it could also affect its relationship with the UN. He alerted the President of the GA, Dr. H.V. Evatt of Australia, whom he described as somewhat difficult, even boorish, that he would ask for a ruling. Evatt ruled that the jurisdiction

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43 PM 136/2/11 vol. 1 tel. 431 Oppositely London to SEA 3 August 1948

44 PM 136/1/1/2 vol.1 undated letter *Hooggeagte dr. Malan*. The political argument was clearly weak, while neither administration had faith in the ICJ as an independent, objective or impartial legal forum. The options were becoming limited.

issue could be raised in committee. Louw acquiesced and reported to Malan that the separation of the legal and political issues put him in a more advantageous position. He considered it a victory.<sup>45</sup>

In the General Debate, Mrs. V.L. Pandit of India, called racial discrimination a continuing risk. Louw, she recalled, had complained the previous day of the poisoning of relations between Europeans and non-Europeans and the misuse of the forum provided by the GA. 'When a Member State...spoke of the basic principles of the Charter being violated', she replied, 'one was entitled to ask whether a policy of racial segregation, pursued without the least regard for every one of those basic principles, of restrictive laws and measures affecting the political and economic rights of certain races, was in keeping with the Charter'.<sup>46</sup> In a moderate, relatively pro-Western statement Pakistan expressed the hope that the SA racial problem would be solved 'on the basis of respect for human rights and fundamental freedoms for all the peoples of that great Dominion without distinction as to race, colour or origin'.<sup>47</sup>

When Louw realized that the GA was likely to adjourn before discussing the Indian issue, he wrote that he would strongly oppose adjournment. The impact of the Indian attack on Hyderabad would have faded when the session resumed in New York, which was probably why India did not seem anxious for an early debate.<sup>48</sup> Louw expressed concern that the GA might refer the issue to the ICJ for an advisory opinion. *'My mening is dat ons dit moet probeer vermy, eerstens omdat die hele saak dan sub judice is, en die uitvoering van ons beleid in Suid-Afrika sal belemmer; en tweedens voel ek glad nie so seker oor die uitspraak van die Internasionale Hof nie, wat in groot mate 'n refleksie is van die VVO self.'*<sup>49</sup>

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45 PM 136/2/11 vol. 2 Louw to Malan 31 October 1948

46 GAOR 1st part 3rd sess. Plenary 113-114

47 *Idem* 212-213. The Pakistani representative was Sir Mohammed Zafrullah Khan, later a Judge on the ICJ: a new state, Pakistan was less used to international organization diplomacy than India in 1948.

48 India successfully attacked the Nizam of Hyderabad on 13 September 1948 in contravention of a standstill agreement the previous November, the Nizam having refused to join it or Pakistan after partition.

49 PM 136/2/11 vol.2 Louw to Malan 29 November 1948

The GA did hold the Indian item over and returned to it in New York.<sup>50</sup> Louw recalled that he had already objected to its inclusion in Paris, as it was an essentially domestic matter upon which the GA was not competent to decide. Having made a mistake before, the GA should not perpetuate its error. The UN's authority was derived from the Charter. By discussing the matter on two previous occasions, Louw said, it had exceeded the powers prescribed in Articles 10 and 14 as qualified by Article 2(7). It could not enlarge these powers by disregarding the provisions of the Charter and risk disturbing friendly relations between states. Not only was the fundamental principle of sovereignty at stake, it was a matter most vital to his country's interests. Since the smaller powers did not have the protection of the veto, the most they could rely on was a strict interpretation of Article 2 (7) of the Charter.<sup>51</sup> The GA President repeated that SA could raise the question of competency in the First Committee; it would then be put to the vote under Rule 110 of the GA Rules of Procedure.<sup>52</sup> Louw said he was satisfied.

India argued that precedent countered the SA objections on Articles 10 and 14 of the Charter concerning the powers of the GA. As for the applicability of Article 2(7), intervention had a specific connotation which the GA, acting under Article 14, did not contradict. The term 'domestic jurisdiction' had not been defined. Although the manner in which a state treated its nationals had formerly been a matter for its sole discretion, 'there was at present a growing sensitivity of the collective conscience of mankind and the idea of human rights was on the march'. Louw riposted that Article 2(7) overrode both Articles 10 and 14.

No formal proposal to delete the item was made; it was included on the agenda and assigned to the First Committee, where Louw raised the question of competence under Rule 110 of the Rules of Procedure. India replied that the President of the GA had not indicated that competence took priority over substance, to which SA responded that it

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50 GAOR 3rd sess. 2ndpart Plenary 221-225

51 He was overstating his case here, as the forum involved was the GA, not the Security Council.

52 Rule 110 provided that 'any motion calling for a decision on the competence of the General Assembly or the Committee to adopt a proposal submitted to it shall be put to the vote before a vote is taken on the proposal in question'.

would be illogical if the committee were to assume competence and discuss the substance before considering the procedural aspect. In any case India had set out the substance of the issue for all to read in its letter to the Secretary-General. On the precedent of the two preceding GA sessions, the First Committee approved India's view that it could discuss the substance of an issue before voting on competence.

It was the UN's first opportunity to consider the issue after the advent of the National Party and the introduction of the policy of apartheid. This alone would have complicated the debates but there was another equally compelling factor. On 10 December 1948, the GA had adopted a declaration containing its definition of human rights and fundamental freedoms. It would no longer be possible for a SA delegation to argue that these rights had not been defined; it could only claim that, as an annex to a GA resolution, the Universal Declaration of Human Rights (UDHR) amounted to a recommendation that was not enforceable against member states.<sup>53</sup>

SA's case was further complicated by the appearance, at the end of 1948, of a doctoral thesis by C.B.H. Fincham, a SA diplomat. Fincham asserted that the loose and ambiguous wording of Article 2(7), its inherent conflict with the spirit of the Charter and the rules of voting in the various organs, which had either to uphold or reject it, meant that the 'domestic jurisdiction clause [was] tending to become a dead letter'.<sup>54</sup> He described the preparatory work at UNCIO as an uncertain guide, since delegations appeared to have had different things in mind when discussing the domestic jurisdiction rule. He found, therefore, no evidence that the subsequent practice of the UN was in conflict with any defined Charter principle. He thought in fact that events proved the soundness of the Lauterpacht view that the 1<sup>st</sup> GA was right not to refer the SA/Indian

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<sup>53</sup> The preparation and adoption of the UDHR are discussed in chapter 3.

<sup>54</sup> C.B.H. Fincham *Domestic Jurisdiction: The exception of domestic jurisdiction as a bar to action by the League of Nations and the United Nations* (LLD Thesis University of Leiden 1948) 184. Fincham submitted his thesis when in Den Haag as a Third Secretary at the SA Embassy. Research began during the Smuts administration but was completed under the Malan government. He did not refer to the impact of the UDHR on domestic jurisdiction, although he defended his thesis within a week of its adoption. His conclusions even so contradicted those of the government he represented and continued to represent for some 30 years.

dispute to the ICJ, as UN practice would strengthen the Court's hand in a future ruling. Fincham commented that 'there could be no clearer guide to the state of international relations than the consistent manner in which the organs of the United Nations have construed the domestic jurisdiction clause in favour of their own competence'.<sup>55</sup> Fincham's views were often quoted in support of the Indian case.<sup>56</sup>

During the First Committee debate, India claimed that with its apartheid policy the new SA government had set out to 'exceed all previous racial persecution and discrimination'. India said Dr. Malan had stressed during the election that if the non-Europeans were able 'by virtue of their numerical supremacy, to enjoy education, social security, the right of trades unions, the right to strike, political equality and to carry arms, they would govern the country and force the Europeans to leave, as had happened in India'. The National Party election manifesto had said that Indians were foreigners who should be repatriated. On the legal aspects, India reiterated the human rights obligations in the Preamble and various articles of the Charter, culminating in the undertaking contained in Article 56 to co-operate in the achievement of those rights and the adoption on 10 December 1948 of the UDHR. In terms of GA Res. 44 (I), it insisted, the GA was bound to take action to ensure that SA treated Indians settled there in conformity with the Charter.<sup>57</sup> India submitted a draft resolution calling for the appointment of a commission composed of representatives of three UN member states to study the question and report its findings to the 4<sup>th</sup> GA.<sup>58</sup>

Apart from pointing out errors of fact, Louw restricted his reply to claiming domestic jurisdiction. He denied the existence of a dispute and refused to acknowledge the

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55 *Idem* 165

56 See e.g. M.S. Rajan *The United Nations and Domestic Jurisdiction* (1960) 86-7. This book covers the first ten years of UN practice and is probably the most extensive study of the question of domestic jurisdiction during the organization's early years. Rajan is recognized as a leading proponent of the dynamic (teleological) theory of interpretation.

57 GAOR 2nd part 3rd sess. 1st Cttee. SR 254-255. The last assertion defied Art. 2(7); the GA could do no more than make recommendations.

58 A/C.1/461/Rev.1

existence of any prior agreement between SA and India.<sup>59</sup> The San Francisco debates, he claimed, supported his thesis, as did the Goodrich and Hambro view that the UN could not make recommendations on matters of domestic jurisdiction.<sup>60</sup> The founders of the UN had realized the dangers inherent in interference in domestic affairs of member states. SA should be allowed to solve its multi-racial problems by itself on the basis of local conditions. Resolutions designating SA the guilty party were counter productive. Louw proposed that the GA be asked to find that, as the matter fell within SA's domestic jurisdiction, it was not competent to consider the Indian complaint. Only five delegations voted in favour. The Indian resolution was then approved. As it failed to obtain a two-thirds majority, the First Committee considered a Franco-Mexican amendment inviting the three governments, Pakistan being the third, to hold a round table conference 'taking into consideration the purposes and principles of the United Nations Charter and the Declaration of Human Rights'.<sup>61</sup> This was overwhelmingly adopted. Australia alone voted with South Africa, to protest the reference to the UDHR.

China was concerned that actions against Indians applied to Chinese in SA as well. It accepted SA's interpretation of Article 2(7) but could not agree with the assertion that the GA was precluded from discussing such issues and making recommendations. France expressed serious doubt that the GA was competent to hear the complaint. Whatever resolution was adopted, it could not implicitly condemn SA. France had in concert with Mexico again submitted one designed to bring the two parties into agreement. The text contained no criticism of the states involved nor did it ask them to report back to the following GA session. India said that it sought a practical solution and would accept the Franco-Mexican draft.

It was left to Haiti to make the essential point that SA could no longer argue that it did not violate human rights established by international usage. The argument 'might have

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59 GAOR 2nd part 3rd sess. 1st Cttee. SR 255-256

60 L. Goodrich and E. Hambro *Charter of the United Nations, Commentary and Documents* cited by E.A. Gross in the *State Department Bulletin* 29 February 1948 259: 'What [Art. 2(7)] means is that the Organization shall not exercise any authority, not even make recommendations of any kind with respect to any matter "essentially within the domestic jurisdiction" of a state.' They revised this opinion in the 3rd edition of the book.

been valid before the adoption of the UDHR on 10 December 1948; since that date it could no longer be adduced'.<sup>62</sup> Louw countered that the UDHR was no more than a declaration; it did not justify interference in domestic affairs, nor was it a part of that Charter to which SA hoped to return the UN. He called for a roll call vote on the Franco-Mexican text and was alone in opposition. The Soviet bloc abstained, presumably to avoid jeopardizing its position on domestic jurisdiction.

## 2.5 Round table conference

In London in the meantime Dr. Malan and Pandit Nehru had had private meetings at the Commonwealth Prime Ministers' Conference, where SA had supported India's request to remain a member despite becoming a republic. Their talks led to negotiations towards a round table conference including Pakistan. Hence the Indian complaint was not considered at the 4<sup>th</sup> GA at the end of 1949.

On 20 February 1950, Dr. T.E. Dönges, Minister of the Interior, made a statement in the House of Assembly to supplement a joint communiqué on the preliminary conference with India and Pakistan. The matter was one of domestic jurisdiction, to be settled by SA alone but it could invite cooperation from countries having an interest. This approach, by necessary implication, 'leaves the complete freedom of legislation in this regard untouched'. The parties recognized the existence of an Indian question and differed on its solution. They had adopted a formula wide enough to embrace both SA's view that a permanent solution must be consistent with the maintenance of the 'European way of life' and the discussion of any suggestions the other two might submit.<sup>63</sup> This agreement was referred to as the Cape Town formula.

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61 A/C.1/462/Rev.1 11 May 1949

62 GAOR 2nd part 3rd sess. 1st Cttee. SR 449-452. Smuts's concession had come back to haunt the SA delegation.

63 *House of Assembly Debates* Vol. 70 cols. 1569-71 20 February 1950

On 15 June 1950 the Prime Minister confirmed that he had received a telegram from India in answer to the SA government's advice that a Group Areas Bill had been submitted to Parliament. India alleged that no reference had been made to the passage of the bill at the preliminary conference. SA had informed the Indian delegation outside the meeting that it 'intended to remove discrimination against any community by providing the same conditions for all' but, had India known what was in prospect, it would have emphasized the grave damage to the prospects of a conference. The Prime Minister said SA had replied that, by giving prior warning to India's delegation of a bill to do away with alleged discrimination while the preliminary conference was in recess, it had shown the urgency of the matter. The effect of the new Act, when adopted, would be to provide separate areas for different race groups 'for the purpose of removing the danger of friction which the existing residential juxtaposition constitutes in our multilateral (sic) population'. At no time had India objected to domestic jurisdiction; it could raise any matter within the agreed formula.<sup>64</sup>

## 2.6 Group Areas Act

On 10 June 1950, India advised the Secretary-General that the projected Group Areas Act<sup>65</sup> would entail further discrimination. Negotiations could not continue. Pakistan withdrew for similar reasons and the item was re-inscribed on the agenda of the 5<sup>th</sup> GA, to which Dr. Dönges led the SA delegation. In the *Ad hoc* Political Committee,<sup>66</sup> he immediately raised the issue of competence. His detailed legal arguments, frequently interrupted by India, followed a familiar pattern.<sup>67</sup> The relationship between a state and its nationals including their treatment, he claimed, fell under its exclusive domestic jurisdiction, subject only to treaty obligations. Article 2(7) reinforced that right. The UDHR neither superseded Article 2(7) nor warranted intervention. It created no legal obligations. Individual rights had different meanings for different states, he asserted. Panama had submitted a declaration at UNCIO but it had been rejected. 'San Francisco

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64 *Idem* 73 cols. 9053-9057 15 June 1950

65 Adopted as Act 41 of 1950

66 Specific political items were referred to this committee to relieve the pressure on the First Committee.

67 PM 136/2/18 vol. 1 and Press Release PM/2045 14 November 1950

did not want to have human rights defined in its Charter.’ As no unanimity existed on this controversial topic, no obligations were imposed.

Jurisdiction, Dönges continued, could not be extended by arbitrary action outside the formal amendment prescribed by Article 108 of the Charter. ‘What is *ultra vires* does not become *intra vires* by mere repetition, especially when it had been so regularly challenged.’ The non-observance of Article 2(7) was a breach of the Charter. The evidence was overwhelming that the nations represented at UNCIO would ‘not have agreed to the enlargement of the functions and powers of the Organization...unless it contained the overriding protection and safeguard’ of Article 2(7). It had been the vital condition for SA’s membership of the UN.

SA denied that its willingness to enter into preliminary discussions with India was an admission of the UN’s competence. SA was under no obligation to resume negotiations as recommended by the 3<sup>rd</sup> GA but was ready to do so without prejudice to its stand on domestic jurisdiction. India, Dönges argued, had been aware of SA legislation when it agreed to the holding of the conference. Criticism of the Group Areas Act was unjustified. It was disingenuous of India to admit that it was aware of the purport of the bill as early as 8 February 1950 but not that ‘legislation was to be introduced before the Round Table Conference took place’. He repeated the assurance that no person, ‘whatever his race, colour or religion, was denied the basic rights and freedoms long recognized in international law and envisaged in the Charter: freedom of conscience, religion and speech’. There was no analogy with the complaint of violations of human rights in Bulgaria, Hungary or Romania, which were parties to treaties that could justify UN intervention.<sup>68</sup> India had apparently abandoned earlier allegations that SA was under treaty obligations. The Union, Dönges added, spent more per capita on developing social services among non-Europeans than any other power in Africa.

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68 See para. 7.2.2 for details. It was important for SA to make this legal distinction and to justify its vote on an issue with domestic jurisdiction overtones, without prejudicing its own case on the Indian question.

Syria discounted SA's arguments and proposed that the First Committee assert its authority, which it did by an overwhelming vote.<sup>69</sup> The debate was notable for an implicit threat that the GA's actions could affect relations between Asian and Western countries and between coloured and non-coloured peoples. Unless the UN defended the principle of human equality, its efforts in that field would be in vain.<sup>70</sup>

Two resolutions were introduced, the first a four-power document initiated by India which followed the usual line of reproaching SA. The second was a more moderate five-power text calling for a continuation of efforts to hold a round table conference. Various amendments were accepted, notably one by Cuba, which took advantage of the SA statement to assert that 'a policy of "racial segregation" (*apartheid*) is necessarily based on a doctrine of discrimination'. Calls were made for the suspension of the Group Areas Act. The five-power resolution was put to the vote first and adopted. India's resolution was withdrawn. In Plenary the committee's draft was approved on 2 December 1950 as GA Res. 395(V). Should the proposed round table conference fail, it recommended the appointment of a three-man commission, one member chosen by SA, one by India and Pakistan, and one by the two commission members or, in default of agreement between them, by the Secretary-General. All three governments were asked to refrain from measures prejudicial to the holding of a meeting, notably the enforcement by SA of the Group Areas Act. The usual references to the Charter and the UDHR were included.<sup>71</sup>

The permanent delegation to the UN, which SA had decided to maintain year round in New York, reported to Jooste, who now combined the posts of Ambassador to the United States and Permanent Representative to the UN, that only Australia and Greece had supported its domestic jurisdiction argument. Several delegations were impressed by the legal case Dönges had put forward but were reluctant to reverse past practice. A new

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69 A/AC.38/L.40

70 UNYB 1950 399

71 The resolution was open to the obvious objection, made by both SA and Australia, that it interfered in the internal policies and domestic legislation of a member state. India again pursued the tactic of appearing conciliatory by withdrawing a text it realized had little chance of success. The complainants had, in fact, succeeded in obtaining a draft that appeared more moderate but would prove as unacceptable as the previous resolutions. The debate might have seemed to soften but no one had given way. India had the weight of voting and of former resolutions on its side. SA could only hope the GA was becoming bored.

approach was needed. A few concessions from the Union, e.g. on the application of the Group Areas Act, might help to moderate the resolutions. Should the government not be willing to compromise, an outright condemnation could be expected sooner or later.

In a covering note to the report, Jooste said that he discerned a gradual swing of sympathy towards SA as the Indian government's policies were becoming less popular. However, this did not translate into positive votes. For example, in committee the US had opposed the inclusion in the five-power draft of a Cuban reference to SA's racial policy as being equivalent to discrimination. Subsequently the US had voted for the resolution in Plenary, explaining in private that it had had to yield to pressure from the Far Eastern division of the Department of State that the US was 'on trial in the Far East'. Jooste also ascribed the US *volte-face* 'to the unfortunate manner in which America is pandering to the unrealistic demands of the non-white races who have but recently emerged from foreign rule and who are extremely sensitive on the question of racial discrimination'. El Salvador had suggested privately that SA make the point that a country where human rights existed was under attack from those where they were ignored, but it was too optimistic to hope that SA would be immune from further attack on those grounds.<sup>72</sup>

On 7 March 1951, SA advised the Secretary-General that its government could not accept GA Res. 395(V) as a basis for a round table conference or the establishment of a three-member commission. 'These provisions constitute intervention in a matter essentially within the Union's domestic jurisdiction.' The government would adhere to the policy agreed upon in the preliminary talks and would continue negotiations on the premise approved in those talks as the Cape Town formula. India informed the Secretary-General that it could not negotiate on that basis, regretted the SA attitude and submitted the whole matter for 'such action as might be considered necessary'. Pakistan expressed regret that the Group Areas Act had been implemented, as this complicated the problem.<sup>73</sup>

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72 PM 136/2 AJ 1950 vol. 2

73 *Ibid.*

## 2.7 Calls for mediation

In its directive for the 6<sup>th</sup> GA, External Affairs envisaged three possible outcomes: a condemnatory resolution, a request for an ICJ advisory opinion or the establishment of an arbitration committee by the GA. It would be possible publicly to ignore the first, while privately putting India in a bad light. India's equivocal position over Korea, its handling of the Kashmir dispute and its refusal to accept the Cape Town formula provided opportunities. The SA delegation should endeavour to obtain the largest possible minority to oppose a resolution. The more extreme it was, the better, as a mild resolution passed almost unanimously would be unfortunate. Any move for an arbitration committee should be discouraged; SA could not bargain with such a committee as that would amount to abandoning its stand on Article 2(7).<sup>74</sup>

Of the three possible outcomes, the directive continued, a request for an advisory opinion from the ICJ was the most dangerous. Since the government's argument was a purely legal one, opposition to such a request would inevitably be seen as a tacit admission that the SA case had 'in fact no firm foundation in international law'. Smuts had proposed consulting it in 1946 but thereafter it had been felt that the debates had so prejudiced SA's case that an impartial decision was unlikely. 'This fact has not however been stated.' If the ICJ failed to uphold the SA stand, the whole basis of its argument would be seen to collapse. The delegation should let it be known discreetly that if the ICJ were to reject the protection offered by Article 2(7), the government might have to consider its continued membership of the UN (presumably in terms of the *rebus sic stantibus* rule).<sup>75</sup>

The delegation should not propose or oppose an appeal to the ICJ. All in all there was little purpose in rehashing old arguments. SA should simply state its objections in the General Committee and Plenary to inscription of the Indian item. It should take no part in the committee debate apart from registering a negative vote.

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<sup>74</sup> *Ibid.*

<sup>75</sup> Under the *rebus sic stantibus* rule, the Union would argue that the circumstances under which it had joined the UN, i.e. the protection of its domestic jurisdiction, had so changed as radically to affect its obligations under the Charter.

The SA delegation made a brief stand on domestic jurisdiction when the 6<sup>th</sup> GA adopted the agenda. India replied that, as the first recommendation of GA Res. 395(V) for a round table discussion had not been met, it remained to consider the appointment of a commission. Many delegations told SA that they hoped to dispose of the issue by providing for some form of open-ended mediation. Pakistan offered to try to amend the Indian draft, or even abstain, if it could have the assurance that the operation of the Group Areas Act would be suspended. SA merely indicated that it would not be provocative but could not prejudice its stand against negotiations based on a GA resolution.

The committee debates followed the usual pattern but the SA delegation felt that most speeches were milder in tone. India quoted an article in the *Johannesburg Star* of 21 December 1951 that there was nothing to discuss, as SA was only prepared to consider repatriation. So long as SA repudiated responsibility for SA Indians, the article read, 'it invites international meddling on their behalf; and it has to keep up the pretence of being willing to confer with others on matters that concern South Africa alone'. The alternative was to accept the Indian population with all its attendant responsibilities.

The shape of things to come appeared from the emphasis India gave to apartheid, which affected the native Africans to a greater degree than Indians, and from Haiti's statement that the conflict was not between the three parties but between SA and the UN. Haiti said the UN did not need the conclusions of science to realize that there was no inequality of races. The multiracial representatives in the GA were among the world's élite. 'Only a warped intelligence would claim to discern any difference in mental powers between [them].'<sup>76</sup> The statement made a strong impact, particularly on the developing nations.

India submitted a proposal, which was a virtual repetition of the previous year. It was amended to include some kind of mediation and a call for the suspension of the Group Areas Act. Only SA and Australia opposed. As SA did not attend the discussion in Plenary, Australia switched its vote to an abstention while maintaining its insistence that

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76 GAOR 6th sess. Plenary 329-340

the UN was not competent to intervene. ‘I do not think,’ wrote Jordaan, ‘that any Delegation had any illusion that the Union Government would act on the resolution.’<sup>77</sup>

## 2.8 Good Offices Commission

At the 7<sup>th</sup> GA the usual argument over inscription took place, only SA opposing. India succeeded in having the apartheid policy included in the agenda, while retaining the item on the treatment of Indians in SA as a separate issue.<sup>78</sup> The two would continue in tandem for several sessions. The SA delegation described the debate in the *Ad hoc* Political Committee as extremely moderate. It wondered whether India’s decision to be non-provocative was activated by the belief that others would not follow its example.<sup>79</sup> SA played heavily on India’s insincerity. When its own interests were at stake, as when it was criticized about Hyderabad, India was just as jealous of the protection offered by Article 2(7). Its Deputy Prime Minister, Sadar Patel, had said in Bombay in October 1948 that his government would reject such interference ‘even if it involved the end of India, the end of Pakistan and the end of the world’. After such a statement, SA asked, why meddle in the domestic affairs of others? SA was not prepared to submit the matter for settlement under the UN Charter. Neither could SA be required to give effect to GA resolutions. Most were drafted in a spirit of condemnation and only toned down at the instance of other delegations.

India introduced a resolution co-sponsored by fourteen Afro-Asian and Middle East states, requesting the establishment of a Good Offices Commission, which would report to the 8<sup>th</sup> GA. The draft called on SA to suspend the enforcement of the provisions of the Group Areas Act, and retained the standard clause of earlier resolutions that the negotiations should be conducted in the spirit of the Charter and the UDHR. SA was alone in opposing the draft resolution but it indicated willingness to continue negotiations outside the UN framework. Such negotiations ‘would not be related to resolutions passed

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77 PM 136/2/14 vol. 3 12 March 1952

78 See para. 8.1.1.

79 PM 136/2/19/1 vol. 1 Progress Report and Press Release issued by the SA delegation. An explanation of India’s moderation may lie in the possibility that, since apartheid was also under discussion, it preferred to be seen as conciliatory over issues in which it was directly involved. It could then make a stronger effort on items where it was less vulnerable to a *tu quoque* attack.

by this organization or any action taken here, [but] would permit of a full and free, and unfettered, discussion of all aspects of the matter'.<sup>80</sup> Plenary approved the Committee's draft and the Good Offices Commission was established.<sup>81</sup>

## 2.9 Curb on Indian immigration to South Africa

On 10 February 1953 Dr. Dönges advised the House of Assembly that a concession arranged in 1913 between General Smuts and Mahatma Gandhi, whereby one wife of an Indian domiciled in SA and her minor children could be granted entry to the Union,<sup>82</sup> would be withdrawn with immediate effect. The ratio between the two sexes had reached a state of balance so that the arrangement was no longer applicable. Standard immigration regulations would apply once the necessary legislation was adopted. The population register would be made applicable to Indians to control illegal immigration.<sup>83</sup> On 9 March 1953, India protested to SA that this action was in conflict with the 'Reciprocity Resolution' adopted by the UK Imperial Conference in 1918 (which more or less reiterated the content of the 1913 agreement) and amounted to a unilateral breach of the Cape Town Agreement of 1927. Pakistan also regretted the action and confirmed that, under the Cape Town Agreement of 1927, it was 'obligatory to hold consultations with the other party with regard to any changes that experience may suggest'.<sup>84</sup>

India supplemented its protest to SA of 9 March 1953 with a complaint to the UN that group areas would shortly be proclaimed in various parts of SA and that the authorities had refused to react to a request from the Natal Indian Organisation (NIO) for more time

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80 PM 136/2/19/1 vol. 1 Address by Mr. G.P. Jooste to the *Ad hoc* Political Committee 7 November 1952

81 GA Res. 615(VII)

82 Immigrants Regulation Act 22 of 1913

83 In effect the new legislation amounted to a ban on further immigration from India or East Africa. SA feared that failure to curb it would be exploited by India to offload its excess population and aggravate an already difficult situation. The move may also have been intended to encourage voluntary repatriation.

84 PM 136/2 AJ 1952 8th sess. India's complaint was not fully founded. The 1921 Imperial Conference had confirmed the right of each Commonwealth member to control the composition of its own population but noted that Indians domiciled in other countries suffered some disabilities. It was desirable that such Indians should enjoy the rights of citizenship. SA had indicated that it was unable to accept the resolution in view of the exceptional circumstances in a great part of the Union. It should have been clear that the concession predated the Imperial Conference and was subject to amendment like any Act of Parliament.

to file objections. The proclamation would force some 63,000 Indians to abandon property in Durban for undeveloped land outside the city boundaries. The aim, according to the Natal Indian Congress (NIC), was to facilitate the expatriation of unhappy citizens 'or confine them to ghettos as a cheap source of labour'.<sup>85</sup> External Affairs passed this complaint to the Secretary of the Advisory Committee on Land Tenure, who denied that the NIO had tendered such a request. He said the NIO had in fact submitted representations timeously.<sup>86</sup> Proposals concerning rezoning had yet to be considered. The Group Areas Act applied to all racial groups and aimed at providing them with separate residential areas. Industrial areas would not be zoned for a long time.

While the dispute raged, the UN Good Offices Commission, composed of Cuba, Syria and Yugoslavia, approached the three governments on 23 March 1953 asking how it could assist. India welcomed the appointment in the hope of an equitable settlement. The stringent application of apartheid in education, it said, would separate Indians from coloureds. SA was entrenching apartheid, 'which in practice means the segregation of non-Europeans, the denial to them of their rights of citizenship and other human rights, and the deprivation of their very means of livelihood'.<sup>87</sup> SA refused to recognize a commission appointed under an unconstitutional resolution and Pakistan did not react. The Good Offices Commission reported that it was unable to carry out its mandate.

## **2.10 Relations with Pakistan harden**

Proceedings in the General Committee and Plenary followed the usual pattern at the 8<sup>th</sup> GA. Before the item reached the committee stage Jooste who led the SA delegation exchanged telegrams with Pretoria. He reported that the Pakistani representative, who seemed concerned that continued strife in the UN could impact negatively on the small Mohammedan community in the Union, had enquired whether it might be possible to do something in New York outside the UN. The Pakistanis offered to press the Indians for

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85 A/2473 14 September 1953 Appendix 1 letter to the Secretary-General 9 March 1953

86 PM 14/15/3 vol. 4. The SA authorities regarded the NIO as a relatively moderate group, with whom discussions were possible, while the NIC was held to be Communist infiltrated and closely involved with the Indian Government and the ANC. India's reference to the former was therefore unusual.

87 A/2473 14 September 1953

a moderate, non-condemnatory resolution, perhaps asking the Good Offices Commission to make a further effort. Pretoria replied that it might be a good idea to lobby the Arab group and try to drive a wedge between it and India but that private discussions on the merits with Pakistan alone would serve little purpose and might be open to misinterpretation. Intervention irritated feelings in the Union and, if the UN wanted to be objective, it would have to undo the damage such intervention had caused since 1946. Pakistan's most constructive approach would be to try to keep the debate within the bounds of propriety and prevent the UN alienating the parties even further.<sup>88</sup> As India was rumoured to be considering a softer line, Jooste proposed avoiding provocation and first seeing how the Indians acted. Malan expressed a preference for shelving the item. He was not opposed to discussions with the Pakistani delegation but negotiations were only possible between governments.

In committee, India called SA's new regulations on entry into the country inhuman, uncivilized and in contravention of the UDHR declaration on family rights. India did not wish to rule out the possibility of a change of heart by SA leading towards a solution in accordance with the Charter. It submitted a draft resolution 'aimed at achieving this purpose'. The text referred to all previous resolutions and, noting the Union's refusal to co-operate with the Good Offices Commission, regretted its failure to suspend the Group Areas Act and its submission of further discriminatory legislation not in keeping with the Charter and the UDHR. The commission should report to the next session 'together with its own views on the problem and any proposals which in its opinion might lead to a peaceful settlement'.<sup>89</sup> SA restated its view of Article 2(7), rejected the Indian allegations as false but refused to go into the substance. If India really sought a solution it had only to put a stop to its vilification. The draft resolution would exacerbate the differences between the two countries.

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88 PM 136/2 AJ1952 Directive for 9th sess.; PM 136/2/14 vol. 3 Report to Prime Minister 28 April 1954

89 White Paper *Treatment of Indians in Union of South Africa: Discussions and Proceedings at United Nations [September to November 1953]*– W.P.C./1954 G.P.S. 105070 – 5

The Pakistani representative then made what Jooste described in a report to the Prime Minister as the most irresponsible and poisonous speech of the debate. As his efforts to convince India had clearly failed, he had joined its campaign. Among his more telling comments were that he would be astonished if ‘ “faith in the dignity and worth of the human person” meant “apartheid”, “faith in fundamental human rights” meant “banning entry of wives and children”, “equal rights” meant “Group Areas Act” or that “promotion of social progress and better standards of life” meant “Asiatic Land Tenure Act”’. Pakistan had earlier said in the Security Council that a state’s domestic jurisdiction ‘(1) pertains to the affairs of the subjects and territories of that state, and (2) is a matter over which that state has powers of direct legislation’. That was not the case here. The ‘seeds of a hundred years war’ were being sown. However, Jooste commented, the Pakistani delegate’s remark ‘let there be a meeting under whatever auspices and under whatever compulsion their (*Suid-Afrika*) own conscience dictates to them, so long as there is going to be a meeting within the spirit of the Charter’ was interpreted as suggesting a settlement outside the UN. The suggestion embarrassed India which pressured Pakistan to intervene again to explain that there was no difference of opinion between their two countries.<sup>90</sup>

Towards the end of the debate, the leader of the Indian delegation, Krishna Menon, Minister of Defence, intervened to retrace the history of events. He alleged that the issue had never been one of domestic jurisdiction. The SA proposal for a meeting outside the UN was tantamount to saying that the Charter would ‘militate against the chances of a settlement’. Reference to the ICJ would serve no purpose, as SA would not accept its opinion. If the GA did ask for an advisory opinion, ‘it would invalidate its own resolution...and would create a precedent for referring every disputed issue to the Court’.<sup>91</sup> SA rejected Menon’s version of events concerning, *inter alia*, the 1918 reciprocity resolution, the Cape Town Agreement and the implementation of the Group Areas Act. The Union was still ready to participate in a conference in accordance with the Cape Town formula and would be prepared to amend its legislation in accordance with whatever unanimous decision might be reached. (Considering the gap between the parties, this was a disingenuous comment, which ran no risk of being put to the test.)

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90 PM 136/2/14 vol. 3 Jooste to Prime Minister Malan 28 April 1954

The roll call vote on the constituent paragraphs of the resolution revealed considerable hesitation by many delegations. Despite this, it was adopted as a whole overwhelmingly in both the *Ad hoc* Political Committee and Plenary as GA Res. 615(VII). Critics denied hostility towards the Union but felt that a major principle, the demise of racial discrimination, was at stake. Most believed that international obligations were involved and that attempts to mediate did not constitute intervention. (It can scarcely have been much solace to SA to know that even friendly delegations believed its policy was wrong.)

### **2.11 Efforts to resume negotiations**

In September 1954, the Good Offices Commission advised the Secretary-General that an official, direct approach to the parties was unlikely to succeed. Informal efforts had proved equally inconclusive. On 25 August 1954 it had asked the SA permanent representative to meet it 'in order to explore the possibilities for the implementation' of GA Res. 615 (VII). He had replied that his government regarded the resolution as illegal and did not recognize the commission. 'On account of the uncooperative attitude' of the SA government, the commission could not submit any new suggestions.<sup>92</sup>

The SA government's directive for the 9<sup>th</sup> GA remained unaltered except in respect of the holding of a round table conference. Menon's statement that 'even now the South African Government does not say that this is a matter exclusively within its domestic concern', had obliged SA to reconsider. It would resume talks but only on the understanding that the other two parties recognized that 'the Union's willingness to discuss the matter outside the United Nations cannot affect our juridical position'.<sup>93</sup>

At the 9<sup>th</sup> GA, the *Ad hoc* Political Committee adopted a resolution, approved without change by the GA, suggesting, in a paragraph on which SA abstained, that the three

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91 White Paper, see fn. 89.

92 A/2723 5 September 1954. According to PM 136/2AJ 1954 10th sess., the initial draft reply had contained a paragraph that the Union was not 'opposed in principle to conciliation in international disputes' but could not allow any intervention in its domestic affairs. The Prime Minister had rejected this statement, '*wat hy meen moontlik as afwatering van ons beleid vertolk kan word*'.

governments seek a solution by direct negotiation.<sup>94</sup> The debate was not confrontational. The sponsors of the resolution were all Latin Americans, which softened the impact. The emphasis was shifting to apartheid, of which the Indian question was only a part. SA offered to revive the tripartite negotiations but specifically rejected the Menon interpretation, insisting that its offer implied no derogation from domestic jurisdiction. Pakistan and India welcomed the SA initiative, on the basis that the meetings would not affect the stand taken by any of the governments. They reiterated their view that the matter was not one of domestic concern. If SA were to demand that they renounce that stand as a basis for new meetings, they would disclaim any responsibility for the failure of the initiative. There was a remarkable similarity in the wording of their cables.

Before SA responded, it received reports of two speeches made by the Indian Prime Minister in Delhi, in which he had accused the Union government of tyranny and naked persecution of tens of millions of African and Indian people. SA requested confirmation of the statements, which would effectively prevent it from pursuing talks. India replied that, as it had consistently criticized SA policies in the past, it was unreasonable to expect it to refrain then. It inferred that the Union did not ‘wish to co-operate in implementation of resolution of United Nations’. Pakistan hoped the door would remain ajar. India immediately informed the Secretary-General of the breakdown and named a representative to try to facilitate contacts. SA rejected India’s nominee on principle.<sup>95</sup>

## **2.12 Withdrawal from 10<sup>th</sup> General Assembly**

By the time the Indian item was debated in Committee at the 10<sup>th</sup> GA, the SA delegation had been withdrawn from the session. Only one and a half meetings were devoted to the item, fewer than at any previous GA. The debate was even more conciliatory. Eight Latin American states and Yugoslavia sponsored a draft resolution, which simply asked the parties to continue talks and invited them to report progress jointly or severally to the next session. There was no reference to the UDHR or to Charter obligations. Neither did the draft prescribe a role for UN mediation or provide for the item’s automatic in a future

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93 PM 136/2 AJ 1954 10th sess.

94 GA Res. 919(X) 14 December 1955

95 For details of the exchange see A/3001 25 October 1955 and A/3001/Add.1 14 November 1955.

agenda. When the draft resolution was adopted in Plenary, India indicated that it would take the initiative to reopen the talks. Menon thanked delegations who continued to offer support and expressed the hope that ‘those countries which do not have colonial possessions based on racial discrimination’ would vote with it the following year.<sup>96</sup>

The SA delegation advised External Affairs that, while nobody sympathized with the Union’s policies, most wanted to rid the agenda of a sterile item. The formula adopted was a face-saving effort. It did not meet SA on Article 2(7) but such a *volte-face* was hardly to be expected, partly because other delegations believed the issue did involve international obligations. A resumption of contact could help to keep the item on ice until the UN ‘might have developed other interests and distractions’. On 21 May 1956 the Indian Permanent Mission advised its SA counterpart that India was ready to ‘initiate and pursue’ negotiations in New York, without prejudice to the legal position of any party on Article 2(7). The SA permanent delegation doubted the genuineness of the approach. India probably hoped to provoke a response confirming the Union’s intransigence and isolating it from world opinion. It suggested the matter rest a while.<sup>97</sup>

### **2.13 Token representation**

Louw, who had been appointed Minister of External Affairs when J.G. Strijdom succeeded Malan as Prime Minister at the end of 1954, said SA could only accept a *démarche* from India in accord with Article 2(7). At the 11<sup>th</sup> GA, he stated that it was the last time SA would explain its objections.<sup>98</sup> India asserted that four-fifths of the SA population lived ‘in conditions that are just beyond slavery, without civil, political or human rights’. Democracy in SA, as in the Greek city-states, was ‘confined to the possessing classes living on the backs of a large and dispossessed proletariat’. India said that SA had rightly claimed that all its actions were a matter of domestic legislation. Legislation was the only way for a state to implement international decisions. If that

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96 GA Res. 919(X) 14 December 1955; GAOR 10th sess. 554th Plenary

97 19/2 vol. 23 22 November 1955 and vol. 24 25 May 1956

98 GAOR 11th sess. 577th Plenary 15 November 1956 29-34

legislation could not be discussed, the GA could not debate any subject, 'because all the peoples of the world are under one sovereign State or another'.<sup>99</sup>

Having again withdrawn its delegation from the session, SA did not attend the brief proceedings in the Special Political Committee, as the *Ad hoc* Political Committee was now entitled.<sup>100</sup> The resolution was stronger than at the 10<sup>th</sup> GA, as it specifically held SA's lack of cooperation responsible for the failure of negotiations. Plenary approved the committee text without discussion. Summing up, the SA permanent representative noted that there was no flagging of interest in SA's racial problems but that the Indian question was of far less importance than 'relations with the Bantu'. A growing realization that 'discussion of any problem of race relations in the emotional atmosphere of the U.N. tends almost inevitably to aggravate rather than to ease racial tensions' was exploited by those who stood to benefit.<sup>101</sup>

#### **2.14 Participation resumed**

SA maintained only token representation at the 12<sup>th</sup> GA and did not attend the debate. The delegation received, as part of its directive for the 13<sup>th</sup> session, a summary of the Union's legal case, which had remained essentially unchanged since 1946. If members' rights were ignored, the argument ran, the UN's continued existence might be threatened. India's complaints covered purely domestic matters like the franchise, education, marriage and employment. Article 2 of the Charter enshrined the sovereign equality of members, who retained the rights consequential on sovereignty. These rights included domestic jurisdiction, which was protected by the overriding role of paragraph 7. It was a corollary to political independence that 'every state has the right to live its own way as long as it does not infringe the rights of other states to do the same and has jurisdiction over all persons and things within its territorial supremacy'. SA recognized no treaty obligations towards India. At their 1927 and 1932 meetings in Cape Town India had recognized the SA position. SA rejected India's contention that recommendations did not

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99 *Idem* 34-38

100 See para. 8.6.1.

101 19/2 vol. 24 7 February 1957

amount to interference. The narrow technical interpretation of ‘intervention’ that India espoused, implied that ‘there would not be a single domestic matter of which the General Assembly could not take the fullest cognizance’ and subject to its procedures. Since the Charter intended the domestic jurisdiction rule to prevail, it was essential to retain the broad interpretation, inhibiting recommendations and discussion.<sup>102</sup>

When he addressed Plenary at the 13<sup>th</sup> GA, Louw announced that his delegation would not ‘participate in any further proceedings, during this session or any other subsequent session,’ concerning either the Indian or apartheid items.<sup>103</sup> The committee debate lasted less than three meetings and passed almost unnoticed in the flurry preceding the end of the GA session. After several speeches whose conciliatory tone, the SA delegation reported, seemed designed to facilitate the resumption of negotiations, the Special Political Committee adopted a mild resolution. ‘The sponsors won over five abstentions (Argentina, Canada, Dominican Republic, Italy and New Zealand) and one absentee.’ In the lobbies the Afro-Asian bloc proclaimed the result as another victory but admitted that India had agreed to the text being watered down ‘to get more votes’.<sup>104</sup> After Plenary had endorsed the Committee’s draft, India regretted the abstentions, ‘usually there are nineteen, this year it has come down to ten’, but hoped that the reduction would help to change hearts and minds in SA. ‘This resolution is a message to the people of South Africa...who have no voice but the voice of this Assembly’. Irrespective of treaty violations or of ‘the violations of human rights and affronts to our own nationality and our dignity’, India would genuinely seek negotiations with SA without throwing the UN overboard.<sup>105</sup> (It would be hard to argue that this statement had any intention other than to ensure that SA’s reaction would be unchanged.)

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102 19/2 vol. 27

103 A/3850 15 July 1958 and A/3854 16 July 1958; GAOR 13th sess. 752nd Plenary 22 September 1958 49

104 19/2 vol. 28 tel. 92 8 December 1958

105 GAOR 13th sess. Plenary

### 2.15 Indian unemployment in South Africa

The standard approaches from India and Pakistan, without prejudice to the attitude any participant held in respect of the issue of domestic jurisdiction, again failed to elicit a reaction from SA in 1959. The committee debate at the 14<sup>th</sup> GA lasted three meetings, less than five hours in total including voting. India laid stress on a remark made by the SA Prime Minister, Dr. H.F. Verwoerd, in the House of Assembly on 29 June 1959. An Opposition member had asked him about unemployment conditions among Indians and ‘natives’, a choice of word that India denounced as derogatory, meaning anyone who did not have the privileges of a white man as officially defined. The Prime Minister had replied that Indians were not his primary problem. ‘If other people are worried about the Indians, let them take the Indians back there, where they would have better opportunities of employment’. India asked the Committee if it knew of any country ‘where the Prime Minister openly states in Parliament that he takes no responsibility for more than half a million citizens in his country because they happen to be of a different complexion, race, origin, colour’. It called on other states to use their good offices.

The SA government had recognized the likely impact of the Prime Minister’s remarks. Consequently Verwoerd adverted to the matter in a later speech in Natal saying that the part of his reply dealing with Indians was an obvious reference to the breakdown in the repatriation policy, for which India had mainly been responsible. It had no right to criticize if it would not offer unemployed Indians in SA better opportunities in India. ‘I will admit to a certain degree of sarcasm here since we know that even in difficult times South Africa’s Indians are in better plight here than millions and millions in India itself.’ This was far from repudiating responsibility, as government action in providing relief after the recent floods in Natal had shown. Indian needs received special study and attention. ‘This is in full accord with the policy of separate development, i.e. full opportunities in all directions for all but within their own population groups or areas.’<sup>106</sup>

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106 19/2 vol. 26 Extract from India’s statement to the SPC 8 December 1959; *House of Assembly Debates* Vol. 11 29 June 1959 cols. 9420-9421; 19/2 vol.26 4 September 1959

The SA delegation reported that it had distributed both of the Prime Minister's speeches on the issue so that the full information was available in the UN 'before the Indian statement was made or even drafted'. It called the debate lethargic and listless; the Pakistani was even seen sleeping. Less than half the Committee was in the room when the vote was due and India sent out 'runners' to round the others up. Canada abstained, after India had made determined efforts to elicit an affirmative vote, going so far as to ask what amendments Canada would require. The US delegate's remarks, the report added, embraced many countries, whose records should inhibit them from castigating another member state. The US said SA was but one example of 'maladjusted ethnic relationships which corrode the political fabric of far too many other countries'. (Considering that universal suffrage was not yet fully practised throughout the US, this was a provocative comment). The report continued that Plenary duly confirmed the draft resolution, which simply indicated that the Indian and Pakistani approaches were without prejudice to 'their respective juridical stands in the dispute'. This aside, it discarded any pretence that legal issues were at stake. It no longer called for the negotiations to be held in terms of the principles of the Charter or the UDHR. It pointed to SA as the only stumbling block preventing a satisfactory solution of the problem.<sup>107</sup> This ensured that, having been arraigned as the guilty party, the Union would not react to the call.

## **2.16 South Africa leaves Commonwealth**

The 15<sup>th</sup> GA opened in September 1960 and, after an adjournment, resumed on 7 March 1961. The first part of the session was marked by the admission of some fifteen newly independent states from Africa, which effected a marked change in the composition of UN membership and its voting potential. The second part coincided with the meeting of Commonwealth Ministers in London, at which SA, having opted by a referendum the previous year to become a republic, decided to withdraw its application to remain a member of the Commonwealth.<sup>108</sup>

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107 19/2 vol. 26 10 December 1959

108 See para. 9.1.4 for details.

SA did not take its seat in the Special Political Committee, which commenced discussions a week after the withdrawal of the Union's Commonwealth application. India introduced the item with an analysis of the impact of the Group Areas Act on the Indian people of Rustenburg, who had been ordered to leave their homes and shops and resettle on barren land outside the town. It did not want special privileges for Indians in SA but did demand equal citizenship rights without distinction. Pakistan regretted that the Union preferred to renounce its Commonwealth association rather than abate its harsh racist policies. Discrimination on the grounds of race or colour could not be tolerated as a principle of state policy. The United Arab Republic feared that discriminatory laws might make the emergent Africans deeply suspicious of all whites from any country or continent. France and the UK condemned discrimination but felt bound by the domestic jurisdiction principle.<sup>109</sup>

The draft resolution was adopted by 71 votes to 0, with six abstentions (Australia, Belgium, China, France, Portugal, UK) and many absentees, probably ascribable to lack of interest. Two discussions were being held where one (apartheid) would have sufficed. Australia and the UK changed their abstentions in Plenary to a positive vote. The former explained that it considered the matter essentially within the Union's jurisdiction but was becoming concerned that a negative vote could be misinterpreted. Now 'it has become apparent that even abstention is open to misinterpretation of indifference to the human issues involved'. The UK agreed that the issue was an aspect of apartheid, 'which is now no longer of purely domestic concern'.<sup>110</sup>

Before the 16<sup>th</sup> GA, Louw issued a press release on 15 August 1961 confirming that he would not answer a note India had sent through the SA Embassy, London, to propose the resumption of talks. India had no right to interfere, any more than SA had in regard to Delhi's discriminatory practices. India applied double standards since it rejected UN interference in its internal affairs. Nehru 'should rather sweep his own porch'. SA did not attend the committee debate during the GA. The four short meetings revealed even

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109 GAOR 2nd part 15th sess. SR 227th – 231st SPC

110 *Idem* Plenary 13 April 1961. SA's withdrawal from the Commonwealth had released both countries from any obligation they might have felt to protect a fellow member.

stronger belief that the Indian complaint really formed one aspect of the racial question. The usual draft resolution was approved unanimously both in committee and in Plenary<sup>111</sup>. India had achieved consensus; it was the last occasion on which its complaint was dealt with as a separate item in the UN.

## **2.17 Conclusions**

### *2.17.1 Attitudes towards negotiations*

It is difficult to conclude from the negotiations between India and SA that either party really sought a compromise. India realized that SA, having voted against the various GA resolutions, would not accept them as a starting point for the talks. Hence, its insistence on reference to previous years' resolutions suggests that there was more behind its thinking than simply the plight of Indians. It is however possible that, at the outset, the prospect of his country's approaching independence encouraged Nehru to offer support to his former compatriots in SA. But as the sessions passed, the item developed its own dynamic, tending to justify the claim that India was conducting a private vendetta. If, as it alleged, it sought no special privileges for its compatriots in South Africa, it had after 1952 when apartheid was included on the GA agenda little reason to maintain an item that was viewed as one aspect of the Union's racial policies. Debates that hardly exceeded five hours during a GA session were themselves a loss of face and the growing African membership was not really interested.

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111 GA Res. 1662(XVI)

It is logical therefore that, if all India was really looking for were the votes to isolate SA, it should resuscitate at later GA's the treaty overtones it had downplayed for some time. Treaty obligations gave its supporters a better option than human rights *per se*, as the latter offered SA a stronger claim to the protection of Article 2(7). India had also to take account of waning interest. Hence its willingness to accept less provocative resolutions as time passed. Once it succeeded in achieving consensus in 1961, after SA left the Commonwealth, it could retire gracefully, conscious that it had achieved its aim. Its future role in helping the African delegations in the anti-apartheid and SWA debates would not lay it open quite so obviously to the charges of conducting a vendetta.

The Union might also have considered negotiations fruitless, believing that India was ready to break off talks on flimsy pretexts at any time. As the SA Indian Congress and other non-white groups like the ANC supported the Indian action at the UN, India had no reason to give way. At the same time, SA was not just an innocent victim. The repeal of Indian representation in Parliament with the adoption of the Asiatic Laws Amendment Act in 1948 was provocative enough<sup>112</sup> but the way in which the Group Areas Bill was introduced in 1950 was even less calculated to facilitate the resumption of negotiations. As Jordaan had warned after the 2<sup>nd</sup> GA, the Union government alienated its friends by failing to adjust its policies to the prevailing international trends. In the event it intensified discriminatory legislation for which it paid a high price internationally.

SA claimed that the agreements resulting from the 1927 and 1932 negotiations with India did not amount to enforceable international instruments. Hence it did not invoke Article 102(2) of the Charter.<sup>113</sup> To have done so, would have been a tacit admission that they

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112 Act 47 of 1948 repealed provisions for Indian representation in Parliament contained in the 1946 Act.

113 Art. 102(2), like Art. 18 of the Covenant of the League of Nations, provided that agreements that had not been registered in the prescribed manner might not be invoked before any organ of the UN.

did constitute legal obligations. India, too, had failed to register the agreements, although it had more interest in demonstrating their enforceability. That the Joint Committee was not asked to declare them out of order at the 1<sup>st</sup> GA was consistent with the view that the practice whereby intra-Commonwealth agreements were not registered with the League of Nations had spilt over into the UN. It indicated the advantage for India of confining its complaint to a political forum where it was assured of a sympathetic majority.

SA was the architect of its own failure. By refusing to discuss the substance of its policy towards SA Indians from 1948 on, or to explain new discriminatory legislation as it was enacted, the Union enabled India to make whatever allegations it wished without fear of rebuttal. Moreover the Indian representatives were past masters in the art of specious argument. The basis of their initial approach had been a *de facto* rejection of discussions outside the UN in favour of guaranteed support inside it. Hence the requests for inscription of the item on the GA agenda, even when there was no call for it in the previous resolution. It was a public rejection of the SA plea for direct negotiations on the basis of the Cape Town formula, which the Union claimed had been agreed to in 1950. Both countries gave biased readings of the Charter and claimed that it supported their arguments but the Union stood in virtual isolation and was no match for India's serpentine ratiocination. SA may have had some minor successes but these were never translated into votes and the delegation could do no more than watch, almost helplessly, as its support eroded annually, until the Union's departure from the Commonwealth left it totally alone.

As Pakistan only joined the UN in September 1947, it made a late entry into the debate. It appeared to want a reasonable solution and to establish good relations with SA but was caught in an untenable situation. The other two parties seemed to regard it as a negligible participant, whose presence was an historical accident. SA appears to have thought the Union's Moslem population of relatively minor significance compared to the Hindu presence. SA might have been better advised to have held bilateral talks with Pakistan in 1953 and tried to drive a wedge between it and India, as there was no love lost between them. SA's reluctance tended to force Pakistan despite itself into the Indian

camp. The events of the 8<sup>th</sup> GA provide an example. It is arguable that the Pakistani representative felt affronted that SA had rebuffed his overtures before the session started. Delegates rarely, if ever, make such far-reaching proposals, as he would appear to have done, without prior approval from their authorities, particularly on delicate policy issues. The discussions could never have got far, as every suggestion would have had to be referred to governments for consideration. On balance it is unlikely that much damage was done but such an unnecessarily harsh rejoinder as Pakistan made in committee might have been avoided by a more forthcoming response from SA. The call for talks in the same speech looks like a holdover from an earlier draft and buttresses this analysis. It provides another example of Pakistan's attempt to palliate the problem. From then on, however, Pakistan and India seemed to act in tandem on the Indian issue.

### 2.17.2 *Role of ICJ*

The first debates in the GA on the treatment of SA Indians set the tone for the arguments on the respective roles of the UN and the ICJ on deciding the limits of domestic jurisdiction. Since the ICJ could not act of its own volition and member states were not entitled to approach it for advisory opinions individually, it fell to the UN (or the Specialized Agencies where appropriate) to select the questions it wished to submit. The arguments in favour of retaining the decision-making prerogative in the hands of the political bodies won the day. They avoided the risk of an unfavourable and precedent setting determination from the ICJ based on purely legal principles.

At the same time, the contention at the 1<sup>st</sup> GA of so eminent a jurist as Wellington Koo of China that, to ask the ICJ whether the matters raised in the 1946 Indian and SA memorandums fell within the latter's domestic jurisdiction was premature and would put too heavy a strain on a newly established Court, was specious.<sup>114</sup> It was a clear indication that proponents of the political solution feared the legal argument might not be on their side. The view espoused by the Soviets that the appropriate court to consider the Indian complaint was not the ICJ but the UN itself, which should act as it were as a *judex in suum litem*, echoed those fears.

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114 See para. 2.1.3 fn. 20.

India had clearly more to gain than SA by not referring its complaint to the ICJ. It could still use the debates in the GA to refer to international law and infuse a legal tinge into what was essentially a political position. Repetition could serve to provide evidence of practice, possibly leading in time to the establishment of international custom in terms of Article 38(1)(b) of the Statute of the ICJ. SA, on the other hand, learnt early on that it could not win a political argument in the UN as it was then composed, even less after more developing nations were admitted to its ranks.

Since Smuts was aware of the ambivalence of his position as the architect of the Preamble to the Charter and a proponent of the overriding role of Article 2(7), he could hardly hold that a simple discussion in the GA amounted to intervention in SA's domestic affairs. He had admitted that the principle was subject to limitations. The corollary was that intervention began with the adoption of a resolution directed towards SA, other than one to refer the argument to the ICJ. He had, therefore, to be prepared to offer a limited explanation of domestic policy but it was naïve of him to think the GA would not take some affirmative action if he adopted a conciliatory stance. Hindsight suggests that Smuts should have insisted that the GA put the legal question of the limits of domestic jurisdiction to the ICJ, before going into the substance. The issue was one of principle. When he entered the debate in committee and conceded that, once the UN had adopted a bill of rights, the overriding role of Article 2(7) might be reduced, he left his successors little or no room for manoeuvre. He put his country at a severe legal and moral disadvantage, for his later objection to approaching the ICJ, as constituted, was as political as that of his critics.

There seems, in fact, to have been an initial misunderstanding on the value of the ICJ between External Affairs officials and politicians. Jordaan's memorandum prior to the 2<sup>nd</sup> GA, suggesting that SA propose that the Charter be amended to allow member states to approach the ICJ for opinions on matters of law, must have preceded the directive that such an approach should be avoided.<sup>115</sup> However, its chances of success were nil. Article

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115 PM 136/1/1 vol. 2 14 July 1947. See also Jooste's suggestion to Malan para. 2.2.1 fn. 26.

96 of the Charter, which limited the right of approaching the ICJ for an advisory opinion to the UN and the Specialized Agencies, ensured that the available machinery would not be subject to misuse. Nevertheless, the idea had merit. It was a justifiable tactic that found favour with his colleagues, rather than a defence of a principle.

When L.C. Steyn, who had acted as legal adviser to the SA delegations to the first two General Assemblies, addressed the Jurist Society of the University of Pretoria in April 1948 on the charges against SA, he spoke as an official of the Smuts administration. His assertion that legal arguments did not simply suffice in a forum like the UN was an indication of the Union government's problem. His speech also implied that SA needed to take action to fit in with world dynamics. When the same author published an article on human rights the following year he appeared to be leaning towards the efficacy of the legal arguments but without placing any reliance on the impartiality of the ICJ.<sup>116</sup> His earlier indication that appropriate action was required from SA was also missing from the later article. The author was presenting cases on behalf of two different administrations. They highlight the change in approach.

The National Party government was aware that the political case it had to offer cut no ice. Consequently SA would only claim that Article 2(7) prohibited the GA from discussing its domestic policies and leave it at that. But the Union's insistence on its legal platform did not provide it with a loophole, for neither the United nor the National Party had any illusions about the political objectivity of the newly elected judges on the ICJ. Since neither SA nor India favoured the legal avenue, if for different reasons, the ICJ played no role in one of the most contentious legal and political issues of the early days of the *UN*.

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116 L.C. Steyn 'Die seggenskap van die Verenigde Volke insake menseregte' 1950 *THRHR* 1

**CHAPTER 3**  
**UNIVERSAL DECLARATION OF HUMAN RIGHTS**

**3.1 Commission on Human Rights**

The UN Charter mentioned human rights and fundamental freedoms seven times.<sup>1</sup> As they were not defined, the United Nations Preparatory Commission decided at its first session in London in December 1945 that a bill of rights should be drawn up. With the approval of the 1<sup>st</sup> GA, the Economic and Social Council (ECOSOC) at its first session established an interim Commission on Human Rights (CHR), ‘consisting of a nucleus of 9 members appointed in their individual capacity’, their term of office to expire on 31 March 1947.<sup>2</sup> Its competence included:

- (a) Formulation of an international bill of rights;
- (b) Formulation of recommendations for an international declaration or convention on such matters as civil liberties;
- (c) Protection of minorities;
- (d) Prevention of discrimination on grounds of race, sex, language or religion;
- (e) Any matters within the field of human rights considered likely to impair the general welfare of friendly relations among nations (a later addition, possibly related to the Assembly’s agenda item on the treatment of Indians in SA).

At the first session of the CHR the Assistant Secretary-General for Social Affairs, Henri Laugier, opened the discussions with the controversial comment that GA Res. 44(I) on the treatment of Indians in SA was proof that no violation of human rights could be covered up by the principle of national sovereignty.<sup>3</sup> The Charter gave individuals and groups the belief that they had the right of appeal to the UN.

SA sent an observer to the meeting. He reported that the CHR was dealing with explosive topics and that some members approached the subject superficially. They were carried

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1 Human rights were mentioned in the Preamble, which had the same legal force as the substantive clauses, and Arts. 1, 13, 55, 62, 68 and 76. Implicit references appeared in Art. 56, where members pledged themselves to carry out the undertakings in Art. 55, and Art. 87 on trusteeship territories.

2 PC/20 OR 1st sess. 23 December 1945 163. SA was not elected to any of these bodies. During the review period, the only organs with human rights connections on which it was represented were the ECOSOC Social Commission from 1947-1951 and the UNICEF Executive Board from 1946-1951. After the National Party assumed power in 1948, the Union did not stand for election to UN organs.

3 After his retirement, Laugier, a former President of the International League for the Rights of Man, served on the UN Commission on the Racial Situation in South Africa, the choice of whose members in 1952 was one reason SA felt it would not be given a fair hearing. For details see para.8.2.

away by high-sounding ideals, forgetting to take practical issues into consideration. ‘If not handled correctly and with great judgement, [the CHR’s efforts] may very well result in achieving the very opposite effect for which the United Nations was created’.<sup>4</sup>

### 3.2 International bill of rights

The UK Foreign Office reported that the drafting committee established by the CHR had debated whether the bill of rights should take the form of a manifesto issued under cover of a GA resolution or whether it should be a convention with binding force. As the two proposals were not mutually exclusive, the drafting committee recommended that both paths be followed.<sup>5</sup> It examined several drafts for a bill of rights, amongst which was the text on essential rights that Panama had submitted in San Francisco.<sup>6</sup> It also examined a draft prepared by the UK, which argued that the provisions of the bill of rights should be deemed fundamental principles of international law and become part of the national law of each UN member state. As the observance of human rights was of international concern, it should be within the jurisdiction of the UN to discuss any violation. It would also be the duty of each member state to take, within its jurisdiction, all measures and legal dispositions for the enactment and effective respect for the rights and freedoms proclaimed in the bill of rights and to co-operate with other states to that end.<sup>7</sup>

#### 3.2.1 Views of Professor Lauterpacht

Professor Hersch Lauterpacht wrote from Trinity College, Cambridge, to *The Times*, London, of 26 July 1947, that the CHR proposed to submit to the GA a declaration of human rights in the form of a ‘manifesto as distinguished from a binding and enforceable legal obligation’, which might be supplemented by more specific conventions. Such a declaration, Lauterpacht believed, was to a large extent a piece of international legislation. ‘Unless the Bill is to be a mere statement of generalities...it must imply some changes, voluntarily consented to, in the law and practice of States.’ Crucial issues

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4 PM 136/4/1 vol. 1 memo. to the Minister 10 February 1947

5 *Political Intelligence Summary* 5 February 1947

6 Declaration of Essential Rights *UNCIO Documents* Vol. III 265 ff. See para. 1.4.6.

7 E/CN.4/21 and annexes. This early inroad on Art. 2(7) may have had an effect on SA’s approach to the whole question.

included economic and social rights ‘no less compelling than rights of personal freedom and of political liberty and the problem of enforcement’. In so far as the existing provisions of the Charter entailed some measure of legal obligation and enforcement, ‘a mere declaration of principles would be in the nature of a retrogression’.

In answer to an enquiry from the SA Department of External Affairs about the author of the letter, the SA High Commission, London, quoted an assistant law adviser at the Foreign Office as saying that Lauterpacht’s intellectual background lay ‘in the logical and somewhat theoretical jurisprudence of the Continent, which Anglo-Saxon lawyers do not always find sympathetic’. His years in England where he was a professor of international law at Cambridge had, however, enabled him to absorb the English way of approaching problems. More than other writers he had ‘built up the Case Law of International Law’. Lauterpacht’s views on international law ‘and particularly Human Rights’ deserved and received considerable respect. Because he based his arguments on actual practice and decided cases his views were saved ‘from becoming too doctrinaire and theoretical’.<sup>8</sup> The same source later warned: ‘It is understood that he takes a dangerous and extreme view about the powers of intervention conferred on the United Nations by the Charter on all questions concerning human rights.’

### 3.2.2 SA comments

The SA law advisers’ internal comments on two of the drafts examined by the drafting committee provided an indication of the approach to human rights under the Smuts administration. They wrote that that the UK had recognised that part of the text it had submitted, would have to be completed by provisions ‘prohibiting distinctions based on race, sex, language and religion’. This remark was too vague and insufficient to require detailed comment. The laws of the Union, they claimed, did not deprive people of political and civil rights on such grounds but did distinguish between them. If these

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<sup>8</sup> P.S.26/44/16/7 9 October 1947. Despite the fact that the UK Foreign Office did not often follow his views on human rights in its dealings with the UN, Lauterpacht, Austrian by birth, served as British expert on the International Law Commission and was elected as UK representative on the ICJ in 1955. In its obituary five years later, the *Encyclopaedia Britannica* commented that his death deprived the world of its greatest thinker and writer on international law.

provisions were to imply ‘absence of discrimination as far as fundamental rights and freedoms are concerned, (they) would not, however, create any conflict with the laws of the Union’.<sup>9</sup> Some alterations to the text would be required to make it compatible with SA municipal legislation.<sup>10</sup>

Panama’s draft Declaration of Essential Rights, the law advisers wrote later,<sup>11</sup> assumed that states were governed under a written rigid constitution. SA had no written constitution in that sense. The South Africa Act of 1909, ‘usually regarded as the constitution of the Union’, was, with minor exceptions, subject to amendment like any other Act. Parliament was sovereign; its laws could not be tested in the courts on the grounds of repugnance to natural justice. The Union’s laws, the law advisers continued, ‘protect and respect the essential human rights as set out in the various articles’ of the Panama draft, although a few might be considered in conflict with some of them. ‘Most of such laws are due to the special circumstances prevailing in the Union’, in respect of which they did not exceed what was reasonably necessary to maintain law and order.

### 3.2.3 *Legal considerations*

In August 1947, the UK Commonwealth Relations Office advised the SA Department of External Affairs that the UK recognized three possible forms in which the CHR could present its first proposals to the GA: a declaration to be adopted by resolution and nothing more, a convention or bill of rights to be adopted without a declaration, or a combination of the two. The first course might do more harm than good and was highly undesirable. A declaration could not create legal obligations, neither could it contain provisions for petitions or enforcement. There was a real danger of it leading ‘men to believe that more progress had been achieved than would in fact have been the case’.

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9 1/141/47 Note J.P.L.T. to Secretary 19 July 1947

10 E.g. prohibition of forced labour, other than as part of punishment for criminal offences, in Art. 2(2) was in conflict with the Work Colonies Act of 1927. The section on idle, dissolute or disorderly persons in the Natives (Urban Areas) Consolidation Act 25 of 1945 also contravened Art. 3(1) on deprivation of liberty, in that s. 29(1) of the Act provided for them to be brought before a magistrate to give a ‘good and satisfactory account’ of themselves. This was not a measure ‘necessary to prevent commission of crime’ as required by Art. 3(1).

11 Minute 1/141/47 to Secretary for External Affairs 6 August 1947. The SA government’s comments on the draft UDHR to the CHR at its 2nd sess. and those in the directive to the 3rd GA are dealt with in this

One of the other courses was preferable. The UK believed there was some uniformity of recognition of the fundamental rights of personal liberty, freedom of religion, speech, opinion and association, and equality before the law. They needed precise definition in a convention with binding force on its parties.<sup>12</sup>

At the end of 1947, the CHR considered the drafting committee's text and decided to prepare three drafts described together as an international bill of human rights. They were a declaration of general principles to be known as the International Declaration on Human Rights, an International Covenant on Human Rights, and Measures for Implementation.<sup>13</sup> On receipt in Pretoria, these drafts were referred to Justice with a request that Dr. L.C. Steyn, who had dealt with human rights issues as legal adviser to the SA delegation to the 2<sup>nd</sup> GA, make a preliminary study 'with a view to submitting amendments or proposals to the United Nations so as to cover the position of all citizens in the Union and South West Africa'.<sup>14</sup> This chapter deals with the International Declaration; the other elements of the international bill of human rights are considered in the next chapter.

The law advisers replied that several articles of the draft declaration went beyond the scope of 'what could legitimately be regarded as rights and freedoms so fundamental as to call for international protection'. They were not the 'elementary essential rights which are indispensable for physical and mental existence as a human being, and with which alone the United Nations are called upon to concern themselves'. The UN Charter only envisaged the protection of a minimum of rights but the declaration trespassed on matters 'which should be left where they belong, in the domestic sphere of the member states'.<sup>15</sup>

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chapter. They provide an adequate picture of the situation, obviating the necessity to review the law advisers' analysis of the Panama draft in detail.

12 1/141/47 Part I Circular Despatch D No. 68 26 August 1947

13 E/600 1947

14 PM 136/4/1 6 January 1948

15 1/147/47 Part 2. The law advisers said Art. 10 of the draft declaration (right to privacy) was in conflict with the Master and Servants Act 26 of 1926, and Art. 11 (right to freedom of movement) with the SA pass laws and restrictions on the movement of Indians. They noted that the declaration was much wider in scope than the covenant, which at that stage appeared to be the better choice for SA.

The economic rights, the law advisers continued, could not be considered fundamental, without asking states to move ‘nearer to the communistic economic system, under which, in practice, many essential human rights are being denied’. Since it was not intended to create legal rights and obligations, the declaration had been drawn up without precision or regard for the true scope of fundamental rights and freedoms but would undoubtedly be invoked as a source of moral rights and obligations. It could intensify internal unrest and cause the Union more embarrassment in the UN. ‘It is of the greatest importance, therefore, that it should not be passed in a form so completely unacceptable’ (my emphasis).

At its second session in May 1948, the drafting committee revised the 1947 draft declaration of general principles on the basis of comments received from governments. It included the SA submission, which drew ‘attention to the incompatibility of the Union’s legislation with a number of the articles’.<sup>16</sup> The CHR examined the revised text at its third session and adopted a new draft, which ECOSOC transmitted without comment to the GA. The directive for the SA delegation to the 3<sup>rd</sup> GA described the final CHR draft as an improvement on the earlier one but still containing some unacceptable articles.<sup>17</sup>

### **3.3 Change of government**

In May 1948 the National Party under Dr. D.F. Malan succeeded the United Party as government of the Union of South Africa. The debate on the new Prime Minister’s Vote provided Parliament with an opportunity to consider future relations with the UN. Scant attention was paid to human rights issues and then only after Mrs. Bertha Solomon, M.P., had raised them in connection with the status of women. The Prime Minister made a few derogatory references to the proposed declaration on human rights as a document drafted by ECOSOC ‘in order to give a definition of human rights’, which he had seen only recently. The UN Charter referred to human rights and ECOSOC had thought it necessary to define everything implied by that term. While much was acceptable on the status of women, much was not.

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16 *UNYB* 1948 457-468; E/CN.4/82/Rev. 1 and Add. 1-10

17 E/800 28 June 1948 29-35; PM 136/2, AJ 1948-49

Two points in particular had struck him when he read it. ‘There should be freedom of marriage between people in all countries of all races, white and other than white...Whether that will be acceptable in South Africa, faced as we are with the difficult problem of miscegenation, I doubt.’ The other was the free movement of people of all races and countries to all other countries. ‘I should like to know the state in which South Africa would find itself if we lifted all restrictions on the entry of individuals...I do not think that even UNO will accept it as it stands.’<sup>18</sup> Quite what these two paragraphs had to do with the status of women is unclear. Mrs. Solomon’s speech was simply a useful peg.

### **3.4 3<sup>rd</sup> General Assembly**

#### *3.4.1 Preparations*

Mr. E.H. Louw, Minister of Economic Affairs and of Mines, who led the SA delegation to the 3<sup>rd</sup> GA, and his government took human rights less than seriously. It was not on his list of matters to discuss with Malan before his departure for Paris. External Affairs had prepared an overall directive on the UN for the SA delegation, presumably for its leader’s guidance. It took into account some of the ideas of the new administration but was less overtly hostile.<sup>19</sup> ECOSOC, the directive said, had done valuable work in the technical field but should not overextend itself. The proposed declaration on human rights contained several badly drafted and unacceptable provisions. Time was needed to harmonize conflicting views. Better a modest document than a controversial one.

External Affairs also prepared a specific directive on human rights. While some delegations thought the draft international declaration needed further study, a view SA shared, it was possible that an attempt would be made to push it through, possibly in modified form, with a two-thirds majority. External Affairs instructed the delegation to support a move to postpone a vote. The longer the GA could avoid decisions ‘on such emotional issues, the greater the likelihood of their being considered objectively’.

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<sup>18</sup> *House of Assembly Debates* Vol. 64 1 September 1948 col. 1356

<sup>19</sup> PM 136/2 AJ 48/49

Specific charges could be expected during the debate but the delegation could not say much more than it already had in the Indian debate. ‘Our task is mainly one of constant reiteration and explanation of the facts which justify our discrimination, combined with judicious lobbying outside the Assembly’ (my emphasis).<sup>20</sup> As for the draft declaration, the directive echoed the law advisers’ view that some articles exceeded the scope of what could legitimately be regarded ‘as rights and freedoms so fundamental as to call for international protection by the society of nations’.<sup>21</sup>

Although SA hoped it would be possible to postpone a decision on the draft declaration, the directive was prepared in some detail. It was approved under the new administration but had been based on actions preceding the elections and repeated much of the opinion provided by the law advisers at the start of the year, while the United Party was still in power.<sup>22</sup> Amendments to the articles of both the draft declaration and the international covenant on human rights had been proposed during the Smuts administration. The difference lay in style rather than substance.

#### 3.4.2 *Nature of draft declaration*

The 3<sup>rd</sup> GA asked its Third (Social, Humanitarian and Cultural) Committee to review the draft declaration on human rights submitted in the report of the third session of the CHR. The Chairman of the CHR, Mrs. Eleanor Roosevelt, widow of the late US President, presented a report on the topics assigned to it, including an international bill of human rights. The CHR, she said, had had time to consider only the draft declaration; texts of the other two facets of the bill, namely a draft covenant and a document outlining means of implementation were submitted unrevised, with the amendments member states had proposed. They had not been discussed. ‘The draft declaration’, Mrs. Roosevelt pointed out, ‘was not a treaty or international agreement and did not impose legal obligations; it

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20 *Ibid.* The drafters had clearly not seen Louw’s letter to the Prime Minister before he left for Paris; see para. 2.4.1. The records do not reveal that this directive received the Prime Minister’s imprimatur, which one would expect, as he was also Minister of External Affairs. However, it was not normal practice to submit every directive to him, only those of major importance. Although Malan did not appear to have made any particular input on international human rights issues at this stage, his strictures in Parliament and the directive coincided.

21 The problem articles included Arts. 9, 11, 13, 19 and 20-25.

22 See para. 3.2.3.

was rather a statement of basic principles of inalienable human rights, setting up a common standard of achievement for all peoples and all nations.’ Although not legally binding, the declaration would have considerable influence. Members’ views had been given full weight.<sup>23</sup>

Other speakers differed on the legal effect, especially if the draft declaration were adopted separately from the proposed covenant and methods of implementation. Not all shared Mrs. Roosevelt’s conviction that it was not legally binding. For SA, Louw expressed concern that the draft declaration would, after adoption, contain ‘unforeseen legal or moral obligations, with which certain countries might not be able to comply’. Conventions bound only parties but member states that abstained on the resolution to adopt the draft declaration would be bound by its provisions. SA thought the text should be confined to ‘fundamental rights’ universally recognized; it went beyond those limits. SA, Louw said, did not accept the thesis that human dignity would be impaired if a person were not allowed to reside in a particular area. ‘Such a thesis would destroy the whole basis of the multi-racial structure of the Union of South Africa and would certainly not be in the interests of the less-advanced indigenous population.’ Large tracts of territory in the Union, where no European was permitted to acquire or occupy land, had been set aside for the exclusive use and development of the non-European population. Participation in government was not a universal right; ‘it was conditioned not only by nationality but also by qualifications of franchise’.<sup>24</sup>

The draft declaration, Louw continued, referred to socio-economic rights; how many states could take ‘international responsibility for the full exercise of such rights’? The declaration should be limited to such fundamental rights as freedom of religion and of speech, liberty of the person, the inviolability of person and property, and free access to impartial courts of justice.

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23 GOAR 1st part 3rd sess. 3rd Cttee. SR 3; E/800 28 June 1948

24 GOAR 1st part 3rd sess. 3rd Cttee. SR 39-40. There are echoes here of *R v Pitje*, 1960 (4) SA (A) 709. Pitje, a lawyer, was found guilty of contempt of court for refusing to sit at a separate table from white lawyers during a court case. The magistrate’s order that he do so was found reasonable. The Chief Justice who delivered the verdict was the L.C. Steyn, who was legal adviser to several SA delegations to the GA.

Louw reported to the Prime Minister that fundamental human rights, irrespective of person, race, language or religion, were the new international mode. In their rivalry to support the slogan delegations fell over each other, the strongest champions being the totalitarian régimes. Their aim was to create a favourable impression abroad, even if they paid little attention to these rights at home. Hence he had had to explain the SA government's view:

*Dit is vir my duidelik dat ons uiters versigtig sal moet wees om nie stilswyend, of andersins, die verreikende beginsels van die voorgestelde Deklarasie te ondersteun nie, met die oog op ons besondere probleme in Suid-Afrika. Indien ons so doen gaan ons onself in dieselfde moeilikheid vind soos met die Indiër vraagstuk, waar ons nou aangekla word op grond van sekere bepalinge in die aanhef tot die Handves.*<sup>25</sup>

Chile refuted the SA view that the draft went beyond the UN Charter; it merely stated the rights explicitly. While the covenant on human rights alone would be legally binding, violation by any state of the rights enunciated in the draft declaration would mean violation of the principles of the UN.<sup>26</sup> The Soviet Union opposed the use of institutions like the ICJ to implement human rights guarantees. Making use of such organs would mean interference in the domestic affairs of states and disregard of national sovereignty. It would tend to convert internal disputes into international ones, endangering world peace.<sup>27</sup> France expressed a different view from that espoused by the Union and the USSR. The UN's competence in the question of human rights, France argued, was an established fact and Article 2(7) of the Charter, relating to matters within the domestic jurisdiction of member states, could not be invoked against it. Once it adopted the draft declaration, the UN would convert human rights from a domestic issue to one of international concern.<sup>28</sup>

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25 PM 136/2/11 vol. 2 Louw to Malan 29 September 1948

26 GAOR 1st part 3rd sess. 3rd Cttee. SR 47 and 50. The Chilean delegate, Sr. Hernán Santa Cruz, would later chair the UN Commission on the Racial Situation in South Africa.

27 *Idem* 57-59. SA and the USSR had similar concerns but expressed them differently.

28 *Idem* 60-63. The French representative, René Cassin, a leading exponent of human rights, seems to have been expressing a personal view, as France took a different stance on Art. 2(7) when its internal affairs were at stake, as well as in the early discussions on SA issues.

Belgium summed up the arguments on the legality or moral import of the declaration. Since the draft would only be submitted to the GA for a recommendation, some delegations denied it a legal content. Belgium did not agree: the GA was a juridical organ and ‘any recommendations made by it had an undeniably legal character’. Whether it was binding was less simple. It was necessary to distinguish those principles, which were a restatement of rules of the customary law of nations and which already possessed a binding character, from those which did not belong to such law. The inclusion of the latter might invest them with the need for very serious consideration but did not make them obligatory.<sup>29</sup>

### 3.4.3 Detailed examination of draft declaration

The Third Committee proceeded to a clause-by-clause analysis of the draft declaration, beginning with the substantive articles and leaving the Preamble to the end. The SA delegation participated in the early part of the discussion.

For purposes of comparison, SA’s comments in the directive to its delegation<sup>30</sup> are quoted after the relevant article in the draft declaration, henceforward referred to as the declaration until its adoption as the Universal Declaration of Human Rights (UDHR). Because of their length some articles of the declaration have been summarized and for as long as it seems that SA attended the debate, specific attention has been paid to its interventions and the reaction thereto as well as to the manner it voted or might have voted. Thereafter, only the views expressed in the directive are quoted, without further attention being paid to the debate.<sup>31</sup>

**Article 1:** *All human beings are born free and equal in dignity and rights. They are endowed by nature with reason and conscience, and should act towards one another in a spirit of brotherhood.*

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29 *Idem* 199-200. This analysis foreshadows statements made by both Louw in the general debate and later by H.A. Andrews, when he explained the SA abstention in Plenary.

30 See para. 3.4.1. While the External Affairs directive had been drafted as having general application, the last paragraph suggested that its political and administrative concerns were directed internally rather than at implications the document might hold for the Union’s international relations and obligations. The new administration was still at an early stage in the elaboration and execution of its policies.

31 Unless otherwise indicated the analysis is based on, and quotes taken from, the 3rd Cttee. SR.

This article is not a statement of fact. All men are not born free and equal, nor are they all endowed with reason and conscience. The article as a whole might well be deleted. Alternatively it could be amended to read have the right to be born free and equal in dignity ('and rights' was omitted).

Charles Te Water echoed Louw's remarks in the Third Committee's preliminary debate when he spoke to the SA proposal, which called for the first sentence to read: 'All human beings are born free and equal *in fundamental rights and freedoms*'.<sup>32</sup> He said that equality was universal as far as fundamental freedoms were concerned (my emphasis) but that the article implied all rights, personal, social, economic and political, whether or not they were fundamental. As a general principle this could not apply to all countries with differing legal, social, economic and political systems. The word 'fundamental' was more realistic. If the SA suggestion were accepted, the word 'dignity' would imply the equal enjoyment of rights and freedoms and 'human dignity would be automatically protected to the full extent envisaged by the Charter'. SA recognised no universality in the concept of equality, nor any universal standard in people's different concepts of human dignity, 'which were, surely, determined by the differences in religious and social systems, usages and customs'.

The Yugoslav representative asked for the complete text of the speech, which had 'aroused his indignation', while the Chairman, Mr. Charles Malik of Lebanon, remarked drily that 'the word "dignity" had been included in the Charter at the suggestion of Field-Marshal Smuts'. Te Water withdrew the amendment in favour of a Guatemalan proposal that Article 1 be subsumed into the Preamble. His delegation was, he said, deeply concerned with the principle of human dignity, but it questioned the validity of the article as drafted, since 'the dignity of an individual was actually a deeper and broader concept than a right'. The Committee rejected Guatemala's proposal by 26 votes to six (SA) with ten abstentions. Article 1 was adopted as drafted, with the deletion of the words 'by nature'. Voting was 26-0-8, a figure that suggests a number of absentees. As there was

no roll call vote, SA's vote is unclear but it would not be unreasonable to infer the representative's absence.<sup>33</sup>

Louw reported that his opening remarks and Te Water's speech on the SA amendment had led Mrs. Roosevelt to write to a leading French daily, *Le Monde*. She had argued for the declaration as it was, despite its flaws, for by 'dint of modifying we can do more harm than good'. The SA amendment was an example. 'As far as one can judge', she wrote, 'the population of South Africa lives under a sign of terror...The essential rights of liberties which the Union of South Africa is disposed to accord to all peoples do not include, if I understand correctly, the social rights nor even perhaps the equality of economic rights.' (SA delegation's translation). Louw protested to the US delegation. Some blame, he told Malan, lay with Mrs. Roosevelt's receptivity of the propaganda efforts of the 'Communist-dominated' Natal Indian Congress but SA could no longer let itself be kicked around. He was convinced that his decision to take the offensive was already helping to restore the country's lost prestige.<sup>34</sup>

The squabble was reported in the SA press. The *Cape Argus* noted that had Te Water simply argued that only fundamental rights were in question, he could have made out a strong case. Differentiation had to be based on equal dignity, not on the relegation of 'one section to a status of inferiority'. SA had in the past countered such accusations by illustrating the progress of the non-Europeans. The UN accused the new administration of reversing that policy and its representative's statement that 'there can be no universality in the concept of either equality or human dignity' would be considered confirmation of the policy change. *The Friend*, Bloemfontein, said that efforts to retail views 'which are the stock in trade of South African Nationalist politics' abroad had left SA branded 'as a nation whose accredited agents were ready to question and deny some

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33 It was a tactic SA used on other occasions. Andrews reported in letter 83/3 11 December 1946 on PM 136/2/11 vol. 2, e.g., that the SA delegation had intended to abstain on the Genocide Convention. When it appeared that even the Soviet Union, which had opposed much of the substance would support it, 'it was thought better tactics on our part to absent ourselves than constitute an invidious minority of a single abstentionist. The Convention was therefore approved unanimously.'

34 PM 136/2/11 letter to Dr. D.F. Malan 10 October 1948. For the full text of Mrs. Roosevelt's letter to *Le Monde* see Te Water Papers SANA A78 Vol. AE 4/1.

of the basic concepts of Western civilisation'. The government could not accuse its opponents of having misrepresented it. Hopefully the incident would shock the complacency of South Africans 'who see the world through the distorting mirror of their domestic fears and prejudices'.<sup>35</sup>

**Article 2:** *Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, property or other status, or national or social origin.*

This article would be acceptable only if the subsequent list of human rights were amended to embrace those regarded by the Union Government as fundamental. Furthermore, the words 'political or other opinion, property or other status, or national or social origin' go beyond the words used in the Charter, and it is not clear what purpose they are intended to serve.

During a long ideological debate the USSR renewed its attack on the failure of SA to live up to the article. 'In the province of Natal, the Indians did not have a vote, and 80% of their children could not attend school.' Te Water objected to the use of unparliamentary language in reference to SA and asked the chairman to rule against such terms so that 'the debate might retain the dignity which should characterize the discussion of the UN'. The chairman replied that he could not bring 58 different nations to heel but regretted the use of terms that caused offence to any member. Yugoslavia returned to the attack to ask why, in violation of the Charter, the SA representative had made a statement 'in which he defended his country's right to practise racial discrimination'. Te Water objected to this statement and added that he would vote for Article 2 'subject to the reservation that the rights and freedoms mentioned in the draft declaration would be interpreted by the Union Government to mean the fundamental rights and freedoms laid down in the Charter'. The Third Committee finally adopted the article in the absence of several members, including SA, which later asked that its positive vote be recorded.

**Article 3:** *Everyone has the right to life, liberty and security of person.*

No objection, as the obvious exceptions are covered in the general limitation clause in article 27.

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35 Charles te Water Papers SANA A78 Vol. AE 24/1. Both articles were dated 7 October 1948.

The discussion ranged around a USSR proposal that the death penalty be abolished in time of peace. It was finally rejected by 21 votes (SA) to nine with 18 abstentions. Article 3 was adopted by 36 votes (SA) to 0, with 12 abstentions.

**Article 4:**

1. *No one shall be held in slavery or involuntary servitude.*

2. *No one shall be subjected to torture or to cruel or unusual punishment*

The reference to cruel, inhuman or degrading punishment is unsatisfactory and should be deleted. Standards as to what constitutes cruel and inhuman punishment vary from country to country and from age to age...A punishment may be cruel and unusual in regard to one type of offence but not to another.

SA did not join the debate. The Committee accepted a Soviet amendment to introduce the article with the sentence: *'Slavery and the slave trade are prohibited in all their aspects'*, by 22 votes to 17 (SA) with three abstentions. The opponents objected to the mandatory language. After the Third Committee voted to delete the adjective *'involuntary'*, the text was approved by 36 votes to none without a roll call. There were four abstentions.

**Article 5:** *Everyone has the right to recognition everywhere as a person before the law.* See comment under [article] 3.

After a short and non-acrimonious discussion, the article was adopted unanimously.

**Article 6:** *All are equal before the law and are entitled without any discrimination to equal protection of the law against any discrimination in violation of this Declaration and against any incitement to such discrimination.*

It may be inferred from this article that the law must provide for protection against any violation of the terms of the declaration, thus introducing an obligatory concept into a document which is not intended to be a legally binding instrument. The principle of 'equality before the law' might be adequately covered by the deletion of the last part of the article to enable it to read: 'All are equal before the law and are entitled without any discrimination to equal protection of the law'. Without such a deletion the clause would not be acceptable.

SA had earlier presented a proposal reflecting this view to the CHR,<sup>36</sup> where it was rejected. When he resubmitted it in the Third Committee, Te Water noted that the portion he wished to delete limited the scope of the article. Equality before the law

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36 A/C.4/226 1948

should not be limited to the principles laid down in the declaration. SA, he said, was a 'highly developed country with legislation which...guaranteed to everybody, without discrimination on the grounds of race, age, sex or religion, the most complete equality before the law.' If the Third Committee did not follow his clarification or disagreed, he would not press the amendment. (Te Water realized he was walking a tightrope.)

For the Soviet bloc, Poland opened the floodgates, in what seems to have been a wilful misunderstanding of the tenor of the SA statement, with the allegation that some five-sevenths of the Union's population did not have equal rights.<sup>37</sup> If Mr. Te Water's remarks were true, why had he wished to excise discrimination from the declaration? Poland would vote against the SA amendment and hoped the majority of delegations would do likewise. Yugoslavia hoped the amendment would not only be withdrawn but that the policy which had inspired it would be modified. The USSR asserted that SA had called for the deletion of the very word which would 'inconvenience' its non-European policy. Millions of people 'paid in blood and tears for the policy of discrimination'.

India said the SA vote for Article 2 had seemed a happy omen but then its delegation had tried to delete the protection against discrimination. It asked SA not to press its amendment 'which would arouse animosity and misunderstanding'. If the amendment were retained, India would oppose it and ask for unanimous opposition from the Third Committee. Other delegations spoke with varying degrees of animosity. France was markedly severe. In the light of Nazism, protection against discrimination was vital. SA's discriminatory laws and policies explained the mistrust with which its amendment had been received. Rejection might 'further the protection of human rights in the Union of South Africa'. France hoped the amendment would not be withdrawn so that it could be roundly defeated in the vote.

The chairman having asked him to clarify his position, Te Water said that he had been surprised by the reaction to a suggestion clarifying the sense of Article 6. There was no attempt to understand SA's position or that of the European civilization's struggle for

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37 The debate is recorded in GAOR 1st part 3rd sess. 3rd Cttee. SR 229-240.

survival in the Union. Given the acrimony of the debate, he would try to make his delegation's position perfectly clear. 'The declaration should be a directive and inspiration to all peoples and to their Governments; it should be simple, intelligible and of universal bearing. The basic text before the Committee did not fulfil these conditions.' The debate had been even more harmful, for it had gone beyond the discussion of fundamental rights and the provisions of the Charter. He withdrew his amendment. The Committee voted on Article 6 in parts and adopted it as a whole by 45 votes to 0 with one abstention, presumably SA.

**Article 7:** *No one shall be subjected to arbitrary arrest or detention.*

The term 'arbitrary' can be given almost any interpretation. In the Union there is inter alia provision for arrest and detention in certain circumstances, although it is doubtful whether any of them could be criticised as 'arbitrary'.<sup>38</sup>

After a long debate, the article was adopted with the addition of the words '*or exile*'. SA did not participate but as it voted for the addition and against other amendments, which were rejected, presumably voted for it as a whole.

**Article 8:** *Everyone has the right in full equality to a fair and public hearing by a fair and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*

Insofar as this clause relates to judicial proceedings, there can be no objection against it. There are, however, many instances in which civil rights or obligations may be said to be determined by quasi-judicial statutory authorities. Such authorities must, of course, observe the elementary rules of justice...If this article means (as it well may be interpreted to do) that quasi-judicial tribunals must in every case be bound to hear oral representations there are many changes which would have to be made in our laws, and in some cases such changes may be found to be quite impractical.

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38 They included the arrest and detention of any person for the purpose of his removal from one province of the Union to another, under ss. 6(1) or 21(b) of the Immigrants Regulation Act 22 of 1913, and the removal from the Union of persons other than aliens, under s. 22 of that Act. Arrests and detention could also be effected under s. 1 of the Riotous Assemblies and Criminal Law Amendment Act 27 of 1914, s. 2 of the Native Administration Act 38 of 1927, or s. 148 of the Insolvency Act, 1936.

The CHR text was adopted unanimously. SA did not participate in the debate.

**Article 9:** *Right of presumption of innocence at public trials for penal offences; no-one shall be held guilty of a penal offence which was not an offence at the time it was committed.*

Clause 1 seems to exclude all trials in camera, while a superior court may, whenever it thinks fit and any inferior court may if it appears to that court to be in the interest of good order or public morals or of the administration of justice, direct that a trial shall be held with closed doors...Where a person under the age of nineteen years is tried, the trial is held with closed doors.

With some amendments the article was approved by 42 votes to 0 with two abstentions. SA did not speak but, given its comments on other articles, may have joined the majority rather than the abstentions, despite the arguments in the directive.

**Article 10:** *No unreasonable interference with privacy, etc.*

The term unreasonable is capable of any interpretation and, in practice, this right can only be regulated by the provision of the law.

The article as amended by the Soviet Union to replace ‘unreasonable’ with ‘arbitrary’ was approved by 29 votes to seven with four abstentions. There was no SA participation. If still present when the vote was taken, it is likely to have opposed in common with other Western nations, or abstained. It would hardly have voted against its ‘friends’.

**Article 11:** *Freedom of movement; right to leave any country and to return to one’s own.*

With regard to clause 1 of the article, the Commission on Human Rights seems to have gone beyond what could legitimately be regarded as a Human Right. In some countries labour perforce has to be controlled and individuals may be required to work in specified industries and in specific localities...In some other countries with a multi-racial population, as in South Africa, it has been found necessary in the interests of peace and good Government to proclaim reserved areas in favour of the different sectors of the population...[and] in the interests of the general welfare and good Government to restrict the influx of large numbers of unskilled labourers into urban areas in circumstances where an adequate supply of labour already exists and housing accommodation is inadequate.

The article, as amended during the discussion, was adopted by 37 votes to 0 with three abstentions. Voting patterns on the amendments when roll calls were taken suggest that

the SA delegation was absent, which would accord with Malan's comments to parliament, Louw's in the general debate and the tenor of the directive.

**Article 12:**

1. *Everyone has the right to seek and be granted, in other countries, asylum from persecution;*
2. *Prosecution genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations does not constitute persecution.*

The first part of this article would appear to be in conflict with every restriction on immigration existing anywhere in the world. The phrase 'acts contrary to the purposes and principles of the United Nations' may mean anything or nothing.

The Article was adopted by 40 votes to 0 with one abstention. SA did not speak. The vote was not recorded. During voting on the amendments, when 45 members attended, it sided with the West but the terms of the directive and Malan's comment in Parliament lend a presumption that it was absent for the final vote.

**Article 13:** *No one shall be arbitrarily deprived of his nationality or denied the right to change his nationality.*

How is 'arbitrary' deprivation to be defined?

The Soviet Union argued that, in terms of Article 2(7) of the Charter, any sovereign state had the prerogative to grant or deprive a person of his nationality and that third parties should not interfere. It was an opinion that would probably have appealed to SA, which did not, however, participate in the debate. There was no roll call vote. Voting on the amendments shows that only about 36 members were present, 45 when the article as a whole was adopted with seven abstentions (the Soviet bloc and Saudi-Arabia).

**Article 14:**

1. *Men and women of full age have the right to marry and found a family and are entitled to equal rights as to marriage.*
2. *Marriage shall be entered into only with the full consent of both intending spouses.*
3. *The family is the natural and fundamental group unit of society and is entitled to protection.*

Would 'equal rights as to marriage' mean that where a state recognises the right of men to contract a polygamous marriage (as under our Native law) it is bound to recognise also

the right of women to contract polyandrous marriages? The intention and purpose of this provision are obscure.

SA did not participate in the debate. Possibly it feared another attack, similar to that during the discussion of Article 6, and felt discretion was the better part of valour. The article was adopted with four amendments.<sup>39</sup>

**Article 15:** *Everyone has the right to own property.*

If it is the intention to say that a State may not deprive any person of all right to own property, or limit this right in order to render it altogether ineffective, it would be desirable to reword the article.

The article was adopted by 39 votes to 0 with one abstention. Although the Soviet Union had fought hard to have the phrase ‘according to the laws of the country’ included, it voted for the final text. There are no clues to South Africa’s vote if it was present.

**Article 16:** *Right to freedom of thought, conscience and religion.*

See [comment under article] 3.

This article provoked a lively discussion, in which the differences between the religions clearly emerged. Saudi Arabia led the Moslem attack on the right to change one’s religious belief. The debate wound a tortuous course to its final adoption unchanged. Although SA had previously expressed itself in favour of similar principles, it does not appear to have attended. It did not react to the USSR’s provocative remark that human sacrifice was still practised in the Union, while its name was not recorded in the roll call vote on freedom to change one’s religion. The final vote of 38 to three with three abstentions recorded the same number of participants as in the roll call. Forty-five votes were cast on the rest of the paragraph, which suggests that SA was simply absent from the debate by this time or chose not to commit itself on changing one’s belief.

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<sup>39</sup> The amendments were:  
 inserting the phrase ‘*Without any limitation due to race, nationality or religion*’ at the start of para.1;  
 inserting the words ‘*free and*’ before ‘full’ in para. 2;  
 adding that ‘*Men and women shall enjoy equal rights both during marriage and at its dissolution*’;  
 adding the words ‘*by society and by the State*’ at the end of para. 3.

**Article 17:** *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*

See [comment under Article] 3.

The debate took the expected line, reflecting the same East-West divide as had prevailed at the United Nations Conference on Freedom of Information in Geneva in March 1948. The Soviet bloc argued that the power of the capitalist-controlled press limited democratic expression, particularly in the US, and left the door open for a recrudescence of fascism. The West replied that the Socialist idea increased state control. In the end, the article was adopted unchanged by 36 votes to six (presumably the Soviet bloc). As the vote took place at the start of a new committee session, it is unclear whether SA was present. During the previous session, it had voted with the Western nations to reject the USSR amendments. Since SA had attended the Geneva Conference there is no reason to suggest it was absent or that it did not support the majority.

**Article 18:** *Everyone has the right to freedom of assembly and association.*

As regards freedom of assembly, the restrictions applicable in the Union under the Riotous Assemblies Act and similar provisions appear to be covered by the general limitation clause. As regards freedom of association, the Union's view has been that this could be more appropriately regulated by an ILO (International Labour Organization) Convention.

The text was approved with the addition of a sentence that no one should be compelled to join an association. SA did not participate in the roll call vote on the amendment, which showed that 47 members voted. Voting on the article as a whole was 36 to three with seven abstentions, which suggests that the delegation was absent.

**Article 19:** *Right to participation in government, to public employment and to have the government which conforms to the will of the people.*

This could not be applied in the Union. As a general rule, convicts, stateless persons and in some cases absentee voters cannot take part in the government; nor can persons who cannot comply with property, literary or educational qualifications, where such qualifications are in force. As regards clause 2 it is difficult to see how right of access to public employment can be regarded as a fundamental human right...As regards clause 3, what is the 'will of the people' and how is it to be determined for the purposes of the Declaration?

The discussion followed predictable lines with some amendments regarding the secrecy of the ballot. There is no record of SA participation or voting.

#### *3.4.4 SA abandons debate*

An undated note among Te Water's papers indicates that after some three weeks of debate Louw had instructed his personnel in the Third Committee not to take any active part in the proceedings, beyond watching them from time to time. The note, clearly drafted by Louw himself, complained that the discussion, which was supposed only to draft a set of moral principles, had been used for 'violent and vituperative attacks on the Union, even when it had not even been present' (as in the debate on Article 16). Louw was not prepared to let his officers stay quiet in the face of such attacks, or to reply and so compromise SA's stand on domestic jurisdiction. 'In the circumstances, we are not taking an active part in the further discussion of the draft declaration on fundamental human rights' (my emphasis). Heated discussions on matters of principle, Louw said, were to be expected but not unprovoked and abusive attacks on member states.<sup>40</sup>

By the time the discussion reached the economic and social rights, which were introduced in Article 20 and covered in the next few articles SA had ceased participation, even to rebut negative comments. These articles represented a departure from earlier declarations of the rights of man and the directive had dealt with them as a unit. It said that they dealt with the duties of states as much as the rights of individuals. They exceeded fundamental rights 'meriting recognition in an international instrument'. Economic rights, e.g. the right to work, the right to equal pay for equal work, the right to social security, the right to rest and leisure could not be assured by the state alone. To declare economic rights fundamental human rights would indicate that the UN was urging its members to move to 'towards state socialism'.

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40 Te Water papers SANA A78 vol. AE 24/1. Exactly when this instruction took effect is not apparent. It was a harbinger of SA abstentions during the discussions of the articles of the human rights covenants, although the reasons given then were based on the instruments' uncertain future. See paragraph 4.7.

SA had earlier proposed two amendments to the Preamble.<sup>41</sup> In its absence they were not submitted during the debate and no vote was taken on them. SA was also absent for the consideration of such items as methods of implementation, the right of petition, the protection of minorities and the accompanying resolution.

#### 3.4.5 *Consideration in Plenary*

The Third Committee devoted 84 meetings to the consideration of each article of the declaration. Plenary examined its report at three meetings, making only one amendment: Article 3 was made a new paragraph of Article 2.<sup>42</sup> The rapporteur indicated that the Third Committee's report consisted of a draft declaration (now called the Universal Declaration of Human Rights) and four related resolutions.<sup>43</sup> The text of the declaration served as the common denominator of rival ideologies and of the variations between the old and the new concepts of political, civil, economic, social and cultural rights.<sup>44</sup> The rights and freedoms set out in the declaration were not absolute but subject to legal limitations, including respect for the rights of others and, as pointed out in Article 29, 'meeting the just requirement of morality, public order, and the general welfare in a democratic society'.

Mrs. Roosevelt recognized that the document was a compromise, which could not satisfy everybody. The Soviet Union had, she said, tried to manipulate the draft into serving groups rather than individuals, 'with which alone the Declaration was concerned'.<sup>45</sup> She reiterated that it contained the basic principles to serve as a common standard for all nations. In a flight of fancy, perhaps not unjustified by subsequent events, she likened it *inter alia* to the Magna Carta and France's 1789 Declaration of the Rights of Man.<sup>46</sup> A

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41 E/C.3/226 and E/C.3/314 1948

42 The quotations in this section are taken from the SR of statements and reservations in the 3rd Cttee. A/C.3/SR 88-170, 174-178 and in Plenary GAOR 1st part 3rd GA Plenary 852-934.

43 A/777 1948. The resolutions concerned the right of petition, the fate of minorities, publicity, and the questions of implementation and a draft covenant.

44 It failed to solve them all, for the draft covenant had eventually to be divided into two, reflecting the difference in implementation measures that continued to separate the rival ideologies.

45 This may have been a misrepresentation of the economic and social articles but would explain the West's determination to oppose the Soviet amendments.

46 Like some others who made the same reference, Mrs. Roosevelt may not have read the former document, unless she shared the view expressed by D.M. Stenton in 'Magna Carta' *Encyclopaedia Britannica* Vol. 14 (ed. 1960) 632, that the Magna Carta 'as it was issued can have satisfied no-one'.

fellow drafter, René Cassin, the French representative both on the CHR and in the Third Committee, introduced a note likely to be of concern to those who later abstained in the vote. ‘The declaration had a wide moral scope. While it was less powerful and binding than a convention, it had no less legal value, for it was contained in a resolution of the General Assembly which was empowered to make recommendations; it was a development of the Charter which had brought human rights within the scope of positive international law.’

Louw assigned the unenviable task of explaining the SA abstention in Plenary to H.A. Andrews, who analyzed the points where the UDHR and the Union’s domestic policy diverged and said that the fears his delegation had expressed in committee seemed to have been justified. The draft created rights like full employment, which few states would be able to guarantee. ‘If the declaration was not intended to entail any obligations, it would be lacking in all practical value.’ Several delegations had espoused the legal obligation thesis. SA wondered if ‘the delegations subscribing to that view realized to what extent they were committing their Governments’. The UDHR would enable many questions formerly considered wholly within the field of domestic jurisdiction to be discussed, even condemned, in the GA. SA regretted that it had no choice but to abstain.

With the well known eight abstentions,<sup>47</sup> the resolution to which the UDHR was annexed, was adopted by 48 votes to 0 as GA Res. 217(III) on 10 December 1948.

#### *3.4.6 Comments from SA delegates*

In his report Andrews recorded that the Soviet representative had privately ‘deplored the Declaration as a dangerous incursion into the domestic jurisdiction of Member States’. USSR opposition in Plenary, however, had ostensibly been based on the failure of the UDHR to reach Soviet standards. Although Mrs. Roosevelt had said that the economic and social rights in the declaration did not ‘imply an obligation on governments to assure the enjoyment of these rights by direct governmental action’, she nevertheless gave their inclusion her whole hearted support. It was not easy, Andrews said, for SA to counter the

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47 The abstentions were, of course, cast by the Soviet bloc, Saudi Arabia and South Africa.

flood of emotion. 'But our delegation's statement was listened to with marked attention, and, I believe, was understood for its honesty of purpose.'<sup>48</sup>

L. Egeland, SA High Commissioner, London, wrote that 'ideologues and propagandists' had dominated the discussions.<sup>49</sup> SA's experience in the debates had been bitter. He believed that several states, which voted for the UDHR, would regret the political weapon 'its dangerously wide-ranging and detailed definitions will place in the hands of their enemies'. He had in mind particularly the use the Soviets would make of it in the propaganda they addressed to colonial peoples. The large proportion of non-European members, Egeland continued, complicated the position. 'South Africa, identified as she is with racial problems of great complexity, occupies an exposed and conspicuous position.' It could not expect to find the UN willing to understand the Union's problems 'or any less desirous of exploiting [its] difficulties'.

### **3.5 Conclusions**

#### *3.5.1 SA bipartisan approach to UDHR*

In their analysis of the individual articles of the Panama Declaration of Essential Rights, the SA law advisers documented the existence of racial discrimination in SA law and in consequence suggested that limitations be placed on certain rights the CHR might recommend. Their approach suggests they misunderstood the purpose of the declaration. Their analysis has not been dealt with in detail, since it is relevant only insofar as the officials had recognized the international implications of discrimination in SA legislation and practice well before the May 1948 elections. The contrast between the Union and the UN was clearly apparent once the generic term 'human rights and fundamental freedoms' was broken down into the specific articles to be included in a bill of rights. One may ask how a Western state should so signally have failed to trim its sails to the prevailing wind. The SA delegation seems to have thought honesty the best policy; few others really

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48 PM 136/2/11 minute 83/3 January 1949

49 Reference illegible 31 January 1949 on PM 136/1

cared. Andrews was right when he forecast that the real debate would be over the human rights conventions and their implementation.

Equally important is that the SA government was willing at that stage to submit its comments and proposals to the UN to help shape not only the draft declaration but also, as will be seen in the following chapter, the proposed covenant on human rights. The suggestions submitted by SA did nothing to promote a liberal view of human rights globally but were designed to protect racial policy at home and limit the contents of the draft declaration to rights which were 'so fundamental as to call for international protection'. These rights were mainly those enunciated by President Roosevelt in his 'four freedoms' speech.<sup>50</sup> The domestic political approach SA adopted did not differ from that of most members. The action shows that the Union government was motivated as much by political self-interest as any of the other states. A simple affirmation of the existing state of customary international law was far from almost everybody's mind.

The strictures SA earned at the 3<sup>rd</sup> GA were deserved; it would have been better advised to hold its peace. The blame, however, cannot be laid at the door of the National Party alone. The suggestions the Union made in respect of both the draft declaration and the draft covenant on human rights were all submitted during the Smuts administration. The Malan government made no original suggestions. Even the SA directive on the draft declaration for the 3<sup>rd</sup> GA was prepared in the immediate aftermath of the elections and largely reflected the thinking of the defeated administration. Malan indeed paid minimal attention to human rights issues. Available documentation indicates that he did not make an input into the SA directives on human rights at that early stage in his government. The fact that the directive could stress that the delegation's task was one of explaining the facts that justified discrimination suggests that, if Malan had received it, he did not read it carefully. This analysis supports the view that the directive had been in preparation even

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<sup>50</sup> See paragraph 1.1. They were freedom of speech and expression, freedom of religion, freedom from want and freedom from fear. To these the SA government added freedom of the press and freedom of assembly.

before the elections. The analysis annexed to it reflected the approach adopted at the first two GA's under Smuts's guidance, rather than that advocated by Louw at the third.

Even so, the directive was unable to specify how the two arguments justifying racial discrimination could be reconciled. At the 2<sup>nd</sup> GA, H.G. Lawrence had asserted that distinctions could not be abolished 'without jeopardizing the natural development, if not the survival, of the races concerned, especially the less advanced races'. At the 3<sup>rd</sup> GA, Louw, too, described discrimination as being in the interest of the indigenous population. At the same session, however, Te Water emphasized the necessity of protecting Western civilization in Southern Africa. It was a very awkward balancing act, not made any easier as the GA commenced discussions on the articles of the human rights covenants and SA tightened its apartheid legislation.

### 3.5.2 *Legal validity of UDHR*

When it adopted the UDHR, the GA was split over its legal significance. Eleanor Roosevelt claimed it had set up a common standard of achievement of moral rather than legal import. René Cassin of France and others insisted that it imposed legal obligations on member states. The Belgian argument that the UDHR would have an incontestable legal force, even if it did not bind members, was probably closest to the SA view as expressed by Louw. Kaeckenbeeck, who served on the Belgian delegation, claimed that many delegates took respect for human rights to the level of '*un droit absolu, supérieur à la souveraineté de l'Etat*'. Racial equality '*s'affirme violemment au profit des races de couleur*' at the expense of the most essential legal principles.<sup>51</sup> Human freedoms had been elevated under the Charter to a universal principle to be enjoyed individually but without clear guidelines for an international control system when Article 2(7) confronted the protection of human rights. There was no logic in juxtaposing sovereignty with the principle of respect for human rights, which entailed a derogation of that same sovereignty.

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51 Kaeckenbeeck *op. cit.* 143

SA never interpreted the UDHR as simply setting a standard. It thought the declaration should have been limited to codifying existing fundamental rights, as interpreted by SA, without giving them any more legal effect than they already possessed under customary international law. When asked to comment on the draft, the legal advisers treated it as they would have any document creating legal obligations. Their approach was more suited to the covenants, which would become binding international instruments. Unlike most other observers, SA assumed that a positive vote created legal obligations for the future. It did not share the view that the UDHR fixed a moral rather than a legal goal to be attained at some future time.

Apart from its frequent evocation in GA resolutions, the authority of the UDHR became evident in new laws and judicial decisions around the world. In the emotional atmosphere of the debate, of course, no state would have ventured outright opposition. However, it remains a signal testimony to the efforts of the 56 members, coming as they did from such a vast variety of backgrounds, that they were able to agree on a draft without a single negative vote. Whatever its imperfections, it did in effect break new ground. The UDHR has stood the test of time and has risen in stature to the extent that its binding quality receives expanding recognition in national as well as international courts. It has become a major element in the development of international humanitarian law. It is of course arguable that subsequent resolutions and international agreements, which tend to cater to the desires of those states which were not members at the time of its adoption, have altered its thrust somewhat, but the constant references to it in so many legal instruments bear witness to a remarkable achievement.

Although SA clung to the opinion that consistent protest rendered a resolution inoperative in the objecting state, Louw's implication during the 3<sup>rd</sup> GA that members who abstained on the UDHR resolution might later be held bound by it, seems to echo Lauterpacht. Louw's fears were justified to an extent by the moral authority the UDHR acquired, the reliance placed on it in other forums after its adoption and the inclusion of its tenets in international instruments and domestic legislation. This does not however affect the fact that the legality of the rights it enshrined derived from the existing recognition of those

rights in international and municipal law, not from their inclusion in an annex to a UN recommendation.

### *3.5.3 SA's abstention on UDHR*

It may be regretted that SA did not swallow its pride and follow those states which, at the time, may have voted for GA Res. 217(III) tongue in cheek. Andrews' remark that his explanation of the SA abstention was heard with marked attention and 'understood for its honesty of purpose' was either wishful thinking or tailored to the requirements of his political masters. It earned no plaudits in, and brought no realism to, the debate. Not even SA's Commonwealth friends agreed with it. When one reads the idealistic remarks of some Latin American and other delegates, however, to say nothing of the Soviet bloc representatives, who must have known how they were misrepresenting their domestic situation, and charts the subsequent actions of their governments, one cannot help asking how much was genuine, how much hypocrisy. The fact is that diplomats do what they are told. They are often away from their headquarters for long periods and are dependent on information and instruction they receive through their ministries. Of that, they have to make the best they can. It provides, however, an interesting insight into the role of international organizations in the development of international law.

**CHAPTER 4**  
**INTERNATIONAL COVENANTS ON HUMAN RIGHTS**

**4.1 First draft covenant: South African response**

Early in 1948, the CHR asked the UN Secretary-General to circulate to member states for their consideration and comment three draft texts, which together composed an international bill of human rights.<sup>1</sup> They comprised a declaration of general principles, a draft international covenant of human rights and measures of implementation. The aim of the draft covenant was to formulate in a legally binding instrument the rights approved for inclusion in the declaration of general principles.<sup>2</sup> The Department of External Affairs asked the SA law advisers to examine both the declaration and the draft covenant. The declaration, finally adopted on 10 December 1948 as the Universal Declaration of Human Rights (UDHR), was considered in the previous chapter.

The law advisers noted that the use of the phrase ‘as being among’ in Article 1 of the draft covenant made it clear that the rights and freedoms enumerated in the text were not exhaustive.<sup>3</sup> The rights mentioned should, as a protective measure, be considered exhaustive, they believed, until amendments were introduced. The draft implied that international law would no longer simply be concerned with relations between states but that a hitherto unknown field of relations between states and individuals would be added to it. Eventually the notion that these rights were ‘founded on the general principles of law recognised by civilised nations’ would be used to make the covenant binding on third parties. ‘Those who are unable to sign the Convention (sic) may find that they have avoided treaty obligations merely to be confronted with so-called legal obligations.’

Several articles, the law advisers remarked, contained provisions at variance with SA law. Article 5 on the right to life seemed to recognize only one exception, the death sentence, leaving out of account loss of life resulting from the suppression of riots, self-

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1 By Res. 46(IV) of 28 March 1947 ECOSOC created a drafting committee to prepare an international bill of rights. See par. 3.1.

2 E/600; P.M. 136/4/1 6 January 1948. See par. 3.2.3 for relevant background.

3 1/141/47 undated memorandum: Observations of the Government of the Union of South Africa on the Draft Convention...on Human Rights

defence or attempted arrests. The drafting came under severe criticism, emanating from the law advisers' view that universal standards did not exist. People differed for example on what constituted 'cruel and unusual punishment'. Some articles, like Article 11 on freedom of movement, went beyond what could legitimately be considered fundamental human rights. Movement control was necessary in a multi-racial country like SA.

The SA government communicated its views to the Secretary-General. Although other governments also commented, occasionally in similar vein to the Union, only the SA suggestions, numbered as they appear in the relevant UN documents, are tabulated below.<sup>4</sup> They are included after the specific articles to which they refer.

**Article 5:** No-one shall be deprived of his life save in the execution of the sentence of a court following his conviction of a crime for which this penalty is provided by law.

Suggested limitations:

1. Suppression of rebellion or riots;
2. Self-defence and defence of another
3. Killing in attempt to effect arrests for certain offences.

**Article 9:** 1. No-one shall be subjected to arbitrary arrest or detention...

2. In consequence, no person shall be deprived of his liberty save in the case of...

Suggested additions:

4. Arrest for the purpose of removal from one province to another;
5. Arrest for the purpose of removal of people other than legally admitted aliens;
6. Arrest of witnesses to bring them before a court;
7. Detention of children in need of care.

**Article 11:** Freedom of movement and choice of residence.<sup>5</sup>

Suggested restrictions:

12. Restrictions imposed where labour has to be controlled and individuals required to work in specified industries and even in specific localities;
13. Restrictions imposed where it is necessary in the interests of peace and good government to proclaim reserved areas in favour of the different sections of the

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4 E/CN.4/95 21 May 1948; E/CN.4/AC/SR 20-44; E/CN.4/AC.1/23 7 May 1948

5 Two texts were proposed permitting movement within borders and the right to leave one's country. The drafting committee forwarded both texts and a set of possible limitations to the CHR for consideration.

- population, and to restrict and control the free movement and choice of residence on the part of individuals belonging to different sections of the population;
14. Restrictions imposed in the interests of the general welfare and good government to restrict the influx of large numbers of unskilled labourers into urban areas where an adequate supply of labour exists, and housing is inadequate.

**Article 17:** Freedom of information

Suggested prohibitions:

16. The prohibition of the dissemination of information calculated to engender feelings of hostility among inhabitants of various races;
17. The prohibition of notices of prohibited meetings;
18. The prohibition of opprobrious epithets, jeers or jibes in connection with the fact that any person has continued or returned to work for any employer, or the sending of information as to any such fact to any person in order to prevent any other person from obtaining or retaining employment, etc;
19. Other statements, expressions or publications which constitute offences or parts of offences under the common law or in terms of statutes, such as blasphemy, treasonable statements, uttering a forged instrument, perjury, contempt of court... the use of indecent, abusive or threatening language in public places, fraudulent statements, statements amounting to *crimen injuriae*, false statements in a prospectus, the offer of any inducement to enter into a hire-purchase agreement;
20. The restrictions imposed upon the publication of preparatory examination and trial proceedings, where the offence charged involves any indecent act or an act in the nature of extortion, or upon the publication of information which is likely to reveal the identity of an accused person under the age of nineteen years of age or of a child concerned in proceedings before a children's court;
21. The prohibition of the disclosure of information obtained in an official or semi-official capacity, whether or not the disclosure will affect the national safety or 'vital' interests of the State;
22. Restrictions upon the publication of a picture or a public entertainment, where the picture or entertainment may give offence to the religious convictions or feelings of any section of the public, or is calculated to bring any section of the public into ridicule or contempt, or is contrary to the public interest or good morals;
23. Restrictions upon the publication of certain electoral matters;
24. The restrictions imposed by the laws relating to copyright;
25. Restrictions which it may be considered necessary to impose in order to eliminate or control subversive ideological propaganda.

**4.2 Draft divided into two**

At its 5<sup>th</sup> session from 9 May to 20 June 1949, the CHR based a new version of the covenant on a text prepared by its drafting committee in 1948. The aim of the revised draft was to achieve the practical realization of the principles already proclaimed in the

UDHR and to provide an international code of human rights and fundamental freedoms that should become 'the common concern of the covenanting states'.<sup>6</sup> The CHR opposed proposals to include self-determination in the draft as a right. It also rejected arguments that some of the economic rights enshrined in Articles 22-27 of the UDHR be included.

At its 6<sup>th</sup> session the CHR examined the revised draft of the covenant, proposals for additional articles in the light of comments received from 12 member states, and a survey on economic, social and cultural rights prepared by the Secretariat. The only inclusion in the revised version that might relate specifically to any of the suggestions made by SA in 1948 was the reference in Article 3 (formerly 5) on the right to life, to the concept of self-defence, which SA had submitted in common with the US. Article 6.2 read: 'No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.' The specific exceptions SA had proposed to the comparable text in the earlier draft (Article 9.2) were subsumed in the catchall. There is little doubt that the exceptions it had proposed to the right included in Article 8 (formerly 11) to choose one's residence would have fallen at the first hurdle. Experience would have dictated that they should not be pressed.<sup>7</sup>

The 5<sup>th</sup> GA stated that the first 18 articles of the covenant, which included the proposed civil and political rights, failed to mention some of the most elementary rights. It adopted a resolution asking the CHR to include economic, social and cultural rights in a new draft, to consider articles on the right of petition by individuals or NGO's either for inclusion or as separate protocols and to 'study ways and means which would ensure the right of peoples and nations to self-determination'.<sup>8</sup> ECOSOC examined the CHR's progress report at its 13<sup>th</sup> session and transmitted it to the 6<sup>th</sup> GA with the suggestion that the decision to include all human rights in one covenant be reviewed. The GA agreed

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6 E/1371 1949. Put this way, the CHR aims might not have appeared too intimidating to the proponents of state sovereignty. Despite its abstentions in the texts of the articles, SA felt able to participate at least in the early stages of the discussions at the GA with the ostensible intention of helping mould the covenant into a more acceptable text than the loosely worded UDHR.

7 The text of the CHR draft and other proposals is reproduced in the 1950 *YHR* 458-474.

8 GA Res. 421(V). The smaller CHR was clearly at odds with the larger membership of the GA.

and asked the CHR to prepare two draft covenants and to include an article in both on the right of peoples and nations to self-determination. This issue was to be given priority.<sup>9</sup> At its 8<sup>th</sup> session in 1952 the CHR continued drafting what were now two covenants, but was unable to finalize either. The treatment of the drafts was becoming a task of the GA rather than its organs. To examine it in that light from the SA viewpoint, it is necessary to return to the 5<sup>th</sup> GA debates in 1950.

### 4.3 5<sup>th</sup> General Assembly

#### 4.3.1 SA directive

At the close of the 4<sup>th</sup> GA, the leader of the SA delegation, G.P. Jooste, wrote to the Prime Minister giving his views on the session.<sup>10</sup> The most important problem was the attitude the Union would adopt towards the covenant of human rights, which was expected to be considered at the 5<sup>th</sup> session. SA should avoid standing alone or with a few Communist states and consider careful participation in the discussion, bearing in mind that the parties would be bound by the results. There is no record of Malan's reply but, in its directive on the proposed covenant on human rights for the 5<sup>th</sup> GA in 1950, External Affairs instructed the SA delegation to follow the actions of the Administering Powers, i.e. the states responsible for non-self-governing territories, and the US with regard to the texts of the economic and social rights articles and to oppose the inclusion of these rights in the draft. A schedule annexed to the directive provided guidance on SA's views on the substantive rights included in the draft covenant.<sup>11</sup>

The schedule indicated that the first five rights were acceptable, i.e. the right to life, prohibition of torture, prohibition of slavery and forced labour, prohibition of arbitrary arrest, and prohibition of imprisonment for civil debt. The first four were applicable in the Union, where the *habeas corpus* rule applied. The article providing for freedom of movement within the borders of a state, the right to leave one's country and prohibiting

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9 GA Res. 545 (VI). For the inclusion of a self-determination article in the covenants, see para. 4.3.3.

10 PM 136/2/13 vol. 1 letter Jooste to Prime Minister 20 March 1950

11 PM 136/2 AJ 1950 vol. 1. Since the covenant was still in an embryonic state, reference is made here to the subject matter of the articles, without identifying them by number. See also para. 4.2 fn.7.

arbitrary exile contravened several of SA's laws.<sup>12</sup> The prohibition on expelling aliens legally admitted applied in the Union, as did the right to a fair trial and the presumption of innocence. According to the schedule, retrospective convictions were not imposed in SA, except under the Suppression of Communism Act and the Asiatic (Land and Business) Act.<sup>13</sup> As the latter was highly technical and 'no *ex post facto* punishment [was] imposed' (sic) even under the former, the article prohibiting convictions for crimes that were not crimes when they were committed, was acceptable in principle. The next four rights, recognition as a person before the law, freedom of thought *et cetera*, freedom of opinion and right of assembly, were acceptable, the latter two because a caveat made them subject to domestic legislation.<sup>14</sup>

As regards the right of association and the right to form and join trade unions of one's choice, the Industrial Conciliation Act<sup>15</sup> did not provide for the registration of non-European trade unions, although their establishment was legal. As long as distinctions existed, it would be expedient not to accept the article. Several SA Acts, such as 'nearly all Native legislation', distinguished between white and non-white. The phrase 'all are equal before the law' was unacceptable so long as it 'continues to be regarded as permitting no exceptions in case of undeveloped communities etc'.

#### 4.3.2 *Third Committee debate*

The SA delegation reported that ECOSOC had asked the GA for policy decisions on the general adequacy of the first 18 articles on civil and political rights, the desirability of applying the covenant to federal states and non-self governing territories, the inclusion of social and economic rights and the articles of implementation. It did not want a clause-by-clause examination, as the general discussion would provide guidance for the CHR. The Third Committee debate, the report continued, suffered from lack of direction. Most

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12 They included the Group Areas Act 41 of 1950, the Native (Urban Areas) Act 21 of 1923 as amended and the Native Land and Trust Act 18 of 1936 as amended.

13 44 of 1950 and 28 of 1939

14 Restrictions did apply in the Union to the rights of freedom of opinion and of assembly, notably under the Suppression of Communism Act and the Riotous Assemblies Act 27 of 1914 as amended.

15 36 of 1937

delegates thought the text vague, imprecise, insufficient and unacceptable. Several claimed that their constitutions protected human rights better than the draft.<sup>16</sup>

Mrs. Roosevelt had said that with a few minor drafting changes the first 18 articles were basically satisfactory to the US. Of the other Great Powers, the UK was satisfied with the draft's scope but doubted whether all the rights included were fundamental or that the draft could constitute a legally binding document. France found the first 18 articles sufficient to express the spirit of the covenant but doubted the adequacy of the text. If the covenant could not meet all aspirations which national constitutions had thought fit to satisfy, it could at least express the greatest number of principles acceptable to all. The Soviet Union said it would submit detailed proposals to provide for banning 'the establishment of Fascist or anti-democratic associations or Unions'.

Of the Commonwealth countries, Canada felt the draft did not allow for accurate interpretation, nor did it distinguish between rights and freedoms. New Zealand found the wording too loose for a legally binding document; it failed to bar discrimination in economic and social matters. India said that 'civil liberties and fundamental freedoms could only exist where people were able to participate in the government by means of periodic elections on the basis of universal and equal suffrage'. SA attended but, despite the detailed nature of its directive, made no statement. Neither did Australia.

The Third Committee, the SA delegation report continued, used a draft resolution proposed by the USA, Brazil and Turkey as a basis for discussion of a future programme of work in the CHR. SA was ready to support most of the draft but could not accept paragraph (e): 'to proceed with the consideration of additional instruments and measures dealing with economic, social, cultural and other human rights not included in the draft

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<sup>16</sup> PM 136/2/13/1 vol. 1 9 September 1950. China, the SA delegation said, had commented wryly that, in such case, 'there appeared to be no need of a Covenant at all' for it would lower the standard of human rights. It suspected that the actual position was less encouraging and expressed concern as to how the covenant could promote and protect individual human rights everywhere. Mere ratification would not grant the enjoyment of these rights to everyone.

Covenant', since it implied the insertion of new rights. SA also opposed paragraph (g), which contained an implicit directive 'for the receipt and examination of petitions from individuals and organisations'. It joined Australia, New Zealand, the Netherlands and the UK in opposing the resolution as a whole. Thirteen countries abstained, including the Soviet bloc, but the final text was adopted by a majority of 29 votes.<sup>17</sup> In explanation of its vote, SA said that it had been unable to support the draft. Although most of the recommendations were acceptable and had been supported in separate votes, some were not. The GA's directive to ECOSOC and the CHR was impracticable, unclear and inconsistent. SA did not detail the items to which it objected, viz. the inclusion of the right of self-determination, of economic, social and cultural rights and the receipt and examination of petitions. On Minister Dönges' instructions it took no other part in the debate.<sup>18</sup>

Finally, the SA delegation noted that the more voluble states had called for the inclusion of every conceivable subject. The Lebanon remarked that those who wished to introduce a profusion of rights were erecting a façade, playing a double game. They made apparently laudable demands intended in reality only to delay the covenant. This explained their hesitancy over the implementation measures.<sup>19</sup>

#### 4.3.3 SA vote in Plenary

When the item reached Plenary, the SA delegation reported that it had supported the preamble of the Third Committee's draft resolution, including a paragraph:

*Considering* it is essential that the Covenant should include provisions rendering it obligatory for States to promote the implementation of the human rights and fundamental freedoms proclaimed in the Covenant and to take the necessary

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17 PM 136/2/13/1 Progress report Committee III 23 November 1950

18 In covering minute 26/11/3 of 24 March 1951 on PM 136/2/14 vol. 2 the SA Embassy in Washington explained that 'Mr. D.H. Botha originally represented the Union on Committee III when this item was discussed, but as his services were required in connection with other matters with which the Union was more vitally concerned, he was replaced by Mr. J.S.F. Botha.' The former was a law adviser and a full delegate, the latter an official of External Affairs and the most junior alternate on the SA delegation. The debates on the two SA issues followed those on human rights only after several days. The way the action was explained was a significant indication of the low priority SA attached to human rights.

19 PM 136/2/13/1 vol. 1 23 November 1950; A/C3/L.76 (1950) and A/C.3/SR 318 9

steps, including legislation, to guarantee to everyone the real opportunity of enjoying these rights and freedoms.

SA had joined 36 other states in rejecting a Soviet proposal to add a clause to the effect that the implementation of the covenant provisions fell under domestic jurisdiction. The Soviet proposal repeated its failed attempt in the Third Committee to delete the implementation clauses in the draft covenant because, it contended, they encroached on state sovereignty. Mexico had supported the Soviet proposal, arguing that, 'as signatories of the covenant [states] make themselves responsible for its application in their own territories'. The SA delegation felt that if this was really the interpretation intended by the Soviet Union, then it was merely stating the obvious. However, including such an obvious and fundamental principle in the resolution could have had far-reaching consequences. 'For it can then be argued that whenever such an obvious principle is not clearly stated, it is not implied.'<sup>20</sup>

The SA delegation report described Part B of the resolution as the meat of the instruction to ECOSOC. The first 18 articles, said the GA, omitted some basic rights; the wording was sloppy and should take note more effectively of the Purposes and Principles of the Charter. Consideration should be given to the records of the debate, particularly the inclusion of the articles proposed by the Soviet Union and to defining all the rights included with the greatest possible precision. While SA could not accept the view that some basic rights had been omitted from the draft, it was not prepared to oppose the final draft. Hence it withdrew when the vote was taken in order not to be alone in opposition.

SA opposed Part D, which instructed the CHR to study ways of ensuring the rights of people and nations to self-determination and Part E on the inclusion of economic, cultural and social rights in the covenant. Part F, which accepted the principle of the receipt and examination of petitions, was adopted by 31 votes to 14 (SA) with 12 abstentions. The debate indicated that the potential for opposition, when handling petitions was discussed

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20 PM 136/2/14 vol. 2 annex to minute 26/11/3 24 March 1951 from Washington. It was a curious reversal of the Union's standard position and SA's silence in the debate rendered its vote ambiguous.

later, was strong.<sup>21</sup> Parts G and H were not controversial and passed unanimously. The whole text was adopted as GA Res. 412(V) by 32 votes to seven with 12 abstentions. SA joined the UK, the Netherlands, New Zealand and Canada in voting against.<sup>22</sup>

#### 4.3.4 SA comment on GA. Res. 421(V)

In terms of GA Res. 421(V), the Secretary-General asked member states to comment on the decisions of the GA by 15 February 1951. SA made no comment on Articles 1-18 of the draft covenant in view of the wide divergence of views as to the rights and freedoms ‘susceptible to enforcement by international machinery’. Each article needed more accurate drafting, effectively to cover ‘an enormous variety of differing standards, conditions and circumstances’.<sup>23</sup> The move to expand the field of full legal obligations could, SA submitted, lead to a position where the document was either unenforceable or had too few adherents to make it genuinely universal. Provision should be made for reservations on individual articles, as some were unacceptable to the Union. ‘If a State is not permitted to accede to the Covenant with reservations in respect of one or two articles, it will in practice not be able to accede to the Convention at all’ (sic).<sup>24</sup>

In the parliamentary debate on his Vote, which coincided with the CHR’s 7<sup>th</sup> session, the SA Prime Minister said 12 of the 15 substantive rights were acceptable ‘and which we have adopted’, two quite unacceptable and one unacceptable without drafting changes. The UN had been so advised. ‘They know that, out of the 15 human rights, there are 13 which we accept in principle, and to which we have no objection. They know that there

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21 Cf. para. 4.8.2.

22 The GA adopted a resolution that Human Rights Day be celebrated every 10 December and invited states to report annually. The tension in the delegation is evident from the wording of the report. ‘The Leader of the Delegation’, it read, ‘instructed that the South African delegation should either abstain on the voting on this Resolution or be absent when voting takes place.’ Since only the Soviet bloc would abstain it preferred the latter option, so that the final vote read 47 to 0 with five abstentions.

23 PM 136/2 AJ 1950 vol.1 Directive on Human Rights to the 6th GA

24 There was truth in these comments. They presaged the length of time taken to draft the covenants and for their entry into force. At home, the proliferation of discriminatory legislation made still more articles unacceptable. Even had the covenants contained reservation clauses and, despite the fact that the word ‘apartheid’ did not appear in either, SA could not have become a party in good faith.

are some of which we would like to see the wording changed, and that there are two which we cannot accept.<sup>25</sup>

#### **4.4 South African delegation withdraws**

The SA delegation was instructed to expound the Union's basic policy on the covenant to the 6<sup>th</sup> GA at its discretion. Since it had not done so previously, a full-scale debate would provide an opportunity. SA, the directive stated, remained opposed to the inclusion of the economic articles, 'as they are not subject to universal enforcement'. If a majority wished to formulate them in an international instrument 'for some form of moral suasion' it should be in a separate document.<sup>26</sup>

As for the individual socio-economic articles, the directive stated, SA had no objection in principle to the right to gain a living by freely accepted work, to just and favourable conditions of work, social security, adequate housing, adequate standards of living, to a high standard of health, protection for maternity, children and young persons, to participation in cultural life, and to the equal right of men and women to the economic and social rights set out in the convention. Most of these articles were so general as to make them unexceptionable. The right to social security could be recognized in principle 'even though, with a population so poor (taking an average of all races), so scattered, the attainment of this ideal may not be in sight'. On the other hand, the right of everyone to form and join trade unions was unacceptable. Certain unions restricted membership, not only in SA. Many countries banned communist trade unions and affiliation with a communist organization.

The attainment of mass literacy or universal free and compulsory primary education, the directive noted, could not be made subject to a timetable, while the call for a detailed plan of action to provide free compulsory education within two years of becoming a party was

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<sup>25</sup> *House of Assembly Debates* Vol. 75 cols. 6820-6826 16 May 1951. Malan's analysis of these rights largely reflected the schedule provided to the SA delegation to the 5th GA. The letter sent to the Secretary-General by External Affairs, however, did not identify the objectionable articles, nor indicate what changes the government would have liked.

<sup>26</sup> PM 136/2 AJ 1950 vol.1 Directive on Human Rights to the 6th GA

impractical. However, there was no objection in principle to the right for parents to choose schools other than those provided by the state, on the assumption that provision of equal facilities for all meant ‘educational facilities of the same standard and not that all should have the right to enter a particular institution, e.g. a university’.<sup>27</sup>

As SA withdrew from the 6<sup>th</sup> GA, owing to a dispute in the Fourth Committee, before the Third Committee debated human rights, its delegation could not explain government policy in terms of the directive. The GA agreed with ECOSOC that two conventions be prepared, the second to accommodate economic, social and cultural rights.

#### **4.5 South African response to General Assembly actions**

After consideration of the Secretary-General’s communications on human rights issues at the 6<sup>th</sup> GA, the Union government reiterated its views on the difficulties of adopting texts to satisfy all parties, most of whom really sought a wording to meet their particular circumstances. SA welcomed the decision to provide for two covenants, since it was necessary to distinguish between rights which could be enforced by international action and rights whose implementation was not so enforceable, but whose observance could be ‘encouraged and promoted by some form of freely accepted international moral suasion’. The articles proposed for the draft International Covenant on Economic, Social and Cultural Rights (ICESCR) were unexceptionable as statements of ultimate objectives but could not be considered fundamental rights in terms of the UN Charter. They fell within the domain of domestic jurisdiction ‘unless individual states are freely willing to surrender that measure of sovereignty’ implicit in measures of implementation.<sup>28</sup>

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27 This was a bold assertion. Freedom of choice for the education of children was being hotly debated in the Union after a bid in *Swart and Nicol v De Kock and Garner* 1951 (3) SA 589 AD to have the Education Act (Language) Amendment Ordinance of the Transvaal Provincial Council of 1949 declared *ultra vires*. The Ordinance limited the medium of instruction up to a certain standard to a pupil’s home language. The Appellate Division decided by a three to two majority that the Ordinance was *intra vires*. The minority argued that it should not have been applicable to private schools, since it denied individuals the right of choice of either official language. The directive clearly approached the problem from a different viewpoint, that of the rights of non-whites. The passage of the Bantu Education Act 47 of 1953 would put the issue beyond doubt.

28 11/4/3 vol.3 minute P.M.136/4/1 28 May1952

SA sent an observer to the 8<sup>th</sup> session of the CHR in May 1952. He reported that the first 18 articles of the International Covenant on Civil and Political Rights (ICCPR) were adopted in modified form and an article on self-determination included.<sup>29</sup> Article 1 of the ICCPR, he wrote, provided for parties to ensure that the rights enumerated in the convention be granted without distinction as to ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. Belgium and the UK felt the reservations issue should be decided before the article was included. The CHR rejected a Soviet proposal to include the right of asylum for persons engaged in, *inter alia* ‘the struggle for national liberation’, as the right was too complex to be dealt with in a single clause. The SA observer said that much time was spent on the first article of the draft ICESCR. Known as the umbrella clause, it bound states to take progressive steps to achieve the enumerated rights and to guarantee their enforcement without discrimination. The majority thought that, in applying the covenant, each party should take the measures appropriate to its own circumstances.

#### **4.6 South African legislation incompatible with covenants**

The 7<sup>th</sup> GA devoted little time to the articles of the draft covenants. Similarly, the CHR failed to complete its consideration at its 9<sup>th</sup> session. Members proposed several new articles on civil and political rights and the question of implementation in the light of the establishment of a human rights committee to receive reports on human rights violations. ECOSOC asked the Secretary-General to send the CHR report to member states for comment before transmitting it to the 8<sup>th</sup> GA. On receipt of this request in August 1953, External Affairs asked the law advisers whether the texts were compatible with SA law.<sup>30</sup> They replied that the Union’s objections remained. It would be better to delay a reply. The 8<sup>th</sup> GA took no decisions but transmitted the records of the Third Committee discussions to the CHR for further consideration.

The CHR drafted provisions at its 10<sup>th</sup> session on reporting systems for the two draft covenants and final clauses. It drew ECOSOC’s attention to the possible advantages of considering the two covenants at separate GA sessions. Precedents existed and the

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29 *Idem* 17 June 1952

procedure might be justified by the exceptional importance of the documents. Among points raised at the CHR session, the SA observer highlighted the admissibility of reservations, which elicited many contradictory views. Most members argued that, as international conventions were often adopted by majority rather than unanimous vote, the opportunity had to be given to the minority to make reservations, which would enable them to accede without reducing their sovereignty. The UK pointed out that the CHR was trying to codify the whole body of domestic legislation on human rights at the international level. It would be almost impossible for all states to achieve a complete identity of views between their law and the covenants. The USSR claimed that anything but an unconditional right of reservation would limit national sovereignty.

In preparation for the 9<sup>th</sup> GA External Affairs and the law advisers together prepared an analysis of the substantive texts of the covenants as they so far existed and of their compatibility with SA domestic legislation. The analysis consisted of the text of each article, a statement of its aim, the legal position in the Union, the opinions of the law advisers and those of the responsible officials of External Affairs.<sup>31</sup> Some articles in the civil and political text were found to be in accordance with SA law. Others could be supported, with reservations. Where these principles could be accepted, the law advisers suggested co-operation toward finding a more apt formulation.<sup>32</sup>

As for the rest of the ICCPR, Article 1, whereby ‘all peoples and all nations shall have the right to self-determination’, was construed by most UN members, the analysis suggested, as protecting all peoples’ rights freely to determine their political, economic, social and cultural status. The law advisers preferred not to comment while External

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30 PM 136/2 AJ 1953 9th sess. vol. 2; PM 136/4/1 28 November 1953

31 PM 136/2 AJ 1953 9th sess. vol. 2

32 The acceptable provisions were Arts. 7 (prohibition of torture), 8 (prohibition of slavery, servitude and forced labour), 9 (prohibition of arbitrary arrest), 10 (humanitarian treatment of prisoners), 11 (no imprisonment for failure to meet a contractual obligation), 13 (no arbitrary expulsion of a lawfully admitted alien), 14 (equality before the courts and right to a fair and open trial), 15 (no retrospective convictions), 16 (the right to legal personality), 17 (no arbitrary or unlawful interference with privacy), 18 (the right to freedom of thought, conscience or religion), 25 (protection of minority rights) and 26 (prohibition of incitement to racial hatred and religious hostility).

Affairs described it as unsatisfactory. The juxtaposition of ‘all peoples’ and ‘all nations’ suggested that the former could be used to describe the various non-white groups in SA. The article was open to a variety of interpretations.

Article 2, which provided for the rights enumerated in the covenant to apply to all citizens without discrimination on the grounds of race, colour, sex *et cetera*, was considered in conjunction with Article 24, equality before the law. Legislation in the Union had drawn such distinctions from the time of the South Africa Act of 1909. While the law of procedure did not discriminate on grounds of race, virtually all legislation dealing with natives did. Both departments agreed that SA could not abandon its stand on the issue of legal equality without discrimination, as the principle was understood in UN circles.

External Affairs felt that Article 3, equal rights for men and women, was not acceptable without reservations on racial grounds, since it too could be interpreted to the country’s detriment. It agreed with the law advisers that Article 4, which provided for limited derogation from rights enumerated in the covenant in times of public emergency held similar dangers. Article 5, which prohibited states from limiting any of the enumerated rights in their domestic legislation, on the pretext that the covenant offered less protection, could, both felt, amount to a drastic limitation of state sovereignty.

Article 6, the right to life, provided that the death penalty could only be invoked in terms of laws which did not contravene the UDHR or the Genocide Convention. The law advisers noted that, as the latter did not bind all UN members, while the former was not legally binding at all, reference to either was out of place. External Affairs added that the courts’ tendency to impose the death penalty for the rape of a white by a non-white in the absence of extenuating circumstances, ‘*en andersom*’, could be prejudicial for SA.

Article 12 on freedom of movement and the right to travel was in conflict with *inter alia* the Group Areas Act<sup>33</sup> and the pass regulations. The law advisers thought the SA

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33 41 of 1950

regulations could be defended in an international body on the grounds of reasonable necessity, although the SA interpretation might differ from that of the majority, since it implied discrimination. External Affairs considered the article ‘obviously unacceptable’.

While the freedom of speech and of opinion provisions in Article 19 conflicted with the Suppression of Communism Act and the Native Administration Act,<sup>34</sup> the law advisers made no comment on them. External Affairs said that the article was subject to necessary legal restrictions but that it was not clear who would judge the necessity. It required greater clarity as did Article 20 on freedom of peaceful assembly, to which the Suppression of Communism and Riotous Assemblies Acts contained exceptions. The law advisers felt that Article 21 on freedom of association, including the right to form and join trade unions, should fall under the International Labour Organization (ILO). In any case, the Industrial Conciliation Act made no provision for registering non-white unions.

The right of men and women of marriageable age to marry with their free consent was protected under Article 22. As this rule applied in SA, the law advisers argued that the Mixed Marriages Act<sup>35</sup> was not inconsistent with it, since it did not limit the right to marry in any way other than racial grounds. External Affairs felt it would make SA vulnerable in the UN. Article 23 on the right to vote and stand for election was unacceptable. That right had been circumscribed in the Union since the South Africa Act of 1909.

As for the rest of the covenant, the law advisers felt that its adoption, notably Article 40, requiring parties to submit reports, would subject states to far-reaching interference in their domestic affairs. *‘Dit is byna seker dat die Verbond as ‘n politieke wapen gebruik sal word en daar bestaan min twyfel dat dit teen Suid-Afrika gebruik sal word as dit ooit aanvaar word.’* External Affairs agreed.

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34 38 of 1927 as amended

35 55 of 1959

With respect to the draft on economic, social and cultural rights, the same strictures applied to Articles 1 (self-determination), 2 (prohibition of discrimination) and 3 (equal rights for men and women) as to the comparable provisions in the other text. Article 4, which allowed for limitations imposed by the state on the enjoyment of the rights enumerated in the covenant, did not really offer the government any protection, since restrictions were permissible ‘solely for the purpose of promoting the general welfare of a democratic society’. Article 5, which prohibited the reduction by states of existing rights to make them compatible with the covenant, would open the way for all kinds of complaints. In practice it would impair sovereignty and was unacceptable.

Article 6 ensured the right to work and to attain full political and economic freedom. It could prove embarrassing since the native could not do all forms of work. There was no objection to Article 7, which provided for just conditions of work, but it too held dangers in regard to differentiation, for example in wages. Article 8 on membership of trade unions should, like Article 21 in the ICCPR text, resort under the ILO. Article 9 (the right to social security) was so vague that there could be no objection in principle, although poverty and the wide diffusion of much of the SA population might make the ideal unattainable. Articles 10 (special protection of family rights), 11 (the right to adequate food, clothing and housing), 12 (the right to an adequate standard of living), 13 (the right of everyone to the highest possible standard of health) and 16 (the right to participation in cultural life) raised no objection in principle, subject to compatibility with native custom.

The law advisers did not comment on the right to compulsory primary education and equality of accession to secondary education enshrined in Article 14. The article provided, *inter alia*, for the promotion of respect for human rights and fundamental freedoms and of ‘understanding, tolerance and friendship among all nations, racial, ethnic or religious groups’. External Affairs felt it was incompatible with racial discrimination

in SA and was accordingly unacceptable. The undertaking in Article 15 to make free primary education available to all within two years was impracticable.<sup>36</sup>

The directive reiterated the view that the covenants should be separated to distinguish between rights enforceable by international action and others. The Union did not oppose the principle of including unenforceable rights in an international instrument but, as SA's interests were served by 'maximum procrastination', the delegation should support the proposal that they be examined in consecutive GA sessions. Lip service might be paid to the admissibility of reservations, i.e. support for the principle but not for any particular wording. 'Since so many of the articles of the draft covenants are not acceptable to the Union, we would probably not be able to sign the covenants even if a reservations clause is included.' However, as SA was unable to endorse most articles of the two covenants, it was preferable to abstain on all articles because several of those included were objectionable (my emphasis).<sup>37</sup>

#### **4.7 South Africa abstains on covenants**

The Third Committee indulged in an acrimonious debate at the 9<sup>th</sup> GA, initially on the procedure of dealing with the draft covenants. It decided to subject the documents to a general discussion before examining the texts in detail. The debate revealed the gulf between the participants, notably over self-determination, in a virtual rehash of earlier arguments in the CHR and in ECOSOC.<sup>38</sup> A Costa Rican proposal inviting members' comment on the drafts within six months, so that the 10<sup>th</sup> GA could commence an article by article review 'in an agreed order', was finally adopted.

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<sup>36</sup> This was a typical example of careless thinking by the drafters. Some ten years would elapse before the convention was signed, 20 before its entry into force, and even then the time limit and the adjective 'free' were deleted.

<sup>37</sup> Cf. para. 4.6 fn. 32. The tenor of the SA directive was an indication of a widening rift. In 1951 Malan had advised Parliament that the government rejected only three of the 15 substantive articles of the political and civil draft. Apart from the provision on self-determination, the current texts contained no new fundamental human rights or negative provisions.

<sup>38</sup> A/2808 and Corr.1

SA did not vote but its delegation's report to External Affairs was scathing. The procedural discussions in the Third Committee had been particularly unsavoury, 'tainted as they were by the vicious anti-colonial political currents which mill below the seemingly idealistic surface of the human rights question'.<sup>39</sup> The debate on substance had been more orderly but it was clear that there was no prospect of achieving universally acceptable instruments for years to come (another 12 in fact, although not quite universal even then). While the concept of human rights in the Charter and the move to make the individual a subject of international law sounded plausible, they had become one of the most insidious weapons of the UN anti-colonial group, for whom the draft covenants were 'merely political vehicles towards a political end'. The general debate had become a propaganda forum to adapt the covenants to domestic policies rather than to align them with international norms.<sup>40</sup>

The report suggested that SA might be ill advised to continue to prevaricate and should start to extricate itself. The CHR had completed its task and handed on the torch to the GA. The 9<sup>th</sup> GA had completed the general discussion; the 10<sup>th</sup> would move to the specific and start to redraft the covenants article by article. As the Union could not sign them, it would be inappropriate to go through the motions of joining in this task. SA should alter its attitude and oppose the inclusion of the reservations clause, since most of the current articles were unacceptable. 'The more inflexible the Covenants are, the less embarrassing it would be for us to reject them as unfeasible propositions.'<sup>41</sup>

In preparing its directive for the 10<sup>th</sup> GA in 1955, External Affairs advised its new Minister, E.H. Louw, that an analysis of the draft covenants prior to the 9<sup>th</sup> session had revealed that most of the articles fell into the objectionable category as far as SA was concerned. The 10<sup>th</sup> session would force SA, in common with the other members, to

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39 11/4/3 vol. 4 2 December 1954

40 Many members, the report said, would have preferred to see the covenants buried but were answerable to public opinion at home. The UK, Australia and New Zealand in particular, driven by strong domestic socialist movements, 'put on an act every year' of seeking a universal formula, talking to the gallery and temporizing the while. SA did not have this problem.

41 These suggestions were made on the eve of Dr. Malan's resignation and the establishment of External Affairs as a separate department with its own Minister, E.H. Louw.

state its position on each article. It could abstain on all of them, as approving only a very few might subject it to unnecessary criticism. To justify this tactic the SA delegation could argue that certain basic issues like self-determination, or the absence of a reservation provision, made the covenants unacceptable. Louw agreed.<sup>42</sup> Accordingly, towards the end of the procedural debate in the Third Committee at the 10<sup>th</sup> GA, SA stated that while some articles might be acceptable after re-drafting, ‘fundamental differences...rule out any prospect of achieving universality for years to come’.<sup>43</sup> The UN could not reconcile the irreconcilable by drafting universal instruments ‘for which our present day world is clearly not yet ripe’. Without universality the covenants would lose all force and effect. SA would therefore neither participate in nor hamper the drafting exercise and would abstain on all the articles submitted for adoption.

The 11<sup>th</sup> GA devoted its attention mostly to the articles of the draft economic and social covenant. By then SA had withdrawn from the session. Since the Third Committee did not have enough time to discuss the item, the GA postponed consideration to its 12<sup>th</sup> session, at which the Union still maintained only token representation.

#### *4.7.1 SA re-examines abstention policy*

SA returned to the 13<sup>th</sup> GA, where Louw, as Minister of External Affairs, led the delegation. The Third Committee opted to start its consideration of the covenants with Article 7 of the ICCPR, the prohibition of torture and cruel or unusual punishment. The SA delegation reported that the US, which had for the past few sessions also followed the line of non-participation in the drafting process and abstained on all votes, had announced a change in policy. Its representative reiterated the US view that the coercion inherent in the covenants was not the best way of dealing with human rights and that it did not intend to sign them when completed. However, the US would consult with other delegates, offer suggestions and help with the drafting in order to arrive at the best possible formulation. Privately the US informed SA that the State Department had agreed to change its policy with reluctance but felt it should help those who were trying to prevent the worsening of the texts. ‘If these Covenants are going to be floating around the

world', its representative said, 'we may as well try to make them as harmless as possible.' Other countries unlikely to accept the final texts applied the same policy.<sup>44</sup>

This, remarked the SA delegation, left the Union alone in continuing to remain silent and to abstain on all votes. It often entailed voting with a very small group and occasionally in isolation, for when the final texts were considered no delegation was willing to vote against them. Abstentions had come to imply negative votes, although it had not been so in the beginning when the self-determination articles had been approved. In effect this implied that SA was seen to oppose every article. As far as possible, the delegation said, it contrived to be absent when the vote was taken. It had succeeded in missing the votes on Article 7 but had had to abstain on the next, slavery and forced labour, which was adopted by 70 for, with Iraq, Lebanon and SA abstaining. Iraq had voted in error and expressed support for the text, while Lebanon had opposed an earlier amendment and could not vote for a text that included it. SA alone had no explanation.

By the time that Article 9 on the liberty of the person and freedom from arbitrary arrest was under review, the pressure on the SA delegation was such that it decided, after Louw had returned home, that a clarification was necessary. Accordingly it reminded delegates of the policy statement made in 1955 that it would abstain on all articles and explained that once the drafts were completed the final texts would be submitted to the government for approval. Abstentions, even on such non-controversial articles as the present one, should not be construed as reflecting the Union's views on individual articles.<sup>45</sup>

A copy of a memorandum drawn up in External Affairs, and forwarded to the SA permanent delegation in New York prior to the 14<sup>th</sup> GA for information, suggested that the draft covenants ignored practical realities. They dealt with such themes as 'political self-determination for all men, absolute equality of opportunity, equal pay for equal work irrespective of race, sex or nationality, non-discrimination and so on'.<sup>46</sup> Most responsible

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43 11/4/3 10th General Assembly Draft International Covenants on Human Rights 13 January 1956

44 *Idem* Third Cttee. undated Progress Report No.3 Draft Covenants on Human Rights

45 136/2/21/1 vol. 2; A/4045 9 December 1958. See para. 4.7.

46 11/4/3 vol. 6 undated memorandum under reference 136/4/1

states opposed the time wasting, which was why SA had consistently abstained. SA had not been alone, until the decision of the US to assist with the drafting obliged it to explain its abstentions. To maintain a policy of non-participation might be an honest procedure but, in the prevailing atmosphere, it was probably ‘a sacrifice at an empty altar’. It might therefore be appropriate to make a statement in the Third Committee similar to that of the US. The SA delegation could add that, while its attitude towards the final texts could not be predicated in advance, it intended to ‘offer suggestions from time to time and to play what part it could in reaching the best possible formula for the draft articles’. A note in the margin reads: ‘the recommendation in the final part was evidently not approved’.<sup>47</sup>

Thus the SA delegation abstained on all votes in the Third Committee and again felt the need to explain its tactics, adding that while it did not intervene in the discussions it continued to follow the deliberations with interest. SA’s abstentions were in varied company, shifting to both sides of the cold war and colonial divides, without apparent reason. The explanation was indeed necessary.

The directive for the 15<sup>th</sup> GA reiterated that the covenants were divorced from practical realities. Had their themes been designed for a utopia, no harm would have been done. But Article 2 of both committed parties to implement human rights by guarantees of non-discrimination and amendment of legislation. After SA had given its customary explanation to the Third Committee, friendly delegates pointed out that abstentions were not an accurate reflection of SA’s attitude towards the covenants and were open to misinterpretation, particularly when SA was the only country not to vote in favour of an obviously acceptable article.

Against this background, the SA delegation again suggested that the abstention policy be reconsidered. Western delegations still doubted the sincerity of the most active protagonists and their own ability to subscribe to the final texts but preferred to

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<sup>47</sup> As the file has been destroyed, it is impossible to trace the memorandum’s fate in Pretoria. It is hardly likely to have been welcomed by the law advisers, if it was in fact discussed with them, and there is no evidence that it was submitted to the Minister.

participate in the drafting. The way SA acted and voted was thought to imply disagreement with the essence of the covenants. Its silence was often construed as an admission of guilt. Since many articles contained basic principles recognized by all civilized nations, abstention did the Union's reputation a disservice; it was inconsistent with the time and money SA spent outside the UN on trying to explain its efforts to find constructive solutions to very difficult problems. Was SA, the delegation asked, not forfeiting a chance to influence the text to provide for countries of unequal economic and social development?<sup>48</sup>

External Affairs gave careful consideration to these suggestions after the 15<sup>th</sup> GA but maintained its view that continued abstention was the best policy. If the covenants had been so drafted that SA could have subscribed to the majority of articles (my emphasis), participation in the debate and the voting might have been possible. But 'inherent in every article is the acceptance of the principle of non-discrimination'. Taking part in the discussions implied accepting the basic principles underlying the covenants and entailed 'a measure of moral obligation which we are not entitled to assume'. Other states could avoid implementing obligations assumed under the conventions with impunity but 'with the searchlight of world criticism highlighting any action' it took, SA was not so lucky.<sup>49</sup>

The SA dilemma was illustrated at the 16<sup>th</sup> GA. During the debate on Article 26 (20 in the final text), prohibiting propaganda for war and advocacy of national, racial or religious hostility that constituted incitement to discrimination, hostility or violence, the Soviet representative deplored the serious problem of the dissemination of racialism and the idea of white supremacy. He referred to SA where 'racialism had become government policy'. SA replied that its domestic policies were in accord with the article's aims. The Soviet Union, on the other hand, advocated forbidding war propaganda when its leader was 'boasting about the size of his bombs'.<sup>50</sup> SA did not otherwise participate in the Committee and was absent for the votes on the rest of the articles. Five years would elapse before the two covenants were finally adopted on 16

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48 11/4/3 vol. 7 15th GA 3rd Cttee. Draft International Covenants on Human Rights 6 June 1961

49 136/2 AJ 1961 16th sess.

50 11/4/3 16th sess. 3rd Cttee. Progress Report No. 3

December 1966, another ten before they entered into force. They fall outside the time-scale of this thesis but it may be noted that SA did not consider participating in either before 1994.

## **4.8 Measures of implementation**

### *4.8.1 First meeting of CHR*

As part of its terms of reference when it was established by ECOSOC in 1946, the interim CHR was requested to draw up an international bill of rights. The second part of the bill was a draft covenant (later two covenants) on human rights. In tandem with the negotiations on the covenants and as part of a single concept, ECOSOC and the CHR considered measures by which their provisions might be implemented.<sup>51</sup> The GA agreed that measures of implementation should be included in the covenants and suggested to ECOSOC that it arrange for a regime of annual reports from member states on the progress they had achieved in promoting human rights.

When he attended the first meeting of the CHR in New York, the SA observer was able to follow only the debate on the implementation of the bill.<sup>52</sup> He reported that India had argued that if there were no provisions for the implementation of economic and social rights in terms of Article 56 of the UN Charter, the CHR had no *raison d'être*. The USSR felt such action was premature, while the UK feared that, as the bill might make inroads on Article 2(7), it would be advisable to see the draft before considering implementation measures. Australia proposed creating an International Court of Human Rights. Unable to agree, the CHR asked its drafting committee to explore both the means of enforcing observance of human rights and the Australian suggestion.

### *4.8.2 Right of petition*

SA made no official statement at the first CHR meeting but its observer raised with friendly representatives a lacuna in the report of the sub-committee, which the CHR appointed to handle complaints of human rights violations addressed to the UN. The

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51 For the adoption of the UDHR, see Chapter 3. The negotiations for the covenants, incomplete within the time frame of this thesis, were dealt with in paras. 4.1 to 4.7.1.

52 PM 136/4/1 vol. 1 tel. 147 29 January 1947; cf. par. 3.1.

Secretariat had prepared a confidential list of complaints but, since the sub-committee had recommended that the list simply go to the members of the CHR, the SA observer had not received a copy. He suggested that the report allow for complaints to be passed to non-member states as well. The UK was embarrassed to help, since its representative had presided over the sub-committee and had failed to notice the slip. Australia raised the point officially, arguing that states accused of violations would not be able to refute the allegations. It proposed an appropriate amendment, which was defeated. Since the UK had opposed the Australian amendment, it at first refused to make the list available to the SA observer but later relented and provided him with a copy of the complaints about SA.

At its third session the CHR received a proposal that an article on the right of petition be included in the international bill of human rights. It read: 'Everyone has the right, either individually or in association with others, to petition or to communicate with the public authorities of the state of which he is a national or in which he resides, or with the United Nations.'<sup>53</sup> There was some doubt as to whether petitioning was a right of itself, or whether it should be included under measures of implementation. The CHR did not have time to examine the point and passed the text to ECOSOC, which passed it on unexamined to the GA, where it was too late to be included in the UDHR.

External Affairs commented on the right of petition in the directive prepared for the 3<sup>rd</sup> GA.<sup>54</sup> The UN, it noted, received thousands of communications concerning human rights on which neither the CHR nor ECOSOC was competent to act. ECOSOC had asked the Secretariat to advise each member state not represented on the CHR of any complaint against it. Although several petitions on human rights violations by SA had been sent to the UN, only one, a resolution by the (Communist) World Federation of Trade Unions, was forwarded in full, the others were in summary form. No indication was provided on what action, if any, the SA government took with respect to the information received.

The directive said that the addition at the end of the proposed article of the words 'or with the United Nations' constituted the recognition of the right of individuals to petition the

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53 1948/9 UNYB 540

UN on anything. ‘This implies a jurisdiction on the part of the United Nations which they obviously do not possess.’ SA did not pursue its objection at the GA, where Cuba argued that the inclusion of an article in the UDHR on the right of appeal to the UN, in the absence of machinery to deal with it, was premature. Other delegations agreed, although they viewed petitioning as a right. The USSR came closest to the SA view. It argued that to petition was not a fundamental right like the right to work. It was the state’s task to redress wrongs. An appeal to the UN violated national sovereignty.<sup>55</sup>

The Third Committee adopted a resolution asking ECOSOC to continue its examination of the right of petition, so that the GA could decide what ‘further action, if any’ it should take. The first preambular paragraph of the draft covenant asserted that the submission of petitions was an essential human right recognized in many constitutions.<sup>56</sup> The CHR remained divided on the issue but at its 6<sup>th</sup> session rejected the GA’s call for the preparation of an article in the draft covenant allowing the Secretariat to receive petitions from individuals and organizations, in addition to the existing provision for state-to-state complaints. In its directive for the 5<sup>th</sup> GA, SA welcomed the CHR’s decision but stated: ‘There is of course no question of the Union subscribing to the Covenant with these implementation clauses.’<sup>57</sup>

The CHR took no action at its 7<sup>th</sup> session on the right of petition, which remained a subject of disagreement, but considered the establishment of a Human Rights Committee to further its implementation proposals. It forwarded to ECOSOC a US proposal for a separate protocol authorizing the Human Rights Committee to receive written petitions from individuals and certain NGO’s, alleging violations of the Covenant, together with

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54 PM 136/2 AJ 48/49

55 1948/9 *UNYB* 541

56 GA Res. 217(III) B 10 December 1948

57 PM 136/2 AJ 1950 vol. 1

suggested amendments.<sup>58</sup> The matter was not taken further but the proposal marked an important step towards the elevation of individuals as subjects of international law.<sup>59</sup>

#### 4.8.3 *Other methods of implementation*

The CHR continued its work on other methods of implementation. At its 5<sup>th</sup> session several delegates shared the Indian view that individuals should be enabled to initiate proceedings. The US and the UK proposed jointly that only states could do so, with *ad hoc* committees being set up to try to resolve issues which had not been settled by negotiation within six months. All, except Australia and India, the latter possibly with SA Indians in mind, envisaged reference to the ICJ. Australia again proposed a Court of Human Rights to deal with problems that might arise, France a commission of experts, Guatemala a conciliation commission. France and Guatemala believed that individuals might become subjects of international law, a step for which the US and the UK were not yet prepared. The Soviet Union opposed all the proposals as interference with the sovereignty and independence of states. At its 6<sup>th</sup> session, the CHR asked the Secretariat to prepare a questionnaire for all member states on the need, if any, to set up international institutions for the purposes of implementation, how the economic and social issues should be dealt with, how the proposed measures should relate to the covenant, who should be entitled to initiate proceedings, and whether any bodies should be established to deal with violations. The SA delegation was instructed to oppose any attempt at the 5<sup>th</sup> GA to widen the implementation proposals recommended by the CHR.

At its 7<sup>th</sup> session the CHR examined the draft measures of implementation through the establishment of a Human Rights Committee and prepared a set of articles to cover a reporting system by member states on progress achieved.<sup>60</sup> Since ECOSOC asked the CHR to continue its efforts at its 1953 session, External Affairs did not expect much

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58 E/CN.4/640 para. 28 and Annex V. The CHR was unable to complete consideration of the petitions issue. It was later subsumed in the GA's redrafting of the two covenants, in which exercise SA did not participate.

59 The SA observer to the CHR learnt that the UN Secretariat received 25,279 communications on human rights world-wide between 3 April 1951 and 7 May 1952, most relating to racial persecution. The records show that it passed on less than a dozen notifications of complaints a year to SA, of which some covered the same event, often related to the Group Areas Act and the Suppression of Communism Act.

60 *Yearbook of Human Rights (YHR)* 1951 524-555; E/CN.4/515 and addenda; E/CN.4/529

debate at the 8<sup>th</sup> GA that year and contented itself with a virtual repetition of the directive prepared for the 6<sup>th</sup> GA. The implementation proposals were still unacceptable and remained so.

#### *4.8.4 Alternative US proposals*

In 1953 the Republican Party, under President Dwight D. Eisenhower succeeded the Democrat Party in the US. For the first time at the UN Mrs. Roosevelt no longer led its delegates to the Third Committee and the new administration showed its intentions towards the draft covenants by submitting three draft resolutions to the CHR at its 9<sup>th</sup> session. One called for annual reports on human rights to be submitted to the Secretary-General by each member state, the second for a series of studies on specific aspects of human rights, and the third for the appointment of experts to provide advisory services.

When it passed the US proposals to other departments, External Affairs noted that some US Congressional leaders had expressed concern that the draft covenants might conflict with legislation entrenched in the US Constitution. They had even called for a limitation on the President's treaty making powers. To thwart this idea, the Secretary of State had indicated that the new administration did not intend to become a party to the covenants; it had advised the CHR that the world was not ready for such comprehensive agreements. To avoid embarrassment, the US had submitted the alternative proposals, which were a radical departure from the goals the CHR had been pursuing. Instead of legally binding covenants containing measures for their implementation, the new texts would have no legal force, although some form of implementation, which might infringe Article 2(7) of the UN Charter, was envisaged. The US proposals would, External Affairs emphasized, create great difficulties for the Union if adopted, particularly the submission of annual reports on results achieved and difficulties encountered.

Asked whether, in the context of Articles 55 and 56 of the Charter on the promotion of economic, social and cultural development, the US proposals impacted on Article 2(7), the SA law advisers said they did not do so of themselves but that they could widen the door to interference. Governments would submit the reports and the UN's role was only

to suggest ways of overcoming difficulties. ‘But we know from past experience that the organisation is not likely to discipline itself to such an extent.’ The proposals were a step away from violation of the Charter. It would be preferable to await developments.<sup>61</sup>

At the 8<sup>th</sup> and subsequent GA sessions, Western members were as hesitant as SA about committing themselves to the US proposals. Other matters surrounding the covenants took priority, the US returned to participation in their drafting and the first two proposals quietly lapsed. ECOSOC did however take up the third, calling for the provision of advisory services in the field of human rights but outside the framework of the covenants.

#### **4.9 Self-determination**

At the 5<sup>th</sup> GA, SA was one of a group of countries unsuccessfully to oppose Part D of GA. Res. 421(V), which instructed the CHR to study ways and means of ensuring the right of people and nations to self-determination. Self-determination, the SA delegation argued, was ‘more a group political right and not the type of right of the individual with which the Commission is competent to deal’.<sup>62</sup> The GA went further at its 6<sup>th</sup> session, when it asked the CHR to prepare two draft covenants on human rights. Each draft covenant was to include an article on the right of peoples and nations to self-determination in order:

- (i) To save the present and succeeding generations from the scourge of war,
- (ii) To reaffirm faith in fundamental human rights, and
- (iii) To take due account of the political aspirations of all peoples and thus to further international peace and security, and to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.

A fracas in the Fourth (Trusteeship) Committee over SWA led to the partial withdrawal of the SA delegation from the 6<sup>th</sup> GA but the deputy permanent representative, J.R. Jordaan, reported that a fight had also developed in the Third Committee in SA’s

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61 PM 136/2 AJ 1953 9th sess. vol. 2

62 PM 136/2/14 vol. 2 annex to minute 26/11/3 from the Embassy Washington 24 March 1951. This is an indication that SA misread the manner in which self-determination would be exploited in the UN and its implications for the colonial or quasi-colonial nations; see para. 6.5. Other elements of the resolution are referred to in para. 4.3.3.

absence. Delegates were divided over an amendment proposal that the covenants should not only contain a provision ‘recognising the fundamental right of peoples to self-determination’, but also that this right should be fostered in non-self-governing territories. After the adoption of mutually contradictory amendments, the final text was, he wrote, a ‘classical monstrosity’.<sup>63</sup> The approval of the proposal opened the door wide for interference in the domestic affairs of the colonial powers, amongst which SA would no doubt be counted.<sup>64</sup>

#### 4.9.1 *SA opposes self-determination in covenants*

The SA directive for the 7<sup>th</sup> GA called the inclusion of the concept of self-determination as Article 1 of both draft covenants ‘far from satisfactory’. The fact that the term ‘all peoples’ was followed by ‘and all nations’ suggested they had different meanings. If the former were construed as covering the various non-European groups in SA, ‘the Union would not bind itself to extend the right of self-determination to them’, especially as self-determination was currently defined as the right of a people ‘freely to determine their political, economic and cultural status’. Article 1(3), which provided that the right of peoples to self-determination included control over their mineral resources, was, the directive averred, equally vaguely drafted. If ‘peoples’ were synonymous with ‘other States’, the provision was unnecessary, since such control was an attribute of statehood. If, however, ‘peoples’ meant a homogeneous group within a state, like Jews in Lithuania or Indians in SA, it would be impossible to define natural resources or how a state could exercise control over them. From the Union’s point of view, it would be fatal.<sup>65</sup>

At the 7<sup>th</sup> GA the Third Committee drew up a text on the implementation of the self-determination articles, with special reference to the states responsible for non-self-

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63 Minute 12/7 5 March 1952 to the Ambassador, Washington

64 GA Res. 545(VI) marked a watershed in the preparation of the human rights covenants, going beyond the previous request to study ways and means to ensure the right of peoples to self-determination by including a right not specified in the UDHR nor in the covenant as first drafted. External Affairs could not have expected this development, for it did not provide a directive.

65 PM 136/2 AJ 1952 7th sess. That some other delegations (apart from the Administering Powers) had misgivings appeared from an article by Dr. Charles Malik, Lebanese Envoy to Washington in the *UN Bulletin* of 1 September 1952. He noted that it was an extremely complex issue. It was not just an anti-West movement (a thesis that the subsequent debate did not fully justify) but everyone could ‘clamor for

governing territories, but did not discuss their inclusion in the draft covenants. Such discussion awaited the acrimonious meetings at the 9<sup>th</sup> GA.<sup>66</sup> Some delegations claimed that self-determination was a political principle, out of place in a document defining individual rights, and subordinate to the main aim of the UN, namely the maintenance of peace. Others stressed its major importance as a prerequisite for the enjoyment of every other right. ‘While the right belonged to peoples and nations, every individual belonging to a people or a nation had to exercise it individually.’<sup>67</sup> No decision was taken and the Third Committee deferred examination of the individual articles. When the 10<sup>th</sup> GA turned its attention to them, the Third Committee spent 26 meetings on Article 1 alone, finally deciding to retain it. SA had by then withdrawn its delegation.

#### **4.10 Conclusions**

##### *4.10.1 SA divergence from UN human rights trends*

The SA list of amendments to the first draft covenant on human rights does not paint a happy picture of race relations in the Union on the eve of apartheid. It demonstrates, particularly in respect of freedom of movement, an existing separation of the races that would be further entrenched.<sup>68</sup> From today’s perspective on the government’s domestic policy, SA’s suggested prohibition of attempts to ‘engender feelings of hostility among inhabitants of various races’, emits a specific negative resonance. Even at the time, considering whence it came, the proposal was ignored in the early drafts of the covenant. Nevertheless the concept became an important feature of the work of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities twelve years later.<sup>69</sup> Eventually it was included as a separate Article 20 of the ICCPR.

It comes as a surprise that SA was rash enough to submit such a list in the context of an international bill of rights. Probably the suggestions were intended to reflect the Union’s reaction to the ravages of the recent war but it was only a short step for its critics to

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his right to independence of thought and action’. He did not take sides, simply highlighted the complexities.

66 See para. 4.7.

67 A/2808 and Corr. 1 para. 34

68 See para. 4.1.

69 See para. 5.6.

extrapolate their significance as proof of internal racial discrimination. The action should be seen against a contemporary background. The proposal for measures to ‘eliminate or control subversive or ideological propaganda’, emanating from the Smuts administration, arguably intended to avoid a recrudescence of fascism. Under Malan it would be taken, correctly, to mean the elimination of communism and opposition to the apartheid policy.

The files do not offer a definitive explanation of why the SA proposals to restrict the draft covenant were limited to four articles. A possible explanation is that the articles chosen were in obvious conflict with SA law. In the light of the welcome the suggested amendments to the draft declaration of general principles (UDHR) received at the 3<sup>rd</sup> GA, these proposals underline the existing gulf between SA and the UN. For that reason it is difficult to accept the law advisers’ comment that SA legislation was largely compatible with the Panama Declaration of Essential Human Rights or Malan’s statement as late as 1951 that, subject to better drafting, SA could accept 13 of the 15 substantive articles of the draft covenant.<sup>70</sup> External Affairs, which faced the criticism abroad, was better versed in the way the international community regarded the Union’s discriminatory legislation.

It would be misleading, however, to suggest that under the National Party there was a sudden divergence from the UN. Rather, there was a hardening of attitudes on both sides. The SA directive on the draft declaration of human rights for the 3<sup>rd</sup> GA already showed there was a gap between them. The analysis of the articles of the two covenants annexed to the directive for the 9<sup>th</sup> GA bears comparison with the advice given for the 5<sup>th</sup> GA. It reflects SA’s growing divergence from UN trends. In 1951 Malan advised Parliament that the government completely rejected only two of the 15 substantive articles but by the 9<sup>th</sup> GA in 1954 almost all the rights in both covenants were open to objection.<sup>71</sup>

The widening gap should not be attributed to the recognition of more human rights as the draft covenants were negotiated. Apart from Article 1 on self-determination, the later texts contained no new fundamental human rights provisions. Neither was it due to new SA laws. Apart from the deprivation of some voting rights, the prohibition of mixed

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70 See para. 3.2.2 and 4.3.4.

marriages and the suppression of communism, legislation in the Union tended to reinforce discrimination already in existence rather than to introduce new ideas. The passage of 16 years simply widened the rift between a reactionary SA and a more progressive UN, not only as the Soviet-Arab-Asian bloc was driving it but also because most of the so-called like-minded delegations were moving in a similar direction.

#### *4.10.2 Officials and government differ*

In his letter to Malan of 20 March 1950, Jooste said it was most important that SA consider careful participation in the drafting of the human rights covenant, bearing in mind that the parties would be bound by the final text. The Union's participation in the debates on the covenant at the 5<sup>th</sup> GA therefore represented a victory for the officials. Despite this there was a gap between them and the government over tactics. The leader to the 5<sup>th</sup> GA, Dönges, was hesitant to commit his delegation during the debate and trod very carefully in explanation of vote. He was undoubtedly correct in prescribing caution, for SA, exposed to attack on the grounds of racial discrimination as it was, dared not run the risk of eliciting hostile reactions or being held to account for its statements later. On the other hand, the nature of Dönges's instructions ensconced SA as an opponent of progress in the field of human rights. To say that its delegation had supported several clauses during the separate votes on GA Res. 421(V) concerning the draft covenant, did not prevent it from being left out on a limb on such issues as self-determination, socio-economic rights, and petitions when it opposed the resolution as a whole. Without clarification at the GA, the SA action could easily be seen as obstructive. At home, however, any hint of support for resolutions the government felt compromised its stand on domestic jurisdiction, would require very convincing explanation. The SA delegation was in a difficult situation.<sup>72</sup>

As it was, SA did compromise its position at the session. By supporting the preamble to the resolution, it committed the Union government to the principle of promoting the human rights and fundamental freedoms 'proclaimed in the Covenant' (my emphasis) and even to legislation 'to guarantee to everyone the real opportunity' of enjoying these

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71 See para. 4.6.

rights. SA had previously criticized them as going beyond the Charter. Worse, without giving reasons, SA opposed a Soviet attempt to include a clause in the resolution that implementation of the covenant provisions fell under domestic jurisdiction. It was perhaps fortunate that attention was not drawn to these lapses later.<sup>73</sup>

Reading between the lines, it is possible to discern that the officials – or a majority of them – would have preferred to explain domestic policy on behalf of the government but that the political imperative prevented them. Their reports distinguished between the directives and the instructions of the ‘leader’, which do not appear always to have coincided. The division emerges most clearly in External Affairs’ directive for the 6<sup>th</sup> GA, which tentatively suggested SA participate actively in the debate on the covenant and ‘thus assist the most responsible delegations in their efforts to produce a realistic document’. The alternative was the ‘purely passive role’ of simply recording a vote.<sup>74</sup> The decision was ‘left to the discretion of the leader of the delegation’, who was, of course, the Minister of the Interior. This hesitancy suggests that the Secretary for External Affairs, rather than the Prime Minister, finalized the human rights directives.

The loss of the relevant files obscures the detail. In their absence it is not possible to conclude that the Prime Minister himself always rejected the policy changes advocated by the SA permanent delegation in New York and the officials in Pretoria. Malan seems to have had little personal input into human rights decisions.<sup>75</sup> More probably, the Secretary for External Affairs simply bowed to the reality of the domestic policy and the government’s inflexibility and stopped submitting such proposals to the Minister. The laconic marginal note on the memorandum prepared in advance of the 14<sup>th</sup> GA that ‘the recommendation in the final part was evidently not approved’, remains an ironic epitaph, but even it leaves the identity of the final arbiter shrouded in obscurity.

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72 See para. 4.3.1.

73 See para. 4.3.3. It was not the only occasion SA faltered at the 5th GA. Although it expressed doubts about the constitutionality of the resolution, SA voted in favour of GA Res. 377 (V) of 3 November 1951 ‘Uniting for Peace’, which enabled the GA to recommend direct action when the Security Council was hamstrung by a Permanent Member’s veto. Thus it voted to expand the powers of the GA at the expense of the Security Council. Cf. para. 7.4.

74 PM 16/2 AJ 1951

75 See para. 4.7.1 fn. 47

#### 4.10.3 *Self-determination in covenants*

The majority of UN members equated self-determination with independence. Its inclusion in the covenants as a right was basically aimed at countries under foreign domination.<sup>76</sup> It was not intended to extend that right to minorities in sovereign states, except insofar as they were guaranteed the lesser one of maintaining their language, culture and religion. The self-determination clause common to the two covenants spoke of ‘all peoples’ but was limited by other arrangements, including regional ones, such as those prohibiting boundary shifts, even to accommodate homogeneous ethnic groups living on either sides of a former colonial boundary. The GA in fact solved only one aspect of the problem. The covenants failed, as the Charter failed, to define self-determination. Article 1 only converted it from a principle to a right without a universally acceptable definition.

The discussions on self-determination demonstrated the ambivalence of member states when the promotion of human rights values came close to home. Many believed, like SA, that the concept provided a propaganda platform for interference in their domestic affairs but none could avoid paying lip service. Thus an internal dispute of a relatively ephemeral nature inside the UN could have a lasting effect on the formulation of international law. The voting power of the anti-colonials established international practice and, as a corollary, contributed to the development of an international law norm.

Statements made during debates become accepted as evidence of international practice or *usus*, although delegations often made them tongue in cheek. Lebanon, for example, remarked at the 5<sup>th</sup> GA that members who wished to proliferate the number of rights in the covenant, were playing a double game and masking their true intention, which was to delay adoption of the covenant.<sup>77</sup> Voting, which is not subject to legal analysis, was usually based on extra-legal considerations. Such behaviour compounds the difficulties confronting courts in their interpretation of UN actions. Practice at home, if that can be determined, rather than speeches at the UN, is still the best evidence to determine *usus*.

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<sup>76</sup> Self-determination outside the covenants is analysed in para. 6.5.

<sup>77</sup> GAOR 5th sess. A/C.3/SR 318 9

#### 4.10.4 *Effect of SA abstention policy*

The SA delegation's abstentions on all the articles of the covenants confirm that it did not have an impact on their elaboration or, *a fortiori*, on the doctrine they enshrined. Although the prohibition of 'advocacy of national, racial or religious hatred' in Article 20 (2) of the ICCPR echoes an early submission by SA to amend Article 17 of the original draft covenant, by no stretch of the imagination was it based on the SA suggestion.<sup>78</sup> The recrudescence of anti-Semitism in 1959 was sufficient to ensure the inclusion of the paragraph in the final text.

By a quirk of interpretation the apparent passivity of SA's consistent abstention policy was metamorphosed into an active expression of hostility towards the liberal human rights philosophy expressed by the majority of UN members. To the chagrin of the SA officials they were prohibited from enunciating a clear vision of what they believed government views on the individual articles to be. The gap was never bridged and the upper hand lay unavoidably with the government.

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<sup>78</sup> See paras. 4.1 and 5.6.

**CHAPTER 5**  
**UNITED NATIONS SURVEYS OF HUMAN RIGHTS ISSUES**

**5.1 UN Yearbook on Human Rights**

In addition to its work on an international bill of rights,<sup>1</sup> the Commission on Human Rights (CHR) charged the Secretary-General, at its first meeting in 1946, with the preparation of a UN *Yearbook on Human Rights (YHR)*. The object of the *YHR* was to collate all declarations and bills on human rights in force in member states. For those which did not possess bills of rights, the Secretariat felt that statements outlining existing legislation and practice should be prepared by recognized experts in constitutional law. In SA, it approached Mr. H.J. May, ‘a solicitor practising in the Transvaal’. May noted that the South Africa Act of 1909 contained no guarantees of human rights and equal treatment often found in other constitutions. Acts of Parliament were the supreme law of the land and often discriminated against non-Europeans in political, property, social and economic rights. Protection against their infringement had to be sought in the courts, which rigorously upheld the law ‘without respect of colour or race’.<sup>2</sup>

The Secretariat passed May’s draft to the Union government for approval but the Department of External Affairs considered it unsuitable as it dealt primarily with recent SA discriminatory legislation, which had been subjected to criticism in the UN. External Affairs informed the Secretariat that it would provide a revised draft ‘in which the conception of human rights prevailing under South African Common Law and the South African constitution will be set out in its correct perspective’.<sup>3</sup>

To assist them in preparing a new statement, External Affairs sent the law advisers a copy of the text of the UK submission, which was drafted for the *YHR* with the approval of the UK government by Sir Cecil Carr, Counsel to the Speaker of the House of Commons. It set out the general nature of the British legal system and the checks on arbitrary rule, before dealing specifically with the various freedoms enjoyed by British subjects, viz.

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1 See paras. 3.2 and 4.1.

2 1/141/47 Part I minute PM 136/4/1 16 September 1947 and annex

3 *Ibid.*

personal freedom, freedom of speech, freedom of the press, religious freedom, freedom of assembly and association and freedom from want.<sup>4</sup> The paper contributed by the SA law advisers followed the general pattern of the Carr text and, judging from the various drafts on Justice's file also of the May submission.<sup>5</sup> The first draft claimed that legal discrimination was 'small compared with the inherent liberties which [non-white peoples] enjoy'. Such legislation was adopted to preserve differing cultural traditions, 'in order that each race may develop peacefully in its own particular mode of life and tradition'. Remarks like these were excised from the final version, which had a less defensive tone.

### 5.1.1 SA submission for YHR

The contribution finally submitted by SA and included in the second edition of the *YHR*<sup>6</sup> stated that the Union had no single bill of rights: the basic statute, the South Africa Act of 1909, contained only a portion of the law and did not even mention the liberty of the subject. Parliament was supreme but never tampered with human rights except for temporary limitations in time of national emergency. Supremacy of the law was an outstanding feature of the system. 'Every legal right possessed by an individual is enforceable by the courts which preserve the utmost impartiality when dealing with different racial groups; and the same treatment is observed by all – whether they be alien, white or black.' The submission, which analyzed five specific freedoms: personal, religious, speech, the press and assembly, may be summarized as follows:

Firstly, as to personal freedom, SA common law presumed innocence until proven guilty, onus of proof resting on the prosecution. The law guaranteed a fair trial and security of person. Trial by jury was elective, except for treason, sedition or public violence. Everyone had the right to be heard in his own defence and could call witnesses, if necessary at state expense. The writ of *de homine libero exhibendo* applied, as did the right to bail except on capital charges. Capital punishment was provided for in cases of treason, murder and aggravated rape.

Secondly, the South Africa Act acknowledged the sovereignty and guidance of Almighty God. SA was a Christian state but provided for freedom of religious belief. There was no state church or religion. Basic tenets of Christianity were

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4 *Ibid.*

5 The *YHR* did not identify the contributor. The submission was prepared by Dr. J.P. Verloren van Themaat, later Senior Law Adviser to the Department of Foreign Affairs, and amended by Dr. L. Wessels. As Dr. L.C. Steyn was law adviser to the first two SA delegations to the GA, he can be assumed to have had a major hand in it.

6 1947 *YHR* 304-306

taught at schools but attendance was not compulsory if parents did not wish their children to attend. No university might discriminate on grounds of religious beliefs.

Thirdly, limitations on freedom of speech covered matters in the interest of the security of the state or words likely to cause a breach of the peace, offend decency or amounting to contempt of judges (court). Libel and slander were actionable. Words or acts promoting racial hostility were prohibited; the Riotous Assemblies Act<sup>7</sup> empowered magistrates to limit written or oral statements the Minister of Justice considered would seriously endanger public peace. These restrictions were designed to safeguard the public not limit the fundamental right.

Fourthly, as regards freedom of the press, the press was subject to the laws of defamation, with a qualified privilege when reporting on Parliament and public bodies, provided the reports were fair and substantially correct. 'The State does not in any way control or fetter the Press.' Newspapers were published in various languages, 'foreign, Native and Indian and they possess the same freedom as those published in the two official languages'.

Finally, the law provided for freedom of assembly. 'In general, there are no prohibitions against persons meeting for any lawful purpose.' Restrictions included penalties for inciting an offence and machinery for prohibiting public gatherings in the interests of peace and security. Apart from civil servants, who might not join a political organization or be active in politics, anyone might form or join a party. The right of association was generously recognized.

Such, concluded the submission, were the freedoms SA considered fundamental. All the country's different racial groups enjoyed them. 'They are not withheld from nor limited in respect of any person on the ground of his class, colour or creed.' They were jealously guarded by the courts: one of South Africa's greatest judges, Lord de Villiers, had said that the court's 'first and most sacred duty is to administer justice to those who seek it, and not to preserve the peace of the country'.<sup>8</sup>

### 5.1.2 *Appointment of SA correspondent*

On 23 April 1948 the UN Secretariat enquired whether SA wished to appoint a correspondent to provide information on legislation relating to human rights issues for inclusion in the *YHR*. The law advisers were hesitant, as the fundamental rights and

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<sup>7</sup> 27 of 1914

<sup>8</sup> *In re Kok and Balie* (1879) 9 Buch 45. From the discrimination viewpoint the government paper was riddled with holes. The use of the word fundamental, as seen in the SA context, and the choice of quote at the end, which was also used in the May draft, were specious, since the racial bias was evident.

freedoms of the Charter were still being defined. Except for a few elementary rights, which would probably be universally recognized, these rights were still unknown. It was not clear how many the Union would be prepared to recognize. To provide information on any right might be construed as an admission that it was fundamental ‘and the information we supply may be used against us’. It was premature ‘and might even be dangerous’ to comply with the request.<sup>9</sup> External Affairs replied that SA had submitted comments to the UN on the draft international bill of rights, without admitting that it considered those rights to be fundamental. It explained that failure to nominate a correspondent might lead the Secretariat to a less reliable source. It was agreed to appoint Dr. Louis Wessels, a state law adviser, ‘to ensure that information for official publication in United Nations documents does not reach the Secretariat except through authorised channels’.<sup>10</sup>

External Affairs told the SA permanent delegation to the UN confidentially that it was disturbed at the Secretariat’s tendency to solicit inputs from non-governmental sources. It seemed to be building up a network of contacts, which might be prejudiced or misleading. The Secretariat had, for example, published some inaccurate information obtained from the SA National Council of Women in reply to a UN Social Commission questionnaire on the status of women. As an intergovernmental organization the UN should only use information authorized by governments, to avoid becoming a source of propaganda from interested third parties (a remark that was equally true of self-serving government inputs). In the official instruction the SA permanent delegation was asked to emphasize to the Secretary-General that the nomination of a correspondent in no way implied that information he might supply on a suggested right constituted ‘any form of recognition by the Union Government of the desirability or otherwise of including such suggested human right in the category of “fundamental human rights”’.<sup>11</sup>

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9 1/147/47 Part 3 minute to the Secretary for External Affairs 8 June 1948. It is remarkable with what prescience, only a week after the May 1948 general election, the law advisers expressed the stance of the new administration.

10 PM 136/4/1 18 June 1948. For a discussion of the draft bill of rights see paras. 3.2 and 4.1.

11 11/4/3 minute PM136/4/1 and letter ‘My dear Jacklin’ both dated 19 June 1948

In January 1949 Dr. Wessels suggested that he advise the UN that ‘no legislation having a bearing on fundamental human rights was passed during 1948’. The repeal of the second part of the Asiatic Land Tenure and Indian Representation Act of 1946<sup>12</sup> might have such a bearing but it was better to avoid referring to it, ‘as political rights are not of the class which we regard as fundamental’. External Affairs agreed and the UN was so advised.<sup>13</sup> Of the two laws included in the 1950 *YHR*, viz. the Group Areas Act and the Suppression of Communism Act, Dr. Wessels supplied only the latter, which suggests he did not think the former relevant. He and the UN did not always see eye to eye. The Secretariat also summarized a court case<sup>14</sup> to show discrimination in the treatment of Europeans and non-Europeans in respect of railway travel. The texts Dr. Wessels supplied for the 1951 edition<sup>15</sup> showed a further divergence from the provisions of the UDHR. They included the new definition of communist, the limitation of functions communists could perform and declaring the Communist Party an unlawful organization. They also provided evidence of racial discrimination.

### 5.1.3 *Relations with Secretariat cool*

As it did for all member states, the *YHR* continued to record the Acts adopted in SA and some of the Supreme Court cases, which impacted on human rights. The UN Division of Human Rights advised Dr. Wessels of the Acts it felt were suitable for the 1952 issue.<sup>16</sup> It also proposed reproducing summaries of two court cases of which one was an appeal against the conviction of a couple married by Moslem rites for contravening the Immorality Act.<sup>17</sup> The point at issue in the appeal case related to the definition of a non-European. The onus was on the Crown, which failed to make its case. The court interpreted the discriminatory clauses of the Act in favour of the accused. In passing the notification to External Affairs, Dr. Wessels affirmed that the UN had published SA Acts

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12 See para. 2.3.

13 1/141/47 Part 2 27 January 1949; 1948 *YHR* 203 ff; PM 136/2 AJ 48/49 Human Rights directive for 3rd GA. Dr. Wessels submitted extracts from earlier laws, namely the South Africa Act of 1909, the Representation of Natives Act 12 of 1936, the Electoral Consolidation Act 46 of 1946 and the Asiatic Land Tenure and Indian Representation Act 28 of 1946. All these laws had been passed before the advent of apartheid, although they were furnished to the UN under the National Party administration.

14 *Rex v Abdurahman* 1950 (3) SA 136 (A)

15 Jury Trials Amendment Act 19 of 1951; 1951 amended version of the Suppression of Communism Act 44 of 1950; Separate Representation of Voters Act 46 of 1951

16 SOA 304/1/01 (1952) 16 March 1954

in earlier issues, despite his arguments against their inclusion. He wondered if there was any point in his remaining a correspondent.

External Affairs commented that the selection indicated that the Secretariat proposed to discuss a wide range of statutes. This was probably due to its role in preparing papers for the item on SA's racial policy which had been included in the agenda for the 8<sup>th</sup> GA.<sup>18</sup> It felt that Dr. Wessels could not let the matter rest but should reply that the choices made by the Division of Human Rights could not be considered an attempt at an 'objective and comprehensive survey of Union statutes as they influence fundamental human rights in general' (my translation). Most of the documents proposed for inclusion in the 1952 issue of the *YHR* dealt with matters of domestic jurisdiction with little human rights import. Similarly, External Affairs saw no purpose in him relinquishing his position as correspondent. If the SA government did not co-operate, the UN would seek a replacement and a new appointment could not be too long delayed. It was preferable to retain someone who would not be too active in providing information on matters of domestic jurisdiction. Even if his opinions were ignored as before, his opposition toward some of the suggestions might incline the UN to be cautious.

In the meantime, External Affairs suggested that the SA permanent representative might advise the Secretary-General informally that the UN consisted of governments; material should only be published with their approval. When the matter was taken up with him 'informally', the Secretary-General agreed that the *YHR* 'and the whole human rights issue seemed to be getting somewhat out of hand'. SA, said the permanent representative, felt that a one-sided selection of material 'might be interpreted as being of a restrictive nature'. The Secretariat concentrated on native affairs, omitting Acts pertaining to the European population, and ignored legislation on other aspects of human rights. The Secretary-General agreed that his staff should be completely objective and that the same field should be covered for all countries. He could not promise, however,

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17 *Rex v Ormonde* 1952 (1) SA 272 (A)

that future issues of the *YHR* would not contain items SA might consider unsatisfactory or that all information furnished by national correspondents would be included. There should, he hoped, be some improvement.<sup>19</sup> Some 18 months passed between the end of the year under review and the publication of a *YHR*. The exchanges the SA government and the correspondent had with the Secretariat should be read in this context.

In the event, the Secretariat omitted only one Act from the list it had originally proposed for the 1952 and one law case. It made no reference to an input from Dr. Wessels, although he remained its correspondent and was sporadically credited with providing information for subsequent editions.<sup>20</sup> He contributed summaries of some SA legislation for the 1954 *YHR* including legislation empowering the appropriate SA Minister to prohibit any gathering where there was reason to fear that feelings of hostility would arise between Europeans and any other population group. While the other elements he summarized did not indicate discrimination on racial grounds, the Secretariat included its own summary of the Natives Resettlement Act,<sup>21</sup> the sharpest indication of such discrimination.

The Secretariat continued to act on its own initiative for the 1955 and 1956 *YHR* when SA withdrew its delegation from active participation in the GA. The note on the Union amounted to a précis of amendments to existing legislation including limitations on the registration of mixed trade unions and adoption of the clause limiting certain forms of employment to different racial groups. The system was referred to as job reservation.

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18 11/4/3 vol. 1 minute PM 136/4/1 12 April 1954 to Washington. For the apartheid debate see chapter 8.

19 11/4/3 vol. 4 minute 19 May 1954

20 A much wider range of Acts was published in the First Report of the United Nations Commission on the Racial Situation in the Union of South Africa (UNCORS), see para. 8.3.2. Each *YHR* saw the light well after the UNCORS reports, which obviously took a much more detailed look at the legislation enacted during the years they covered, 1953-1955.

21 19 of 1954

At its 11<sup>th</sup> session, the CHR decided that the 1955 *YHR* should contain official statements on arbitrary arrest, detention or exile. The SA permanent representative noted that the directive prepared for the 10<sup>th</sup> GA had indicated that the Union had not objected to the relevant article of the UDHR, nor to the manner in which the prohibition of arbitrary arrest, detention or exile was defined in the draft ICCPR. A positive response would not conflict with the government's decision to abstain on the article-by-article discussion of the covenants.<sup>22</sup> The government agreed and submitted a list of the occasions on which arrests could be made in SA with or without warrant by peace officers and of the circumstances in which private persons might make arrests or be called upon to do so.<sup>23</sup> Exile, it said, was 'unknown in South African law'. The SA contribution was included in a supplementary *YHR* for 1959.

The 1958 *YHR* section on SA was prepared by the Secretariat and submitted to the Union government for comment. Only short references were made to SA, including one on the lowering of the voting age for whites from 21 years to 18. SA's only comment was to amend a typing error. On 11 April 1961 the Secretariat requested comments before the end of May on the legislation it proposed to include in the 1959 issue.<sup>24</sup> The request was submitted to various SA departments. Justice had no comment. Bantu Administration and Development explained that, as the Bantu peoples were not homogeneous, it was

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22 11/4/3 vol. 4 17 April 1956. See paras. 3.4.3 Art. 7 and 5.7.2.

23 In terms of the Criminal Procedure Act 26 of 1955

24 The list included the Criminal Law Amendment Act 16 of 1959, which added to the number of arrests that could be effected without warrant and altered certain elements of trial without jury to facilitate the task of the administration. The Prisons Act 8 of 1959 consolidated aspects of prison administration including the carrying out of the death sentence and corporal punishment. Although the Bantu Self-government Act 46 of 1959 aimed at the gradual development of natives 'within their own areas to self-governing units on the basis of Bantu systems of government', it abolished the representation of natives in both Houses of Parliament with effect from the end of the term of office of the sitting native representatives. The Industrial Conciliation Amendment Act 41 of 1959 dealt with the separation of races in mixed trade unions and with the job reservation provision in the principal Act. Finally the Extension of University Education Act 45 of 1959 'provided for the establishment of university colleges exclusively for non-white persons and limited the admission of such persons to certain university institutions'.

expedient to grant their territorial authorities further rights and powers and to provide for direct consultation between those authorities and the central government. The aim was to stimulate progress towards self-government. Native representation in Parliament was being phased out but would be counter-balanced by the appointment of commissioners-general to represent the government in the various Bantu national units.

The lengthiest reply came from the Department of Labour. Section 8(3) of the Industrial Conciliation Act<sup>25</sup> had required mixed trade unions to establish separate branches for white and coloured members. The aim of the amendment was to tidy up the Act's legal defects, notably to extend the Minister of Labour's authority to grant exemption from the relevant section's operations. Section 77 of the Amendment Act did not reserve work for any race but simply provided the framework. If it came to the Minister's notice that employees of one race were replacing those of another, he could indicate his intention of having the matter investigated by the Industrial Tribunal. The Industrial Tribunal's recommendation for or against a specific reservation, which had to be tabled in Parliament, was mandatory, as the Minister did not have the power to override it. 'The object of work reservation is to safeguard the interests of the different racial groups. It is a precautionary measure against inter-racial competition and a positive measure to ensure the orderly co-existence of the different races.'<sup>26</sup>

The Department of Education, Arts and Science proposed that the draft on university education should contain information on the university colleges for coloureds at Bellville and Indians in Durban, with the rider that non-white students could attend white universities offering courses for them not available in their own facilities. In addition they could follow correspondence courses at the University of South Africa.

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25 11 of 1924

26 136/4/1/7 15 September 1961

The foregoing was conveyed to the Secretary-General on 22 August 1961 and appears to have been the last time that detailed comment was made on the Secretariat's proposals. Thereafter the SA correspondent, now External Affairs' own legal adviser, Dr. J.P. Verloren van Themaat, would await the proposed text before commenting. He did not supply information in advance.<sup>27</sup> Space limitations, after an increase in UN membership, also helped, for the 1960 *YHR* referred only to the fact that the Pan Africanist Congress (PAC) and the African National Congress (ANC) were declared unlawful organizations.

## **5.2 Sub-Commission on Prevention of Discrimination and Protection of Minorities**

The UK Foreign Office weekly *Political Intelligence Summary* of 5 February 1947 on the first session of the CHR<sup>28</sup> referred to the political strategy of the Soviet Union which, without prior warning, had persuaded ECOSOC to approve the establishment of two sub-commissions, one on the protection of minorities and the other on the prevention of discrimination. The CHR decided to combine the two into a single body called the Sub-Commission on the Protection of Minorities and the Prevention of Discrimination (hereafter sub-commission). Its 12 members were nominated by governments and elected by the CHR but served in their personal expert capacities. The sub-commission's brief, which its members appeared to interpret rather liberally, was to undertake studies and make recommendations to the CHR concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national and linguistic minorities, and to perform any other functions entrusted to it by ECOSOC or the CHR. The UK Foreign Office commented that 'much mischief may come out of this sub-commission', if its scope were not carefully defined before the CHR decided what 'minorities', 'discrimination', and 'human rights' were.

Rather than working through the CHR, the sub-commission seemed to prefer to issue instructions itself. Amongst these was a suggestion that the Secretariat establish a national coordinating committee of non-governmental organizations in each member

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<sup>27</sup> *Idem* 28 December 1961; 11/4/3 vol. 7

<sup>28</sup> See para. 3.2, fn. 5; E Res. 9(II) 1946.

state. The committees would have consultative status with ECOSOC and be instrumental in forming a standing committee in the UN to take constructive measures in the field of human rights. The SA Secretary for Social Welfare expressed his astonishment that there was no provision for consultation on the formation of such committees with governments. 'Their creation would apparently be achieved by direct negotiation with individuals or groups of individuals within the State, without regard to the Government.' Such action constituted an infringement of Article 2(7) of the UN Charter and disregarded appropriate procedures. The Secretary hoped the CHR would temper its sub-commission's ardour, or if it were equally sanguine, that ECOSOC would show more restraint.<sup>29</sup> External Affairs asked the SA permanent delegation to keep a watchful eye on the sub-commission's future activities.

On 28 September 1950 the Secretary-General drew member states' attention to ECOSOC Res. 303 F (XI), which asked him to obtain from all governments examples of legislation and judicial decisions that had been found useful in preventing discrimination, 'as well as full information regarding the protection of any minority within their jurisdiction by legislative measures'. He also sought data that could serve as a basis for defining the term 'minorities'. In a tentative definition, the sub-commission had noted that the problem of protection did not arise when 'the group in question, though numerically inferior to the rest of the population, is the dominant group therein'. External Affairs felt that, 'in the special conditions applicable in the Union', no useful purpose would be served by replying.<sup>30</sup> The following year the Secretariat advised that the CHR had referred the proposal regarding the definition of minorities and interim measures for their protection to the sub-commission for further study.

In 1952, the Secretariat prepared a memorandum containing data on the activities of UN organs at the sub-commission's request. The memorandum referred not only to the

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<sup>29</sup> 11/4/3 vol. 1 minute 473/7 2 August 1949. While other delegations were also irritated with the sub-commission's pushiness, the tone of the letter from Social Welfare shows a clear concern that the Union government would be vulnerable to allegations of discriminatory practices.

<sup>30</sup> E/CN.4/358; 11/4/3/1 vol. 1 PM 136/4/1 11 November 1950

treatment of people of Indian origin in SA but also to race conflict in the Union, although at that stage there was no more than a request that apartheid be included on the GA agenda. The SA deputy permanent representative asked the Secretary-General to explain why reference was made to apartheid in the memorandum before the GA had convened to consider it. ‘Since...thousands of letters [are] received in the Secretariat alleging discrimination elsewhere in the world, I am at a loss to understand why mention is made of the letter under consideration.’<sup>31</sup> The Secretary-General agreed that the reference was irregular and apologized for the error. He offered to have a corrigendum issued.

### *5.2.1 Sub-commission subjected to criticism*

In its report on the 10<sup>th</sup> session of the CHR, the SA delegation remarked that the sub-commission continued to provoke controversy by pushing for independent status. Its critics, mainly the Western delegates, complained that it tended to include substantive resolutions relating to its future work programme in the body of its report, i.e. not for CHR approval but for action by itself. It had also appointed, from its own membership, Mr. C.D. Ammoun of Lebanon special rapporteur for a study on discrimination in education. The crux of the problem was that its members took too liberal a view of ECOSOC’s suggestions for studies on discrimination.<sup>32</sup> The Secretary-General told the sub-commission that financial considerations prevented him from making staff available for studies other than that on discrimination in education. The SA permanent representative reported that members were obviously ‘peevish’ at the lack of appreciation in the higher organs of the UN of ‘a legitimate child which has been repudiated’. Without staff, the sub-commission could not carry out its functions.<sup>33</sup> Eventually, however, additional funds were provided and the Secretary-General was able to make staff available but the sub-commission made slow progress on the issues involving discrimination that it surveyed. Those affecting SA are examined below.

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31 11/4/3/1 vol. 1 24 September 1952

32 11/4/1 vol. 1 18 June 1954

33 *Idem* 2 March 1955

### 5.3 Discrimination in education

The study on discrimination in education, which would set the pattern for future studies, was to pay special attention to instances of discrimination typical of general tendencies and would serve to educate world opinion. It should include conclusions and proposals on which the sub-commission could make recommendations for action.<sup>34</sup> The procedures adopted for the study were outlined in Resolution B of its 6<sup>th</sup> session as amended by the CHR. The report would be prepared in three stages. Material collected from governments, Specialized Agencies, non-governmental agencies and recognized scholars and scientists, would be analysed and verified. It would be global, factual and objective, pointing out general trends and practices. In addition the report would examine the factors which had led to discriminatory practices, whether ‘economic, social, political or historic in character’, and highlight ‘those resulting from a policy evidently intended to originate, maintain or aggravate such practices’.<sup>35</sup>

The special rapporteur, Mr. Ammoun, approached governments in May 1954 for the required material while the Secretariat wrote to the other sources. SA did not react to his first request but gave consideration to the second, which asked for comments and supplementary data on a draft country report relating to the Union. SA might have been provoked into responding this time by an earlier comment of the Indian expert at the meeting in January 1955. He accused the Union government of spending much less pro rata on native education than on white and of pursuing a subtle policy of ‘locating schools in areas practically inaccessible to the children who needed them’. Legally speaking, he said, the facilities existed, but ‘the students could not go into the area without falling victim to a certain amount of social disgrace’.<sup>36</sup> The deputy permanent representative told the sub-commission that the statement was nonsense.

SA’s official reply was sent on 16 April 1956 after the Minister of External Affairs had agreed that relevant information could be supplied provided it did not lead to recognition,

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<sup>34</sup> *Ibid.*

<sup>35</sup> E/CN.4/Sub.2/181/Rev.1168

either direct or indirect, by the Union government of any right of the sub-commission or the CHR to intervene in SA's domestic affairs.<sup>37</sup> All the SA government's comments were included in the special rapporteur's revised country report of 15 August 1956.

### 5.3.1 *Education in SA*

Based largely on official publications, documents of the SA Institute of Race Relations, UNESCO's survey on the access of women to education, some input from non-governmental organizations and supplementary data provided through the SA permanent delegation, the draft country report on SA prepared by Mr. Ammoun was factual. It detailed the different systems applied to the four major population groups prior to April 1955, the date set for the implementation of the Bantu Education Act.<sup>38</sup> That Act had transferred control over native education from state-aided mission schools under the general control of the provinces to the Department of Native Affairs. The SA government had pointed out that except for a few Anglican ones, no mission schools had closed. The Catholic Church in SA had refused to turn over its schools and accepted a reduced subsidy, while some denominations decided to continue without one. Unlike private schools for other races, the report noted, mission schools had to apply for registration, which could be cancelled or refused 'if the Minister is of the opinion that the establishment or continuance of the school "is not in the interests of the Bantu people"'. The University of South Africa offered correspondence and vocation courses at the higher level for all races (possibly the only instance in the report of non-discriminatory practice on racial grounds).<sup>39</sup>

The report said that all white children were accommodated at primary and secondary schools, but that lack of accommodation limited the intake of coloured and Indian pupils,

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36 E/CN.4/Sub.2/L.92 18 August 1955; Press Release SOC/1927 6 January 1955

37 PM 136/4/20 5 April 1956

38 47 of 1953

39 E/CN.4/Sub.2/Add.54 14 June 1956. The information from the SA government included in the report was provided in an annex to letter 11/4/3/1 12 April 1956 to the Secretary-General.

despite the construction of new schools and the use of double sessions. Staffing of coloured vocational schools was, according to the report of the SA governmental Commission on Technical and Vocational Training, less liberal than for whites 'because of the shortage of classrooms and the shortage of teachers. Rather than turn children away, teachers have permitted rooms to be sadly over-crowded.'

Education for the natives was not compulsory but arrangements would be made for double sessions for them also. These would permit more children to attend school and remove the chief cause of irregular attendance, namely the use of children to do household chores. No medical services would be provided for Bantu schools, since no funds were available. The government explained this as meaning 'that available funds could be used more beneficially by enabling more children to attend schools'. The Department of Public Health and provincial hospitals and clinics provided adequate medical services. The SA Department of Education said that about 99% of white children between 7 and 15 years attended school, as compared with 37% of native children and about 80% of other non-European groups.

The Minister of Native Affairs, the report continued, had explained his native education policy as enabling natives to obtain fundamental education without an increase in state expenditure. By this he meant 'a knowledge of English and Afrikaans up to Standard II, the Standard required for a Native child in present society'. The government stated that the Minister had been misreported; he had actually said that fundamental education would include instruction through the mother tongue up to Standard II 'as well as a knowledge of Afrikaans and English, and the cardinal principles of the Christian religion'. While education was free for most groups of children, natives were expected to contribute towards the cost and for the construction of new schools.<sup>40</sup>

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40 The above indicates the tenor of the 24-page revised country report. A cardinal point was that SA's supplementary data did nothing to deny or explain the existence of discrimination, which was the topic at issue. The country report could be said to bear the Union government's imprimatur.

Although he wrote in an objective and factual manner, the mood of the special rapporteur could be gleaned. He recorded that admission to training schools for teachers was Standard X for whites, VII for coloureds and Indians, while Standard VI was required for the Natives Lower Primary Teacher's course, although a large percentage took the higher course for which Standard VII was needed. Native teachers could be dismissed if they criticized 'superior officers of the Department of Native Affairs' in the press or behaved in a manner that the Secretary [for Native Affairs] considered 'deleterious to his position as a teacher'. The report then drily quoted in paragraph 96 the government's statement that 'grounds for selection, appointment, promotion, disqualification etc., of teachers are the same for all population groups'.

The available data collated and circulated in the final study aimed at covering all forms of discrimination enumerated in the UDHR and seeking instances where discrimination had been overcome. SA was singled out for applying deliberate discrimination in education on the grounds of race. Six pages were devoted to the Union, three to SWA based on reports of the Committee on South West Africa, three to comments of religious organizations on the Bantu Education Act and apartheid generally, and one to comments on SA education in the second UNCORS report. Only the first was drawn from the report submitted to the Union government for comment before inclusion.<sup>41</sup>

Paragraphs 100-121 of the study, which dealt with the Union, served to buttress the special rapporteur's assertion that, while discrimination was traditional, 'one of the main effects of apartheid has been to increase and aggravate discrimination in education, particularly in regard to the Bantu'. Only the reformed Afrikaans churches approved the Bantu Education Act. Other denominations followed the line that 'a policy which, in effect, aims at conditioning the African people to a predetermined position of subordination in the State is incompatible with the Christian principles for which the Church stands'. The Catholic church condemned government policy: it argued that the black man felt every law and regulation of apartheid as an insult and refused to admit that

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41 E/CN.4/Sub.2/181. The final study already shows a hardening attitude towards the Union.

these restrictions were beneficial, ‘simply because there is in him as in every other man, the instinct of freedom, justice, human dignity and self-respect’.<sup>42</sup>

The SA permanent representative reported that the study devoted far more space to SA than to any other country. He singled out paragraph 720: ‘[W]e have reluctantly and with regret called attention to a very few rare cases of deliberate discrimination. We would of course have preferred to have found none but, given the evidence, what position could we take?’ ‘This quotation’, he wrote, ‘is the only excuse I have observed for what appears to have been a deliberate attempt on the part of the author of the study (or more probably of the United Nations Secretariat) to highlight the extent of discrimination prevailing in the Union and South West Africa.’<sup>43</sup> For further action the study was passed to UNESCO, where it should have been from the start.

#### **5.4 Religious rights and practices**

In 1956 the sub-commission appointed its Indian expert, Mr. A. Krishnaswami, special rapporteur to prepare a study on discrimination in religious rights and practices. Governments received the customary requests for contributions to country studies; those addressed to SA being forwarded in March 1956 and February 1958, without response. While the country studies were in preparation, Mr. Krishnaswami presented an interim report at the sub-commission’s 10<sup>th</sup> session and a supplement the following year.<sup>44</sup> The SA permanent representative reported that the sub-commission’s discussion of the supplement centred on the inclusion of references to specific countries.<sup>45</sup> No agreement was reached. Only two cases, one affecting SA and the other the US, had been cited in the supplement. The first quoted a statement in the first UNCORS report that when SA became a foundation member of the UN, other states were aware of the prevailing situation and could not have expected a radical transformation overnight. They could

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42 See paras. 670-676 of the study.

43 11/4/3/1 vol. 1 11 January 1957

44 E/CN.4/Sub.2/L.123 15 November 1957 and annex

45 11/4/3/1 E/CN.4/Sub.2/L. 123 vol. 1 16 February 1959

however expect SA to ‘fulfil in good faith the obligations assumed by it under the Charter’.<sup>46</sup> Mr. Krishnaswami rejected a suggestion that it was inadvisable to include the references to SA and the US in the report.

#### 5.4.1 Country report on SA

The Secretary-General forwarded the draft country report on SA to the permanent representative for comment and supplementary data. The text had drawn largely on government sources, such as the SA contribution to the 1947 *YHR* and publications of the SA State Information Office. The UNCORS reports figured in the draft country report, as did the American publication *Africa South*, but only one Non-governmental organization, the World Union for Progressive Judaism (WUPJ), was quoted. Although the draft found SA generally tolerant of religious practices, the Bantu Education Act of 1953 again came under scrutiny. A summary of church reaction to the Act provided by the WUPJ included the statement that Jewry was unrestricted in freedom to practise Judaism but suffered under the Act from the ‘restrictions on its sociological endeavours’.<sup>47</sup>

The country report found that the statement in the 1947 *YHR* that in SA a person ‘may worship alone or with others in private or in public’ was tacitly refuted by other comments on separate worship in the Dutch Reformed and other churches. Some Anglican parishes, the draft noted, practised mixed worship or allowed their buildings to be used when not required for whites. In *Africa South*, Gell averred that most Anglican parishes did not do so because of the recalcitrance of the white congregation and the priest’s ‘infirmity’.<sup>48</sup> The SA permanent representative described the WUPJ summary as ‘not only distorted in its brevity, but actually incorrect with regard to certain facts’.<sup>49</sup> The

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46 E/CN.4/Sub.2/L.123/Add.1 31 October 1958; see para. 8.3.1.

47 Annex to SO 234 [5-1-3] 24 February 1959. The ‘sociological endeavours’ were not defined, but presumably meant working with other races.

48 Source given C.W.M. Gell ‘Color and the South African Church’ *Africa South* Vol. 1 No. 2 (1957) 66

49 11/4/3/1 3 March 1959

particular problem of Bantu religious sects was mentioned in the report. ‘The Department of Native Affairs has listed (not recognized) no fewer than 1,350 names of such Sects.’

#### 5.4.2 *Final report*

In the foreword to his final report, issued at the end of 1959, the special rapporteur rejected the principle of citing examples from individual countries. As a result the quotation from UNCORS that SA should fulfil its Charter obligations, which he had included in the draft, was omitted.<sup>50</sup> The sub-commission transmitted the body of Mr. Krishnaswami’s report to the CHR without endorsement. It simply provided a record of its discussions. However, it revised the principles suggested by the special rapporteur and approved a new version unanimously, before including it in the report to the CHR. In March 1961 the final report was referred to member states for further comment. As none was forthcoming from SA, the text is not analysed further.

### 5.5 **Political rights**

At its 10<sup>th</sup> session the sub-commission approved proposals submitted by Mr. Hernán Santa Cruz of Chile for him to prepare a study on discrimination in the field of political rights. It would contain material on conditions for participation in elections, eligibility for elective or non-elective office and separate representation of distinct groups. The Secretariat said it had sufficient funds to produce only a skeleton study, which it would base on the small number of country reports so far submitted. More funds would be required if a final text were to be completed in the next two years. This did not satisfy the sub-commission, which adopted a resolution requesting the Secretary-General to provide the funds and calling on member states to submit the necessary material. The permanent representative commented that, ‘given his long connection with UNCORS, it is not unlikely that South Africa will feature very prominently’.<sup>51</sup>

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<sup>50</sup> E/CN.4/Sub.2/2

<sup>51</sup> 11/4/3/1 14 February 1958. Mr. Santa Cruz reported from 1953–1955 on apartheid issues as chairman of UNCORS; see para. 8.2.

At its 12<sup>th</sup> session in January 1960, the sub-commission devoted less than one session to the study.<sup>52</sup> The special rapporteur, Mr. Santa Cruz, submitted a memorandum containing his views on political rights as ‘the equal and inalienable rights of all members of the human family’. While there was no reference to specific countries, it would not have been difficult to identify SA from remarks like ‘the application of requirements such as literacy, the ownership of property, or the payment of taxes, only to certain voters, solely on the ground of the real or supposed collective characteristics of the group to which they belong, and not to all, would be doubly discriminatory’.<sup>53</sup>

#### 5.5.1 *Draft country report on SA*

On 14 September 1960 the Secretary-General forwarded the draft country report on SA, which he proposed to circulate as it was, subject to any input from the Union. The draft<sup>54</sup> provided background on the structure of the state and the party political make-up of Parliament, noting the imminent cessation of native representation. It recorded the banning of the Communist Party and the prohibition, after the Sharpeville and other demonstrations, of the ANC and PAC.<sup>55</sup> It outlined the electoral qualifications of European and coloured voters, noting that those natives who had been registered on a separate list in the Cape Province would no longer participate in elections. As for Asians, ‘such few Indians as qualify under the old Natal roll’ were entitled to register on the common roll. The rest had lost whatever voting rights they might have aspired to with the repeal of the relevant section of the Asiatic Land Tenure and Representation of Indians Act of 1946. Only whites were eligible for elective public office, although members of other population groups could be elected or appointed to special subordinate bodies created to look after their interests. Bantu authorities would be established only in their own areas.

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52 *Idem* 14 February 1958, 16 February 1959 and 10 March 1960

53 E/CN.4/Sub.2/L.158 2 December 1959

54 The draft was forwarded to External Affairs under cover of minute 11/4/3/1 28 September 1960.

55 For background to these events see para. 9.2.

The draft report recorded the SA contributions on freedom of opinion, expression and assembly to the *YHR* in 1947. Since then, the report continued, several laws regulating freedom of opinion and of assembly as well as prohibiting incitement, had come into force. It quoted the Minister of the Interior as having stated that 82 people had been prohibited from attending public gatherings for various terms in 1956 and 15 in both 1957 and 1958. The SA permanent representative reported that the special rapporteur had relied mostly on the Institute of Race Relations 1958/59 Survey and the 1947 *YHR*. The UNCORS reports had been quoted but ‘not as often as might be expected’ from the author of both studies. ‘The Union’s political affairs have been discussed so often at the United Nations that the whole approach...apart from questions of fact, is slanted if not biased.’ A detailed reply attempting to correct all the inaccuracies would neither change the approach nor give it perspective and might only enhance the study’s status.<sup>56</sup>

External Affairs approached the Departments of Justice and of Bantu Administration and Development for their views. It agreed with them that ‘while the factual mistakes would not require a great deal of amendment’, placing them in the correct perspective would be a substantial undertaking. It would, however, be preferable to avoid the impression that the report correctly interpreted the position in the Union. The permanent representative was so advised. He informed the Secretary-General that the SA authorities had decided not to comment on specific paragraphs, as they felt that if the summary were to be balanced by including ‘the purposes, principles and constructive ideas fundamental in the Government’s policy, it would have to be re-written in its entirety’.<sup>57</sup> The country report was, in fact, issued before the SA reply reached the Secretary-General.

### 5.5.2 *Review of overall draft study*

The sub-commission devoted most of its 13<sup>th</sup> session to the special rapporteur’s overall draft study, in which he recapitulated most of the country report on SA.<sup>58</sup> Although it alluded to the fact that many states paid lip service to the principle of non-discrimination, the overall study feared they often discriminated in practice. References to countries that

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56 11/4/3/1 vol. 2 28 September 1960

57 136/4/20 4 February 1961; 11/4/3/1 14 February 1961

58 E/CN.4/Sub.2/L.217 15 December 1960

did so were limited to grounds of race and included Kenya, under UK administration, and SA, the latter with respect to apartheid at home and the administration of SWA.

The SA permanent representative reported that Mr. Santa Cruz had agreed to revise the paragraphs of his report on types of political discrimination.<sup>59</sup> Members of the sub-commission suggested that he should ‘clearly condemn the policy of apartheid’ and make it clear that ‘such a system...was not limited to political rights but affected [the] entire economic and social life’ of segregated groups and individuals. Mr. Santa Cruz was non-committal on how he would deal with individual countries but undertook ‘to state clearly the undeniable fact that some states signatory to the Charter were perpetuating and even intensifying discrimination in the matter of political rights’. He added that ‘where a State denied its people the rights laid down in the Universal Declaration of Human Rights, they had an inalienable right to resist oppression’.

The permanent representative said that the Communists were major critics of the study. They argued that the existence of more than one political party was not necessarily the sign of a democracy and meant nothing in itself. Many terms, like universal suffrage, democracy and genuine elections were understood differently in different countries. The special rapporteur submitted a tentative five-point plan of action but it was discussed only superficially. According to the permanent representative, there was little enthusiasm for international or regional instruments, or for a reporting procedure, while several members felt it unlikely that ‘many sovereign states would request assistance for the ensuring of free and fair elections in their countries’. With the Soviet Union and Poland abstaining, the sub-commission thanked the rapporteur and asked him to submit a final report.

## **5.6 Racial and national hatred and religious and racial prejudice**

At the request of the International League for the Rights of Man, a body that enjoyed consultative status with ECOSOC, the sub-commission gave its attention during its 12<sup>th</sup> session in January 1960 to manifestations of anti-Semitism. Soviet experts, reported the SA permanent representative, said that, while the events were part of a fascist campaign

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59 11/4/3/1 vol. 2 7 April 1961

against Jews, they could extend to Slavs or other peoples the Nazis considered inferior. The Uruguayan expert went further and considered racial prejudice and discrimination in general. Racist theories still existed despite efforts to combat it. Swastikas were painted in some countries; others followed policies of apartheid.<sup>60</sup>

#### *5.6.1 References to SA at 15<sup>th</sup> GA*

Racial hatred was included in ECOSOC's annual report to the 15th GA, where Czechoslovakia drew attention to incidents in various parts of the world during 1959 and 1960. It submitted a resolution condemning 'the revival of manifestations of racial and national hatred' as violations of the Charter and the UDHR. Liberia objected to the words 'the revival' of manifestations and asked for them to be replaced by 'any kind'.

Although many countries were attacked in the Third Committee, no one had referred to the Union and for most of the debate the SA delegation thought it could support the resolution if some of the more tendentious phraseology was expunged. Ghana, however, used the Liberian proposal to quote a resolution condemning apartheid, which had been adopted by the Conference on Independent African States in 1958.<sup>61</sup> The SA delegation was accordingly instructed not to respond to the attack and to abstain on the resolution and its parts. In an explanation of vote, SA said that the Union government was trying to reconcile racial and cultural differences and to assist each racial group to achieve its highest aspirations within its own area. Some delegates had confused racial and national hatred with discrimination. Ghana had equated it with SA government policy. This unwarranted attack had led the SA delegation to abstain, although the Union government was firmly opposed to all forms of racial and national hatred.

Having learnt that the resolution would be submitted to Plenary for unanimous acceptance, the SA delegation reconsidered its action and obtained approval to vote in favour, as the aim of the current text was in accord with the basic tenets of SA domestic

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<sup>60</sup> *Idem* 10 March 1960

<sup>61</sup> The resolution was also referred to in the debate on the adoption of a Declaration on the Granting of Independence to Colonial Countries and Peoples, see paras. 6.5.2 and 10.4.

policy. An affirmative vote was accordingly registered followed by another explanation that it was ‘the specific purpose and a fundamental aspect of the policies of separate development...to eliminate racial friction and to remove the causes of racial hatred’. The resolution was approved as GA. Res. 1510 (XV).<sup>62</sup>

### 5.6.2 *Further consideration of manifestations of racial hatred*

The sub-commission devoted much of its 13<sup>th</sup> session in January/February 1961 to racial hatred in the light of the GA resolution. Most of the discussion concerned anti-Semitism. Several members traced the phenomenon to ‘the survival of discriminatory laws and the absence of legislative action to abolish them in a number of independent countries, trust territories and non-self-governing territories’.<sup>63</sup> The sub-commission prepared a draft for the GA to call upon all governments to rescind discriminatory laws and to take appropriate measures to ‘combat racial, national and religious hatred’. The SA delegation requested a directive for the 16<sup>th</sup> GA. Being concerned that critics could ‘place their own interpretation on the relevance of the draft to affairs in South Africa’, Foreign Affairs left the decision to Louw. A note in the margin of the relevant directive stated that, if the item was discussed, SA should attempt to be absent for the vote. Although racial hatred was placed on the agenda as a specific item, the Third Committee was unable to give it appropriate attention and deferred consideration to a later session.<sup>64</sup>

## 5.7 **Freedom from Arbitrary Arrest, Detention and Exile**

### 5.7.1 *Country monograph on SA*

At its 12<sup>th</sup> session in 1956, the CHR decided to undertake a study of its own, on freedom from arbitrary arrest, detention and exile. It appointed a four-member committee from among its members to prepare a report. In January 1959 the Secretary-General forwarded a draft country monograph on SA and requested its comments. The permanent representative said that, although SA’s earlier contribution to the 1959 supplementary *YHR*,<sup>65</sup> which exempted it from responding to the committee’s initial request for

62 SA Embassy Paris 30/6 vol. 1 Report on the Third Committee 6 June 1961

63 E/CN.4/815 9 February 1961; 11/4/3/1 vol. 2 7 April 1961

64 11/4/3/1 vol. 2 minutes 136/4/1 10 November and 18 December 1960. For the department’s name change, see Introduction fn 4.

65 See para. 5.1.4.

information, had formed the basis of the monograph the CHR committee seemed to have acquired additional information. This was an understatement.

The first part of the draft was devoted to fundamental principles and was to a large extent based on the works of May, and Gardiner and Lansdown, together with selected legislation on the treatment of natives.<sup>66</sup> The second part reproduced the SA contribution to the 1959 supplementary *YHR* but again went further covering other aspects, such as detention during preparatory examination and pending trial, provisional release, the rights of persons detained, and the remedies and sanctions available to them. The third part covered detention on other grounds, such as mental disorders, and specific regulations relating to natives. The draft noted that, on the declaration by the Governor-General of a state of emergency, the Public Safety Act<sup>67</sup> contained regulations that provided for summary arrest and detention for more than 30 days, subject only to the detainee's name being tabled in both Houses of Parliament. May was quoted as having written that it was 'the most far reaching piece of legislation...because it gives the executive in peacetime almost unlimited powers of legislation by regulation'.

The draft tempered the statement in the government's contribution to the 1959 supplementary *YHR* that exile was unknown in SA law by references to a 'number of legislative enactments relating to compulsory movement or change of residence'. With regard to the Riotous Assemblies Act,<sup>68</sup> the draft referred to the judgement of Stratford, ACJ, as reported by May, on an appeal against a banning order. Stratford had held that, once the court was satisfied that Parliament had conferred an unfettered discretion on the Minister of Justice, it was not the function of the court to curtail its scope in the least degree; it was the court's function to enforce the Minister's will. 'The rule of law, that is supremacy of the law that Parliament made', said the learned judge, 'shall prevail over

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66 H.J. May *op. cit.* 3rd ed. (1955); F.G. Gardiner and C. Lansdown *South African Criminal Law and Procedure* 6th ed (1957); Native Administration Act 38 of 1927; Native Laws Amendment Act 54 of 1952, (corrected in the final version on the SA government's advice to the Natives (Urban Areas) Consolidation Act 25 of 1945 as amended in 1952)

67 3 of 1953

68 17 of 1956

what is called a rule of natural law, that is, the principle of hearing an accused in self-defence.’<sup>69</sup>

### 5.7.2 SA reviews draft monograph

The draft monograph was submitted to the SA law advisers, whose comments were provided to the UN with the caveat that they only dealt with certain factual errors and that the government reserved the right to comment on the draft report as a whole later. External Affairs felt that, since the draft gave a negative impression, it would be politically advantageous to provide a more balanced context. Its law adviser, Dr. J.P. Verloren van Themaat, commented that, while the reference to the Public Safety Act included May’s remark that it was a ‘most far-reaching piece of legislation’, it failed to mention that the Act made provision for full parliamentary oversight over executive action. Unless such rectification was provided, the draft would be assumed to be correct. The comments finally submitted contained contributions from the Departments of Bantu Administration, Health and Indian Affairs. These contributions were included in the final text which was issued as a conference document on 7 February 1962.<sup>70</sup>

The SA government drew attention to certain errors. The inclusion of SA among countries that could amend their constitutions only ‘with a special qualified vote’ was correct only in so far as two sections of the Constitution of the Republic of South Africa Act of 1961 were concerned.<sup>71</sup> The rest of the Act could be amended or repealed by normal legislative procedure. The statement that some systems, including SA, could bar the use of *habeas corpus* in cases of penal detention only applied in SA under emergency regulations promulgated in terms of the Public Safety Act of 1953. Finally, the assertion that no appeal against penal detention was allowed, or only after a specific period, was incorrect, except under the recent emergency regulations.<sup>72</sup> The SA permanent representative commented that countries were not mentioned by name in the body of the

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69 *Sachs v the Minister of Justice* 1934 AD 11

70 11/4/3/2 vol.1 minute 136/4/20 6 May 1961; 136/4/1 9 September 1961

71 Ss.108 and 118

72 Note on 11/4/3/2 3 October 1961

report<sup>73</sup> but did appear in the footnotes. SA regulations, or their equivalent, were in force in other countries. The SA law advisers agreed that the references to SA were in accordance with its laws.

On the basis of the report the CHR approved a set of draft principles. These were also submitted to the SA law advisers, who commented: ‘Our laws do not conform to these draft principles in many respects and, if subscribing to these principles implies agreement to alter any laws which conflict with them, it is obvious that the Republic cannot subscribe to them without some reservation or qualification.’ External Affairs commented that it was unlikely that SA would change its laws to conform.<sup>74</sup>

### **5.8 ECOSOC surveys forced labour practices**

Surveys of specific human rights matters did not always originate in the CHR or the sub-commission. At a request of the American Federation of Labour (AFL), for example, ECOSOC asked the Secretary-General at its 8<sup>th</sup> session in 1949 to ascertain whether governments would be prepared to co-operate in an impartial enquiry into practices of forced labour and measures for its abolition. The AFL request was based on action taken at Nürnberg against Nazis charged with this offence, and aimed at highlighting conditions in the Soviet Union. After consulting the Department of Labour, External Affairs advised the SA permanent delegation on 17 May 1949 that only persons sentenced for criminal offences and those in ‘work colonies’ were subjected to forms of forced labour. It could prove embarrassing if a commission of enquiry were set up, since various interests would exploit a visit by it. ‘It might well be that the Commission would include persons such as Asiatics, Africans, etc.’. Although there was no *prima facie* objection to replying, it might be better not to. If pressed the SA delegation could explain the position in the Union ‘personally and informally’, not on behalf of the government.<sup>75</sup>

The SA deputy permanent representative thought it would not benefit the Union’s interests to display an uncooperative attitude. It was hardly likely that a commission of

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73 Finally issued as E/CN.4/826.

74 11/4/3/2 vol. 1 136/4/1 30 April 1962 and 12 December 1962

75 PM 136/4/40 vol. 1 annexure 1 to minute PM 8/8 to Secretary for Social Welfare, date illegible

enquiry would visit all 59 UN member states. He suggested a reply either that SA subscribed to the ILO definition of ‘forced labour’<sup>76</sup> or that the practice existed only as far as explained by External Affairs. He would require a detailed explanation of the functioning of work colonies, since the term carried unsavoury connotations at the UN, where it was associated with forced labour camps in Siberia.<sup>77</sup> The Secretary for Labour explained that SA had not ratified the ILO Convention because paragraph (c) of Article 2 provided that duly sentenced convicts should ‘not be hired to or placed at the disposal of private individuals, companies or associations’. SA had advised the ILO that the paragraph was incompatible with government policy. The position was unchanged.

#### 5.8.1 *Ad hoc Committee on Forced Labour*

In consultation with the ILO, ECOSOC set up an *Ad hoc* Committee on Forced Labour in June 1951 to study forced labour practices, both as a method of political coercion and as a contribution to the national economy.<sup>78</sup> The *ad hoc* committee interpreted its terms of reference as requiring it to ascertain whether persons incarcerated for political reasons were required to perform certain services as a means of persuading them to change their opinions, and whether others were made to do work ‘of such a nature as to lend a large degree of economic assistance’ to the imprisoning state. SA claimed that neither interpretation applied to the Union.

#### 5.8.2 *Allegations of forced labour in SA*

Byelorussia, Poland and the World Federation of Trade Unions (WFTU) alleged forced labour practices in SA at subsequent ECOSOC meetings. The allegations related to treatment of non-Europeans, the recruitment of mine labour in neighbouring countries, the oppressive nature of the pass laws and the widespread use of farm prisons. Apart from Poland’s statement that non-whites enjoyed no political rights, the claims

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76 Art. 2 of International Labour Convention No. 29 on Forced Labour (1930) reads: ‘For the purposes of this Convention, the term “forced or compulsory labour” shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.’ The article provided for certain exceptions too lengthy to quote here.

77 11/4/11 25 May 1949

78 Unless otherwise noted this analysis is based on the Committee’s report to ECOSOC E/2431 (1953) and documents on PM 136/4/40.

concentrated on the use of involuntary labour to maintain supplies in the agricultural and industrial sectors of the economy. The allegations were presented to the SA government in a letter from the Secretary-General dated 22 November 1952.

Accusations relating to farm labour in SA were also made by a representative of the Anti-Slavery Society to the *ad hoc* committee in Geneva and published in a joint UN-ILO press release of 16 October 1952. The SA Acting Secretary for Labour reacted to these accusations on 18 December 1952: farm prisons had been set up to provide native prisoners serving sentences ranging from six months upwards for serious offences with a congenial occupation in outdoor surroundings, and so alleviate overcrowding in urban prisons resulting from the rural influx during the war. Building of new prisons had not kept pace with this influx when money was diverted to the war effort.

The official SA reply of 26 February 1953 to the allegations in the letter from the Secretary-General denied any systems of forced labour. On the political side the reply recorded the passage of the Suppression of Communism Act but insisted that no attempt had been made to influence the opinions of the few persons detained under it. None of the allegations was relevant to the *ad hoc* committee's mandate. The government was replying because the committee had not reached any conclusions on relevance. 'The Union Government do not, however, recognise any obligation to furnish explanations in future on matters falling outside the terms of reference of the Ad Hoc Committee.'<sup>79</sup>

In its general observations, the *ad hoc* committee found that both types of forced labour mentioned in its terms of reference violated the UN Charter and the UDHR. This highlighted the need to 'ensure and effectively safeguard human rights and dignity'. Paragraph 552 of the report called for an earnest appeal from the UN to all governments concerned 'to re-examine their laws and administrative practices...to reaffirm faith in fundamental human rights [and] in the dignity and worth of the human person'.

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79 E/2431 Appendix III 373-396 and 403-413

On specific countries, the *ad hoc* committee rejected five of the allegations against SA as irrelevant but concluded that, while no complaints had been received about political coercion, the Suppression of Communism Act, to which the Union government had drawn its attention, ‘could be used as an instrument for the correction of the political opinions of those who differ from the political ideology of the State’. An economic legislative system existed in SA, creating an insuperable barrier between the indigenous population and persons of European origin. The effect was to channel the former into agricultural and manual work and create a permanent and abundant labour force. Thus ‘a system of forced labour of significance to the national economy appears to exist’.<sup>80</sup>

### 5.8.3 SA response to report

The SA Prime Minister arranged a meeting of the departments concerned on 18 August 1953 to discuss the nature of the reaction, if any, to the report.<sup>81</sup> The participants agreed that it would be desirable to reply, as the allegations could be refuted without compromising the government’s stance on domestic jurisdiction. There was a clear distinction between the *Ad hoc* Committee on Forced Labour and other commissions that were looking at specifically SA issues.<sup>82</sup> The investigation into forced labour was a general enquiry, taking it outside the range of the domestic jurisdiction provisions of Article 2(7) of the UN Charter. The other commissions were illegal bodies investigating specific actions of a single member state.<sup>83</sup>

### 5.8.4 Consideration at 8<sup>th</sup> GA

The debate in the Third Committee of the 8<sup>th</sup> GA, reported the SA representative, was between the US and the USSR; other delegates had no desire to consider the substance of the report. Administering Powers said that their agreement to co-operate did not indicate that the UN’s decision to take action had removed the question of forced labour from the sphere of domestic jurisdiction. The enquiry was general, not directed towards specific

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80 E/2431 79-80

81 PM 136/4/40 vol. 3 undated memo. *Verslag van die Ad Hoc Komitee op Dwangarbeid*

82 UNCORS was an example.

83 PM 136/4/40 vol. 3 undated report

states. (The argument did not really hold water for some states had become a special target). The committee called on ECOSOC to consider the matter and report to the 9<sup>th</sup> GA. SA abstained in the vote and explained that it was in some doubt as to the UN's competence. Membership of the ILO and, *a fortiori*, ratification of its labour conventions, implied acceptance of that body's competence 'in various aspects of what are generically termed "labour problems"'. To that extent SA recognized that the ILO, rather than the UN, could intervene in labour practices.

In its report, the SA delegation noted that the *ad hoc* committee's report was proving to be a spanner in the works of the UN anti-colonial machine. 'The Slav bloc could hardly describe it as a "shameful libellous pamphlet – a compendium of lies" and yet quote it against us.' Similarly, the Arab-Asians could hardly use it to attack SA without at the same time indicting the Russians. 'Several delegations...found it necessary to absent themselves both while the discussions were under way and during the vote.'<sup>84</sup> There was, in fact, no criticism of the Union.

#### 5.8.5 SA supplements earlier replies

ECOSOC transmitted the report of the *ad hoc* committee to the 9<sup>th</sup> GA, where it gave rise to a lively debate. Calls were made for it to be considered on a humanitarian basis rather than as a political issue. SA regretted that facts concerning it had been badly misinterpreted. It was as essential to curb 'excessive migration of unskilled workers to ward off the consequent social evils', as it was to allow a serious offender 'to accept, at his express wish, occupation against pay in congenial surroundings until he could again take his proper place in society'. Forced labour did not exist in SA. The conclusions were at variance with the facts and unwarranted. SA would therefore abstain on the resolution but vote in favour of operative paragraphs which condemned the existence of systems of forced labour and called for further efforts towards their abolition.<sup>85</sup>

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84 PM 136/2 AJ 1954 10th sess.; PM 14/15/3 vol. 5 annex to unnumbered minute Washington to SEA 15 January 1954

85 GAOR 9th sess. A/C.3/SR.588 and 618; A/2662 Report of the Third Committee. The SA speech was tortuous. The government's real aim was to terminate the *ad hoc* committee and it feared that a positive vote might lead to its prolongation. The abstention would have reinforced the impression of SA's lack of concern for fundamental human rights but was consistent with the constant fear expressed by the Prime Minister of any action that might weaken his stance on domestic jurisdiction. Nevertheless, SA had

The SA delegation reported that the debate at the 9<sup>th</sup> GA revealed even less enthusiasm than the previous year; several states were aware of the report's inaccuracies. The UK remarked that the chief criticism one might make was that the authors 'leant over backwards in order to show their impartiality and had a tendency to discover forms of forced labour or possible forced labour where they did not really exist'. The anti-colonials complained that the terms of reference were too narrow for a universal enquiry particularly as regards the 'inhuman exploitation' of native labour in colonial territories. The report added (probably with a hint of self-satisfaction) that 'throughout the debate [there was] never a word about South Africa'.<sup>86</sup> Thereafter ILO dealt with the issue, as it would have *ab initio*, had the AFL complaint not been politically motivated.

## 5.9 Conclusions

### 5.9.1 Relations with UN Secretariat

The 1947 correspondence between SA and the UN Secretariat concerning the *YHR* demonstrates that relations were cool even before the advent of the National Party in 1948. SA was often slow in responding to UN requests for information, which may have obliged a Secretariat beset by deadlines to try other channels. The request to H.J. May for a general paper on human rights legislation in SA to the first *YHR* in fact followed the pattern of approaching outside sources, if a member state, like SA or the UK, did not have a rigid constitution. The difference was that the UK expert was appointed with his government's approval, while May was approached directly. Thus SA was justified in censuring the Secretariat for seeking information about the Union from other than official channels, without first asking the government to nominate an expert. Suspicions of bias were easily aroused after, for example, the UN Assistant Secretary-General for Social Affairs had stressed that GA Res. 44(I) on the treatment of Indians in SA was proof that no violation of human rights could be covered up by the principle of national sovereignty.

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explained domestic issues in a UN forum without invoking the wrath of its critics. This fact may have encouraged it to consider such steps in future.

<sup>86</sup> PM 136/2 AJ 1954 10th sess.

Such a statement could only be interpreted as the Secretariat's rejection of the Union government's claim to domestic jurisdiction.<sup>87</sup>

The arm's length approach was maintained by Dr. Wessels, the law adviser SA nominated to act as correspondent on the *YHR*. Although he was appointed under the National Party administration, much of the discussion in Pretoria on the correspondent's role took place before, during and immediately after the general elections. There is no evidence that his appointment or the approval of his selection of laws for inclusion in the *YHR* resulted from anything more than an exchange between officials. Neither Prime Minister seems to have interfered. While the laws Dr. Wessels furnished to the UN in 1948 were passed before the advent of apartheid, the annual correspondence thereafter over the *YHR* reflected the widening gap between SA and the UN Secretariat.

Prior to May 1948, SA officials would have had to bear in mind Smuts's rather nuanced recognition of the impact of new definitions of human rights on the scope of Article 2(7) of the UN Charter. The Malan government rejected this view and one can discern a firming of attitude immediately after the election, even before it was clear what practical policy the new administration would adopt towards the UN. The SA law advisers' comments on UN human rights enquiries at the time displayed a remarkable prescience of legal and political developments. There is, however, no evidence that SA's policy towards the *YHR* would have been substantially different, had there been no change of administration. The *YHR* contained factual material, updated each year, with minimal comment. Obviously disagreement could arise over the choice of material but the facts published in the *YHR* were not in dispute.

In their discussion on the content of the *YHR* in 1954, the SA permanent representative and the Secretary-General agreed that the Secretariat should carry out its mandate faithfully and treat all members of the UN with the same objectivity. The task could not have been easy, for the composition of the Secretariat reflected the geographical make-up of UN membership. While the appointees were required to swear under oath that their

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<sup>87</sup> See paras. 5.1.1 and 3.1

loyalty to the organization would transcend national affiliation, there can be little doubt that national prejudice coloured their view of international issues. The mandate of the Secretariat is to execute the decisions of the UN impartially and in conformity with the resolutions adopted by its organs. Given the cool relations between SA and the majority of UN members, suspicions of *mala fides* could be expected to arise on both sides. On balance, however, SA had little reason to complain of its treatment by the Secretariat as far as the *YHR* was concerned.

The upper hand lay with the Secretariat. The reference to apartheid in the 1952 memorandum containing data on the activities of UN organs may have revealed a measure of misplaced zeal, rather than bias, and SA was within its rights to object. But the damage had been done. A formal protest drawing attention to the error would only have been to SA's detriment, a fact of which the Secretary-General would have been aware when he made his offer to issue a corrigendum. He placed the onus on SA, when he could and should have rectified the mistake himself.<sup>88</sup>

### 5.9.2 *Relations with other human rights organs*

The members of the other UN organs were not UN officials and did not suffer the same constraints as the Secretariat. They could be less circumspect in their remarks about SA. Even in a small body like the Sub-commission for the Prevention of Discrimination and the Protection of Minorities, whose composition changed little in the early years, the hardening of attitudes was obvious and was reflected in the sub-commission's human rights surveys. The information contained in the first survey, on discrimination in education, was submitted to the Union in draft form for comment. SA furnished supplementary data for the country report, so that the published version bore the government's imprimatur. None of the data did anything to deny discrimination, which was the essential question. SA officials made attempts in this and later surveys to place

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<sup>88</sup> See para. 5.2. The SA protest only had a delaying effect. At its 11th session the sub-commission had before it a note from the Secretariat on race conflict, with a relatively long summary of the comments of the states who had requested the inscription of the apartheid item in 1952 and only a brief reference to the Union government's position (11/4/3/1 vol. 1 16 February 1956). This time SA took no action.

the reports in context but the facts they contained, based as they were for the most part on official SA documents, were not contradicted. Co-operation with the sub-commission became increasingly tenuous and the policy SA adopted of leaving the special rapporteur to produce a draft country report of his own, tended to backfire. Once the report existed, the Union could only highlight errors of fact or, if it found none, lamely contest the conclusions the special rapporteur drew from the evidence before him.

The Secretariat played a preponderant role in the preparation of the documentation and of the conclusions in the final reports, which contained little information that was not already available to UN members.<sup>89</sup> Delegations would have been surprised had the reports come to any conclusion other than that SA practised discrimination. The SA permanent representative called the conclusions in the study on discrimination in education little more than an academic exercise. ‘The material included in the study...may be used against us but I do not feel that this aspect need be taken seriously.’<sup>90</sup> As further surveys were produced the evidence became more compelling and SA more critical and less dismissive. What protected it from harsher treatment was that the reports had to be factual, of global import, objective and even-handed. Otherwise the special rapporteur and, through him, the Secretariat would have faced the wrath of all members singled out for criticism, and their supporters.

SA had good reason to feel that the CHR Committee on Freedom from Arbitrary Arrest, Detention or Exile, and therefore the Secretariat, went beyond their mandate in the monograph prepared for SA.<sup>91</sup> The Union government’s input for the 1959 supplementary YHR on the same topic was all that was required. The additional fields dealt with in the monograph were only distantly related to the topic. The legislation on restriction of movement cited by the *ad hoc* committee for example could, with the

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<sup>89</sup> See para. 5.3.1. The SA permanent representative alleged that the information on discrimination in education was collated by the Secretariat. This was obviously correct, since one special rapporteur would have been unable to collect and sift the information required for a report of this nature by himself. This fact in no way alters the picture, for SA drew attention to hardly any errors of fact either in the country reports or their final conclusions.

<sup>90</sup> 11/4/3 vol. 7 20 May 1959 CHR 15th sess.

<sup>91</sup> See para. 5.7.1.

possible exception of the Riotous Assemblies Act, only be likened to 'exile' by a stretched interpretation. The UDHR provided no definition of the term to widen it beyond the dictionary definition of compulsory exclusion from one's country. The compilers were presumably guided in their approach by Article 12 of the draft Covenant on Civil and Political Rights on freedom of movement. That article had by then only been adopted in the Third Committee, not the GA. SA noted 'errors' in the monograph but none that was totally inaccurate. It could only say that the monograph should be placed in the correct perspective but did not make the effort to provide that perspective. For practical purposes the information provided by a UN organ again went unchallenged.

### *5.9.3 SA response to UN surveys*

SA's willingness to respond to UN enquiries on human rights issues may appear surprising in the light of the criticism to which it was subjected and the misuse that it felt was made of its replies. The answer can be found in the manner in which the SA authorities interpreted domestic jurisdiction. The Union government did not react to allegations regarding the political rights of non-whites or the residential segregation of Indians, when they were under discussion in the UN, since these charges affected a specific country, namely SA itself, and impacted on its domestic jurisdiction. SA's reliance on the purely legal argument of the overriding nature of Article 2(7) of the Charter in these cases had, however, proved ineffective and a different strategy was needed. The ECOSOC/ILO investigation on forced labour practices affected all members and allowed SA to furnish information on internal issues without yielding on the domestic jurisdiction principle. It offered the SA Prime Minister and his officials an opportunity to get their message across in the international arena.<sup>92</sup> The point is underlined by the fact that the SA reply to ECOSOC was delivered in 1953, the same year that the Union government refused to recognise UNCORS.

SA was under no legal compulsion to respond to the ECOSOC/ILO questionnaire, since it was not a party to the ILO Convention on Forced Labour. However, as a member of the ILO, it might have felt a compelling obligation, in terms of a 1948 decision of that

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<sup>92</sup> See para. 5.8.3.

Specialized Agency's Governing Body that all members should report on involuntary labour practices, whether parties to the convention or not. The tripartite composition of ILO – government, employers and trade unions – should not be discounted. Had the SA government failed to react, one of the other two components might have made a less favourable submission. This is, however, an arguable proposition; SA trade unions represented white workers rather than black, while the employers' organizations were equally restrictive in their representation. But it was a thin line, as the government was well aware. No attempt is made in this thesis to analyze the SA government's replies. It is enough to register the fact that they referred to more recent legislation than that contained in the initial survey.<sup>93</sup> This enabled the *ad hoc* committee to update its references and to include laws passed during the apartheid era. Although this worked to its disadvantage (the committee based its more negative conclusions on the newer legislation), SA does not appear to have been dissatisfied with the overall result, and might have considered the exercise a worthwhile precedent.

SA, it is true, might have refused to reply to ECOSOC. Its practice in respect of other general surveys suggests that it would not have done so. Hence it would be inaccurate to describe this response as opportunistic. Under Article 56 of the Charter, SA had pledged itself to co-operate with the UN in finding solutions for general economic and social problems. Failure to do so was an implicit violation of the pledge and could also have compromised the Union's reliance on Article 2(7) on issues affecting SA alone.

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93 The more recent legislation included the abolition of the former pass laws and their replacement by the Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952. Reference was also made to the Suppression of Communism Act, but the *ad hoc* committee nowhere alleged, as it might have done within its terms of reference (see para. 5.8.1) that involuntary labour practices in SA were politically motivated.

## CHAPTER 6 EVOLUTION OF HUMAN RIGHTS IN THE UNITED NATIONS

### 6.1 Introduction

Human rights issues became a constant theme at the UN to complement its primary role of maintaining international peace and security. Certain of these issues have been touched on in the previous three chapters. Others also impacted in various ways on SA's relations with the organization. Some are discussed below. The first, relating to the rights and duties of states, covers a time frame both before and after the 1948 elections. The second, on the rights of women and children, highlights the problems SA officials were experiencing in dealing with issues where the Union could be exposed to allegations of discrimination. The third, covering refugees and their right to asylum, demonstrates how the SA government's attitude towards humanitarian issues was perceived by the rest of the world. Finally, the question of self-determination and the right of colonial peoples to independence is considered in the context of the equation of SA's domestic policies with colonialism by much of the international community.

### 6.2 Rights and duties of states

In tandem with its statement of essential rights, which served as the basis for the preparation and adoption of the UDHR, Panama proposed a draft Declaration of the Rights and Duties of Nations to the 1<sup>st</sup> GA.<sup>1</sup> The draft was passed to member states for review. The SA law advisers had no comment but, as External Affairs felt that there was a political advantage in submitting SA's views, it asked them to reconsider. Certain items seemed to be of interest.<sup>2</sup> The law advisers' response was sour: 'When we are asked to comment on a matter...we examine its legal aspects, having regard to the special interests of the Union. The statement, therefore, that we have no comments to offer, follows upon such examination and signifies that in our opinion there is neither an illegality nor an endangering of the Union.' International law, they said, allowed for

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1 See paras. 1.4.6 and 3.2.

2 PM 136/2/6 minute to Secretary for Justice 11 July 1947

divergent opinions and legal principles were made to fit political facts rather than government policies being adapted to a uniform international legal code.

The law advisers did, however, accede to External Affairs' request. Their opinion did not relate to human rights *per se* but made two points in that context. Firstly, the word 'state' had different meanings in different countries and times. The draft affirmed that a government should be effective, stable and representative but, they asked, was 'a France ruled for seventy-five years under the enlightened despotism of a Louis XIV' to be denied statehood 'merely because the government did not represent the people'? Secondly, Article 21 of the draft declared that a state should ensure that internal conditions did not threaten international peace. To that end 'it must treat its own population in a manner which does not violate the dictates of humanity and justice or offend the conscience of mankind'. The law advisers agreed that national law ought undoubtedly to comply with such an obligation. While some doubt had previously existed as to the absolute right of intervention 'where the dictates of humanity and justice were violated or the conscience of mankind offended...it may correctly be said that international law now recognises [intervention] as admissible'.<sup>3</sup>

### 6.2.1 *Consideration by International Law Commission*

The SA observer at the 1<sup>st</sup> session of the International Law Commission (ILC) reported that the commission had discussed the Panama draft together with documentation collated by the Secretariat.<sup>4</sup> It had paid specific attention to Article 7 which now read: 'Every State has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'.<sup>5</sup> The US Chairman, Judge M. O. Hudson, had suggested that the ILC might excise the final phrase. By trying to impose a legal duty the draft went beyond anything

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3 P.M.136/6/2 minute 1/113/47/167 from Justice 30 July 1947. The comment on the relevance of Art. 21 implicitly supports the view that a state's treatment of its citizens could fall within the international domain. The opinion was written while H. G Lawrence was Minister of Justice and reflected Smuts's thinking with regard to human rights. Read without Smuts's caveat that fundamental rights had still to be defined, the comments left External Affairs in a difficult position and it did not reply to the Secretary-General.

4 11/4/3 3 June 1949

5 Art. 21 in the Panama text and Art. 6 in the final version

‘so far known in international law’. Discrimination, he said, existed in many countries. Prof. J.L. Brierly, the report continued, agreed that Article 7 brought a matter of domestic jurisdiction into the international domain. A change might however be taking place in contemporary international law, he had suggested, in the light of the implication in the UN Charter that respect by states for the human rights of their nationals helped to maintain friendly external relations. A state might have a duty under international law to respect the human rights of its subjects, but there was nothing to justify the retention of the discrimination phrase, as no state would admit to violating the Charter because it discriminated between the sexes. Other members disagreed and the text was retained unchanged.<sup>6</sup>

Hudson pursued his objection to Article 7, as did Brierly who, however, voted for the draft as a whole. The former told the SA observer that he felt the article was a grave mistake; the ILC’s attitude ‘was dictated by political expediency and fear of public opinion’. The Russian, V. Koretsky, objected that the draft contained shortcomings and deviated from fundamental UN principles like sovereignty, sovereign equality and the right of self-determination.<sup>7</sup>

For the Union government, the vote in the ILC was an implicit setback. Although the draft declaration, which now related to the rights and duties of ‘States’, was of general rather than specific import, it clearly internationalized a matter of domestic jurisdiction. Having been asked for their views on the draft as revised by the ILC, the SA law advisers commented that, as the GA had no legislative powers, its adoption of the draft could only emphasize existing rules of international law, not create new ones. Any provision which went further or introduced ‘as a rule of law a subject that has not yet been sufficiently

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6 In *International Law and Human Rights* (1950) 154 fn. 20, Lauterpacht interpreted the debate differently. Judge Hudson had, he wrote, submitted that while states had not accepted a legal obligation when signing the Charter, the duty of a state ‘to treat its own population with respect for human rights and fundamental freedoms for all’ could be implied. Although Brierly had expressed agreement, Lauterpacht continued, he ‘had proceeded to qualify his statement in a way which probably amounts to a disagreement with the Chairman’, saying that it could be argued that modern international law did impose such a duty.

7 GAOR 4th sess. Supplement No. 10 para. 46 fn. 3. Neither view provides a contemporary basis for Lauterpacht’s conclusions. He was arguing a theory not yet fully accepted by many of his peers and

developed in the practice of States to warrant recognition as a legal rule', had no place in the declaration. Existing law enjoined states 'to treat their population in a manner which does not shock the conscience of mankind'. This was not as wide as the principle laid down in the article. The GA's action with regard to the treatment of Indians in SA did not imply, the law advisers said, that the 'theory of non-discrimination should now be regarded as a rule of international law'. It only indicated a political trend which might develop into customary or international law. The article was therefore unacceptable.<sup>8</sup>

In February 1950, the SA delegation reported that the Sixth Committee had subjected the draft Declaration of the Rights and Duties of States to considerable criticism at the 4<sup>th</sup> GA.<sup>9</sup> The delegation said that the US and the UK aimed at giving it a 'decent burial'. Many delegations inclined to the opinion that no further action should be taken on the draft. After another inconclusive debate at its 5<sup>th</sup> session, the GA did not return to the topic in the period under consideration, giving the declaration its 'decent burial' and sparing SA the embarrassment of abstaining on, or absenting itself from, the final votes.

### **6.3 Rights of women and children**

#### *6.3.1 Convention on the Political Rights of Women*

At the request of the 3rd GA in March 1949, the Commission on the Status of Women, which ECOSOC had established on 21 June 1946, examined the possibility of proposing a convention on the granting of political rights to women. The commission submitted a text guaranteeing women the right to vote, to be eligible for election and to hold public office, on the same conditions as men. ECOSOC asked the Secretary-General to submit the text to member states for comment. External Affairs circulated the draft to SA government departments.

Interior had no comment, as women in SA enjoyed the same political rights as men. Social Welfare recommended that the rights of non-whites should be taken into

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interpreted events and documents in a manner that fitted his ideas on human rights obligations. However, subsequent practice did tend to support him; cf. para. 3.2.1.

8 1/141/57 7 September 1949

9 PM 136/2/13 GA 4th sess. Report of the International Law Commission 1 February 1950

consideration. *'Daar is wat die Naturel betref ook sulke faktore soos stamgewoontes bv. veelwywery (polygamy) wat betrokke is en wat veelvuldige implikasies meebring.'* Native Affairs agreed and commented that family and tribal systems prescribed the status of women in primitive communities. Women generally opposed innovations affecting their status. New laws could weaken the existing tribal legal system, loosen family ties and undermine woman's standing. The acquiescence and cooperation of the community was essential. Justice argued that the Union's multi-racial composition and differing levels of development made it impractical and unrealistic to become involved.

The Public Service Commission remarked that the regulations for admission to the civil service did not distinguish between men and women except in terms of the type of work involved. Women were better suited for nursing and typing, men for trades and fieldwork. Women received less pay than men, since some work of a routine nature, 'which naturally entailed a lower salary', was given only to them. They competed on an even basis with men for promotion to higher clerical and administrative positions. There was no distinction in professional categories but the retirement ceiling was five years lower for women than for men.<sup>10</sup>

The SA deputy permanent representative was advised that the proposed convention would not be applicable in the Union. He should not reply to the Secretary-General.<sup>11</sup> At its 14<sup>th</sup> session, ECOSOC recommended that the GA open a convention for signature and ratification. The preamble would affirm the desire of parties to implement equal rights, to equalize the status of the sexes in the enjoyment of political rights in accordance with the UN Charter and the UDHR, and to recognize the rights of all to participate in government and the civil service. While it was instructed to avoid discussing individual articles, the SA delegation to the 7<sup>th</sup> GA was given discretion to point out that political rights of women were of recent origin even in advanced countries. Universal recognition would require education and enlightenment, particularly in countries where such rights were bound up with local custom and tradition. Change should not be imposed from outside. The delegation exercised its discretion in the Third Committee in favour of the

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10 PM 136/2 AJ 1952 7th sess.

statement contained in the directive. It added that, in some cases, damage could be caused to social structures and would be resisted by the women themselves. ‘Although the rights might seem to be fundamental, the issue should not be forced.’<sup>12</sup>

After the rapporteur of the Third Committee advised Plenary that, despite differences of opinion on the draft, there was unanimity over the principle, the Convention on the Political Rights of Women was adopted on 20 December 1952.<sup>13</sup> SA was absent for the vote. The Soviet bloc, Afghanistan, Ecuador, Egypt, Iran, Saudi Arabia and Yemen abstained, which may explain SA’s preference to be absent. The Union did not become a party to the convention.

### 6.3.2 *Advisory services in human rights*

At the suggestion of the CHR in 1955, ECOSOC took up one of the proposals the US had introduced in 1953 as a means of replacing the methods of implementation of the draft covenants on human rights,<sup>14</sup> and established a system of advisory services in that field. The advisory services consisted of arranging annual regional seminars and of providing fellowships in different countries. The programme was initially limited to two regional seminars but the 13<sup>th</sup> GA agreed unanimously that three be held ‘if possible’.<sup>15</sup> In terms of the GA decision, ECOSOC authorized the Secretariat to arrange a seminar during 1960 on the participation of women in public life, to be held in Addis-Ababa. External Affairs, which was approached by the SA National Council of Women, ascertained that invitations were issued to all governments of the region and to those responsible for dependent territories. NGO’s in consultative status with ECOSOC could attend as observers. A local organization would not be entitled to send a representative, so that the SA government would have to nominate one.<sup>16</sup>

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11 PM 136/4/14 12 December 1951

12 GAOR 7th sess. Third Committee SR 371

13 *Idem* Plenary 438

14 See para. 4.8.4.

15 136/2/26/1 vol. 2 Progress Report No. 8 25 November 1958. The SA delegation, which had abstained from voting in Committee, reported that, as other abstentions were unlikely, ‘the Union’s representative managed to be absent when the vote was taken’ in Plenary. It is difficult to avoid reading a note of irony in the way in which it recorded its action.

16 As a member of the newly created Economic Commission for Africa, SA could and did attend UN sponsored meetings on the continent.

External Affairs discussed the Addis Ababa meeting with the SA permanent representative in New York, from whom it learnt that no unnecessarily contentious issues had surfaced at previous seminars but that race and colour were likely to be raised in Addis-Ababa. If SA did send a representative, she would not only have to be qualified to handle the issues but would also have to abide by her directive. The government would also have to be ready to join a debate in the GA later. Assuming those problems could be solved, the permanent representative said, participation might be to SA's advantage as, although its representative might face criticism, she would 'be in a position to impart information on the great advance that has been made in South Africa in this field.'<sup>17</sup>

Attendance at the Addis Ababa meeting meant that the official assigned to the Third Committee at the GA would need to be fully briefed on women's issues or that SA would have to break tradition by including a woman on the delegation. As the relevant Head Office files have been destroyed, the reasoning against it can only be inferred. Presumably the authorities were afraid to risk a breach of the domestic jurisdiction principle or being the butt of criticism. The seminar was held in December 1960 and discussed the educational, economic, political, social and legal obstacles impeding women's progress. A hundred participants attended. They included representatives from the Southern Africa High Commission Territories as a group and from the Federation of Rhodesia and Nyasaland, but not from SA. Among the resolutions adopted, was one calling for African governments to consider appointing women to their UN delegations.<sup>18</sup>

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17 11/4/3 2 August 1959

18 UN press release SOC/2774 29 December 1960. During the 16th GA the following year, the US proposed that the advisory services programme provide more fellowships annually. SA abstained in Plenary, where the proposal was approved without a negative vote (11/4/3 2 February 1962). There was no reason for SA to take this step. It had no specific objection to the fellowship programme and had even considered participation. The government probably feared that additional funds might be used to support research by students from some of the new member states into SA's domestic policies. In this way it provided another, albeit small, justification for those who accused it of lacking concern for human rights issues, especially as no reason was given for the abstention.

### 6.3.3 *Declaration on the rights of the child*

The desirability of a declaration on the rights of the child was mooted in 1946 but remained dormant until 1959 when the CHR considered a draft at its 15<sup>th</sup> session. The SA permanent delegation reported that most members favoured a short text of general principles without measures of implementation. The Soviet bloc countered with proposals for a detailed and precise document, even a convention that would list state obligations. The CHR adopted the initial draft and passed it to ECOSOC.<sup>19</sup> SA did not expect ECOSOC to submit it to the 14<sup>th</sup> GA so took no action on the CHR text. It was taken aback to find that the ECOSOC annual report did mention the rights of the child. As that report only reached SA after the GA session had opened, there was no time to consult technical departments before Louw left for New York. External Affairs cabled that ‘while proposed rights are presented in the form of an ideal towards which Governments will strive, we cannot ignore our own experience in connection with Declaration on Human Rights, which has, despite absence of legal commitment, often been invoked against us’. It suggested that Louw decide SA’s strategy *in situ*.<sup>20</sup>

The Third Committee devoted 23 meetings to the draft declaration because the chairman and most members felt that its adoption should not be held over to a later session, as was common practice. The Communists were at pains to emphasize the role of the state and the necessary social measures the declaration should contain, so that it could guide under-developed countries in the right direction. The developing states avoided the draft’s detailed provisions, admitting that they were not yet in a position to put such principles as free and compulsory education into practice.

It was felt, the SA delegation reported, that the Union’s particular problems would hinder acceptance of those parts of the draft declaration which prohibited any forms of

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19 A/4185 17 August 1959; 11/4/3/3 vol. 1 15 May 1959

20 11/4/3/3 vol. 1 tel. No. 50 SEA to Safdel 24 September 1959. Presumably the officials had relied on the prognosis that the GA was unlikely to proceed. There had been time to consult other departments on the basis of the CHR report, which was circulated as early as May. One can only speculate, for the Head Office file has been destroyed.

discrimination or contained a reference to the fundamental rights and freedoms specified in the UDHR. SA therefore expressed general approval of the need to provide children with special care and to help them develop into free persons exercising their rights and responsibilities. Although its municipal law contained many similar provisions to the current draft,<sup>21</sup> SA would prefer a more realistic declaration.

The SA delegation took no part in the drafting of the principles but voted for non-controversial ones or amendments that shortened and improved the text. It opposed proposals introducing extra obligations and abstained, or absented itself, on those which would cause special difficulties for the Union. It abstained on the declaration as a whole, explaining that its reservations had not been altogether satisfied in the final version. The draft principle causing the most problems called for raising the child *inter alia* in an atmosphere of tolerance and promoting ‘aversion for all forms of national, racial or religious discrimination’. SA would have supported an amendment limiting the text to raising the child ‘in a spirit of peace, tolerance and universal brotherhood and in full consciousness that his energy and talents should be devoted to the service of his fellow men’, but India (which maintained the caste system in practice if not in law) and Mexico proposed a sub-amendment that the child be protected ‘from practices which may foster racial, religious and any other form of discrimination’. In an obvious reference to an incident in SA, India related a story of a football team unable to visit another country because its players were of mixed colours. Since the sub-amendment was likely to be adopted, SA absented itself for the vote.

Several delegates, the report continued, recognized that the sub-amendment had been politically motivated, partly because of India’s desire to embarrass the Union, whose absence was noted. France, which proposed to delete the words ‘racial’ and ‘religious’ in the amendment, regretted SA had not been there to lend support. The SA delegation noted that its single vote would not have affected the outcome and that, had SA voted with France, it would have been in an embarrassing situation as ‘it would have been

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21 Notably the Children’s Act 31 of 1937, as amended

impossible to run out of the room between the votes'. Plenary adopted the Declaration on the Rights of the Child by 78 votes to none. SA was not present.<sup>22</sup>

## **6.4 Refugees and right of asylum**

### *6.4.1 Convention Relating to the Status of Refugees*

The UN's efforts to solve the post-war refugee problem culminated, on 28 July 1951, in the adoption of a Convention Relating to the Status of Refugees at a UN Conference of Plenipotentiaries, which SA did not attend. The SA Minister of the Interior, T.E. Dönges, decided against signing the convention, as refugees wishing to enter SA were considered 'on their individual merits according to the Immigration laws, in common with all alien immigrants. It is considered that it might compromise the Union Government were it to subscribe to the Convention at this stage' (my emphasis).<sup>23</sup> This ambiguous remark indicated that the SA government was not prepared to submit its legislation on any form of immigration to international scrutiny or, given its domestic policies, bind itself to admit and try to assimilate refugees as defined in the convention.<sup>24</sup> Most refugees would originate in African states and complicate a difficult domestic problem.

At the 6<sup>th</sup> GA, the UN High Commissioner for Refugees, who was appointed in terms of the convention, explained the critical situation his office faced and stated that there were three possible methods to solve the refugee problem – repatriation, resettlement and assimilation. SA felt that none was a solution; governments should be free to apply their own tests to prospective immigrants. The GA called on member states to support the High Commissioner, who had launched an appeal for funds. SA replied on 8 July 1952 that, while it was alive to the serious problems confronting refugees, its resources had already been taxed to the limit. It had incurred considerable expense to meet its UN obligations in Korea. 'Furthermore, in spite of the efforts which are being made to assist

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22 11/4/3/3 vol.1 3 November 1959. Thirty years would pass before the declaration's principles were enshrined in a UN convention. In SA, a new Children's Act 33 of 1960, described by the *YHR* as providing for the 'protection, supervision and welfare of certain children', was passed the following year.

23 PM 136/2 AJ 1952 7th sess.

24 In essence, Art. 1A(2) of the 1951 Convention Relating to the Status of Refugees defines a refugee as a person who, 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' is outside his country of nationality and is afraid to return to it.

thousands of needy children in the Union, much remains to be done in this field.’ The government’s first obligation was towards these children and it could make no contribution to aid given under the High Commissioner’s mandate. At the 7<sup>th</sup> GA, the SA delegation repeated that national expenditure on needy native children at home had a prior call on the exchequer.<sup>25</sup>

#### 6.4.2 *Declaration on the Right of Asylum*

At its 13<sup>th</sup> session in 1957, the CHR examined a French draft for a declaration on the right of asylum. It was an attempt to provide a formula for the application of the right to asylum contained in Article 14 of the UDHR. In 1960 the CHR adopted a draft consisting of a preamble and five articles, which it passed to ECOSOC for consideration by the GA. ECOSOC members welcomed the idea, with certain reservations. Although they understood that the rules and standards of conduct proposed were intended as guidelines, they differed on the emphasis to be placed on respect for national sovereignty and the provision of adequate protection for the asylum seeker. Article 3 of the draft, promoting the principle of *non-refoulement* (that an asylum-seeker not be returned against his/her will to the country he/she has fled), was a compromise. Some thought it provided inadequate protection for the individual, others that it did not specify that the decision to grant asylum be at the discretion of the receiving state. ‘While a refugee genuinely in fear of persecution should not be rejected or returned, it was nevertheless up to the State to decide if that was the case.’ It was suggested the draft Covenant on Civil and Political Rights should make provision for the grant of asylum. Proposals to that effect existed but some members felt the one did not exclude the other. The declaration would in any case precede the entry into force of the covenant.<sup>26</sup>

External Affairs passed the proposed text to the Departments of the Interior and Justice for comment. The former limited its reaction to Article 2, which provided that the international community should concern itself with the welfare of persons forced to leave

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25 GAOR 7th sess. 3rd Committee SR 332. That same year apartheid was inscribed on the GA agenda. Only in 1959 would the SA government reconsider its refusal to contribute to the High Commissioner’s expenses but it made no concessions on the admission of refugees.

26 A/4415 Report of the Economic and Social Council 1 August 1959 - 5 August 1960

their country because of persecution or well-founded fear thereof. Interior was unclear who should determine the validity of such fear and by what standards. Unless the authorities of the country of origin were acknowledged, anyone might assume the guise of a refugee to launch attacks against his government or use ‘the United Nations as a forum for propagating traitorous statements’. Concern that the draft might provide a loophole for SA or SWA dissidents, if they still needed one, was obvious from the reply.

The Department of Justice noted that SA had never subscribed to the UDHR, which was ‘not a Convention binding on States’. As the draft Declaration of the Right of Asylum purported to derive its authority from that document, SA should follow the course adopted in 1948 and abstain. No SA law related specifically to the right of asylum. ‘Any person entering the Union must comply with the existing immigration laws.’<sup>27</sup> The only purpose the declaration would serve was to extend the moral, rather than the legal, obligation to grant asylum to the entire international community. This too was unnecessary since Article 14 of the UDHR already provided that everyone had the ‘right to seek and to enjoy’ asylum.

In its directive for the 15<sup>th</sup> GA, External Affairs noted that the last paragraph of the preamble recommended that, ‘without prejudice to existing instruments’, states should base their practices on the principles of the declaration. It wondered how long it would take for ‘should’ to become ‘shall’ and for non-acquiescent states to be accused of violating the Charter and the UDHR.<sup>28</sup> The directive agreed that the text of Article 2 was contentious. It added that, as Article 14 of the UDHR exempted non-political crimes from the operation of asylum, the definition of persecution would depend on that of a political crime. When a national law imposed a restriction on activities harmful to the state and an individual or group deliberately contravened it, ‘it seems that this article will afford such a fugitive protection’.

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27 This was a standard response to avoid having to deal with refugees as defined in the 1951 Convention Relating to the Status of Refugees, to which SA was not a party.

28 136/2 AJ 1961 15th sess.

More obnoxious was the declaration's provision that the UN should consider 'in a spirit of international solidarity' appropriate measures to lighten the burden on the country granting asylum. It could imply calls on the UN budget even if the country of origin, which contributed to that budget, disagreed that fear of persecution was well founded.<sup>29</sup> Article 4 was another example of 'high-flown ideology': to call on refugees to abide by the purposes and principles of the UN Charter was so wide and undefined that it had little practical use. Article 5 confirming the right of refugees to return home was, as some members of the CHR had averred, totally out of context and a repetition of part of the preamble. As with all these ideological exercises it was difficult to vote against a declaration which dealt with a humanitarian issue. Unless the text was altered significantly SA should abstain. The delegation could consider what measures it might support, try to obtain greater clarity on some of them and draw attention to the budgetary implications of Article 2. These fears did not materialize at either the 15<sup>th</sup> or the 16<sup>th</sup> GA, whose agendas were too crowded to permit consideration of the draft declaration.

#### 6.4.2.1 Progress after 1961

Since most of the projects considered in this or the previous chapter, were not completed by the end of 1961, a survey of the progress of one of them to its term, based on the *UN Yearbooks* for the relevant GA sessions, may be instructive. At the 17<sup>th</sup> GA in 1962, the Third Committee limited consideration of the draft Declaration on the Right of Asylum to territorial asylum, postponing the problem of diplomatic asylum.<sup>30</sup> The new African presence at the UN made itself felt with an addition to the definition to include 'persons struggling against colonialism' as entitled to claim asylum. After a long delay, the Third Committee decided at the 20<sup>th</sup> GA in 1965 to refer the text to the Sixth (Legal) Committee, which also decided to confine its consideration to territorial asylum. A 20-member working group was asked to prepare a new draft, which it delivered too late for

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29 This concern was justified. The UN later took measures, not only for the education of expatriate members of the ANC and the PAC but also to pay the expenses of both movements to maintain offices in New York. Funds were provided from the regular budget, to which SA contributed until its suspension from participation in the GA in 1974.

30 Territorial asylum is granted to a refugee outside the frontiers of the state he/she has fled. Diplomatic asylum may be granted within the premises of the receiving state enjoying immunity inside the refugee's country of origin.

consideration at the 21<sup>st</sup> GA. That session was momentous enough for the adoption of the two human rights covenants, neither of which mentioned the right to asylum.

The working group's draft eliminated the substantive references in the initial text to the right to leave and to return to one's country, and to 'fear of persecution'. The receiving state could evaluate the grounds for granting or rejecting asylum; its decision would not be regarded as an unfriendly act by any other state. This text resolved much of SA's minor criticism but the retention of a reference to colonialism was insurmountable, as was the fact that, as External Affairs had foreseen, the verb 'should' in the substantive paragraphs now indeed read 'shall'. The replacement of the subjunctive by the imperative became a feature of such declarations adopted after 1960.

When the new text was debated the following year several states welcomed the compromise the working group had achieved. They thought it balanced the interests of the refugee, of the state of origin, of the receiving state and of the international community. The majority stressed that it was not intended to 'propound legal norms or to change existing rules of international law'.<sup>31</sup> Its aim was rather to lay down broad humanitarian and moral principles in terms of which states might seek to unify practice. Some thought it might lead to the adoption of an international convention. The Sixth Committee approved the final draft by acclamation and Plenary adopted it unanimously.<sup>32</sup>

## **6.5 Self-determination and independence**

### *6.5.1 Nature of self determination*

Having included self-determination as a right in both human rights covenants, the main issue in the Third Committee of the 7<sup>th</sup> GA was the nature of the concept and a draft resolution making it applicable to non-self-governing (NSG) territories. The SA delegation reported that the UK stressed the ambiguity of extending the right to 'peoples' as opposed to 'states'. Self-determination did not lend itself to easy definition as a right; it was a principle of universal application, applicable to groups rather than individuals. The anti-colonials replied that self-determination would benefit the inhabitants of such

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31 1967 UNYB 759

territories, which were not members of the UN.<sup>33</sup> The US, said the report, was in a difficult situation. Under Mrs. Roosevelt's leadership, it expressed strong support for the principle of self-determination as a universal concept, although it did not think the UN could lay down precise guidelines to cater for the wide variety of cultures in the world. Accordingly the US proposed an amendment to the draft resolution, which would provide for all members to recognize the 'right' to self-determination in all territories. Was self-determination, the US asked, of vital importance to the '200 million inhabitants of NSG and Trust Territories' and of none whatsoever 'to the more than 2000 million people living in other territories'? India spoke strongly in favour of the original text, as the outcome of the debate could influence events in Africa and Asia where some populations were still denied the exercise of the right. The procedures could be settled later.<sup>34</sup>

SA said that the Charter did not hold the Administering Powers accountable to the UN. The world body had no supervisory role over the territories for which these powers were responsible, or the authority to arrange plebiscites. The GA could not impose new obligations outside the ambit of the Charter by calling for 'details regarding the extent to which the right of peoples to self-determination is exercised by the peoples of those territories'. (SA's concern was, of course, the effect of the resolution on its administration of SWA). If the UN wished to amend the Charter it could do so in the appropriate manner, not by adopting majority resolutions.

The Third Committee approved a resolution upholding the principle that Administering Powers grant self-determination on demand to non-self-governing and trust territories under their control, 'after the popular will has been ascertained by a plebiscite under United Nations auspices'. In another it asked ECOSOC to continue preparing recommendations on the steps that UN organs could take to develop international respect

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32 GA Res. 2312(XXII) 14 December 1967

33 A/2165; PM 136/2/19/1 vol. 1 UN 7th sess. 3rd Committee Progress Report No. 6 28 November 1952

34 Pakistan put India's arguments into perspective. For five years the peace of Asia had been threatened by the Indo-Pakistan dispute over Kashmir. Pakistan said this was a classic example of the right of peoples to self-determination, which should be implemented 'through a free and impartial plebiscite held under the aegis of the United Nations'. Half a century later the dispute has still to be resolved.

for self-determination. SA supported the Administering Powers, steadfastly voting against.<sup>35</sup> In Plenary the US tried vainly to re-introduce its amendment in favour of universality. The UK alleged that the draft resolution confused self-government with political independence. Inhabitants of sovereign states also lived in ignorance and had no voice in the management of their affairs. Neither argument succeeded and both resolutions were adopted.

At its 10<sup>th</sup> session, the CHR recommended that the GA appoint two commissions, one to consider permanent sovereignty over natural resources and the other to examine any situation resulting from alleged denial or inadequate realization of the right of self-determination. Opponents thought the CHR recommendation was inconsistent with the limits on international action prescribed by the Charter. The US considered the problem too complex for summary solutions; self-determination was not limited to independence and form of government was less important than freedom to choose.<sup>36</sup> Some delegates suggested that rather than establish commissions on self-determination, the CHR should promote global observance of political and civil rights in general. The commissions risked conflict with Article 2(7), while the Charter contained no provision for any organ to implement the principle of self-determination. Other delegates argued that delaying tactics concerning a burning issue would exasperate hundreds of millions of human beings. At its 11<sup>th</sup> session the CHR reaffirmed its earlier recommendations.

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35 PM 136/1/19/1 3 December 1952. The US voted against the first resolution but for the second. The SA delegation remarked that the US said that 'although they were not impressed with the resolution and would have preferred to abstain, Mrs. Roosevelt was in favour of it and the U.S. would accordingly vote for it'. This casts an interesting light on her influence. Gen. D.D. Eisenhower had been elected President in November 1952 and the US delegation was acting during the bridging period between the two administrations. Yet, as a political appointee of an outgoing Democratic President, Mrs. Roosevelt could still direct her country's actions in the human rights field, if only for a few weeks longer.

36 The SA delegation reported that when Arabs spoke of self-determination they thought of Tunisia and Morocco within the pan-Islamic concept. Greece thought of Cyprus, India of more space for its citizens, South America of their liberation from Iberia and possibly of a convenient instrument to undermine the metropolitan economies in Africa and eliminate a formidable rival for raw materials. The Soviets saw an opportunity that the Afro-Asian colonies, freed from Western imperialism, would fall under their yoke.

ECOSOC passed the CHR recommendations to the 10<sup>th</sup> GA together with a US draft resolution for the appointment by the Secretary-General of an *ad hoc* commission to conduct a thorough study of the principle of self-determination. The study would include the concept of peoples and nations and the attributes of the principle of equal rights and self-determination affecting the rights and duties of states in international law. Too few meetings on self-determination were allocated at the 10<sup>th</sup> and 11<sup>th</sup> General Assemblies to achieve a result. The debates revealed two major streams: those who argued that the UN Charter referred to a 'principle' of self-determination and those who supported its inclusion in the draft covenants as a 'right'. Some delegates asserted that the 'right' should be applicable to minority groups in independent states (the way it was interpreted in SA), others that political freedom depended only on whether a country was under foreign domination of any kind, political or economic. They opposed the US suggestion for an interim study, as it would confuse the issue and raise obstacles to independence.

The UK, which also disliked the US proposal, advised SA that it had tried to persuade the US to redraft it. SA responded that it would maintain only token representation at the 12<sup>th</sup> GA. However, it viewed *ad hoc* commissions as another way to rationalize interference in the domestic affairs of member states. SA would prefer no action. 'So-called compromise resolutions which are intended to forestall more drastic action do not materially affect the end result inasmuch as they constitute a retreat on the question of principle.'<sup>37</sup> The proposal to set up commissions to examine situations resulting from the alleged denial or inadequate realization of self-determination, offered the Soviet-bloc and other anti-colonials a propaganda platform. Had it attended, SA would have abstained.

The SA delegation reported little apparent enthusiasm and little direction to the Third Committee debate at the 13<sup>th</sup> GA. Behind the scenes there were strong efforts to rally support for the CHR proposal that a commission be set up to survey the status of the right to permanent sovereignty over natural wealth and resources as a basic constituent of self-determination. The lack of preparation in the presentation of the proposal was evident, the proponents had not even agreed on the composition of the commission or its terms of

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37 136/2/25 vol. 1 Jooste to Liesching 25 November 1957

reference. They simply decided, over vehement Western protests, to let Plenary fill in the gaps. After the commission was established, the US agreed to serve on it. SA did not join the debate but strongly supported the argument that ‘the texts...were defective, incomplete and in places obsolete, and that they were in no state to be voted on’.<sup>38</sup>

#### *6.5.2 Soviet proposal for independence of colonial countries and peoples*

The lack of tangible results in the self-determination debates, the rapid growth in UN membership after 1955 and the influx of newly independent African members in 1960 opened the way for the anti-colonial states to propel the GA towards promoting the right of self-determination in countries still under foreign administration more forcefully. The Second Conference of Independent African States in Addis-Ababa in June 1960 had adopted a resolution calling for an end to colonialism in all its forms and manifestations. For the Soviet Union, Secretary Nikita Krushchev profited both from this resolution and the presence of new African members to launch an attack on colonialism during his address to the 15<sup>th</sup> GA in the same year. He supplemented his speech with a ‘freedom-inspired proposal’ for a draft declaration on granting independence to colonial countries and peoples. ‘The complete abolition of the colonial system of government will be a fine and genuinely humanitarian act’ on the path of progress, he said.

There followed a formal Soviet request for the inclusion of an item on the agenda entitled ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’. The supporting memorandum was composed of demands for immediate independence, the elimination of ‘all strongholds of colonialism in the form of possessions and leased areas’ and adherence to Charter provisions on sovereign rights and territorial integrity. The item was approved unanimously for discussion in Plenary.<sup>39</sup>

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38 136/2/26/1 vol. 3 Progress Report No. 10 12 December 1958. It is arguable that this was an example of democracy in action. Having lost the vote, the minority accepted the outcome and adapted to it. However, it is more probable that the US wished to avoid ceding control of the commission to the USSR and accepted nomination in order to try to influence its direction and protect the interests of donor nations.

39 GAOR 1st part 15th sess. 869th Plenary 74; A/4501 and A/4502

### 6.5.2.1 GA. Res. 1514(XV)

The Plenary debate opened with a Soviet Union criticism of the ruined empires where ‘the colonialists still succeeded in keeping tens of millions of people in slavery’, immediately rebutted by the UK, which argued that the theme should apply equally to countries under Soviet oppression. The latter replied that the subject was about the liquidation of colonial régimes not intervention in the ‘affairs of the peoples that exist and act in freedom within the framework of the Soviet Union and other Socialist countries’.<sup>40</sup>

On behalf of 26 Afro-Asians, Cambodia submitted a text they felt better answered the UN’s needs, ‘as a means of putting to an end an anachronism in the history of mankind, the domination of one country by another and the exploitation of one people by another’. The sponsors, whose numbers soon increased to 43, tried to keep discussions on an elevated plane. Most welcomed the USSR initiative, although not all approved the language employed in its draft proposal. Argentina considered political independence meaningless if the new states remained in economic thrall. Ghana reacted by quoting President Nkrumah’s dictum: ‘Seek ye first the political kingdom and all other things shall be added to it’. Saudi-Arabia argued for the right of peoples to overthrow alien domination ‘even by force of arms’.

Although references were made to SA, they were not prolonged, presumably because its items were considered elsewhere. The SA permanent representative intervened only once to exercise his right of reply. He regretted that the debate had concentrated on just one type of colonialism and not on ‘the subjugation of other people in other continents by conquest’. Was there ‘no concern for those who live in subjugation under the new type of colonialism or imperialism’? Much of the Afro-Asian draft was acceptable but SA could not support it in its entirety. Since the resolution was a single unit, the SA delegation would not vote on its constituent parts and would abstain on it as a whole.<sup>41</sup>

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40 GOAR 925th to 947th Plenary beginning 28 November 1960

41 GAOR 1st part 15th sess. 1960 945th Plenary 1247.

Plenary adopted the Afro-Asian draft without a negative vote on 14 December 1960 as GA Res. 1514 (XV), calling it the Declaration on the Granting of Independence to Colonial Countries and Peoples. Consisting of several preambles, and seven operative paragraphs, it affirmed the right of all peoples subject 'to alien subjugation, domination and exploitation' to speedy independence, and to an end to 'colonialism in all its manifestations'. A Soviet amendment in terms of which all colonial countries would become independent by the end of 1961 failed.

In terms of the declaration, self-government implied immediate accession to independence. On 15 December 1960, however, Plenary adopted GA Res. 1541 (XV) on a report of the Fourth Committee. This resolution contained a set of principles which defined when a non-self-governing territory had reached a full measure of autonomy. It recognized three types of self-government: emergence as a sovereign independent state, free association with an independent state or integration with one. Applying the principle of self-determination, the emergent entity was given a choice, of which sovereign independence was only one. The Secretary-General subsequently described the declaration as a comprehensive restatement of the principle of self-determination. It can be assumed that he had both resolutions in mind when he made this comment.<sup>42</sup>

#### 6.5.2.2 Implementation of declaration

The Soviet Union Foreign Minister requested the inclusion of an item in the agenda of the 16<sup>th</sup> GA to consider the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. The request was accompanied by two memorandums, the first of which referred to the 'violence practised against the indigenous inhabitants of South and South West Africa'. The second was more detailed and charged the colonial powers, including the USA, with maintaining their heavy yoke over 71 million people. It ascribed a monstrous mockery of the most elementary human rights to SA, 'that veritable private domain of slave owners, where the white lords and masters...build their entire prosperity on the exploitation of millions of black and coloured slaves'. SA had extended its régime of terror and racial discrimination to SWA,

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42 *Introduction to Annual Report 1961 2*

‘which has been converted into a colony deprived of all rights’. SA’s rude rejection of every UN appeal was placing it outside the UN community. Other Western powers were not spared equally acidulous charges.<sup>43</sup> The US countered that the Soviet colonial system was one of the cruellest and most repressive ever devised.

The item was again handled directly in Plenary. The substantive debate advanced the declaration by providing for its implementation to be monitored. The theme was heavily concentrated on the achievement of independence. Neither the Soviets nor the Afro-Asians, except for a thoughtful speech by Ceylon, referred to other options. Some delegations, notably the Administrative Powers and Ceylon, endeavoured unsuccessfully to revive the views contained in GA Res. 1541 (XV) on the definition of self-government. Their failure suggested the absorption of that definition into the fact of independence, the Soviet interventions making it clear that it envisaged no compromise on sovereignty or on the departure of the Administrative Powers. Several draft resolutions were submitted, resulting in a compromise that referred to the 1960 declaration, regretted where it had not been implemented and reaffirmed its objectives. A Committee of 17 was set up to examine the implementation of the declaration and make suggestions and recommendations on its progress.<sup>44</sup>

Most Western states avoided mentioning SA, although the US, which again represented a Democratic administration, that of President J.F. Kennedy, called apartheid a gross infraction of human rights. Quoting Thomas Jefferson’s dictum that governments derived their power from the consent of the governed, the US remarked that the consent of the vast majority of South Africans counted for little and that all UN members aimed to eradicate that injustice. The Afro-Asians kept the SA overtones alive. References were usually limited to the extension of its domestic policy to SWA, of which it was called the ‘colonizer’.

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43 A/4859 29 August 1961 and A/4889 27 September 1961

44 GA Res. 1654 (XVI) 27 November 1961. France, SA, Spain and the UK opposed. The Committee’s membership was soon expanded and it became known as the Committee of 24.

Saudi Arabia commented ominously that SA was a government for whites to rule blacks through discrimination and persecution. 'It is not African, for Africa can never be party to such a disgrace, whether based on religion or persecution.' Unseating it was the only realistic sanction. A government in exile that represented the people might help them to regain their independence and rejoin the UN. Mali complained that in SA a white minority deployed an extreme form of colonial fascism by pursuing apartheid in blatant disregard of civilized public opinion. If it were to ensure the implementation of the 1960 declaration in SA, the UN would have to consider recourse to 'means commensurate with the insolence and racist hatred of a Government which so scornfully flouts our Organization'.<sup>45</sup> SA made no response and abstained in the final vote on the resolution.

## 6.6 Conclusions

### 6.6.1 SA's low profile on human rights issues

SA's continuous low profile in human rights debates helped isolate it in the international community. Its delegation avoided commitment when such ostensibly non-contentious instruments as the Convention relating to the Status of Refugees and the Convention on the Political Status of Women were adopted in 1951 and 1952. That SA was unable to support them was evidence enough of the discrimination it was accused of following at home. Many countries acknowledged gender discrimination but, in SA, racial overtones exacerbated the problem. Distinctions that existed between men and women also existed between women, as shown by the SA government's unwillingness to attend the Addis-Ababa seminar on the role of women in public life.

The Fabian tactics applied at the 14<sup>th</sup> GA, during the debates on the adoption of the Declaration of the Rights of the Child, illustrate the dilemma.<sup>46</sup> The fact that SA spoke and voted suggested a tentative softening of the government's limitation on participation in human rights debates, in line with Louw's expressed intention of taking a more active part in the work of the UN.<sup>47</sup> But its standard policy still left SA between the Scylla of abstention and the Charybdis of absenteeism and did not include the more positive role of

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45 GAOR 1049th Plenary 595ff

46 11/4/3/3 vol. 1 tel. No. 50 SEA to Safdel 24 September 1959; see para. 6.3.3.

47 *House of Assembly Debates* Vol. 97 col. 351 15 July 1958

assisting in the drafting. No advantage was gained by being absent from the vote. The declaration was a resolution of humanitarian import, with only moral authority over those who had voted in favour. It was of dubious value at best for SA to claim that it was not bound by the decision, because a vote had been taken in its absence.

The SA law advisers' opinions on the proposed declaration on the rights and duties of states, in fact provided an early indication of a gulf developing between SA and the UN opposition to discrimination in all its forms. The first opinion was drafted during the United Party administration. The second followed the change of government. There is a clear evolution in their thinking over two years, suggesting that either the legal position or the 'interests of the Union' had changed in the meantime. Even so, the law advisers do not appear to have considered the draft a threat to national sovereignty. Unlike the Russian member of the ILC, they ignored the implications of Article 14, which imposed the duty on states to conduct international relations in accordance with the 'principle that the sovereignty of each State is subject to the supremacy of international law'.<sup>48</sup>

#### *6.6.2 Declaration on the Right of Asylum*

The negotiations to achieve a Declaration on the Right of Asylum lasted ten years, 18 if its inscription as a topic for codification is reckoned, i.e. a year longer than those for the human rights covenants. It took Article 14 of the UDHR no further, with the possible exception of a reference to colonialism and explicit recognition that granting asylum was a humanitarian, not an unfriendly act. The GA took no steps towards an international instrument or even the consideration of diplomatic asylum. As a Third Committee item, its origin was political. Only by a quirk of agenda planning did it reach the Sixth Committee and assume a legal tinge. Yet it had been on the agenda of the ILC since 1949. The exercise was in effect a waste of the UN's time and money, incurred at the instance of a single member (France), but because of its humanitarian nature, impossible to reject. Both committees seem to have recognized this tacitly, the Third by constant postponement and the Sixth by shifting the responsibility to a working group. The fact that the declaration overlapped with several international and regional instruments was

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<sup>48</sup> See para. 6.2.1.

ignored. It was an example of the political misuse by UN members of humanitarian issues, from which legal norms arise without the in-depth consideration they require.

### 6.6.3 *Self-determination and independence*

Rosalyn Higgins has noted that self-determination was often confused with independence and, in the case of minorities, secession. Article 1(2) of the Charter, she wrote, provided for self-determination while Article 55 set out the economic and social steps necessary to create the conditions for it to be applied. The coupling of the two articles, she argued, indicated that the drafters of the Charter had in mind states not individuals or groups.<sup>49</sup>

The UNCIO discussions already revealed a dichotomy of views on the ‘principle’ of self-determination. Its relationship to Article 2(7) was vague. The problems became more pronounced at the 5<sup>th</sup> GA, where most UN members treated it as a ‘right’ inherent in countries under foreign domination. The Administering Powers, on the other hand, claimed that the administration of the territories, for which they had assumed responsibility, was a matter of domestic jurisdiction. The SA government, of course, supported the Administering Powers. Its difficulty, however, was not so much accession to independence of countries under colonial rule, as the concern expressed by External Affairs that the phrase ‘all peoples’ in the draft human rights covenants would come to be applied to the Union’s non-white population groups.<sup>50</sup>

By 1952, over the objections of many Western states, the GA had included self-determination as a substantive right in both draft covenants. It became a key element of the campaign to end colonialism and, as in SA’s case, the domination of indigenous peoples by a foreign power. It was tacitly admitted to override Article 2(7).

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49 R. Higgins *Problems and Process* (Clarendon Press Oxford 1994) 111ff and 121ff

50 See para. 4.6

Van Wyk viewed the concept in another light, which did not limit itself to the question of independence. She suggested the UN might use the principle to justify interference in the domestic policy of member states by reference to the norm of protecting minority rights, especially the right of self-determination. While probably differing on the meaning of the term, she seems implicitly to have endorsed Chowdhury's view that 'the correlation between self-determination and human rights, like two sides of the same coin, reiterates the principle that the two rights are inseparably linked and universal in character'.<sup>51</sup> Van Wyk also pointed out that there was some dispute over whether self-determination was an established norm or *ius nascendum*. As for who had the right to it, the word 'peoples' was not defined in the Charter and writers tended to differ. It was arguable that the various peoples of SA did have the right to self-determination (and, by analogy, to secession). The SA policy of creating independent homelands in the 1970's supported this view. The policy was rejected in the UN and elsewhere but, with the end of colonialism and the break-up of the USSR, the right of oppressed minorities to secession remains unresolved.

There is no doubt that the concept of self-determination as interpreted by the SA government differed from the way in which it was construed by the rest of the African continent. The Union government tended to view it, in the light of SA's ethnic variety, as a group right, implying the possibility of secession. SA writers differed amongst themselves, mainly in terms of their support for the government or the liberation movements. Strydom has made the point that writers like Asmal and Suttner followed GA Res. 1514(XV) and justified the struggle in SA as aimed at liberating its indigenous majority from a quasi-colonial oppression. They were not concerned with minority rights. Others, like Heunis, he said, used it to justify the homelands policy or, like Booysen, to plead the case for a separate national existence for the Afrikaner people.<sup>52</sup>

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51 C.W. van Wyk *Die Misdaad van Apartheid in die Volkereg* (LLM dissertation UNISA 1979) 99-100. Chowdhury, of course, reflected the standard Indian interpretation of self-determination as a right to independence, extrapolating his argument from the anti-colonial majority decisions in the UN.

52 H.A. Strydom 'Self-determination: Its use and Abuse' 1991-2 (17) *SAYIL* 90-116 The complexities of defining the term are set out in some depth in the article.

The adoption of GA Res. 1514(XV) in 1960 was intended to enshrine the claim of all dependent territories to independence. The resolution did not aim to enable minorities in such territories to determine their own future, except insofar as they were guaranteed the right to maintain their own culture. Neither did it provide for them to secede; on the contrary it insisted on territorial integrity. Internationally speaking, therefore, the Bantu as a single national concept might claim the right to independence in terms of the resolution, in due course even to wage a war of liberation. Once achieved, however, that same right would not extend to the separate groups making up the country within its existing boundary.<sup>53</sup>

GA Res. 1514 (XV) added to the provisions of the Charter in that it called for an end to both the trusteeship system and to non-self-government. Once the Soviet proposal had been made, no delegation would have the temerity to oppose the principle. Only the formulation of an acceptable text was at issue. The Afro-Asian sponsors seem to have been unwilling to accept amendments or drafting changes from other delegations. The draft was not circulated to all UN members, certainly not the Administering Powers or SA, before being presented to Plenary.

The Union may have had reason to abstain on the vote, since the resolution was an example of amendment of the Charter by interpretation, a procedure to which SA took strong exception. However, by abstaining, it compromised itself on the issue of principle, if only in regard to SWA. A negative vote would have been a more accurate reflection of the SA position. To the extent that the resolution constituted an advance on Charter provisions, its adoption was an act in which the Administering Powers and, by its statement and its abstention, SA had tacitly acquiesced.

The resolution, in fact, went further than simple amendment by interpretation. By its mandatory insistence on the independence of non-self-governing territories, it made the

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53 On this basis the OAU would in September 1968 deny the right of Biafra to secede from Nigeria in terms of the provisions of the OAU Charter that existing colonial boundaries should be maintained.

Charter and the UDHR the basis of a new direction of international law. Adherence to the Charter, a document in whose formulation they had had no part, had been the initial price of admission of former colonies to the UN, making them part of the international community. With the adoption of GA Res. 1514(XV), they put their imprimatur on a section of great importance to them and on which they had not been in a position to comment when the Charter was drafted. Their voting power, allied to that of the other anti-colonial members, now enabled them to do so. It marked a significant change in the development of norms of international law.<sup>54</sup>

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54 Sir Humphrey Waldock 'General Course on Public Law' in *Recueil des Cours* II (ADI 1962) 106 30-33 has noted that the declaration seemed to place itself and the UDHR on the same plane as the Charter. Eschewing the usual GA reference to 'recommendation' it read: 'All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration' (my emphasis). Brownlie *Basic Documents in International Law* 4th ed. 306, states that the declaration, together with the Charter, supported the view that self-determination was now a legal principle. He, too, noted that the declaration was in the form of an authoritative interpretation of the Charter rather than a recommendation.

**CHAPTER 7**  
**STATE SOVEREIGNTY AT ISSUE**

**7.1 Introduction**

On assuming office in May 1948, the National Party administration emphasized that its policy towards the UN was based on the principle of domestic jurisdiction, in terms of which the GA was not empowered to discuss the internal affairs of a member state. Domestic jurisdiction trumped allegations of human rights violations. The new Prime Minister stated that SA would assert its claim to the protection of Article 2(7), despite the interference that had already occurred contrary to the assurances Smuts had given Parliament in the 1946 debate on the Charter.<sup>1</sup> Referring to a debate at the 2<sup>nd</sup> GA as to whether the UN should be ‘abolished completely, or modified and restricted’, Malan said ambiguously that SA would work in that direction and support all efforts to ‘restrain UNO from interfering in the domestic affairs of any nation’.<sup>2</sup>

This chapter examines SA’s adherence to that principle in respect of Soviet bloc countries, with which it did not maintain friendly relations, and the colonial powers, with which it did. It reviews the problems caused for the Union by a US proposal to expand the powers of the GA where the Security Council was hamstrung by the exercise of the veto and how that proposal was put into practice. The review concludes that the Union’s stand on domestic jurisdiction was not inflexible, and could be attenuated by political considerations.

**7.2 Soviet bloc**

*7.2.1 Exit visa from Soviet Union*

When accused during the 3<sup>rd</sup> GA of violating the human rights of the Russian daughter-in-law of the Chilean Ambassador to Moscow, by refusing her an exit visa, the Soviet Union replied that its decision was a matter of domestic jurisdiction. Article 2(7), it

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<sup>1</sup> Smuts had assured Parliament in 1946 that Art. 2(7) overrode the rest of the Charter. This was before he attended the 1st GA, where he admitted that fundamental human rights were a possible exception. The difference in emphasis in the 1948 debate was due to the fact that he was now speaking in Parliament as Leader of the Opposition not as Prime Minister. See paras. 1.5.1 and 2.1.2.

<sup>2</sup> *House of Assembly Debates* Vol. 64 1 September 1948 col. 1365

claimed, overrode the other Charter provisions, including Articles 1(3) and 55. Instead of explaining the reasons for the visa refusal, the Soviet Union simply alleged human rights violations in Western countries, including discrimination against women in the US, the UK and France and racial discrimination in Australia and SA.<sup>3</sup> The Soviet Union used the *tu quoque* argument against SA to support its contention that a state had the sovereign right to issue or refuse entry or exit visas. In September 1948, it said, the Union government had refused a passport to the Presidents of the Transvaal Indian Congress and the South African Indian Congress, who had applied to attend the 3<sup>rd</sup> GA in Paris in order to explain the situation of Indians in South Africa.<sup>4</sup>

As a logical consequence of its abstention when the item was included on the agenda of the 3<sup>rd</sup> GA, SA abstained on the resolution criticizing the Soviet Union's action, in concert with the Moslem delegations, Burma, China and India. However, it directly contradicted the instruction contained in the SA directive for the session that 'the Union should defend the right of any member, even a critic, to accept or reject a resolution for sound reasons'. The SA delegation explained to External Affairs: 'We had our special problem since the Chilean complaint...raised the question of domestic jurisdiction, on which we felt it would be unwise to compromise our position'.<sup>5</sup> The abstention was tactical but weakened the SA argument on the overriding nature of Article 2(7). The SA delegation should have supported the Soviet Union as a matter of principle.

### 7.2.2 *Violations of human rights in Bulgaria, Romania and Hungary*

Trials in Hungary of Cardinal Mindszenty and in Bulgaria of a group of Protestant churchmen on charges of treason were also raised at the 3<sup>rd</sup> GA. Neither country was a member of the UN, as they had not yet concluded peace treaties with the Allied Powers after the war. On their behalf, the Soviet Union asserted the protection of Article 2(7).<sup>6</sup>

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3 GAOR 2nd part 3rd sess. Plenary SR. 'The policy of racial discrimination and intolerance was,' said the Soviet Union, 'openly practised in Australia.' Admission to that country was reserved to persons who were proved to be 51% European in origin.

4 GAOR 2nd part 3rd sess. Plenary SR

5 PM 136/2 AJ 48/49; PM 136/2/11 vol. 2 PS 16/11/17(?) 31 January 1949

6 The Soviet bloc claimed on their behalf that the Cardinal had confessed *in camera*, while at least part of the Protestant churchmen's confessions had been obtained in public. The UK riposted that, as the public confession in Bulgaria was demonstrably false, doubts surrounded the others.

The majority of members in the Third Committee felt that the GA was competent to examine the question and invited both accused countries to attend the debates. They declined. By itself, their absence would not have inhibited discussion, but the states negotiating the peace treaties with them asked that, as the application of human rights provisions in the treaties was still under consideration, the complaint be held over until the next GA. SA expressed doubts about the advisability of UN intervention before the dispute settlement mechanism had been exhausted, adding that it was unsure of the UN's competence to intervene at all.

Uruguay rejected the Soviet invocation of Article 2(7) of the Charter. On entering into an international compact, Uruguay pointed out, a country gave up some of its domestic jurisdiction, apart from that already limited by the rules of customary law. When human rights were endangered, the UN was vitally affected. Even had the UDHR not been drafted, the principles it enshrined were valid and the Charter expressed the need to protect them. Similarly, the ICJ was enjoined by Article 38 of its statute to apply general principles of law applicable in civilized countries. In the international field, these principles restricted state jurisdiction.<sup>7</sup> When states undertook to apply certain standards and set up an organization to ensure their application, there could be no question of unlawful interference. Article 2(7) did not apply in such circumstances.<sup>8</sup>

At the 4<sup>th</sup> GA, the Soviet bloc still asserted state sovereignty and domestic jurisdiction on behalf of the Eastern European states, now including Romania, while the US and the UK explained the steps that had been taken to ensure these states would comply with the human rights and fundamental freedoms clauses of the peace treaties.<sup>9</sup> The US, Brazil and Canada proposed asking the ICJ for an advisory opinion to clarify the legal obligations.<sup>10</sup> These developments enabled SA to take a more definite stance in the

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7 The Uruguayan argument raised contentious issues whose impact would expand as the UDHR grew in stature as a point of legal reference. They were not views with which SA would associate itself but they needed to be taken into account, if the Union were to maintain a consistent voting pattern.

8 GAOR 2nd part 3rd sess. Plenary SR 24-26

9 Annex to *Ad Hoc* Political Committee Records of the 4th GA vol. 1 75-111; A/985/Rev.1 20 September 1949 and A/990/Rev.1 19 September 1949

10 A/AC.31/L.1/Rev.1 17 October 1949

debate. Arguments over domestic jurisdiction or reference to Articles 55 and 56 of the Charter, SA believed, confused the issue, as Article 2(7) was not involved. The US and the UK had made it clear that the complaint concerned treaty violations, of which the GA was entitled to take cognizance. SA believed the countries involved should abide by their international treaty obligations and would support the request to the ICJ for an advisory opinion.<sup>11</sup>

At the 5<sup>th</sup> GA, the *Ad hoc* Political Committee had before it the ICJ advisory opinion, which noted that all three countries had refused its jurisdiction and failed to appear before it. The peace treaties enjoined them to secure the enjoyment of basic human rights and fundamental freedoms to all persons under their jurisdiction. The respondents had not argued the case or denied their obligations. The ICJ found that they should participate in the dispute settling mechanism provided for in the treaties. The three did not react, effectively scuppering the appointment of treaty commissions to observe progress. Australia proposed a resolution expressing grave concern that the respondents, who were aware of having breached their human rights obligations, had failed to nominate representatives to the commissions or to refute the accusations. Some amendments to the resolution were approved.

SA attended the discussions, where its representative, J.R. Jordaan, continued to tread a careful path. He advised care in condemning the alleged violations. ‘The Assembly could do no more than reiterate, in moderate terms, its concern for the respect of human rights provided for in the treaties, leaving the door open to the accused parties to disprove the charges.’ There was a *prima facie* case that the three countries had violated their treaty obligations, which explained SA’s support for the request to the ICJ. They ‘might have been within their rights in rejecting the Court’s opinion if they had offered a strong defence’ (my emphasis). Their failure to do so or to accept the GA’s invitation to explain their position was evidence that they were in breach of their treaty commitments.<sup>12</sup>

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11 GAOR 4th sess. 1949 *Ad Hoc* Political Committee SR 40-41. As a party to the treaties, the Union was invited to submit a written statement on the questions submitted to the ICJ. It chose not to do so.

12 PM 136/2/14 vol. 2 5 October 1950. In 1947 Jordaan recommended amending the Charter to allow requests by member states for ICJ advisory opinions (see para. 2.2.1). His comments in the committee

SA continued that it had been ready to support the original Australian draft. It would vote in favour of the revised one with the exception of paragraph 2 and would abstain on the final sentence of paragraph 3. These were amongst the amendments and read:

*The General Assembly...*

2. Condemns the wilful refusal of the Governments of Bulgaria, Hungary and Romania to fulfil their obligations under the provisions of the Treaties of Peace to appoint representatives to the Treaty Commissions, which obligation has been confirmed by the International Court of Justice;
- 3[Deplores]...that they are callously indifferent to the sentiments of the world community.<sup>13</sup>

### **7.3 Non-self-governing territories**

#### *7.3.1 West New Guinea*

SA consistently voted for the Netherlands in its dispute with Indonesia over West New Guinea. The issue here was rather different from other colonial issues, for while the Netherlands was in the process of according independence to Indonesia after the Second World War, it decided to retain sovereignty over West New Guinea. When the issue was raised at the 3<sup>rd</sup> GA, the Netherlands did not claim domestic jurisdiction but argued successfully that the GA should not consider the dispute while bilateral negotiations with Indonesia were under way and the Security Council was seized of the question. SA, however, related its support for the Netherlands to Article 2(7).

The matter lay dormant until the 11<sup>th</sup> GA in 1956 when Indonesia again asserted its claim to West New Guinea. SA joined the Netherlands and Australia in opposing the inscription of the item on the GA agenda. Neither of the other two raised Article 2(7), and by that time the SA government had decided not to assert Article 2(7) if the states involved in an issue failed to invoke it. Thus External Affairs' directive required SA to vote against

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debate might have had a personal as well as an official resonance. He was avoiding the real issue, since the Soviet bloc's ostensible objections were lack of competence and domestic jurisdiction.

13 The only reason for SA to tread so carefully on these two paragraphs was the possibility that the GA could make similar accusations against the Union, not only in respect of its treatment of Indians but also of its execution of the SWA mandate, which had also been referred to the ICJ for an opinion in 1948.

inscription and not to participate in the committee debate. The delegation opposed this instruction, arguing that failure to reiterate the Union's view on domestic jurisdiction during the debate implied that SA would withhold support from two friendly countries, particularly from Australia, which was then a firm ally. Accordingly it sought and obtained a new directive. It was now authorized to vote against a draft resolution transferring the territory to Indonesia and to explain that in its opinion the item was covered by Article 2(7) of the Charter, as the 'Minister attaches great importance to this explanation'. The SA vote helped to prevent a two-thirds majority in favour of the Indonesian claim.

The rival claims of the Netherlands and Indonesia surfaced five years later at the 16<sup>th</sup> GA, during the debate on the implementation of the Declaration on the Granting of Independence to Colonial Peoples and Countries. Louw asked for instructions on the policy to adopt on the question, in the light of SA's new policy of reciprocating the attitudes taken on SA issues by third parties. The Netherlands had been negative during both SA items. Verwoerd advised Louw that he should not be influenced by the revenge motive, as this would reduce his prestige. He should be objective, '*met duidelike argumente in terme van ons beginsels*'. Promises had been given to the Netherlands in the past and should be kept.<sup>14</sup>

### 7.3.2 Cyprus

Apart from its own claims to domestic jurisdiction, the Union supported the claims made by the colonial powers, specifically UK and France, that the administration of their colonies was not subject to UN scrutiny. The debates took a new turn in 1956 with the admission of new members. On the eve of the 11<sup>th</sup> GA, the SA permanent representative reported that that the UN's prestige was improving. He added that many friendly delegations felt that 'the expedient of temporary withdrawal from the Assembly has passed the stage where it can bring either moral or tactical advantage'. Consequently, the

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14 GAOR 16th sess. Plenary 1047th–1066th meetings; MB 4/E vol. 2 letter from Jooste 31 October 1961. By then Australia had also parted ways with SA and voted against it over apartheid. See. para. 8.9.1

UK had decided to participate in the discussions over Cyprus and France was likely to do no more than boycott the debate on Algeria.<sup>15</sup>

Calls that Cyprus should be granted independence were discussed in London at a Commonwealth meeting in November 1956. The UK said that Greece had submitted a proposal calling for the application of the principle of self-determination to Cyprus. The UK believed the complaint was in conflict with Article 2(7) but had decided to submit a counter proposal of its own accusing Greece of interfering in the UK's internal affairs. The UK would abstain on the Greek proposal, which would probably be approved in any case. It feared that a vote against inscription might provoke opposition to its counter proposal. Moreover, since a conference had been held in London with Turkey and Greece, it was difficult to maintain that Cyprus was still a domestic matter. The UK hoped that both items would be included in the GA agenda without a vote.

There were differences of opinion among the 'old' Commonwealth members. Canada believed both items should be included 'with as little fuss as possible'. Australia felt it should oppose; it was unwilling to abandon the domestic jurisdiction principle, as that would jeopardize its support for the Netherlands on West New Guinea. Two years before, New Zealand would not have opposed the inclusion of any item, on the basis that Article 2(7) did not inhibit inscription. Since then the UK had persuaded it to oppose the inscription of Cyprus. A *volte-face*, New Zealand felt, would be embarrassing and it would be preferable to stick to the principle of domestic jurisdiction. SA agreed and added that it had doubts about the implications of the proposed UK strategy, as it might prove awkward in other contexts.<sup>16</sup> The 'new' Commonwealth members did not express their views.

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15 12/13 23 October 1956

16 The UK tactic outlined at the Commonwealth meeting could not have reassured SA, implying as it did that the tripartite discussions between the Union, India and Pakistan took the Indian issue out of the domestic sphere.

At the 11<sup>th</sup> GA, SA stated that the inscription of the Greek proposal violated Article 2(7) but did not press for a vote. To avoid compromising the principle, SA was absent when a resolution acceptable to the protagonists was approved unanimously.<sup>17</sup>

### 7.3.3 *Algeria*

Although France did not request a vote and asked SA not to speak, Louw also opposed the inclusion of the Algerian item on the 11<sup>th</sup> GA agenda, on the same grounds. He felt it would be inconsistent to remain silent but agreed not to press for a vote.<sup>18</sup> He returned home before the debate, which, the permanent representative reported, revealed a cleavage between East and West. The original French tactics had been to prevent a resolution obtaining the necessary two-thirds majority. During the debate in the Fourth Committee, however, France inclined to the view that a text receiving even a simple majority would be a triumph for the Algerians. It therefore arranged with its friends for a compromise text that simply noted the statements in debate and hoped that a peaceful and democratic solution could be found. By a procedural manoeuvre the French managed to have this text voted on after an Afro-Asian proposal had been rejected but before a second, more moderate one, was put to the vote. The committee adopted both the compromise text and the more moderate proposal by simple majority, submitting both to Plenary, where a two-thirds majority would be required.

These manoeuvres incensed the Arabs and the Asians, who used the period between the committee stage and Plenary to exert pressure on some delegations to alter their votes. To obviate this, France agreed to a second compromise, on which it would not vote. The new resolution read that the GA, having noted that the situation in Algeria was causing

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17 After the CHR's 11th session the previous year, the Turkish Embassy in London approached the SA High Commission to request the Union's support in opposing the establishment of a commission to examine any situation resulting from alleged denial of the right of self-determination (annex to P.S. 26/44/16/7, 24 June 1955). Turkey was opposed to the move because of the opportunity it offered for interference in matters of domestic jurisdiction and 'possible effects on the Cyprus issue'. It would welcome SA's support at the GA. Turkey was assured of the Union's cooperation. Although not stated explicitly, this approach was an example of the bargaining procedure of which Louw was so critical. Turkey would be expected to support SA on the domestic jurisdiction issue in return. However, SA was so deeply rooted in its stance that it had little room for manoeuvre.

18 14/15/3 vol. 13 Safdel to SEA tels. No. 69 15 November 1956 and. No. 70 16 November 1956

suffering and loss of life, hoped that ‘in a spirit of co-operation a peaceful, democratic and just solution’ would be found in conformity with the principles of the Charter.<sup>19</sup>

The SA delegation learnt of this development just as Plenary began to examine the Fourth Committee’s report, too late to obtain instructions from Pretoria. The permanent representative decided not to attend the session, construing absence as being compatible with his instructions to assist SA’s friends on Article 2(7) only when so requested. Louw rejected this explanation. He complained that the French delegation’s decision to abandon its strong stand on Article 2(7) ‘was not a sufficient reason why we should be a party to the French retreat, thereby prejudicing our own position on an issue which is of paramount importance to South Africa’ (my emphasis).<sup>20</sup> The permanent representative replied that a consistent absence after the inscription vote did not compromise the SA stance; the record simply showed that neither it nor Hungary was present.

Louw then instructed him to make the point in personal talks with the French that the voting and lobbying on the Algerian issue showed that there was ‘one rule for the great and influential, and another for the smaller nations’. However, Louw added, it would be necessary to reconsider policy in the light of the French concession and vote only when a delegation actually invoked Article 2(7). Thus, the directive issued to the SA delegation to the 12<sup>th</sup> GA noted that France had not opposed a discussion in the 11<sup>th</sup> GA, despite claiming that the UN lacked competence. It seemed that France would answer accusations and inform the 12<sup>th</sup> GA about Algeria, without taking part in the debate. ‘This is the same sophistry France used at the last session.’<sup>21</sup> For this reason the SA delegation should vote against the inscription of the Algerian issue on the agenda without a statement or explanation of vote.

Twenty-five Afro-Asian states requested the inclusion of an item on Algeria in the agenda for the 14<sup>th</sup> GA in 1959 on the grounds that there had been no improvement in the

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19 14/15/3, 19/2 4 July.1957 and annex

20 *Ibid.*

21 1/30/7/2 tel. no. 10 18 February 1957; 136/11/2 undated memo

position of the Algerians. France, which had adopted a new Constitution as the Fifth Republic under an executive Presidency, opposed but did not ask for a vote. The General Committee, on which Louw served in his capacity of Vice-President, recommended the item's inclusion without objection. This was an example of the revised policy whereby the Union would not oppose inscription unless the country concerned appealed to Article 2(7). It was a grudging and tacit recognition of the premise that inscription was not intervention. The French followed the same procedure as before and boycotted all the substantive debates as an infringement of domestic jurisdiction, barred by the Charter. They chose the General Debate to explain that President Charles de Gaulle had promised that, once peace was restored, France would offer Algerians a referendum in which they could choose between secession, identification with the metropole (France) or self-government in close association with it, and so determine their own destiny.

The permanent representative reported that Tunisia introduced the Fourth Committee debate and welcomed, as did the provisional Algerian government-in-exile, the offer of a referendum, preferably under neutral auspices. He said that states which supported France were inhibited by their inability to oppose Algeria's 'right' to self-determination. Only five invoked Article 2(7). Of these SA alone used no other argument. SA said that, as Algeria had been juridically an integral part of France since before the inception of the UN, its administration was a matter of domestic jurisdiction. SA would oppose the draft resolution. The other four all equivocated to some extent and, by referring to the de Gaulle plan, trespassed on the substance of the question.

The initial draft resolution called the situation a threat to international peace and security and noted with satisfaction that the 'two parties' concerned had accepted the right of self-determination as the basis for a solution. It urged them to enter into 'pourparlers' towards implementing that right and reaching a cease-fire. SA voted against each paragraph of the draft preamble, mostly with tiny minorities and once alone. The two operative paragraphs and the resolution as a whole were approved by 38 votes to 26 with 17 abstentions, not enough to obtain a two-thirds majority in Plenary. The Afro-Asians then let it be known that they were negotiating a more moderate text, which might

command the necessary majority. The new text omitted both the paragraph noting with satisfaction the acceptance of the right to self-determination and that referring to a threat to international peace and security. The operative paragraphs still recognized the right to self-determination but were a little less prescriptive on the nature of the ‘pourparlers’. Voting was by roll call on individual paragraphs, all of which were adopted by overwhelming majorities. SA voted against throughout, alone in opposing the recognition of the right of self-determination, although there were 21 abstentions. The draft as a whole failed to obtain a two-thirds majority.<sup>22</sup>

The SA permanent representative wrote that those who had followed the Algerian discussions at the 14<sup>th</sup> GA understood why SA had voted with tiny minorities and even alone. Members of the press, however, queried the Union’s opposition to innocuous paragraphs ‘in particular the one referring to the right of self-determination – a right which had now been recognized by the French themselves’. He wondered whether the logical explanation that any part of an unacceptable resolution was unacceptable itself really served its purpose. Could the same end not be achieved with less danger of being misunderstood? SA might say at the outset that it considered a resolution *ultra vires* and would oppose it without voting on the individual paragraphs. During roll call votes it could simply announce it was ‘not participating’. This would avoid having to vote against paragraphs the Union would in other circumstances find acceptable.<sup>23</sup>

External Affairs felt that the suggestion was open to objection. It did not enable SA to state its case forcefully enough. More important, non-participation might lead to the preservation of an undesirable paragraph, whose deletion could have emasculated the overall text. Friendly delegations, more ready to compromise, could misunderstand the procedure and apply pressure to vote on particular paragraphs. On balance though the

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22 11/97 15 January 1960; A/4339 9 December 1959 Report of the First Committee

23 30/6 minute 11/97 15 January 1960 to Secretary for External Affairs. This was the policy SA followed on articles of the draft covenants on human rights. Whatever tactics it adopted, the Union was being driven further into a corner on all issues involving human rights, of which self-determination and non-discrimination were now essential elements. See. para. 4.7.

permanent representative's suggestion offered more advantages than drawbacks, as it would avoid wilful misinterpretation of a consistent negative vote even on inoffensive paragraphs, while leaving the policy issue in no doubt. If adopted, the practice would have to be applied and followed consistently so that 'no deviation can be hoped for no matter how tactically advantageous to our friends'.<sup>24</sup> The proposal did not get the consideration it sought, although at senior official level the response was sympathetic. It was not submitted to Louw before he left for New York and policy remained unchanged.

#### **7.4 Uniting for peace**

At the 5<sup>th</sup> GA in 1950 concern was expressed that events in Korea had demonstrated that a consistent veto by one Permanent Member alone could hamstring the Security Council. It was only the absence of the Soviet Union that had enabled the UN finally to take enforcement action against North Korea under Chapter VII of the Charter. To prevent similar obstruction in the future, the US and six other powers sponsored a four-part resolution enabling the GA to recommend effective and collective measures for the prevention and removal of threats to the peace if the Security Council was unable to take the necessary action. Article 10 of the Charter, they said, endowed the GA with the power to consider and make recommendations on any matter within its competence.<sup>25</sup>

Chile introduced a text which added a fifth dimension of 'raising the productive capacity of under-developed countries and enforcing the observance of human rights everywhere' by international cooperation. Article 2(7) and the veto 'prevented such cooperation'. Democratic principles should be strengthened to make the UDHR a 'living reality'. The US held discussions with Chile, the upshot of which was the inclusion of a fifth part, Section E, giving effect to Chile's ideas.

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24 136/1/11 memo. 'Voting by the South African Delegation...' 20 February 1960. Although a change in tactics was not approved for the Algerian and other questions, the French strategy was having an effect on the SA approach to the apartheid question. For the first time since 1947, the SA government authorized its delegation to the 14th GA to follow the French example and explain some aspects of its racial policy during the General Debate without compromising on the principle of domestic jurisdiction. See. para. 8.9.

25 GAOR 5th sess. 1st Committee SR 67

SA expressed concern with the constitutionality of the proposal. The GA should not approve action which would ‘amount to the amendment of the Charter by means other than those prescribed in Article 109’. SA doubted the legality of a provision ‘enabling the Assembly to sanction the use of force’. When the Chilean text was submitted, SA commented that the main purpose of the proposed resolution was to deal with armed aggression or the imminence thereof. Section E was not an emergency problem and should not be allowed to detract from the main thrust. It went beyond Article 1(3) of the Charter and proclaimed that the maintenance of peace depended upon respect for human rights and fundamental freedoms. SA would abstain on that section. It voted for all the other parts of the resolution on the understanding that armed force would be used only in response to armed aggression between states when the Security Council was unable to act.<sup>26</sup> Section E passed by 58 votes with 2 abstentions.

In Plenary SA confirmed its abstention, albeit alone, on Section E and its support for the rest of the resolution, subject to the understandings already expressed in committee. The Iraqi/Syrian proposal calling on the antagonists in the Korean conflict to resolve their differences was, SA said, ‘wisely silent on the question of blame, for it is important that the appeal should not be a source of further differences and of offence to any one of the permanent members concerned’.<sup>27</sup> SA added that smaller nations needed to be satisfied that the new procedure would ‘not be utilized for ulterior purposes or turned against themselves as an instrument of interference in their domestic affairs’. The final draft was adopted on 3 November 1950 and became known as the ‘Uniting for Peace’ resolution.<sup>28</sup>

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26 *Idem* 108-109 and 155

27 GAOR 5th sess. Plenary 298-300. This was a covert reference to the resolutions on the Indian issue, which singled the Union out for criticism and, in effect, blame. It was an appropriate reiteration of SA’s view of the role of the UN.

28 GA Res. 377 (V) was adopted by 54 votes to 5 (Soviet bloc) with 2 abstentions (India and Argentina). SA’s lone abstention on Section E almost justified the statement in para. 92 of the first UNCORS Report that the vote had been unanimous. One must grant Sr. Hernán Santa Cruz, the author of both the report and Section E of the resolution, some parental licence.

#### 7.4.1 *Suez and Hungarian crises*

Vetoes by the Permanent Members prevented the Security Council from acting during the Suez Canal and Hungarian crises in 1956. Emergency sessions of the GA were convened in tandem just before the 11<sup>th</sup> GA in terms of the ‘Uniting for Peace’ resolution. Over the French/UK objection that that resolution was not applicable to the Suez incident, the GA agreed to discuss the Israeli-French-UK attack on the canal after the Egyptian government had nationalized the Suez Canal Company and declared martial law in the Canal Zone. Referring to the Union’s ties of friendship with all four countries concerned, SA abstained throughout the debate and attributed its consistent abstention to the lack of time afforded its government to consider the implications of the resolutions.<sup>29</sup>

Louw instructed the SA Ambassador in Paris to explain to the French Foreign Minister, before the 11<sup>th</sup> GA opened, that SA’s abstention did not indicate sympathy for the Egyptian regime. It was simply a reaffirmation of the policy of non-intervention in other countries’ affairs. No ship bearing the Union’s flag used the canal, since most of its trade went via the west coast of Africa. Its oil came from Abadan and Red Sea ports. Louw said he had advised the Egyptian representative in Pretoria of the strong stand the government took on the observance of international engagements like the 1888 Convention of Constantinople, which provided that Suez should be open to traffic in peace and war alike. Egypt had been interfering with Israeli shipping since 1949 when, after a long absence, it rejoined the board of the Suez Canal Company. However, since the UK had 80,000 troops in the zone and no Western power complained, it seemed the acts had been condoned. The SA law advisers had expressed the opinion that the Egyptian government could nationalize a joint stock company registered in Egypt. To condemn the action would constitute interference in Egypt’s domestic affairs, a practice that SA consistently eschewed. SA would follow that approach in respect of Algeria.<sup>30</sup>

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<sup>29</sup> This might have been valid when the matter first arose but was a little hollow later, when SA found itself isolated with Egypt, Israel and the Soviet bloc in abstaining on the vote to establish a UN Emergency Force for the Middle East.

<sup>30</sup> M.B. 12 19 October 1956; annex to minute 14/15/3 vol. 13 20 October 1956

Louw explained the action in Parliament. ‘We abstained because we have consistently taken up the attitude that, as a non-user of the Canal, we are not interested in the Suez issue’. SA, he said, would have opposed a GA resolution imposing sanctions on Israel because the GA would have been using the ‘Uniting for Peace’ resolution to assume the functions of the Security Council. ‘We were not satisfied that the Assembly, especially constituted as it is today, has the right to deal with a matter of this kind.’<sup>31</sup>

SA did not have the same inhibition in speaking or voting on the repression of an uprising in Hungary by Soviet troops and the forcible deposition of the Imre Nagy government.<sup>32</sup> The equally forceful installation of Janos Kadar as the head of government complicated the issue as the debate proceeded. The USSR invoked Article 2(7) and was followed by the Hungarian delegation. SA explained that it had voted for the right of the GA to consider the item because it was satisfied that the article did not apply. SA did not recognize the Kadar régime and could not accept an appeal from it as a bar to discussion at the GA.<sup>33</sup>

India on the other hand did invoke Article 2(7), on the basis that Hungary’s relations with neighbouring socialist states, including the Soviet Union, were based on ‘mutual respect of their sovereignty, territorial integrity, and friendship and cooperation and non-interference in the internal affairs of each other’. The GA should not act out of emotion or predilection. ‘Therefore, any approach that we make as though this is a colonial country, which is not represented at the United Nations, is not in accordance either with the law or the facts of the position.’<sup>34</sup>

When he arrived in New York for the regular session, Louw told Plenary that the crises in Hungary and Suez should serve to highlight the need not to undermine a basic principle

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31 House of Assembly Debates Vol. 95 10 June 1957 col. 7600

32 The former Hungarian Prime Minister, Imre Nagy, had appealed for the assistance of the Soviet Union to help subdue the uprising but later called for the withdrawal of Soviet troops. When his appeal failed he called on the UN to hold an emergency session of the GA. While this meeting was taking place, representatives of the Kadar Revolutionary Workers and Peoples Government arrived in New York and protested against the question being considered at all.

33 GAOR 2nd Emergency Special sess. 570th Plenary 54

34 *Idem* 571st Plenary 6

of the Charter, namely Article 2(7). On Hungary, Louw stated, India had said it could not subscribe to any proposals ‘which disregard the sovereignty of States represented here...the sovereign independence and equality of its members must be respected’. India had joined Ceylon, Indonesia and Burma in publishing a communiqué in the *New York Times* on 15 November 1956 to the effect that the four countries were ‘opposed to any such intervention and are determined to resist a resurgence of colonialism whatever form it might take’. Ceylon had said that members ‘must visualize the time when such interference may be possible even in the domain of their own affairs’.<sup>35</sup> Louw asked how these views could be equated with India and the GA’s actions regarding SA.

## 7.5 Conclusions

### 7.5.1 Soviet bloc

In 1948, the Union government had announced a rigid policy in respect of Article 2(7). Both Soviet bloc items at the 3<sup>rd</sup> GA set traps for the SA delegation. The excuse that an abstention over the issue of an exit visa to the Chilean Ambassador’s daughter-in-law avoided compromising SA over domestic jurisdiction was lame to say the least. Legally speaking there was no answer to the Soviet allegation that SA had refused passports to its subjects. If the Union claimed the sovereign right to issue or refuse passports, it could hardly refuse the same leeway to another UN member.<sup>36</sup> The fact that the delegation abstained suggests that the less rigid approach of the United Party administration towards domestic jurisdiction still influenced some of its members, several of whom had served under Smuts and Lawrence. Nevertheless, it is something of a surprise that the more strictly principled Louw allowed the delegation to take that route.

Avoiding participation in both the debate and the vote in Plenary at the 3<sup>rd</sup> GA on Bulgaria and Hungary posed yet another problem and the SA delegation equivocated in the Third Committee on the role of the UN.<sup>37</sup> Absence or even abstention would have

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35 GAOR 11th sess. 577th Plenary 15 November 1956 29-34

36 See para. 7.2.1.

37 See para. 7.2.2.

been a logical, if dubious, continuation of its tactics at the session; SA was unlikely to have voted alone with the Soviet bloc. The Union had fallen between two stools. The choice between human rights and domestic jurisdiction was clear. The general directive was to support claims 'even by its critics' to the latter, placing the SA delegation in a quandary when the states concerned were its major opponents. However, as the majority of states also equivocated by failing to decide on the substance of the offences, the SA compromise was less manifest. After the peace treaties were concluded the delegation could assert the primacy of treaty obligations over domestic jurisdiction.

The similarity of the Bulgarian, Hungarian and Romanian issues to the SA Indian problem, was striking. Much of the argument surrounded human rights, domestic jurisdiction, competence, treaty obligations and a dispute. Both SA and the Soviet bloc used the same arguments to justify the legal position they had adopted for themselves but denied them when their interests were not at stake. On both issues, the majority was consistent, although the majority was in each case differently composed. On a strict analysis SA had not done its stand on principle much good, for it had applied the same political equivocation towards the question of domestic jurisdiction as most other states.

#### *7.5.2 Non-self-governing territories*

The issues relating to non-self-governing territories indicate the problems of maintaining a rigid stance towards Article 2(7). SA continued to raise the article even when the parties it supported did not do so. Rather than providing the assistance it wished to give them, the SA delegation was obliged to flog a dead horse at the risk of introducing an extraneous factor into the discussion and provoking further opposition. In due course, constant repetition may simply have led to the SA intervention being ignored. Recognition of this fact might have prompted the government by 1956 to limit support during debates to 'friendly' countries that still invoked Article 2(7) when they were under attack. Even then the SA delegation found the directive too rigid and was forced to ask

for its amendment so as to enable it to play a positive role when the rival claims to West New Guinea were raised at the 11<sup>th</sup> GA.<sup>38</sup>

SA opposition to inscription of the Indonesian complaint on the 3<sup>rd</sup> GA agenda, based as it was on Article 2(7), may have been an even more practical expression of adherence to the principle of domestic jurisdiction than was the Indian issue. SA had acquiesced to the inscription of the Indian complaint; Louw had bowed to the GA President's ruling that the question of competence could be argued in Committee, i.e. after inscription and allocation to a committee. Yet SA was alone in arguing consistently that the GA's decision to examine the West New Guinea question violated the Netherlands' domestic jurisdiction, and so contravened Article 2(7). That Louw had to ask for instructions on the inscription of the item at the 16<sup>th</sup> GA suggests that even he was beginning to have doubts about the value of continuing his stand.<sup>39</sup>

Louw's persistence gained no new friends and, by opposing the inscription of the Greek complaint over Cyprus, alienated at least one old one. Those who, like the UK and Australia, had backed the SA stand in the early years of the UN had steadily fallen away. Whether Louw truly believed that member states were amending the Charter provisions by interpretation or not, he was faced with the fact that, with the admission of new members, the UN was beginning to rewrite the jurisprudence of international law.<sup>40</sup> The basis on which that law was developing might have owed more to political interests than strict legal principle and many states might contravene the very laws and norms they were creating with impunity. Nevertheless, new law was in the process of creation.

At the 7<sup>th</sup> GA, the US committed what SA considered a *volte-face* over Article 2(7), when it changed a vote against SA on the Indian item to one that favoured France over the claims to independence of Tunisia and Morocco. The Union felt that the US had been

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38 See para. 7.3.1.

39 Louw was already compromising over a refusal going back to 1948 to explain his Government's racial policies by employing the tactic his officials had suggested of invoking domestic jurisdiction but at the same time voluntarily entering into the substance of the question.

40 See para. 6.6.3

prompted by politics rather than legal principle, when it explained, rather lamely, that it had had time to reconsider the issue of domestic jurisdiction between the two votes. The success of the French tactics at the 11<sup>th</sup> and 14<sup>th</sup> General Assemblies on Algeria strengthened SA's belief that double standards favoured the major powers or at least states with strong regional support.

SA might have been correct about the US action but its belief was not entirely justified in complaining about the French success. France was showing signs of moving in a positive direction on Algerian self-determination. French policy in its own territories could not be interpreted as discrimination. SA failed to recognize this, at least at government level. It imputed the absence in the final text of the resolutions of any finger pointing at the colonial power to France's Great Power status. The fact was that France succeeded in reaching a compromise with its critics. It was a tactical success. Unlike the Union, France had made use of the opportunities the UN provided. Nevertheless, considering the violence in Algeria, SA could well think its resentment justified.

### *7.5.3 Abstention policy*

The permanent representative's call for the SA delegation to pursue different tactics on resolutions it disliked, rather than simply abstain, tended, as adumbrated, to scotch the snake not kill it, since his proposal did not go far enough.<sup>41</sup> Once SA had expressed its objection to a resolution, as others often did, its delegation should have been allowed to adopt a more positive or negative stance on the individual parts. The difficulty was that government policy and its unwillingness to be subjected to criticism severely limited the suggestions that the permanent representative could submit. Any statement by SA on individual articles would have to indicate the nature of its objection, for example to the self-determination principle or to any other which fellow delegations were not prepared to oppose. Rather than vote against, the government preferred to abstain.

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41 See para. 7.3.3.

In the circumstances, the permanent representative was left little other choice than that of 'not participating in the vote'. Unfortunately that option, too, would not have spared the SA delegation the embarrassment it suffered on human rights issues in general. SA had adopted a similar policy in regard to the draft human rights covenants and found that it became untenable for the delegation. So long as the government could not reconcile domestic policy with the theoretical, at least, importance of human rights at the UN, the delegation was hamstrung. The country was isolated. To continue along its chosen path could only exacerbate its problems. Yet the calls at the time of Africa's march to independence for the Union to change its domestic policies seemed to lead only to the abyss. Despite misgivings the government would pursue the path of obstinacy, of rejecting world opinion, however biased, and call it principle.

#### 7.5.4 *United action for peace*

The US proposed the 'Uniting for Peace' resolution GA Res. 377(V) during the cold war when it seemed to control the vote in the GA. The proposal was a Greek gift for SA. It was one thing to criticize the Soviet Union's abuse of the veto, another to lose the protection the veto provided should the Security Council ever become seized of and bogged down over a SA issue. A negative vote on the resolution would have aligned SA with the Soviet bloc, an abstention with India. Either would have alienated the Union from the US, whose brainchild the resolution was. Faced with Hobson's choice, SA weakened its stand on principle by voting for a resolution which had the effect, in its eyes, of amending the Charter and, worse, extending the powers of the GA *vis-à-vis* the Security Council.<sup>42</sup> The human rights provision of Section E was another two-edged sword. It was difficult enough to stand out as the sole abstention but a positive vote could have been used as effectively against SA in later debates, as were Smuts's statements at UNCIO and the 1<sup>st</sup> GA. Strictly speaking, if it were to remain true to its principles, the SA delegation should have opposed Section E and, in fact, the whole resolution but once again it was obliged by force of circumstance to compromise.

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42 See para. 7.4; GAOR 5th sess. 1st Committee SR and Plenary; A/C.1/575 and A/C.1/576.

The SA dilemma was exacerbated by the Suez and Hungarian crises. The explanation SA gave the French Foreign Minister before the 11<sup>th</sup> GA belied its claim that it had not had time to consider the implications of the Suez resolutions. The history of the use of the Suez Canal made SA's reference to Egypt's international obligations and the Convention of Constantinople rather far-fetched. The convention, signed by only eight European powers and Turkey, but not including Egypt, was for practical purposes 'a statement of principle rather than fact'.<sup>43</sup> In 1949, Egypt had refused to allow shipping bound for Israel to pass through the canal. In 1956, it decided to nationalize the canal, declare martial law in the Canal Zone and occupy the company's offices. The SA law advisers' opinion that Egypt was competent to take these steps had a Jesuitical element, aimed at rationalizing the political need to avoid alienating the only independent country in Africa with which SA had diplomatic relations. The government's concern was that those relations were precarious. In 1961, in fact, Egypt refused to accredit a new envoy from SA, when his predecessor was transferred to Canberra.

Had SA truly believed that to condemn Egypt's actions amounted to interference in that country's domestic affairs, its prevarication at the GA amounted to a retreat on the principle. The explanation Louw gave Parliament that SA did not use the Suez Canal and was therefore not interested in the issue was equally unconvincing. Closure of the canal was to SA's advantage; more shipping would round the Cape of Good Hope and use SA port facilities. His obiter that SA would have opposed a sanctions resolution against Israel because it would have been a misuse of the 'Uniting for Peace' resolution was weak on two counts. The Security Council was as clearly unable to act on Suez as over Korea. SA had supported the resolution albeit reluctantly when it was adopted in 1950. The only reason for opposing a similar resolution in 1956 would have been support for Israel. The argument was also strained because the GA had no power to impose sanctions or the use of military force on a member state, merely to recommend them.

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43 T.G.H. James *et al* 'Egypt, History of' *Encyclopaedia Britannica* (15th ed. 1975) Vol. 6 496

More telling was Louw's uncertainty that the GA 'especially as it is constituted today' had the right to decide the issue. The 'uncertainty' was doubtless due to concern that the GA might one day claim the right to recommend sanctions against SA. Louw was adopting a defensive position in advance. Without acknowledging him, the government was beginning to appreciate that Smuts's argument in favour of the veto might have an advantage as a safety net for at least one middle order nation.

Similarly, although it recognised states rather than governments, SA rightly took refuge in the excuse that it did not recognise the Kardar régime, which had been imposed on Hungary by external force.<sup>44</sup> Consequently it did not have to explain how it would have responded to the former Hungarian Prime Minister's request, on which the emergency GA had been convoked. As in Korea, SA took positive steps to support UN action in Hungary. It contributed in funds and in kind towards Hungarian relief, despite having indicated that it did not recognise the administration. In effect, it had joined a debate called on the basis of the 'Uniting for Peace' resolution, attenuating further its right to object should that resolution be invoked against the Union.

Taken all in all, SA's stand on the principle of domestic jurisdiction was predicated more by political expediency than by legal principle. It proved a weak reed if it was intended to uphold the static (or positivistic) interpretation of Article 2(7) for it did little to protect that ambiguously worded paragraph from the depredations of the teleologists. It was in fact counter-productive as far as SA itself was concerned and, in the end, the government was forced to find its own refuge in equivocation.

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44 The GA also equivocated on the issue. GA Res. 1133(XI) 14 September 1957 concluded that the new régime had been imposed on Hungary by USSR troops. The 12th GA neither accepted nor rejected the credentials of the Hungarian representatives and its delegation took part in that and subsequent GA sessions. This so-called Hungarian formula was applied to SA in 1965 when its delegation's credentials were challenged for the first time.

**CHAPTER 8**  
**APARTHEID ON THE AGENDA**

**8.1 Apartheid first inscribed on General Assembly agenda**

The UN Department of Public Information dated the organization's consideration of SA's racial policies from India's letter of 16 July 1948 to the Secretary-General requesting him to include the Indian question in the provisional agenda of the 3<sup>rd</sup> GA. That request stated: 'The present Government in the Union of South Africa stands committed to the policy of "apartheid", or racial segregation, and the domination of all non-White peoples by the Europeans'. The years from 1946 to 1952 constituted a period of consensus building at the UN, with increasing references to the general domestic policies of the Union government to buttress the Indian complaint.<sup>1</sup>

The SA permanent representative, G.P. Jooste, noted these developments in his report to the Prime Minister after leading the SA delegation to the 4<sup>th</sup> GA. The UN, he wrote, had adopted a strong line over human rights, to the extent of ignoring domestic jurisdiction. *'En aangesien die handhawing van menseregte geheel-en-al bepaal word deur die verhouding tussen die staat en sy burger, is die toeëiening van bevoegdheid in hierdie verband deur die Organisasie een van die mees onheilspellende ontwikkelings in die V.V.O.'*<sup>2</sup> The implications, Jooste said, were most ominous for SA, where a white minority held power. As the whites would not share power, they created a permanent inequality, which made them the target of venomous criticism and poisoned SA's foreign relations. The term 'apartheid' had acquired overtones internationally, which the Union's critics could misuse to great effect. SA government propaganda was totally ineffective.

In January 1952, Malan made a strong attack on the UN during the censure debate at the opening of Parliament. His remarks were based on a resolution he had received from the

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1 *The United Nations and Apartheid 1948-1994* (United Nations Blue Book series, Vol. 1) 1994 8-9. Significantly, the book gives minimal space to the arguments of the SA government or its representatives at the UN but reproduces statements and letters of its opponents *in extensu*.

2 P.M.136/2/13 vol. 1 20 March 1950

African National Congress (ANC), calling for absolute equality between the races and an end to the colour bar. The ANC had said it relied on friends abroad, i.e. the UN. Malan accused the UN of casting aside its ‘manifesto’ that prevented it from interfering in domestic affairs. It was concerned, he said, only with the well being of the non-whites.<sup>3</sup>

A month before the 7<sup>th</sup> GA, India, together with 12 Middle East and Asian states, asked the Secretary-General to include a supplementary item in the agenda: ‘The question of race conflict in South Africa resulting from the policies of *apartheid* of the Government of the Union of South Africa’. A supporting memorandum accused SA of introducing a policy ‘designed to establish and perpetuate every form of racial discrimination’ by maintaining white superiority over the non-white majority. ‘A new tension is thus being created which is no less serious than others affecting world peace.’<sup>4</sup> India paid tribute in the General Debate at the 7<sup>th</sup> GA to the ‘courage and sacrifice of men and women’ engaged in a campaign of passive resistance. It assured the resisters of global appreciation for their stand.<sup>5</sup>

Jooste accused India of exploiting events which might not have arisen, had it not been for India’s constant interference. This was a blatant contravention of GA Res. 380(V) in which the GA had solemnly reaffirmed that ‘whatever the weapons used, any aggression, whether committed openly, or by fomenting civil strife in the interest of a foreign Power, or otherwise, is the greatest of all crimes against peace and security throughout the world’. How could India reconcile its present actions with its support for that resolution?

### 8.1.1 SA asks for ruling on competence

SA submitted a motion under Rule 80 of the GA Rules of Procedure, which provided that a decision be taken on competence before a proposal was voted on, that the GA decide it was not competent to consider the matter. The Security Council alone had the authority to intervene in the sense India had given the word ‘intervention’ in 1948, viz. ‘dictatorial

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3 *House of Assembly Debates* Vol. 76 25 January 1952 cols. 225-227

4 A/2183 15 September 1952

5 GAOR 7th sess. Plenary 206-207

interference'.<sup>6</sup> In 1949, SA remarked, India had objected to the discussion of its invasion of Hyderabad by the Security Council, as there was no dispute likely to endanger international peace and security.<sup>7</sup> India had called it an issue of domestic jurisdiction and argued that to raise it in the Security Council, 'which was thousands of miles away from the actual scene of events...merely gave opportunity for statements which inflamed communal passions and disturbed India's internal tranquillity'. SA shared India's sentiments that UN debates inflamed domestic issues.

The suggestion India had made in its memorandum that the situation in SA constituted a threat to peace was, SA insisted, ridiculous. No neighbouring country could claim that its territory was under threat from the Union's domestic legislation. India's allegation that the Group Areas Act compelled non-whites 'to abandon their present land and premises and to move to new and usually inferior reserved areas without compensation' was unfounded. In any case it was not a threat to the peace. The UK, too, denied the GA's competence, saying that nothing was 'more clearly and obviously a matter of a country's domestic jurisdiction than the relationship which, as a matter of State, it has rightly or wrongly decided to maintain between persons of differing races living within its borders'.

India argued that past practice justified the inclusion, particularly the debates on the treatment of Indians in SA. For Chile, Mr. Hernán Santa Cruz submitted that Articles 10 and 14 rebutted the Article 2(7) argument. No text, he said, defined exactly which matters fell within national competence. A 'mere decision of the Committee which drafted these provisions can[not] impose upon the Organization an eternal obligation with regard to the interpretation of one of the most important provisions of the Charter'. The GA voted by 45 votes to six with eight abstentions to include the item.<sup>8</sup>

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6 *Idem* 53-60. The speech was largely a repetition of arguments used by SA delegations from Smuts on.

7 See para. 2.4.2 fn. 48.

8 The President's ruling that the SA motion was admissible, before the vote to include the item on the agenda was overridden by 41 votes to ten with eight abstentions. There was never any doubt it would be defeated, although such rulings are usually made after discreet advice from the Secretariat.

In the *Ad hoc* Political Committee, the Indian delegate dealt with the substance of the issue, pointing out that 13 countries representing some 600 million people had proposed the item. The major legislation to implement apartheid, like the Separate Representation of Voters Act<sup>9</sup>, which the SA Supreme Court had declared *ultra vires*, ‘relegated the African race to the ancient system of tribal rule for the express purpose of preventing their fusion into a modern nation’. The situation endangered the entire African continent.<sup>10</sup>

The SA delegation described the debate, which ranged mostly around competence, as fairly moderate. Exceptions included Pakistan, which called the situation ‘a stinking mess’ giving people a right to rebel, the Soviet bloc and Liberia. Ecuador and Uruguay waxed emotional over an Indian pamphlet, which quoted Prime Minister Malan as saying that in solving its problems SA should ‘avoid the example of the Latin-American states, who were nations of half-castes’. Most delegates seemed to believe quite genuinely that SA violated human rights and fundamental freedoms by intensifying discrimination. Some, said the delegation, asserted that when the Union signed the Charter it could not have doubted that the right of equality was a fundamental human right.<sup>11</sup>

Two resolutions were proposed. The first, sponsored by 18 members, affirmed that apartheid was necessarily based on doctrines of racial discrimination, which might disturb international peace. The reference to international peace was later withdrawn in order to ensure a larger majority. The resolution called for the establishment of a commission to examine the racial situation in SA in the light of Article 2(7) of the Charter and its human rights provisions. The Scandinavians proposed the second resolution. It affirmed that principles of equality were best suited to a multi-racial society and that policies perpetuating discrimination were ‘inconsistent with the pledges of Members under Article 56’. The first text, as amended, was adopted on an East-West divide, by 35 votes to two (Peru and SA) with 22 abstentions. Mexico and the Soviet bloc joined SA in opposing the Scandinavian draft, which passed by 20 votes to seven

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9 46 of 1950

10 A/AC.61/SR13 12 November 1953

11 PM 136/2/19 vol. 1 26 November 1952

with 32 abstentions. The SA delegation's second progress report noted that the debate provided 'ample evidence of an almost universal concern about events in SA'.

When the *Ad hoc* Political Committee's report was submitted to Plenary, SA unsuccessfully introduced a motion that the GA find itself 'unable to adopt the proposals'. It was careful to eschew a reference to discussion or consideration. SA was alone in opposing both resolutions when they were adopted on 5 December 1952, although 23 states abstained on the first and 34 on the second. SA said that by adopting the first text, the GA would create a precedent which would enable it to discuss member states' domestic affairs and 'to take specific action with regard to such affairs'. After the vote, SA announced that the Union government would continue to 'regard any resolution emanating from a discussion on or the consideration of the present item as ultra vires and therefore void'.<sup>12</sup>

#### *8.1.2 SA delegation suggests strategy change*

Jooste reported to External Affairs that it was doubtful that any state would in future be able successfully to invoke Article 2(7) against alleged violations of human rights or racial discrimination. He spelt the facts out in his report to the Prime Minister.<sup>13</sup> Many Asians considered that complete racial equality was a fundamental human right and encountered no resistance from the West. Racial discrimination, he warned, was not condemned as a phenomenon but a government, which acted to perpetuate it, was.

The GA, Jooste wrote, provided the most influential propaganda platform for any state seeking publicity. SA was almost alone in failing to use it. On the assumption that withdrawal from the UN was not an option, it was time to consider a new strategy. One possible choice was to take part in the discussions on the merits of the item. SA could defend government policies and set the record straight in the debates, without abandoning its stand on Article 2(7). This was a calculated risk that might be worth taking. The other option was to boycott debates on SA's domestic policy, except to reiterate the legal arguments. If the GA continued to interfere, SA would ignore its actions and absent itself

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12 GAOR 7th sess. Plenary 331ff

from the debates. Whatever the government decided, Jooste said, the SA delegation should play a more positive role in the GA, make its views known on all important international problems and claim its right to representation on UN organs and to such posts as President of the GA and chairman, vice-chairman or rapporteur of committees.

## 8.2 South Africa rejects UNCORS

With the adoption of Res. 616 A (VII) of 5 December 1952, the GA established a three-member commission to study the racial situation in SA (UNCORS). In May 1953, the permanent delegation received an informal approach from the UN Secretariat asking whether SA would admit UNCORS or allow a Union government representative to testify in Geneva.<sup>14</sup> UNCORS chairman, Mr. Hernán Santa Cruz of Chile, cabled the SA Minister of External Affairs requesting ‘complete co-operation’. As the government replied that it did not recognise the commission, UNCORS decided to examine published statements of SA politicians and relevant legislation, to receive memoranda and to take oral testimony from individuals and NGO’s, in addition to views it might receive from governments. No member state appointed a representative to be heard by UNCORS. Some, like Belgium, Australia and the UK, denied its competence, while Syria, India and Pakistan submitted memoranda.<sup>15</sup>

Malan advised Parliament that he would ignore UNCORS. If the attacks made on SA ‘were ignorance, we could combat it by giving them the information. But I have no doubt...that it is not ignorance alone; to a large extent it is also malice.’<sup>16</sup> He would discourage other bodies in SA from giving evidence to UNCORS. ‘If we encourage or

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13 PM 136/2/11 vol. 3 20 February 1953

14 PM 136/2 AJ 1952 8th sess. Racial Situation in South Africa. There was some delay in finding suitable companions for Mr. Hernán Santa Cruz of Chile to serve on UNCORS. Of the three original nominees two withdrew. Dr. Ralph Bunche felt that, as a member of the Secretariat, he should not participate. The SA permanent delegation ascribed the later nomination of Mr. Dantès Bellegarde (Haiti) partly to the need to replace one person of colour by another. The third member was M. Henri Laugier (France), a former UN Assistant Secretary-General; see paragraph 3.1 fn. 3.

15 A/2505 and Add. 1 *Report of the United Nations Commission on the Racial Situation in the Union of South Africa* paras. 42-45 and 51

16 *House of Assembly Debates* Vol. 85 11 August 1953 col. 1320. There was bipartisan support to reject UN intervention but the Opposition often called on the government to explain and defend its policy abroad.

permit it, it would amount to the very thing which the Government does not want to do, or has not the courage to do, will be done behind the Government's back by irresponsible people or people who are not connected in any way with the Government (sic).'

SA tactics at the GA were tentatively approved at a meeting between the Prime Minister, Dr. Dönges, D.D. Forsyth, the Secretary for External Affairs, and Jooste. The delegation would make the usual preliminary objections and continue to object in the *Ad hoc* Political Committee. Reference might be made 'to selected passages in the report as examples of interference in the Union's purely domestic affairs'.<sup>17</sup> The UNCORS report had not been circulated by the time the GA convened under the Presidency of Mrs. V.L. Pandit of India. SA objected that the specific matters listed in the memorandum India had submitted in 1952 were essentially within the jurisdiction of a sovereign state. Discussing them 'often constitutes what is perhaps one of the most insidious forms of intervention of which this Organization is capable'.<sup>18</sup>

### **8.3 First UNCORS report**

#### *8.3.1 Competence*

UNCORS submitted its report on 3 October 1953. It devoted 18 pages to justifying its competence and a similar number to general information on SA.<sup>19</sup> The claim to competence largely reflected Lauterpacht's views on domestic jurisdiction and human rights, the arguments India had deployed in its dispute with SA, and past UN practice. Most UN member states differed from the SA static approach, the report stated, while leading writers differed among themselves. Lauterpacht held that human rights were no longer a reserved question. They were the only 'breach' in Article 2(7) for which states had to relinquish a fraction of their sovereignty. Otherwise they would have had to exclude the human rights principle from the Charter. Some scholars, said UNCORS, approached the question differently. Preuss had written that the framers had intended to restrict the UN's powers of interference but had endowed the article with elasticity. It did not preclude 'discussion, study, investigation and recommendation'. Kelsen 'was in

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17 PM 136/2 AJ 1952 8th sess.

18 GAOR 8th sess. 435th Plenary 26-27. Cf. India and the Hyderabad question, para. 8.1.2.

19 First UNCORS Report Chapters II and V

almost entire agreement'. He argued that a state was not precluded from submitting to the UN a matter over which another claimed domestic jurisdiction.<sup>20</sup>

The report said the UN was justified in assuming competence in cases of systematic violation of human rights affecting millions of human beings. It was logical that the GA might judge whether a violation of fundamental human rights in a particular country fell within its domestic jurisdiction or not and, 'if necessary, address a recommendation to Member States inviting them to liquidate the position in question'.<sup>21</sup> The Charter had translated a principle of municipal law into international law and the GA had reaffirmed it with the UDHR. Sufficient case law had been built up to establish the UN's competence. Human rights could be violated within frontiers but their protection was essentially a question of international law, hence a UN function. By a large majority, the GA had implicitly confirmed a broad interpretation of Article 2(7) when it decided to examine the issue of apartheid from the point of view of the violation of human rights. This was perhaps the furthest UNCORS went in preparing the bed of Procrustes for SA.

### 8.3.2 *UNCORS analyses apartheid*

UNCORS noted that the word apartheid, which it defined as "separation, separate development" (of races)' was of recent origin and did not appear in the 1946 Afrikaans/English dictionary.<sup>22</sup> It based its analysis of the policy on a National Party pamphlet, prepared on 29 March 1948 for the general elections, and speeches by SA government members. Entitled *The National Party's Colour Policy*, the pamphlet contrasted equal rights, including the franchise, 'for all educated and civilised persons', with separation 'based on the Christian principles of justice and reasonableness'. The policy aimed to protect the purity of the Europeans as a white race and of the indigenous

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20 First UNCORS Report 19 paragraphs 152 and 153. Kelsen's view related to a dispute rather than an internal issue. The GA devoted chapter XIX of his book to dispute settlement under the Charter, not intervention. His view that the action of the 1st GA on the Indian issue went further than the Charter provided, found no place in the report.

21 *Idem* para. 162

22 Prof. D.B. Bosman and I.W. van der Merwe (eds) *Tweetalige Woordeboek* 3rd ed. (Tafelberg 1946). Later editions translated apartheid as 'apartness, separateness, distinctness', without specifying race. The *Woordeboek van die Afrikaanse Taal* of 1950 gave a detailed political description including comments by Dr. W. Eiselen that the vast majority of whites desired it and by Dr. H.F. Verwoerd that it meant that each man should have his proper place.

peoples as ‘separate communities, with prospects of developing into self-supporting communities within their own areas, and the stimulation of national pride, self-respect, and mutual respect among the various races of the country’. The alternative was national suicide. ‘The policy of the country must be so planned that it will eventually promote the ideal of complete separation (*algehele apartheid*) in a national way.’<sup>23</sup>

Amongst the members of the SA Cabinet quoted in the UNCORS report were the Minister of Lands, Mr. J.G. Strijdom, who told the House of Assembly on 31 January 1949 that, given the demographic situation, the European had to keep the right to vote in his own hands. On 12 April 1950, however, the Prime Minister told Parliament that total territorial apartheid was an ideal, ‘nowhere to be found in our official declarations of policy’. To return natives who had never lived outside the European areas to their tribal homes would entail a vast increase in the land allocated to them or lead to tremendous congestion.

The Minister of Native Affairs, Senator H.F. Verwoerd, emphasized to the Native Representative Council on 5 December 1950 that a little over one-third of the natives resided in the reserves, about the same in rural areas and on white farms, the rest, more or less detribalized, in urban areas. Overpopulation and overstocking in the reserves had driven many to seek a living in the European zones. As it was unlikely that all the natives could be attracted home, they would have to receive as much self-government as practicable in the locations. Thus the apartheid policy also examined suitable education for the Bantu, exclusively at the service of his own people.<sup>24</sup> In 50 years, Verwoerd predicted, industrial development would bring some 13 million natives, of a total of 19 million, into urban areas. ‘In South Africa with her problem of 19 million Natives in 50

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23 First UNCORS Report Chap 5 and Annex V

24 Five months later, the report said, Verwoerd told the Senate that a start should be made with the tribal unit, in order to develop self-government in each separate area. ‘White South Africa must remain their guardian...we cannot mean that we intend...to cut large slices out of South Africa and turn them into independent States.’ The map showed that any attempt to divide the Union into neighbouring states was ‘a completely impossible and impracticable interpretation of self-government in their own areas’.

years time, wherever they may live, as against the 6 million Whites, the fate of European civilization remains in danger.<sup>25</sup>

The UNCORS report noted that SA was an original signatory of the Charter. Differential treatment and unequal status there went back further than the founding of the Union. Member states could not expect it to change overnight but they did have the right to expect it to fulfil in good faith the obligations it had assumed on membership. The most important duty was to avoid any action to aggravate or increase discrimination. However, discrimination was increasing in SA, in contravention of Articles 56, 55c and 1(3) of the Charter.

Conditions in SA not in harmony with the UDHR, said UNCORS, included voting limitations, control over movement, residence, property, professions, family rights, social security, and the provisions relating to idle and disorderly natives.<sup>26</sup> *In fine*, UNCORS found that all apartheid measures enacted since the adoption of the Charter directly contravened Article 1 (all people are born free and equal in dignity and rights), Article 2 (no distinction of any kind) and Article 7 (equal protection of the law without discrimination) of the UDHR. The constant aggravation of the problem would preclude any non-violent solution and prepare the ground for agitation and subversion. The UN might, in a spirit of brotherhood, ‘express the hope’ that SA reconsider the policy and ‘suggest’ how it could help, e.g. by arranging a conference between the various groups.

### 8.3.3 SA reacts

Rather than repeat the tactics that had failed at the 7<sup>th</sup> GA, the SA delegation proposed a new resolution, containing fewer loopholes, for External Affairs’ consideration.<sup>27</sup> It read:

The Ad Hoc Political Committee -

1. Noting that the matters to which the item entitled: “The question of Race Conflict resulting from the policies of Apartheid of the Government of the Union of South

<sup>25</sup> What this amounted to was a protectionist policy for the authors and their children, leaving succeeding generations to reap the whirlwind. Although it was a lucid projection of the future demographic situation, the government’s immigration policy remained restrictive.

<sup>26</sup> Native Laws Amendment Act 54 of 1952

<sup>27</sup> PM 14/15/3 vol. 4 tels. 119 and 120 22 October 1953

Africa' relate...are matters which are essentially within the domestic jurisdiction of a member of the United Nations.<sup>28</sup>

2. Having regard to the provisions of Article 2, paragraph 7, of the Charter.
3. Noting that nothing contained in Chapter IX of the Charter can be construed as giving authority to the United Nations to intervene in the domestic affairs of member States.
4. Noting that the said matters do not constitute a threat to international peace and security.

*Decides -*

5. the Ad hoc Political Committee has no competence to intervene in the matters to which the said item relates.

The third and fourth paragraphs, the delegation thought, might pin some members down; others could consider them objectionable. It might be better to delete them. As many delegations were concerned at the growing tendency towards intervention but unlikely to express this view in their votes, it might be preferable just to stick closely to Article 2(7). External Affairs felt that the third paragraph could offer an opportunity to introduce Articles 55 and 56 into the discussion and that the need for the fourth would depend on the debate. Their deletion would shorten the resolution and concentrate on the essential issue. Paragraph 1 might theoretically make it more difficult for those who opposed it to claim the protection of Article 2(7) in future but that was unlikely to affect the vote.<sup>29</sup> The Prime Minister approved the draft subject to the deletion of paragraphs 3 and 4.

The Minister of the Interior, Dr. T.E. Dönges, said that the UNCORS report touched on almost every sphere of activity in the Union. 'If this is not intervention then the word is meaningless'. UNCORS was inconsistent; it criticized the lack of housing in the cities and the efforts to control the influx from rural areas. The SA delegation should avoid a detailed analysis of the report, as that might touch on the merits of apartheid. It could, however, state that 'a substantial part of the information available to the Commission emanated from parties who, in the light of their past records, must be considered biased'. UNCORS had accepted their evidence without any question, e.g. paragraph 739.<sup>30</sup>

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<sup>28</sup> Referred to in A/2183 these were land tenure, conditions of employment by public services, regulation of transport, suppression of Communism, combat service in the armed forces, the franchise, population movement, and the regulation of labour, education and housing.

<sup>29</sup> PM 14/15/3 vol. 4 note BGF to Mr. Jones 23 October 1953

<sup>30</sup> PM 136/2 AJ 1952 9th sess. tel. 110 13 November 1953. Para. 739 concerned evidence on the housing situation given by the Rev. Michael Scott, on behalf of an NGO, the International Rights of Man, and a private witness, Mr. T. Wardle, 'who are well acquainted with Cape Town and Durban'. UNCORS said

### 8.3.4 GA considers report

The UNCORS chairman/rapporteur introduced his report in the *Ad hoc* Political Committee, after SA had said that its presence did not constitute recognition. He called for a peaceful resolution of a unique and complex problem, based on understanding, co-operation, conciliation and persuasion. SA needed technical assistance in a variety of fields, from education to the development of social sciences.<sup>31</sup>

In submitting its draft resolution under rule 120 of the GA rules of procedure, SA asserted that the topics listed in the report covered matters of domestic administration. The report was an *ex parte* argument starting from a preconceived premise, giving special prominence to the Indian statements and to authors who favoured the view that the GA was competent to act. Chapter VII alone, SA said, contained 64 factual errors. It criticized the Liquor Act,<sup>32</sup> which was based on the League of Nations mandates system for the protection of backward natives. Natives who had reached a civilized, adult responsibility could easily acquire exemption. There was a clear anti-European bias in the report, notably against the Afrikaners and the police. UNCORS had exceeded its terms of reference, adding several *obiter dicta* that attacked the Union's national sovereignty and suggested that the UN was the arbiter of SA's destiny. To say that the situation was leading to a deadlock which could only result in force, was 'completely unwarranted, extremely dangerous, and irresponsible', little short of an incitement to revolt with the implicit support of the UN.<sup>33</sup>

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their evidence confirmed the data in its possession and was beyond dispute. Non-Europeans camped rather than lived 'in the worst conditions of promiscuity, filth and destitution'.

31 White Paper *Proceedings at 8th General Assembly 1953*. UNCORS forgot apparently that provision of such assistance required the acquiescence of the recipient country. The Union would not then accept the label of developing country, even had it agreed that the offer did not constitute intervention.

32 30 of 1928

33 The white SA press welcomed the delegation's criticism of the report, which the *Rand Daily Mail* of 25 November 1953 said was based on the assumption that the 'forces of reaction are permanently in command'. SA was a democratic country and would sort its problems out; the UN should not interfere. *Die Transvaler* of the same date concluded that the only escape route left to the *Ad hoc* Political Committee was to approve the SA draft resolution. '*Die reaksie op hierdie voorstel sal die toets wees van die waarde wat aan die opregtheid, die vrede en die vermoë van die V.V.O. geheg moet word.*' In the *Indian Opinion* 4 December 1953, however, the ANC and South African Indian Congress (SAIC) commended UNCORS on the 'the fruit of intensive study and objective evaluation of the facts...a major contribution towards the achievement of racial harmony and the establishment of true democracy in South Africa'.

The SA delegation reported that when submitting its draft resolution, it had explained that if the *Ad hoc* Political Committee believed that it could intervene in the issues mentioned in paragraph 1 with respect to SA, 'it must believe also that the United Nations has competence and can similarly intervene in these matters in other countries'. This statement had raised concerns among several delegations, notably the South Americans who felt that a negative vote on that paragraph might create a dangerous precedent. Some delegations opposed the submission of the draft resolution, amongst them Canada and Scandinavia, who argued that the question was not properly put. The committee chairman, however, upheld its validity and was not overruled. Several delegates claimed that their vote on the proposal did not reflect their view on whether the matters in paragraph 1 were essentially within the jurisdiction of a member state.<sup>34</sup> The SA draft was rejected by 42 votes to seven with seven abstentions.

During the committee discussions, Mr. Santa-Cruz refuted the SA allegations, which he said comprised quotations out of context and a partial reading of the text. Errors were mostly the result of the Union government's refusal to admit UNCORS into SA. The report laid special emphasis on India because it had submitted the most complete and detailed presentation. The counter arguments were well known and needed no repetition (my emphasis).<sup>35</sup>

A text, introduced by India on behalf of 17 delegations, was then approved. Noting a suggestion that SA should be asked reconsider its policy, the preamble agreed with UNCORS that apartheid would never be accepted and that it could endanger friendly relations among states. The operative part of the resolution requested UNCORS to continue its study and to suggest measures to alleviate the problem and promote a peaceful settlement. It invited the Union's co-operation.<sup>36</sup> SA objected that there was now no limitation on what the commission might report and that it would have authority to 'suggest measures to bring about a change in the internal situation of South Africa'.

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34 These disclaimers are an indication that the apartheid issue was already *sui generis*.

35 This was another example of UN partiality. The arguments for and against were equally well known but more space was given to SA's critics. Cf. para. 8.1 fn. 1.

36 A/2611 7 December 1953

### 8.3.5 *SA delegation analyses debate*

D.B. Sole reported to the permanent representative. Despite the prominence given to the apartheid debate in the SA press, he said, it was not considered a major issue at the GA. At the same time, it would be wrong to ignore that even SA's friends at the UN opposed racial discrimination and the concept of permanent supremacy of white over non white. Most delegates thought apartheid a legal breach of the Charter; all felt it morally repugnant.<sup>37</sup> The SA delegation had had the difficult task of showing that the UNCORS report was biased and ensuring that the jurisdiction argument pre-empted that of substance. It succeeded only partially in the former aim but, with the help of other delegations, brought the question of competence into relief. No delegate, not even Santa Cruz, endorsed or defended the concluding recommendations.

SA's critics, Sole wrote, affirmed that apartheid was a human rights issue which, they claimed, constituted a threat to peace. For both reasons, it was outside the ambit of Article 2(7). The GA was in any case master of its own competence. SA's legal defence might have rebutted the first claim but, as it could not deal with the substance, forfeited the moral ground on which the UN decided human rights issues. The second assertion, that it was a threat to peace, carried no weight. The third was more complex, however. It was difficult to argue against the right of the GA to interpret the Charter, particularly since SA did not agree that the ICJ should settle the interpretation of particular clauses. (This may have been overstated but the SA government had long before lost faith in the objectivity of the ICJ.)

In his report to the Prime Minister, the permanent representative endorsed Sole's view and added that few believed the policy promoted non-white interests. It was a hopeless task in that environment for SA to oppose emotion with nothing other than cold legal argument. Even the few states that supported SA and claimed that they did so on legal principle, insisted that their votes were in no way intended to justify discrimination.<sup>38</sup>

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<sup>37</sup> PM 14/15/3 vol. 5 annex to unnumbered minute to SEA 15 January 1954

#### **8.4 Malan explains apartheid**

On 12 February 1954, the year in which he retired, Malan received an ‘almost unique’ request from a Rev. John Piersma, on behalf of a group of Christian reformed ministers in the USA, to explain apartheid. His reply, a rare occasion on which the policy was expounded to an overseas audience, was included in External Affairs directive for the 9<sup>th</sup> GA.<sup>39</sup> Apartheid, Malan explained, was a traditional policy. Colour difference was only one element of the contrast between two irreconcilable ways of life, in the face of overwhelming numerical odds. There was ‘no parallel for the South African racial record of non-extermination, non-miscegenation, non-assimilation, but instead preaching and practising Christianity with the retention of racial identity and mutual respect’.

Education was a major problem. Nearly 800,000 Bantu children received free education, a larger percentage than elsewhere in Africa. Of the £14 million spent on non-white education, whites bore most of the cost; each ‘carrie[d]’ more than four non-whites. Coloureds, who could follow any trade they wished, were also a drain on the exchequer. Industrial legislation made no distinction on the grounds of race, while the law forbade wage discrimination. Non-whites had full access to all health services.

Allegations that the Bantu were denied political rights were untrue. Advisory boards in black urban areas, elected by the residents, provided an adequate mouthpiece; tribal authorities were being established in rural areas, while various councils offered the Bantu ample opportunity for self-government, self-expression and increased development. The Bantu elected whites to represent them in Parliament. Industrial development had brought the Bantu ‘to a level far beyond that reached by him (sic) in any other country on the sub-continent’. The task ahead included the agricultural and industrial development of the reserves, extending the powers and functions of local government, and over time replacing white officials, professional men and traders by Bantu. An experiment of many years was in its initial stages; it would be unwise to try to draw up a blueprint for the next 50 years.

The South African Institute of Race Relations (SAIRR) took issue with Malan.<sup>40</sup> Scientific studies, it averred, showed that skin colour was not a sign of permanent cultural difference. Urban Africans absorbed Western culture without wishing to be assimilated racially. Malan had stated that apartheid did not begrudge the non-white the attainment of his highest aims; his claim was belied, the SAIRR countered, by restrictions on their freedom of movement and the right to seek work. Industrial legislation on the mines, trade unions and conciliation machinery also distinguished on grounds of colour.

The 800,000 pupils at school represented only 41% of natives of school-going age while future limitations on the government's contribution to their education would place the burden of expansion on them. It would entail expenditure 'far beyond what the African can bear at his present rates of pay.' Given the size of the African labour force it could be said that every white was dependent on, rather than 'carried', four non-whites. Other misleading statements included the positions available to coloureds and full access of non-whites to all health services. It was estimated that only 5% of medical practitioners cared for 70% of the overwhelmingly non-white population in the lower income group.

The Natives Representatives in Parliament also criticized the letter. If the Prime Minister really believed that a heathen remained a heathen, the Dutch Reformed and other churches had been wasting their time for two centuries. Was the proposition that 'apartheid furthers basic human rights' a misprint? Was there 'no industrial colour bar worth speaking of'? All this showed that apartheid was an oppressive policy. Similarly, the Native Representatives said, the statement concerning free education and the burden borne by the white taxpayer contradicted the government's recent decision that the native population had to bear the responsibility for financing the extension of its educational services. Black education had existed for more than a century; it had created a whole class of highly educated and cultured people, who were known and respected abroad.

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39 PM 136/2 AJ 1952 9th sess. Annexure III

40 Open letter 21 April 1954 quoted in the 3rd UNCORS Report A/2953 Annex 2.

The Prime Minister replied: 'When you give education to a Native, that does not mean that he is civilized.'<sup>41</sup>

### **8.5 Second UNCORS report**

UNCORS again wrote to the Minister of External Affairs to seek his cooperation, this time on 25 February 1954. It promised to consider 'with all the care the search for truth deserves' any correction the SA government sent it.<sup>42</sup> The Prime Minister indicated that he had no objection to working with UNCORS, provided he could be assured of its impartiality. Dönges however considered the request as one for co-operation in 'resiling from the stand which the Union has consistently taken, namely, freedom from interference in our domestic affairs'. The reply of unconstitutionality was returned.<sup>43</sup>

For its report, UNCORS received unsolicited memorandums from the ANC/SAIC and the SA Liberal Party. It asked member states for information on similar situations in their own countries. It recorded papers by South Africans, including the SAIRR, the South African Bureau for Racial Affairs and other authors, on possible solutions.<sup>44</sup> A chapter on economic development in SA since 1910 was prepared by the UN Secretariat and used unchanged. The SA Minister of Labour was reported as saying he wished the trade unions to disappear. The overwhelming majority of Parliament and the country, he said, would not permit 'the strike weapon to be placed in the hands of the natives'. (It would have interested the readers to learn who he considered made up the country).

Chapter VII of the report recorded the experience of other countries in three categories: integration, complete separation and separation within a federal organization. The success of all the examples cited was due to 'recognition that the different ethnic groups

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41 *House of Assembly Debates* Vol. 83 3 May 1954 cols. 4462-3, 4475-6 and 4480-83. Both letters and the debates were sent to the SA delegation for discreet circulation to friendly delegations.

42 GOAR 9th sess. Supplement No. 16 (A/2719) *Second Report of the United Nations Commission on the Racial Situation in South Africa*

43 PM 14/15/3 SEA to Dr. Dönges 21 April 1954; PM 136/2AJ 1952 9th sess.

44 New legislation quoted covered movement, residence and property rights, work, use of public services, education and public health, criminal law and differential treatment. The articles of the UDHR, with which they were not in conformity or harmony, included Arts. 1, 2, 3, 10,13, 17, 20, 23, 26 and 29, rather more than the three to which Dr. Malan had taken exception in 1951.

are of equal human dignity'.<sup>45</sup> SA was sociologically and historically unique. The greatest obstacle was its government's obstinacy. The SA Minister of Native Affairs had admitted economic interpenetration, but denied that increased employment of natives was integration; otherwise 'asses, oxen and tractors used by the farmers are also integrated into the country'. 'Such words', the report said, 'which reduce human labour to the level of beasts of burden are utterly revolting.' Whatever language was used, a responsible government spokesman had admitted that the policy was not slowing ethnic group interpenetration in the economic field.

#### 8.5.1 SA directive for 9<sup>th</sup> GA

The SA delegation to the 9<sup>th</sup> GA was told to safeguard the Union's legal position at all stages. The draft directive submitted to Prime Minister Malan contained a suggestion for a slightly new tack. Instead of opposing discussion, SA should test only the *Ad hoc* Political Committee's competence to adopt a resolution on the merits of the case. The right to discuss could be tested in the Plenary, where SA would maintain its view of Article 2(7). Previous strategy had combined both competencies and enabled states that believed in the UN's right to discuss apartheid but were uncertain about adopting a resolution on the merits, to rationalize their vote. Although he doubted its efficacy, Malan agreed to try the experiment, provided there was no concession on intervention.

External Affairs provided the SA delegation with a memorandum prepared by a leading British authority, Gerald Fitzmaurice,<sup>46</sup> who described domestic jurisdiction as a relative concept dependent on the existing state of international law and relations. The crux of

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45 The report quoted the conclusion of Brazilian sociologist, Prof. G. Freyre, that integration in Latin America was compatible with the 'preservation of the essential values of European culture'. Haiti had achieved 'total integration within a common culture and a common social and judicial order'. Complete separation had taken place in India and Palestine. Their problem was the inability of the conflicting religions, or 'intense nationalisms', to cohabit in the same territory. The Soviet Union exemplified the federal solution, where racial problems had been settled by prompt and continuous action by the authorities.

46 136/2 AJ 1952 9th sess. Annexure II Memorandum G. Fitzmaurice 'The Legal Position respecting the Domestic Jurisdiction Issue in the United Nations Assembly'. There is no indication of the date on which the memorandum was drafted, the circumstances or how it was obtained. It may have been prepared for the UK but seems to relate specifically to the apartheid debate. Its interest lies in the reputation of the author,

the problem, he wrote, was whether a definite, precise and legal international obligation was involved. Where a state was not subject to such an obligation, the matter remained essentially within its jurisdiction. Of more practical importance was whether discussion constituted intervention. If discussion were not precluded, it was immaterial whether a matter was one of domestic jurisdiction. Fitzmaurice submitted that Lauterpacht's dictatorial intervention definition was wrong with regard to Article 2(7). It 'leads to an absurdity because the one case which it admits as constituting intervention is equally the one case in which intervention is expressly permitted'. Discussions amounted to an evasion of Article 2(7), since they could effect the same result as a recommendation and influence opinion within the state discussed. Their aim was to exert pressure on the government concerned and influence its internal policy.<sup>47</sup>

According to Fitzmaurice, 'intervention means intervention in the particular affairs of a particular State or States in relation to a particular and current issue'. Only this definition reconciled the contradictions. The GA could discuss as abstract topics all the issues contained in Article 55 of the Charter and make general recommendations. It was quite different when it criticized the domestic activities of a particular state in relation to a specific issue and 'when a resolution is adopted calling upon that State to conduct itself in a certain way in relation to that issue, or to alter its domestic policy in some respect'.<sup>48</sup>

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who later served on the ICJ, and its value to the SA delegation to have an independent legal authority to support its argument. There is however no record that SA quoted the memorandum explicitly in debate.

47 Both SA and India, the latter over Hyderabad, expressed the same view. SA was more consistent but India adopted whatever line suited it, depending on how its interests were affected.

48 For Kelsen's view of the 1st GA resolution anent the Indian issue, see para. 2.1.3 fn. 22.

### 8.5.2 SA attacks report

The second UNCORS report was published well after the start of the 9<sup>th</sup> GA, on 18 November 1954. External Affairs cabled the delegation that it should not discuss the substance but could again quote examples to show interference.<sup>49</sup> UNCORS had not only dealt with the economic and financial situation in SA but had recommended a policy for the future and indirectly entered party politics. Using biased evidence, it presented a lopsided picture. The telegram said, for example, that UNCORS had submitted contradictory information on the Natives Resettlement Act,<sup>50</sup> which was designed to reduce overcrowding in urban areas, improve municipal services and enable the residents to acquire houses. Natives could not own land in European areas, any more than whites could in native areas. External Affairs described Chapter IV of the report, which described a year in SA under apartheid, as purveying only critical comment. UNCORS, it said, preferred allegations to facts and held up other countries, astonishingly enough the Soviet Union, as examples of how SA might solve its racial problems. The report asserted incorrectly that the human rights provisions of the Charter had become ‘the general principles of law recognized by civilized nations’.

When the 9<sup>th</sup> GA opened, the SA delegation repeated its objection to including apartheid in the agenda, arguing that repetition did not legalize an unconstitutional act. In the *Ad hoc* Political Committee it stated that UNCORS had acted on several unfounded assumptions, among them that Article 2(7) did not apply to human rights issues or that the UDHR created legal norms. Worse still, UNCORS quoted sources opposed to the Union government, ‘with evident approval’. With superficial knowledge of the SA situation, which it described as ‘sociologically and historically unique’, it offered to solve the Union’s problems. How far could the UN go and say ‘this is not interference’?<sup>51</sup>

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49 PM 136/2 AJ1952 10th sess. tel. no. 74 24 November 1954

50 19 of 1954

51 GAOR 9th sess. 476th Plenary 38-40; PM 14/15/3 vol.7 Statement 3 December 1954. The delegation reported that its strictures had led the UNCORS chairman to complain that his honour and dignity had been impugned. He had ‘used his wounded feelings to secure the sympathy of his fellow Latin-Americans in voting for a continuance of his sufferings’. This was not heroic but ‘it was smart’.

The *Ad hoc* Political Committee adopted a resolution commending UNCORS for its work, extending its life for another year and calling on SA to reconsider its position and to take into account the ‘valuable experience of other multi-racial societies’.<sup>52</sup> The SA delegation reported that Santa Cruz had explained privately that his team relied on the objectivity of the Secretariat, without verifying the information it submitted. He was told to expect no official help in this respect, since SA held UNCORS to be unconstitutional. He promised to try to produce an objective report; ‘his own feeling was that the Commission should not itself draw any conclusions or make recommendations’.<sup>53</sup>

### **8.6 Third UNCORS report**

On 10 February 1955 the chairman of UNCORS again asked the SA Minister of External Affairs, now E.H. Louw, to supplement the one-sided documentation on which it was accused of basing its reports. SA returned the usual reply. India submitted a joint ANC/SAIC paper on the tribulations of the non-white peoples of SA. It began: ‘There are so many wrongs and injustices done to the non-white people in the Union of South Africa by the Whites that the danger of the position ever being overstated or exaggerated is remote.’<sup>54</sup>

The third UNCORS report analyzed ten new SA Acts in the context of the Charter and the UDHR and provided a ‘methodical and descriptive account’ of significant events, including Malan’s retirement.<sup>55</sup> The sources consulted were mainly parliamentary debates, official publications, and daily and weekly press in both official languages. The report noted ‘the great freedom of expression enjoyed and employed by the non-European Press’.<sup>56</sup> It recorded the activities of the ANC and reproduced the Freedom Charter adopted at Kliptown on 26 June 1955 by the Congress of the People. It also

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52 PM 136/2 AJ 1954 10th sess.; A/2857 11 December 1954 Report of the *Ad hoc* Political Committee. Plenary approved the Committee text as GA Res. 820 (IX) on 14 December 1954.

53 PM 14/15/3 vol. 7 Aide Mémoire 21 December 1954. The SA permanent representative offered further insights. Had it not been for the personal interest of its chairman in a post that offered him an income, social standing and a role in international affairs, he reported, it was unlikely that the UNCORS mandate would have been renewed. It needed not only Santa Cruz’s efforts but those of the Indian and Chilean delegations to secure a narrow margin in Plenary, where a two-thirds majority was required, by persuading several delegates who had avoided the committee debate to vote there.

54 A/AC.70/5 26 August 1955

55 A/2953 GAOR 10th sess. Supplement No. 14

printed the Prime Minister's letter to Rev. John Piersma and the SAIRR reaction, a year after SA had discussed these two documents with friendly delegations.<sup>57</sup>

UNCORS chose not to offer fresh conclusions or suggestions, as the earlier ones were as sound as ever. Despite the volume of legislation passed during the year, UNCORS felt that the Union government's aim of fully implementing the apartheid policy seemed as far away as ever. 'The [new] legislation covers only a tiny fraction of reality and affects the daily life of the people as a whole only incompletely and after a great time lag.' In urban areas the races were almost inextricably intermingled. The operation of apartheid both in law and in practice, was still characterized by gradualism and flexibility. It would take many years, by which time 'the succession of generations, White and Black, will have changed the course of events'.

SA, the report concluded, was a 'colony without a mother country', very different from most colonial countries. Unlike English settlers, who identified with a homeland or the British Commonwealth, the Afrikaners were isolated; 'they feel no solidarity with a distant mother country and they are confronted with a growing majority of Negroes and Coloureds'. They could escape this isolation by seeking 'the solidarity which the United Nations endeavours to create among its members'. SA could not remain deaf to the 'generous and disinterested offers of assistance tendered by all mankind in its earnest desire to promote' the principles of the Charter and the UDHR.<sup>58</sup>

### 8.6.1 10<sup>th</sup> GA

The SA permanent representative was instructed to oppose the inclusion of apartheid in the 10<sup>th</sup> GA agenda, to register an immediate protest in the *Ad hoc* Political Committee and to take no part in the debate, beyond voting.<sup>59</sup> If the report was approved or the life of UNCORS extended, he should announce that he had been recalled from the session.

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56 *Idem* 21 fn. 51 and 35 fn. 131

57 See para. 8.4.

58 A/2953 GAOR 10th sess. Supplement No. 14 92-99. It is hard to feel that UNCORS really expected the SA government to believe that such sentiments were more than pious and hypocritical self-justification, or that they would have the slightest impact on official thinking.

59 136/2 AJ 1954 10th sess.

The permanent representative described the picture in New York as very confused. Unanimity seemed to be lacking even among the Afro-Asians. The Indian delegation had, he said, adopted a moderate stance in committee. One of its members had told both the Brazilian and SA delegates that India wished to resume direct negotiations and reach a solution. The continuation of UNCORS was under threat but nothing else was clear.<sup>60</sup>

The committee adopted a draft resolution that made no concessions but asked UNCORS to keep the matter under review. The SA permanent representative then stated that the Union government regarded the enquiry into its domestic legislation in the most serious light. The resolution was a flagrant transgression of Article 2(7), as interpreted at San Francisco. The SA delegation, he announced, had been recalled from the remainder of the GA session. Afraid the press would not report the action with the necessary emphasis, Louw issued a communiqué. SA's withdrawal, it said, was complete, 'even from the precincts of the United Nations buildings'.<sup>61</sup> The Union government was not prepared to await the uncertain outcome of the Plenary debate.

While the delegation would have preferred to await that outcome, Louw was not willing to accept the idea of a return, even if the call to extend the life of UNCORS failed to obtain a two-thirds majority. It would only be a technical victory as a majority of the GA would still be in favour. The UK delegation in fact advised London on 12 November 1955 that SA officials had said they would not have acted as they did had there been enough votes in committee, where only a simple majority was required, to defeat the resolution in Plenary. They knew that even 'their few constant supporters did not in fact agree with them on any of the South African issues'. UNCORS had outlived its usefulness but the UK would have to take the initiative, as the South Africans seemed too

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<sup>60</sup> 14/15/3 vol. 9 tel. 64 Safdel to SEA 31 October 1955. The SA delegation alerted the government to an Indian memorandum to UNCORS which contained highly personal condemnations of SA politicians. It was issued on the same day as the main report as a mimeograph but not included as an annex. The Indian delegation privately affected ignorance of its existence. The SA delegation had probably failed to register it at the time and was trying to rectify its omission, for it is unlikely that the Indian remarks would have been allowed to pass without comment had they been seen earlier.

<sup>61</sup> *Idem* vol. 10 undated note: 'The Minister of External Affairs has just issued the following statement'.

proud to act themselves.<sup>62</sup> (A marginal note reads ‘Quite right! EHL’). In the end the GA merely called on SA to recall the faith it had affirmed when signing the Charter and to observe its Article 56 obligations. The UNCORS mandate was not prolonged, which enabled Louw to say that the GA had left the door ajar for SA to return.

### **8.7 General Assembly debates apartheid in South Africa’s absence**

Although SA attended part of the 11<sup>th</sup> GA, it boycotted the apartheid item, following the debate in the *Ad hoc* Political Committee from the public gallery. India quoted SA politicians to demonstrate the ‘almost pathological fear of “non-white” domination and of white extinction’. It felt duty bound to detail the recent apartheid measures, in the absence of an UNCORS report.<sup>63</sup> Ethiopia referred to Malan’s comment in 1953 that SA could not tolerate the creation of independent native states on its border as one ‘which did not tend to facilitate relations’ with the other sovereign countries of Africa.<sup>64</sup> The Philippines submitted a draft resolution, which avoided reference to precedents, expressed belief in a conciliatory approach and asked the Secretary-General to seek ways of persuading SA to return to the GA. The text differed from an earlier draft, which embodied the standard condemnation. The Philippines succumbed to pressure, however, and joined in sponsoring a combined draft, which was adopted.<sup>65</sup> Nevertheless, in Plenary they repeated that apartheid was a matter of national and racial survival for SA. The resolution was ‘whistling in the wind’ if SA were not there.

India’s tone, the SA permanent delegation felt, was restrained. ‘Prejudices based on tradition’ (a reference to the lingering of the caste system), India said, died slowly. It would not object to obtaining an opinion from the ICJ on whether apartheid violated the Charter. Ethiopia claimed that SA wished to export apartheid to the North, an aim that

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62 The text of the UK delegation’s cable is on 14/15/3 vol. 10.

63 11/93 26 January 1957 annex

64 J.G. Strijdom, Malan’s successor, put the position differently. SA would have to come to terms with changes in Africa. The continent was large enough to embrace countries under both black and white control in friendship. ‘With a view to economic and other matters...there will have to be contact between us as Governments...there will have to be ordinary relations and even diplomatic relations’ (*House of Assembly Debates* Vol. 94 2 May 1957 cols. 5209-5210).

65 A/SPC/L.5 16 January 1957. As the debate on the Philippines proposal adjourned, the Indian representative walked out holding the Philippine delegate by the arm. The SA permanent representative

inhibited good relations. The committee's draft resolution deplored SA's failure to revise its policies in co-operation with the UN and renewed the appeal to the Union government do so in the light of world opinion.<sup>66</sup> It was adopted by 59 votes to five with ten abstentions and eight absentees, including SA. Louw described the overall tone as more sober-minded but refused to be drawn on relations between SA and the UN.

According to the deputy permanent representative, the debates at the 12<sup>th</sup> GA, where SA maintained only token representation, lacked enthusiasm and were attended mainly by junior delegates. To demonstrate the lack of progress, Spain repeated the speech it had made the previous year.

### **8.8 South Africa loses ground**

Apartheid was inscribed on the agenda of the 13<sup>th</sup> GA at the request of 11 states, the West being represented by Greece and Ireland, on the grounds that the situation remained 'unameliorated' and posed a grave threat to peaceful relations between ethnic groups of the world. Although SA was represented at the session, it took no part in the debate. While the new African voice of Ghana made itself heard stridently enough to earn a rebuke from Nicaragua for its criticism of some older members, the debate was regarded as one of the more moderate in recent years. India, which struck the ominous note, taken up by some others, that conditions in SA were analogous to colonialism, proved amenable to a more moderate resolution than before. This concession enabled the US and Canada to switch votes and the Netherlands to suggest that a text that failed to single SA out, would have let it move from an abstention to an affirmative vote.

The US said it would have opposed a text that condemned SA, but could support one that expressed regret that the Union government had not responded to GA appeals. Canada argued that the GA could not compel SA to change its policies. It hoped that the resolution would prove an incentive to co-operation and enable SA to contribute

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commented: 'This almost literal demonstration of the traditional Assembly technique of "arm-twisting" did not go unnoticed' (11/93 26 January 1957; Progress Report 25 January 1957 14).

66 A/SPC/L.18

substantially to resolving other matters of common concern. The Netherlands said that it could vote for a resolution condemning racial segregation in general but would abstain on one calling for a revision of the policy of a particular state. Australia and the UK left their remarks to explanations of vote, grounded on Article 2(7).<sup>67</sup>

When he presented the committee's text to the GA, the rapporteur remarked that no delegation had implied or expressed approval of the policy of apartheid. Those who had objected to the resolution were motivated by considerations of competence alone. The first three paragraphs of the draft resolution dealt with human rights and government policies generally, stressing obligations under Article 56 of the Charter. It ended by expressing concern that SA had not yet reacted to appeals to reconsider policies which prevented all racial groups from enjoying the same rights and fundamental freedoms. The SA delegation called the vote approving the draft as GA Res. 1248 (XIII), the Union's 'gravest prestige blow to date'. The US and Canada had given the Afro-Asian bloc the breakthrough it had desperately sought after years of stalemate. It was not the number of defectors but their prestige and the belief that they were traditional allies that increased the impact. By voting for a mild resolution they had surrendered the principle and increased the pressure on those who still abided by Article 2(7).<sup>68</sup>

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67 GAOR SPC 86th to 94th meetings

68 14/15/3 vol. 21. The SA delegation said that the debate suggested collusion, since most speeches were repetitious. They could be summarized as not wishing to interfere in SA's domestic affairs but having to consider a threat to international peace and security, which overrode Art. 2(7). The UN should continue its efforts in the hope that SA, with whom the country concerned had excellent relations, would heed the voice of the world and revise its policies.

### 8.8.1 *US and UK explain their votes*

When forwarding the text of the US statement to External Affairs, the US Ambassador noted that the initial Indian draft resolution had been altered to accommodate US views. A call to SA to ‘take appropriate measures to assure fundamental human rights and equality to all racial groups’ had been amended to a general one addressed to all member states. The US supported the final text, which it had not sponsored, ‘as an act of good faith’ towards those who had responded to its plea for moderation and would continue to seek the elimination of specific, condemnatory language.<sup>69</sup>

On behalf of the UK delegation, Mr. Gilbert Longden reiterated its stance on Article 2(7) in a letter to *The Times*, London, of 31 October 1958. ‘The terms of this article are clear beyond peradventure and until the Charter is amended, they impose an absolute ban on these discussions.’ Without it, many states would have refused to sign the Charter. The only reason it was necessary to explain the UK vote was ‘because people...persist in misconstruing it as a vote in favour of apartheid’. *The Times* dealt with the matter in an editorial of 17 November 1959. It also stressed that the UK action was not based on sympathy with the apartheid policy but was intended to support a sister member of the Commonwealth asserting its legal rights. SA had not compromised its right to legislate for its Bantu subjects by foreign treaty. The legal view was debatable, ‘since presumably the jurists advising the supporters of the resolution dissented’. Nevertheless, the British decision was legally defensible, if open to being misunderstood politically. UN discussions might canalize world opinion but that opinion’s cumulative force was better effected by ‘meetings, speeches and writings in the individual countries’ (my emphasis).

## 8.9 **Louw explains apartheid to 14<sup>th</sup> GA**

Louw’s speech in the General Debate at the 14<sup>th</sup> GA was the first time he offered an apologia for apartheid in the UN. He described the policy as traditional, from the days of

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<sup>69</sup> *Idem* letter dated 21 October 1958. The impact of the US action was more accurately assessed by the American Committee on Africa, Inc. (ACOA) in the December 1958 issue of the *Africa-U.N. Bulletin*. While the tougher Indian draft had been toned down to a conciliatory approach, ACOA argued, SA had lost an important argument. ‘The United States can never again claim that the question is one of internal concern only, and the pressure of the times will probably lead to a stronger and more forceful position in subsequent years now that the great barrier has been lowered.’

the settlers' arrival. The enactments of the present administration were designed to improve the education system and promote Bantu self-government. In five years the number of Bantu pupils had grown from 800,000 to 1,400,000. Some 26,000 teachers served them. The Bantu no longer needed representation in Parliament since their territories were to receive institutions enabling them to proceed towards autonomy. In the interim, the Union government would act as the guardian of the emergent Bantu self-governing States. The policy entailed enormous sacrifices and expenditure but, despite this, SA would consider resuming contributions to such worthy funds as the United Nations Children's Fund (UNICEF). Turning to the rest of the continent, Louw asked why, if the system were so oppressive, SA had to cope with illegal immigration from the North? He assured 'the States and territories of Africa of our willingness to co-operate with them in regard to all matters of common concern'.<sup>70</sup> He advised Verwoerd that his speech had an 'exceptionally' good reception with applause and felicitations from heads of delegation, including the Foreign Minister of Ghana.<sup>71</sup>

Louw did not escape a sarcastic reply from India that he had not only tried to defend his government's policy but had expounded one 'which he thought should be accepted by the world'. While discrimination based on race, creed, caste or colour still existed in all countries, SA was alone in not trying to eliminate it. Indigenous races were there before the Dutch or the Bantu. 'If the Union Government is prepared to bring the Hottentots and the Bushmen to self-government, that would be an even greater contribution.' SA's industrial development was dependent on black manpower. If blacks were good enough to produce wealth, they should enjoy political power as well.<sup>72</sup>

Ghana opened the Special Political Committee debate at the 14<sup>th</sup> GA by attacking Louw's statement in the General Debate. The speech, which the SA permanent representative described as bitter and the spearhead of the black African attack, referred to the 'diabolical minority', a description which was not in the printed text.<sup>73</sup> Ghana denied

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70 GAOR 811th Plenary 28 September 1959 227-232

71 PM 136/2/27 vol. 1 Louw to Verwoerd 11 October 1959

72 *Idem* 823rd Plenary 6 October 1959 423-424. This analysis differed from the UNCORS reports, which accepted that the Bantu tribes were not yet sufficiently developed to participate on a basis of equality.

73 A/SPC/SR.140-148; 14/15/3 vol. 24 minute 10/3 7 November 1959

SA's claim to speak on behalf of the continent. Africa, it asserted, rejected Louw's explanation that the self-government the Union government envisaged would benefit a majority that had no say in the elaboration of policy.

The draft resolution, submitted for the committee's consideration, reiterated that apartheid was still being pursued. It called on all member states to conform to their obligations under the Charter, expressed deep regret that SA had not reconsidered its discriminatory policies and appealed to all members to use their best endeavours to achieve the purposes of the resolution.

The Indian delegate intervened in the debate 'without rancour'. SA, India said, had taken a very promising part in formulating the Charter. Its intransigence was paradoxical, since it had striven, as an 'ardent defender of the fundamental freedoms', to have human rights included in the Charter. The Acts passed in 1959 had misleading titles and were 'iniquitous' in intent. They offered the Africans a 'wholly illusory' autonomy. India said the danger of bloody clashes was real and could spread by contagion to other African territories. 'That should not cause any surprise, since the representatives of the Union of South Africa had not presented that policy as a necessary evil limited to their own country but as a pattern for the world to follow.'<sup>74</sup> The draft resolution, said India, reflected the lowest common denominator of adverse opinion. It did not ask for sanctions, merely appealed to all members to influence the Union in a positive direction.

While the Union tended to ignore attacks from hostile quarters, the support it sought from its friends was declining. The US, for example, profoundly regretted SA's intransigence. It called on all members to re-examine their interracial and interreligious relations and to guard against human rights violations, especially those imposed by law. In his report, the

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74 *Ibid.* India clearly misrepresented Louw. Like others, including the Soviet bloc, it could make allegations of doubtful veracity, secure in the knowledge that SA, whose absence from the Committee it 'deplored', would not be present to refute even the most outrageous claims.

SA permanent representative called this rather provocative statement (given the racial problems in the US) important, in view of its effect on moderate Western opinion. He also singled out the Netherlands' remark that it had begun to doubt whether Article 2(7) still protected SA, or whether a stage had been reached when it no longer applied. The Netherlands was, he feared, preparing the ground for a positive vote, rather than an abstention, on a future apartheid resolution.

Just before its representative intervened in the debate, Australia informed the Union that it would abstain on the resolution. Australia had to maintain its relations with its Asian neighbours and with the emergent African states, as its 'white Australia' immigration policy might be raised at the UN.<sup>75</sup> Jooste, now Secretary for External Affairs, advised the Australian High Commissioner that the news would be received with concern. Bilateral relations between the two countries had always been promoted by a common front against UN interference in domestic matters. SA had never, Jooste said, asked for support for apartheid as a policy. It adhered so strictly to the domestic jurisdiction principle that it had been prepared to alienate Greece over Cyprus.<sup>76</sup>

In the Special Political Committee, Australia bridged the gap by repeating its delegation's belief in the clarity and validity of Article 2(7). It was not unmindful of the purposes of Article 55 and did not approve of racial discrimination. 'No such policy existed in Australia' (my emphasis). Of other 'old' Commonwealth members, the UK maintained its stance on Article 2(7). New Zealand voted in favour of the resolution because 'it had a duty to speak out when the principle of respect for human rights was being ignored'. Canada abstained on the resolution, which its Minister of External Affairs told Parliament was not as mild as the one it had supported in 1958.<sup>77</sup>

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75 14/15/3 vol. 24 minute 8/0 10 November 1959 High Commissioner to SEA. Considering Australia's treatment of its aborigines, particularly attempts to enforce the assimilation of the lighter coloured ones, its new stance may have owed more to concern for keeping the spotlight away from its own internal policies.

76 *Idem Aide-Mémoire* 9 November 1959

77 14/15/3 vol. 24 minutes 167/2 10 February and 15 February 1960

In SA's absence, the draft resolution was adopted in the Special Political Committee by 67 votes to three (France, Portugal and the UK) with six abstentions (Australia, Belgium, Canada, Dominican Republic, Netherlands and Spain) and approved by Plenary as GA Res. 1375 (XIV). The SA permanent representative remarked that newer states like Ghana were trying to revive antagonism towards SA by stirring up emotions.

## **8.10 African influence at United Nations**

### *8.10.1 Calls for sanctions*

The debate on apartheid at the 15<sup>th</sup> GA was requested by 41 states from all regional groups. They alleged that SA had not only failed to reconsider its discriminatory policies against its indigenous inhabitants, but had put new ones into effect at a time when large areas of Africa were rapidly becoming independent. Louw stated his objections in Plenary to the inclusion of the two SA items in more detail than for some time past, since there were many new members who might not have been *au fait* with the relationship between Article 2(7) and Articles 55 and 56. Few of SA's critics could prove that they fulfilled the last-mentioned. SA, Louw claimed, observed it better than many. SA was an African state whose accusers did not have clean hands.

In the Special Political Committee Brazil spoke first, noting the new aspects likely to dominate the meeting. They included the shooting of demonstrators at Sharpeville and SA's withdrawal from the Commonwealth.<sup>78</sup> Ghana led the African assault with an appeal to the international community, not just African states, to break off diplomatic relations, close their ports to SA ships, prevent their ships from entering SA ports, boycott all its goods, refuse landing and overflying rights and interrupt postal and telecommunications with it. Libya and the United Arab Republic recognized that the new African and Asian states had brought a major new impulse into the UN.<sup>79</sup>

Two draft resolutions were proposed to the Special Political Committee. The first, prepared by four Asian powers, followed the standard pattern. The Africans submitted the second, much more drastic, one which in paragraph 5 recommended the sanctions

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<sup>78</sup> See paras. 9.1.4 and 9.2.1 for details on both issues.

Ghana had enumerated. Although voted on first, for tactical reasons, it was too radical to achieve the necessary two-thirds majority but was approved by simple majority. Only Portugal opposed the Asian draft, which, with minor variations on the individual paragraphs, was adopted by 93 votes to one. Both drafts were forwarded to Plenary.<sup>80</sup>

The SA permanent representative wrote that old hands had called the speeches sharper than before. He ascribed the intensification to the presence of more extremists, who had had their first opportunity to debate apartheid in the GA since Sharpeville. SA had become 'fair game'. The Africans had smelt victory when SA withdrew from the Commonwealth and sought a similar success in New York. The SA delegation decided that the best answer to Ghana was to avoid the debate by circulating a memorandum comparing what SA did for the Bantu with what Ghana did for its subjects.<sup>81</sup>

The spokesman for the new voting direction of the colonial states was the UK. It re-emphasized the weight it attached to Article 2(7), which it described as an essential provision by which all states should abide. However, '*apartheid* was unique in that it involved the deliberate adoption, retention and development of policies based entirely on racial discrimination'. The policy had grave international repercussions, mostly in Africa, but as the Commonwealth conference had shown, also in other continents. Subject to two reservations, the UK would support the Asian draft. It did not agree with paragraph 5 of the draft that there was a threat to international peace. '*Apartheid* was an essay in folly' but others could not tell SA what to do. Paragraph 3 of the Asian text asked member states to take collective action to bring about the abandonment of the policy. To abide by such a request could cause many of them severe problems in their bilateral relations with SA. (Australia, Belgium, France and Scandinavia followed the UK, while Norway abstained only on paragraph 3.)

As for the African resolution, the UK confessed that the use of the word 'recommends' in paragraph 5 had led it to share the misgivings India had expressed about the GA

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79 GAOR 2nd part 15th sess. Special Political Committee 232nd – 245th meetings; A 4419

80 A/SPC/L/59 and A/SPC/L.60 Corr.1 and Add. 1 and 2

81 10/3, 10/2 vol. 5 26 April 1961

proposing a course of action. Any state that voted for the paragraph would be committing its government to breaking off diplomatic relations, imposing economic sanctions and depriving itself of whatever leverage it might possess to influence SA. Economic sanctions were unprecedented and would have the opposite effect from that intended. Apart from harming ordinary citizens, they might cause opponents of the government in SA to rally to its support. The UK urged the sponsors to abandon this dangerous path, or it would vote against.<sup>82</sup>

#### *8.10.2 SA isolated*

The SA permanent representative initiated the debate in Plenary on a point of order. Both resolutions, he said, were a clear breach of Article 2(7), as they sought ‘to persuade Member States to take separate and collective action, to intervene in the Union’s affairs’, far beyond anything in the past. Several members seemed to believe that ‘allegations, founded or unfounded, can be given the status of facts by continued reiteration’. The Union claimed the protection of Article 2(7) and would support any member states, ‘who have not denied us our rights’, claiming it. The other states had forfeited a similar claim in respect of their own domestic affairs.<sup>83</sup>

Paragraph 5 of the African draft resolution, which called for sanctions, failed to receive a two-thirds majority and was rejected. Ethiopia claimed that the vote of 44 in favour, 34 against and 21 abstentions represented a moral victory not a technical defeat. Ghana and Ethiopia then asked that, as the rejection of paragraph 5 had ‘effectively killed’ it, the African draft resolution not be voted on and the GA agreed.<sup>84</sup> The Asian draft resolution was thereupon approved by 95 votes to one (Portugal).

The SA permanent representative wrote that the West’s rejection of SA’s stand on domestic jurisdiction painted a dark picture. With the defection of the UK and Australia, the dyke had burst. SA’s internal affairs had been internationalized. The newer African

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82 A/SPC/SR.242 5 April 1961 paras. 12-20

83 GAOR 2nd part 15th sess. 981st Plenary 13 April 1961 266

84 *Idem* 273-275

members, he wrote, were ready to take stronger action than the Asians. The Asian states were shrewder and drafted resolutions likely to achieve large majorities in the GA. At the same they did not wish to entrust that organ with the power to impose sanctions. The permanent representative felt the Asian moderation was a temporary ray of light only. The Africans would repeat the proposal until they obtained a two-thirds majority and would use SWA as a platform to launch a two-pronged attack. *‘Sommiges wil ons net slegsê, anders wil ons ook nog skop, sommige wil ons vertrap en die uiterstes wil ons vernietig’* (sic). The solution lay in strengthening ties of bilateral friendship, whatever criticism was expressed at the UN.<sup>85</sup>

### 8.10.3 Louw provokes anger at 16<sup>th</sup> GA

Louw again described himself as the representative of an African state at the 16<sup>th</sup> GA. SA had, he said in the General Debate, profited by the mistakes of some colonial powers to build ‘a system of self-government for the different ethnic groups, which, while observing democratic principles, takes account of Bantu tradition and custom’. While the apartheid policy aimed at giving the Bantu progressive control over his homelands, it also ensured to those of European descent control of their land, which they had opened up and developed over three centuries. SA wished to protect the interests of all its non-European peoples ‘without interference from outside, be it from Western, Eastern or African countries’. His remarks, which included wide-ranging criticism of other governments, negative comparisons of their efforts compared with SA and a provocative reference in favour of freedom of expression, provoked a stormy reaction from the Africans.<sup>86</sup>

Louw attended the Special Political Committee debate on apartheid. He said he would not deal with the policy of separate development as he had voluntarily explained it in the

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85 10/3, 10/2 vol. 5 26 April 1951

86 For details of the General Debate, see para. 10.5.1 and GAOR 1033rd Plenary 387-398.

General Debate, although it was not the UN's concern. The sponsors of the item had neither the constitutional nor the moral right to raise a domestic issue. The SA delegation would refute specific charges and 'not hesitate to show that the practices complained of, including alleged contravention of Articles 55 and 56 of the Charter, also take place in the countries of several of the sponsors or of those delegations who support them'.<sup>87</sup>

The debate was acrimonious, setting a pattern for the next 30 years. Of the two draft resolutions submitted to the committee, the first, preponderantly African, contained three controversial paragraphs. It recommended the imposition of specified sanctions<sup>88</sup> and asked the Security Council to consider applying Article 6 of the Charter on grounds for expulsion and Article 11(2) on the necessity for Security Council action in a matter involving a member state. The second draft was less drastic and its eight sponsors were more representative of the geographic regions. It urged all states to try to persuade SA to abandon policies based on racial superiority and repugnant to human dignity.

Louw opposed both drafts, the former on the grounds of deliberate interference. The Special Political Committee would make itself ridiculous, he said, if it condemned SA for 'discriminatory laws and measures' at the instigation of those who violated those same principles. It would have to take similar action against Ghana, 'where human rights were trampled on', Saudi Arabia, 'which engaged in the slave trade', the United Arab Republic and the USSR. Louw said the sponsors of the first draft had avoided indicating the articles of the Charter on which they based it. Some had mentioned a threat to the peace but the threat must be coming from outside. Ceylon's statement that only a massive rebellion seemed open to the non-whites, or Syria's assertion that African countries would intervene to support them, could constitute such threats.

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87 GAOR 16th sess. SPC 267th – 288th Meetings; 19/2 23 October 1961 Opening statement to SPC. China expressed pleasure that Louw had helped the SPC to understand SA's policies and hoped he would convey home a first-hand impression of the feelings of other states. Even if the UN applied double standards, it 'did not mean its moral prestige would be strengthened by shutting its eyes to the wrongs of "apartheid"'. It took time to change long-established policies but it was opportune to make a start.

88 These were the same sanctions that the Africans had proposed at the 15th GA without success. They are listed in para. 8.10.1.

The US argument that apartheid had acquired an international character, Louw objected, bordered on a *petitio principii*; only the debate took it out of the municipal domain. The US misinterpreted Articles 55 and 56 when it accused the SA government of violating them. SA did more to promote the economic, social and health wellbeing of its peoples than any other state on the continent. The Group Areas Act was designed to avoid mixed areas, the growth of slums and racial clashes and, like the pass laws and the education acts, to protect non-white interests.

The Special Political Committee adopted both draft resolutions. The controversial paragraphs in the African text narrowly failed to achieve a two-thirds majority, although the resolution as a whole was adopted by 55 votes to 22, with 22 abstentions. The more moderate draft was adopted by 72 votes to two (Portugal and SA), with 27 abstentions. Those who opposed sanctions either felt the GA should not intrude on the Security Council's domain or that individual states should make up their own minds.

Louw made his last attempt in Plenary. He argued that the GA sat as a court when considering draft resolutions and should not be swayed by distorted and false allegations, particularly when they were the basis of a call for punitive action. As at the previous GA, the controversial paragraphs of the African draft resolution failed to gain a two-thirds majority and were accordingly rejected. Consequently, the Ivory Coast representative requested that the African draft resolution be withdrawn and the GA again agreed. He warned, however, that the proposals would be submitted each year until a majority would come to understand that it was 'more honourable to save the dignity of man than to cling to selfish material considerations'. The remaining resolution was finally adopted by 97 votes to two (Portugal and SA).

## **8.11 Conclusions**

### *8.11.1 Apartheid inscribed on GA agenda*

As early as 1950, the SA permanent representative, G.P. Jooste, alerted Prime Minister Malan to the ominous overtones abroad of apartheid. He did so in the context of discussions on human rights. It is possible that the government took a more sanguine

view of the situation, as the Indian issue had not been included on the 4<sup>th</sup> GA agenda in 1949.<sup>89</sup> It may well have thought that if the Indian item with its international treaty overtones were to disappear, there was little likelihood of so obviously domestic a matter as apartheid replacing it. The point the government missed was that, if the Indian question were to die a natural death, SA's critics would seek another avenue of attack. Resentment against racial discrimination was a dominant factor in UN thinking.

India resumed its complaint of the treatment of Indians in SA after the Nehru-Malan talks broke down. At the same time, it would have been aware that UN members were becoming disenchanted with an annual repetition of the item even before SA officials discerned the declining interest in the early fifties. India needed to expand the terrain and place a purely SA issue on the GA agenda, so that it should not be accused of pursuing a vendetta. The Arab-Asians, opponents of discrimination in Latin America and, not least, a Soviet bloc seeking the support of the developing world, could all exploit apartheid. The non-Western world was closing ranks and racial questions were no longer confined to local boundaries. India's opportunity arose in 1952 when the ANC launched a defiance campaign, some blame for which SA ascribed to Indian interference.<sup>90</sup>

#### *8.11.2 Apartheid as violation of human rights*

Jooste noted in his report on the apartheid debate at the 7<sup>th</sup> GA that it was doubtful whether any state in future would be able successfully to invoke Article 2(7) to counter allegations of human rights violations or racial discrimination. He was correct only as far as discussion was concerned. Resolutions and recommendations depend on the will of the majority. Many African states accused of human rights violations have used the voting power of their regional bloc membership, successfully to bar UN action. Zimbabwe is a notable modern example.

The Union's domestic jurisdiction argument was wearing thin, but in the face of a policy it was unable to justify globally, it was the only one available to it. Objectively speaking,

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<sup>89</sup> See para. 2.5.

<sup>90</sup> See para. 8.1.

its legal arguments were strong. They retained their validity in terms of the Charter, when they were applied to other issues than apartheid and the treatment of Indians. However, with the adoption of GA Res. 616 A (VII), by which it authorized UNCORS to examine the racial situation in SA, the GA had crossed a threshold. It had approved a specific recommendation on a purely domestic matter with no overtones of treaty or international obligations, other than those relating to customary international law and outlined in Article 38 of the Statute of the ICJ.

With the appointment of UNCORS, the dispute reached a new political level and SA had to take it into account. Not one vote was cast in favour of its legal thesis. Even though some important states objected to the content of the resolution in debate, they abstained in the vote, a poor substitute for opposition. Jooste's contention that SA's purely legal argument had no chance of success in a debate with human rights overtones was compelling. The SA delegation therefore made a technical shift. Unable to invoke Article 2(7) to forestall discussion or consideration of apartheid, it limited itself to impugning the allegations contained in the memorandums calling for the inclusion of the item in the UN agenda and the resultant resolutions, if without conviction.<sup>91</sup> It asserted repeatedly that there was no evidence of a threat to international peace and security. These arguments, too, were valid but they strengthened the impression that the content of the UNCORS reports was factually correct and that the legislation they quoted had the negative effects ascribed to it by the country's critics. SA's implicit prevarication did nothing to allay the concerns of less hostile delegations.

The building of the apartheid legislative edifice created an ever-widening gulf between the Union and the UN. SA legislation was framed for internal consumption and needed little explanation for the local electorate but in the international arena, where justification was essential, the Union offered virtually none. The gap between the SA delegation, possibly External Affairs as well, and the government was also widening, in that explanations the officials would hope to provide to a sceptical audience abroad were not necessarily compatible with those the government gave at home. The limitation on SA

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91 E.g. its objection to the Indian memorandum A/2183 12 September 1952. See para. 8.1.1.

participation in GA debates, where Article 2(7) was involved, left the officials no opportunity to test their ideas in practice. However, their experience in other debates on human rights and, after 1958, on apartheid itself, suggests that they were better off sticking to domestic jurisdiction than trying to explain the substance of the policy.

### 8.11.3 UNCORS

Neither the first UNCORS report nor the SA criticism of it gave a fully objective analysis of the competence issue. Each protagonist selected different passages from the authorities it mentioned, or gave conflicting interpretations when the choice coincided. SA probably painted a more accurate picture, since UNCORS often drew forced conclusions, such as those where it argued that Kelsen and Preuss agreed that the GA was competent to deal with matters normally considered to fall within a state's domestic jurisdiction.<sup>92</sup>

Kelsen stated, for example, that Article 2(7) prohibited UN interference with member states. The authors of the Charter, he stressed, had eliminated a reference to international law, making it possible to interpret the term 'to intervene' as relating to any activity of the UN. The 1<sup>st</sup> GA did not formally decide that the treatment of SA Indians was 'essentially' within SA's domestic jurisdiction; it actually intervened by adopting a resolution, 'which did not contain a recommendation but the statement of a fact, the expression of an opinion and a request to report'.<sup>93</sup>

Similarly, Preuss argued that Lauterpacht had adopted an unduly restrictive interpretation of the term 'intervention'. 'In reducing the significance of a key provision of the Charter

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92 GAOR 8th sess. Supplement No. 16 paras. 152-155

93 Kelsen *op. cit.* 772; see para. 2.1.3 fn. 22. Kelsen added a supplement to his book recognizing that later developments at the UN might be considered unconstitutional but that 'directing our views towards the future, we may see them as the first steps in the development of a new law of the UN'. They were exceptions to the principle *ex iniuria ius non oritur*. New law could arise from the violation of the old. The UN action in Korea and the Uniting for Peace resolution conflicted with existing UN law but suggested that *ex iniuria ius oritur*.

to a nullity...Lauterpacht ignores the broad sense' attached to it at San Francisco.<sup>94</sup> The framers of the Charter, Preuss said, had obviously intended to prohibit the GA from discussing or making recommendations on domestic jurisdiction issues. A problem arose because there was no evidence that they intended to remove matters covered by Article 55 of the Charter from the sphere of domestic jurisdiction. The dichotomy might, he thought, be reconciled by distinguishing between the competence of the GA to make recommendations on matters of general concern while excluding all forms of interference in the economic and social concerns of particular states (my emphasis).<sup>95</sup>

The records of the debate on the report confirm Sole's assertion that several delegations were concerned with the direction being followed in the UN. However, although the 8<sup>th</sup> GA went further than its predecessor in promoting interference in SA's affairs, only 11 delegations registered outright opposition. For the majority, the SA items were *sui generis*, reducing the danger that they might constitute a precedent. Although Louw would later claim that SA's legal arguments were irrebuttable and had not been refuted, they were already being subsumed in a political voting majority that was inherently opposed to any form of racial discrimination bearing hints of colonialism.

In any case, the SA assertion that local dissidents were responsible for its poor global image no longer held water. The Acts and court cases reported in the *YHR* were clear proof of SA's discriminatory legislation.<sup>96</sup> The Union's links with the humanitarian provisions of the Charter were becoming ever more tenuous and, after the UNCORS reports were published, its actions would have appeared even less defensible. Higgins has argued that the GA followed correct legal and logical guidelines in its assessment of the SA situation. It first ascertained the realities of the situation, she wrote, and only then found them in conflict with the Charter.<sup>97</sup> Her view implies, however, either that the GA

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94 L. Preuss 'Article 2, paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction' in *Receuil des Cours* I (ADI 1949) 578 and fn. 3. Nonetheless, he recognised the likelihood of the interpretation of Art. 2(7) evolving. UNCORS merely anticipated this development.

95 *Idem* 585 fn. 1. For SA the drawback was that a proliferation of general resolutions, anodyne in character, could lead to an unacceptable body of jurisprudence and of norms of customary law.

96 See para. 5.1.2 and 5.1.3.

97 R. Higgins *The Development of International Law through the Political Organs of the United Nations* 120-123

could safely ignore Article 2(7) as far as SA was concerned, or that the resolutions establishing UNCORS and enabling it to function for three years, over the Union's objections, did not contravene the Charter's domestic jurisdiction provision.

There is a clear disparity between the way in which the SA delegation described events and the reliance Higgins placed on the care with which the GA proceeded in handling the apartheid issue, the factual nature of the UNCORS reports and the good faith of member states. While her confidence that the UN could not take such decisions so consistently over a long period of time *mala fide*, is plausible, it is equally plausible that decisions taken for political self-interest rather than moral or legal principle, do not by repetition alone demonstrate *bona fides*. Delegations made the point in debate. The ICJ could have had a role to play in examining the legal elements of the issue but the GA had circumvented that avenue as well. One becomes perplexed, even concerned, about the role of UN organs, other than the ILC perhaps (although even that body was sometimes accused of bowing to political pressures), in the development of human rights norms.

#### 8.11.4 Prime Minister's letter to Rev. Piersma

The value of the Prime Minister's correspondence with the Rev. Piersma<sup>98</sup> is that it seems to have been the first time that Malan attempted a public justification of the apartheid policy to a foreigner, admittedly one he expected to be sympathetic. He risked criticism both at home and abroad. When he replied in the House of Assembly to the comments of the Native Representatives, who provided the nearest approach to the thinking of the other population groups, his only defence, that education did not civilize natives, was weak. He pointed out correctly that, as funds for improving the position of the non-white were provided in the budget and depended on the collection of taxes, whites bore the lion's share of the tax burden. On the other hand he was unwilling to admit that the native's contribution to the exchequer was minimal because he was unable to earn enough to pay more. If the burden fell on the Europeans, as Malan insisted, it was because the level of white earnings obliged them to make the necessary tax contribution. The taxpayer's commitment to the welfare of the Bantu was irrelevant.

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98 See para. 8.4.

The public debate that the publication of the letter unleashed in SA is clear enough not to require further comment, except to note yet again that it was confined to the white electorate, a clear indication of the repressive nature of legislation with respect to the other races. The whole furore, in fact, was an illustration of the task that awaited the SA delegation in New York, had its request to join the substantive debate been approved.

#### *8.11.5 Withdrawal tactic*

The SA withdrawal at the 10<sup>th</sup> GA was not without some positive result. The resolution adopted on the basis of the third UNCORS report was milder than its predecessors were. It eliminated UN action and failed to renew the UNCORS mandate. Louw felt, no doubt, that the line he had advocated in 1948/9 was at last taking effect. On the other hand, although the UN is loath to terminate such bodies once they have been created, UNCORS had fulfilled its purpose, without really satisfying anybody. Its reports had not been endorsed, just called constructive. They had, if only by way of rebuttal, offered SA a limited opportunity to explain domestic policy. These were minor victories for the Union. The legal argument to which the SA delegation was confined won no converts.

SA was finally forced to recognise that the policy of token representation was counter-productive and resumed full participation at the 13<sup>th</sup> GA. The return enabled the delegation to start taking a more active part in items not specifically related to SA. It also helped to soften the tone of the debates but that was a double-edged sword, since moderation led to the defection of former 'allies' and the country's further isolation.

The session marked another step down in the Union's relations with the UN. By voting for GA Res. 1248 (XIII), Canada and the US crossed the narrow line of principle, lending further quasi-legal status to the anti-colonial arguments, which had already weakened SA by likening its policies to an aggravated form of colonialism. Canada's decision to revert to an abstention the following year did not alter the fact of its earlier vote. As shown by the UK and Australian vote switches after the Union's withdrawal from the

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Commonwealth, the GA decisions on SA were politically motivated. Few member states, not even SA, honestly grounded their votes on legal principle. Self-interest was the predominant motive. Despite this, the constant repetition of anti-apartheid resolutions, whether or not SA ignored them, and the growing number of states that voted for them were instrumental in establishing international jurisprudence within the ambit of Article 38 of the ICJ Statute.

On balance SA's cause had not been helped by its quasi-withdrawal in the mid-fifties. Neither did its consistent reliance on Article 2(7) protect it, once it had become clear that it was a failed strategy. There is, unfortunately, no evidence that any other strategy would have enjoyed more success. Participation in the 1948 debate on the UDHR, well before the influx of the newly independent states, had not worked to SA's advantage. Its resumption of full participation at the 13<sup>th</sup> GA and explanation that its racial policies were consistent with Charter principles also failed. Some of the failure can be ascribed to the timing of the new approach, as by then it was too late to close the stable door. For the rest, Louw made the cardinal error of indiscriminately accusing SA's critics and its friends of hypocrisy. His allegations may have been justified but they were counter-productive for a country fighting a lost cause alone.

#### *8.11.6 SA isolated at 16<sup>th</sup> GA*

At the 16<sup>th</sup> GA, Louw experienced the full effect of isolation within the UN, when not a single member voted against Liberia's motion to censure his speech in the General Debate.<sup>99</sup> SA's position had changed markedly. The increase in African members brought them into the ambit of the cold war, where their voting strength would have a telling effect, and votes were a decisive factor. SA was an obvious victim. Its single vote failed to counterbalance the 27 of the rest of the continent. Whatever bloc support it might have relied on, minimal at best, vanished when it left the Commonwealth.

Jones has rightly argued that the UN 'demonstrated the inconsistency and hypocrisy of states towards the use of the Assembly and Security Council as instruments for

authorizing various forms of interference in a human rights issue which legally belonged to the sphere of domestic jurisdiction'. The Afro-Soviet claim that apartheid was a threat to international peace, he insisted, lacked verisimilitude, as it was difficult to see how the racial policy of the SA government within its own territory could threaten the territorial integrity or political independence of other states. If the Soviet Union offended in this respect, so did the Western powers. They were open to the criticism that they feared to support coercive measures and so upset 'their economic and defence interests in an area in which the Soviet Union was seeking to extend its influence and naval power'.<sup>100</sup>

Toase concluded in an even-handed assessment that apartheid was an exceptional problem.<sup>101</sup> It was not an inter-state dispute and the chances of internal compromise were non-existent. SA government opponents sought first the abandonment of the policy, then the transfer of power to a black majority. The SA argument based on Article 2(7) was, he thought legally sound, if not watertight. It contained loopholes that the Africans could exploit. UNCIO had dropped the criterion of international law contained in the Dumbarton Oaks proposals. It failed to define the word 'intervene', leaving that task to the GA. The Charter was often ambiguous and member states could interpret it by a majority vote, which was not necessarily arbitrary.

The rising temper of the debate, Toase continued, made it difficult for the West. Racial discrimination had become a litmus test of international relations. Most Western states preferred persuasion to coercion. The Africans replied that the West rationalized its inaction to preserve its economic links with SA and sabotage the African campaign. Their argument was unjustified as, in 1961 he said, at least nine Afro-Asians maintained

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99 It will be appreciated that the term 'isolation' is used here in a sense specific to the UN and does not extend to SA's bilateral relations outside that context. For details of the fracas, see para. 10.4.1.

100 G. Jones: *The United Nations and the Domestic Jurisdiction of States* (Cardiff University of Wales Press 1979) 53-59. Nevertheless, he made no attempt to counter the assertion of the African states, who equated SA and apartheid with colonialism, that so long as one African territory remained under foreign jurisdiction the continent was not free.

101 F.M. Toase, *The United Nations and the Apartheid Question, 1945-1964* (D Phil. thesis Univ. Coll. of Wales Aberystwyth 1983) 311 ff.

trading links with it. Although figures were not published, it has been claimed, in support of Taose's contention, that, even after the GA had adopted a series of resolutions recommending sanctions against SA, most of the African continent was in some kind of trading relationship with it, including arms purchases.

There can be little doubt that SA's strategic position controlling the Cape sea route and its possession of metals and minerals vital to the global economy, particularly the developed world, played an important role in protecting it from the anti-colonial onslaught at the UN. The economic equation requires detailed examination. It is, however, extraneous to the subject of this thesis but needs to be borne in mind as a partial explanation of the length of time SA managed to keep the UN at bay.

**CHAPTER 9**  
**SHADOW OF SHARPEVILLE**

**9.1 South Africa leaves Commonwealth**

*9.1.1 Winds of change*

The UK intervention in the Special Political Committee during the apartheid debate at the 14<sup>th</sup> GA at the end of 1959, where its representative merely reiterated his government's traditional stand on competence, gave little hint of change.<sup>1</sup> Below the surface, however, tensions had been simmering between SA and other Commonwealth members for some time. The UK permanent representative reported to his government in November 1955 during the 10<sup>th</sup> GA that the South Africans knew that even 'their few constant supporters did not in fact agree with them'.<sup>2</sup> The actions of 'old' Commonwealth colleagues during and after the 14<sup>th</sup> session revealed such tensions just below the surface. The SA acting High Commissioner reported that, in its Parliament at Ottawa, Canada had even evoked the spectre of choosing between SA and the new Commonwealth members at the UN.<sup>3</sup>

The Union government facilitated disengagement. Although the Governor-General's speech opening Parliament in January 1960 gave no warning, Prime Minister H.F. Verwoerd chose the no-confidence debate to announce a referendum, at a time to be decided, to ascertain whether SA should become a republic. The change had been in gestation as a constant aim of National Party governments since Union in 1910. It was appropriate, he said, to make the announcement before the 50<sup>th</sup> anniversary celebrations of Union, but the vote would not take place until the emotions they excited had subsided.<sup>4</sup>

The UK Prime Minister, Sir Harold Macmillan, arrived in Cape Town on the heels of this announcement at the close of a tour through Africa, during which he had assured the new states of continued UK support and co-operation. Without prior warning and in the

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1 A/SPC/SR. 147 9 November 1959

2 See para. 8.6.1.

3 14/15/3 vol. 24 minutes 167/2 10 February and 15 February 1960. SA's chance of remaining a member of the Commonwealth, even assuming the government really wished, as it later professed, to do so, grew more fragile as former UK colonies in Africa obtained independence.

4 *House of Assembly Debates* Vol. 103 cols. 86-106 20 January 1960

precincts of the SA Parliament, Macmillan told his audience on 3 February 1960 that the West needed to come to terms with African nationalism. ‘The winds of change were blowing through Africa’. It was the theme of his African tour but the time and place of this speech gave it added resonance and impact. The UK had to do its duty as it saw it, he said, and could not be expected to extend support to SA for a policy that denied access to political power on the basis of race.

Verwoerd replied extempore to this pellucid hint of how the UK delegation would behave at the UN in future. Both, countries, he said, were devoted to peace and to Western values. SA’s policies were in full accord with the new developments in Africa. Justice had to apply not only to the blacks but also to the whites, who had facilitated the development of Black nationalism. The whites saw themselves as part of the Western world, with a duty to maintain Western civilization in that part of the Continent.<sup>5</sup>

#### 9.1.2 *Louw represents Verwoerd in London*

In April 1960 Verwoerd was the victim of an assassination attempt. The assault prevented him from attending the Commonwealth Prime Ministers meeting in London and personally assessing the opinion of the heads of state of the ‘new’ Commonwealth towards his own. Louw, whom Macmillan described in his diaries as ‘rude and ill-informed’, represented him and was unable to obtain any assurances that SA would be welcome in the Commonwealth under a republican constitution.<sup>6</sup> Although other Commonwealth members had not encountered problems when they assumed republican status, the meeting agreed that any prior comment might be viewed as an attempt to interfere with the referendum in SA. A communiqué of 15 May 1960 suggested that if SA decided to become a republic and wished to remain a member, it ‘should then ask for the consent of the other Commonwealth governments’. Although they did not interfere in each other’s domestic affairs, ‘the Ministers emphasised that the Commonwealth itself is

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5 *Souvenir of visit of The Rt. Hon. Harold Macmillan, Prime Minister of the United Kingdom, to the Houses of Parliament, Cape Town* published on the authority of Mr. Speaker (Cape Times Ltd. Parow 3 February 1960)

6 A. Horne *Macmillan 1957-1986* (London 1986) 204. He was equally candid about other participants.

a multi-racial association and expressed the need to ensure good relations between all member states and peoples of the Commonwealth.’<sup>7</sup>

The SA Opposition criticized the government later that month for failure to ensure racial peace at home. Government policy isolated SA from the West. International isolation could be extrapolated from the decline in support at the UN during the years of National Party rule. When apartheid had been raised in the GA for the first time in 1952, 24 had voted against SA and 34 abstained. In 1959 the figures were 63 to three with seven abstentions. In the Security Council in 1960 not a single vote was cast for SA.<sup>8</sup>

### 9.1.3 *SA withdraws application*

The referendum on becoming a republic was held on 5 October 1960 and provided Verwoerd with the mandate he sought. When he opened Parliament the following January the Governor-General announced that the Prime Minister would advise the Commonwealth of the result of the referendum and convey SA’s desire to remain a member on the basis that the form of government of each member was its own concern. Verwoerd and Louw left for London in March 1961 to put this request. It failed and SA’s application was withdrawn, in the light, according to the communiqué, ‘of the views expressed on behalf of other member Governments and the indications of their future intentions regarding the racial policy of the Union Government’.<sup>9</sup>

The Canadian Prime Minister, John Diefenbaker, told his Parliament that the heads of government, other than Verwoerd, believed that ‘to give unqualified consent to South Africa’s application would be to condone the politics of apartheid’. They could not compromise on the question of racial discrimination, if the Commonwealth, ‘irrespective of race, colour or creed’, were to have ‘a mission for all mankind’.<sup>10</sup>

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7 N. Mansergh *Documents and Speeches on Commonwealth Affairs 1952-1962* (Oxford University Press 1963) 362

8 *House of Assembly Debates* Vol. 105 19 May 1960 cols. 8107ff; cf. para. 9.2.

9 Horne *op. cit.* 391

In the UK House of Commons, Macmillan ascribed the result to Verwoerd's unwillingness to make the slightest concession to the views of his colleagues, 'or to relax in any form the extreme rigidity of his dogma'. He pointed out that constitutional change had not been at issue since India had established a precedent by adopting a republican constitution in 1949. SA had recognized this by agreeing that its domestic policy might be discussed. Macmillan regretted the outcome of the meeting, because the participants should have tried to help rather than 'avert [their] eyes and pass by on the other side'.<sup>11</sup> The Commonwealth, he said, had become an association of peoples, no longer a group with a common allegiance, but one based on a common idealism.

For India, Pandit Nehru described the problem as one not only of fundamental human freedoms but also of national self-respect. The basic condition for the Commonwealth to survive was strict adherence to the policy of racial equality. The result had strengthened the organization by putting equality 'on the highest level in the world'. SA had virtually been isolated from world opinion.

In Canberra, Menzies said that, unlike him, a considerable number of Prime Ministers sought SA's exclusion. Two sought a declaration that SA's policies were incompatible with membership, another reserved the right to move for the Union's expulsion or to withdraw itself, a fourth had said he would attack apartheid and SA membership whenever possible. Although it had not been expelled technically, Menzies believed the Union had been given no option. Verwoerd had not conceded the domestic jurisdiction principle but, for SA to remain a member, 'debate about apartheid was inevitable'. The rule of non-interference once broken could be broken again.

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10 Mansergh *op. cit.* 365-400 recorded the statements of some participants to their respective Parliaments in chronological order.

11 This was a Jesuitical explanation, for Verwoerd had thought the policy debate would be part of a session at which the other African members would also come under the spotlight. Presumably Macmillan felt that by keeping SA a member, the Commonwealth could have influenced its domestic policies for the better, an opportunity that was lost once SA withdrew.

In Ghana, Kwame Nkrumah said he had examined the possibility of changing SA by force of example. He had tried to do so; even offering to exchange diplomats but a three-year negotiation had failed. He doubted that keeping SA in the club was a viable policy.

#### *9.1.4 Verwoerd explains to Parliament*

Cancelling a visit to President de Gaulle in Paris, Verwoerd returned immediately to SA to inform the House of Assembly why he had withdrawn the application. He offered three reasons. First, SA's domestic policies would have been considered fair game at future meetings or anywhere else. Secondly, there was a threat that calls might be made for SA's expulsion and, thirdly, other states might reconsider membership. Verwoerd explained that he had made the serious concession of agreeing to explain the government's colour policy because refusal to do so would have ruined the chances of a successful application. The argument that the matter would not have been discussed had SA abandoned its plans for a republic was, he said, unsound. The constitutional change was immaterial, as the Afro-Asians intended to try to force SA at every opportunity to abandon its colour policy. What they sought was 'the domination of superior numbers in the name of full equality'. As for diplomatic relations (to which Ghana had referred), they could not be established with unfriendly countries. If they changed their attitude, Verwoerd had told them, friendly visits would follow and the exchange of missions could be considered. India had had a mission in SA, as did the United Arab Republic. The allegations that SA had implacably refused were unfounded.

Withdrawal from the Commonwealth, he said, offered the advantages of continuing domestic policy unhindered, saving friends embarrassment and having time before a republic was established to enact the necessary legislation. In his final statement to the meeting, Verwoerd had expressed his regret and that of the SA people and observed that opposition had emanated from Prime Ministers 'in whose countries oppression and discrimination are openly practised and where the basic principles of democratic government are openly flouted'. He had had Ghana, India, Malaya and Ceylon in mind

but others were not free from these practices and made little attempt to discontinue them even if their laws did not expressly allow them.<sup>12</sup>

## 9.2 Sharpeville

### 9.2.1 *Demonstrations against pass regulations*

Six weeks after Macmillan's 'winds of change' speech, Verwoerd told the House of Assembly on 21 March 1960 that the PAC, a militant offshoot of the ANC, was provoking its supporters to protest the obligation to carry passes. Intimidation had begun the day before and had recommenced that morning.<sup>13</sup> While the debate on his Vote proceeded, police opened fire in the native township of Sharpeville on some 20,000 demonstrators, causing many fatalities. Similar incidents occurred in other parts of the country then and on the days following. Verwoerd insisted that the riots were not in reaction to apartheid or to the pass laws. For law-abiding natives, he said, the reference books were a protection against uncontrolled urbanization and unemployment. It was no burden to carry them at all times, just as whites did their pocket books. The disturbances were a periodic phenomenon similar, but on a smaller scale, to those in other parts of Africa in recent months, as well as to disturbances in SA in 1946-47 when the United Party was in power. The countrywide agitation had been planned and drew much of its force from the sustained attacks, both internal and external, on the government's policy over the previous ten years.<sup>14</sup>

### 9.2.2 *Security Council seized*

On 25 March 1960, the Afro-Asian group at the UN requested an emergency meeting of the Security Council in terms of Article 35(1) of the Charter 'to consider the situation arising out of the large-scale killings of unarmed and peaceful demonstrators against racial discrimination and segregation'. These events endangered international peace and security.<sup>15</sup> SA hoped to oppose the inscription of the item but in the absence of a

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12 *House of Assembly Debates* Vol. 107 cols. 3335-3337 and cols.3482-35 21-23 March 1961

13 *Idem* Vol. 104 cols. 3577 ff 21 March 1960

14 *The Times* London 23 March 1960

15 A/4494 Report of the Security Council to the General Assembly 16.July 1959–15 July 1960 4

precedent, the chances of its representative being allowed to speak prior to the adoption of the agenda appeared negligible.<sup>16</sup>

Shortly before the Sharpeville demonstrations, the SA permanent representative had returned home to attend a family bereavement. His deputy, H.P. Martin, approached the US, which presided the Security Council that month, with the request that SA be allowed to participate in the discussion on the adoption of the agenda and that the meeting be postponed to await the permanent representative's return. Martin also spoke to the Secretary-General, who acknowledged that the *démarche* was reasonable. In his personal view, however, there was 'rough justice' in the practice not to grant such requests as they 'could be used to hold up Council progress in cases such as aggression'.<sup>17</sup>

Louw disputed the 'ethics of a procedure which would debar the Union from contesting inscription', as the situation was unprecedented. The Security Council could not make an informed decision without hearing the 'Union's arguments and the factual information' which only its representative could supply. The President's unwillingness to effect a reasonable postponement denied an elementary right and implied 'acceptance of spurious claims as to both nature of events and sense of urgency'. If he could not oppose, the SA representative should protest immediately after inscription, or as soon as the Afro-Asians had spoken. He should not comment on their interventions in case it was interpreted as participation in a debate on the substance but could refer to 'distortions and inflammatory statements'. He should then leave the chamber to seek further instructions.<sup>18</sup>

The Security Council President, Martin replied, denied that his decision against postponement prejudged the case or accepted Afro-Asian claims. He was also subject to instructions 'which I took to imply that Washington was at least partly behind decision'. The President would prefer to put the matter to a vote, despite the weight of precedent against SA, in view of its importance in other cases. Since the Security Council was

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16 10/3/1 tel. No. 27 25 March 1960

17 *Idem* tel. No. 30 26 March 1960

18 *Idem* tels. 20 SEA to Washington, 24 SEA to Safdel 28 March 1960

master of its own procedure, Martin took this as a hint of the US line, even if the SA case was indeed unprecedented.<sup>19</sup>

The UK permanent mission to the UN told Martin that it had advised the Foreign Office that the Security Council President was sympathetic to the SA request but could not agree to a delay of more than a week. He would fix the date for 30 March, the day before his term of office expired.<sup>20</sup> He would also prefer to hear SA before the agenda was adopted, but the UK representatives felt the weight of precedent would be against him, if the demand were opposed. The President might be able to arrange for SA to speak first in the debate, as a gap after the complaint's inscription would diminish the impact of its statement. An alternative was to send W.C. du Plessis, the SA Ambassador in Washington, a former permanent representative, to state his government's views.<sup>21</sup>

The permanent representative, B.G. Fourie, recalls that before he left SA, Louw told him to limit his argument to Article 2(7). Fourie felt that such an approach was inadequate.<sup>22</sup> Louw must have reconsidered, possibly on the basis of a UK request, for on 30 March External Affairs instructed that the main emphasis should not fall on that paragraph but on other chapters of the Charter.<sup>23</sup> SA should refer in particular to Article 34, which set out the powers of the Security Council to consider disputes that could endanger international peace and security. As the events were purely internal, the article did not apply to SA. Article 33 made it clear that a dispute involved more than one party, otherwise any state could claim that an internal situation affected international security.

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19 *Idem* tel. Saleg to SEA No. 32 28 March 1960. More accurately, the Security Council was bound by its Rules of Procedure, unless and until amended by the appropriate machinery.

20 The Presidency of the Security Council rotates among its members alphabetically on a monthly basis.

21 10/3/1 tel. Saleg to SEA No. 162. Calling upon the Ambassador in Washington was an odd suggestion, even had the SA government been agreeable. He was no longer accredited to the UN and much time might have been lost while new credentials were prepared in Cape Town and cabled to New York.

22 Discussion with author 9 October 2004 and confirmed in B.G. Fourie *Brandpunte* (Tafelberg 1991) 41.

23 10/3/1 tel. No.31 30 March 1960. In an unnumbered minute 1 April 1960 the SA High Commission, London, reported that the Commonwealth Relations Office hoped that the SA representative would not limit himself to Art. 2(7) but deal with the factual situation and contradict 'any false assumptions introduced by the proposers'. The UK Opposition had refrained from criticizing the government's tactics, thus enabling the Foreign Secretary to authorize the UK representative to take a strong line on the importance of Art. 2(7).

The SA permanent delegation reported that the debate had already started when the new instructions were received. The permanent representative had in fact arrived in time for the debate, to be advised that there was no question of speaking before inscription. As no objection was made to the inclusion of the item, the President did not put it to the vote.<sup>24</sup>

In his opening statement, Fourie relied on Article 2(7), quoting several past speeches in the GA in support of the domestic jurisdiction principle, and making only passing reference to Articles 34 and 35. He asked why SA should be singled out when many other disturbances and riots ‘leading to a serious loss of life’ had occurred elsewhere during the past year. Although judicial enquiries were proceeding, the Union could not allow the allegation of ‘mass killing of unarmed and peaceful demonstrators’ to go unchallenged. Fourie offered a description of events similar to that Verwoerd had given the House of Assembly. He explained that the reference book consisted of an identity card ‘which, under our laws, applies to male and female of all races’ and contained a section noting particulars of tax payments etc. The reference book was intended to counter uncontrolled influx of unskilled labour from the rural to the industrial areas and the social problems that would result. It distinguished locals from the residents of outside territories who flocked to SA without any identification papers.

Demonstrators armed with a variety of weapons had, Fourie said, attacked the police and fired shots at them. Recent murders of both black and white police carrying out their normal duties in other parts of the country showed that their retaliation at Sharpeville had been for self-protection. They had ‘an elementary right to defend their lives when threatened by mobs not amenable to the ordinary methods of control’. Communist style pamphlets calling for the destruction of the capitalistic state and the establishment of a People’s Republic had been circulated in advance.<sup>25</sup> It was essential, Fourie asserted, that the law be obeyed, whether one agreed with it or not. The SA government would ensure

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24 B.G. Fourie *Buitelandse Woelinge Om Suid-Afrika 1939-1985* unp. ms. 1990 43; A/4494

25 One such predicted bloodshed on 26 June 1961 when ‘volunteer soldiers must be prepared to sacrifice for freedom and organise more people to join the ANC’. It reached New York too late for inclusion in the statement. After vilifying the ‘swines of Dutch origin’ who knew they were a bastard race, it stressed that there was no place for the white man in SA.

that order was maintained. Should the Security Council dissociate itself from this vital principle of constitutional government, it would take a step of unforeseeable consequences. If the present discussion added further incitement to the rioters to attack not only the police but also peaceful citizens, the blame would accrue to the members of the Security Council. Fourie then withdrew ‘from a chair at the table to one in the hall’, to report to his government for instructions.<sup>26</sup>

### 9.2.3 *Security Council debate*

Tunisia opened the substantive debate by denying the validity of Article 2(7), as the matter had been settled in the GA.<sup>27</sup> The Security Council had to act to bring the situation to an end and ensure the observance of human rights and fundamental freedoms for all. India said the new developments ‘transcended the considerations of geographical location and political ideologies and were threatening to engulf all mankind in an enormous tragedy’. The UK and France argued for the limitation explicit in Article 2(7), although they opposed policies of racial discrimination. The former based itself on a motion adopted in the House of Commons, which, ‘while recognising that [the UK] had no responsibility for or jurisdiction over the independent countries of the Commonwealth’, wished to record its sympathy with all the peoples of SA. The problems of other countries should not be under-estimated and the Security Council should approach them with strict regard ‘for the limitations in which it could legitimately express its opinion’. Its role was to alleviate tensions not to exacerbate them.<sup>28</sup>

Ecuador submitted a draft resolution deploring the SA government’s policies and actions and calling on it to initiate measures towards racial harmony based on equality and to abandon apartheid. It asked the Secretary-General to consult with SA with a view to making arrangements to uphold the purposes and principles of the Charter and to report whenever necessary and appropriate.

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26 10/3/1 Statement by Mr. Fourie in the Security Council, tel. 34 to SEA 30 March 1960

27 This was a doubtful assertion, as the functions of the two bodies differed.

28 10/3/1 UK Mission to the UN Press Release 31 March 1960

Louw authorized Fourie to return to the table and make a later intervention in the debate, concentrating on other articles of the Charter and the endangering of international peace and security. ‘You can then elaborate on argument that there is no such danger in this case unless perhaps certain states harboured designs on South Africa even before recent happenings there’ (my emphasis). Fourie was to refer to other incidents which were not raised in the UN, including those in India in 1956 and the despatch of 1000 troops by the US government to maintain law and order in Little Rock, Arkansas. ‘Ask whether Security Council has a double standard of conduct and justice.’<sup>29</sup> Fourie stuck closely to his new brief. He quoted the incidents in India but avoided Little Rock. With one exception, the Soviet Union’s accusation that SA was embarking on the mass destruction of other races, he refused to reply to criticisms of government policy. He had, he said, already expressed the government’s regret at the loss of life of some 73 persons but put the question: ‘If this constitutes the mass destruction of other races, how would [the Soviet] describe the loss of life running into hundreds of thousands elsewhere?’

Ecuador’s proposal was adopted by nine votes to none with two abstentions, France and the UK.<sup>30</sup> France doubted its timeliness and legitimacy, while the UK felt it exceeded the proper function of the Security Council. African participants and India would have preferred a stronger resolution but were satisfied with its recognition that the events in SA had led to international friction and might endanger peace and security.<sup>31</sup>

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29 *Idem* unnumbered tel. SEA to Safdel New York 31 March 1960

30 S/RES/134 (1960) 1 April 1960. The operative portion of the resolution read:  
The Security Council...

1. *Recognizes* that the situation in the Union of South Africa is one that has led to international friction and if continued might endanger international peace and security;
2. *Deplores* that the recent disturbances in the Union of South Africa should have led to the loss of life of so many Africans and extends to the families of the victims its deepest sympathies;
3. *Deplores* the policies and actions of the Government of the Union of South Africa which have given rise to the present situation;
4. *Calls upon* the Government of the Union of South Africa to initiate measures aimed at bringing about racial harmony based on equality in order to ensure that the present situation does not continue or recur, and to abandon its policies of apartheid and racial discrimination;
5. *Requests* the Secretary-General, in consultation with the Government of the Union of South Africa, to make such arrangements as would adequately help in upholding the purposes and principles of the Charter and to report to the Security Council whenever necessary and appropriate.

31 10/3/1 tel. 39 Safdel to SEA 1 April 1960. Fourie explained to External Affairs that several telegrams had arrived too late for use in the debate. References to other disturbances, such as Little Rock, risked backfiring. The support of the US, which still presided, and of the West, notably France, was essential to counter an Indian suggestion that oral evidence be heard from ANC representatives.

In his report of 5 April 1960, Fourie claimed that his short description of events had helped to change the tone of the debate. It had also enabled the Union's side of the story to reach millions of people and forced the complainants to revise their original allegations of mass murder. Both Ceylon and India had admitted to disturbances in their own countries and elsewhere. Such incidents, they said, differed from the SA situation in that they were not the result of 'a consistent, deliberate, and persistent effort to destroy the competition of a certain group of people with the minority community in the country'. India added that if SA gave up apartheid and racial discrimination, 'we shall have nothing to say about any civil commotion that might happen in South Africa'. Some Africans, the reported noted, would have preferred a proposal for sanctions even if it were vetoed, as failure in the Security Council would have enabled them to raise the matter in a special session of the GA (where their voting power gave them more leverage).

### **9.3 Meetings with Secretary-General**

#### *9.3.1 Preliminary discussions*

The Secretary-General immediately telephoned the SA permanent representative, who agreed to call on him 'within the framework of the general relationship' existing between SA and the UN, 'not in terms of the resolution adopted by Council'. The Secretary-General indicated that he was not sure of the type of arrangements to be made. The request in paragraph 5 of the resolution<sup>32</sup> did not amount to a 'delegation of authority from the Council' and he did not interpret his task as being related to the other paragraphs. Nevertheless, a formal approach to SA could not be delayed. They agreed that enquirers would be told that a meeting had taken place at the request of the Secretary-General but that 'there was no consultation on the basis of the Security Council resolution'. Urquhart relates that the Secretary-General had decided to use the 'Peking formula' by which he acted on the basis of his authority under the Charter, not under a resolution. This was a procedure adopted to facilitate a meeting between him and Premier Chou En-Lai, before the Peoples Republic of China had been admitted to the UN and while the Republic of China (Taiwan) still represented the mainland. In effect a UN

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32 For text see fn. 30.

member could not reject an approach from the Secretary-General unless it rejected the authority of the Charter. The only challenge to this authority lay in an allegation that he was exceeding the limits prescribed by Article 2(7). That article was not a limitation, if the Security Council found, 'as it had done in the case of the Sharpeville massacre, that a domestic situation is also a threat to international peace and security'.<sup>33</sup>

Louw wrote to the Secretary-General, Dag Hammarskjold, agreeing that the proposed basis for a meeting with Prime Minister Verwoerd was acceptable. It would remove his government's difficulty that consenting to discuss the Security Council resolution with the Secretary-General could imply that SA recognized 'the competence of the Council' and accepted the UN's right to intervene in the Union's domestic affairs. The meeting opened a prospect of ending the discord of the past 14 years, which had 'tended to increase the difficulties of the Union Government in dealing effectively with the complex human relations in South Africa'. Louw's government welcomed the opportunity to set the record straight. The Secretary-General's visit to SA should take place after the reports of the judicial commissions but preliminary talks between them in London during the Commonwealth Prime Ministers meeting could help.<sup>34</sup> The Secretary-General agreed. He advised the Security Council in his interim report that SA's consent to discuss the resolution with him would not require the Union government to recognise UN authority. 'It seems to me,' cabled the SA permanent representative, 'that the Secretary-General is still searching for a formula...to get question for the time being out of propaganda field' and to avoid becoming embroiled in SA's racial problems.<sup>35</sup>

While arrangements were being settled, the External Affairs budget vote produced some strong criticism of its Minister in Parliament. The Opposition insisted that although the

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33 10/3/1 tel. No. 43 2 April 1960; Brian Urquhart *Hammarskjold* (Harper Colophon Books 1984) 495 ff; cf. Fourie, *Buitelandse...* 49. Urquhart's interpretation of the resolution's statement that the situation was one that had led to international friction 'and if continued might endanger international peace and security', was strained. It was a Chapter VI comment not, as Urquhart implied, a Chapter VII finding which would have entailed a mandatory resolution rather than the recommendation which emerged from the debate.

34 10/3/1/1 vol. 1 11 April 1960

35 *Idem* 1 26 April 1960; S/4305 19 April 1960

Charter might impede the UN, the rigid legal argument no longer provided real protection. 'The White people in South Africa are in a minority; this Government represents a minority of the Whites, and we therefore have in the eyes of a world a handful of Whites, a minority minority, trying to defy the world.' The Minister, said the Opposition, had a duty to advise the Cabinet of the international impact of its domestic policy. Louw replied by recalling other riots in Africa. SA, he said, had opposed the Security Council debate, only partly on the basis of Article 2(7). He was aware of the divergent opinions about the article. 'The attitude of South Africa - you may call it a rigid or a narrow interpretation - is that we adhere to the strict interpretation.' Discussions with the Secretary-General did not contravene the principle.<sup>36</sup>

The discussions between Louw and Secretary-General Hammarskjold took place in London on 13 and 14 May 1960. They confirmed the views that had been exchanged in New York. The Secretary-General explained that he had no special political authority; the arrangements he had been asked to make in terms in paragraph 5 of the Security Council resolution were administrative and within his normal competence. SA was exercising its sovereignty in speaking with him. As a member it had every right use his services and those of the Secretariat and nothing could be done without its agreement. He could not involve himself with SA's domestic policies unless the Union asked him, but, as the emissary of the other members, it was his duty to express their concern. Asked whether the concern was justified, the Secretary-General said that the African nationalists were politically motivated. Like the professional troublemakers who fed on such incidents, amongst whom he counted the Communists, they would not be satisfied with any feasible 'arrangement'. The West was responsible and honest but needed to be assured that the Union government applied reasonable human rights safeguards.

Providing such assurance was the Union's task, not his, Hammarskjold said, but he had given thought to the possible appointment of a judge, as in Sweden, who would have special powers to examine grievances (he did not then use the word ombudsman). If necessary, such a person might correspond with him, or arrange some other way for his

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36 *House of Assembly Debates* Vol. 105 cols. 5509 ff 19-20 April 1960

report to come to the attention of the UN, without the Union acknowledging its status in any way. There might be, the Secretary-General believed, other avenues but he did not advise a UN commission. The Union could not be expected to accept one and would as easily accomplish anything a commission could. Louw was encouraged by these ideas. The difficulty was 'to devise something which would not in any way prejudice our approach on the question of domestic jurisdiction and non-intervention'.<sup>37</sup> It was agreed that the Secretary-General would come to SA in the last week of July 1960.

Although there would be no obstacles, the Minister said 'it would not be wise to engage in outside discussions', especially with the ANC and PAC 'which were illegal organisations'. The Secretary-General replied that he would give more thought to the question of contact allowed. Urquhart wrote that Hammarskjold emphasized 'he would wish to have free access to all persons he might wish to see'.<sup>38</sup> The crises in the Congo caused the Secretary-General's visit to be postponed until January 1961 and the Security Council took no action, pending the outcome of the talks.<sup>39</sup>

### 9.3.2 *Developments at 15<sup>th</sup> GA*

When Louw arrived in New York for the 15th GA, the Secretary-General advised that he wished to submit a second interim report to the Security Council and asked for an indication of proposals Prime Minister Verwoerd might make at their meeting. Verwoerd cabled that he was concerned to avoid any hint that SA would grant the UN a voice in the Union's internal affairs. He was aware that SA should not insist on a wording that might provoke a condemnatory discussion but did not wish to create the idea that his policies

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37 10/3/1/1 vol. 1 Notes on the London Talks

38 Urquhart *op. cit.* 496

39 Peripheral to the discussion with the Minister of External Affairs, the Secretary-General was asked to give his views on the racial question in SA (10/3/1/1 vol. 1 unsigned and undated memorandum). He saw only two completely just and equitable solutions, total integration or total separation. 'From the human rights angle there was no distinction, value-wise.' There was merit in development along traditional lines but the tendency in Africa to adopt Western procedures meant that native traditions in SA would have to be modernized. While there were historical precedents for skipping some intermediate stages in development, it would be wrong to impose external patterns on the Bantu, just as he felt it was unwise to graft British parliamentary traditions on to the African peoples. Total separation seemed unlikely, as many blacks would remain permanently in the white areas. 'To say they can exercise their civic rights in the Bantu areas if they go back does not answer the question in practice.' Louw stressed that his government's policy was one of total separation.

would be submitted to the UN for consideration. He was willing to inform the Secretary-General of the rationale and aim of apartheid but not to submit plans for palliating the Security Council. The UN's tendency to intervene in unstable regions should not be used in other areas under the pretext of maintaining peace. SA was not an emerging state, nor was the UN a world government which could ignore its Charter.<sup>40</sup>

Louw replied that the Secretary-General only wished to learn whether the government had in mind any steps to ease the position. Louw had received an advance copy of the draft interim report, which ended with the sentence: 'It would be my intention to submit to the Prime Minister proposals which would provide for appropriate safeguards of human rights with adequate contact with the United Nations'. Louw felt the wording could be interpreted 'as a threat which would prejudice proposed consultation' and suggested saying instead that he 'discuss with the Prime Minister means which could be devised for upholding the purposes and principles of the Charter'. Hammarskjold did not amend his draft, which also stated that no restrictive rules were to be placed on the Secretary-General.<sup>41</sup> The General Debate at the 15<sup>th</sup> GA was troubled by a confrontation between the Soviet Union and the Secretary-General over the continuing problems in the former Belgian Congo. The dust had not settled by the time he left for SA.

### 9.3.3 *Secretary-General visits SA*

The long-awaited visit took place from 6-12 January 1961, while the 15<sup>th</sup> GA was in recess.<sup>42</sup> When they met, Verwoerd said that SA had tried to work constructively with the UN as an instrument of peace and harmony 'which are its true aims', but was under constant attack. SA experienced hostility in the GA, while the West from whom it had inherited the problem was sacrificing it 'for the dubious friendship of the "uncommitted" states of Africa and Asia'. SA's efforts to maintain peace and order at home did not

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40 10/3/1/1 vol. 1 tel. No. 107 SEA to Safdel 30 September 1960

41 *Idem* tel. 116 Safdel to SEA 1 October 1960 S/4551 11 October 1960. The interim report was meant to reduce pressure on the Security Council to revert to the apartheid issue by explaining why events in the Congo had forced the Secretary-General to delay his visit to SA.

42 This section is based on 10/3/1/1 vol. 1 memo: Brief record of talks between the Prime Minister and the Secretary-General of the United Nations Pretoria 6-11 January 1961 1st draft.

threaten world peace. It was a victim of the Communist anti-colonial campaign to fuel the 'aspirations of certain African politicians'.

After the Prime Minister had explained the motivation and objectives of separate development (not reflected in the record), the Secretary-General expressed his general understanding but drew attention to doubts in world opinion. There was a 'built-in' ambiguity in the homelands policy. Although designed for self-development, it amounted to trusteeship by the central authority, over which the territorial authorities could exert no influence. Other doubts included the policy's financial and economic practicability, the equitable delineation of the homelands, the rights of the urban natives, and human rights legislation in general. Unless the policy was viable, uncertainty could lead to tension between black and white, stimulated by international propaganda.

Verwoerd replied that the appointment of commissioners-general in the native areas was evidence of good intention. They were likely to be followed by a consultative council, where he would meet leaders of the territorial authorities and of the ethnic groups in the urban areas. Border and tertiary industries would reduce the influx to the cities and be accompanied by automation in white areas. He foresaw a 'circular movement from Bantu areas to urban areas and back', political rights being retained in the homelands. Any assessment of equality of land distribution should include the UK High Commission Territories of Basutoland, Bechuanaland and Swaziland.

The Secretary-General felt that the transition stage remained uncertain. Human rights did not have a purely local resonance, as migratory workers had an international status. 'Could the Union not find a formula which satisfies it that human rights are taken care of but which at the same time gives symbolic expression to the built-in quasi-international status of the problem?' It might be preferable to channel intervention rather than to try to avoid it. The choice lay between the Afro-Asian predilection for integration, which white SA would not accept, and separation. The problem for the West, which could not afford to antagonize the Afro-Asians, was the choice of tactics. The matter was urgent, as the Africans would not leave the initiative to the Asians, nor the Asians to the Communists.

If the Union were to gain support for its separation policy, Hammarskjöld continued, it would have to define the boundaries and status of the native territories, grant them some form of pre-recognition and put forward an imaginative economic programme. Even so, SA would remain a mixed society. Civil rights were one thing but the world was concerned with human rights. Race-based domestic legislation prompted an international reaction. SA should consider some form of concession to and linkage with the UN, such as an ombudsman, whose reports would provide an indication of the intricacy of the problem. The Prime Minister felt, however, that the ombudsman proposal could develop into a court sitting in judgement and be misused by outside organizations. It would be seen, in practice if not in theory, as infringing SA parliamentary sovereignty, while any relationship with the UN might compromise his government's stand on accountability. A disappointed Secretary-General said he had envisaged the ombudsman as an adviser, not a judge, who would help to keep the effects of policy in focus. The mere fact of his existence should help to mute criticism.

Since it was important that the Secretary-General not return to the Security Council empty-handed, Verwoerd agreed to recommend to Cabinet that contact be maintained. He would consider speeding up the achievement of his policy objectives and defining them more clearly, while avoiding any suggestion of accountability. Much would depend on the UN refraining from actions designed to embarrass his government. The Secretary-General felt it unwise to link future visits to the homelands policy as this might lead to his mandate being extended to cover the implementation of paragraph 4 of the Security Council resolution, which called on SA to abandon apartheid. So far he was only expected to try to find some kind of 'arrangement' without formalizing its nature.

Neither side felt able to go further and it was agreed to issue a statement that the Union government had found the talks useful and that contact, including future invitations, would be maintained. On his return to New York, the Secretary-General advised the Security Council that, while no mutually acceptable agreement had been found, its lack was inconclusive. He wished to continue the exchange and further his efforts to find an

adequate solution. His visit had enabled him to have ‘unofficial contacts with various members of the South African community’, although he had had to return two days early to brief the Security Council on events in the Congo.<sup>43</sup> The Security Council noted his report without debate. In the House of Assembly, the Prime Minister reiterated that sovereign independence was not infringed. A spirit of understanding had prevailed, ‘even though, as could be expected, most divergent points of view had at times to be put on both sides’. The Secretary-General had been free to meet whomsoever he wanted but had been unable to accede to all the huge number of requests. The invitation to him to visit SA would be renewed as and when appropriate.<sup>44</sup>

The SA permanent representative reported that that Hammarskjold had told his senior officials of the Prime Minister’s ‘personal honesty and integrity of purpose’ and that they should get the question ‘in its right perspective’. He apparently told certain delegations, including India and Tunisia, that they should give SA time. He might, thought the permanent representative, have managed to erect a temporary dyke. The Africans were in no hurry for the Security Council to meet, probably preferring to put their case in the resumed GA session where their resolutions stood a better chance of acceptance. Wieschoff, one of Hammarskjold’s senior aides (who died with him in an aircraft crash outside Ndola, Northern Rhodesia, later in the year) had suggested a procedural move of holding talks in London after the coming Commonwealth meeting there, as it might ease matters in the GA. The permanent representative felt that such meetings could lose their value if they became commonplace. It would be better to hold them in reserve in case a serious situation arose.<sup>45</sup> Hammarskjold and Verwoerd were not to meet again.

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43 S/4635 23 January 1960

44 *House of Assembly Debates* Vol. 106 cols. 15-16 23 January 1961. Urquhart (*op. cit.* 496-499) confirmed the ‘surprisingly good’ atmosphere of the talks with Verwoerd. His quotes from Hammarskjold’s unpublished records were similar to the External Affairs record but with a much stronger tone than the latter’s more nuanced reflections. Hammarskjold, he wrote, ‘began by criticizing both the theory and the practical application’ of apartheid. ‘He expressed himself as frankly shocked both at the South African legislation itself and at its application’. The ‘unpracticability and the unacceptability of the current policy created a risk that the whole structure might collapse in the most tragic circumstances’. As often the case with UN reportage, Urquhart gave no space to Verwoerd’s explanations.

45 10/3/1/1 vol.1 3 February 1961

#### 9.3.4 *Verwoerd analyzes 15<sup>th</sup> GA*

The Prime Minister's Vote in the House of Assembly coincided with the end of the 15<sup>th</sup> GA and the voting on the SA items there. Verwoerd stressed that SA was a member of the UN. The organization had suffered an influx of member states 'which were completely inexperienced even so far as their own government was concerned, and much more so in regard to international policy'. They had become a pawn of the cold war. Calling themselves non-aligned, many were becoming 'thoroughly committed', mostly to Russia, while taking all they could get from the West. Hence, SA could expect more attacks instigated mainly by the Communists in their struggle for world domination. The West was most unfairly prepared to jettison SA to gain their favour. It had served no purpose to give UN members information on apartheid. Louw had done so for the first time in 1959, with some success, but 'within a year they had forgotten all about it'.<sup>46</sup>

Verwoerd told the House that Prime Minister Macmillan had warned him in 1960 that the UK would have to sacrifice the non-intervention principle, as it no longer believed the SA government's domestic policy to be covered by Article 2(7). When the time came to yield on a principle, even one both governments had espoused for many years, Macmillan said, one had to adapt. The decision had preceded and could not be linked to SA's withdrawal from the Commonwealth. The UK, Verwoerd noted, had opposed the sanctions proposal at the GA. Other states had opposed it as well, which proved they were not ready for drastic action.<sup>47</sup>

During the same debate Verwoerd advised Parliament of the government's reluctant acceptance of the fact that the different native areas would have to develop into 'separate Bantu states'. It was not what he had had in mind and in normal circumstances whites would have continued to rule over the whole country. However, SA could no longer

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46 A year marked by Sharpeville. The statement contradicted Louw's assertions that information had been provided in the past.

47 *House of Assembly Debates* Vol. 107 cols. 4155 ff 10 April 1961

ignore ‘the new views in regard to human rights’ as well as ‘the power of the world and world opinion and our desire to preserve ourselves’.<sup>48</sup>

## 9.4 Conclusions

### 9.4.1 *Republican status*

The National Party’s decision to hold a referendum on changing SA’s constitutional dispensation affected only the white electorate, those who wished to retain the monarchy and those who preferred a republic. Verwoerd interpreted his mandate as one to remain in the Commonwealth on his terms, i.e. non-interference in SA domestic policy. There must be some doubt that he and party really wished to continue membership and it can be argued that the debate in London in 1961 provided the loophole he was seeking.<sup>49</sup>

Internally speaking, the change from a constitutional monarchy to a republic was a small one in practice, amounting to the replacement of an hereditary monarch by an elected president. Most of the existing constitutional machinery remained. As Wiechers argued, the essence of the SA system of government was not affected by the change.<sup>50</sup> SA had simply converted from a constitutional monarchy to a constitutional, i.e. non-executive, presidency and power continued to reside in the hands of an elected Prime Minister and his ruling party.

Despite the variations in their constitutions, SA and its fellow members of the ‘old’ Commonwealth including the UK were, with the exception of India, all constitutional monarchies answerable to an electorate. The substitution of a president did not change the internal nature of this accountability. The political institutions of Commonwealth members were democratic and they all held regular elections. They were seen as democracies. May stated unambiguously that despite the contrary impression created by its critics, ‘the Union’s constitutional system is essentially democratic’. Apart from the

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48 *Idem* col. 4193

49 See para. 9.1.2.

50 M. Wiechers *VerLoren van Themaat’s Staatsreg* 3rd ed. 223. At 215 Wiechers noted: ‘*Met enkele uitsonderings is al die bepalings van die Zuid-Afrika-wet herroep en herbepaal.*’

possibility that a ministry could be driven from power by a vote of members of Parliament, it was also possible for a government to lose its majority at a general election. A parliamentary term expired every five years, after which the electorate was 'free to show its confidence or otherwise in the government at a general election. This is not the position in a dictatorship or totalitarian form of government.'<sup>51</sup>

Universal suffrage was not an integral component of a democratic state but SA differed from other Commonwealth members in that it officially maintained and extended voting qualification restrictions on grounds of race. One explanation for this difference lies in the internal ethnic ratios of the Commonwealth states. The Union government's concerns that whites would be submerged, did not affect the others. The immigration policies of Australia, Canada and New Zealand were as racially restrictive as were those in SA but they were treated essentially as questions of domestic jurisdiction and did not compound their problem.

The timing of the change in SA was what counted. The Commonwealth was opening its ranks, as Verwoerd noted, to states that were linked, not by race and tradition, but by having been subjects of a British monarchy. Had he lost the referendum, even that connection would not have sufficed to protect SA from criticism by the new members. The Union government's position was already virtually untenable and would have deteriorated further. Commonwealth meetings would, in the context of African decolonization, have become extensions of GA debates on apartheid. The new states would denounce anything less than total political equality for all SA's different racial groups. From Verwoerd's viewpoint it was obviously preferable to grasp the nettle.

The problem becomes clearer against the background of diplomatic representation. Verwoerd's rather equivocal explanation to Parliament that the new Commonwealth members were unfriendly is unconvincing. The right of chancery is both active and passive but to insist that relations between countries must be friendly before representatives are exchanged, is exaggerated. The presence of a resident diplomat does

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51 May *op. cit.* 131-132

no more than indicate that relations between two states have not reached a point of actual hostilities. A more credible interpretation is that the concession, small as it might have seemed to others, would have had a considerable impact internally. It would have been impossible to prevent the African envoys, their families and suites from enjoying publicly the full spectrum of social and cultural life denied to most population groups in the country of their accreditation. An equally compelling reason was that their presence would have facilitated contact with the resistance movements. This was true of India and had been a reason for the closure of the Soviet mission in the mid-fifties.

It should be borne in mind that, although SA's adoption of a republican form of government gave some of its critics, like the United Arab Republic, an opportunity to withhold recognition, it did not affect its status in the UN. In terms of the Charter, membership was confined to states, whose form of government was irrelevant. Even the condition laid down in Article 4 that member states should be peace-loving, had yielded to the principle of universality. Neither did the Charter contain a provision that the government should be representative of its inhabitants, a criterion that would have disqualified several states over the years. The single ground for loss of membership was persistent violation of Charter Principles, which could lead to the invocation of the expulsion machinery provided for in Article 6, a provision that has not been invoked throughout UN history.

#### 9.4.2 *Justification of discrimination*

An indication of the fragility of the SA justification of its domestic policy in the international arena after 1959 is that Verwoerd was driven to follow the *tu quoque* argument Louw had espoused at the GA, with as little effect. In a political forum, the moral or immoral acts of third states do not serve to justify one's own. In a negative manner, such acts could have been raised in the ICJ, as evidence (or lack thereof) under Article 38(1)(b) of the ICJ Statute 'of a general practice accepted as law'.<sup>52</sup> This was one reason why UN members preferred not to consult the ICJ on SA domestic issues but

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<sup>52</sup> SA would argue along these lines when it denied the existence of a 'norm of non-discrimination' before the ICJ in the *South West Africa Case, Second Phase* ICJ Reports 1966.

assumed the right to decide themselves. It was generally accepted that no country was free from criticism in the field of human rights practice but, so long as it was moving in the appropriate direction, it was to a large extent exempt from attack over discriminatory practices. This applied *a fortiori* to states which, like the Afro-Asians or the Latin Americans, were members of a cohesive regional bloc. SA's membership of the looser Commonwealth alliance had not provided the protection it needed but its departure from that club would teach it the meaning of isolation.

#### 9.4.3 *Sharpeville in Security Council*

The announcement of the coming referendum, the 'winds of change' speech and the Sharpeville demonstrations did not have apparent direct links, yet their chronological proximity underlines their combined impact. The call for a referendum, so soon before Macmillan's visit, would have appeared as calculated to him, as was his own unusual action in failing to provide his host with an advance copy of his 'winds of change' speech. The timing of the PAC demonstrations on the very day of the debate on the Prime Minister's Vote may well have been stimulated by Macmillan's speeches on his African tour and was unlikely to have been purely coincidental. The PAC pre-empted the ANC, which had also decided on an anti-pass campaign. Both actions were planned for March 1960.<sup>53</sup>

The UN was caught unawares by developments in SA but the Security Council reacted swiftly to the Afro-Asian request for an emergency meeting. The speed of its response was intended to placate the Africans but served, particularly under the US presidency, to compensate for its impotence during the Hungarian and Suez crises three years earlier.<sup>54</sup>

Since there was no precedent for a debate that involved neither a dispute between states nor a threat to the peace, it might be thought that the UK could have taken a stronger line than simply following past practice.<sup>55</sup> Had it done so, however, it would doubtless have lost the battle and possibly the influence it hoped to exert in the debate. The decision to

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53 Various authors, see i.a. F. Meli *South Africa Belongs to Us* (James Currey Ltd.1989) 140.

54 For details see para. 7.4.1.

55 See para. 9.2.2.

adopt the easier alternative of not opposing inscription or pressing the SA request was wise in the circumstances. It was the first UK expression of views at the UN since Macmillan's 'winds of change' speech and in a forum that carried more weight than the GA. A tightrope existed in that a fellow member of the Commonwealth was under attack for policies the UK Prime Minister had just queried in Cape Town. Britain was still a colonial power. It was not the time or the place for a radical change and the speech gave little indication of one. Nevertheless the UK's failure to veto the resolution presaged problems ahead for SA. Whether the UK or France would have interposed a veto had the Security Council tried to make a Chapter VII finding, is arguable. The fact that they abstained on a lesser resolution, on the grounds that it exceeded the Security Council's authority, suggests they might well have vetoed stronger action.

The Security Council's resolution was, despite the efforts of the Soviet Union, relatively muted. It made only a finding of 'international friction' which 'if continued might endanger international peace and security'. African influence was more limited in the Security Council than in the GA. Tunisia was the continent's only representative in 1960 but the Africans were able to put their leverage in the GA to good effect. Their continuous calls for sanctions led the Security Council to make a Chapter VII finding in August 1963 and impose a mandatory arms embargo against SA.<sup>56</sup> By that time U Thant of Burma was Secretary-General and, as SA was no longer a member of the Commonwealth, the threat of a UK veto had receded.

#### *9.4.4 Secretary-General*

The role assigned to Secretary-General Dag Hammarskjöld in the Security Council resolution<sup>57</sup> was the outcome of behind the scenes lobbying, as he was unhappy with the strong, definitive mandate the Afro-Asians wanted. Few delegates expected SA to speak to him; some even hoped that, if his effort failed, the Security Council would meet again

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<sup>56</sup> S/RES/181 7 August 1963

<sup>57</sup> See para. 9.2.3 fn. 30.

and provide an opportunity to raise the emotional level of the debate with a view to a stronger resolution.

Since SA was unwilling to negotiate with the Secretary-General on the basis of the Security-Council resolution, an alternative solution was found in the Charter. According to Articles 97 and 98, the Secretary-General is the 'chief administrative officer' of the UN. He performs such other functions as the major organs may entrust to him. The GA and the Security Council could therefore entrust him with *ad hoc* political functions, since the two articles did not exclude them. In this case, however, his actions related to his administrative position. Urquhart's view that a precedent for the SA talks existed, because Hammarskjold had met Premier Chou En-lai of the Peoples Republic of China in Peking in terms of the same articles, was mistaken. His reference to the 'Peking formula' missed the point that the Peoples' Republic of China was not technically a member of the world body (except in the Gilbertian sense that Taiwan was deemed to speak for it). The explanation Hammarskjold gave at the meeting with Louw, that SA was exercising its sovereignty when it chose to make use of the Secretary-General's services, which were available to all UN members, was a better description. It enabled SA to give its domestic jurisdiction argument a more positive application.

Both sides had a specific, if contrary interest, in the way the talks were presented; yet neither record was published. The External Affairs version was marked Top Secret. The public was left only with the official description of the meeting as 'frank, constructive and helpful'. Both Verwoerd and Hammarskjold preserved a strictly objective position in public, possibly in the hope that something positive might emerge from subsequent meetings. Fourie's comment that Hammarskjold's death on 17 September 1961 was a greater setback for SA than most South Africans imagined carries considerable weight.<sup>58</sup> Under his successor, U Thant, the pendulum swung back to the GA and the negotiations came to a halt. The intensity of the attacks on SA in the GA increased and Louw became

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58 B.G. Fourie in *Verwoerd: Só Onthou Ons Hom*, ed. Wilhelm J. Verwoerd (Protea Boekhuis 2001) 129. Hammarskjold, he explained, had submitted ideas on avoiding the worst problems with the UN. He could not be considered a friend but such goodwill as he did display was based on his respect for Verwoerd. 'Daar was weer 'n opflikkering van hoop in ons soeke na 'n vergelyk met die VN.'

more intractable and abrasive, until the urbane Dr. Hilgard Muller succeeded him on 9 January 1964.

#### 9.4.5 *Parliament*

In Parliament respect for human rights and non-discrimination as a moral issue remained unspoken, with the rare exception of the Natives' Representatives. Neither the UDHR nor the draft human rights covenants surfaced in the House of Assembly debates on Sharpeville and its aftermath. No party was prepared to risk alienating its electoral base by challenging the premise that the white man must retain control of the country, even of the areas allocated to the other races or population groups.

Verwoerd asked Parliament during the debate on his Vote why Britain had renounced the principle of domestic jurisdiction. 'Why does she also adopt the attitude today that a matter which is an internal concern of ours...is no longer governed by the principle of non-interference?' That SA's racial policy had repercussions outside its borders was only an excuse. The real reason, he concluded, was to avoid losing political and economic influence over the Afro-Asians. While this may have been an accurate assessment of UK motives, it was a misreading of the UK statement in the Special Political Committee at the 15<sup>th</sup> GA. The UK had not abandoned Article 2(7); it had explained that the uniqueness of apartheid was the basis of its vote. The domestic jurisdiction principle, where other member states were concerned, was in the UK's opinion still valid.<sup>59</sup>

Verwoerd's claim that the UK vote at the 15<sup>th</sup> GA was not related to SA Commonwealth membership was obviously rationalization. Warnings had, it is true, been given that the UK was having second thoughts but, even after the 'winds of change' speech in 1960, the role it played in the UN remained unchanged. Only on 24 March 1961, in the immediate wake of SA's withdrawal from the Commonwealth, did the UK abstain on the Indian item in the Special Political Committee. A week later it adopted the new line on apartheid and thereafter changed its abstention on the Indian issue to a positive vote in

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<sup>59</sup> *House of Assembly Debates* Vol. 107 10 April 1961 cols. 4186-4188. Cf. paras. 2.16 and 8.10.1.

Plenary. The UK delegation seems to have been as taken aback as any other by the events in London. A reading of the UN records of the debates at the GA suggests that it received new guidance from the authorities in Whitehall as a result of the SA withdrawal.

The pressure under which SA was struggling, in its relations both with the UN and with friendly states, was revealed by the manner in which Verwoerd advised Parliament of the government's reluctant decision that the different native areas would have to develop into 'separate Bantu states'. His statement justified Louw's assertion to Hammarskjold during their discussions in London the previous year that the aim of the apartheid policy was total separation. Perhaps Verwoerd was more convinced by Hammarskjold than he admitted. The concession made no impression on international opinion, however, nor on the GA, which continued its attacks with increasing intensity. As Machiavelli rightly pointed out, 'in adversity harsh remedies are too late and the good that you may do is of no avail since it is counted as forced and you get no thanks for it'.<sup>60</sup>

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60 N. Machiavelli *The Prince* translated by Thomas G. Bergin (Franklin Library 1983) 27

**CHAPTER 10**  
**GENERAL RELATIONS WITH UNITED NATIONS**

**10.1 General Debate**

A standard method for a member state to express its views in the UN was to participate in the General Debate, which opened each session of the GA and served as a barometer of international relations. A delegation could comment on any aspect of international affairs and often used the opportunity to explain its country's policies over the past year or to criticize shortcomings in the organization. The General Debate could also reflect relations between individual members. It was a tool SA did not employ to best effect. During most of the period covered by this thesis External Affairs officials asked in vain to be allowed to play a more constructive role in the work of the UN. When the Union government finally acceded to their request in 1958, the changed membership of the organization and the abrasive tactics employed by the Minister of External Affairs rendered the effort futile. This chapter surveys the deterioration of the National Party administration's relations with the UN.

*10.1.1 SA's early participation*

After the National Party victory in the elections of May 1948, the Department of External Affairs prepared a brief on the UN for the Minister of Economic Affairs, Mr. E.H. Louw, who was appointed to lead the SA delegation to the 3<sup>rd</sup> GA. The brief took into account ideas the new administration had expressed in Parliament but was not so overtly hostile towards the world body. It described the Charter as often abused but as an 'admirable document that purported to establish the rule of law for the rule of arbitrary force'. SA applied the rule of law at home and expected the UN to do the same. The Union would not undertake obligations other than those in the Charter, nor accept that the UN's jurisdiction could be made to exceed the ambit of the Charter, either by resolution or by interpretation. The brief stressed that the SA delegation 'should defend the right of any member, even a critic, to accept or reject a resolution for sound reasons' (my emphasis). Constructive participation was the appropriate policy. Criticism from friendly states should be answered tactfully but if SA were again placed in the dock at the GA, it might

have to reconsider its position. ‘No public statement...committing the Union to a particular course of action, should be made without prior Government approval.’<sup>1</sup>

When he ascended the rostrum at the 3<sup>rd</sup> GA, Louw spoke for a government that had been elected only four months earlier on a platform of apartheid (which implied that it would apply internal discrimination as a matter of policy). His speech was more critical than his predecessors’ analyses of the successes and failures of the UN.<sup>2</sup> The GA, Louw said, had become a platform for ideological propaganda poisoning relations between Europeans and non-Europeans and for attempts to intervene in the domestic affairs of member states. If the UN continued on this road, SA might have to reconsider its membership. Only frank discussion could avert the UN’s inevitable collapse.

Louw reported to Malan that his statement had made a very good impact. The SA delegation had regained some of its lost prestige. He proposed to continue these tactics and would not be concerned by the voting on SA issues. *‘In die internasionale wêreld geniet die land wat vasstaan ‘n baie groter prestige as dié wat altyd gewillig is om te buig onder wat genoem word “wêreld opinie”.’*<sup>3</sup> H.A. Andrews, who had served on the SA delegations to the first two GA sessions, suggested with greater tact in his report on the 3<sup>rd</sup> GA that the Union’s strategy at the earlier sessions had helped to reduce opposition ‘riding upon a wave of anti-imperialism’ after the war. By 1947 several delegations were helping to moderate the tone of the resolutions on SA items. In 1948, Andrews remarked, Louw put SA’s case even more effectively, so that opponents abandoned the legal approach for the moral stand. He added: ‘An attitude of firmness – *fortiter in re* – must of course be maintained; but we can lose nothing by continuing to be *suaviter in modo*.’<sup>4</sup> This statement flew in the face of Louw’s strategy and manner. Leif

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1 PM 136/2 AJ 48/49; see paras. 2.3 and 3.4.1.

2 GAOR1st part 3rd sess. Plenary

3 PM 136/2/11 vol. 2 29 September 1948. On his return home Louw commented that South Africa’s prestige in the UN was very low. He wondered whether it was worth £150,000 to attend meetings where he mixed with ‘Siamese and Indians and Russians and God knows what’. The Opposition referred to this remark during the budget debate when the House was asked to approve an additional £11,000 for the UN budget for 1949. The Minister of Finance responded that the annual contribution approved at a GA session was a constitutional obligation (*House of Assembly Debates* Vol. 64 April 1949 cols. 2403-2404).

4 PM 136/2/11 vol. 2 letter 83/3 11 January 1946

Egeland, the SA High Commissioner in London, wrote in a similar vein. Even SA's friends, whose support had been unwavering, he said, determined their attitudes 'more by overriding considerations of policy than by entire agreement with our standpoint.'<sup>5</sup>

At the 4<sup>th</sup> GA, the SA delegation was for the first time led by an official, Mr. G.P. Jooste, Ambassador to the US. In the General Debate, he complimented the UN on its successes and asked what ideology would replace it, should it fail. Shortly after the session, he reported to the Prime Minister that the GA had taken a strong line over human rights.<sup>6</sup> No civilized state, he wrote, rejected the theory that man had inalienable rights. Since the war, discrimination had become a relic of the past. Human rights, he added, were internationalized by distinguishing between their political and legal aspects and adopting decisions based on political arguments. Many delegates thought sovereignty an outdated concept and saw the UN becoming a world parliament.

The Union's friends, Jooste continued, wanted SA to play its rightful part and were eager for a gesture that it did not simply regard the UN with contempt. The drafting of the human rights covenant would be a major issue at the 5<sup>th</sup> GA. The Union should, he advised, consider careful participation when the subject was debated and align itself with states that sought to unite the UN against 'illegal' action and to form an effective institution. The GA should be obliged to consult the ICJ whenever so requested by a member state.<sup>7</sup>

#### *10.1.2 SA walkout from 5<sup>th</sup> GA*

Dr. T.E. Dönges, Minister of the Interior, led the delegation to the 5<sup>th</sup> GA. His arrival was delayed and Jooste again delivered the SA statement in the General Debate. It followed the conciliatory lines he had proposed to Malan. SA government policy, he claimed, aimed to raise the living standards of all the peoples of Africa. It was aware of

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5 *Idem* minute PS 16/11/17(?) 31 January 1949

6 P.M.136/2/13 vol. 1 20 March 1950

7 This was a reversion to Jordaan's suggestion before the 2nd GA. It indicates that the opposition to the ICJ was political, rather than administrative. See para. 2.2.1.

the task ahead and was ‘making great sacrifices towards its fulfilment’.<sup>8</sup> The UN was not composed of states with an identical outlook and culture and it was ‘not the function of the Organization to remould the peoples of the world to a common pattern’. When he arrived in New York, Dönges told the GA that the time for sneers and vituperation was past. ‘Such abuse of this forum may gain cheap applause and fleeting fame, but what does it do to build bridges between nations?’<sup>9</sup>

The SA delegation’s participation in the work of the session was severely affected by the decision of the Fourth (Trusteeship) Committee to hear oral representations from ‘certain Herero Chiefs’. The Prime Minister first ordered the delegation to withdraw from the session but agreed to a more limited gesture: it should boycott the debates in Plenary and curtail its work in the committees. In his report on the session, the deputy permanent representative, J.R. Jordaan, discerned two schools of thought on these tactics. The more hostile group said openly that the SA delegation would rejoin the debate. The refusal to allow Hereros to address the GA was ‘clear proof that we had something to hide and that we lacked the courage to face our accusers’. The more ‘responsible’ delegations, especially Western Europe, thought SA could enter its usual strong reservations, then expose distortions and tell the world where the government was headed.<sup>10</sup>

The report evoked much discussion in External Affairs. There was some support for the idea of going over to the attack and, as R.H. Coaton put it, ‘exposing the social weakness of our main critics...the Asiatics, the Arabs and the South Americans’. The consensus was, however, that an attempt of this kind would backfire. Similar efforts in the past had failed. External Affairs prepared background material on other countries for use at each GA but the delegation left it untouched, as its authenticity was doubtful and its detail unsure. Many of the target countries, most officials believed, were those the West preferred not to alienate. The blocs they represented commanded a voting majority in the GA. Whatever their actual practice, none touted racial discrimination as official policy.

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8 PM136/2/13 vol. 1 25 September 1950

9 GAOR 6th sess. Plenary

10 PM 136/2/16 vol. 1 Report 12/7 to the Ambassador Washington 5 March 1952.

There was merit in a proposal to inform delegations on the actions of other states but the problem was the method and the forum. ‘For every one statement we can deliver’, B.G. Fourie insisted, ‘our opponents can counter attack in 30 to 40 replies’.<sup>11</sup>

Jooste continued to pursue his tactics of moderation in the General Debate at the 8<sup>th</sup> GA in 1953. On this occasion he turned the spotlight on the need for economy. The multiplicity of UN agencies, commissions and committees entailed expenses some states could not afford. ‘Material costs are involved which countries like my own could often devote more justifiably to the immediate and essential welfare of their citizens’.<sup>12</sup>

## **10.2 1955 – year of change**

1955 was a watershed year. Dr. Malan retired in December 1954 and was succeeded by J.G. Strijdom. For the first time since Union, the portfolio of External Affairs was separated from that of the Prime Minister. Strijdom’s appointment of Louw as Minister of External Affairs was symbolic of a hardening approach towards the UN and the Commonwealth. Jooste was transferred to London and replaced as permanent representative by the High Commissioner to Ottawa, W.C. du Plessis.<sup>13</sup> In New York the Charter was due for possible review. Finally, the membership of the UN increased by over 25% at the 10<sup>th</sup> GA, although the impact of the change would only be felt in 1956.

### *10.2.1 SA calls for return to Charter values*

The 10<sup>th</sup> GA was preceded by an anniversary meeting of the UN in San Francisco. Louw attended and devoted his address to his standard analysis of the Charter, notably the misuse of the veto and of the provisions of Article 2(7). He called for a return to original Charter values. Back in Pretoria he instructed that Du Plessis be told to follow the same line in the General Debate. The gist of his instruction was that over a nine-year period

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11 *Idem* various memorandums prepared in April 1952

12 GAOR 8th sess. Plenary 103-104

13 A former private secretary to General J.B.M. Hertzog and official of External Affairs, Du Plessis had resigned when asked by Smuts to give up his membership of a quasi-secret society of Afrikaners, the *Broederbond*. He was elected to Parliament in the 1948 election, defeating Smuts at Standerton, but returned to External Affairs at the end of 1953 as a political appointee. He served on the SA delegation at the 9th GA during which he succeeded Jooste as leader.

the Union had been subjected to ‘unfair and often malicious attacks’, through the constant repetition of arguments it had consistently refuted. The SA items had become a Roman holiday for some whose own records fell short of the principles to which they paid lip service. SA would not reply indefinitely. It would confine itself in future to opening statements and take no further part in debates. The SA delegation would not attend the committee meetings on its items, as the GA had gone to ‘the utmost limit in transgressing the provisions of Article 2(7) of the Charter’.<sup>14</sup>

Du Plessis followed the Minister’s instruction at the 10<sup>th</sup> GA and, in the usual reference to Article 2(7), said that all who had heard the debate on the meaning and purpose of the article at the start of the 10<sup>th</sup> GA ‘must agree that those who argued for the right of intervention were fairly consistent in one thing, and that was in ignoring the clearly expressed intention of the authors of the Charter’. They interpreted it ‘purely in the light of the political self-interest of the chance majority at a given time’ with little regard for legality. The UN was not a court of law, neither were most delegates lawyers. Such case law as was built up had to be traced to its source, if it were to have any authority at all. That source was the San Francisco records.<sup>15</sup>

The other side of the coin as far as SA was concerned, namely the problems involved in a re-examination of Charter values, emerged before the session. In terms of Article 109(3), the 10<sup>th</sup> GA had to consider the desirability of a review of the Charter. The approaching ten-year deadline for the review had enabled Jooste to approach the General Debate from a slightly different angle at the 8<sup>th</sup> GA. Many reasons, he said, justified amending the Charter. The problems did not always lie in its provisions but often in their abuse. Article 2(7) had suffered more consistent violation than any other. Some members

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14 136/2/17 vol. 1 memorandum August 1955. Louw’s draft instruction for Du Plessis’s speech included a comment that, as this was the last occasion the Union would deal with the attacks, it might be useful to ‘refute the charges of “oppression” of the non-whites, etc., etc.’. Although deleted from the final directive, its initial inclusion suggests that the initiative of the officials had made some impression but that the government had still to make up its mind. Louw may have wanted to test the non-participation tactic before considering stronger action. He was not attending the GA and might have preferred the force of a ministerial presence (his own?) to buttress a change in direction.

15 GAOR 10th sess. 528th Plenary

wished its restrictions to disappear; others had based their decision to join the UN on the protection the article offered. Their differences could be reconciled by following the amendment procedures prescribed in Chapter XVIII of the Charter at the proper time.<sup>16</sup>

The directive for the 10<sup>th</sup> GA noted that, while Article 109 of the Charter referred to a ‘review’, it had become customary to speak of ‘revision’. The word ‘review’ suggested that a conference might consider the UN’s successes and failures and ways to improve its functioning, without necessarily amending the text. Revision implied a greater likelihood of amendment. A review conference risked worsening the position. If the Union tried to clarify the meaning of Article 2(7) its proposals would probably result in the ‘affirmation of the attitude adopted by the majority over the past ten years’. If the article were amended to conform to current trends, the Union government might have to reconsider its membership of the UN. The Minister commented that in view of the dangers inherent in an amendment, it would be better to leave well alone. As for the tendency to give GA decisions the force of law, thereby indirectly amending the Charter, Louw remarked with undisguised sarcasm: ‘I doubt whether on that ground we could suggest a revision’.<sup>17</sup>

#### *10.2.2 Universality becomes principle of UN membership*

Of more immediate effect on both the UN and SA than a review of the Charter was the decision at the 10<sup>th</sup> GA to admit new members. Until that session membership applications were examined individually, not entirely on merit but within the framework of the cold war and the *quid pro quo* principle. Several had been held up by the refusal of non-Communist members to approve the admission of the remaining Soviet-bloc states. In retaliation, the Soviet Union blocked other applicants.

An agreement was finally brokered to admit 16 of the outstanding applicants on the basis of the principle of universality, i.e. all applicants were eligible. Some delegations protested that this violated Article 4 of the Charter, which limited membership to peace-

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16 GAOR 8th sess. Plenary 101-104

17 136/2 AJ 1954 10th sess. The GA followed a middle path. With GA Res. 992(X) of 21 November 1955 it established a committee to report to the 12th GA on an appropriate time to hold a review conference.

loving states able and willing to carry out the Charter obligations.<sup>18</sup> France said some delegates were concerned with ‘the expediency of inexorable political circumstance’ where political considerations overrode legal principles.<sup>19</sup> The Preamble to the Charter called for the establishment of ‘conditions under which justice and respect for the obligations arising under treaties and other sources of international law can be maintained’. The UN could not achieve that aim by violating the Charter.<sup>20</sup>

### 10.3 Token representation

As recorded earlier, the SA government decided to withdraw its delegation from the 10<sup>th</sup> GA as a result of the Special Political Committee’s proposal to continue the UNCORS mandate. The decision received general approval in Parliament where the Opposition spokesman said that as he interpreted ‘the general feeling of the people of South Africa...drastic action was probably justified in the circumstances’. Permanent withdrawal, however, would be unwise. It was far better to stand one’s ground. The Union had friends who had supported it and it should do the same for them.

Louw replied that, while some support was received, it was not unqualified. SA would ‘continue to wage this struggle against the contempt with which U.N.O. treats...its own Charter.’<sup>21</sup> It would not leave the UN, unless membership became impossible. As important matters would be discussed at the 11<sup>th</sup> GA, including SA Indians, he would lead the delegation. The UN, Louw said, had admitted 16 new members, mostly from the Soviet bloc or members of the Bandung group of developing nations. Together these groups could block important decisions, i.e. those requiring a two-thirds majority. With more admissions expected, the future for the Western nations was not rosy. Much of the voting took place on a *quid pro quo* basis rather than the merits of the issue. An

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18 GAOR 10th sess. Plenary. Peru argued speciously that Art. 4 had to be interpreted both in its literal significance and its spirit. The latter enjoined universality, subject only to the ‘discretionary action of a member of the Security Council’. Since treaties must always be interpreted in the light of their objects, and the object of the UN was universality, ‘then the overriding principle in the interpretation of Article 4 must be universality.’

19 The UK Prime Minister would use the same argument to Verwoerd in 1960 to justify his decision to end support for the South African stand on domestic jurisdiction over apartheid. See para. 9.3.4.

20 As if to prove the primacy of political expediency, however, France abstained on the First Committee resolution and, a week later, voted for all 16 states recommended by the Security Council.

abstention in the UN was a voting method Louw chose to interpret as negative, on the principle that those who are not for you are against you.

Prior to the 11<sup>th</sup> GA in 1956 the SA permanent representative wrote that universality was firmly entrenched in UN thinking and that the organization's prestige was improving. Many friendly delegations felt that temporary withdrawal from the GA no longer had any moral or tactical effect. Almost no one considered Article 2(7) a bar to discussion and recommendation. Louw's tactical line at the session, however, which Cabinet approved in advance, was to oppose the inscription of the two SA items on the agenda and use the General Debate to convey the government's response to whatever action the GA had decided upon. When he spoke unsuccessfully against inscription in Plenary, Louw said it was the last time he would explain his reasons. SA's patience was not inexhaustible. The atmosphere of the meeting, he reported to Pretoria, could be gauged by the fact that his announcement of a SA contribution to Hungarian relief 'was received in complete silence'. He would make the statement approved by Cabinet.<sup>22</sup>

In the General Debate Louw said appeals to Charter principles were seldom more than lip service. The decision to permit the continuation of the Indian vendetta, with its Soviet and other allies, had forced his government to take stock of its position. It had decided that, while remaining a member of the UN, SA would maintain token representation at the GA. His government hoped that the views of the more responsible states would finally prevail.<sup>23</sup> Summing up the session, the SA permanent representative, D.B. Sole, called Article 2(7) a 'dead-letter to be invoked only in the interests of consistency'. Competing ambitions in Africa could lead 'within a couple of decades to attempts at active intervention by other African states in the internal politics of the Union'.<sup>24</sup>

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21 *House of Assembly Debates* Vol. 91 cols. 4412 ff and 4432 ff 26 April 1956 and coll. 4506-7 27 April 1956. In Parliament the term 'people of South Africa' applied to the white electorate and was bipartisan.

22 14/15/3 vol. 13 tels. Safdel to SEA No. 69 15 November 1956 and. No. 70 16 November 1956

23 GAOR 11th sess. 577th Plenary 29-31. India countered that SA had been alone in opposing inscription: 'if India was vindictive, so was practically every other Member'. Hopefully SA might one day ask for such a discussion itself. India's statement exemplified the paternalistic tone it often adopted at the UN. The SA permanent representative, in fact, related a joke circulating at the time that there would be no lack of sponsorship for an item entitled: 'Treatment of the United Nations by a person of Indian origin'.

24 19/2 vol. 26 Memo 11th sess. of the General Assembly Agenda items 24 and 61 7 February 1957. The comment on Art. 2(7) echoes the view Fincham expressed in his 1948 thesis.

In Louw's absence, the Prime Minister said in Parliament on 2 May 1957 that, if the UN continued to flout Article 2(7), he predicted that SA would resign, presaging the downfall of the organization. Louw returned to the House of Assembly for his budget debate on 10 June. The Opposition acknowledged that SA understood why the delegation had withdrawn. However, the country now lay suspended like Mohammed's coffin, between heaven and earth. It would do better to return and participate in co-operation with friendly states. The Union could not fulfil its purpose in Africa in isolation.<sup>25</sup>

Louw stressed that SA faithfully carried out its UN obligations. Token representation meant that the delegation would vote only in the GA. It would limit its vote to matters where Article 2(7) had been invoked, to the election of members of the Security Council and, since SA would continue to pay its contribution, to Fifth (Budgetary) Committee matters. He denied that the SA delegation had failed to inform the UN on domestic policy. It had done so for years but no notice had been taken of it.<sup>26</sup> SA would resume its seat once the GA abandoned its strained interpretation of Articles 2(7), 55 and 56 but there was very little hope of it returning without a change of heart on Article 2(7).

Louw wrote to his Australian and New Zealand colleagues that, as the votes of the Afro-Asian group and the Soviet bloc were known, SA would be guided by the attitude of the Western group and the moderate Latin Americans in deciding whether or not to return. Were a substantial number of these nations to oppose renewed inscription of the SA items on the GA agenda, it would be a sufficient indication that sentiment had shifted. More votes against inscription could help to speed up the Union's return. SA missions abroad were asked to make a formal approach to the governments to which they were accredited. The Union was only concerned with the attitude of the Western countries. Unless a

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25 *House of Assembly Debates* Vol. 95 10 June 1957 cols. 7595-7611

26 It is difficult to reconcile this statement with the constant requests from the delegation to be allowed to explain the country's racial policy or with Louw's own comment to Malan before he left for Paris in 1948; cf. paras. 10.5 and 2.4.1.

substantial number voted against inscription, not merely abstained, it would not resume full participation. In fact a continuation of the present state of affairs might oblige SA to 'terminate its membership of the organisation'.<sup>27</sup>

Louw interpreted the result of the purely formal steps taken by SA at the 12<sup>th</sup> GA in 1957 to protest inscription of the items in a positive manner. Despite large majorities in favour of inscription, there had been a slight movement towards SA.<sup>28</sup> At the opening of the 1958 session of Parliament the Governor-General recalled that SA maintained token representation at the UN. The 12<sup>th</sup> GA had continued to interfere in its domestic affairs but debates, he said, were more conciliatory. Western nations had 'accorded South Africa a larger measure of support in its resistance to unconstitutional action by the United Nations Organization'.<sup>29</sup> This painted a somewhat rosy picture.

After the general elections that year, Louw, still Minister of External Affairs, advised Parliament that token representation had achieved its purpose and that, despite the likely re-inscription of the Indian and apartheid items, Cabinet had decided to resume participation in the work of the 13<sup>th</sup> GA, where SA would play a fuller role than in the past. 'During recent years there has been a reluctance (understandable in the circumstances) on the part of Union delegations to participate actively in the discussions. So, also, South Africa has declined nomination for the more important elective posts in the General Assembly, or election to the Security Council.'<sup>30</sup> As Minister of External Affairs, he would lead the SA contingent, which would at a suitable stage seek election to the Security Council.<sup>31</sup> Forty-eight years were to pass before SA made a successful bid.

Louw embroidered this theme at the 13<sup>th</sup> GA. Without the evidence of conciliation SA had observed at the 12<sup>th</sup> session, it would not have returned. The UN could not maintain

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27 14/15/3 unnumbered letters and circular to all heads of diplomatic missions 19 August 1957

28 *Idem.* Statement by the South African Minister of External Affairs 14 November 1957

29 *House of Assembly Debates* Vol. 96 col. 3 17 January 1958

30 This statement was yet another that can hardly be reconciled with the repeated appeals by officials to stand for election, sponsor resolutions or contribute to certain humanitarian funds. The reluctance, if that was what it was, rested solely with the government.

31 *House of Assembly Debates* Vol. 97 cols. 350-351 15 July 1958

double standards. 'It cannot regard the actions of one State as being constitutional and...similar actions by another State as unconstitutional.' The weakness of the Charter was functional rather than organic and 'could be remedied only by a firm resolve to apply it as conceived and drafted'.<sup>32</sup>

#### **10.4 Louw attacks human rights records of other states**

At the 14<sup>th</sup> GA, for the first time since 1946, SA was elected to a Vice-Presidency in the Commonwealth seat. Louw assured the Prime Minister that the election had had a positive effect. '*By hierdie mense tel rang, en 'n posisie van eer, nogal baie.*' SA was now looked up to, not treated as a criminal. At the banquet for Krushchev he had been seated at the head table, above the French and US Foreign Ministers. The average delegate noted such things; they enhanced the country's prestige.<sup>33</sup> In the General Debate Louw averred that an international instrument could not be dismissed as a legalistic formula, to be varied or disregarded at will. If the majority wished to violate the Charter, or disregard its explicit provisions, it was between them and their consciences.

Events after the Sharpeville demonstrations in March 1960 and prior to the 15<sup>th</sup> GA were not conducive to an easy session. The Second Conference of Independent African States in Addis Ababa on 24 June 1960 had adopted a resolution calling on its members to sever diplomatic relations with and to impose sanctions on SA. The resolution called on the UN (by implication the Security Council) to take appropriate steps under Article 41 of the Charter, i.e. the use of all measures short of armed force, to give effect to its decisions. Sixteen African states, mostly of the French *Communauté*, but also Nigeria, were due for admission to the UN while, to celebrate its 15<sup>th</sup> anniversary, the largest gathering of heads of state and government in UN history would attend.

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<sup>32</sup> GAOR 13th sess. Plenary 24 September 1958 134-136. Yet it is due to a dynamic interpretation of Charter provisions that the UN continues to exist. The actual amendments adopted so far have not affected the substance, purposes or principles of the Charter.

<sup>33</sup> 136/2/27 vol. 1 11 October 1959. For the first time Louw experienced what his officials had been saying for ten years. His analysis failed, however, to appreciate that seating was purely a matter of protocol. Both the dignitaries were Vice-Presidents like him but he was the longest serving Foreign Minister of the three.

When Louw intervened in the General Debate, he put into effect threats he had made in past years to examine the human rights records of other countries.<sup>34</sup> India, Louw said, had led the campaign against SA, but was itself guilty of state cruelty. In 1956 some 10,000 Free Nagas were believed to have lost their lives, yet the Security Council had never called India to account.<sup>35</sup> The caste system was an ongoing sore. ‘Our case at the United Nations would have been stronger’, he quoted an unnamed Indian author as writing, ‘if the high moral standards of human rights that Pandit Nehru demands for our people elsewhere, were available to them at home.’ African students complained of the treatment they received in India because they were black. Louw recorded Swedish and Norwegian discriminatory treatment of the Lapps, as well as the existence of slavery in Africa and the Middle East, notably Saudi Arabia. Iraq, which the World Bank said was ‘largely in the hands of sheiks and urban proprietors’, left its peasants to live in appalling poverty. It was in no position to accuse SA of violating Article 55 of the Charter.

The ‘unsavoury history of oppression and the denial of human rights and freedoms in the Soviet Union and its colonies’, Louw pursued, were well known. The presence of 16 new African states was sufficient reason for Krushchev’s ‘unexpected decision’ to lead the Soviet delegation to the GA. He seemed to be having some success in courting them. SA, Louw claimed, was as African as any of the new members. ‘The word “African” is a purely geographic term and does not have an ethnic connotation.’ The recent disturbances in the Union were due to subversive elements under Communist influence.

Louw pointed to racial discrimination in Liberia, where land ownership and voting rights were confined to persons of Negro blood. A SA author had written: ‘The peculiar interest of the country lies in this colonial exploitation of black men by black men’. By this he meant that the Americo-Liberian minority discriminated against the indigenous

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34 GAOR 1st part 15th sess. 905th Plenary 14 October 1960 723-730

35 The Nagas were a group of tribes inhabiting the Naga Hills which separated the Indian province of Assam from Burma (now Myanmar).

population.<sup>36</sup> Louw added that democratic rights were under threat in Ghana, whose President Nkrumah had accused SA of ‘a policy of racial discrimination and persecution which in its essential inhumanity surpasses even the brutality of the Nazis against the Jews’. Only 3% of the continent’s population, Nkrumah had said, was non-African. ‘To these minority settlers a solution seems impossible unless what they describe as “justice” is done to [them]’ irrespective of whether the other inhabitants were treated unjustly.<sup>37</sup>

Liberia exercised the right of reply. It admitted that the discrimination of which Louw accused it was indeed practised; otherwise, it said, Liberia would not have existed. Unlike SA, the Liberian government had invited an international commission in 1932 to investigate allegations of forced labour.<sup>38</sup> The SA claim to be an African state was false. Liberia asked how SA could ‘exploit, suppress and even kill its fellow men’ and then complain about interference in its domestic jurisdiction.<sup>39</sup>

#### *10.4.1 Louw courts disaster at 16<sup>th</sup> GA*

Shortly before leaving to attend the 16<sup>th</sup> GA in 1961, Louw told a meeting in Calvinia that it was not in SA’s interests to quit the UN. It would isolate itself. The difference in numbers between the West and the Communist/Afro-Asian bloc was small; the SA vote helped the former, while its defence of Article 2(7) could have a beneficial effect. He hoped to convince Western countries that SA was a ‘last fortress against Communism’.<sup>40</sup>

Mr. Mongi Slim of Tunisia was elected President of the 16<sup>th</sup> GA. In his acceptance speech, he said that world peace would remain seriously threatened until the spectre of racialism was exorcised. ‘The peoples of South Africa and elsewhere must regain their

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36 S. Cloete *The African Giant* (Collins 4th imp. 1958) 249. Louw ignored his officials’ advice that the use of the *tu quoque* argument was counterproductive. He seems from the evidence of his correspondence with his Prime Ministers to have been unaware of the negative impact of such remarks.

37 The Ghana Mission issued the text of President Nkrumah’s speech in pamphlet form. The pamphlet was banned in SA as ‘obscene or objectionable literature’.

38 Liberia had had no alternative, as it was appealing to the League of Nations for financial assistance. See H.A. Wieschoff ‘Liberia’ *Encyclopaedia Britannica* (ed. 1960) vol. 13 1006.

39 GAOR 1st part 15th sess. 905th Plenary 745 14 October 1960

40 10/2 vol.5 *SOUTH AFRICAN NEWS* Information Service of South Africa New York 18 August 1961

rights in full and, above all, their dignity in their own country.’<sup>41</sup> Louw immediately issued a press statement. Strict impartiality, he said, was a President’s most important qualification but it was lacking in the present incumbent. Mr. Slim had not followed precedent or he lacked good manners. The SA delegation could have no confidence in his presidency. It was not a statement calculated to win the Tunisian to his side.

During the General Debate, Louw castigated nations, like the Soviet Union, which championed human rights and dignity abroad but ignored them at home. As a representative of Africa he wondered whether the new members were all ready to assume their obligations. This was important in view of the Soviet call for all dependent countries, except for those it controlled, to receive independence. Ghana’s President, he said, was eliminating its parliamentary opposition, moving towards authoritarianism and, like Guinea, flirting with Moscow. Louw compared SA with other former colonial territories, showing in an implicit reference to Articles 55 and 56 of the Charter how advanced SA was in the fields of *inter alia* literacy, education, health, power and veterinary health. States that threatened SA with sanctions closed their eyes to colour, religious, caste and other discrimination, as well as to serious local disturbances, elsewhere. It was not enough to say that they were not the result of official policy.

‘In view of the special circumstances’, the GA President offered the floor to Ghana but gave it instead to Liberia on a point of order. The so-called ‘point of order’ culminated in a motion for Louw’s speech to be stricken from the record as a piece of fiction. Ghana then called on Louw to explain why SA should not be expelled from UN membership. Uruguay urged Liberia not to press the motion. The speech, it said, emanated from a government which had set itself up ‘as the one law, the one voice, the one opinion and the one authority which can invalidate all the resolutions of the General Assembly, all the resolutions of the Security Council and the advisory opinions of the International Court of Justice’. That was reason enough to keep the statement on record.<sup>42</sup>

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41 GAOR 16th sess. 1008th Plenary 20 September 1961

42 GAOR 16th sess. Plenary 387-398. Uruguay’s analysis was exaggerated but illustrated the emotional level of the debate. Other countries also ignored UN resolutions and ICJ advisory opinions.

Cooler heads prevailed after the lunch break. Other African states spoke. In greater or lesser measure they aligned themselves with a Nigerian request that Liberia reconsider its statement that SA by its action had shown that ‘this microscopic minority...is not fit to live on that continent’. Louw made a provocative response in favour of free expression. He could not agree that his remarks were in any way offensive, since 90% had related to SA’s internal policy, which was unjustly maligned abroad. His comparisons with other states had been perfectly justified not only by the facts but also in response to disparaging and insulting references to SA. Louw suspected that the entire process had been prearranged and would have occurred no matter how mild his criticism.

Liberia bowed to pressure and amended its motion to strike the statement from the record to one for a vote of censure of a speech that was ‘offensive, fictitious and erroneous’. With no objection, other than SA’s, the President put Liberia’s new motion to the vote. It was adopted by 67 votes to one (SA) with 20 abstentions. Nine countries, including Belgium, France, the UK and the US used the mechanism of not participating in the vote.

The SA Prime Minister, H.F Verwoerd, deplored this manifestation of double standards and the invasion of a member’s right to state its views. SA would continue to explain its apartheid policy ‘in the hope that the inherent justice, wisdom and humanity of that course’ would in time be understood. ‘Only then can this world organisation be saved from the failure and self-destruction which now threatens it from within.’<sup>43</sup>

### **10.5 South African officials call for constructive approach**

SA officials had long been concerned about the country’s standing at the UN. The files of both External Affairs and the SA permanent mission in New York provide many examples of calls as early as 1948 for SA to play a more meaningful role in the work of the UN. Political considerations and government concern not to prejudice its stand on domestic jurisdiction always outweighed their arguments. Just prior to the 9<sup>th</sup> GA, the

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43 Paris 30/6 vol. 1 I.13/2 14 September 1961

officials returned to the attack and again gave thought to possible ways of improving the country's standing at the UN. A draft memorandum indicated that the Union would not win support for its legal stand unless it improved its prestige in other areas, the most important of which was human rights. Not one delegation had failed to reject SA racial policies as a breach of its Charter and human rights obligations. The Union was not represented on a single major UN organ or permanent commission.<sup>44</sup>

A constructive approach to issues of importance to the UN was essential, the memorandum continued. SA might resume voluntary contributions to humanitarian programmes, like the UN funds for children, for refugees and for the Expanded Programme of Technical Assistance. The latter had the advantage that SA could offer technical assistance mainly to African countries, even a place at its universities, and profit from similar offers from other states through the UN. As the acquiescence of the recipient government was a *sine qua non*, there was no threat of interference. An application from a Communist, non-white or other undesirable could always be rejected on the ground that the facility was not available. When opportunities to stand for ECOSOC and the Security Council had arisen in 1950 and 1951, the memorandum recalled, the Prime Minister had rejected them. It might be time to reconsider.

Jordaan, then deputy permanent representative, felt that SA's past contributions justified membership of the main organs. External Affairs should plan on that basis. The Trusteeship Council was a non-starter and any candidate for the ICJ would have to establish his expertise in the Sixth (Legal) Committee or the ILC. The CHR could be excluded, 'because in present circumstances the Union will in all probability be non-co-operative and in consequence might well become a constant target for attack'. Only ECOSOC and the Security Council were left. The outlay was affordable and SA should not skimp on its national security or its international prestige. All matters in the UN,

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44 PM 136/11 draft memo 8 July 1954. Since 1945 SA served only on the Committee on Contributions and the Fiscal, Social and Transport and Communications Commissions. Even this limited interest in the organization's work did not survive the early years. At the 5th GA, for example, Jooste was invited to chair the important First (Political) Committee but Dönges, who desired his services on the delegation full time, obliged him to decline.

Jordaan pointed out, were debated and voted on in terms of the national interest of the voting state. Participation in the routine work of committees was a necessary precursor to election to office. 'I do not think,' he concluded, 'we have, on important matters with which we were not directly concerned, ever introduced proposals of our own...nothing adds more quickly to the stature and prestige of a delegation than the introduction and debate of sensible draft resolutions and amendments.'<sup>45</sup>

The High Commissioner, Ottawa, W.C. du Plessis, shared most of Jordaan's views.<sup>46</sup> He, too, had no doubt that human rights were the basis for the general attacks on SA but he disagreed that more constructive participation in the work of the GA was the right tactic. SA should first explain the philosophy, principles and achievements of its racial policies clearly and positively, avoiding *tu quoque* arguments, while maintaining its stand on domestic jurisdiction. Its action might not succeed but would encourage its friends. Other steps could follow. Both agreed that withdrawal from the UN was not an option.

External Affairs did not act on these suggestions. A note on Du Plessis's letter commented that he and Jordaan had considered all possible steps to improve the position: 'This was not our intention. We intended to deal only with the first and least involved steps we might take.' Du Plessis's letter was discussed with the Prime Minister, who was reported as feeling that the proposal would serve no purpose.

*Die V.V.O. verlang niks minder as algehele gelykstelling tussen alle rasse in die Unie en enige ander voordele wat ons aan die nie-blankes besorg is vir hulle van mindere belang. Waarom hulle dus 'n moontlike verdere stok in die hande stop deur op direkte en ooglopende wyse ons rassebeleid op die voorgrond te gaan stel?*<sup>47</sup>

The proposal to re-evaluate relations with the UN was resuscitated in 1956. The Secretary for External Affairs noted that he had often discussed the general question with the Minister and, unless there were new factors, he had a definite directive. A draft memorandum responded that no country could afford to write off the UN, despite its

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45 11/4/3 vol. 6 minute 11 20 July 1954

46 *Idem* minute 8/1 to SEA 27 July 1954

47 PM 136/11 note DS 7 September 1954

imperfections.<sup>48</sup> The Union had been told that it was not pulling its weight and might be written off as a country of no international consequence. In 1952 the Prime Minister had been alerted to the meagre role SA was playing. His reply was that consideration could be given only to standing for election to one of the major organs. This, the memorandum stressed, would require high-profile participation in the general work of the UN. Participation went hand in hand with financial assistance. Failure to contribute to extra-budgetary humanitarian funds since 1948 had damaged SA's international reputation. Even token contributions would 'give the lie to those countries which believe that our internal racial policy is coloured by a complete indifference to the wants of mankind in general'. Contributions would facilitate enhanced activity by SA in the work of the UN and enable it to propose resolutions or submit amendments instead of simply voting.

SA-UN relations complicated consideration of these suggestions. That they were unsuccessful then appeared from a background paper prepared for the 11<sup>th</sup> GA in 1956. The paper stated that the small European population of the Union, who would bear the burden of a voluntary contribution to UN technical assistance programmes, 'is already having to make sacrifices to finance the existing heavy developmental programme at home'. Domestic resources were taxed to the full. The government was unable to contribute.<sup>49</sup> External Affairs went further the following year in the directive on the budget estimates. It observed with concern an increase in the UN's extra-budgetary activities 'the size of which is no longer pre-determined', especially in the human rights field. 'Should, as appears likely, a move be made to integrate the administrative budgets of the regular and technical assistance programmes, it would be extremely embarrassing for the Union, which has made no voluntary contributions.' SA should oppose it.<sup>50</sup>

This attitude was revised only after SA decided to end token representation in 1959. SA announced at the 14<sup>th</sup> session of the GA that it would make a contribution of \$23,000 to

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48 136/11/2 undated memorandum

49 136/2 AJ 1956

50 136/2 AJ 1957. Louw clarified the government's opinion of UNICEF the same year in Parliament. 'It was a fund for children in war ravished countries. Well, countries cannot continue to be "war-ravished" for years and years and years' (*House of Assembly Debates* Vol. 95 10 June 1957 col. 7671).

UNICEF in 1960. It was part of a sum designed to give expression to the government's 'sympathy with action taken by the United Nations' in humanitarian fields.<sup>51</sup> The government would, SA said, make a similar sum available to the High Commissioner for Refugees, 'whose efforts and achievements it followed with admiration'. Cabinet had also agreed to make a token contribution of \$10,000 to the Expanded Programme of Technical Assistance. SA wished to give tangible evidence of its sympathy for the technical assistance programmes of the UN.<sup>52</sup> The gesture contrasted oddly with the growing hostility of the UN consequent on the increase of African member states. It had come too late. Sadly, the years of effort by the officials did not reap their just rewards.

## 10.6 Conclusions

### 10.6.1 SA approach to General Debate

In his General Debate address to the 3<sup>rd</sup> GA, Louw was, to say the least, more than frank. It seemed an unnecessary provocation to evoke the spectre of a possible SA withdrawal in the course of his first opening statement. His letter to Malan before his departure suggests that it was little more than an idle threat aimed at ensuring French, UK and US backing for moderate resolutions on SA.<sup>53</sup> He had in effect thrown down the new government's gauntlet. His views on Article 2(7) were less confrontational, since other speakers, notably the Soviet bloc, expressed similar views on the status of the article.<sup>54</sup> Louw failed to appreciate that their remarks did not amount to support for SA. They simply reflected the value of Article 2(7) to any state, other than SA, under attack for its domestic policy.

Jooste, at least at the outset, was more conciliatory. However, his assertion at the 5<sup>th</sup> GA that the world's peoples were not cast in the same mould and that it was not the UN's task to remould them to a common pattern was awkward. Most member states

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51 SA emphasized that it had contributed to UNICEF in 1946 and 1948, when it served on the UNICEF Executive Board, on the understanding that it was a single donation. Over and above the government's contribution of £108,280, the SA public donated £380,350 in 1948 bringing the total per capita contribution in that year to the third highest in the world.

52 136/4/37 Circular B.1 1960 13 January 1960. These contributions were repeated the following year. They may have been facilitated by Louw's election to a vice-presidency in 1959.

53 PM 136/1/1/2, undated letter *Hooggeagte dr. Malan*; cf. para. 2.4.1.

54 See paras. 7.2.1 and 7.2.2.

subscribed to the idea of a common pattern in the sphere of human rights. Otherwise there would have been no UDHR, no human rights covenants. No one disputed that discrimination might be justifiable; it was the nature of the discrimination that counted. Thus the undertones of Jooste's remark can hardly have failed to alienate many of his listeners. His call for economy at the 8<sup>th</sup> GA<sup>55</sup> was a more practical demonstration of the use that could be made of the General Debate. It placed SA on the side of the lesser nations who shared the same concerns. SA objections went deeper however. Although a detailed analysis in Pretoria three years later of the UN scale of contributions would indicate that SA was over-assessed, the 1953 call did not reflect genuine resentment at having to pay a share of inflated UN budgetary expenses.<sup>56</sup> The real point at issue was that SA was helping to finance commissions established to consider and report on SA items. Although it held them illegal, it could not reduce its budgetary contributions *pro rata*. There was thus an element of rationalization in the complaint.

#### *10.6.2 Admission of new members*

The adoption of a package deal in 1955 to admit 16 new members to the UN on the basis of universality had serious implications for SA. Whatever the rights and wrongs of the decision, the abandonment of 'long-held principles' by UN members held ominous overtones, since SA had nothing other than 'principle' to cling to, even if, as submitted earlier, its adherence that principle was sometimes suspect.<sup>57</sup> The number of new and prospective applicants would swell and almost all would join SA's critics. The compromise decision did not justify Peru's assertion that universality reflected the 'spirit' of Article 4.<sup>58</sup> The change of heart implied no sudden recognition by the UN that Article 4 was concerned with universality rather than maintaining peace and security but the practical effect was to change the nature of the article. The vote provided an example of amendment of the Charter by interpretation and supplemented Du Plessis's reference to 'chance majorities and the building up of case law, not on legal grounds but mainly on

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55 See para. 10.1.2.

56 A survey, undertaken by the author during 1956, revealed that on a strictly objective application of the criteria for preparing the annual scale of contributions to the UN budget, SA was over-assessed by 37%.

57 See para. 7.1.

58 See para. 10.2.2 fn. 18.

the basis of political expediency and sentiment'.<sup>59</sup> As Kelsen recognized, it was not the logically true but the politically preferable meaning of the interpreted norm that became binding.<sup>60</sup> Universality had prevailed, at the expense of textual limitation.

Louw's analysis of the implication of the package deal for the blocking of resolutions favourable to the West, *a fortiori* to SA, served little purpose. The way a country votes depends largely on the wording of a resolution, the internal political situation in that country at the time it expresses its vote and the nature of its relations with other states. As Louw rightly pointed out, membership of a regional bloc played an increasing role but it was not the determining factor. As far as SA was concerned, the voting pattern over the medium term showed a decline in the number of states of all regional blocs willing to align themselves with its argument. Nevertheless, there was, until the large influx of African members, a tendency to moderate the tone of the resolutions. This moderation may be ascribed partly to the apathy induced by the annual futile debates but the main purpose, as India admitted, was to increase the number of votes in favour of the Indian proposals and to reduce the number of abstentions.<sup>61</sup>

Moskowitz has pertinently pointed out that the universality principle enshrined by the deal inhibited calls for the expulsion of SA. It would have contradicted political logic, he wrote, for a GA, which had only just accepted the principle, to force the resignation of a founding member 'for a violation of the Charter of which others, including some of the newly admitted members, were no less suspect.'<sup>62</sup> Individual calls that SA be expelled were simply threats, as the GA did not invoke the expulsion machinery in Article 6.<sup>63</sup> In the same way, the failed experiment of token representation demonstrated once and for all that termination of its UN membership was not a valid option for SA. The resultant

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59 See para. 10.2.1.

60 Kelsen *op. cit.* Preface

61 See paras. 10.3, 2.14 and 8.9.

62 M. Moskowitz *Human Rights and World Order* (Oceana Publications Inc. 1958) 173

63 An undated memorandum on 136/1 vol. 21 prepared in External Affairs shortly before the rejection of the credentials of the SA delegation in 1974, quotes Abdul Minty, Secretary-General of the Anti-Apartheid Movement in London and years later Deputy Director-General of the SA Department of Foreign Affairs, as saying that the African nations had no intention of driving their attacks on SA to a point where it would be 'excluded from [UN] membership either legally or illegally'. Such action would have deprived them 'of a most valuable propoganda forum'. He may have been rationalizing.

impasse – no expulsion, no withdrawal – may have inspired a loosening of tongues at the 15<sup>th</sup> GA, where Louw initiated his *tu quoque* tirades against other UN members and the Africans began their campaign for UN recommended sanctions.

Edvard Hambro, a Norwegian permanent representative to the UN and quondam President of the GA, has noted the change in debating styles resulting from the increase in membership. The new members, he said, dominated many debates, causing some alarm among those who felt their voting strength bore no relation to their real weight in the world community. The universality principle had made the criteria for admission set out in Article 4(1) a dead letter. Any appraisal of the functioning of the UN had to take blocs into account, for their majority could force ‘valid resolutions’ through without the support of the major powers. However, a vote recommending sanctions against a state carried little weight if that state’s major trading partners were not in favour.<sup>64</sup>

Ferguson-Brown took a contrary view, namely that states could claim legality for acting on a non-binding GA resolution.<sup>65</sup> This view ascribed a power to the GA in 1962, which the text of the relevant Charter articles did not support. It is an indication of how a majority of votes could qualify that text. Sanctions at that stage were, in fact, a purely bilateral decision. India had withdrawn its High Commissioner from SA in the forties. Ghana claimed to have instituted sanctions on 1 August 1960, while Egypt refused to accept a new envoy from SA once it became a republic. None of these acts was related to a GA recommendation. Legality did not enter into the equation.

### 10.6.3 Isolation

By 1961 SA had become completely isolated in the UN. Not a single voice was raised in its favour to protest the censure of Louw’s speech in the General Debate at the 16<sup>th</sup> GA. As he had made clear, Louw would have considered the abstentions and, presumably, the decision of some states not to participate in the vote as expressions of hostility.

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64 Goodrich, Hambro and Simons *op. cit.* 3rd revised ed. Foreword

65 For example GA Res. 1761 (XVII) which requested member states to apply various forms of economic sanctions against SA. K. Ferguson-Brown ‘Legality of International Economic Sanctions against South Africa in Contemporary International Law’ 1988/9 (14) *SAYIL* 59

Nonetheless, his suspicion that the Africans had followed a planned strategy at the 16<sup>th</sup> GA did not lack verisimilitude. The African move, to which the Tunisian GA President could well have been privy, was probably a pre-concerted response to Louw's remarks at the previous session, for on this occasion he had not criticized Liberia, which submitted the motion to strike his speech from the records. Liberia, however, had the prestige of a founder member, as did Ethiopia, which seconded. The entire affair fitted the admitted African strategy of persuading the UN to impose sanctions against SA.

No one was ready to defend SA's legal position against the newly acquired voting strength of Africa. Many might have argued that, while SA claimed the right to express its views freely in the GA, it denied the same right at home to leaders of the non-white population. It is difficult to see how Louw could have explained and justified the apartheid policy some 12 years after its inception without making comparisons with other states. However, he had also to demonstrate that it was fair, viable and non-discriminatory, that it was, in short, consonant with the country's obligations under the Charter. Simply to argue that others were guilty of similar, or worse, practices alienated them and served as an admission of his government's own culpability. The records also suggest that his manner of delivery was openly provocative.

Nevertheless a legal precedent had been created. The GA could now condemn SA and recommend steps to implement that condemnation, for Charter provisions no longer served to protect it from attack. More accurately, as apartheid was considered *sui generis*, a vote against SA, whether or not in violation of specific Charter articles, did not bind the voting state on any similar issue. A state could deny the applicability of the domestic jurisdiction principle in regard to SA, without in any way compromising its own claim to Article 2(7) should a complaint be laid against it. States were in fact seldom held to account later for the way they voted in the GA but, with respect to SA, they were safe from criticism. The case was truly unique. Moreover, having left the Commonwealth, SA belonged to no form of political bloc, regional or otherwise, and, unlike Israel, would not always be able to rely on a veto by a Permanent Member should the Security Council in future consider Chapter VII sanctions measures.

**CHAPTER 11**  
**CONCLUDING OBSERVATIONS**

The aim of this chapter is to extract major elements of SA's early relations with the UN as they have emerged from an examination of available documentation and themes addressed in previous chapters and, somewhat cursorily, to consider their relevance, if any, to later developments. To do so it will be necessary to refer to events outside the time frame of this thesis. Some overlapping with earlier chapters is unavoidable.

**11.1 SA and interpretation of Charter**

'[H]istory', observed Fernandez-Armesto, 'is moulded more by the falsehood men believe than by the facts that can be verified.'<sup>1</sup> The remark serves as a counterpoint to Kelsen's prefatorial comment: 'It is not the logically "true", it is the politically preferable meaning of the interpreted norm which becomes binding'.<sup>2</sup> Against this background the concept of the 'amendment of the Charter by interpretation' against which SA representatives so often inveighed, tends to lose practical relevance. No document survives the test of time untouched; words change their sense with the passage of the years. Several of those used in the Charter were already open to various interpretations when they were first included.<sup>3</sup> Most drafters had specific meanings in mind but even they recognized that their brainchild would have to adapt to a changing world if it and the UN were to last. As Ress has pointed out, the fact that the text has survived for 50 years with minimal changes proves its adaptability.<sup>4</sup> The declaratory resolutions attendant on the admission of the newly independent states at the end of the 1950's did not indicate their rejection of certain Charter provisions as at first drafted but their desire to relate them to conditions with which they were familiar, with, for the most part, the assent of the original members.

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1 F. Fernandez-Armesto *Millenium* (Black Swan 1996) 509

2 Kelsen *op. cit.* Preface

3 R. Wolfrum observes in 'Preamble' B. Simma *et al* (eds) *The Charter of the United Nations – A Commentary* (Oxford University Press 1994) 46 that the connotation of the word 'peoples', which appears in a general sense in the Preamble, differs from its use in Art. 1(2) where it has a more ethnic implication in conjunction with the principle of equal rights and self-determination.

4 G. Ress 'The Interpretation of the Charter' in Simma *et al* (eds) *op. cit.* 28

Kelsen's rider that the choice of interpretation 'as a legal act' depended on political motives begged the fact that the UN is not a law-making body. It can purport to codify existing international law, to adopt conventions or declaratory recommendations, but the effectiveness of its actions is limited to the members who choose to abide by them. Thus, despite its moral significance, the UDHR, like the resolutions which flowed from the UNCORS reports, was a political rather than a juridical document, the legal force of the international instruments it spawned binding only the states that ratified them. A positive vote in the GA might have ethical implications for a country but is not enforceable against it.

Lauterpacht, on the other hand, ascribed legal consequences to the Charter provisions enshrining, *inter alia*, the obligation to promote human rights. This, despite the general recognition at San Francisco that 'to impose actively upon the Members the observance of human rights...would thus raise hopes going beyond what the United Nations could successfully accomplish'. A state, he said, might legally decline to act on a series of GA recommendations, but did so at its peril. 'Persistent disregard' might expose it to consequences 'legitimately following on a legal sanction'.<sup>5</sup> His view was a consequence of his concept of an international organization invested with a quasi-legislative function.

The Charter provided for a review after ten years. Although the word 'review' does not exclude amendment, it does not prescribe it. Article 109 suggests rather an examination of how the text was standing up after the first decade. Yet for SA (and other member states) review had by 1955 come to mean revision, itself a slight 'amendment by interpretation' to which the Union did not object, indicating that its static evaluation of the text was limited largely to those articles by which it was most affected. The Union government was, of course, reluctant to tamper with the Charter, not because it thought the text inviolate, but for fear that any alterations might be less acceptable to SA and

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5 Lauterpacht *op. cit.* 146 and ICJ Reports 1955 67

would not require unanimity to come into force for all members. In particular, Louw opposed re-examining Article 2(7).<sup>6</sup>

#### *11.1.1 Preamble and human rights*

No matter how one interprets the Preamble to the Charter, it remains a continuing paradox that it was SA who placed the concept of fundamental human rights at the forefront and played a decisive role in bringing about a change in the *raison d'être* of the UN at its very outset. From then on, the two were at loggerheads over the meaning of the term. The enormities of the Nazi regime during the Second World War made the inclusion of a reference to human rights in the constitution of any new world organization unavoidable, but Smuts could not have been unaware of the likely impact of his action on problems at home. The solution of the riddle, if there is one, seems to lie in the personality of the author and his inability, or unwillingness, to connect the practical realities of domestic politics with a more idealistic international vision in the euphoria of the imminent end of the Second World War. The Preamble was grounded in Smuts's appreciation of global politics, not the situation at home. Three years had to elapse before his term of office as Prime Minister ended and the next elections would not have entered into his calculations. The concept surfaced in other areas of the Charter of course and would have been enshrined in it on the basis of the amendments proposed to the original Dumbarton Oaks proposals. A bill of rights to supplement the Charter provisions was also unavoidable. The debates at San Francisco show, however, that the force of the original suggestion was regarded as emanating from Smuts. Credit may have been given to the person rather than the country, but the Preamble was a formal SA submission.

Despite the strongly idealistic tone of Smuts's address on human rights at UNCIO,<sup>7</sup> SA had already chosen paths that would diverge from those nations with whom its destiny in the UN should have been joined. In particular, Smuts threw SA's weight behind the Great Powers and the Security Council at the expense of the lesser nations and the GA.

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<sup>6</sup> See paras. 10.2.1 and 1.3.2.

<sup>7</sup> See para. 1.4.6.

Moreover, he had a global view that differentiated him from most of his tribe, as emerged during the ratification debate in the SA Parliament in January 1946. But even he did not, rather than could not, put the humanitarian vision he had evoked into practice in the Union. The US Founding Fathers experienced the same dilemma in respect of race relations at the time of the Declaration of Independence. Human rights, like charity, begin at home. The fact that Smuts recognised the dilemma in which he found himself indicates that he foresaw that SA might one day require assistance from at least one veto wielding power, rather than rely on the fragile hope of majority support in a body like the GA that would increasingly come to represent the developing nations.

On a strict legal assessment, Kelsen's remark that the words of the Preamble remain empty phrases in their relationship to human rights and fundamental freedoms has validity,<sup>8</sup> although he ignored the proviso made at UNCIO that the GA would amplify the use of the term in the body of the Charter by subsequent action. The fact remains, however, that the initial SA submission of a draft Preamble to the Commonwealth Ministers in April 1945 had introduced an additional theme to those contained in the Dumbarton Oaks proposals, which found an echo in later amendments by the sponsoring nations. It provided the basis of discussion in UNCIO and was approved as having the same legal effect as the rest of the one and indivisible Charter, which the Union signed and ratified, albeit by executive action. It may not have become part of SA municipal law but that would be a devious argument. SA can be said to have set the standard but to have failed to live up to it. This was as true of the United Party in 1946/7 as of the National Party after 1948.

The Preamble left the definition of human rights in the air. It contained no prohibition of discrimination. Equality of rights was only between men and women and nations large and small. Both SA administrations chose to interpret human rights obligations under the Charter as comprising only the five specific freedoms: personal, religious, speech, the press and assembly, to which SA had referred in its submission for the 1947 *YHR*. They ignored the related clauses of the Charter, which made it clear that negative

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8 See para. 1.4.1.

discrimination in municipal law was incompatible with the brave new world they heralded. Although he foresaw the probable impact of an approved bill of rights, Smuts left the door open for his successors to argue without justification that the UDHR exceeded the bounds set by San Francisco. Smuts himself was not a likely pioneer in human rights codification. Even at San Francisco he had been disconcerted by a 'vague humanitarianism', which became more concrete at GA sessions.<sup>9</sup> It is significant that, having initiated the principle of human rights in the Preamble, SA was not selected as a member of the body established to draft the consequent international bill of rights.

The limited size of the SA delegation prevented it from participating fully in the work of all the UNCIO committees and forced it to concentrate in terms of its brief on the issues of special concern to the Prime Minister.<sup>10</sup> However, SA voted to adopt the commission reports and the Charter as a whole, which it ratified without reservations. Malan and his party might have criticized the manner of the ratification but they did not disavow it when they came to power. SA was accordingly a party to the Charter and bound to observe it in full. Although one should be wary of laying too much stress on the role it played in human rights and other important discussions, SA bore its burden of responsibility for the final product.

When UNCIO ended there could be no doubt in the mind of any delegate that a precise listing and definition of human rights would be a major preoccupation of the GA. Most countries shared the belief that the Charter provided the framework. Smuts recognised that its provisions would be subject to clarification and definition. His use of the legal loophole offered by Article 2(7) when the Indian issue was discussed at the 1<sup>st</sup> GA was discreet, for he admitted that its scope was not unlimited and that agreements reached on fundamental human rights could affect it. His assurances to Parliament, however, that Article 2(7) overrode all the others, were a striking example of the dichotomy between statements made at home and those felt more appropriate for international consumption.

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9 PM 136/1 vol. 3 tel. to J.H. Hofmeyr 4 June 1945

10 Various papers on PM 136/1

The rift between such statements widened after the 1948 elections and explains the new government's tenacious insistence on a strict application of the domestic jurisdiction article, despite pleas from officials that it explain the benefits of SA's racial policies to the GA. Even when Louw finally conceded after the walkout tactic of the mid-fifties rebounded, his attempts to put apartheid in perspective were counter-productive and unconvincing, nullified by an abrasive delivery and the controversial tenor of his remarks.

### *11.1.2 UDHR*

Goodrich remarked that a proposal to include a bill of rights in the Charter had failed due to lack of adequate time.<sup>11</sup> It was an important point, which needed elaboration. Had such a bill been included it would have had binding force on all members rather than setting a non-obligatory standard, as did the UDHR. The lack of time explanation, however, was specious. The nations gathered at San Francisco did little more than recognise the human rights principle, leaving it to their successors to grasp the nettle of defining them. President Truman's own reference to them in his final speech at San Francisco was significant but cannot be construed as evidence that he, or the US Senate, would have approved a UN Charter containing a binding bill of rights.

Smuts did not regard all the rights the draft declaration contained as fundamental and it is an open question whether he would have authorized an affirmative vote for its adoption had he still been in power. But he left the door ajar. Moreover, Smuts could not have made his affirmation of faith in 1945, had he not believed that his administration abided by the obligations enshrined in the Charter. However, Dönges's assertion that the UDHR had no legal effect at all was a weak point in the case he presented to the 5<sup>th</sup> GA. Neither the principle of human rights and fundamental freedoms nor the Panama proposal for a statement of essential rights was rejected at San Francisco, as he claimed. UNCIO did not include a bill of rights in the Charter and the reasons were more significant than the lack of time Goodrich suggested, but there was a clear intention that human rights would be given definition as soon as the GA started to function. All UN members, including

SA, cooperated in drawing up the bill of rights and, as Higgins has argued, some rights were so fundamental and so globally recognized as not to require further definition.<sup>12</sup> They were already part of customary international law.

Although SA clung to the doctrine that consistent protest rendered a resolution inoperative for the objecting state, Louw's complaint during the 3<sup>rd</sup> GA that members who abstained on the UDHR might later be held bound by its articles, seems to echo Lauterpacht. The moral authority the UDHR acquired, the reliance placed on it in other forums after its adoption and the inclusion of its tenets in international instruments and domestic legislation, justified his fears. This does not, however, derogate from the fact that the global legality of the rights it enshrined derived from their existing recognition both in customary international law and by the majority of civilized states in municipal legislation, not from their inclusion in an annex to a UN resolution.

By the same token, the fact that member states, other than SA, after voting in favour of the UDHR, have ignored many of its provisions with impunity does not impugn the legal validity of the rights they ignore or the moral authority of the document that enshrines them. This applies equally to those who joined the UN after 1948 but subsequently subscribed to resolutions and declarations referring to the UDHR.

The rights the UDHR enshrined were generally recognized, although not by SA, as fundamental human rights when Panama first catalogued them for UNCIO. Later instruments may have defined them more closely but did not increase their number. In the 21 years before the human rights covenants were adopted, only one was added to the list as a 'right', namely self-determination, which had earlier been included in the Charter as a 'principle'. Each right was an abstract concept given concrete form only insofar as an individual state applied it, or created conditions in which it could be applied, in municipal legislation. Unless the interest of a third party was significantly affected, as in the SA-Indian issue, ignoring or breaching these rights entailed no particular

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11 L.M. Goodrich *The United Nations in a Changing World* (Columbia University Press 1974) 163

12 R Higgins *The Development of International Law through the Political Organs of the UN* 119

consequences within the UN, except opprobrium where the dereliction was so severe and manifest that members were unable to remain passive. A vote of censure or a critical resolution as an expression of world opinion was the extent of any action the GA could take and was limited by the support an offending state could muster to oppose it.

When the UN was founded, many members already considered SA's internal policies reprehensible. But, had they not provoked the ire of India, which was on the verge of acceding to sovereign independence from its colonial overseer, it is unlikely that they would have been raised in the GA so soon. Nonetheless, decolonization and the discriminatory nature of SA domestic legislation would have compelled the spotlight to fall on the Union at some stage and ensure a continuing confrontation with the international community that was easy for anti-colonials to exploit. There is, however, an element of irony, which could not have been lost on Mrs. V.L. Pandit, in the fact that India's independence was accompanied by separation, albeit on the basis of religion rather than ethnicity, analogous to the expressed ideals of the National Party in 1948.<sup>13</sup>

### *11.1.3 Domestic jurisdiction*

The UNCIO debating records leave little doubt that the domestic jurisdiction provision was adopted for internal political reasons, not for international legal imperatives. Hence the division at the first GA between those who favoured referring the interpretation of Article 2(7) to the ICJ as the legal organ of judgement, those who believed that the onus of interpretation lay with the state concerned, and those who considered that each UN organ was master of its own procedure, including seeking an advisory opinion on points of law if it so wished. The proponents of the third solution won. Their success, based on voting power, implied that member states should feel obligated, if not bound, to comply

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<sup>13</sup> See Mrs. Pandit's remark in para. 2.2.2 that partition might have helped to solve the SA problem. It is, however, disingenuous to ascribe the apartheid policy to colour alone. The xenophobia implicit in it reflected the typical minority fear of submersion, exemplified by SA's restrictive immigration policy, even towards Western countries. Pigmentation was a complicating factor, which promoted the external and simplistic perception of a complex domestic problem.

with UN resolutions for which they had voted. Louw made the point at the 3<sup>rd</sup> GA that certain recommendations, like the UDHR, could even acquire a significance that would be taken as binding on member states that had abstained.<sup>14</sup>

While the UNCIO records also support a view that SA's reading of Article 2(7) was too rigid, many commentators agree that the wording of the paragraph was not definitive. The final text appears to have been welcomed by all participants. Most seem to have supported it with a subjective and tacit reservation. If their country was at issue, Article 2(7) applied. If another state's interests were involved and relations with it were not too intimate, the provision could be sidestepped. At UNCIO, states took care to lay the foundations for views they would propagate as the UN matured. SA delegations, however, had no statements of their own in the records to advance when domestic jurisdiction surfaced at the GA. Their main sources, statements by Dulles of the US and the Australian Minister of External Affairs, Evatt, proved weak reeds, as SA's opponents could also use their speeches to support contradictory theses.

Smuts's assurances to the SA Parliament concerning the primacy of Article 2(7) of the Charter amounted to no more than a statement of opinion that could not be substantiated conclusively from the San Francisco records. He partly confessed as much at the 1<sup>st</sup> GA. He seems to have believed, naively, that the organization he helped found would be open to persuasion by rational argument. His disillusionment over the Indian question soon undeceived him. Having followed the events at the first two sessions from afar, the National Party appreciated the implications of the coming independence of Third World countries and their attachment to the principle of non-discrimination better than he had. Elected on a platform of apartheid, the Malan government did nothing to appease the UN, but virtually cocked a snook at the GA from the moment of its first appearance there. Rejecting the United Party's conciliatory approach, the new administration no longer claimed that its actions did not contravene the Charter but simply argued that they were exempt from consideration by the GA. Although the ambiguous drafting of Article 2(7)

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14 See para. 3.4.2.

and the reliance other human rights offenders placed on the text seemed to offer some protection, they were no real shield for SA against the preponderant voting power of the developing world and its resentment of any suspicion of colonialism.

The Union's reliance on the domestic jurisdiction principle can also be related to its interpretation of state sovereignty. The South Africa Act of 1909, which created the institutions of government was, with limited exceptions, subject to amendment by simple majority. Accordingly SA, which had adopted the Westminster parliamentary system, did not have a rigid constitution similar to those purporting to regulate governments in most states. Elton wrote of the UK that 'in the modern state there are in fact no limitations on the supremacy and competence of statute: parliament may forbear doing certain things because it is too sensible or too frightened to attempt them, but there is no one who can dispute its authority'.<sup>15</sup> This reflected National Party thinking. Consent of the governed was not material and, as its administration became more established and authoritarian, the limited control exercised by the courts and vaunted in the second volume of the *YHR*, was curtailed.

The Westminster nature of the SA parliamentary system enabled Smuts and his successors to rely on the compliance of party members to approve any executive action and explains the cavalier treatment they sometimes accorded the legislature,<sup>16</sup> one of whose members quoted May:

'Since the First World War the readiness, amounting to recklessness, with which Parliament has delegated or surrendered powers to Ministers has made inroads into democratic government which has quite changed its nature compared with what it was a few decades ago. The difference between democracy and totalitarianism is largely a difference in the degree and permanence of delegated powers.'<sup>17</sup>

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15 G.R. Elton *England under the Tudors* (The Folio Society 1997) 167

16 See paras. 1.5 on ratification and 9.1.2 on Louw's failure to report on his 1960 meetings in London.

17 H.J. May *op. cit.* 2nd ed. February 1949 quoted in *House of Assembly Debates* Vol. 73 col. 9095 15 June 1950 by Dr. D.L. Smit, who had accompanied Smuts to UNCIO.

In SA power lay with the executive branch and was for the 84 years of white rule after Union administered faithfully by the officials of the public service.

#### *11.1.4 Art. 2(7) in practice*

Dönges's insistence that the domestic jurisdiction provision was a precondition for the adherence of the smaller powers including SA to the UN suggests some confusion in the mind of the Union government on the respective roles of the veto and of Article 2(7). In terms of Article 27, the veto pertained only to the five Permanent Members in the Security Council. It could not be applied in the GA where, apart from their powerful influence, the Great Powers were theoretically as much at the mercy of the majority as any other state. Countries that had objected to the veto at San Francisco had done so to reduce the dominance of the Great Powers, not to acquire the right for themselves. Smuts understood this, but the National Party seems to have seen the article as an extension of the unanimity principle enshrined in the Covenant of the League of Nations, Article 5(1). On this reading, Article 2(7) would give any ordinary member the right to veto a GA resolution by which it was negatively affected. This would explain the Union's insistence on a strict static interpretation of Article 2(7) based on the UNCIO records.

Yet a SA diplomat, Charles Fincham, was amongst the first scholars to conclude that Article 2(7) was tending to become a dead letter. His conclusion was somewhat premature, for member states still invoke it in their own political interests even if they opt to reduce its scope when others claim its protection. A more accurate assessment was that the article's impact was limited in practice, political rather than legal in its essence, and dependent for its application on voting majorities. Later authors who, like Kaeckenbeeck, Kelsen and Preuss, felt that the drafters did intend to place strict limits on the UN's right of interference, accepted that the elasticity of the article could lead in time to a reduction in the level of state sovereignty in matters before the organization.

Higgins ascribed to Fincham the view that the presence in the Charter of articles that might seem to be at variance with Article 2(7) was irrelevant, since the latter had

priority.<sup>18</sup> It is difficult to reconcile her comment with his view of the article's sterility. It would rather seem that Fincham thought the ICJ, or some of its judges, would probably have abided by its earlier dictum that domestic jurisdiction was an essentially relative question dependent upon the state of international relations.<sup>19</sup>

Neither SA nor India produced compelling arguments to support their views on the relationship between Article 2(7) and other Charter provisions. Apart from its rigorous interpretation of 'intervention', SA relied almost entirely on the UNCIO debates and the word 'nothing' to justify the article's overriding power. India's attempt to limit its scope by contrasting it with other articles was similarly unconvincing. To this extent India's assertion that, as interpreted by SA and the UK, Article 2(7) prohibited discussion of human rights was a red herring. At no stage did any member state, not even SA, allege that the GA could not discuss human rights. How else could the UDHR have come into being? SA participated in such discussions. What it opposed was intervention in its internal affairs, whatever the topic and whatever form intervention might take.

India claimed, in opposing SA's legal arguments, that as a legal document the Charter used the language of law. Lauterpacht, India said, had used Oppenheim's definition of 'intervention' when he told the International Law Association in 1947 that the Charter did not authorize 'peremptory demands accompanied by enforcement or threat of enforcement in case of non-compliance, for this is the accepted meaning of "intervention"'.<sup>20</sup> India, in fact, tended to quote teleological authors like Lauterpacht and Rajan, and even to dismiss the views of the drafters of the Charter as irrelevant, unless they happened to coincide with its argument.

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18 R. Higgins *The Development of International Law through the Political Organs of the UN* 65

19 *Tunis and Morocco Nationality Decrees Case* 1932 PCIJ Series B No. 4 24

20 Statement to the *Ad hoc* Political Committee A/AC.61/PV.18 17 November 1952 8-32. Like Lauterpacht, India omitted to clarify that Oppenheim was referring to inter-state relations not those between an organisation and its constituent members. In *International Law and Human Rights* 168 fn. 9 Lauterpacht quoted India as saying in 1948 that the term intervention 'has a technical meaning in international law, it means dictatorial interference'. This was a prime example of an author quoting a source based on his own writings to buttress his opinion.

SA's difficulty was that it lacked the voting support that India enjoyed. Its argument against competence therefore needed a strong legal foundation. At the same time, Dönges weakened his case with the exclusive use of legal technicalities, particularly as he was unable to convince a sceptical audience that the Union government did not discriminate against its non-white subjects. Thus, his assertion that the UDHR created no additional obligations for SA might have been juridically correct but was politically damaging as a further demonstration of SA's lack of concern for the human rights provisions of the Charter. Dönges provided a lawyer's rationalization, ill suited to an emotional political forum. His argument skirted the good faith obligation in Article 2(2) and the provision in Article 2(5) that 'all members shall give the United Nations every assistance in any action it takes in accordance with the present Charter', although as he himself pointed out, SA did, unlike many other states, cooperate with the UN when the 'Uniting for Peace' procedure was first invoked in Korea.

UNCORS and, by analogy, the UN Secretariat, joined other commentators in using arguments to justify a pre-determined conclusion of its competence to discuss and report on SA. Despite the injunction in GA Res. 616 A (VII), which set out its terms of reference, there was no likelihood of a finding that Article 2(7) precluded its actions. Neither would the majority of members have welcomed such a result. They had after all established UNCORS precisely to examine and report on SA's domestic policies. In so doing they asserted their own competence as well as that of the commission they had brought into being. The significance of Chapter II of the first UNCORS report lay in the fact that, although the GA did not endorse its conclusions, it did not reject them. In effect therefore the report provided a quasi-legal basis for past and future political UN action on domestic jurisdiction and for the competence of its lesser organs. It provides an example of a SA contribution to UN jurisprudence albeit by negative action, although the validity of that contribution was never tested in an objective legal forum.

#### *11.1.5 Role of ICJ*

Irrespective of the doubts in some UN members' minds, including the UK and SA, of the total objectivity of its judges, the refusal to consider the ICJ an automatic point of

reference was a logical extension of the preference shared by most of them for political solutions. Their preference was fortified by the omission of a provision in the Charter for member states to seek advisory opinions from the ICJ. This omission avoided frivolous requests and fortified political decision-making at the expense of the judicial. Fincham's seconding of the Lauterpacht argument opposing the submission of the Indian complaint about SA to the ICJ would suggest that however much he regretted its 'gratuitous disparagement' at the 2<sup>nd</sup> GA, he accepted that international law followed politics.<sup>21</sup> He would otherwise have opted for the static interpretation of the article in the light of the records at San Francisco. It followed that the ICJ was subject to the tyranny of majority decisions, a pawn, rather than the overseer, of the UN. Fincham was not necessarily wrong but his thesis weakened his government's arguments.

It seems, however, doubtful that Lauterpacht was fully convinced by his own argument to justify the GA decision not to accede to the SA request for an advisory opinion.<sup>22</sup> What better time, in fact, for the ICJ to interpret a provision of the Charter than so close to its adoption, before it was overlaid by a series of political decisions? Its case list was not overloaded and advisory opinions did not constitute binding precedents. Lauterpacht did not imagine a finding in favour of SA, since he considered his own analysis of the Charter conclusive, but he seems to have been concerned by the possibility of a restrictive interpretation of Article 2(7). After his experience at the 1<sup>st</sup> GA Smuts also lost faith in the ICJ but his reasons were political not legal. Louw and Dönges vainly used a political forum to argue a legal case, without ever considering the ICJ an impartial arbiter.

The early commentators drew no particular conclusions from the failure of the Union government to press its request for an advisory opinion. Two at least were present at the early debates. Among them Kaeckenbeeck, who deplored the GA's failure to approach the ICJ, fell into what Lauterpacht would have considered the pessimist category and interpreted the Charter in a static sense. But even he seems ambivalent and to have hoped for a teleological result in due course based on the practice of UN members. The

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21 Fincham *op. cit.* 134

SA view that, for national and political reasons, the ICJ was not a satisfactory source of appeal probably animated other states put on the defensive. It would have suited them to fault the political, emotional, judgement of the other UN organs, rather than to run the risk of a considered non-partisan legal decision.

## **11.2 Relations with United Nations**

### *11.2.1 Bipartisan approach to external affairs*

The SA government's refusal to discuss its domestic matters in the UN during the early years created an impasse. The use of purely legal arguments in a political body was an obvious tactical error. Unwilling to yield, SA attempted to cast the blame on its opponents for their disregard of the Charter and showed its displeasure by withdrawing its delegation from some GA sessions. The strategy never reduced the number of attacks, although it might have softened the intensity of resolutions adopted early on, until the impact of the members admitted after 1955 and especially in 1960 became palpable.

It is common cause that the aftermath of the 1948 elections exacerbated the dispute between SA and the UN, leading to the presumption that had the United Party not been defeated at the polls, relations might have been easier. The events of the first two General Assemblies do little to support this conclusion. While the second ended without the adoption of a resolution on the Indian issue, the SA delegation's report warned that the reprieve was only temporary. India's complaint had been directed against policies that had evolved over four decades, for which both political parties were at some time responsible. Nor should it be forgotten that the official SA submissions on the UDHR and the draft human rights covenant preceded the advent of the National Party to power. As Malan remarked in Parliament during the first debate on his Vote as Prime Minister in 1948, there was little difference between the two parties on matters of foreign policy. They agreed over the need to maintain white supremacy and to resist interference. For both, the concept 'South Africa' meant the white electorate. The difference was in style rather than substance.

In a revealing passage, May argued that the politics of the country was dominated by race.<sup>23</sup> In 1955, this meant the 60-40 ratio between persons of Afrikaans or English extraction. Relations with the black section of the population were a different issue in which only the extent of separation and the method of its implementation divided the parties. While May's book was framed to be objective, even critical, it displays a disregard of impending changes in the global political environment that was characteristic of the SA of the time. A single reference was made to the UN - on the Indian issue. Human rights as a doctrine found no place in the work of a presumably liberal SA authority on constitutional matters as late as 1955. Yet officials had already identified them, together with SWA and apartheid, as one of the country's three major problems in its relations with the international community.<sup>24</sup> May himself had earlier drawn the UN Secretariat's attention to the practice of discrimination.<sup>25</sup>

The basis for SA's dispute with the UN was apparent from its submissions on the draft bill of rights, while Smuts was Prime Minister.<sup>26</sup> There is no empirical evidence to suggest that, despite his awareness that he walked the same tightrope,<sup>27</sup> he would have authorized a positive vote for GA Res. 217(III) of 10 December 1948 to which the UDHR was annexed, had he still been in power. Available documents suggest the contrary. SA would probably have abstained, although it might have taken the absentee option as on other potentially embarrassing issues at GA sessions, during the vote on the Genocide Convention for example. Louw's abstention was a positive act, with moral and political consequences which absence would have rendered ambiguous. The SA vote can be considered a bipartisan action, reflecting current political thinking.

Sanders writes that the National Party claimed to have 'stronger medicine' than segregation but that 'in 1948 at least, no coherent scheme lay behind its electoral rallying

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23 May, *op. cit.* 3rd ed 143

24 See para. 10.5.

25 See para. 5.1.

26 See paras. 3.2.2 and 4.1.

27 See para. 1.7.1.

cry of “apartheid”. The slogan’s vacuity did not, however, prevent the white electorate from ceding Malan and his party a mandate to represent its interests.<sup>28</sup> Although Sanders’s claim ignores the point that the delimitation system enabled Malan to defeat the United Party with a minority of votes actually cast, it illuminates Louw’s comment to the new Prime Minister that the incoming government had no political arguments other than those deployed by Smuts and Lawrence at the first two General Assemblies.

On the other hand, External Affairs officials do not appear to have appreciated that the apartheid policy could not be justified in the international arena. Neither those serving in New York, nor even the home-based officers appointed to the delegation, experienced the day-to-day problems of non-white racial groups living under apartheid or of their public service colleagues administering it. They wanted an active role in the UN, to make a positive contribution to it and to receive recognition for their efforts. The wish might therefore have been father to the thought. Opportunities existed, as in the field of nuclear energy, but the four issues in which SA appeared at a disadvantage (South West Africa, the treatment of Indians, apartheid and human rights) acted as a constant brake. Officials on SA delegations to the UN constantly advised the government of the counter-productive effect of its attitude towards the UN and the international community. The destruction of pertinent files makes it difficult to research efforts made within External Affairs to influence policy on human rights but there is enough evidence to indicate that it was not idle. When he was Secretary for External Affairs, Jooste remarked that he had several times sounded the Prime Minister on closer relations with the UN but felt that he had received a clear negative directive.<sup>29</sup>

### *11.2.2 Co-operation with UN organs*

It cannot be concluded from the foregoing that the National Party administration refused all cooperation with the UN on matters touching its domestic policies, even where human rights were involved. In the early years it commented on actions taken in this field by ECOSOC and the CHR; it submitted contributions to the *YHR* and returned replies to

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28 M. Sanders *Complicities* (Duke University Press 2002) 83. See para. 2.4.1 fn. 44.

29 See para. 10.5.

enquiries on forced labour conditions and on some of the first studies initiated by the Sub-commission on the Prevention of Discrimination and the Protection of Minorities. Contributions were hampered by the government's concern that they might compromise its stand on Article 2(7) but were authorized on the rationale that the studies were of a general nature not aimed at a specific country. External Affairs officers were anxious to be even more positive, to explain apartheid, but they too laboured under the omnipresent fear that their reports would be examined against the principle of non-discrimination. SA's submissions would have had to be tailored to the prejudices of the recipient.

The problem was illustrated by the tenuous collaboration with the Secretariat over topics included in the *YHR*. The appointment of a correspondent was more a preventive measure than a genuine desire to assist, provoked by the alarm which the paper prepared by May for the first volume had generated.<sup>30</sup> The pressure increased until the Secretariat initiated the selection of the current year's enactments and court cases and the SA correspondent commented only when he or External Affairs felt the need. Their problem was exacerbated by the legislative expansion of discrimination into almost every sphere of SA life. The *YHR* expressed no judgement; it was enough that it printed extracts from new Acts or summarized a couple of court cases for the message to be clear. Without appearing to criticize, it provided bricks for the anti-apartheid edifice every year. Although it remained ostensibly objective and was limited by space constraints, the Secretariat steadily wrested the initiative from SA.

A similar pattern emerged in the Union's co-operation with the CHR Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. The studies this body undertook offered SA an opportunity to explain aspects of domestic policy and cast them in a positive light. Yet at no stage did SA take the initiative of submitting a draft for a CHR or a sub-commission country paper. The special rapporteurs were obliged to consult available public documents and, with the vital assistance of the Secretariat, draw up their own analyses, which were then referred to the SA delegation for comment. Hardly ever did SA reject the factual accuracy of the monographs, although it often felt

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<sup>30</sup> See para. 5.1.

they missed the practical context. But it responded in defensive mode, usually with the caveat that its reply did not constitute abandonment of its stand on domestic jurisdiction. It is easy to trace the development from a fairly cool relationship at the beginning to a tendency by UN rapporteurs to discount official SA inputs. This was more obvious in later studies when pressure was put on them to place SA, as it were, in the stocks.<sup>31</sup>

### 11.2.3 *Withdrawal and expulsion*

Despite the occasional threat, withdrawal from the UN was never a genuine option. The SA government might have flirted with the possibility but, as internal problems elicited growing opposition at home, the attractiveness of precipitate action in the UN receded. Kelsen argued that the UNCIO records did not support a legal right of withdrawal, because it was not formally approved in Plenary nor mentioned in the Charter. His view is not convincing but need not be considered here for, with the ephemeral exception of Indonesia, the issue has not arisen and his thesis can only be tested against practice.<sup>32</sup> Attendance at sessions of UN organs is a right not a duty. Absence from the GA is not withdrawal from the UN unless accompanied by a declaration to that effect. SA's boycott of a couple of sessions was not even close.

Of more relevance was possible expulsion. Saudi Arabia expressed the SA government's unspoken concerns at the 16<sup>th</sup> GA when it envisaged a liberation movement government-in-exile.<sup>33</sup> With the changing composition of members, that prospect was not so remote for, after continued pressure from the Afro-Asians and the Soviet bloc, and despite the illegality of the procedure, the SA delegation's credentials were rejected in the GA after 1974. This entailed its *de facto* suspension from participation in the work of the GA. Since SA was not elected to other GA organs, its continued inability to participate in their work had theoretical rather than practical significance. While the GA decision did

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31 See para. 5.2.

32 H. Kelsen *op. cit.* Chapter 7. The only recorded instance of a 'withdrawal' from the UN itself, Indonesia, did not provide a precedent. It was short-lived and not challenged. SA may have shared Kelsen's uncertainty, however, for it was instrumental in changing the UNESCO Constitution at Montevideo in 1954 by the insertion of a withdrawal clause, as a prelude to leaving that Specialized Agency.

33 See para. 6.5.2.2.

prevent SA from exercising its rightful role within the UN to the fullest extent, its membership remained unaffected.<sup>34</sup>

In terms of Article 6 of the Charter, total expulsion of a UN member requires action in both the Security Council and the GA. The calls that were made in the early 1960's in the latter forum that SA's membership be terminated had no legal consequence by themselves. A proposal in the Security Council to expel SA was subject to the veto and, whatever its criticism of that weapon, SA could rely on it being used whenever such a proposal was made. The SA government's dogged perseverance on its chosen course, despite the apparent dangers it was incurring, can be explained by its obvious contempt for the ability of the international community to unite effectively against it in both UN organs, coupled with confidence that in any truly critical situation the West would not leave it in the lurch. The record suggests that, despite the weight of criticism it endured, it was not mistaken.

#### *11.2.4 Composition of UN membership*

The racial composition of the UN was of constant concern to SA. The remarks to this effect attributed to Smuts on his return home after the 1<sup>st</sup> GA may have been the first overt reference but Louw made several.<sup>35</sup> Fifty-one states made up the organization at the start of its first session, during the latter stages of which another four were admitted. Sixteen were Western and associated (including the Union), 20 Latin American, two African, three Asian, eight Middle-Eastern and six East European. SA considered only the first group 'white', bearing in mind the Communist ideology of the last. The implication was that the white nations were in the main 'friendly', the others varying in degrees of hostility. Even this categorization was artificial, for SA could not rely on the

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34 As a result of that action, SA ceased paying its budgetary assessment for nearly three decades. A member state cannot be forced to pay its dues. It can, in terms of Art. 19 of the Charter, lose its voting rights but that is all. Deep in arrears as it was, SA retained most of the other benefits of UN membership including the right to participate without vote at open Security Council meetings, to present valid legal credentials to the Secretary-General and to receive standard services and official documentation from the Secretariat. It was allocated a seat at all GA sessions, for which special credentials were required. The SA delegation was unable to assume its seat only because the GA rejected the special credentials on the dubious grounds that they were issued by a 'minority' government that was not representative of the majority of its inhabitants.

35 See *inter alia* paras. 2.2.1 fn. 27 and 10.3.

unqualified support of the like-minded members of the Commonwealth, let alone all those of the Western group. The voting record in committee and in Plenary on the Franco-Mexican resolution to solve the SA Indian issue at the 1<sup>st</sup> GA already foreshadowed the problems which would arise later.<sup>36</sup>

As Afro-Asian membership expanded, support for SA waned. By 1960 the UN had 106 members of whom 51 were Afro-Asians (including the Arabs), well over a blocking third in voting on important resolutions. By then SA stood virtually alone when its items were voted on. In 1961 at the 16<sup>th</sup> GA, in the SA delegation's absence, the last resolution on the Indian complaint was passed unanimously. Only Portugal voted with SA on the apartheid resolution, while not a single member, apart from SA itself, voted against the motion to censure Louw for his speech in the General Debate.

The day of the non-aligned movement (consisting of those mainly Third World member states who claimed not to align themselves with either the West or the Soviet bloc) had dawned. The impact of the new members on the voting patterns in the GA and on the nature of the resolutions approved there was pronounced. More important, the concept of self-determination merged with that of independence. SA, a former colony which had long before achieved sovereignty, did not see self-determination in this light. Its concern was the meaning of the word 'peoples' in the concept and the extent to which the answer would affect its internal situation.

Equated by the new members with the colonial powers, the issue SA faced after the adoption of GA Res. 1514(XV) on the independence of colonial countries and peoples, was whether its separate population groups could be considered entitled to determine their own future. Ironically, its concerns presaged those the new member states would later experience and for which they would find the same answer. The right to protect one's culture, language or religion is sacrosanct but does not entail the unilateral right to

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36 GA Res. 44(I). See paras. 2.1.2 fn. 17 and 2.1.3.

secession. After independence, the self-determination of ‘peoples’ becomes subject to the benevolent tolerance of the central authority.<sup>37</sup>

#### *11.2.5 Louw’s influence*

Louw bears a proportionate share of the responsibility for the difficulties his delegation encountered in New York. He consistently failed to heed his officials’ advice that the *tu quoque* argument was counter-productive. It may have been human to want to respond to virulent attacks. The debate on the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples at the 16<sup>th</sup> GA illustrates the provocation. The Soviet Union called the SA government a régime that practised racial discrimination, police oppression and slave labour in SWA. (These allegations would soon be applied to practice in SA as well). African comments were similarly provocative.<sup>38</sup> But ripostes in kind were no instruments of state diplomacy for a beleaguered SA. Although Louw finally succumbed, too late, to his officials’ plea for an explanation of the government’s racial policy, he did so in a way that nullified any positive impression they had hoped to make. The countries he singled out for criticism did not deny his allegations. Discrimination was, they admitted, still practised but was being attenuated, not intensified as in SA. His timing, too, was seriously at fault for his interventions at the 15<sup>th</sup> and 16<sup>th</sup> GA coincided with the influx of newly independent states, mainly from Africa. No matter how persuasive his tongue, he could never have hoped to convince that anti-colonial majority. Yet his despatches to his Prime Ministers suggest that he was unaware of the negative effect of his remarks.

How far Louw was willing to isolate SA on an ‘issue of principle’ emerged *inter alia* at the 11<sup>th</sup> GA, when he alienated Greece by insisting, even when the UK had not done so, on opposing consideration of the self-determination of Cyprus on the grounds that it was a matter of the UK’s domestic jurisdiction.<sup>39</sup> Sir Pierson Dixon’s remark that the Union knew it had no support for its policies at the UN reflected the SA delegation’s reporting,

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37 Cf. The Constitution of the Republic of South Africa 1996 ss. 30, 31 and 235.

38 GAOR 16th sess. 1049th Plenary 576 and 595ff. See para. 6.5.2.2.

39 GAOR 11th sess. 578th Plenary 40

yet Louw expressed surprise on reading it. At the League of Nations Louw had avoided contact with the Commonwealth group<sup>40</sup> and, unlike his staff, did little to attract Commonwealth solidarity at the UN. While he must be credited with unswerving loyalty to his government, he failed in his duty to advise it on a strategy to counter the negative external impact of domestic policy. If anything he encouraged it to remain intransigent.

Louw seemed, despite a long parliamentary and international organization experience, to believe that arguments in debate translated into votes. He often reported on the positive impact of his statements, a positive impact not reflected in the voting. He shared an apparent ingenuousness in this respect with Smuts.<sup>41</sup> Votes at the UN are pre-determined in the directives member states provide to their delegations. Approval for changes are normally obtained from Ministries at home after negotiations in the lobbies or in regional caucus meetings, not as a result of cogent arguments deployed during debate.

Louw recognized that UN resolutions were political and that, although there was a tendency to draw on earlier resolutions, the actions of one GA did not bind the next. But he failed to draw the appropriate conclusions. He would not accept that voting was based on a subjective appreciation of allegations affirmed or denied, national interest, regional bloc allegiance and individual interpretation of the text of the Charter, which was sufficiently elastic to buttress conflicting views. Hence his severe condemnation and apparent misunderstanding of ‘horse-trading’ and regional bloc formation at the GA. He seemed not to appreciate that voting majorities provided an indication of the state of international relations but not necessarily of legal principle or of a factual situation. He may be said in spirit never to have left San Francisco.

#### *11.2.6 SA isolated in UN*

Toase wrote that the UN could not induce SA to abandon apartheid, but that it made the country pay a high price for maintaining the policy. ‘The UN cast the South African Government into a kind of moral and political wilderness.’ By remaining obdurate SA

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40 T. Wheeler (ed) *op. cit.* 115

41 See para. 11.1.3.

‘separated itself morally and politically from the rest of mankind’.<sup>42</sup> *Prima facie* this conclusion is accurate but a caveat should be inserted. The SA government represented a white ethnic minority. Only in this respect did it differ from other governments who gained power without having obtained the suffrage of a majority of the electorate, or where the populace had no vote. White rule was becoming an anachronism in Africa. This enabled the ‘rest of mankind’ to isolate the ‘white South’ in their own self-interest and, like Macmillan, call it principle. That SA chose to interpret such treatment as the application of double standards was understandable but pointless.<sup>43</sup> The term ‘double standards’ is a misnomer; it is one facet of self-interest, of which SA was as jealous as any other country. A more accurate but, perhaps, equally pointless charge was that the sovereign equality of member states existed in theory rather than fact. ‘Equality’ was exercised only in votes in the GA and was dependent on the influence of a specific country or the support it could amass.

The ‘isolation’ SA experienced by 1961 must be understood in the context of voting and resolutions. It does not imply the boycott of the SA delegation by all the others or the termination of its bilateral relations with their governments. Although SA was excluded from regional blocs at the UN after 1961, consultations with its colleagues on an individual basis continued, even after the suspension of its delegation in the GA after 1974, until it returned to full participation in 1994, when it joined the Africa group. Inevitably, however, it took less and less interest in the global issues with which the UN was dealing as, although it received the documentation, it suffered from being unable to attend the Plenary and committee discussions at the GA and its organs. There is no adequate substitute for personal contact and exchange of views at international meetings.<sup>44</sup> The cumulative impact was even greater when the ban was extended to many of the Specialized Agencies, which dealt with technical issues. Here SA was not only divorced from the mainstream of developments but the supply of documents dried up as well. It is arguable that the country still has a way to go before it finally catches up.

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42 Toase *op. cit.* 327

43 An example of the SA complaint is contained in the annex to P.S. 26/44 16 May 1957.

44 After 1974, the PAC and the ANC were admitted as observers when SA issues were under discussion.

### 11.3 South Africa and human rights law

The relevant organs of the UN assumed the right to interpret the separate clauses of the Charter, as they were raised in debate, on a majority basis. Perception, majority perception, although the majorities differed in most cases, allied to cold war manipulation, anti-colonial prejudice and national self-interest, proved the deciding factor in most UN human rights recommendations. Practice evolved on these foundations and developed into political norms. Whether they became legal norms is more difficult to qualify, for, apart from a discussion on the existence a ‘norm of non-discrimination’ during the SWA case in 1966,<sup>45</sup> they were not formally submitted to the ICJ for advisory opinions. Nevertheless, there is little or no likelihood that, were such a question to be submitted to it today, the ICJ would invalidate sixty years of UN practice.

*Prima facie* one might conclude from the amount of time spent by the UN on SA issues during its first 50 years, that the country had a major impact on the way human rights law evolved during the latter half of the 20<sup>th</sup> Century. It would be more accurate to say that the long debate derived from the gap between the Union’s domestic legislation, specifically racial discrimination, and the way in which the UN was moving without SA’s help or hindrance. None of the comments SA made on the proposed bill of rights propelled the project forward. Its contribution for the 1947 *YHR* clearly indicated a belief that those rights only comprised freedom of person, of speech, of religion, of the press and of assembly. Even they became circumscribed at home as local laws multiplied and opposition, both internal and external, intensified.

Similarly, such participation as SA might have had in the drafting of the UDHR was in the nature of prescribing limits to the rights proposed. Its negative character was emphasized in the comments SA submitted early in 1948 for the draft human rights covenant. From a modern perspective one reads the proposed limitations with a sense of wonder. It is hard to imagine how, even at that time, some of them could have been submitted to a body whose membership was composed of nations from every region of the world for inclusion in a document devoted to the definition and protection of the

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45 *South West Africa Case Second Phase* ICJ reports 1966. See further para. 11.3.2.

freedom of the individual. What support the Union government could have expected in that environment for its proposals for the deprivation of individual liberty by ‘arrest for the purpose of removal from one province to another’, or for restrictions imposed on freedom of movement ‘where labour has to be controlled and individuals required to work in...specific localities’, to mention only two, is difficult to conceive.<sup>46</sup>

As the UN was creating a document devoted to the protection of the freedom and dignity of the individual, it comes as a surprise that the SA law advisers could write in August 1947 that the laws of the Union, with only a few exceptions, protected the essential rights enunciated in the Panama declaration. Their assertion, only a few months later, that it was of the utmost importance that the draft declaration of general principles submitted by the CHR, which hardly differed in essence from the Panama document, should ‘not be passed in a form so completely unacceptable’, was a much more realistic assessment.

The SA delegation’s abstentions throughout the debates on the human rights covenants confirm that it did not have an impact on their elaboration or, *a fortiori*, on the doctrine they enshrined. The decision to abstain on all clauses even prevented SA from assisting ‘like-minded’ states in their efforts to shape these clauses into an acceptable form and being seen to repay its friends for the slender support they still offered it. In effect, negotiation of the covenants stemmed not only from customary international law, but also from anti-colonial criticism of the colonial powers, the cold war and the socialist-capitalist dialectic. SA fell between these stools, being unable to find a home anywhere. Protection by the ‘old’ Commonwealth was grudging at best and, as the colonial powers bowed to the inevitability of independence, SA became a scapegoat for their policy changes.<sup>47</sup>

At the same time the Union’s continuous low profile in human rights debates contributed to its isolation. Because of its concerns over issues of discrimination, it avoided commitment when non-contentious instruments like the Conventions on the Status of

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46 Yet neither was alien to the practice of centrally controlled economies. Where SA differed was the element of racial discrimination. See para. 4.1 for a list of limitations suggested by SA.

47 Cf. Macmillan’s ‘winds of change’ speech to Parliament, para. 9.1.1.

Refugees and the Political Status of Women were adopted in 1951 and 1952. The termination of its contributions to UNICEF and its refusal to help in meeting the expenses of the High Commissioner for Refugees or the Expanded Programme of Technical Assistance provided ammunition to those who accused it of indifference to global humanitarian causes.<sup>48</sup> Seen as a wealthy country, its argument that the needs of its local populations prevented it from contributing to these funds was rejected as spurious, particularly after apartheid was included on the agenda of the 7<sup>th</sup> GA. The SA delegation's difficulties were compounded by the fact that it could not simply be absent whenever human rights were discussed, for its absence would be both noted and exploited. Its dilemma was not shared at home, where the audience was domestic, rather than international.

Participation in UN humanitarian international agreements was incompatible with SA legislation from the outset. The fact that the Union avoided voting on the UN Convention on the Prevention and Punishment of the Crime of Genocide in 1948 was a case in point. After 1960, however, the problem became aggravated. The majority as then composed insisted on the inclusion of a condemnation of apartheid in human rights instruments from then on, apart from the human rights covenants. SA could not join any of them, not because it objected to them in principle, but in view of the reference to apartheid. A reservation was an unacceptable option. It would only draw attention to the domestic situation. Thus SA did not become a party to any UN human rights instrument until the last decade of the century.

As Partsch pointed out, the SA contribution to human rights law in the UN consisted rather of playing an involuntary role in the development of human rights practice, such as the adoption of a reporting mechanism. For example, the Committee of 24, which was created to oversee the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, based its initiative to abandon the principle that the CHR could not act on complaints it received of human rights violations

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48 See para. 10.5.

on those that occurred in SA.<sup>49</sup> The examination procedure finally adopted by ECOSOC was limited to ‘gross violations’, which indicated that the aim was political rather than the legal protection of individuals.<sup>50</sup> Thus, if SA did not contribute positively to the development of international law, it helped inspire the machinery for its implementation.

### *11.3.1 International jurisdiction*

The execution of a GA recommendation was dependent on the will of individual member states but they could rely on its existence to exempt them from the legal consequences of an action against a third party, which might otherwise have been considered a violation of international law. Ferguson-Brown has argued, for example, that the anti-apartheid resolutions adopted by the GA endowed boycotts and sanctions against SA with the trappings of legality.<sup>51</sup> It was submitted earlier that the initial application of bilateral sanctions against SA preceded the GA recommendations and had nothing to do with legality under international law. In any case SA was unlikely to have challenged sanctions imposed by individual states in the GA. Even in commercial forums such as the General Agreement on Tariffs and Trade (GATT), it could not rely on majority support, although the case it prosecuted was justified under GATT rules.<sup>52</sup>

Irrespective of inter-state relations, the question of whether such GA recommendations extended to the application of sanctions by one state against the subjects of another for actions contrary to obligations *erga omnes*, was unclear. Until 1973, consideration of such likelihood had not arisen in the UN context. In November of that year the possibility of one state taking action against a subject of another in its domestic courts was envisaged in the annex to GA Res.3068 (XVIII), namely the Convention on the Suppression and Punishment of the Crime of Apartheid, opened for signature in that year but entering into force some three and a half years later. Article V provided that persons ‘may be tried by a competent tribunal of any State Party to the Convention which may

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49 K-J. Partsch ‘The Interpretation of the Charter’ in Simma *et al* (eds) *op. cit.* 16-17. Cf. para. 6.5.2.2 fn. 44.

50 E Res. 1503(XLVIII) 27 May 1970

51 See para. 10.6.2 fn 65.

52 See para. 10.7.2. In 1985 a GATT panel upheld a SA protest against Canada for allowing the Province of Ontario to discriminate against the importation of SA Kruger rands in favour of the locally

have acquired jurisdiction over the person of the accused'. Such jurisdiction was limited to parties. Although the UN published annual lists of high profile SA offenders, not even the most hostile states took action against them in terms of the convention. Because they were often refused visas to visit these countries the opportunity for them to be summonsed was limited and the provision served little practical purpose other than a deterrent to travel.

Its importance lay rather in the second part of the article, '...or by an international penal tribunal having jurisdiction' with respect to states parties to the convention. Although no cases were brought in terms of this phrase either, the adoption of the resolution introduced the principle of establishing courts, other than the International Court of Justice, under UN auspices, with criminal jurisdiction to try offences by individuals against human rights. A limiting factor was the acceptance by the offending individual's state of the special court's jurisdiction. To this extent apartheid and international opposition to it had a seminal influence on international criminal procedure, leading finally to the establishment of the International Criminal Court (ICC) in 2002.

The establishment of the ICC and other specialized criminal courts has had the effect of entrenching the individual as a subject of international law. The only cases so far brought to trial by the ICC have involved individuals, while the ICJ has in fact rejected its competence to hear a case against Serbia. Hence SA, which strenuously resisted the notion of the individual as a subject of international law, played an inadvertent role in promoting that development.

### *11.3.2 Effect of UN resolutions*

Because GA resolutions were political and because they were not legally binding, whatever their moral force, they did not in the opinion of most UN members contravene the provisions of the Charter. Members were reluctant to bind themselves and even more unwilling to run the risk of legal precedents on human rights by approaching the ICJ. In

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produced Maple Leaf gold coin. Beyond noting the panel's decision, however, the GATT Council took no steps to implement the finding.

its first 16 years the ICJ issued only four advisory opinions on human rights questions. Of these only that on Bulgaria, Romania and Hungary dealt with domestic jurisdiction and in the context of peace treaty obligations. This is not to suggest that the UN ignored the legal side of its functions. Organs like the Sixth (Legal) Committee, the ILC and the CHR have made considerable strides towards codifying international law. Constant repetition of resolutions, whether or not they were ignored as politically motivated, together with the number and quality of member states that voted for them, has been instrumental in establishing international jurisprudence within the ambit of Article 38 of the ICJ Statute. It supplies evidence of consistency and, with less justification, of the establishment, if not the actual practice, of legal norms.

Higgins has also noted that the role of UN resolutions in the development of customary international law norms still gives rise to debate. Authorities differ over the value of a state's vote in determining the existence of a customary norm. Many argue that states vote without really expressing their true beliefs. Hence she concludes that there is no easy definition of the role that international organizations, notably the UN, play in the creation of customary norms. It is necessary to look at the subject matter of their recommendations, whether they purport to have a binding effect or are simply recommendatory, and the extent to which states put them into practice. The majorities by which they were adopted as well as the evidence of *opinio iuris*, i.e. the extent to which they are regarded as law, are also significant elements towards reaching a decision. 'When we shake the kaleidoscope and the pattern falls in certain ways, they undoubtedly play a significant role in creating norms.'<sup>53</sup>

The UN family has built up a considerable store of case history from which academics extrapolate the development of current human rights law. States do not necessarily share their conclusions but examine each agenda item on merit, a procedure that tends to promote the dynamism of that development. The arguments of the early years remain much the same today, except that the notion that human rights do override the word 'essentially' in Article 2(7) has taken root. This view has strengthened with the watering

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53 Higgins *Problems and Process* 28

down of the concept of sovereignty. It may differ from the aim of the drafters of the Charter, most of them at least. Nevertheless there is no final clarity. Each decision still rests on the political will of the majority, not on a legal determination that might constitute a lasting precedent.

It is not unreasonable to think that the long years of strife over apartheid should have established precedents and general norms. They do not appear to have done so and the Charter provisions evoked at the time are still variously interpreted. The theses SA advanced in those early years have not lost their force and are advanced today, although not in the same depth and without acknowledgement, by states accused of human rights abuses and their supporters. SA's arguments might not have promoted the development of international law, except insofar as they are quoted in scholarly works, but they provide a valuable source of jurisprudence. The majorities of which Du Plessis spoke in 1954 are less 'chance' today as a result of regional bloc formation but they still decide the issue and their motives are no less political.

### *11.3.3 UN resolutions and international law norms*

Waldock is but one author to have drawn attention to the use, following the enlargement of UN membership after 1955, of mandatory terms in declaratory resolutions on human rights issues and to the conclusion of international agreements to complement them. It follows that UN practice, irrespective of the legal soundness of the two main schools of interpretation, teleology and positivism, was tending in the direction espoused by the teleologists. Nevertheless the static theorists' claim that declaratory resolutions are still not legally binding irrespective of their language, while international instruments bind only the parties, remains valid to the extent that these resolutions have not been absorbed into customary international law. Akehurst asserts that multilateral treaties could definitely provide evidence of customary law, particularly if they were declaratory. They could, he believed, be quoted against a non-party, even if they had not yet come into

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force. In other words it was not the treaty or the resolution that had binding force but the existing customary international law it entrenched.<sup>54</sup>

SA has made an important contribution to this debate. During the SWA cases before the ICJ, the Applicants – Ethiopia and Liberia - claimed that SA had violated a ‘norm of non-discrimination’ in its execution of the League of Nations mandate. This norm had been created, they asserted, by repeated resolutions and declarations in both the UN and the ILO. Since the ICJ limited its 1966 judgement to a finding that the applicants had not established any legal right or interest, by implication deciding that the satisfactory performance of the mandate did not constitute an obligation *erga omnes*, it gave no consideration to the claim. Three judges, however, adverted to the question in their separate opinions.

Judge Jessup of the US articulated what was probably current thinking. The applicants’ claim he said, was open to the objection that ‘since these bodies lack a true legislative character, their resolutions alone cannot create law’. Nevertheless he believed that a ‘standard’ did exist and could have been applied by the ICJ as a ‘purely judicial function of measuring by an objective standard whether the practice of apartheid’ in SWA violated SA’s obligations under the mandate.<sup>55</sup>

*Ad hoc* Judge J.T. van Wyk expressed the view that the ICJ had been asked to approve a ‘legal fiction’, namely that conduct which differed from the alleged norm violated the mandate. His analysis dismissed the arguments that GA resolutions directed against SA racial policies had established the norm and were applicable by the ICJ in terms of Article 38 (1) of its Statute. The UN, he said, did not possess the legislative competence to bind a dissenting minority, *a fortiori* when the resolutions themselves did not purport

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54 P. Malanczuk *Akehurst’s Modern Introduction to International Law* 7th ed. (Routledge 1997) 40

55 *South West Africa Case, Second Phase* ICJ Reports 1966 432-433. Judge Wellington Koo (232) differed. Failure by administering authorities to accept a GA resolution was not he thought proof that ‘a recommendation of the General Assembly in and of itself has not binding force’. His point ignored the fact that SA had undertaken no contractual obligation to administer SWA under GA supervision.

to impose such a norm. Neither could acceptance of non-discrimination be deduced from the general practice of member states.<sup>56</sup>

Judge Tanaka of Japan put forward a third, more forward-looking opinion. In his view international convention, custom and general principles of law combined to support the norm of non-discrimination. He argued that the creation of international organizations like the UN had resulted in the substitution of the long-drawn out process of evolving customary norms by a more rapid method of 'parliamentary diplomacy'. Speed of communication facilitated and accelerated the process. 'This is one of the examples of the transformation of law inevitably produced by change in the social substratum.' Individual resolutions might not have a binding character, but with repetition it became possible to consider them cumulatively as an expression of the collective will of the international community.

Since the Charter, the UDHR and other resolutions laid consistent stress on human rights and fundamental freedoms, they should be regarded as having legal force even if they had not been succinctly defined. In response to SA claims, Judge Tanaka accepted that the norm was not absolute. Discrimination was admissible in certain circumstances provided it was proportionate to the individual circumstances of those affected by the discrimination, not detrimental nor against their will. He added that 'from the point of view of human rights and fundamental freedoms [all human beings] must be treated equally'. Although some aspects of apartheid might be beneficial, discrimination on the ground of race or colour, violated the norm.<sup>57</sup>

It therefore appears that no consensus exists concerning the role of GA resolutions in providing evidence of customary international law. Judge Tanaka was correct in his view that modern technology and the speed of communications have accelerated the process but that is all. No doubt the majority of the UN subscribes to the existence of a norm of non-discrimination and rightly so. The concept was after all included in the UN Charter.

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56 *Idem* 170

57 *Idem* 289-300

Most states claim to abide by it and the fact that not all apply it in full does not lessen its legal character.

Dugard describes the practice of SA courts in the mid 20<sup>th</sup> Century as subscribing to the monist theory that customary international law was part of municipal law and did not need to be incorporated by legislative act.<sup>58</sup> From the government's viewpoint, this practice mattered little, since its positivist approach to international law and its attachment to the sovereignty principle implied that the courts would only apply it to the extent that it did not conflict with statute law. Consequently, the government could claim to abide by the 'rule of law', when what it had in mind with this concept was the legislation adopted in Parliament rather than the rules of common law, the law of nature or customary international law. This viewpoint made it essential for SA to oppose the idea that the UN could amend customary international law through declaratory resolutions, however often they were re-iterated.

#### **11.4 Envoi**

In the final analysis, both the static and the dynamic approaches to the legal nuances of the Charter text retain their original validity. The disparity of views amongst delegations and commentators reveals an obvious subjectivity in dealing with matters of interpretation, while UN practice is no less revelatory of individual political self-interest and regional sympathies. The Charter is still rationalized, rather than interpreted, more or less *ad rem*, at the will of the prevailing majority, of which SA is now part.

SA's former years of dispute generated a plethora of recommendations and argument. Whatever their legal validity, they were regarded at the time as *sui generis* and must therefore be considered as having had at best a tangential impact on human rights law as it evolved in the UN. This provides a further demonstration that the Union's impact on the development of humanitarian law was minimal or negative, with respect to both theory and practice. The SA influence, such as it was, was limited to acting as a catalyst for the establishment of judicial and administrative machinery to implement the

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58 J. Dugard *International Law A South African Perspective* 3rd ed. (Juta and Co. 2000) 47-48

enforcement of the rules of human rights law. For the present, judicial enforcement, in the international criminal context at least, is applicable only to individuals. This in itself is evidence of the increasing relevance of the individual as a subject of international law. SA bears its share of involuntary responsibility in this development in the UN context. The governments of the day recognised only states as subjects of international law but the adoption of the Convention on the Suppression and Punishment of the Crime of Apartheid ensured that individuals, too, would be so considered.

The passage of time since San Francisco has not witnessed the global elimination of racialism or of religious discord. Xenophobia haunts the growing masses of refugees throughout the world while, as independence has been achieved on a global basis, self-determination is discreetly resuming its status as a principle rather than a right. The CHR itself has been exposed as subject to political manipulation and replaced. A few of the problems the UN confronted in 1945 may have been solved, some have resurfaced in different guises, many are as intractable as ever. The few SA officials, who were with the UN at its inception, could be excused a smile if they quote the maxim: *Plus ça change, plus c'est la même chose.*

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<sup>1</sup> The prefix PM is omitted from 1955 onwards, when External Affairs was separated from the Office of the Prime Minister.

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## APPENDIX II: ABBREVIATIONS

ACOA	American Committee on Africa Inc.
ADI	<i>Annuaire de l' Institut de Droit International</i>
AFL-CIO	American Federation of Labour and Council of Industrial Organizations
A.J.	Annexure Jacket
ANC	African National Congress
CCTA	Council for Technical Co-operation in Africa South of the Sahara
CIAS	Conference of Independent African States
Charter	Charter of the United Nations
CHR	United Nations Commission on Human Rights
Cttee.	Committee
DPI	United Nations Department of Public Information
ECOSOC	United Nations Economic and Social Council
ETAP	United Nations Expanded Programme of Technical Assistance (also EPTA)
GAOR	General Assembly Official Records
GATT	General Agreement on Tariffs and Trade
GPRA	Provisional Government of Algeria
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
IRO	International Refugee Organization
League	League of Nations
MP	Member of Parliament
NGO	Non-Governmental Organization
NIC	National Indian Congress
NIO	National Indian Organisation
NP	National Party
NSG	Non-Self-Governing Territories
OR	Official records
OUP	Oxford University Press
PAC	Pan Africanist Congress of Azania
PCIJ	Permanent Court of International Justice
PM	Prime Minister
SA	South Africa(n)
SABRA	South African Bureau for Racial Affairs
Safdel	South African Permanent Delegation to the United Nations
SAIC	South African Indian Congress
SAIRR	South African Institute of Race Relations
SANA	South African National Archives
SAPA	South African Press Association
SEA	Secretary for External Affairs
SPC	Special Political Committee
SR	Summary records
SWA	Territory of South West Africa
SWAPO	South West African Peoples' Organization
Tel.	Telegram
UAR	United Arab Republic
UDHR	Universal Declaration of Human Rights
YHR	<i>United Nations Yearbook of Human Rights</i>
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations

UNAC	United Nations Appeal for Children
UNCIO	United Nations Conference on International Organization, San Francisco, 1945
UNCORS	United Nations Commission on the Racial Situation in the Union of South Africa
UNEF	United Nations Expeditionary Force to the Middle East
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
Union	Union of South Africa
<i>UNYB</i>	<i>United Nations Yearbook</i>
US	United States of America
USSR	Union of Soviet Socialist Republics (also Soviet Union)
WFTU	World Federation of Trade Unions
WHO	World Health Organization
WUPJ	World Union for Progressive Judaism

United Nations documents

A	General Assembly
AC	Assembly Committee
C	Committee
E	Economic and Social Council
E/CN.4	UN Commission on Human Rights
Corr.	Corrigendum
L	Limited distribution
PC	Preparatory Commission
Res.	Resolution
Rev.	Revised
SC	Security Council
SPC	Special Political Committee
Sub.	Sub-commission

### APPENDIX III: SELECTED PROVISIONS OF UNITED NATIONS CHARTER

#### **Preamble:**

*We the peoples of the United Nations determined*

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and  
to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and  
to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and  
to promote social progress and better standards of life in larger freedom,

*and for these ends*

to practice tolerance and live together in peace with one another as good neighbours, and  
to unite our strength to maintain international peace and security, and  
to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and  
to employ international machinery for the promotion of the economic and social advancement of all peoples,

*have resolved to combine our efforts to accomplish these aims*

Accordingly our respective Governments, through our representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

#### **Article 1**

The Purposes of the United Nations are:

1. To maintain international peace and security and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

#### **Article 2**

The Organization and its Members, in pursuit of the purposes stated in Article 1, shall act in accordance with the following principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits of resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter...
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

#### **Article 4**

1. Membership of the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter, and, in the judgement of the Organization, are able and willing to carry out these obligations.
2. The admission of any such state to membership of the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

**Article 5**

A member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership of the General Assembly upon the recommendation of the Security Council.

**Article 6**

A Member of the United Nations 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.

**Article 10**

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers or functions of any organs provided for in the present Charter, and, except as provided for 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.

**Article 12**

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council so requests.

.....

**Article 13**

1. The General Assembly shall initiate studies and make recommendations for the purpose of:
  - a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;
  - b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
2. The further responsibilities, functions and powers of the General Assembly with respect to matters mentioned in paragraph 1(b) above are set forth in Chapters IX and X.

**Article 14**

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 or 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.

**Article 15**

1. The General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.
2. The General Assembly shall receive and consider reports from the other organs of the United Nations.

**Article 18**

1. Each Member of the General Assembly shall have one vote.
2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council...the admission of new Members of the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members,...
3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

**Article 19**

A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

**Article 24**

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

**Article 25**

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

**Article 27**

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by the affirmative vote of seven [now nine] members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven [now nine] members including the concurring votes of the permanent members; provided that in decisions under Chapter VI...a party to a dispute shall abstain from voting.

**Article 31**

Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of the Member are specially affected.

**Article 33**

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

**Article 34**

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuation of the dispute or situation is likely to endanger the maintenance of international peace and security.

**Article 39**

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

**Article 41**

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

**Article 55**

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

**Article 56**

All Members pledge themselves to take joint and several action in co-operation with the Organization for the achievement of the purposes set out in Article 55.

**Article 96**

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

.....

**Article 97**

The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

**Article 98**

The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council...and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization.

**Article 102**

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

**Article 108**

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council.

**Article 109**

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council. Each Member of the United Nations shall have one vote at the conference.
2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council.

**Article 110**

1. The present Charter shall be ratified by the signatory states in accordance with their constitutional processes....
2. The states signatory to the present Charter which ratify it after it has come into force will become original Members of the United Nations on the date of deposit of their respective ratifications.

**Statute of the International Court of Justice**

**Article 38**

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contending states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

## CURRICULUM VITAE: JEREMY BROWN SHEARAR

Born in Queenstown, Cape Province, on 4 October 1931, Mr. Shearar obtained his Cape Senior Certificate at Queen's College in 1948. He was awarded a B.A. at Rhodes University, Grahamstown in 1951, majoring in Roman Law and Latin, and an LL.B. at the University of Stellenbosch in 1953. He joined the South African Department of External Affairs and, after five years in the International Organisations Section, was transferred to Paris, France, returning to Pretoria at the end of 1966, where he served successively in the Consular and Rest of Africa Sections.

In December 1971, Mr. Shearar was appointed Counsellor and Consul-General in the South African Embassy, London, and later served as Minister Plenipotentiary in Washington D.C. and in Paris. After a further stint as Deputy-Director and Director of the International Organisations Division at Head Office, he was accredited Ambassador and Permanent Representative to the United Nations, Geneva, in December 1984 and New York in August 1988. He returned to Pretoria in 1991 as Deputy Director General (Multilateral) of the Department of Foreign Affairs and retired on 30 April 1994.

During his career Mr. Shearar represented South Africa at a variety of international conferences, including the World Meteorological Organization, the International Commission for South-East Atlantic Fisheries, the International Whaling Commission, the International Bureau for Weights and Measures and the United Nations Conference on the Human Environment. He led South African delegations to the General Agreement on Tariffs and Trade, the International Red Cross, the International Atomic Energy Agency and the Preparatory Commission for the Organization for the Prohibition of Chemical Weapons. In 1993 and 1994 he attended the OAU/UN group of experts meetings on the denuclearization of Africa in Harare and Windhoek as expert observer. After retirement he completed the English version, based on the approved Afrikaans text, of the *History of the South African Department of Foreign Affairs 1927-1993*. The English version was published in 2005.

On 1 October 1966, Mr. Shearar married Miss Penelope Frith of Cape Town. They have two children, a son, Linden, born in Cape Town on 18 March 1971, and a daughter, Ashley, born in London on 21 January 1974.