

CONCEPTS OF LAW AND JUSTICE  
AND THE RULE OF LAW  
IN THE AFRICAN  
CONTEXT

by

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## SUMMARY

The study makes a descriptive and analytical study of the development of the dynamic concept of the rule of law with special reference to the African contribution.

First, the study shows that the Diceyan concept of the rule of law was narrow and peculiar to the Western liberal legal culture, and that more specifically, the substantive content of the concept of the rule of law was limited to the first generation of human rights. In its international and African context the concept was expanded to include all three generations of human rights and also identified with the concepts of democracy and the right of peoples and nations to self-determination. The expanded concept came to be known as the Dynamic Concept of the rule of law.

Secondly, the study traces the origins and development of the principle of equal rights and self-determination and their extension to all peoples and nations and shows that these rights are universal, not relative, as they derive from the inherent worth and dignity of the individual. Also, the study shows that in the African context the three generations of human rights have been interlinked, made inter-dependent, and then identified with the rule of law, human rights and the right of self-determination (perceived as a right to democratic self-governance). Hence, the worth and dignity of the human personality has been made the fountainhead of human rights and have been elevated to the substantive elements of the Dynamic Concept of the rule of law and the basis of the modern African Constitutional State.

Under the Colonial Rule both the Diceyan and the dynamic concept of the rule of law were not recognised. Instead, Colonial and racist regimes tried to create alternative institutions of government which denied the oppressed peoples the right to democratic self-governance and independence. However, Colonial and oppressed peoples relied on the dynamic concept of the rule of law in their freedom struggles and in the elaboration of their policies. Hence, the constitutions of all the former colonies in southern Africa under discussion were to different degrees informed by the Dynamic Concept of the rule of law.

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## CHAPTER I

### INTRODUCTION: ON THE PROBLEM AND THE METHODOLOGY

British Colonialism and apartheid Colonial rule did not recognise the worth and dignity of black people and their inherent basic rights. Thus blacks, especially Africans, were denied basic human rights and in particular, the right to participate in the government of their own Country. Instead, parallel institutions of government were established for blacks who were excluded from the Central political process. However, these institutions were merely advisory bodies which ensured that the colonial authorities maintained full control of Government and the State institutions. These Constitutional arrangements were accompanied by a host of racially discriminatory laws.

Thus the doctrine of the rule of law that our legal system inherited from the United Kingdom did not protect blacks to the same extent as whites. The doctrine was eroded further after the introduction of apartheid when the law became the main instrument for the enforcement of the inhuman policy of apartheid.

Successive Colonial governments were able to introduce these racially - discriminatory policies and to deny blacks their right of self-determination and equal rights as customary international law did not offer Colonial people any protection. When the right of self-determination was recognised after World War I it was only limited to some European Nationalities and Trust Territories.

After World War II the right of self-determination and human rights was extended to all peoples and nations. However, no measures were adopted to ensure their implementation, especially in Colonial territories. The further elaboration of the right of self-determination and human rights and their implementation was largely left to Colonial and oppressed people. These resulting struggles for the achievements of these rights offered African peoples

an opportunity to contribute to the development of Public International Law, especially International Human Rights law and the dynamic concept of the Rule of Law.

The study is descriptive and analytical based on a vast body of available literature in most of the conventional areas, but less so in others, especially most recent developments in South Africa and on the right to self-determination.

The object of this study is manifold.

- (a) It traces the development of the dynamic concept of the rule of law and its constitutive elements, such as equality, freedom, justice and the right to democratic governance.
- (b) It traces the origins and nature of the doctrine of human rights and the right of self-determination and their relationship to the principle of democracy.
- (c) It traces the development of the right of self-determination and human rights and their incorporation in various international and regional human rights and their elevation to peremptory rules of customary international law.

In particular,

- (d) It traces the development of the dynamic concept of the rule of law and its role in the efforts of African countries and national liberation movements to achieve their rights of self-determination and equal rights.

This study confines itself to selected African countries, with special reference to Zimbabwe, Namibia and South Africa. These countries have been chosen because of their proximity to one another, historical ties, and the similarity of racial policies and the efforts of the United Nations to encourage constitutional transformation in each of these countries.

The constitutional transformations in Zimbabwe, Namibia and South Africa are analysed and compared. In particular, the study traces the role of the United Nations, the international human rights law and the dynamic concept of the rule of law in the transformation process, the management, duration and

implementation of the constitutional process in these countries, especially South Africa, to show that it is in modern times the epitome of the realisation of the dynamic concept of the rule of law.

## CHAPTER II

### TOWARDS A DYNAMIC CONCEPT OF THE RULE OF LAW

#### 2.1 English, American and South African interpretations: a brief overview

Most discussions of the modern concept of the rule of law begin with Dicey.<sup>1</sup> Phillips<sup>2</sup> identified the core of Dicey's threefold exposition as -

- (a) the absence of arbitrary power;
- (b) equality before the law; and
- (c) the importance of the general principles of the British constitution.<sup>3</sup>

According to Yardley<sup>4</sup> the first two elements of the rule of law are closely related

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<sup>1</sup> According to Dicey the rule of law forms a fundamental principle of the English Constitution and has the following three meanings:

1. "... no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint" ... " It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence or arbitrary power, and excludes the existence of arbitrariness, of prerogative or even a wide discretionary authority on the part of the government."

2. "... every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."

3. "... the general principles of the Constitution (as for example the right to personal liberty or the right to public meeting) are with us as the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign Constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the Constitution ... Our Constitution, in short is a judge-made Constitution. ..."

See AV Dicey *Introduction to the Study of the Law of the Constitution* 10th ed. (1959) 188, 202-203.

<sup>2</sup> O Hood Phillips and Paul Jackson *Constitutional and Administrative Law* (1978) 36.

<sup>3</sup> Wade and Phillips take the view that the general principles of the constitution are not, as Dicey claimed, empirical principles of the English constitution but elements of the legal idea - that is, an aggregate of directive principles as to what the law ought to be: ECS Wade and GG Phillips *Constitutional and Administrative Law* 9th ed. (1977) 89-90.

<sup>4</sup> DCM Yardley *Introduction to British Constitutional Law* 7th ed. (1990) 75.

and amount to equality before the law for all citizens. Dicey<sup>5</sup> related the rule of law to basic rights (or civil liberties) when he stated that the concept meant the security given under the English constitution to the rights of the individual. These rights or liberties include: the freedom of the person, freedom of expression, freedom of movement and the right to hold meetings.<sup>6</sup> Mathews<sup>7</sup> points out that the notion of civil liberties is broader today than Dicey's description and includes the freedom of conscience, speech, information and association.

To Jennings<sup>8</sup> the rule of law involves the notion that all governmental powers, except legislation, should be determined and distributed by reasonably precise laws. In other words, any person acting on behalf of the state must be empowered by a specific rule of law which authorises his or her action.<sup>9</sup> In short, the rule of law requires that the state as a whole must be regulated by law. Hence, Marsh<sup>10</sup> identifies the rule of law with the German notion of the *Rechtsstaat*.<sup>11</sup> This requires, first, that all state activities must have a legal basis and second, that legal authority must respect fundamental human rights.

Jennings,<sup>12</sup> like Yardley,<sup>13</sup> divided the rule of law into criminal- and

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<sup>5</sup> See Dicey *Introduction to the Study of the Law of the Constitution* 184.

<sup>6</sup> See note 1 above. Also see Anthony Mathews *Freedom, State Security and the Rule of Law* (1986) 15.

<sup>7</sup> Mathews *ibid*. Yardley's catalogue of civil liberties includes: freedom of the person to behave as he pleases, equality before the law, freedom of property, the right to free elections, freedom of speech and to write freedom of public worship, freedom of assembly and association, and family rights. See Yardley *Introduction to British Constitutional Law* 96.

<sup>8</sup> See W Ivor Jennings *The Law and the Constitution* 5th ed. (1959) 48.

<sup>9</sup> Hayek formulated this principle in the following definite and emphatic terms: "Stripped of all technicalities this (the rule of law) means that government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of his knowledge": FA Hayek *The Road to Serfdom* (1944) 54.

<sup>10</sup> Marsh "The Rule of Law as a Supra-national Concept" in AG Guest (ed.) *Oxford Essays in Jurisprudence* (1961) 228.

<sup>11</sup> On the history of this notion see DH van Wyk "Suid-Afrika en die Regstaatidee" 1980 *TSAR* 152. The principle will be explained more fully below.

<sup>12</sup> See Jennings *The Law of the Constitution* 48-51.

<sup>13</sup> Yardley *Introduction to British Constitutional Law* 75.

constitutional-law aspects. In the criminal-law context he equated the rule of law with the maxim *nulla poena sine lege*, which includes the following four notions:<sup>14</sup>

- (a) the categories into which crimes fall should be determined by general rules of a more or less fixed character;
- (b) a person should not be punished except for a crime which falls within general rules;
- (c) penal statutes should be strictly construed, so that no act may be made criminal which is not clearly covered by statute; and
- (d) penal laws should not be made retrospectively.

Under the constitutional-law aspect Jennings also identified four characteristics:

- (a) the limitation of state powers, except the powers of parliament;<sup>15</sup>
- (b) the substitution of constitutional government (which he equated with the rule of law) for state absolutism;
- (c) the separation of powers; and
- (d) the notions of equality and liberty, which he regarded as fundamental or natural rights.

To de Smith,<sup>16</sup> the rule of law lends itself to a wide range of interpretations, with one factor in common: it is accepted by everybody as something good. He distils two meanings out of the various interpretations: first, rule of law means legality; second, law should conform to certain minimum standards of substantive and procedural justice. Under these minimum standards he lists: certainty and predictability; adequate safeguards against abuse of discretion;

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<sup>14</sup> See Jerome Hall "Nulla Poena Sine Lege" XLVII *Yale Law Journal*, 165 *et seq.* Also see John Rawls *A Theory of Justice* (1972) 235-243.

<sup>15</sup> This is in line with the English doctrine of parliamentary sovereignty which holds that parliament has "the right to make or unmake any law whatever and, further, that no person or body is recognised by the law as having a right to override or set aside the legislation of parliament": see Dicey *Introduction to the Study of the Law of the Constitution* 39.

<sup>16</sup> See SA De Smith *Constitutional and Administrative Law* (1970) 40.

equality of treatment; no unfair discrimination; a fair hearing before an impartial tribunal.

O Hood Phillips<sup>17</sup> identifies the rule of law with the fundamental human rights incorporated in many modern constitutions. Among such rights he includes:<sup>18</sup> personal freedom, equality before the law, freedom of property, free elections, freedom of speech, freedom of conscience and worship, freedom of contract, the right to assembly, the right of association and family rights. He points out that these rights are always restricted, expressly or impliedly, by concepts such as "public order" or "due process of law", and that the courts may or may not have jurisdiction to review legislation that infringes upon such rights.<sup>19</sup>

Civil liberties owe their place as the substantive (or material) aspect of the rule of law to their recognition and incorporation as higher law into Western constitutions. Fundamental human rights found their first definite and emphatic formulations in the American and French declarations of rights. To understand the contribution of the American Constitution to the modern concept of the Rule of Law, it is necessary to look briefly at the history of the relationship between England and its American Colonies that gave rise to the birth of the American Constitution. Towards the end of the Eighteenth century, the British Parliament, contrary to the English Constitution which stated that taxation could only be levied with the consent of those that paid it, decided on the imposition of various taxes on the American Colonies. The objections of the Colonies and their appeals to the English Courts fell on deaf ears. Open rebellion followed. From this episode the Colonists learnt an invaluable lesson, realising that in order to protect the individual's fundamental rights and freedoms, the powers of the individual branches of the government, including the Legislature, would in some way have to be limited. This lesson was conceptualised in the American Constitution (1787) where Parliamentary sovereignty was replaced by

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<sup>17</sup> See Phillips and Jackson *Constitutional and Administrative Law* 16.

<sup>18</sup> Cf also note 7 *supra*.

<sup>19</sup> This depends on whether a legal system recognises judicial review (e.g. USA) or not (e.g. United Kingdom). See Joseph Jaconelli *Enacting a Bill of Rights* (1980) 122.

a sovereign written Constitution (in which Montesquieu's<sup>20</sup> theory of the separation of powers was firmly embedded). Certain of the fundamental rights and freedoms of the individual that were deemed necessary to protect from growing governmental powers were entrenched in the Constitution in the form of a "Bill of Rights" (consisting of 10 Amendments added, in 1791, to the Federal Constitution of 1787). The following civil liberties were included: free exercise of religion, freedom of speech and the press, peaceable assembly, petition for redress of grievances (first amendment); security of the person, home, papers and effects from unreasonable search and seizures (second amendment); no deprivation of life, liberty or property without due process of the law<sup>21</sup> (fifth amendment); freedom of excessive bail or fines and from cruel and inhuman punishments (eighth amendment). The system of limiting government power reached a climax in 1803 in the now famous case of *Marbury v Madison*.<sup>22</sup> Chief Justice Marshall found that the courts had the authority to test legislation against the fundamental law as laid down in the Constitution (a function referred to as [constitutional] judicial review, even though there is no such "testing right" contained in the Constitution.<sup>23</sup> This decision formed the cornerstone upon which future American constitutionalism was built. The American Colonists showed preference for a system of previously established and entrenched principles above the discretionary action of a transitory parliamentary majority.

In the same year (1791) A Declaration of the Rights of Man was added as a preface to the French Constitution; it was subsequently confirmed by the preambles to the constitutions of 1946 and 1958.

Some South African jurists, like their English counterparts, read substantive or

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<sup>20</sup> Montesquieu *De L'Esprit des Lois* (1784).

<sup>21</sup> This action derives from Article 39 of the Magna Charter which some authors interpret as the first formulation of the principle of legality. See Lord Parker of Waddington *Magna Charter and the Rule of Law* (1965) 5.

<sup>22</sup> 1 Cranch 137 (US).

<sup>23</sup> See Van der Vyver *Die Juridiese Sin van die Leerstuk van Menseregte* (Unpublished LLD-thesis, University of Pretoria 1974) 668 *et seq.*

higher values into the rule of law. For instance, Beinart<sup>24</sup> interpreted it as a principle of legality as opposed to the doctrine of "law and order" which holds that every "act" emanating from Parliament, however, vague, absurd or unjust in the concrete sense, is law.<sup>25</sup> Moreover, like de Smith, Beinart<sup>26</sup> argued that the rule of law contains certain minimum standards of justice, among others the maxim *nulla poena sine lege* and equality before the law of all in rights and dignity. Beinart concluded that these substantive values constituted the legal idea.<sup>27</sup>

Another South African jurist, Molteno, based his notion of a higher-law character (or substantive aspect) of the rule of law on Dicey's identification of the rule of law and civil liberties. More specifically, he based his view on three factors that are common to all three propositions of Dicey's exposition of the rule of law, namely:<sup>28</sup>

- (a) that the rule of law was concerned with the protection of individual legal rights and liberties;
- (b) that these rights and liberties were enforceable against, and protected by the State; and
- (c) that the organ for the protection of individual legal rights and liberties was the judiciary.

The views of both Beinart and Molteno were echoed by Wiechers.<sup>29</sup> Like Beinart, he interpreted the rule of law as the principle of legality; and like Molteno and his English counterparts he concluded that the principle of legality did not only relate to *wetsgebondenheid* (*Gesetzmissigkeit*; i.e. adhering to the letter of the law) but also to the wider principle of *regsgebondenheid* (i.e. adherence to the

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<sup>24</sup> Beinart "The Rule of Law" 1962 *Acta Juridica* 100-101.

<sup>25</sup> Some authors interpret the rule of law as a law and order theory. For a discussion of this theory see Mathews *Freedom, State Security and the Rule of Law* 1-2 and Mathole Serifo Motshekga "The South African State Security legislation" in 1980 *Yearbook of African Law* 97.

<sup>26</sup> Beinart "The Rule of Law" 131-132.

<sup>27</sup> *Ibid.*

<sup>28</sup> See DB Molteno "The Rules behind the Rule of Law" 1965-7 *Acta Juridica* 136.

<sup>29</sup> See Wiechers 1967 *THRHR* 309 and Wiechers *Administrative Law* (1985) 11 *et seq.*

law in general). In summary Wiechers, like his Anglo-South African counterparts, divided the rule of law into a formal and a material (or substantive) aspect. Moreover, he derived the substantive aspect of the concept from natural law or ethical jurisprudence.

Wiechers' concept of a material aspect of the rule of law was unequivocally supported by Mathews<sup>30</sup> who took the view that the rule of law did not only mean the rule of any law but also the rule of law with a liberal content. Elaborating on the latter, Mathews<sup>31</sup> argued, like Wade and Phillips,<sup>32</sup> that the rule of law gave expression to the idea of law (or the legal idea) itself. He divided the rule of law into three distinct but closely related principles.<sup>33</sup> The first principle states that acts of the government towards the individual, particularly those affecting his civil liberties (such as the right to freedom of person, speech and association, and the right to choose representatives to make laws), should be in accordance with previously established general laws, having a reasonably specific reference. In terms of the second principle civil liberties, being essential to the operation of law as an order designed to regulate human affairs, should be incorporated into the legal system subject to the following three conditions: well-recognised limits upon their exercise; limitations consequential to the need to reconcile them with one another; and qualification of such rights in times of exceptional crisis. The third principle requires that the interpretation and application of the general rules referred to in the first principle, and adjudication of any limitations of the rights referred to in the second principle, should be under the control or supervision of an independent judicial body with effective remedial powers and acting according to fair trial procedures or the requirements of procedural due process.

All in all, Mathews saw Dicey's exposition of the rule of law as an attempt to set

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<sup>30</sup> See AS Mathews "A Bridle for the Unruly Horse" 81 1964 *SALJ* 312 at 319.

<sup>31</sup> *Ibid* 320.

<sup>32</sup> See note 3 *supra*.

<sup>33</sup> See Anthony Mathews *Law, Order and Liberty in South Africa* (1971) 31.

out the basic requirements of the principle of legality.<sup>34</sup> His own reformulation of Dicey contains the following distinct but closely related requirements of this principle:

- (a) no one shall be subject to pains and penalties except for a distinct breach of law established before the ordinary courts;<sup>35</sup>
- (b) equality before the law;
- (c) the subject is better protected when rights and remedies are incorporated into the ordinary law of the land.

These propositions<sup>36</sup> do not only identify the rule of law with civil liberties, but also bring them into the sphere of operation of procedural justice, thus making the formal and substantive aspects of the rule of law complementary.

In short, Mathews' concept of the rule of law includes the following central features: recognition of civil liberties and fair trial procedures and their incorporation into the law of the land; the limitation of state power through these substantive and procedural restraints; and a judicially enforceable bill of rights.

Sanders<sup>37</sup> like Mathews, uses Dicey as the basis of his formulation of the Rule of Law. He defines the Rule of Law as follows: "It is that politico-legal code of

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<sup>34</sup> Mathews states with reference to the principle of legality, that it "requires that the qualifications or limitations on the basic freedoms should be general, prospective, open and clear." AS Mathews "The Rule of Law - A Reassessment" in Kahn (ed.) *Fiat Iustitia Essays in Memory of Deneys Oliver Schreiner* (1983) 302.

<sup>35</sup> Mathews states that the phrase "distinct breach of the law" was Dicey's way of expressing the notion of clear, preannounced rules or standards as a guide to conduct: *ibid* 301.

<sup>36</sup> Dicey's theory, together with modern restatements of it, entails a combination of formal and substantive justice. Mathews formulates them in the following propositions:(a) The Rule of Law requires the observance of legality in the form of general and clear preannounced rules administered by independent courts. (b) It also requires that citizens should actually enjoy the basic civil liberties of person, conscience, speech, movement, meeting and association. (c) The substantive rights described in paragraph (b) are best secured by the procedural mechanisms described in paragraph (a) as the principle of legality. These rights therefore constitute the sphere of operation of the rules of procedural justice referred to in paragraph (a): *ibid*.

<sup>37</sup> Sanders "Die rule of Law - n Gemeenskaplike Westerse Gedragkode" 1971 *THRHR* 164 ff.

conduct for the state authority which at a given time is in the best position to grant the individual the maximum joy and to guarantee those claims of the subject which in the light of the prevailing circumstances of the state community concerned are regarded as fundamental, taking into account the equal claims of other members of the state community and the justified demands of the state authority.”<sup>38</sup> Basson and Viljoen<sup>39</sup> state that the concept of the Rule of Law does not mean much for the protection of fundamental rights. They declare that the Rule of Law is too formal in legal terms because the emphasis is on procedure and formal requirements to which state actions have to conform. The Rule of Law means rather the structure of the legal system and not the content of the law and thus does not guarantee the protection of human rights. The Rule of Law should rather be seen as but one of the legal principles with an ethical foundation according to which the law must be actualised. Dugard<sup>40</sup> agrees with these views when he says that the Rule of Law is only procedural in nature and does not guarantee the protection of human rights.

Views opposed to the Rule of Law and the incorporation of fundamental rights are also to be found in South African legal literature.

Venter<sup>41</sup> opposed any extensive interpretation of the rule of law on the basis that it "presuppose(d) the notion of 'fundamental rights' accruing to the individual against (state, government) authority and thus reflects a humanist philosophy which is unacceptable in South Africa". He based this conclusion on the preamble and section 2 of the Republic of South Africa Constitution Act of 1961, which acknowledged the sovereignty of God. Venter argued that "the Christian premise of the sovereignty of God stands in radical opposition to the humanistic point of departure which makes man the sovereign consideration". As a result, he suggested that South African lawyers reject the rule of law and

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<sup>38</sup> *Ibid* .

<sup>39</sup> Basson and Viljoen *South African Constitutional Law* (1988) 224.

<sup>40</sup> Dugard *Human Rights* in Basson and Viljoen note 37 at 223.

<sup>41</sup> "The Withering of the 'Rule of Law'" (8) 1973 *Speculum Juris* 69 at 86-88.

embrace "Christian government, necessarily including juridical ordering and administration of justice with a distinct Christian accent." However, in a recent publication,<sup>42</sup> Venter does recognise certain individual rights (or competencies) including the following: the right to employment, social security and education, freedom of speech, conscience, and so on. Venter espouses a system of law regulated by modal juridical principles complemented with Christian justice. Carpenter<sup>43</sup> states, with reference to Venter, that the ideal of Christian justice applied to the legal sphere would indeed ensure the recognition of the individuality of each person; ensure legal certainty; provide flexible and fair results; promote equality of treatment in comparable circumstances and engender legality and legitimacy (since both state and subject are bound by law).

Unlike Venter, JD van der Vyver did not reject the idea of fundamental rights. According to him,<sup>44</sup> Calvinism does not "deny the existence or relevance of a rule of law in the sense of legality, or of particularly precious human rights, but rebels against humanist endeavours to make man or human reason the measure and sole consideration of such rule or such rights". Van der Vyver maintained that Calvinism prefers a theocentric to an anthropocentric approach to the doctrine of human rights, because (he argued) Calvinism and historic Christianity taught that ethical norms as well as natural laws regulating the cosmic order have a fixed divine foundation. Van der Vyver himself rejected the liberal interpretation of the rule of law and adopted Dicey's view that the principles inherent in the rule of law were empirical rules of English constitutional law. He accordingly rejected any identification of the rule of law with an internationalisation of human rights. Accordingly, in its historical and literal sense, the rule of law simply meant formal legality.<sup>45</sup> No wonder that he also opposed attempts to identify the rule of law with democratic or liberal political theories.

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<sup>42</sup> Venter *Die Publiekregtelike Verhouding* (1985).

<sup>43</sup> Carpenter *Introduction to South African Constitutional Law* 97.

<sup>44</sup> *Seven Lectures on Human Rights* (1976) 120.

<sup>45</sup> *Ibid* 121.

In summary, Anglo-American and South African approaches to the rule of law can be grouped under three heads or categories:

- (a) law and order;
- (b) procedural-justice;
- (c) basic-rights.

As it appeared above, the first category is generally rejected while the second and third categories are generally accepted and considered to be complementary. The basic-rights approach identifies the rule of law with democracy and requires that civil liberties should be incorporated into municipal laws. This approach constitutes the material (or substantive) aspect of the rule of law. Its weakness, at least in English and South African law,<sup>46</sup> is that the individual is allowed the enjoyment of his or her civil liberties only to the extent that they are not limited by law, which is at the mercy of a sovereign parliament.<sup>47</sup>

## 2.2 International Law Interpretations

The traditional concept of the rule of law has certain serious limitations. First, its material (or substantive) content tends to concentrate on civil liberties or individual rights and does not extend to the search for justice in social, economic and political spheres. It avoids reference to the social, economic and political goals or values towards which legal enactments are or may be directed.<sup>48</sup> This narrow interpretation of the rule of law could not satisfy the social, economic and political aspirations of developing (or third-world) countries which emerged after World War II.<sup>49</sup> Secondly, the vast political, social and economic upheavals that followed the two world wars and, in particular, the

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<sup>46</sup> Before the South African Constitution of 1993.

<sup>47</sup> Cf H Street *Freedom, the Individual and the Law* 4th ed. (1977) 12.

<sup>48</sup> See Mathews *Freedom, State Security and the Rule of Law* 11.

<sup>49</sup> These goals were embodied in the Atlantic Charter of 1941 and the Universal Declaration of Human Rights which were embraced by colonial and dependent peoples the world over.

reaction against arbitrary government, discredited the "law and order" and procedural justice approaches to the rule of law, awakening world leaders to the need for concerted action to protect human rights under the rule of law.<sup>50</sup> However, the United Nations Charter only incorporated the right of peoples and nations to self-determination and equality in rights and dignity<sup>51</sup> and remained silent on the rule of law. This omission was cured by the Universal Declaration of Human Rights (1948)<sup>52</sup> which proclaimed in its preamble that it is essential to protect human rights under the rule of law in order to prevent rebellion against tyranny and oppression. In its operative clauses the Universal Declaration, unlike the UN Charter, set forth specifically so-called first and second generation rights which should apply to human society without any form of discrimination whatsoever. These rights included certain attributes of a democratic government which are worth citing in full:<sup>53</sup>

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access to public service in his country.
- (3) The will of the people shall be the basis of the authority of government; this will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free and fair voting procedures.

Hardly two years after the adoption of the Universal Declaration members of the Council of Europe adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)<sup>54</sup> which came into force in

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<sup>50</sup> See International Commission of Jurists (ICJ) *The Rule of Law and Human Rights* (1966) 1.

<sup>51</sup> Article 1(2) and 55. For the text see F van Panhuys, LJ Brinkhorst and HH Maas *International Organisation and Integration* (1968) 25.

<sup>52</sup> For the text see Rudolf Bernhardt and John Anthony Jolowicz (eds.) *International Enforcement of Human Rights* (1985) 163 *et seq.*

<sup>53</sup> Article 21.

<sup>54</sup> For the text see Bernhardt and Jolowicz *International Enforcement of Human Rights* 201 *et seq.*

1953. In the preamble the governments signatory to the Convention reaffirmed their common heritage of political traditions, ideals, freedom and the rule of law and resolved to take "the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration".

The European Convention, like the Universal Declaration, neither redefined the rule of law nor specifically extended it to the search for social justice. During the fifties the International Commission of Jurists (ICJ) realised that the principles of the rule of law required clearer definition and that they were indeed of universal application.<sup>55</sup> Thus at their first International Congress held in Athens in 1955 the ICJ extended the rule of law to the entire human family and affirmed its identity with civil liberties and democracy. The ICJ described the rule of law as springing<sup>56</sup>

from the rights of the individual developed through history in the age-old struggle of mankind for freedom; which include freedom of speech, press, worship, assembly and association and the right to free elections to the end that laws are enacted by the duly elected representatives of the people and afford equal protection to all.

The Act of Athens (as the Athens Congress Declaration came to be known),<sup>57</sup> reduced certain attributes of the rule of law to mandatory constitutional rules. It subjected the state to the law, enjoined governments to respect the rights of the individual under the rule of law, demanded effective means for the enforcement of these rights, and urged the judges to be guided by the rule of

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<sup>55</sup> See ICJ *The Rule of Law and Human Rights* 1.

<sup>56</sup> *Ibid* 3.

<sup>57</sup> For the text see *ibid* 65.

law, protect and enforce it without fear and favour and resist any encroachments by governments or political parties on their independence as judges.

At its second congress in Delhi, the ICJ re-affirmed the Act of Athens and expanded the material aspect of the rule of law by incorporating the second generation rights embodied in the Universal Declaration.<sup>58</sup> The ICJ described the function of this expanded (or dynamic) concept of the rule of law as not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic and cultural conditions under which his or her legitimate aspirations and dignity may be realised. Moreover, the New Delhi Declaration, like humanist philosophers,<sup>59</sup> derived both the first and second generation rights from the worth and dignity of the human personality and imposed a duty on the legislature to create and maintain the conditions which will uphold the dignity of the individual. As a result the ICJ elevated human dignity to the primacy of the legal and constitutional order and the fountainhead of all human rights.

The final step in the development of the expanded or 'dynamic' concept of the Rule of Law was taken at the Lagos Conference (1961) which discussed the concept with particular reference to Africa. The Law of Lagos (as the Lagos Declaration came to be known)<sup>60</sup> extended the dynamic concept of the Rule of

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<sup>58</sup> *Ibid* 66.

<sup>59</sup> For example, Samuel Pufendorf *Die Gemeinschaftspflichten des Naturrechts (Ausgewählte Stücke aus "De officio Hominis et Civis")* (1973) 14.

<sup>60</sup> See ICJ *The Rule of Law and Human Rights* 67.

Law to both dependent and independent peoples and identified it with democracy, human rights and the right of African peoples to self-determination and independence.<sup>61</sup> The Law of Lagos enjoined African peoples to incorporate this dynamic concept of the Rule of Law into their constitutions and then set forth the attributes of an African constitutional state. These include: legislatures established in accordance with the will of the people who have adopted their constitution freely; democratic representation in the legislatures; incorporation into constitutions and entrenchment of fundamental rights such as the right to personal liberty and non-restriction of personal liberty in peacetime without trial in a court of law. Like its predecessors, the Law of Lagos based its concept of human rights on the Universal Declaration. Hence Mathews<sup>62</sup> took the view that the Law of Lagos fused the rule of law and the Universal Declaration into one, reducing the former to a vehicle for the full achievement of justice in the material (or substantive) sense.

The identification of the rule of law with justice in the broadest sense created a close affinity between the former and the German notion of the *Rechtsstaat*<sup>63</sup> - a 'law state', or constitutional state. The *Rechtsstaat*, like the Rule of Law, has a formal and a material aspect. The formal aspect resembles the classical meaning of the Rule of Law.<sup>64</sup>

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<sup>61</sup> They declared that "the principles embodied in the conclusion of this conference ... should apply to any society, whether free or otherwise, but that the Rule of Law cannot be fully realised unless legislative bodies have been established in accordance with the will of the people which have adopted their Constitution freely." See Ian Browlie *Basic Documentation on Human Rights* (1981) 427.

<sup>62</sup> Mathews *Freedom, State Security and The Rule of Law* 11-12.

<sup>63</sup> *Ibid.*

<sup>64</sup> See JD van der Vyver "The Concept of Political Sovereignty" in Coenrad Visser (ed.) *Essays in Honour of Ellison Kahn* (1989) 336.

- [1] the notion of regulating the powers of government by means of legal provisions, and in particular of controlling and confining the exercise of power by the executive branch of government;
- [2] the doctrine of separation of powers;
- [3] the notion that interference with civil liberties must be sanctioned by statute;
- [4] the principle of legality and independence of the judiciary;
- [5] protection of basic human rights and fundamental freedoms.

Other principles of the *Rechtsstaat* include: the principle of democracy, the right to vote, the right to opposition, legal certainty, the existence of natural law (*überpositives Recht*), the right to a trial before an ordinary judge, protection against arbitrary arrest, the principle of no punishment without a law sanctioning such punishment, the prohibition of retroactive laws, and the right to a judicial hearing.<sup>65</sup>

Doehring<sup>66</sup> regards all states in which public institutions are regulated by law as law-states. This confirms the affinity between the Rule of Law and the *Rechtsstaat*.<sup>67</sup> However, as far as the historical development, philosophical foundation and substantive meaning are concerned, the *Rechtsstaat* is not the

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<sup>65</sup> *Ibid* 337.

<sup>66</sup> See Karl Doehring *Staatsrecht der Bundesrepublik Deutschland* (1985) 47 *et seq.*

<sup>67</sup> Paul Bockelman described this affinity in the following terms:

In its simplest meaning, the rule of law means that all activity within the State should have a legal (as opposed to a merely arbitrary) basis. In a more developed sense, which brings it closer to the European conception of the *Rechtsstaat* it implies that legal authority has certain express (or at all events, tacitly understood) limits; it must, in brief, respect fundamental human rights.

See "Law and Security in the Modern State" in *Law and State* (1960) 60.

equivalent of the English concept of the Rule of Law.<sup>68</sup> Like the dynamic concept of the Rule of Law, the *Rechtsstaat* idea seeks to subject the exercise of all manifestations of state authority to substantive constraints and norms contained in a supreme constitution and founded on the principle of human rights.<sup>69</sup> The material conception requires measures for the establishment of a materially just society, i.e. measures based on the normative content of the constitution.<sup>70</sup>

### 2.3. Conclusion

The Diceyan concept of the Rule of Law consists of a formal and material aspect. Its material (or substantive) content comprises civil liberties - "first generation rights" - such as those claimed to be found in the common law, and protected by the courts, or those incorporated into the French and American declarations of individual rights and subsequent human rights charters. The Universal Declaration of Human Rights identified these rights with democracy, internationalised them and afforded them protection under the Rule of Law. Although the Declaration contains social and economic rights, it neither expressly nor impliedly incorporated them into the notion of the Rule of Law. During the fifties the ICJ expanded the Rule of Law by incorporating these rights (in addition to civil and political rights) into the material (or substantive)

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<sup>68</sup> See DH van Wyk "Suid-Afrika en die Regstaatsidee" 1980 *TSAR* 152 at 156-7; LC Blaauw *The Constitutional Tenability of Group Rights* (Unpublished LLD thesis, University of South Africa 1989) 311-9.

<sup>69</sup> See HJ van Eikema Hommes "De Materiële Rechtstaatidee" 1978 *TSAR* 42 at 46-7.

<sup>70</sup> See Blaauw "The Rechtsstaat Idea compared with the Rule of Law as a Paradigm for the Protection of Rights" 1990 *SALJ* 76 *et seq.*

aspect of the Rule of Law. This expanded (or dynamic) concept of the Rule of Law brought about a convergence of the Western and Third-World (including African) concept of a law (or constitutional) state (*Rechtsstaat*).

In 1961 the ICJ added a new attribute to the international concept of a law-state by identifying the rule of law with democracy, human rights and the right of peoples to self-determination. In the context of Africa, the dynamic concept of the rule of law makes the recognition of the right of self-determination of colonial and oppressed peoples a prerequisite for the creation of constitutional states.

## CHAPTER III

### THE RULE OF LAW, DEMOCRACY, SELF-DETERMINATION AND HUMAN RIGHTS

#### 3.1 General

Although the development of the concept of self-determination and that of human rights in the era of the United Nations go hand in hand (mainly through the mutual recognition both concepts receive in many of the same human rights instruments), it is proposed here (for the purpose of clarity), to trace, first, the development of the concept of self-determination in International Law; secondly, the linkage of the Rule of Law with the said concept; and thirdly, the internationalisation of the linkage.

#### 3.2 Self-Determination

##### 3.2.1 Historical Background

As to the origins of the concept of self-determination, there are many (and varied) opinions. There are those who feel that its origins go back to the Greek city states, with as its primary source the idea of self-government.<sup>1</sup> Others date the earliest beginnings from the Peace of Westphalia in 1648 when a limited principle of "religious equality" was given the sanction of international law.<sup>2</sup> Yet others would attribute the concept to Emperor Napoleon III who, as part of his ideological programme, embraced the principle of the "awakening of nationalities".<sup>3</sup> Winston Churchill (who would later play a role in the modern

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<sup>1</sup> Toynbee *Hellinism* (1959) implies this throughout with Athens being the best example. See also JM Kelly *A Short History of Western Legal Theory* (1991) 24-26.

<sup>2</sup> See Gross "The Peace of Westphalia 1648-1949" 1948 *American Journal of International Law* 20-24.

<sup>3</sup> See Woolsley "Two Treaties of Paris" 1919 *American Journal of International Law* 81-83.

development of the concept) attributed the first practical implementation of the principle to the Italian nationalist ideologue, Mazzini.<sup>4</sup>

Others argue that the origins of the concept can be traced back to the doctrine of divine kingship,<sup>5</sup> upon which the relationship between the state and the subject was based from prehistoric times<sup>6</sup> up till the 18th and 19th centuries. This doctrine held that the King not only derived omnipotent (or plenary<sup>7</sup>) powers<sup>8</sup> from God, but also that he or she was the representative of the Supreme Being (or God) on earth. Thus the doctrine vested State sovereignty (including legislative, executive and judicial powers) in the King.<sup>9</sup> These absolute arbitrary powers entitled the rulers to make any law and impose any punishments they pleased.<sup>10</sup> The subjection of the people to arbitrary rule in this manner resulted in popular resistance against the system of divine kingship and demands for popular sovereignty.<sup>11</sup> Consequently, during the 18th and 19th centuries a number of monarchies were overthrown and replaced with republican governments,<sup>12</sup> that is, governments of the people by the people and for the people.<sup>13</sup> [Ironically, without overthrowing the monarchy, the same

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<sup>4</sup> Churchill *The World in Crisis* (1929) 208-209.

<sup>5</sup> See HP Blavatsky *The Secret Doctrine* London (1888) 29; Samuel Sharpe *The Early History of Egypt* (1936) 8; Bornwick *Egyptian Belief and Modern Thought* (1928) 103 and HA Wieshoff *The Zimbabwe-Monomotapa Culture of South East Africa* (1941) 105.

<sup>6</sup> On this period generally see Brian Brown *The Wisdom of the Egyptians* (1923) 10-11; W Marshall Adams *The Book of the Master or the Egyptian Doctrine of the Light born of the Virgin Mother* (1898) 111-113, Youssef Farag *The Copts* (1981) 299 and Ivan van Sertima *The African Presence in ancient America - They came before Columbus* (1976) 209.

<sup>7</sup> I.e. full and absolute powers.

<sup>8</sup> This doctrine was based on Matthew 16 v18 to 19. It is believed that St. Peter derived these powers from Christ after recognising Him as the long awaited Messiah at Mount Caesarea in Phillipi; see Laoge *The Three Great Semitic Religions* (1978) 19.

<sup>9</sup> Thus imperial laws, decrees and commands came to be regarded as the laws, decrees and commands of Christ, made known through the emperor. See Ullman *A History of Political Thought* (1968) 357.

<sup>10</sup> This position found better expression in the maxim *Quod princeps placuit vigorem habet legis* (that which pleases the king has the force of law). See CP Joubert "Die Gebondenheid van die Soewereine Wetgewer aan die Reg" in 1952 *THRHR* 7 et seq.

<sup>11</sup> See Rousseau *Social Contract* (1975) 201; Edward D Ingraham (trans) *An Essay on Crimes and Punishments* (1819) 17-19.

<sup>12</sup> See S Pomorski *American Common Law and the Principle Nullum Crimen Sine Lege* (1975) 10-13.

<sup>13</sup> See "The American Declaration of Independence" in James Kent *Commentaries on American Law* vol. 11 (1971) 1-2.

process played itself out in Britain.) The struggles for these republican (or popular) governments took the form of popular demands for the right to self-determination.

The two most striking examples of this were the French Revolution and the American Revolution. The latter can be traced back to the American Declaration of Independence of 4 July, 1776, which declared that governments derived their just powers from the consent of those whom it governed, and that whenever such a government becomes destructive to these ends, the people have the right to alter or abolish it. After the overthrow of the ancient regime, the French National Assembly further developed the concept of self-determination when it stated that:<sup>14</sup>

"In the name of the French people the National Assembly declares that it will give help and support to all peoples wanting to recall their freedom. Therefore, the Assembly considers the French authorities responsible to give orders to grant all means of assistance to those peoples to protect and compensate the citizens who might be injured during their fight for the cause of liberty."

The National Assembly's doctrine of popular sovereignty further required the renunciation of all wars of conquest and contemplated annexations of territory to France only after plebiscites had been held in the said territories.<sup>15</sup>

Although European Colonial powers denied African and Asian peoples the right to equality and self-determination, these principles received qualified international recognition during World War I.<sup>16</sup> On 27 May, 1916 President Wilson<sup>17</sup> proclaimed that:

"every people has a right to choose the sovereignty under which they shall live."

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<sup>14</sup> See Ingrid Delupis *International Law and the Independent State* (1974) 6-7.

<sup>15</sup> See Thürer *Encyclopaedia of Public International Law* vol. 8 470.

<sup>16</sup> 1914-1918.

<sup>17</sup> See US *Congressional Record* L III (Part 9) 8854.

In his message to Senate on 22 January, 1917 President Wilson<sup>18</sup> again stated that:

"No peace can last, or ought to last, which does not recognise and accept the principle that governments derive all their just powers from the consent of the governed and that no right anywhere exists, to hand people about from sovereignty to sovereignty as if they were property."

In his Fourteen Points delivered to Congress on 11 February 1918 President Wilson proclaimed the principle of self-determination in definite and emphatic terms:<sup>19</sup>

"National aspirations must be respected, peoples may now be dominated and governed only by their consent. 'Self-determination' is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril."

In his Fourth Point Wilson made the principle of self-determination the basis of friendly relations among nations.<sup>20</sup>

Upon his return from the Peace Conference President Wilson<sup>21</sup> observed on 24 February 1924 that:

"the central principle fought for in the war was that no government or group of governments has the right to dispose of the territory or to determine the political allegiance of any free people."

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<sup>18</sup> See US *Congressional Record* L IV (Part 2) 1742.

<sup>19</sup> *Ibid.*

<sup>20</sup> The Fourth Point reads:

"all well defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to break the peace of Europe and consequently of the world." *Ibid.*

<sup>21</sup> US *Congressional Record* LXVI 3785.

Finally, Wilson included the principle of self-determination in his first and second drafts of the Covenant of the League of Nations. The drafts required the contracting powers to agree that all future territorial adjustments would be pursuant to the principle of self-determination. To his disappointment this principle found no place in the final draft. The Allies accepted self-determination only insofar as it applied to the disintegration and dissolution of the German, Austro-Hungarian, Turkish and former Russian Empires. They had no intention of applying the principle to their own colonies and subject peoples as they still regarded them as objects of colonial expansion.<sup>22</sup>

Self-determination merely found indirect support in article 22 of the Covenant of the League of Nations<sup>23</sup> by which a mandates system was devised as a compromise solution between the ideal of self-determination and the interests of the occupying powers. However, self-determination as a general principle did not form part of the Covenant and was therefore, for the duration of the League of Nations, a political rather than a legal concept. This was confirmed by the League's Council and its commission of rapporteurs in the Åland Islands dispute (1920-1921)<sup>24</sup> even though certain autonomy rights were granted to the population concerned.<sup>25</sup>

In the meantime, however, the principle of self-determination had gained unqualified support from the Bolshevik Revolution which proclaimed such progressive ideals as democracy, the right of self-determination of peoples, and protection for minority rights as the true aims of the allied cause in World War I.<sup>26</sup> The New Soviet State invested a revolutionary content in the principle of self-determination, viewing it as a programmatic principle in the struggle for

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<sup>22</sup> See Tunkin (ed) *International Law* (1989) 42.

<sup>23</sup> See Harold S Johnson *Self-determination within the Community of Nations* (1967).

<sup>24</sup> See LoN, *Official Journal*, Vol. 21 (1921 2) 699.

<sup>25</sup> *Ibid.* These being mainly arrangements for the non-fortification and neutralisation of the island, and protection for the ethnic character of the island.

<sup>26</sup> See Slonim "Origins of the South West Africa Dispute: The Versailles Peace Conference and the Creation of the Mandates System" in IV *The Canadian Yearbook of International Law* (1968) 116.

abolishing social and national oppression and achieving socialist revolution. In this new formulation the principle of equality and self-determination of nations and peoples was viewed as "a consistent expression of struggle against all national oppression."<sup>27</sup>

In his Decree of Peace at the end of World War I Lenin formulated the principles of equality and self-determination of nations and peoples in more certain and definite terms. He proposed that:<sup>28</sup>

"all the belligerent peoples and their governments ... start immediate negotiations for a just, democratic peace",

and stressed that by:

"such a peace the government means an immediate peace without annexations (i.e. without the seizure of foreign lands, without the forcible incorporation of foreign nations) and without indemnities."

The Soviet Union took the lead by breaking with the tsarist colonial policy, denouncing all tsarist treaties of a colonial or unequal nature.<sup>29</sup>

In practical terms, the Soviet Union incorporated the principles of equality and self-determination of nations and peoples in her treaties with eastern countries which certain European imperialist powers viewed as objects of colonial expansion.<sup>30</sup> For instance, in its treaty with Persia, the Soviet State condemned the policy of the former tsarist government that:<sup>31</sup>

"not only violated the sovereignty of Asian States but were also conducive to the

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<sup>27</sup> See Tunkin *International Law* 48.

<sup>28</sup> *Ibid* 146.

<sup>29</sup> See Lenin's concluding speech following the discussion on the report on peace (26 October to 8 November) cited in Tunkin *International Law* 48.

<sup>30</sup> See Tunkin *International Law* 48.

<sup>31</sup> *Ibid*.

use of crude force by European predators in their relations with Eastern peoples.”

Thus the Soviet Union and other parties to the treaties recognised<sup>32</sup>

“the right of each people to choose its own political destiny freely and without obstacles.”

In line with this principle the Soviet Union proclaimed the idea that unequal treaties had no legal force and accordingly annulled everything contained in her secret treaties<sup>33</sup> with other countries insofar as it was aimed, as was mostly the case, at securing advantages and privileges for the Russian landowners and capitalists and the retention, or extension, of the annexations by the great Russians. This was probably the first time in history that a great power voluntarily renounced treaties that gave it rights and privileges in other countries.<sup>34</sup> What is most significant, however, is that the Soviet Union represented the principle of self-determination as one of International Law,<sup>35</sup> and not merely as something that was largely political, having no legal validity within the Law of Nations.

The denial of equality and self-determination to African peoples aroused the spirit of African nationalism and anti-colonialism. As a result, African leaders in South Africa and other parts of the continent began to demand recognition of the right of African peoples to self-determination.<sup>36</sup> For two reasons the Allied Forces during WW II supported this demand. First, the dependent colonies had made great contributions in person power and resources to the war effort and,

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<sup>32</sup> *Ibid.*

<sup>33</sup> From 1914 to 1916 Allied leaders, in anticipation of victory in World War I, had concluded a series of secret treaties for dividing up colonial spoils severed from Germany and Turkey. See Slonim "The Origins of the South West Africa Dispute" 115-116.

<sup>34</sup> See Tunkin *International Law* 49.

<sup>35</sup> See Thürer *Encyclopaedia of Public International Law* vol. 8 470.

<sup>36</sup> See Jack and Ray Simons *Class and Colour in South Africa 1850-1950* (1983) 386. Also see Pallo Jordan "Socialist transformation and the Freedom Charter" in 1986 *African Journal of Political Economy* 148.

secondly, there was the general feeling that the world should be put to rights, that richer and older nations should help people who were poor and underdeveloped to build themselves into new nations.<sup>37</sup> These factors forced the President of the United States of America, Mr. Roosevelt, and the Prime Minister of the United Kingdom, Mr. Churchill, to proclaim a new policy towards colonial peoples and territories. They incorporated this policy in the Atlantic Charter<sup>38</sup> of 14 August 1941.

The Atlantic Charter affirmed the territorial integrity of dependent and independent territories and extended the right of self-determination to colonial peoples. More specifically, the signatories to the Charter<sup>39</sup>

"desire[d] to see no territorial changes that [did] not accord with the freely expressed wishes of the people concerned"

and they

"respect[ed] the right of all people to choose the form of government under which they will live..."

and they wished to see

"sovereign rights and self-determination restored to those who have been forcibly deprived of them..."

At an inter-allied conference held in September 1941, the Soviet Union declared its agreement with the basic principles of the Atlantic Charter.<sup>40</sup>

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<sup>37</sup> See Andrew Cohen *British Policy in Changing Africa* (1959) 35, Hough *Botswana Konstitutionele Ontwikkeling* (1970) 8.

<sup>38</sup> For a text see 1941 *AJIL* 35 supp 19.

<sup>39</sup> See "The Atlantic charter" (14 August 1941) in US Senate Sub-Committee on the United Nations Charter *Review of the United Nations Charter* Senate Document no 87 Eighty-third congress (second session) 37-38.

<sup>40</sup> See Tunkin *Theory of International Law* (1974) 62.

The Atlantic Charter came to be accepted throughout the colonial world as a proposal to give colonial peoples the right of full self-determination of their political affairs.<sup>41</sup> Those who held such hopes were disappointed by Prime Minister Churchill<sup>42</sup> who asserted that the Charter was not intended to apply to colonies but was concerned with the restoration of the sovereignty, self-government, and national life of the States and Nations of Europe under the Nazi yoke. In all parts of the colonial world as well as many circles of Great Britain and the United States, Churchill's statement was interpreted as an exclusion of the colonial peoples from the high ideals of the Atlantic Charter. It was obvious from the pronouncement that Churchill sought to revert to the British policy of trusteeship which professed to grant self-government when it deemed the appropriate time had come.<sup>43</sup> On the contrary, the Atlantic Charter had unequivocally extended the right of self-determination to colonial peoples.<sup>44</sup> In his broadcast to the world in February 1942, President Roosevelt refuted Churchill's statement and reaffirmed the universality of the Atlantic charter by declaring that it was applicable "to all humanity."<sup>45</sup>

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<sup>41</sup> See H A Wieschhoff *Colonial Policies in Africa* (1944) 73.

<sup>42</sup> Shortly after his return from the meeting, on 9 September 1941, Mr Churchill declared in the House of Commons as follows:

"The Joint Declaration does not qualify in any way the various statements of policy which have been made from time to time about the development of constitutional government in India, Burma, or other parts of the British Empire. We are pledged by the Declaration of August 1941 to help India to attain free and equal partnership in the British Commonwealth with ourselves, subject, of course, to the fulfilment of obligations arising from our long connection with her and our responsibilities to her many creeds, races, and interests ... At the Atlantic meeting we had in mind, primarily, the restoration of the sovereignty, self-government, and the National life of the states and nations of Europe now under the Nazi yoke and the principles governing any alternations in the territorial boundaries which may have to be made. So that it was quite a separate problem from the progressive evolution of self-governing institutions in the regions and peoples which owe allegiance to the British Crown. We have made declarations on these matters which are complete in themselves, free from ambiguity, and related to the conditions and circumstances of the territories and peoples affected. They will be found to be entirely in harmony with the high conception of freedom and justice which inspired the Joint Declaration."

<sup>43</sup> Cf the terms of Mandate B. See Louis "The South West African Origins of the 'Sacred Trust' 1914- 1919" in 66 *African Affairs - Journal of the Royal African Society* no 262 (January 1967) 34.

<sup>44</sup> See § [a] of the Atlantic Charter.

<sup>45</sup> See Wieschhoff *Colonial Policies in Africa* 74.

The controversy surrounding the interpretation of the Atlantic Charter notwithstanding, pressures for decolonisation increased. These pressures came from various quarters including African political organisations<sup>46</sup> and anti-colonialist groups in Great Britain<sup>47</sup> and the United Nations forum.<sup>48</sup> As late as April 1943 the West African Students' Union in London addressed to the Secretary of the Colonies an appeal which amounted to a demand for dominion status<sup>49</sup> for the British territories of West Africa. A group of West African editors who had visited London in the same month issued a statement on "The Atlantic Charter and West Africa"<sup>50</sup>, demanding more precisely an expansion of self-governing institutions in this area. More specifically, they demanded the immediate abandonment of the "Crown Colony" system of government and the substitution thereof by a representative government for a period of ten years, to be followed thereafter by a responsible self-government for the territory. During the period of representative government, a British administration would remain in control of policy, subject, however, to local legislation. The legislative Council, while continuing to have some nominated official members without the right to vote, should be composed chiefly of unofficial members, elected by universal adult suffrage. These demands found support, *inter alia*, in a special issue of the Empire's Bi-monthly Record of January 1943. It

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<sup>46</sup> These organisations included the African National Congress of South Africa which adopted a document entitled "African Claims in South Africa, including the Atlantic Charter, from the standpoint of the Africans within the Union of South Africa" [see James Leatt, Theo Kneiffell and Klaus Nürnberger *Contending Ideologies in South Africa* (1986) 90] as well as from the Pan African Congresses of the time. See Basil Davidson *Africa in History* (1984) 316.

<sup>47</sup> See Lord Hailey "A Colonial Charter", an address to the annual meeting of the Anti-slavery and Aborigines Protection Society on 28 May, 1942.

<sup>48</sup> See The International Colonial Convention, issued in May 1943 by the Anti-Slavery and Aborigines Protection Society. Cited by Wieschhoff *Colonial Policies in Africa* 75.

<sup>49</sup> It is interesting to note that Britain had only granted dominium status to those colonies which were suitable for white settlement and self-government within a reasonable time. These colonies (which included South Africa and Southern Rhodesia) were granted self-government, and in the case of South Africa also independence, yet without ensuring that the white minority were not placed in such a position as to exercise undue political control. See James Hales "The Reform and Extension of the Mandate System; A Legal Solution of the Colonial Problem" in *The Grotius Society* (1941) 1 and Wieschoff *Colonial Policies in Africa* 77.

<sup>50</sup> See Memorandum by the West African Press Delegation (N Azikiwe, I B Thomas, Mallum Abubakar Imam, T G Tackie, R B Wuta Ofei, C V Jarret, T D J. Thompson, C W Downes Thomas, representing newspapers in Nigeria, Gold Coast, Sierra Leone and Gamiba). *Ibid* note 4.

reproduced an open letter<sup>51</sup> to the Secretary of State for the Colonies requesting the democratisation of the Commonwealth and the extension of the Atlantic Charter. The British resisted this under the pretext that the great diversity of social and political circumstances rendered it impossible to grant self-government to their dependencies at that stage.<sup>52</sup> In other words, the British reaffirmed their policy of trusteeship over their dependencies.<sup>53</sup>

The British opposition to the right of African and Asian peoples to self-determination suffered a deadly blow during the Big Four consultation on the formation of the United Nations organisation at San Francisco in 1945. Here, the Soviet Union first proposed the insertion among the purposes of the organisation of a clause that relations among the nations be based on respect for the principle of equal rights and self-determination of peoples.<sup>54</sup> During a press conference, Soviet Foreign Minister Molotov indicated that his government supported the movement for dependent countries to achieve national independence as soon as possible.<sup>55</sup> The technical committee responsible for outlining the purpose and principles of the new organisation did not clarify the issue further. It merely recognised the principle of self-determination and went on to state that the principle<sup>56</sup>

"conformed to the purposes of the charter only in so far as it implied the right of self-government of peoples and not the right of secession."

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<sup>51</sup> The pertinent part of this letter read as follows:

"You no doubt know that we, in this Bureau, have been pressing for an extension of the Atlantic Charter to the colonies ever since that Charter was formulated and Mr Churchill hedged about including the colonies in its scope. We have used whatever channel we could to bring home to your office and to the public in this country what a grave psychological error it was to omit the dependencies from an international proclamation of that sort. We asked that the Atlantic Charter should be declared unequivocally to be universal and in addition that a special Colonial Charter should be formulated in order to make our intentions for the future of the Colonies more specific and exact than the Atlantic charter itself is ... The Americans were asking for it. We in this country were asking for it. The Colonies were asking for it."

<sup>52</sup> See Wieschhoff *Colonial Policies in Africa* 76.

<sup>53</sup> See Slonim "The Origins of the South West Africa dispute" 116.

<sup>54</sup> See Ruth B Russel *A History of the United Nations Charter* (1958) 810.

<sup>55</sup> *Ibid* 811.

<sup>56</sup> UNCIO *Documents* (VI) 296.

The Belgian delegate attempted to narrow the application of the principle to freedom of self-government within the sovereignty of member states. He observed that the word "people" could mean either a state or a national group which did not identify itself with the population of a particular state, and that to adopt the latter meaning would be to open the door to intervention by one state into the affairs of another in order to champion the desires of such a group.<sup>57</sup> These arguments were refuted by the Report of the Rapporteur for the Committee. At the San Francisco Conference it indicated that the principles of equal rights and of self-determination of peoples were complementary parts of one standard of conduct, adding that an essential element of these principles was a free and genuine expression of the will of the people.<sup>58</sup>

The increased influence of the Soviet state on the international scene and the upsurge of national liberation movements generated by the struggle against fascism during World War II led to the incorporation of the principles of equal rights and self-determination of nations and peoples into the charter of the United Nations, which in turn catapulted it into the forefront of the international arena where it would develop into a basic tenet of modern International Law.<sup>59</sup>

### **3.2.2 Development under the Aegis of the United Nations.**

#### **3.2.2.1 Incorporation into the Charter of the United Nations**

The principle of self-determination as provided for in the Atlantic Charter, was restated in the declaration by the Allies signed in Washington on 1 January, 1942. Ultimately, the Atlantic Charter's provisions had considerable influence on the San Francisco Conference (1945) where the concept of self-determination was further reshaped and ultimately incorporated into the United Nations Charter.

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<sup>57</sup> *Ibid* 300.

<sup>58</sup> *Ibid* 396.

<sup>59</sup> See Tunkin *International Law* 142.

The United Nations Charter<sup>60</sup> mentions self-determination twice: in Articles 1 and 55. Article 1(2), which deals with the purposes of the organisation, states that one of these shall be

"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."

In Chapter IX (which is titled "International Economic and Social Co-operation"), Article 55 lists several goals the UN should promote in the spheres of economics, education, culture and human rights:

"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 higher standards of living, full employment, and conditions of economic and social progress and development."

Apart from these general articles there is nothing in the Charter which specifies the right of developing countries to acquire independence and self-determination and no rules which safeguard such independence.<sup>61</sup> There is, however an implicit reference in the Charter in the part concerning colonies and other dependent territories. Article 73 affirms that :

"Members of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are permanent, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories ...".

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<sup>60</sup> For a text of the UN Charter see F van Panhuys *et al.* *International Organisation and Integration* (1968) 18.

<sup>61</sup> See Ingrid Delupis *International Law and the Independent State* (1974) 7.

Further, Article 76(b) provides that one of the basic objectives of the trusteeship system is to promote the "progressive development" of the inhabitants of the trust territories towards "self-government or independence", taking into account, amongst others, "(t)he freely expressed wishes of the peoples concerned." Here, the obligations of the mandatories, as under the Covenant of the League of Nations,<sup>62</sup> included an obligation to report to the UN on the developments in the mandated territories.

Although there are those who would argue that the UN Charter thus made the concept of self-determination a legally binding principle according to international law,<sup>63</sup> this view is to be doubted. The mere fact of its incorporation into the UN Charter would not seem to be enough evidence that the concept has become *jus cogens*. It is true that the provisions concerning non self-governing and trust territories create binding international obligations, but the general principles of "self-determination" and of "equal rights" of peoples are framed too vaguely and are also too complex to entail specific rights and obligations. The Charter neither defines what constitutes "peoples" nor specifies the content of the principle. Thus, in the absence of any concrete definition, it cannot be realistically interpreted, applied or implemented in the framework of international law. More practically, the concept of self-determination according to the Charter of the UN would seem to be an important guiding principle for the organs of the UN in the exercise of their powers and functions. This interpretation seems to be borne out in the text of Article 1(1) of the Charter where the concept is described as being one among several possible "measures to strengthen universal peace," and must therefore be of highly flexible nature in order to fulfil its instrumental function. This is borne out by the following observation made at the San Francisco Conference:

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<sup>62</sup> See note 23 *supra*.

<sup>63</sup> See Tunkin *International Law* 142; also Cristescu "A study of the Historical and Current Development of The Right to Self Determination" cited from Lawson (ed) *Encyclopaedia of Human Rights* (1989) 1337; MK Nawaz "Colonies, Self-government and the United Nations" 1962 *Indian Yearbook of International Affairs* 3-47.

"Self-determination was considered only as a means of furthering the development of friendly relations among states and to strengthen universal peace. It was regarded, not as independent value, but only as second to the goal of peace, with the obvious consequence that it might and indeed should be set aside, when its fulfilment would give rise to tension and conflict among states."<sup>64</sup>

The Charter perspective on self determination comes to the fore most clearly in the Chapters on Non-Self-Governing and Trust Territories, where the term self determination is not specifically mentioned.<sup>65</sup> In these chapters independence is never stated as an absolute and immediate goal for all dependent territories. The emphasis is rather on "self-government", which may or may not include independence, on the "progressive development" of a territory's free political institutions, and on permissible variations in the governing regimes in territories, based on the "particular circumstances of each territory and its peoples and the freely expressed wishes of the people concerned."

At most, self-determination represented, in the words of a noted author,<sup>66</sup> "one of the desiderata of The Charter." The UN Charter thus failed to provide for an adequate decolonisation strategy.

### **3.2.2.2 Development through UN practice.**

A turning point in the attitude of the UN towards self-determination occurred on 14 December, 1960, when the General Assembly adopted The Declaration on The Granting of Independence to Colonial Countries and Peoples.<sup>67</sup> In the Declaration the UN recognised "the passionate yearning for freedom in all dependent peoples " and declared that:

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<sup>64</sup> Antonio Cassese "The Helsinki Declaration and Self-Determination" in Thomas Buergenthal (ed.) *Human Rights, International Law and The Helsinki Accord* (1977) 84.

<sup>65</sup> Michla Pomerance "Self-determination Today: The Metamorphosis of an Ideal" 1984 *Israel Law Review* 311.

<sup>66</sup> Yehuda Z Blum "Reflections on the Changing Concept of Self-Determination" 1975 *Israel Law Review* 511.

<sup>67</sup> Resolution 1514 (XV). This resolution originated as a proposal of a group of Afro-Asian states and was passed 89 to 0 with 9 abstentions. (Portugal, Spain, USA, UK, South Africa, Australia, Belgium, France and the Dominican Republic).

"The subjection of peoples to alien subjugation, domination, and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation."<sup>68</sup>

And further that

"[A]ll peoples have the right to self-determination: by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>69</sup>

The Declaration goes further to say that immediate steps are to be taken to transfer, without reservation, all powers to the peoples in the trust and non-self-governing territories or all other territories which had not yet attained independence, "in accordance with their freely expressed will and desire."<sup>70</sup>

Thus for the first time the UN declared self-determination to be a right to which all peoples were entitled, and further, gave the right an economic, social and cultural content. The head of India's delegation, Jha, was so pleased with the declaration that he called it "one of the noblest declarations, one of the noblest resolutions coming out of the United Nations .... There is nothing further that can be done - no pretext can be advanced for delaying the freedom of dependent peoples."<sup>71</sup>

This Declaration can be seen as the source of the modern legal right of self-determination, a view echoed by Dugard.<sup>72</sup> To many members (of the UN) this declaration legitimised the view of many newly independent states that colonialism was an illegality while it also emphasised the need for decolonisation.

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<sup>68</sup> Art 1.

<sup>69</sup> Art 2.

<sup>70</sup> Art 5.

<sup>71</sup> Miljan Peter Ilich *Newly Independent Nations and their Radical Perspectives on International Law* (LLD-Thesis City University of New York 1977) 133.

<sup>72</sup> Dugard *Recognition and The United Nations* (1987) 158.

The next step in the development of the concept of self-determination by the General Assembly was the adoption of the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights on 16 December, 1966. These covenants further interpreted and greatly expanded the principle of self-determination. The Covenants share an identical Article 1 which states that all people have the right to self-determination.

By its inclusion in the common Article 1 of the Covenants, the concept of self-determination was firmly established as a fundamental human right or, put more accurately, it was established as a source or essential prerequisite for the existence of individual human rights, since these rights could not genuinely be exercised without the realisation of the [collective] right to self-determination.<sup>73</sup>

At its twenty fifth session [1970], the General Assembly unanimously passed the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN.<sup>74</sup> Critescu<sup>75</sup> describes this declaration as the most "authoritative and comprehensive formulation so far of the principle of self-determination". The declaration first proclaims that self-determination is a basic principle of international law pertaining to friendly relations and co-operation between states. It goes further to say that the right to self-determination encompasses the right of all peoples to choose for themselves their political status and to seek their economic, social and cultural development.

### **3.2.2.3 The International Court of Justice**

The International Court of Justice at The Hague has given the right of self-determination considerable recognition, mainly through views voiced by its members in the Barcelona Traction case, and the South West Africa and Western Sahara advisory opinions.

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<sup>73</sup> Thürer *Encyclopaedia of Public International Law* vol. 8 472.

<sup>74</sup> GA Resolution 2625 (XXV).

<sup>75</sup> Critescu "A study of the Historical and Current Development of the Right to Self Determination" in Lawson (ed.) *Encyclopaedia of Human Rights* (1989) 1338.

In the Barcelona Traction case,<sup>76</sup> it was not the official judgement that is relevant to the present subject, but the concurring opinion of Justice Amoun (from Lebanon). The judge emphasised that the right of self-determination was now one of the "imperative rules of law." He indicated that it became a rule of law largely due to the General Assembly resolutions and declarations elaborating and applying UN Charter principles. He stated that the "international law-making nature of these declarations and resolutions cannot be defined, having regard to the fact that they reflect well-nigh universal public feeling." Amoun J. goes on to say that against those who proclaim that self-determination is not a right in International Law, "there stands arrayed, once again, with the support of a Western minority, the serried ranks of the jurists, thinkers and men of action of the Latin-American and Afro-Asian countries, as well as of the socialist countries. For all of them self-determination is now definitely part of positive international law."<sup>77</sup>

In the 1971 South West Africa advisory opinion the International Court of Justice also gave a great degree of recognition to the existence of the right to self-determination.<sup>78</sup> From the opinion of the court it is clear that the crucial reason for its decision that South Africa's rule of Namibia was illegal was that the principle of self-determination was violated by that rule. This decision was reinforced by the GA resolutions and actions to remove South African control over Namibia. The court stated emphatically:<sup>79</sup>

"Further, the subsequent development of international law in regard to the non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them... A further important state in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples ... which embraces all peoples and territories which have not yet attained independence...".

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<sup>76</sup> Barcelona Traction, Light and Power Company (Ltd) *ICJ Reports* (1970) 310.

<sup>77</sup> *Ibid* 312.

<sup>78</sup> Legal consequences for states of the continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) *ICJ Reports* (1971) 75.

<sup>79</sup> *Ibid* 31-32.

In the Western Sahara Advisory opinion<sup>80</sup> the International Court of Justice again saw fit to decide in favour of the legal nature of the principle of self-determination. The court took as its main source for its finding on the international standing of the said principle, the General Assembly, and cited a number of relevant resolutions, especially 1514(XV) and 2625(XXV). In its decision the court ruled against the claims of Morocco and Mauritania to the Spanish Sahara which would have denied the residents the right of self-determination. The Court stated that it:

"has not found legal ties of such a nature as might affect the application of resolution 1514(XV) in the decolonization of Western Sahara, and in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory...".<sup>81</sup>

Under the auspices of the UN, mainly through the General Assembly and the International Court of Justice, the principle of self-determination was developed from being a guiding principle for the UN to become a basic principle of International Law. Recognition for this has come from many quarters. The International Law Commission mentioned it as a possible peremptory norm in its commentary on the Draft Articles of the Law of Treaties.<sup>82</sup> Dugard argues that once the right to self-determination is recognised as *jus*, it would seem to follow by necessary implication that it is *jus cogens* in the light of the pivotal position it occupies in the contemporary international public order.<sup>83</sup> On the basis of these developments and practice in the UN, Espiell boldly declares that

"today no-one can challenge the fact that, in the light of contemporary international realities, the principle of self-determination necessarily possesses the character of *jus cogens*."<sup>84</sup>

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<sup>80</sup> Western Sahara Advisory Opinion ICJ Reports (1975) 31-34.

<sup>81</sup> *Ibid* 68.

<sup>82</sup> Dugard *Recognition and the United Nations* (1987)159.

<sup>83</sup> *Ibid*.

<sup>84</sup> *Ibid*.

### 3.2.2.4 Self-Determination and Human Rights

The historical and current development of the right to self-determination shows that it has become an important concept in contemporary International Law, and that it influences all aspects of the modern international arena, be it of a political, legal, social or cultural nature. But its influence is of special importance in the matter of the fundamental human rights of individuals and peoples.

As shown, the ICJ linked the rule of law with fundamental human rights.<sup>85</sup> The latter were endorsed almost universally as the substantive content of the rule of law.<sup>86</sup> With the development of the UN, third world or emerging states gained an important forum through which they could voice their concerns. They had a decided influence in the development of modern international law. Thus, as the numerical influence of the non-aligned new nations grew in the GA, and as the balance of power between the US and the USSR made them more eager to court the third world's favour, the newly independent states were enabled to influence the GA in such a way as to bring to the forefront of the world stage many of their grievances. In particular, the third world played an important part in the development of the right to self-determination.<sup>87</sup> This can be seen by the readiness with which many scholars from third world nations proclaimed self-determination as a principle of International Law.<sup>88</sup> Rahmatullah Khan<sup>89</sup> goes even further by stating that not alone was self-determination part of International Law, but that it was "responsible for the universalization of

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<sup>85</sup> See chapter 2 paragraph 2 *supra*.

<sup>86</sup> *Ibid.*

<sup>87</sup> Thürer states that "(t)he principle of self-determination in its modern conception also appears as a principle of legitimacy underlying and inspiring the evolution of International Law." Thürer *Encyclopaedia of Public International Law* vol. 8 475.

<sup>88</sup> See Umozurike *Self Determination in International Law* (1972) 270; Tunguru Huoraka "The 1971 Advisory Opinion on South West Africa (Namibia)-Colonial International Law Rejected" 1972 *East African Law Review* 5 192-195; Sagay "The Legal Status of Freedom Fighters" 1973 *East African Law Review* 6 24; S. Jayakumar "The Philippine claim to Sabah and International Law" 1968 *Malay Law Review* 10 327; RC Hingarani (ed.) *International Law through the United Nations* (1972) 193-194.

<sup>89</sup> Rahmatullah Khan "International Law - Old and New" 1966 *Indian Journal of International Law* 6 496.

international law ... It is common knowledge that this principle wrought a revolution in the character and content of International Law."

The principle of self-determination of peoples is a vital feature of International Law as it is regarded as being the basis for development on the one hand, and more importantly, it is the most important principle of International Law concerning friendly relations and co-operation amongst states. If one keeps in mind that one of the four aims of the UN as laid down in the Charter is the promotion of friendly relations amongst nations,<sup>90</sup> then it follows that UN activity is incompatible with any form of subjection or pressure exerted by the strong against the weak and that all relations between states must be based on the sovereign equality of states, and further, that the equal rights and self-determination of peoples have as their corollary sovereign equality.

It can thus be said that self-determination for many states did have the effect of bringing awareness for fundamental human rights to many corners of the world where these had been absent. This is because self-determination has become a prerequisite for the meaningful recognition and effective protection of fundamental human rights.

This is, however, not a new idea in International Law at all. An early landmark concerning the relationship between human rights and self-determination was GA Resolution 637(vii), passed on 16 December 1952, which states in its preamble that

"the right of people and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights."

The resolution goes on to confirm that

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<sup>90</sup> See in this regard GA Resolution 637(VII) The Right of Peoples and Nations to Self-Determination.

'(t)he Charter of the United Nations, under Articles 1 and 55, aims to develop friendly relations among nations based on respect for the equal rights and self-determination of peoples in order to strengthen universal peace..."

There can, however, be no achievement of the high ideals of the United Nations as long as peoples continue to be dominated by aliens, thus denying them the right to determine their own destiny, and preventing them from exercising their fundamental right to freedom, independence and self-determination.

The right to self-determination is a collective right, it is a fundamental human right<sup>91</sup> which forms part of the international legal order that was established by the Charter of the UN. The beneficiaries of this right are peoples. Individuals participate directly and through the realisation of their human rights in the exercise of this right. Thus the collective right of self-determination concerns each individual, as the deprivation of that right would mean the loss of individual rights.<sup>92</sup> As Pomerance<sup>93</sup> states:

"Within the United Nations it has become axiomatic that self-determination is the imperative basis of all human rights."

The General Assembly, in Article 1 of Resolution 1514 stated unequivocally that the denial of self-determination was a denial of fundamental human rights. Alex Quaison-Sackey,<sup>94</sup> the statesman from Ghana, said that this declaration

"made it clear that the subjection of peoples to alien forces is in itself a denial of

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<sup>91</sup> See CC Mojekwu "Self-Determination: The African Perspective" in Friedlander *Self-Determination: National, Regional and Global Dimensions* (1980) 232, 234.

<sup>92</sup> Cristescu states that the "universal realisation of the right to self-determination is of great importance for the effective guarantee and observance of fundamental human rights. At the same time, the promotion and protection of human rights and fundamental freedoms contributes to the implementation of the right to self-determination; the guarantee and observance of the various individual human rights and freedoms contribute, in the area of their exercise, to the realisation of the different aspects - political, economic, social and cultural - of the right to self-determination.". See Cristescu "A study of the Historical and Current Developments of the Right to Self Determination" 1339.

<sup>93</sup> Pomerance "Self-determination Today: The Metamorphosis of an Ideal" 332.

<sup>94</sup> Alex Quaison-Sackey *Africa Unbound* (1963) 139.

fundamental human rights and therefore contrary to the Charter of the United Nations...".

The International Covenants<sup>95</sup> in their common Article 1 once again established the dependence of individual human rights on the collective right of self-determination. States were, through those Covenants, given an obligation to respect the right of peoples to freely determine their political status and to pursue their economic, social and cultural development.

By endowing "peoples" with the right to freely determine their political status, it is implied that governments owe their existence and powers to the consent of those they govern. Thus the will of the people is the basis of the government's authority (this being classic democratic theory). That democracy is part and parcel of self-determination is borne out by the many definitions given to the concept of self-determination. Higgins<sup>96</sup> defines it as the "right of the majority within an accepted political unit to exercise power." Johnson<sup>97</sup> defines it as the "the process by which a people determine their own sovereign status." Umozurike<sup>98</sup> argues that the first basic characteristic of self-determination is "government according to the will of the people."

Thomas<sup>99</sup> defines self-determination as including:

"the right of a people to determine freely and without compulsion, the form of their government, the people who shall administer their government, the governmental machinery and the rules to which their government must conform."

Although these definitions only take into account the political content of self-determination, they serve to emphasise that, as Pomerance states:<sup>100</sup>

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<sup>95</sup> See para 2.2.2 *supra*.

<sup>96</sup> Higgins *The Development of International Law through the Political Organs of the United Nations* (1963) 105.

<sup>97</sup> Johnson *Self-Determination within the Community of Nations* (1972) 27.

<sup>98</sup> Umozurike *Self-Determination in International Law* 270.

<sup>99</sup> Amy van Wynen Thomas *et al Non-Intervention* (1956) 369.

<sup>100</sup> Pomerance "Self-determination Today: The Metamorphosis of an Ideal" 337.

"Democracy, human rights and representative government within the state are part and parcel of the concept of self-determination."

It can thus be said that peoples have the right to self-determination. This right is part of International Law<sup>101</sup> and is a prerequisite for recognition and protection of individual human rights and a democratic form of government is needed after self-determination has been granted.<sup>102</sup>

### 3.3 Development of International Human-Rights Law

#### 3.3.1 Historical and Philosophical Background

The roots of international human rights law stretches back to the sixteenth and seventeenth century humanist philosophy<sup>103</sup> and is inextricably linked with the

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<sup>101</sup> Thürer suggests that a new rule of International Law has emerged which holds that "a state established in violation of the right to self-determination (and basic human rights such as racial discrimination) is a nullity in International Law." As a basis for this argument he points to the fact that the international community recognised neither Southern Rhodesia before the elections on the basis of one man one vote, nor the "homelands" established on the territory of South Africa: *Encyclopaedia of Public International Law* vol. 8 475.

<sup>102</sup> Thürer states that "(i)f finally, at the close of the age of colonialism, self-determination as a principle is to become truly universal in scope, it should be developed in the sense of a continuing process of internal self-government - i.e. democratic government..." *ibid.*

<sup>103</sup> Samuel Pufendorf summed up the principle of humanity in the following words: "Das Wesen des Menschen besteht in seiner sittlichen Freiheit. Gott steht über dem Gesetz weil er sich selbst Gesetz ist. Die Tiere stehen ausserhalb des Gesetzes und werden von ihren Naturtrieben beherrscht. Die Würde der menschlichen Natur verlangt dagegen eine sittlich gewordene Freiheit, ohne welche, Ordnung, Zucht und Schönheit im Menschlichen leben nicht denkbar wären. Schon im blossen Namen Mensch liegt eine Würde und da diese allen Menschen Gleichermassen zukommt, ist jeder dem anderen von Natur gleich. Diese natürliche Gleichheit ist keine physische, sondern eine "rechtliche" Gleichheit, die darauf beruht, dass die Pflicht zur Geselligkeit und Humanität alle Menschen gleichermassen bindet, weil sie mit der menschlichen Natur als socher verknüpft ist. Darum gibt es keine Sklaven von Natur; Herrschaftsverhältnisse können nur durch freie Zustimmung begründet werden ...". Pufendorf derived certain human rights, namely the principles of equality and non-discrimination, from this humanist philosophy. See *Die Gemeinschaftspflichten des Naturrechts* (Ausgewählte Stücke aus "De Officio Hominis et Civis") (1973) 14. Note that Hermetic ancient African and Greek philosophers derived the principle of equality from the principle of consubstantiality between the *Logos* of God and man. Thus the consubstantiality of God and man imbued every person with worth and dignity making all persons equal in rights and dignity. See Deinhard *Das Mysterium des Menschen* (1910) 262. Also see Otto Willman *Geschichte des Idealismus* (1973) 43 and William Robson *Civilisation and the Growth of Law* (1941) 201.

right of peoples to self-determination.<sup>104</sup> The rudiments of international human rights law are traceable in the Declaration of the French National Assembly which recognised the right of other peoples to self-government. The National Assembly undertook not only to support struggles for freedom but also to adopt a policy of non-interference in the domestic affairs of other nations.<sup>105</sup>

Although the French National Assembly adopted this policy, it can be said that exactly the opposite policy, namely that of "humanitarian intervention" in the internal matters of a state, also provided a basis from which international human rights developed. The doctrine of humanitarian intervention in cases where a state committed atrocities against its own subjects which shocked the conscience of mankind thus provided a limited exception to the doctrine of national sovereignty.<sup>106</sup> In the nineteenth century it was used largely against the Ottoman Empire.<sup>107</sup> Strictly speaking, according to the doctrine of national sovereignty, those matters were the sole concern of the Ottoman Empire. Yet through the doctrine of humanitarian intervention liberal western powers interceded on behalf of the peoples concerned (especially the British under Gladstone in the case of the people of Bulgaria).

Thus throughout the nineteenth century up till World War II there were some international commitments to the settling of disputes where the doctrine of human rights was invoked. However, those commitments did not involve the question of the individual's right to political freedom or to material welfare. They were limited to the right of European minority groups to self-government.<sup>108</sup> The Berlin Treaty of 1885 extended the doctrine of human rights to the protection of colonial peoples in terms of the principle of trusteeship. More specifically, the Treaty protected their freedom of conscience

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<sup>104</sup> See para 2.2.4 *supra*.

<sup>105</sup> See Delupis *International Law and the Independent State* (1974) 6-7.

<sup>106</sup> See Sieghardt *The International Law of Human Rights* (1983) 13.

<sup>107</sup> In 1827 on behalf of the Greek people, by France and Syria in 1860-1861, and again in 1876 when 12000 Christians were massacred by irregular Ottoman troops in what is today Bulgaria: *ibid* 13.

<sup>108</sup> See Helle Kanger *Human Rights in the UN Declaration* (1984) 11-12.

and religion.<sup>109</sup> During World War I the Allied Forces increasingly lay emphasis on the moral and liberal goals of the war. Thus progressive ideals such as democracy, the right of self-determination of peoples, and protection of minority rights were proclaimed as the true aims of the war. The Bolshevik Revolution confirmed this development and gave cause to the principle of self-determination to be extended to the peoples of Africa and Asia as well as of Europe.<sup>110</sup>

Hence, in his Fourteen Points President Wilson<sup>111</sup> called for

"a free, open minded, and absolutely impartial adjustment of all colonial claims"

based on the principle

"that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined."

No wonder that at the end of World War I the Allied Forces incorporated, though vaguely, the right of people to self-determination in the covenant of the League of Nations.<sup>112</sup>

During the inter-war years some people felt that more could be done internationally to safeguard the basic rights of man. Under the League of Nations certain Minority Treaties were concluded. These sought to protect the rights of certain linguistic and ethnic minorities which fell within new state territories created by the Treaty of Versailles and St. Germain. Sieghardt<sup>113</sup> sees these as "precursors of modern international human rights instruments."<sup>114</sup> This

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<sup>109</sup> See Article 6 of the Treaty.

<sup>110</sup> See note 26 *supra*.

<sup>111</sup> See note 18 *supra*.

<sup>112</sup> See note 22 *supra*.

<sup>113</sup> See Sieghardt *The International Law of Human Rights* 13.

<sup>114</sup> In this regard Sieghardt refers especially to article 4 of the German Polish Convention on Upper Silesia of 1922. He states that it "broke new ground in guaranteeing rights of individuals - including the rights to life, liberty and the free exercise of religion, and equal

period also saw the beginning of international collaboration in a number of humanitarian fields. Examples of this include:

- [1] International Treaties created under the influence of the Red Cross concerning prisoners of war.
- [2] The establishment of the International Labour Organisation in 1919.
- [3] The "Slavery Convention" of 1926.

In 1929 therefore, the Institute of International Law took a step which had a tremendous influence on a movement which was to culminate in the human rights provisions in the Charter of the United Nations. That Institute was made up of distinguished international lawyers from Europe, the Americas and Asia. One of their aims was "the voicing of the legal conscience of the civilised world." In pursuit of this aim the Institute adopted the Declaration of the Rights of Man.<sup>115</sup>

Considering that the judicial conscience of the civilised world demanded recognition for the individual of rights, preserved from all infringements on the part of the state, and that it was important to extend to the entire world international recognition of the rights of man, the Institute adopted in six short Articles what it considered to be the duties of every state with respect to the rights of the individual. The Declaration proclaimed that it was the duty of every state to recognise:

- [a] the equal rights of every individual to life, liberty and property and to accord to all within its territory the full and entire protection of this right without distinction as to nationality, sex, race, language or religion;<sup>116</sup>
- [b] the right of every individual to the free practice, both public and private, of every faith, religion or belief, provided that the said practice shall not be incompatible

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treatment before the law - even against States whose own nationals they were": *ibid.*

<sup>115</sup> For a text see 35(2) *Annuaire* (1929) 298-300.

<sup>116</sup> Article 1.

- with public order and good morals;<sup>117</sup>
- (c) the right of every individual both to the free use of the language of his choice and to the teaching of such language;<sup>118</sup>
  - (d) that no motive based directly or indirectly on distinctions of sex, race, language or religion empowered states to refuse to any of their nationals, private and public rights, especially admission to establishments of instruction, and the exercise of the different economic activities, and professions;<sup>119</sup>
  - (e) that the equality as contemplated in the Declaration is not to be nominal, but effective, and that it excludes all discrimination direct or indirect;<sup>120</sup>
  - (f) that except for motives based upon its general legislation, no state shall have the right to withdraw its nationality from those whom have attained it for reasons of sex, race, language or religion, it should further not deprive individuals of the guarantees contemplated in the Declaration.<sup>121</sup>

Although the Declaration of the Institute of International Law did not have international validity it popularised the concept of human rights during the inter-war years.<sup>122</sup>

Consequently, when the Nazi regime deprived the individual of both civil and political rights, subjecting him to police tyranny and the most brutal oppression on the grounds of race or religion, the attention of the world focused acutely on the question of the protection of human rights internationally. As the Second World War progressed, opinions were voiced from different quarters all over the world as to the place of human rights in the international order which was to follow the cessation of hostilities. The statesmen of the United Nations took the lead in the international human-rights movement. They insisted that the foundations of peace must be built on a respect for the rights of man.<sup>123</sup>

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<sup>117</sup> Article 2.

<sup>118</sup> Article 3.

<sup>119</sup> Article 4.

<sup>120</sup> Article 5.

<sup>121</sup> Article 6.

<sup>122</sup> See Ezeji for *Protection of Human Rights under the Law* (1964) 53.

<sup>123</sup> *Ibid* 53-54.

In his message to Congress in January 1941 President Roosevelt<sup>124</sup> lent support to the international human rights movement when he referred to the "Four essential human freedoms" to which he looked forward as the foundation of the future world. These freedoms were:

- (1) freedom of speech, and expression;
- (2) freedom of every person to worship God in his own way;
- (3) freedom from want and
- (4) freedom from fear, for all peoples everywhere in the world.

Moreover, the President of the United States and the Prime Minister of Great Britain set out in the Atlantic Charter of 1941:<sup>125</sup>

"the common principles in the national policies of their respective countries on which they based their hopes for a better future of the world."

They included among these principles the right of peoples to self-determination and went on to say that after the destruction of the Nazi tyranny, they hoped

"to establish a peace which will afford assurance that all men in all lands may live out their lives in freedom from fear and want."

The Atlantic Charter had a profound influence upon the thinking of other world leaders. Thus in the preamble to the Declaration of "26" United Nations issued on 1 January 1942<sup>126</sup> it was stated that these nations subscribed to the purpose and principles of the Atlantic Charter. They also believed that the destruction of the Nazi regime was necessary to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own as well as in other lands.

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<sup>124</sup> See 35 1941 *American Journal of International Law* suppl 193.

<sup>125</sup> See note 38 *supra*.

<sup>126</sup> See *UNYB* (1946-47) 1.

Late in the summer of 1944 the representatives of four super powers<sup>127</sup> had conversations at Dumbarton Oaks in Washington in connection with the future world order following the end of the war.<sup>128</sup> The declarations by world leaders and governments on the one hand, and the pressures of private human rights organisations and individuals on the other hand, persuaded the Dumbarton Oaks Conference to put the question of human rights high on their agenda. The Conference agreed upon the following human rights provision:<sup>129</sup>

"With a view to the creation of conditions of stability and well being which are necessary for the peaceful and friendly relations among nations, the organisations should facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms. Responsibility for the discharge of this function should be vested in the General Assembly, in the Economic and Social Council."

Less than a year after the Dumbarton Oaks Conference sponsoring powers invited other countries to send representatives to a United Nations Conference in San Francisco.

The San Francisco Conference was convened to prepare "a charter for a general international organisation for the maintenance of international peace and security."<sup>130</sup> Several delegations, particularly from small countries and the United States, attended the conference determined to exert pressure sufficient to bring about the strengthening of the human-rights provision in the Dumbarton Oaks text. Contrary to the racial policies of his government, the Prime Minister of the Union of South Africa, General Smuts, strongly supported the demand for the amendment of the Dumbarton Oaks text. He said:

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<sup>127</sup> They included the USSR, USA, UK and China. See Ezejiolor *Protection of Human Rights under the Law* 55 note 16.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> The Conference lasted between 25 April and 26 June 1945. *Ibid* 56 note 19.

"I would suggest that the Charter should contain at its very outset, and in the preamble, a declaration of human rights and of common faith which had sustained the Allied Peoples in their bitter and prolonged struggles for the vindication of these rights and that faith ... We have fought for justice and decency and for the fundamental freedoms and rights of man, which are basic to all human advancement and progress and peace."

Finally, the sponsoring powers gave their support to the proposed amendment to the Dumbarton Oaks text and adopted the United Nations Charter.<sup>131</sup> The "International human rights movement" also forced the Paris Peace Treaties of 1947 to include human rights provisions. Each of the defeated enemy states undertook:<sup>132</sup>

"to take all measures necessary to secure to all persons under its jurisdiction without distinction as to race, sex, language or religion, the enjoyment of human rights and fundamental freedoms including freedom of expression, of the press and publication, of religious worship, of political opinion and of public meeting."

### **3.3.2 International Human Rights Instruments**

#### **3.3.2.1 General**

The development of the international human rights law culminated in the adoption of the United Nations Charter (1945)<sup>133</sup> and the Universal Declaration of Human Rights (1948).<sup>134</sup> These instruments gave further impetus to the development of international human rights law and its incorporation into

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<sup>131</sup> See note 60 *supra*.

<sup>132</sup> See Italy (Article 5); Rumania (Article 3(1); Bulgaria (Article 2); Hungary (Article 2(1)); and Finland (Article 6). See 1947 *BAYIL* 392-398 and *Interpretation of Peace Treaties* ICJ Reports (1950) 221.

<sup>133</sup> For the text see F van Panhuys L J Brinkhorst and H H Maas *International Organisation and Integration* (1968) 25.

<sup>134</sup> *Ibid.*

regional and municipal laws. In this paragraph these UN documents are briefly analysed and their impact on the further developments of international human rights law is traced.

### **3.3.2.2 The United Nations Charter**

In June 1945 the founding members signed the United Nations Charter at San Francisco. The charter entered into force on 24 October of the same year.<sup>135</sup> The adoption of the UN Charter marked the birth of a new international politico-legal order based on the principles of equal rights and self-determination of all peoples and nations. These principles are incorporated in Articles 1(2) and 55 of the Charter.<sup>136</sup>

Articles 11, 12 and 13 of the Charter which concern the administration of non-self-governing territories and trust territories reflected the international concern for such territories.<sup>137</sup> To achieve the objectives embodied in articles 1(2) and 55 of the Charter regarding these territories the UN adopted a decolonisation strategy<sup>138</sup> requiring colonial powers to promote to the utmost, in terms of the UN Charter, the well-being of colonial peoples and

- (a) ensure their political, economic, social, and educational advancement, their just treatment and their protection against abuses;
- (b) to develop self-government and to assist them in the progressive development of their free political institutions.

Similar obligations were imposed on States which administer trust territories.<sup>139</sup> The UN Charter, like the covenant of the League of Nations, imposed a duty on colonial powers to report to the UN on the developments in trust territories, but failed to provide safeguards to ensure that peoples of such territories actually

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<sup>135</sup> See A H Robertson *Human Rights in the World* (1970) 23.

<sup>136</sup> See para 2.2.1 *supra*.

<sup>137</sup> See Delupis *International Law and the Independent State* 7-8.

<sup>138</sup> See article 73 of the UN Charter.

<sup>139</sup> See article 76.

do attain independence. Arguably, chapter 11 was devised to replace colonial aspirations with the concept of self-government of territories under the administration of members of the UN, but it failed to provide the UN with the machinery to deal with colonial questions.<sup>140</sup>

### 3.3.2.3 The Universal Declaration of Human Rights

In the autumn of 1945 the preparatory commission of the UN General Assembly recommended that the Economic and Social Council should immediately establish a commission on human rights and direct it to prepare an international Bill of Rights. The General Assembly approved that recommendation on 12 February 1946. The Commission on Human Rights was constituted within a matter of months.

The first regular session of the Commission opened in January 1947, and its task was the drafting of the International Bill of Rights. In 1948 the Commission submitted a draft Bill of Rights through the Economic and Social Council to the GA. The Commission also submitted at the same time a draft Covenant prepared by the drafting committee. At its third session held in Paris in the autumn of 1948 the GA decided to consider only the draft declaration which was subsequently adopted on 10 December 1948.<sup>141</sup>

In its preamble the Universal Declaration of Human Rights (UDHR) recognised the humanist doctrine which holds that the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace. The preamble acknowledged that disregard and contempt of human rights was an impediment to the enjoyment of human rights.<sup>142</sup> Thus the preamble identified the rule of law and the concept of human rights in the following terms:

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<sup>140</sup> See Delupis *International Law and the Independent State* 8.

<sup>141</sup> See A H Robertson *Human Rights in the World* 25-26.

<sup>142</sup> See Atlantic Charter, note 39 *supra*.

" ... It is essential, if man is not to be compelled to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

Furthermore, the preamble established a direct link between the Universal Declaration and the UN Charter making the former an integral part of the latter.<sup>143</sup> It declared that:

"the peoples of the United Nations have in the charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom."

The preamble imposes a duty on member states to co-operate with the United Nations in the promotion of universal respect for and observance of human rights and fundamental freedoms.<sup>144</sup> Finally the preamble declared the Universal Declaration of Human Rights a common standard of achievement for all peoples and nations and made it applicable to both dependent and independent peoples. In short, the preamble of the Universal Declaration of Human Rights, like ancient and humanist philosophers, derived the concept of human rights from the worth and dignity of the human personality and reduced them to the substantive (or material) content of the rule of law.

The preamble provides a framework for the thirty Articles which form the *corpus* of the Declaration and without which many of the provisions of those articles would not be easy to understand. The thirty articles of the Declaration may be classified into four main categories:

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<sup>143</sup> See Elias *Africa and the Development of International Law* (1988) 185.

<sup>144</sup> Cf preamble of the UN Charter.

## 1. *Personal rights of the individual*

The Declaration captures the humanist doctrine which holds that all human beings are born free in equal dignity and rights and that they should act towards one another in a spirit of brotherhood.<sup>145</sup> On that basis it extended all rights and freedoms to every person without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>146</sup> Then the Declaration set out the rights and freedoms in question:

- (a) that everyone has the right to life, liberty and security of person;<sup>147</sup>
- (b) that slavery or servitude and the slave trade are forbidden;<sup>148</sup>
- (c) that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment;<sup>149</sup>
- (d) that the right of everyone to recognition everywhere as a person before the law is guaranteed;<sup>150</sup>
- (e) that all are equal before the law and are entitled without any discrimination to equal protection of the law;<sup>151</sup>
- (f) that every person is entitled to an effective judicial protection of his constitutionally or legally guaranteed rights;<sup>152</sup>
- (g) that everyone is guaranteed freedom from arbitrary arrest, detention or exile;<sup>153</sup>
- (h) that, in the determination of his legal rights, and obligations and of any criminal charge against him, everyone is entitled to a fair and public hearing by an independent and impartial tribunal;<sup>154</sup>
- (i) that an accused person is entitled to be presumed innocent until proved guilty according to law, and that no one may be found guilty of any criminal offence

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<sup>145</sup> Article 1.

<sup>146</sup> Article 2.

<sup>147</sup> Article 3.

<sup>148</sup> Article 4.

<sup>149</sup> Article 5.

<sup>150</sup> Article 6.

<sup>151</sup> Article 7.

<sup>152</sup> Article 8.

<sup>153</sup> Article 9.

<sup>154</sup> Article 10.

- which was not such an offence at the time of its commission, nor may a heavier penalty be imposed than the one applicable when the offence was committed;<sup>155</sup>
- (j) that everyone is entitled to freedom from arbitrary interference with his privacy, family, home or correspondence or from attacks upon his honour and reputation;<sup>156</sup>
  - (k) that everyone is entitled to freedom of movement and residence within the borders of each state, and to leave any country, including his own, and to return to his country;<sup>157</sup>
  - (l) that the right of asylum is guaranteed except for crimes or acts contrary to the purpose and principles of the United Nations;<sup>158</sup>
  - (m) that everyone is entitled to a nationality, and may not be arbitrarily deprived of it or denied the right to change it;<sup>159</sup>
  - (n) that the right of all men and women of full age to marry and found a family, without any limitation due to race, nationality or religion, is guaranteed and that society and the state must protect the family as the natural and fundamental group unit of society;<sup>160</sup>
  - (o) and that everyone has the right to own property alone as well as in association with others, and that he must not be arbitrarily deprived of it.<sup>161</sup>

## 2. *Civil and political rights*

The Universal Declaration did not incorporate the right of peoples to self-determination but it embodies rights and freedoms which are conditions precedent to the enjoyment of the right to self-determination.<sup>162</sup> These rights and freedoms include:

- (a) freedom of thought, conscience and religion including freedom to change one's religion or belief and to manifest it, either alone or in community with others,

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<sup>155</sup> Article 11.

<sup>156</sup> Article 12.

<sup>157</sup> Article 13.

<sup>158</sup> Article 14.

<sup>159</sup> Article 15.

<sup>160</sup> Article 16.

<sup>161</sup> Article 17.

<sup>162</sup> See Elias *Africa and the Development of International Law* 186.

in teaching, in practising, worshipping and observance, in freedom of opinion and expression, including freedom to hold opinions without interference and in seeking, receiving and imparting information and ideas is also guaranteed;<sup>163</sup>

- (b) that everyone is entitled to freedom of peaceful assembly and association, and a person cannot be compelled to belong to an association.<sup>164</sup>

Finally the Declaration impliedly elaborated on the right of peoples to self-determination by guaranteeing the right of every person to take part in the government of his country either directly or through freely chosen representatives, and providing that every person is entitled to equal access to public service in his country, and that the basis of the authority of government must be the will of the people as expressed in periodic and genuine elections conducted on a universal and equal suffrage and held by secret ballot or equally free voting procedures.<sup>165</sup>

### 3. *Economic, social and cultural rights*

The Declaration did not only recognise the worth and dignity of the human personality<sup>166</sup> and its inherent rights, but also his or her right to social security and to realisation of the economic, social, and cultural rights necessary for his or her dignity and free development. In line with the worth of the human personality and its right to development and social security the Declaration provides:

- (a) that everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment; that everyone, without discrimination, has the right to equal pay for equal work; that everyone who works is entitled to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity and supplemented, if necessary, by other means of social protection; and that everyone has the right

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<sup>163</sup> Articles 18 and 19.

<sup>164</sup> Article 20.

<sup>165</sup> Article 21.

<sup>166</sup> Article 22.

to form and to join trade unions for the protection of his interests; that everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay;<sup>167</sup>

- (b) that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, and motherhood and childhood are also entitled to special care and assistance and all children, whether born in or out of wedlock must enjoy the same social protection;<sup>168</sup>
- (c) everyone is entitled to have free education from the elementary and fundamental stages and compulsory in the elementary stage, and education should be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms;<sup>169</sup>
- (d) that everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits, as well as the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author;<sup>170</sup> and
- (e) that everyone is entitled to a social and international order conducive to the full realisation of the rights and freedom set forth above.<sup>171</sup>

#### 4. *Social obligations of the individual*

The Declaration recognises the interdependence between the rights of the individual and those of society and the limitations of individual rights resulting from the rights of others.<sup>172</sup> Thus it imposes duties on every member of the society. Finally the Declaration warns member states against any manipulation of its provisions.<sup>173</sup>

The Universal Declaration succeeded in capturing the principle of humanity and

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<sup>167</sup> Article 24.

<sup>168</sup> Article 25.

<sup>169</sup> Article 26.

<sup>170</sup> Article 27.

<sup>171</sup> Article 28.

<sup>172</sup> Article 29.

<sup>173</sup> Article 30.

its inherent doctrine of equal rights and dignity of individual members of the human family and reducing it to the substantive (or material) content of contemporary international law. Furthermore, it internationalised the seventeenth and eighteenth century rights of the individual and introduced social, cultural and economic rights as well as the duties of the individual towards society and the state. Finally, and most significantly the Universal Declaration derived the concept of human rights from the worth and dignity of the human personality and identified these rights with the doctrine of the rule of law.

#### **3.3.2.4 The Covenants**

Resolution 217(111) of 10 December 1948 not only approved the text of the Universal Declaration but also decided that work should go ahead on the two other parts of the International Bill of Rights - namely the Covenant containing legal obligations to be assumed by states, and measures of implementation.<sup>174</sup> The first draft Covenant produced by the Commission on Human Rights was devoted to the classical civil and political rights. When the GA was consulted on the matter in 1950 it decided that economic, social and cultural rights should also be included.<sup>175</sup> After a long debate the GA decided in 1952 that there should be two separate Covenants, with as many similar provisions as possible, and that both should include an article on the right of all peoples to self-determination.<sup>176</sup> These resolutions not only affirmed the right of peoples and nations to self-determination but also recognised it as a prerequisite to the full enjoyment of all fundamental human rights.<sup>177</sup> Thus it recommended that member states of the United Nations should

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<sup>174</sup> See Robertson *Human Rights in the World* 28-29.

<sup>175</sup> See General Assembly (GA) Resolution 421(V) of 4 December 1950.

<sup>176</sup> See GA Resolutions 543(VI) and 545(VI) of 5 February 1952.

<sup>177</sup> See Louis B Sohn and Thomas Buergenthal *International Protection of Human Rights* (1973) 516.

"uphold the principle of self-determination of all peoples and nations; recognise and promote the realisation of the right of self-determination of the peoples of non-self-governing and trust territories who are under their administration and shall facilitate the exercise of this right by the peoples of such territories according to the principles and spirit of the UN Charter in regard to each territory and to the freely expressed wishes of the people being ascertained through plebiscites or other recognised democratic means, preferably under the auspices of the UN;

take practical steps, pending the realisation of the right of self-determination and in preparation thereof, to ensure the direct participation of the indigenous populations in the legislative and executive organs of government of those territories, and to prepare them for complete self-government or independence."

During the protracted debates on the proposed Covenants various UN members insisted that the Covenants should contain an article defining the principle of self-determination.

Consequently a serious debate ensued concerning whether or not, in Covenants dealing with the rights of individuals, the principle of self-determination of peoples could be considered a correlative. Into this discussion developing countries managed to inject the principle of permanent (or inalienable) sovereignty over natural wealth and resources. In the jargon of the Human Rights Commission, as well as its draft article on self-determination, this principle came to be known as economic self-determination.<sup>178</sup>

The Commission on Human Rights completed its work by 1954, and submitted its draft texts to ECOSOC and the GA [Report of the Tenth Session of the

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<sup>178</sup> See James N Hyde "Permanent Sovereignty over Natural Wealth and Resources" in 50 1956 *American Journal of International Law* 855.

Commission).<sup>179</sup> When the draft Covenants prepared by the Human Rights commission were being considered by the Third Committee of the GA, it devoted its attention largely, over a period of nearly 10 years, to the substantive rights. There was also much discussion of the right of all peoples to self-determination, which was incorporated in the Common Article 1<sup>180</sup> of the Covenants.

During the years 1956-58 the Articles relating to economic and social rights were approved with a good deal of detailed revision but with little major amendment. In 1958 the UN General Assembly noted that the right of peoples and nations to self-determination as affirmed in the two draft Covenants included the principle of permanent sovereignty over their natural resources and resolved to establish a Commission to conduct a full survey of the status of this basic constituent of the right of self-determination.<sup>181</sup> Further, in 1960 the General Assembly reiterated the duty of the UN to accelerate the economic and social advancement of developing countries so as to contribute to safeguarding their independence and helping to close the gap in standards of living between developing and developed countries.<sup>182</sup>

In the same year (1960) the UN General Assembly consolidated the relationship

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<sup>179</sup> See document E/2573 62-72.

<sup>180</sup> The adopted text read:

"1. All peoples have the right to self-determination. By virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development.

2. The peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States parties to the Covenant having responsibility for the administration of non-self-governing, and trust territories shall promote the realisation of the right of self-determination in such territories in conformity with the provisions of the United Nations Charter".

See UN Doc A/C31 L 489.

<sup>181</sup> See Johnson *Self-determination within the Community of Nations* 40.

<sup>182</sup> See GA Resolution on "Concerted Action for Economic Development of Economically Developed and of Economically Less Developed Countries." Resolution 1515(IV) of 15 December 1960.

between the right of political and self-determination of peoples under the Declaration on the Granting of Independence to Colonial Countries and Peoples. This Declaration reaffirmed, first, the UN's faith in fundamental human rights and, secondly, in line with the broad right of self-determination elaborated on the decolonisation strategy of the UN contained in Article 73 of the UN Charter.<sup>183</sup> The 1960 UN decolonisation strategy is so important to this thesis that it must be reproduced in full. It holds that:<sup>184</sup>

- (a) the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the UN Charter and is an impediment to the promotion of World Peace and co-operation;
- (b) all peoples have the right to self-determination and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;
- (c) inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence;
- (d) all armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected;
- (e) immediate steps shall be taken, in trust and non-self-governing territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom;
- (f) any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purpose and principles of the charter of the United Nations;
- (g) 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

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<sup>183</sup> See note 138 *supra*.

<sup>184</sup> This resolution incorporated the principle of self-determination embodied in the proposed Covenants. See Johnson *Self-determination within the Community of Nations* 41.

Declaration on the basis of equality, non-interference in the internal affairs of all states, and respect for the sovereign rights of all peoples and their territorial integrity.

In sum, the Declaration on the Granting of Independence to Colonial Countries and Peoples invalidated the principle of trusteeship embodied in the Berlin Treaty of 1885, the Covenant of the League of Nations and the UN Charter itself. It outlawed colonialism in all its forms.<sup>185</sup> Furthermore, it outlawed the suppression of popular struggles against colonial rule, violation of the integrity of colonial territories, called on all colonial powers to transfer all power to colonial countries and peoples. And finally and perhaps most significantly, the Declaration called on all states to bring their social, economic and social orders in line with the UN Charter and the Universal Declaration as well as its own provision.

The Declaration on the Granting of Independence to Colonial Countries and Peoples has been described as an important landmark in the anti-colonialist trend. Put mildly, the Declaration was described as a bold interpretation of Article 73 of the UN Charter.<sup>186</sup> No wonder that even the (mainly Western) states which had abstained when the resolution was adopted in 1960 later came to accept it as an accurate statement of modern international law,<sup>187</sup> a view which was later echoed by the International Court of Justice.<sup>188</sup>

During the first half of the sixties the UN General Assembly reaffirmed the

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<sup>185</sup> Note that as early as 1955 colonialism was outlawed by the Bandung Charter which stated that colonialism is an evil that must be brought to an end, and that "the subjection of peoples to alien subjugation, domination and exploitation constituted a denial of fundamental human rights contrary to the UN Charter and an impediment to the promotion of freedom and independence for all such peoples", and, finally, called upon colonial powers to grant freedom and independence to colonial countries and peoples. See The Institute of Pacific Relations *Selected Documents of Bandung Conference* 1955.

<sup>186</sup> See Michael Akehurst *A modern introduction to International law* 6th edit. (1987) 294.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

principle of economic self-determination in a number of landmark resolutions.<sup>189</sup> For instance, in 1962 the General Assembly<sup>190</sup> declared:

- (a) that the right of peoples to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well being of the state concerned;
- (b) nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law;
- (c) violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the UN Charter.

In short, this resolution invalidated the colonial policy of exploitation of the resources of colonial territories without regard to the economic interests of those territories. This resolution (together with the 1960 Declaration) therefore, dealt a deadly blow to the colonial system.

To implement the Declaration on the Granting of Independence to the Colonial Countries and Peoples the GA established a special committee on the situation with regard to implementation of the Declaration (the committee of seventeen) and charged it with the duty to study the application of the Declaration and make suggestions and recommendations on the progress and extent of its implementation.<sup>191</sup> The committee was enlarged in 1962 by the addition of seven members.<sup>192</sup> In 1963, the GA dissolved the committee on information from non-self-governing territories,<sup>193</sup> which with the transfer of responsibilities

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<sup>189</sup> For a full discussion of these resolutions see Fritz Visser "The Principle of Permanent Sovereignty over Natural Resources and the Nationalisation of Foreign Interests" 1988 *CILSA* 177. Also see James W Nickel *Making Sense of Human Rights* (1987) 6.

<sup>190</sup> See UN GA Resolution 1803 (XVII) of 14 December 1962.

<sup>191</sup> See UN GA Resolution 1654 (XVI) of 27 December 1961.

<sup>192</sup> See GA Res 1810 (XVII) of 7 December 1962.

<sup>193</sup> See GA Res 1970 (XVIII) of 16 December 1963.

previously assigned to special committees relative to designated territories made the Special Committee of Twenty-Four the only body responsible for matters relating to dependent territories with the exception of the Trusteeship Council.<sup>194</sup> Membership on the Committee was tailored to the wishes of the anti-colonial interests, with special regard to geographical distribution. It has with only two exceptions remained constant.<sup>195</sup>

Since its establishment, the Special Committee has in general become a Steering Committee for much of the activity of the GA.<sup>196</sup> It received human rights petitions and held hearings with petitioners. On the basis of these petitions and hearings they made recommendations to the GA. Subsequently the GA adopted a number of other resolutions on equality and on natural resources.<sup>197</sup> These resolutions were also of great importance to the position of developing nations under international law and to their right of self-determination.<sup>198</sup>

During the Seventeenth Session, the General Assembly invited the Special Committee to appraise the Security Council of any developments in the dependent territories which might threaten international peace and security.<sup>199</sup> The Committee consistently drew the attention of the Security Council to the situation in the dependent territories in Southern Africa and other parts of the world. Three years later<sup>200</sup> the General Assembly requested the Special Committee to recommend a deadline for the accession to independence of each territory, in accordance with the wishes of the people. The Committee was further requested to pay particular attention to the small territories,

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<sup>194</sup> See Johnson *Self-determination within the Community of Nations* 42.

<sup>195</sup> *Ibid* 37.

<sup>196</sup> *Ibid* 42.

<sup>197</sup> These resolutions include: GA Resolutions 626 (VIII), 1236 (XII), 1301 (XIII), 1495 (XV), 1565 (XV), 1686 (XVI), 1803 (XVIII), 1815 (XVII), 1904 (XVIII), 1966 (XVIII) and 2158 (XXI). See Detter "The Problem of Unequal Treaties" in 1960 *International and Comparative Law Quarterly* 1071.

<sup>198</sup> See Delupis *International law and the Independent State* 10.

<sup>199</sup> See GA Res 1810 (XVII) of 17 December 1962.

<sup>200</sup> See GA Res 2105 (XX) of 20 December 1965.

recommending the most appropriate ways, as well as the steps to be taken, to enable their population to exercise fully their right to self-determination and independence. In its reports the Special Committee repeatedly emphasised that the principle of trusteeship no longer applied to small nations.<sup>201</sup> Thus the Special Committee saw its mandate in the efforts to find the most effective ways of enabling small nations to achieve a status of self-government by independence. It had come to be accepted that a full measure of self-government was satisfied either by "emergence as a sovereign independent state," "free association with an independent state", or "integration with an independent state".<sup>202</sup>

The 1965 resolution recognised "the legitimacy of the peoples under colonial rule to exercise their right to self-determination and independence" and invited "all states to provide material and moral assistance to the national liberation movements in colonial territories." In effect, this resolution granted legitimate nationalist movements an international status.

Henceforth support for national liberation movements increased. For instance, a year later the General Assembly adopted a resolution which affirmed not only the principle of the prohibition of the use of force in international relations, but also the right of peoples to self-determination.<sup>203</sup> This resolution recognised that peoples subjected to colonial oppression were entitled to seek and receive all support in their struggles which were in accordance with the purposes of the charter. Thus it declared that any force which deprived peoples of this right was itself a violation of the UN Charter. Numerous speakers during the debate took the view that oppressed peoples were free to use force in their struggle for independence.<sup>204</sup> Thus in the resolution condemning all forms of intervention

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<sup>201</sup> The Special Committee rejected the principle on trusteeship on the basis of GA Res 1514 of 16 December 1960 which stated that

"inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence."

<sup>202</sup> See Johnson *Self-determination within the Community of Nations* 43-44.

<sup>203</sup> See GA Res 2160 (XXI) of 30 November 1966.

<sup>204</sup> See Johnson *Self-determination within the Community of Nations* 154.

in the domestic affairs of States<sup>205</sup> it was stated that assistance to national liberation movements would not be considered an intervention in the domestic affairs of other states and that under certain circumstances it could be strongly recommended in defence of the right of self-determination of the peoples concerned. In an earlier resolution of 13 December, 1966, the GA reaffirmed all its previous resolutions, approved the sending of visiting missions to the dependent territories, declared the continuation of colonial rule a threat to international peace and security and reaffirmed, further, "its recognition of the legitimacy of the struggle of the peoples under colonial rule to exercise their right to self-determination and independence" and urged "all states to provide material and moral assistance to the national liberation movements in colonial territories."

Three days later, the GA unanimously approved the draft Covenants on human rights.<sup>206</sup> In accordance with the decision of the GA taken in 1952, both Covenants start off in identical terms, with a common Article 1 on the right of self-determination. This Article reaffirmed the termination of the principle of trusteeship<sup>207</sup> and stated that the right of self-determination was an existing right, was of immediate application and resulted in the right of **All Peoples** to determine freely their political status. In subsequent paragraphs it reaffirmed the right of economic self-determination and its interlinkage with the right of political self-determination.

Articles 2-5 of both Covenants constitute Part II thereof. These Articles contain in each case an undertaking to respect, or to take active steps to secure progressively, the substantive rights contained in Part III of both Covenants. Article 2(1) of the Covenant on Civil and Political rights imposes an immediate obligation on states to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognised in the Covenant.

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<sup>205</sup> See GA Res 2225 (XXI) of 19 December 1966.

<sup>206</sup> See GA Res 2200 of 16 December 1966.

<sup>207</sup> See Article 1(3).

In short, it imposes on states parties the obligation to maintain a defined common standard. To accommodate states who could not meet this standard immediately, Article 2(2) provided for a progressive (rather than an immediate) obligation to take the necessary steps to adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant, in cases where they were not already provided for in the municipal law.

Article 2(1) of the Covenant on Civil and Political Rights contains a standardised non-discrimination clause while Article 2(3) provides for a remedy for persons whose rights have been violated. The remaining articles in Part II provides for: the equality of the sexes (Art 3); the possibility of derogation in times of public emergency (Art 4); prohibition against the abuse of these rights (Art 5).<sup>208</sup>

Unlike its counterpart, the Covenant on Economic, Social and Cultural Rights contains a progressive (not an immediate) obligation in terms of which states parties accept standards which they intend to promote and which they pledge themselves to secure progressively, to the maximum extent possible having regard to their available resources. This is the natural result of the difference in the nature of the rights recognised in the two Covenants. In short, the former is a mandatory, while the latter is a promotional Convention.<sup>209</sup>

Of the remaining general provisions in the Covenant on Economic, Social and Cultural Rights, the non-discrimination clause (Art 2(2)) is similar to that in the other Covenant, as are the texts on the equality of sexes (Art 3) and the prohibition on the abuse of the rights secured and the Articles containing the General Saving clause. The Article on limitations (or derogations) is very different. It only permits derogations which are determined by law and are solely made for the purpose of promoting the general welfare in a democratic

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<sup>208</sup> Cf article 30 of the Universal Declaration.

<sup>209</sup> See Robertson *Human Rights in the World Today* 39 *et seq.*

society.<sup>210</sup> No reference is made to a state of emergency, which is the condition precedent for derogations in the other Covenant. Finally, Article 2(3) contains a provision designed to protect developing countries from economic exploitation by their more powerful neighbours. The harshness of this provision is mitigated by protection of the right of property by the Covenant.

The rights which the Covenant on Civil and Political Rights is designed to protect are set out in Part III. They are the following: the right to life; freedom from torture and inhuman treatment; freedom from slavery and forced labour; right to liberty and security; right of detained persons to be treated with humanity; freedom from imprisonment for debt; freedom of movement and of choice of residence; freedom of aliens from arbitrary expulsion; right to a fair trial; protection against retroactivity of the criminal law; right to recognition as a person before the law; right to privacy; freedom of thought, conscience and religion; freedom of opinion and of expression; prohibition of propaganda for war and of incitement to national, racial or religious hatred; right of assembly; freedom of association; right to marry and found a family; rights of the child; political rights; equality before the law; rights of minorities.<sup>211</sup>

A comparison of the Covenant of Civil and Political Rights with the Universal Declaration shows that the rights set out in the former are generally defined in greater detail and include rights which were not incorporated in the latter instrument.<sup>212</sup> The right of property (which was included in Article 17 of the Universal Declaration) is not included in either covenant as states parties could not reach agreement owing to their different political philosophies.<sup>213</sup>

It is not proposed to examine in detail the definitions of any of the Civil and Political Rights set out in the Covenant save to observe that Articles 25 and 27 further amplified the right of self-determination. Article 25 affirms and

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<sup>210</sup> See Article 4.

<sup>211</sup> Articles 6 - 27.

<sup>212</sup> These Articles include 10, 11, 20, 24 and 27.

<sup>213</sup> See Robertson *Human Rights in the World Today* 37.

amplifies certain political rights embodied in Article 21 of the Universal Declaration. Article 25 provides:

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot guaranteeing the free expression of the will of the electors;
- (c) to have access, on general terms of equality, to public service in his country."

To prevent the domination of the minorities by majorities resulting from the application of Article 25 the Covenant in Article 27 provides that:

"In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

It is quite clear that Article 25 seeks to implement the right of peoples to self-determination, while Article 27 merely seeks to protect minority rights within a democratic society. In other words, Article 27 does not grant minority groups the right of political self-determination within existing states. It merely protects their right to use their own language, practise their own culture and religion.

The Covenant on Economic, Social and Cultural Rights, like its counterpart, contains a somewhat longer list and more detailed definitions than those in the Universal Declaration. Owing to the admission of an increasing number of developing countries as new members of the UN, the original six Articles in the Universal Declaration were increased to ten in the Covenant on Economic, Social and Cultural Rights. The rights protected by the latter are the following:

the right to work; the right to just and favourable conditions of work, including *inter alia* fair wages, equal pay for equal work and holidays with pay; the right to form and join trade unions, including the right to strike; the right to social security; protection of the family, including special assistance for mothers and children; the right to an adequate standard of living, including adequate food, clothing and housing and the continuous improvement of living conditions; the right to the highest attainable standard of physical and mental health; the right to education, primary education being compulsory and free for all, and secondary and higher education generally accessible to all.<sup>214</sup> Article 14 permits the progressive implementation of this right. Finally, Article 15 grants the right to participate in cultural life and enjoy the benefits of scientific progress. The other provisions relate to implementation mechanisms.<sup>215</sup> As was said, the major difference between the two Covenants is that the first is a mandatory while the latter is a promotional convention.<sup>216</sup>

In 1970 the General Assembly adopted "The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."<sup>217</sup> This Declaration further amplified aspects of the right of self-determination which it considered necessary to guarantee in order to implement the UN Charter and to secure international peace and security. In this resolution the General Assembly recalled that the subjection of peoples to alien subjugation, domination and exploitation constituted a major threat to the promotion of international peace and security and declared that:

"By virtue of the principles of equal rights and self-determination for peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference their political status and to pursue

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<sup>214</sup> See Articles 6 - 13.

<sup>215</sup> For a discussion of these articles see Robertson *Human Rights in the World Today* 37 *et seq.*

<sup>216</sup> *Ibid* 40.

<sup>217</sup> See GA Res 2625 (XXV) of 24 October 1970.

their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the charter."

Under this resolution, therefore, the right of self-determination involves not only to remain free from foreign domination, but also a right of the citizens to elect a government representing the people of a territory as a whole. In other words, the right of self-determination is applicable to sovereign (or independent states such as South Africa) where only a section of the population elect the government. At the same time the resolution guaranteed the territorial integrity of states.<sup>218</sup>

Finally, in resolution 130 of 1977<sup>219</sup> the General Assembly explicitly extended the right of self-determination to "sovereign" states such as South Africa. In this resolution the General Assembly decided that the approach to future work within the United Nations system with respect to human rights questions should take account of certain concepts, including the following:

"In approaching human rights questions within the United Nations system, the international community should accord, or continue to accord, priority to the search for solutions to the mass and flagrant violations of human rights of peoples and persons affected by situations, such as those resulting from apartheid, from all forms of racial discrimination, from colonialism, from foreign domination and occupation, from aggression and threats against national sovereignty, national unity and territorial integrity, as well as from the refusal to recognise the fundamental rights of peoples to self-determination and of every nation to the exercise of full sovereignty over its wealth and natural resources."

In 1979 the General Assembly recalled that disregard and contempt for human rights have resulted in barbarous acts which outraged the conscience of mankind and reaffirmed that mass and flagrant violations of human rights were of special concern to the United Nations. Thus it urged the appropriate UN

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<sup>218</sup> See Delupis *International Law and the Independent State* 11.

<sup>219</sup> See GA Res 32\136 of 16 December 1977.

bodies, within their mandates, particularly the Commission on Human Rights, to take timely and effective action in existing and future cases of mass and flagrant violations of human rights.

Finally, the Commission on Human Rights invited the sub-commission to bring to its attention any situation which it had reasonable cause to believe revealed a consistent pattern of violations of human rights and fundamental freedoms, in any country, including policies of racial discrimination, segregation and apartheid, with particular reference to colonial and other dependent territories.<sup>220</sup>

### **3.3.3 Regional Human Rights Instruments**

#### **3.3.3.1 General**

The UN Charter and Universal Declaration of Human Rights gave impetus to the development of regional human rights instruments such as the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and Peoples Rights. The object of this paragraph is not to analyse at any great length any of these regional human rights instruments, but to trace the role of international human rights instruments on the evolution of regional human-rights law and its incorporation in the municipal laws of European and African countries. The focus will fall mainly on the European Convention, the Inter-American Convention and the African Charter on Human and Peoples' Rights.

#### **3.3.3.2 Europe**

##### **3.3.3.2.1 Background**

The same factors which led the United Nations to concern itself with the protection of human rights, led to the growth of European concern therein. These factors are, first, a natural reaction against the Nazi and fascist tyrannies which suppressed human rights as a deliberate instrument of national policy

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<sup>220</sup> See BG Ramcharan *The Concept and Present Status of the International Protection of Human Rights* (1989) 6.

and even as a precondition of their establishment and secondly, during the immediate post-war years it soon became evident that the democratic systems of Europe needed protection against the possible revival of Nazism and Fascism. European leaders realised that the preservation of democracy and the maintenance of the rule of law required foundations on which to base the defence of human personality against all tyrannies and forms of totalitarianism.<sup>221</sup>

After World War II Western Europe sought the defence of the human personality in the doctrine of human rights of the seventeenth century<sup>222</sup> and the international Human Rights instruments.<sup>223</sup> The history of the European Convention on Human Rights dates back to 1947. Immediately after the war there came into being a number of important private organisations in different countries campaigning for European unity.<sup>224</sup> In December 1947 these organisations decided to form the International Committee for the Movements for European Unity, to co-ordinate their actions and to conduct a joint campaign throughout the continent. This committee in 1948 organised the historic Congress of Europe at the Hague. The objects of the Hague Conference were:<sup>225</sup>

- (a) to demonstrate the widespread support for the cause of European unity existing throughout the free countries of Europe;
- (b) to make practical recommendations to governments for its realisation;
- (c) to provide a fresh impetus and inspiration to the campaign.

The Congress adopted a political resolution in which it demanded the convening of a European Assembly chosen by the Parliaments of the participating nations from among their members or others, which, inter alia, was to advise upon immediate practical measures designed progressively to bring about the

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<sup>221</sup> See Robertson *Human Rights in the World Today* 51.

<sup>222</sup> See Ezejiolor *Protection of Human Rights under the Law* 97.

<sup>223</sup> See Robertson *Human Rights in the World today* 51.

<sup>224</sup> *Ibid* 51 *et seq.*

<sup>225</sup> See Ezejiolor *Protection of Human Rights under the Law* 98.

necessary economic and political union of Europe; to examine both the juridical and constitutional implications and the likely economic and social consequences of the creation of such a Union or Federation, and to prepare the necessary plans for the above purposes. The resulting Union or Federation was to be open to all democratically governed European Nations which undertook to respect a Charter of Human Rights.

The Congress set up a commission and charged it with the function of undertaking immediately the double task of drafting a Charter of Human Rights and of laying down standards to which a State had to conform if it was to deserve the name of a democracy. The bottom line for a democratic State required any aspirant State to guarantee to its citizens liberty of thought, assembly, and expression as well as the right to form a political opposition. Furthermore, the European Assembly was required to make proposals for the establishment of a Court of Justice with adequate sanctions for the implementation of the Charter and to this end any citizen of the associated countries was to have redress before the court, at any time and with the least possible delay, for any violation of his rights as formulated in the Charter.<sup>226</sup>

Further, the Congress adopted a Cultural Resolution in which it affirmed its commitment to human rights as the basis of their efforts for a united Europe, but expressed the view that human rights would be insufficiently protected by an agreement only. Hence it stated that it:<sup>227</sup>

“(c)onsiders it essential for the safeguard of these rights that there should be established a Supreme Court with supra-state jurisdiction to which citizens and groups can appeal; and which is capable of assuring the implementation of the charter.”

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<sup>226</sup> *Ibid* 99.

<sup>227</sup> *Ibid*.

Finally, the Congress issued a "Message to Europeans" stating that:<sup>228</sup>

"We desire a United Europe throughout whose area the free movement of persons, ideas and goods is restored;

We desire a charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition;

We desire a Court of Justice with adequate sanctions for the implementation of this Charter;

We desire a European Assembly where the forces of all our nations shall be represented."

Pursuant to the resolutions of the Hague Congress, the Council of Europe, made up of a consultative Assembly and a Committee of Ministers was formed on 5 May, 1949.

The primary aim of the Council of Europe was to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which they claimed as their common heritage, and to facilitate their economic and social progress. They sought to achieve this aim, inter alia, by agreements and common action in the maintenance and further realisation of human rights and fundamental freedoms. Further, and perhaps more significantly, the Council of Europe made a condition of its membership acceptance of the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.

The European Movement drew up a draft Convention on Human Rights and referred it to the Committee of Ministers in July 1949 requesting the Committee to place the matter on the agenda of the Consultative Assembly. In August

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<sup>228</sup> *Ibid.*

1949 the Assembly placed the matter on its agenda under the item "measures for the fulfilment of the declared aim of the Council of Europe, in regard to the maintenance and further realisation of human rights and fundamental freedoms". After discussion, the Assembly instructed the Committee of Ministers to draw up a Convention providing a collective guarantee and designed to secure the effective enjoyment of the rights and freedoms proclaimed in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948.

Following a long debate in both the Committee of Ministers and the Consultative Assembly the Committee of Ministers signed the European Convention for the Protection of Human Rights and Fundamental Freedoms at their sixth session held in Rome on 4 November 1950. The convention came into force on 3 September 1953. Soon after, a Committee of Experts drew up a Protocol defining the rights which were omitted from the Convention. The Protocol, including the rights of election, property and education, was signed on 30 March 1952 and it came into force on 18 May 1954.<sup>229</sup>

### **3.3.3.2.2 The Rights and Freedoms guaranteed**

The Universal Declaration of Human Rights (1948) had a major influence on the European Convention on Human Rights.<sup>230</sup> This appears in the preamble of the convention in which the Signatory Governments, Members of the Council of Europe, recalled, *inter alia*, the Universal Declaration of Human Rights and reaffirmed their profound belief in fundamental freedoms as the foundation of justice and peace in the World and that these freedoms could best be maintained by an effective political democracy. Secondly, the convention linked political democracy and fundamental freedoms by resolving that:

"as governments of European Countries which are like-minded and have a

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<sup>229</sup> *Ibid* 99-101.

<sup>230</sup> For a text see De Villiers *et al* (ed.) *Human Rights Documents that Paved the Way* (1992) 45.

common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for collective enforcement of certain of the rights stated in the Universal Declaration.”

Pursuant to this resolution the high contracting parties took twelve rights from the Universal Declaration and incorporated them into the European Convention.<sup>231</sup> Further, they took three more rights from the Universal Declaration and included them in the Protocol.<sup>232</sup>

The rights and freedoms guaranteed to everyone within the jurisdiction of the High Contracting Parties are:

- (a) the right to life;
- (b) freedom from torture or inhuman or degrading treatment or punishment;
- (c) freedom from slavery or servitude;
- (d) the right to liberty and security of person;
- (e) the right to fair trial;
- (f) freedom from retroactive legislation;
- (g) the right to respect for private and family life;
- (h) the right to freedom of thought, conscience and religion;
- (i) the right to freedom of expression;
- (j) the right to freedom of peaceful assembly and association;
- (k) the right to marry and found a family;<sup>233</sup>
- (l) the right to seek an effective local remedy for the violation of any of the rights and freedoms set out in the Convention and Protocol;<sup>234</sup>
- (m) freedom from discrimination in the enjoyment of the rights and freedoms set forth in the Convention and Protocol;<sup>235</sup>
- (n) the right to peaceful enjoyment of possessions;<sup>236</sup>

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<sup>231</sup> Cf Articles 2-12 and 14 of the Universal Declaration of Human Rights.

<sup>232</sup> Cf Articles 17, 21 and 26 of the Universal Declaration and Articles 1-3 of the Protocol.

<sup>233</sup> Articles 2-12

<sup>234</sup> Article 2.

<sup>235</sup> Article 13 of the Convention and Article 5 of the Protocol.

<sup>236</sup> Article 1 of the Protocol.

- (o) the right to education;<sup>237</sup>
- (p) the right to free election.<sup>238</sup>

Although these rights and freedoms were derived from the Universal Declaration they are more extensively defined and qualified than in the Declaration. The reason is that they were intended to be enforced through a judicial system which requires reasonable certainty and precision.<sup>239</sup> Hence, even where derogation was allowed it had to be in accordance with the law. Furthermore, the principle of humanity, though not alluded to in the preamble, exercised a profound influence on the High contracting parties. No wonder they prohibited any derogation with respect to the following rights and freedoms, even during a public emergency:<sup>240</sup>

- (a) the right to life, freedom from torture or inhuman or degrading punishment;
- (b) freedom from slavery or servitude;
- (c) freedom from punishment for acts or omissions made criminal by retroactive legislation.

The Convention and Protocol only took over from the Universal Declaration those rights and freedoms which were capable of judicial enforcement and left it to the signatory states to extend the scope if they so desired.<sup>241</sup> The next steps to extend the scope of the Convention were taken in 1960 under the Second Protocol<sup>242</sup> which guaranteed the following six civil and political rights and freedoms:

- (a) freedom from imprisonment on the ground of inability to fulfil a contractual

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<sup>237</sup> *Ibid* Article 2.

<sup>238</sup> *Ibid* Article 3.

<sup>239</sup> See Ezeji for *Protection of Human Rights under the Law* 104.

<sup>240</sup> See Article 15(2).

<sup>241</sup> Hence Article 60 provided:

"Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any high contracting party or under any other agreement to which it is a party."

<sup>242</sup> See Ezeji for *Protection of Human Rights under the Law* 107.

- obligation;
- (b) freedom of movement within a State and to leave any State;
  - (c) freedom from exile;
  - (d) freedom from expulsion save in excepted cases;
  - (e) the right to recognition as a person in the eyes of the law;
  - (f) the right to equality before the law.<sup>243</sup>

Meanwhile the Council of Europe had adopted a common social policy which led the Consultative Assembly to lay down the basic principles for a European Social Charter which was adopted in July 1961 and signed in October of the same year.<sup>244</sup> Part II of the Social Charter comprises the following nineteen articles containing undertakings agreed on by the parties:

- (a) the right to work;
- (b) the right to just conditions of work;
- (c) the right to safe and healthy working conditions;
- (d) the right to a fair remuneration;
- (e) the right to organise;
- (f) the right to collective bargaining;
- (g) the right of children and young persons to protection;
- (h) the right of employed women to special protection;
- (i) the right to vocational guidance;
- (j) the right to vocational training;
- (k) the right to protection of health;
- (l) the right to social security;
- (m) the right to social and medical assistance;
- (n) the right to social welfare services;
- (o) the right of the disabled to special facilities;
- (p) the right of the family to social, legal and economic protection;
- (q) the right of mothers and children to social and economic protection;

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<sup>243</sup> These articles were inspired by the draft Covenants on Human Rights - notably Articles 11, 13, 14 and 15. *Ibid* note 4.

<sup>244</sup> For a text see Brownlie *Basic Documents on Human Rights* (1993) 363 ff.

- (r) the right to engage in gainful occupation; and
- (s) the right of migrant workers and their families to protection and assistance.<sup>245</sup>

A number of these rights already formed the subject of the conventions and agreements previously concluded by the member States of the Council of Europe. Part III of the Charter contains the provisions which permit progressive implementation of social rights. Only seven of these rights were then regarded as of particular importance. The European Convention on Human Rights and its protocols contain mechanisms for its implementation. It is not proposed in this thesis to deal with these mechanisms or to analyse these instruments any further as the object of this paragraph was merely to trace the influence of the Universal Declaration on the European Convention.

### **3.3.3.3 The Americas**

#### **3.3.3.3.1 Background**

The origin of Latin American unity can be traced back to the early nineteenth century when many Latin American countries gained their independence.<sup>246</sup> This unity was strengthened by the recognition given it by Britain, and especially by the American "Monroe Doctrine", which forbade any European interference in American affairs.<sup>247</sup>

The first concrete moves towards unity was made in 1822 by Simon Bolivar who called for a meeting of plenipotentiaries of the Americas, with the aim of establishing a confederation of the newly independent republics. Through his insistence, the "First Congress of American States" was held in Panama in June and July, 1826, which produced the ambitiously titled "Treaty of Perpetual Union, League and Confederation". This treaty, however, died in its infancy as only one state ratified it.

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<sup>245</sup> See Articles 1-19.

<sup>246</sup> See Robertson *et al Human Rights in the World* 161 *et seq.*

<sup>247</sup> *Ibid.*

In 1889 the USA stepped forward and arranged the "First International American Conference" in Washington DC.<sup>248</sup> At this conference, attended by seventeen American Republics, the International Union of American Republics was founded (more commonly referred to as the Pan American Union). The principal functions of this Union was the promotion of economic co-operation and the peaceful settlement of disputes.

From the beginning of the twentieth century, until the outbreak of the Second World War in 1939, eight conferences of American states were held in various Latin American capitals. During the war three more conferences were held to discuss the problems confronting the American states which had arisen on account of World War II.

Mindful that the international community would experience change due to the influence of the War, the Inter-American Conference on Problems of War and Peace was held in Mexico in February and March of 1945. The aim of this conference was to consider the organisation of the Inter-American system in the post war world. The conclusions reached at this conference were instrumental in the adoption of Chapter VIII<sup>249</sup> of the United Nations Charter in San Francisco a few months later. In 1947 the Inter-American Conference in Rio de Janeiro devoted itself mainly to the question of the maintenance of peace and security in the continent. The product of this conference, the Inter-American Treaty of Reciprocal Assistance,<sup>250</sup> still serves today as the basic instrument of collective security of the Inter-American system.

By 1948 it had, however, become clear that the regional co-operation system under the Pan-American Union was in need of review. An important step in this regard was taken at the 1948 Inter-American Conference held in Bogota, where the "Charter of Bogota" was adopted. This charter laid the constitutional foundation for the establishment of the Organisation of American States (OAS).

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<sup>248</sup> The conference lasted from October 1889 to April 1890.

<sup>249</sup> This chapter concerns "Regional Arrangements".

<sup>250</sup> Signed on 2 September 1947.

The Charter proclaims that the OAS is a regional agency within the United Nations<sup>251</sup> whose purposes include:

- (1) the strengthening of peace and security;
- (2) the peaceful settlement of disputes;
- (3) the provision of common action in the event of aggression;
- (4) the promotion of economic, social and cultural development.

The Charter goes on to reaffirm the significance of international law and fundamental human rights. Further, the Charter provides for certain economic, social and cultural standards for states parties to adhere to.

Another important text adopted at the Bogota Conference was the American Declaration on the Rights and Duties of Man.<sup>252</sup> Although this declaration is similar in content to the Universal Declaration, it is interesting to note that it was adopted seven months before the Universal Declaration (i.e. in May 1948), and further, that in addition to 28 articles proclaiming the individual's rights, it contains 10 articles setting out the duties of the individual.

The Bogota Conference gave new impetus to the OAS by reorganising it along the following lines;

- (1) The Inter-American Conference was established to serve as the supreme policy-making organ;
- (2) The Economic, Social, Cultural and Judicial Councils were organised;
- (3) The Council of Permanent Representatives was retained (seated in Washington DC) as the organ of direction for current business.

A milestone in the region's initiatives in the field of human rights was reached in a meeting of consultation of the Ministers of Foreign Affairs held in Santiago

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<sup>251</sup> Article 1.

<sup>252</sup> For a text see Sieghardt *The Lawful Rights of Mankind* (1985) 214 *et seq.*

in 1959. At this meeting the Ministers adopted a "conclusion" stating that

"...eleven years after the American Declaration of the Rights and Duties of Man was proclaimed, the climate in the hemisphere is ready for the conclusion of a Convention - there having been similar progress in the United Nations Organisation and in the Union known as the Council of Europe in the setting of standards and in the orderly study of this field, until today a satisfactory and promising level has been reached."<sup>253</sup>

The task of preparing a draft Convention on Human Rights was given to the Inter-American Council of Jurists. That Council met in Santiago later that year and prepared a draft Convention, this being based largely on the European model.<sup>254</sup> This draft was laid before the Second Special Inter-American Conference held in Rio de Janeiro in 1963 for consideration.<sup>255</sup>

It was soon realised that due to time constraints the competent committee would not be able to produce a new draft Convention. Thus the three drafts were referred to the Council of Permanent Representatives who, after consultation with the Inter-American Commission on Human Rights, would produce the new draft Convention. This draft would then be sent to the various governments for comment, after which the Council would call a special conference to produce the final text, which would then be opened for signature.

Accordingly, the Inter-American Commission on Human Rights was requested to examine the drafts and to submit its proposals on the matter. Before it could do this, the general Assembly of the United Nations, in December 1966, approved the texts of the Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. The Council of the OAS decided to approach the member governments as to whether or not they still wanted to proceed with

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<sup>253</sup> See Robinson *Human Rights in the World* 163.

<sup>254</sup> *Ibid.*

<sup>255</sup> In fact, three drafts were considered at the Second Special Inter American Conference, the one from the Council of Jurists, and two revised drafts prepared by Uruguay and Chile. *Ibid*

the preparation of a separate Inter-American Convention now that the United Nations had prepared the two previous Covenants. With the majority of the member states answering in the affirmative, the Council proceeded to submit to the member governments the revised draft Convention, prepared by the Inter-American Commission on Human Rights, for their comment. These comments were then reviewed at a Specialised Conference on Human Rights held in San Jose, Costa Rica, in November 1969, and the final text was drafted.<sup>256</sup>

The American Convention on Human Rights<sup>257</sup> (also known as the Pact of San Jose) was drafted at this conference and opened for signature on 22 November 1969. The Convention entered into force on 18 July, 1978, with the deposition of the eleventh instrument of ratification.<sup>258</sup>

### **3.3.3.3.2 The Rights and Freedoms Guaranteed in the American Convention on Human Rights**

The authors of the American Convention drew substantial inspiration from not only the Universal Declaration and the International Covenant on Civil and Political Rights, but also from the European Convention on Human Rights.<sup>259</sup> This is borne out in the preamble to the American Convention where it is stated that

"These principles have been set forth in ... the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, world-wide as well as regional in scope...".

The inspiration the authors took from the Covenant on Civil and Political Rights

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<sup>256</sup> Nineteen of the twenty-four member states were present at this conference. The absentees being Bolivia, Barbados, Haiti, Jamaica, and Cuba. *Ibid*

<sup>257</sup> For a text see Sieghardt 220 *et seq.*

<sup>258</sup> To date the following states have ratified the Convention: Barbados, Bolivia, Columbia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru and Venezuela.

<sup>259</sup> See Andrews *et al* *The International Protection of Human Rights* 18.

can be seen clearly from the question that arose as to the necessity of the American Convention shortly after the promulgation of the UN Covenant in 1966, and in particular from the content and wording of the American Convention.<sup>260</sup>

Further, there is no other regional human rights instrument which has had the success and influence of the European Convention on Human Rights. Frowein suggests that the preamble of the American Convention was influenced by the European Convention.<sup>261</sup>

In the preamble the state parties reaffirm their belief in a "system of personal liberty and social justice based on respect for the essential rights of man...", with the further provision that this could best be attained within the "framework of democratic institutions." Thus the protection of human rights can only be effectively achieved in a democracy.

The American Convention contains provisions, on the most, for civil and political rights, these being contained in Chapter II. The rights and freedoms guaranteed to everyone within the jurisdiction of the state parties, under Chapter II are:

- (a) the right to juridical personality;
- (b) the right to life;
- (c) the right to humane treatment;
- (d) freedom from slavery;
- (e) the right to personal liberty;
- (f) the right to a fair trial;
- (g) freedom from *ex post facto* laws;
- (h) the right to compensation;
- (i) the right to privacy;

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<sup>260</sup> *Ibid.*

<sup>261</sup> Frowein " The European and American Conventions on Human Rights - a comparison" 1980 *Human Rights Law Journal* 45.

- (j) freedom of conscience and religion;
- (k) freedom of thought and expression;
- (l) the right of reply;
- (m) the right of assembly;
- (n) freedom of association;
- (o) the rights of the family;
- (p) the right to a name;
- (q) the rights of the child;
- (r) the right to nationality;
- (s) the right to property;
- (t) freedom of movement and residence;
- (u) the right to participate in government;
- (v) the right to equal protection;
- (w) the right to judicial protection.<sup>262</sup>

The Convention contains no guarantees concerning economic and social rights as such. It does, however, contain a provision<sup>263</sup> in which the states parties undertake to adopt various measures designed to achieve "progressively ... the full realisation of the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter of the OAS as revised by the Protocol of Buenos Aires."<sup>264</sup>

As with the European Convention, the rights and freedoms in the American Convention are to a large extent derived from the Universal Declaration, but are also further defined and qualified as they too are meant to be enforced through a judicial system. The American Convention does permit the imposition of various restrictions and limitations by state parties on the enjoyment of many of the rights and freedoms it guarantees.<sup>265</sup> Article 27 specifically allows for the derogation by states parties from a number of the obligations the Convention

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<sup>262</sup> Articles 3-25.

<sup>263</sup> See Article 26.

<sup>264</sup> See Buergenthal *et al* *The Inter-American System* (1983) Part 1 Chpt 2 3.

<sup>265</sup> *Ibid* 3. See for example Articles 16(2), 29, 30 and 32.

contains in certain emergencies.<sup>266</sup> However, the American Convention<sup>267</sup> underlines the importance it attaches to certain basic human rights and freedoms by prohibiting any derogation whatsoever from the following articles:

- (1) Article 3 - the right to juridical personality;
- (2) Article 4 - the right to life;
- (3) Article 5 - the right to humane treatment;
- (4) Article 6 - freedom from slavery;
- (5) Article 9 - freedom from *ex post facto* laws;
- (6) Article 12 - freedom of conscience and religion;
- (7) Article 17 - the rights of the family;
- (8) Article 18 - the right to a name;
- (9) Article 19 - the rights of a child;
- (10) Article 20 - the right to nationality;
- (11) Article 23 - the right to participate in government;

"or any of the juridical guarantees essential for the protection of such rights."

Thus, the American Convention contains in itself a comprehensive limitation on derogations from the rights and freedoms contained therein. The American Convention further contains mechanisms for the protection of the rights and freedoms therein, namely the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.<sup>268</sup> For the purpose of this thesis it is not necessary to expand on these mechanisms, as the aim of this paragraph is to trace the influence of the Universal Declaration and the European Convention on the American Convention.

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<sup>266</sup> These emergencies include times of war, public danger, or other emergencies which threaten the independence or security of a state party: see Article 27(1).

<sup>267</sup> See Article 27(2).

<sup>268</sup> Article 33.

### 3.3.3.4 Africa

#### 3.3.3.4.1 Background

The history of African declarations of human rights are directly traceable to the Western Declarations of Human Rights and, in particular, the European Convention on Human Rights. Article 63(3) of the Convention authorised the signatory states to extend it to their colonial territories<sup>269</sup> provided that in such territories the provisions of the Convention would be applied with due regard to local requirements.<sup>270</sup> Pursuant to this provision the United Kingdom extended the Convention to forty-five territories in October 1953.<sup>271</sup> Among the African territories included were Nigeria, Kenya and the High Commission Territories. The first African territory to receive a Bill of Rights was Nigeria.<sup>272</sup> The bills of the other territories were modelled on that of Nigeria.<sup>273</sup> Hence they were known as Neo-Nigerian bills. For this reason it is proposed to begin the enquiry into the evolution of African regional human-rights law with Nigeria.

#### 3.3.3.4.2 Nigeria

It was seen in the previous paragraphs that the atrocities committed by the Nazi regime and the resulting threat to World peace gave impetus to the development of international human-rights law. To prevent the re-emergence of Nazism, European Countries incorporated international human-rights law in the European Convention<sup>274</sup> and their Constitutions.<sup>275</sup>

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<sup>269</sup> See also Article 4 of the Protocol.

<sup>270</sup> See Article 63(3).

<sup>271</sup> See Ezeji for *Protection of Human Rights Under the Law* 109 note 19.

<sup>272</sup> See Lawrence Silas Zimba *The Constitutional Protection of Fundamental Rights and Freedoms in Zambia* (LLD Thesis London 1979) 225.

<sup>273</sup> See D O Aihe "Neo-Nigerian Human Rights in Zambia" in (1971 - 1972) *Zambia Law Journal* 3 & 4 43.

<sup>274</sup> See notes 232 and 233 *supra*.

<sup>275</sup> These States incorporated European Community laws through Treaties of accession. For instance, in 1972 the UK enacted the European Communities Act of 1972. Section 2 of this Act provided:

"All such rights, powers, liabilities, obligations and restrictions from time to time created

In Nigeria (and Africa in general) the incorporation of human-rights norms in the Constitutions resulted from concerns with the protection of minorities from domination by majorities.<sup>276</sup> Here, the processes of constitution-making in Nigeria will be used to illustrate how minority fears led to the adoption of a bill of rights. Britain was traditionally opposed to the incorporation of written and enforceable bills of rights in the independence constitution of her colonies. For instance, India and Ghana did not receive any bills of rights at independence. But in Nigeria the dynamics of the constitutional settlement process forced Britain to change her mind.<sup>277</sup>

Pursuant to her post-World War II policy to grant self-government to her African Colonies, the Imperial Government issued a constitution for Nigeria in 1951.<sup>278</sup> This constitution (known as the MacPherson Constitution) provided for one central and three regional governments. At the same time there were three main political parties in the country each of which formed a government in one of the regions. In the northern region, which had more than half of the population of Nigeria, the party in power was the conservative and traditionalist Northern Peoples Congress. This Party (NPC) derived its main support from the northerners including the Hausa, Fulani and Kanuri ruling circles made up of the autocratic Emirs and prominent native authority officials. In the western region the government party was the Action Group (AG) which derived its main support from the Yorubas - by far the largest tribe in the region. In the east the National Council of Nigeria and the Cameroons (NCNC), which derived its support from the Ibos, was in power.

Owing to its massive support in the northern region the NPC had as many

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or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies."

<sup>276</sup> See Ezejiolor for *Protection of Human Rights under Law* 178 *et seq.*

<sup>277</sup> *Ibid.*

<sup>278</sup> *Ibid.*

members in the House of Representatives as the other parties put together. In other words, the former discredited colonial structures controlled the new government. But their power was checked by the structure of the political parties and the constitutional provision requiring each region to be represented in the council of Ministers. This resulted in an uneasy coalition government.

When the southern parties, the AG and NCNC, attempted to recruit supporters in the north, through their own members and political allies, their efforts were regarded by the NPC and its supporters as an unwarranted intrusion in the affairs of the region. It was claimed that the native authority police were used by the NPC government to intimidate and victimise political opponents and that the Muslim courts, staffed by the Alkalis, who were controlled by the Emirs, also victimised political opponents.

In 1953 the AG and NCNC called for self-government. This move was opposed by the NPC. The tensions resulting from this and the harassment of the AG and NCNC supporters in the northern region forced the colonial secretary to invite all political leaders to London for a review of the Constitution.

The AG/NCNC alliance saw the London Conference as an opportunity to propose a measure which would permit free political activity in the north. Hence they proposed an amendment to the Constitution incorporating a declaration of certain basic human rights for Nigerian citizens in all parts of Nigeria. In line with the traditional attitude of Britain the Colonial Secretary rejected that proposal. Instead the London Conference agreed on a federal State structure made up of three considerably autonomous regions. At the Lagos conference held in 1954 certain minority groups in these regions expressed fears and anxieties about their future in those regions in view of the structure of the political parties and their control of the regional governments. As a result they asked to be recognised as regions or separate States.

At the 1957 Conference the AG led a number of minority groups who demanded their recognition as separate States. Furthermore, the AG once more proposed the incorporation of a Bill of Rights in the Constitution. These measures were calculated to weaken the NPC in the North. The Conference accepted the idea of a Bill of Rights but rejected the creation of new States.<sup>279</sup> The Colonial Secretary then appointed the Willink Commission to enquire into the fears of the minorities and the means of allaying them, to advise on the safeguards which should be included in the Constitution for this purpose and to recommend the creation of new States, but this as a last resort.<sup>280</sup> The Commission found genuine, though sometimes exaggerated, fears among minority groups, but came to the conclusion that a case had not been made out for the creation of new States. In any case, it further remarked, new States would themselves have minority groups in them. The Commission also found less support for a Bill of Rights; but nevertheless it recommended the incorporation of one in the Constitution on the ground that it

"defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed."

In suggesting clauses for the proposed Bill of Rights the Commission relied on the provisions of the European Convention on Human Rights.<sup>281</sup> In its proposals the Commission copied the rights and freedoms embodied in the European Convention word for word.<sup>282</sup>

The 1958 Conference accepted practically all the Commission's recommendations on fundamental human rights but rejected the question of new States. However, the Constitution made provision for the creation of new States after independence. To placate the minority groups demanding new

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<sup>279</sup> See Ezeja *Constitutional Developments in Nigeria* (1961) Chapter 8.

<sup>280</sup> The Report of the Commission under the chairpersonship of Sir Henry Willink is contained in Cmnd 505 (1958) 97.

<sup>281</sup> *Ibid.*

<sup>282</sup> See Ezejiofor *Protection of Human Rights under Law* 180.

States the Conference agreed to incorporate a Bill of Rights in the Constitution in time to allow free political activity for the federal election due to take place late in 1959. Thus Nigeria received a Bill of Rights from the imperial Government before independence in 1960.<sup>283</sup>

Cursory examination of the Nigerian Bill of Rights shows that this Bill was derived from the European Convention and other Western declarations of human rights. The rights and freedoms guaranteed to the individual by the Nigerian Constitution were in most part declaratory of existing rights and privileges. They include: the right to life; freedom from torture or inhuman treatment, slavery and forced labour; the right to personal liberty, to be informed promptly of reasons for arrest or detention and to be brought to trial without delay;<sup>284</sup> the right to a fair hearing in the determination of one's civil rights and obligations<sup>285</sup> by a court or other tribunal established by law;<sup>286</sup> the right to be presumed, on a criminal charge, innocent until proved guilty;<sup>287</sup> to be informed promptly and in detail of the nature of alleged offence; the right to adequate time and facilities to prepare a defence personally or by legal representatives of one's own choice; to examine personally or by legal representatives witnesses called by the prosecution; to assistance without payment of an interpreter at the trial; to copies of courts' records of proceedings on payment of prescribed fees; the right not to be subjected to retroactive penal legislation, not to be subjected to a penalty heavier than that in force at the time of the Commission of the offence, not to be subjected to "double jeopardy", not to be compelled to give evidence at criminal trial, and not to be convicted for an offence unless it is defined and the penalty thereof is prescribed in a written law, the right to private and family life;<sup>288</sup> freedom of thought and conscience;<sup>289</sup> freedom of expression; the right to peaceful assembly and

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<sup>283</sup> *Ibid.*

<sup>284</sup> See Sections 17-20.

<sup>285</sup> See *Gokpa v Inspector General of Police* (1961) 1 All NLR 423.

<sup>286</sup> See *Merchant Bank v Federal Minister of Finance* (1961) 1 All NLR 598.

<sup>287</sup> See *Ibeziako v Police Commissioner* (1963) All NLR 88.

<sup>288</sup> See Sections 21-22.

<sup>289</sup> See *Ojibe v Ubani* (1961) 1 All NLR 400.

association; freedom of movement; freedom from discrimination based on tribe, place of origin, religion or political opinion and the right to property.<sup>290</sup>

Like the European Convention, the Nigerian Constitution permitted the restriction of individual rights and freedoms in a period of emergency<sup>291</sup> provided that such derogations would only be limited to the extent reasonably justifiable to deal with the emergency. Furthermore, in peacetime the rights guaranteed by Sections 22-26 could only be derogated from by any law that is "reasonably justifiable in a democratic society". To ensure the enjoyment of these rights the constitution made the bill of rights justiciable.<sup>292</sup>

### **3.3.3.4.3 The Incorporation of Human Rights Goals in African Regional Human Rights Law**

#### **3.3.3.4.3.1 Background**

The New International Politico-Legal Order (created with the influence of the Third World) and the International Human-Rights Law in particular had a profound impact on African nationalist leaders. Thus after World War II they began to demand the right of self-determination and independence. These pressures for decolonisation led to the independence of many African countries during the fifties.<sup>293</sup> From 15-22 April 1958, independent African States held their first Conference in Accra, Ghana.<sup>294</sup> Although African nationalist leaders were inspired, inter alia, by international human-rights law, they did not place the question of human rights on the agenda of their first conference. They were more concerned with safeguarding their independence and solidarity and assisting dependent African territories to gain self-government and independence.<sup>295</sup>

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<sup>290</sup> See Section 24-27 and 30.

<sup>291</sup> See Section 28.

<sup>292</sup> See Section 22-26.

<sup>293</sup> See Okoye *International Law and the New African States* (1972).

<sup>294</sup> See *Africa Special Report* April 1958 (vol. 3 no 4) 1-4 and 10-11.

<sup>295</sup> See Okoye *International Law and the New African States* 122.

In December 1958 independent African States held their first All-African Peoples Conference of political parties in Accra, Ghana. This Conference laid the foundation of African unity and reaffirmed the commitment of independent African States to the total liberation of Africa from imperialism and colonialism.<sup>296</sup> The aims and objects of this Conference were reaffirmed in 1960.

In the meantime three black African states (namely Ghana, Guinea and Liberia) adopted the SANNI Declaration<sup>297</sup> which reaffirmed their support for the struggles of African peoples for national independence and self-determination. Furthermore, and perhaps more significantly, this declaration placed the issue of human rights on the agenda. In the preamble the signatories also resolved to assist the struggles of dependent African peoples for racial equality and human dignity and apparently recalling the Universal Declaration of Human Rights, stated:<sup>298</sup>

"that freedom, equality, justice and dignity are noble objectives of all peoples and are essential to the achievement of the legitimate aims and aspirations of the African peoples".

The Declaration proposed a Special Conference in 1960 of all independent States of Africa, as well as non-independent States which had fixed dates on which they would achieve independence to discuss and work out a Charter which would achieve their ultimate goal of unity between independent African States. The signatories to this Declaration also agreed on a declaration of principles which would be presented to the proposed Conference for discussion. The principles included:

- (a) the inherent right of African peoples to independence and self-determination and

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<sup>296</sup> See Louis B Sohn *Basic Documents of African Regional Organisations* (1971) 33.

<sup>297</sup> For a text see *ibid* 40-41.

<sup>298</sup> Cf Preamble of the Universal Declaration of Human Rights.

- to decide the form of government under which they wished to live;<sup>299</sup>
- (b) non-interference in the domestic matters of other States;<sup>300</sup>
  - (c) friendly relations among independent African States based on the objectives of freedom, independence, unity, and the African personality;
  - (d) the interests of the African peoples; and
  - (e) the commitment to help other African territories still under foreign domination with a view to accelerating their achievement of self-government and independence.

In their second conference held in Addis Ababa (Ethiopia) in 1960 African leaders condemned, inter alia, the suppression of national liberation movements and the indiscriminate detention and restriction of nationalist leaders.<sup>301</sup> A year thereafter independent African States adopted the historic African Charter of Casablanca<sup>302</sup> which not only reaffirmed the new International Politico-Legal Order with respect to Africa, but also the belief of independent African States in the United Nations Charter. Further, the Casablanca Charter reaffirmed the faith of signatories in the conferences held in Accra (1958) and Addis Ababa (1960) and, apparently inspired by the Council of Europe, called for the creation of the African Consultative Assembly which would hold periodical sessions.

From 15-22 May 1963 the Foreign Ministers of thirty independent African States met in Addis Ababa. Their agenda included;

- (a) establishment of an organisation of African States;
- (b) decolonisation;
- (c) apartheid and racial discrimination; and
- (d) Africa and the United Nations.<sup>303</sup>

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<sup>299</sup> Cf Article 1(2) and 55 *ibid.*

<sup>300</sup> *Ibid.*

<sup>301</sup> See Brownlie *Basic Documents on Human Rights* (1987) 103.

<sup>302</sup> For a text see Sohn *Basic Documents of African Regional Organisations* 42-43.

<sup>303</sup> See Zdenek Cervenka *The Organisation of African Unity and its Charter* (1968) 28.

The Charter of the Organisation of African Unity was signed by thirty independent African States in Addis Ababa from 22-25 May 1963.<sup>304</sup>

In its preamble the Charter of the Organisation of African Unity (OAU) reaffirms the principles embodied in earlier Charters and Declarations of independent African States. In particular, it linked the right of self-determination and the concept of human rights by reaffirming the inalienability of the right of African peoples to self-determination and the idea that freedom, equality, justice and dignity were the essential objectives for the achievement of the legitimate aspirations of the African peoples.<sup>305</sup> Furthermore, the preamble reaffirmed the principles of development and African solidarity, territorial integrity and the resolve of independent Africa to eradicate all forms of colonialism from Africa. Finally the preamble reaffirmed the belief of independent Africa in the UN Charter and the Universal Declaration of Human Rights as the foundations for peaceful and positive co-operation among States.

The purpose of the OAU Charter was set out as follows:<sup>306</sup>

- (a) to promote the unity and solidarity of the African States;
- (b) to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa;
- (c) to defend their sovereignty, their territorial integrity and independence;
- (d) to eradicate all forms of colonialism from Africa;
- (e) to promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

The purposes of the OAU clearly implied the duty to encourage the promotion and protection of internationally recognised human rights within member States. Furthermore, the OAU Charter incorporated the principles of the UN

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<sup>304</sup> For a text see Sohn *Basic Documents of African Regional Organisations* 62-63.

<sup>305</sup> Cf the preamble of the Universal Declaration of Human Rights.

<sup>306</sup> See Article 11 of the OAU Charter.

Charter<sup>307</sup> regarding peaceful co-existence among nations and reaffirmed its absolute dedication to the total emancipation of dependent African territories.

A close examination of the OAU Charter (and its antecedents) shows that for a significant part of their existence OAU member states devoted most of their energies to the eradication of colonialism from the African continent, the struggle against apartheid in South Africa, and the maintenance of regional peace and stability. By contrast, the Council of Europe concerned itself with human rights from its inception. In fact, it stipulated the protection of human rights as one of its principal goals right from its inception in 1949.<sup>308</sup> Further, it prescribed the observance of human rights as an obligation of membership<sup>309</sup> and set forth the sanctions that could be imposed as a result of any violations.<sup>310</sup> These differences highlight the special circumstances in which the OAU was formed and their effect on its prioritisation of goals. In particular, the need to forge African unity in terms of the principle of non-interference in the domestic affairs of member states and the struggles against colonialism and apartheid relegated human rights to the background and made their priority the defence of their hard-won independence, the struggle for the right of self-determination of dependent African peoples and the maintenance of peace and security among member States.<sup>311</sup>

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<sup>307</sup> See Articles 1(2) and 55.

<sup>308</sup> Article 1 of the Statute of the Council of Europe reads:

"(a) The aim of the council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress;

(b) This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms ...".

<sup>309</sup> Article 3 of the Statute provided:

"Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the council."

<sup>310</sup> Article 8 provided:

"Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw ... If such member does not comply with this request, the committee may decide that it has ceased to be a member of the council ...".

<sup>311</sup> See EL-Ayouty *The OAU After Ten Years* (1975) 161.

### 3.3.3.4.3.2 The Antecedents of the African Charter on Human and Peoples' Rights

The idea of the African Charter on Human and Peoples' Rights (also known as the Banjul Charter) dates back to the Lagos Conference on the rule of law held under the auspices of the International Commission of Jurists (1961). The conference adopted a resolution (known as the Law of Lagos) which declared:<sup>312</sup>

"that in order to give full effect to the Universal Declaration of Human Rights of 1948, this conference invites the African Governments to study the possibility of adopting an African Convention on Human Rights in such a manner that the conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that the recourse thereto be available for all persons under the jurisdiction of the signatory States".

But the idea of the Convention did not find much favour during the sixties. The reasons for this, as shown in the previous paragraph, are that the OAU was then solely concerned with the defence of the sovereignty and independence of member States, maintenance of peace and security and the struggles for the right of dependent and oppressed African peoples for self-determination.

Following the adoption of the UN Covenants in 1966, Nigeria took the lead towards the adoption of an African Convention on Human Rights. In 1967, on a Nigerian initiative, the UN Commission on Human Rights took up the call for African human rights institutions.<sup>313</sup> On 8 March 1972, the Commission adopted a resolution<sup>314</sup> inviting the OAU to create a Regional Human Rights Commission. These calls were followed by a number of important conferences held in various parts of Africa which contributed to an increasing awareness of human rights in Africa, in particular in Cairo (1969), Addis Ababa (1971) and Dar-es-Salaam (1973).<sup>315</sup> But of special significance was a colloquium of African jurists held at Dakar in 1978 which succeeded in drafting concrete proposals on

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<sup>312</sup> See Brownlie *Basic Documents on Human Rights* 416.

<sup>313</sup> See Gino J Naldi *The Organisation of African Unity - An Analysis of its Role* (1989) 109.

<sup>314</sup> See Resolution 24 (XXIV) of 8 March 1972.

<sup>315</sup> See Roger Chongwe "African Charter on Human and Peoples' Rights" (1987) 13 *Commonwealth Law Bulletin* 1605.

a human rights document.<sup>316</sup>

The OAU Summit Meeting held in July 1979 in Monrovia passed Resolution 115 instructing the Secretary-General of the OAU to appoint a Committee of experts with a mandate to draw a preliminary draft on an African Charter on Human and Peoples' Rights providing *inter alia* for the establishment of organs for the promotion and protection of human and peoples' rights.<sup>317</sup> At the end of 1979 African legal experts met in Dakar to prepare the first draft of the proposed charter. The stated objective of these experts was to prepare a Charter based on African legal philosophy and responsive to African needs. These experts believed that problems unique to Africa required a departure from such regional human rights instruments as the European Convention (1950) and the American Convention (1969).<sup>318</sup> Thus in preparing the draft the experts took into consideration the virtues of African culture and collective rights which had been denied the African peoples by imperialism and colonialism.

In order to produce a truly African Convention, a ministerial conference comprising mainly African ministers of justice and legal experts met in Banjul (the Gambia) in June 1980 to continue and complete consideration of the Draft Charter on Human Rights. In June 1981 this draft was adopted in Nairobi (Kenya) as the African Charter on Human and People's Rights. This Charter came into force on 21 October 1986 after Niger became the twenty-sixth state to ratify it, thereby creating binding legal obligations on all the parties thereto to give effect to the rights enumerated therein.<sup>319</sup>

The Banjul Charter is the third regional human rights instrument to take effect.

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<sup>316</sup> See Naldi *The Organisation of African Unity* 109-110.

<sup>317</sup> See Theo van Boven "The Relationship between Peoples' Rights and Human Rights in the African Charter" 1986 (1) *Human Rights Law Journal* 186-7.

<sup>318</sup> See International Commission of Jurists *Human and Peoples' Rights in Africa and the African Charter* (Report of a Conference held in Nairobi from 2 to 4 December 1985) 25.

<sup>319</sup> Article 63 of the Banjul Charter provides that the Charter would come into force three months after the OAU Secretary-General received notification that a simple majority of OAU member States, twenty six, had ratified it.

Although its authors sought to produce an indigenous document, many view the Charter as reflecting internationally recognised fundamental rights as contained in the Universal Declaration of Human Rights and the International Covenants on Human Rights. The Banjul Charter is composed of four sections, a preamble and three main parts.

### **3.3.3.4.3.3 Analysis of the Charter**

Many writers have produced scholarly analyses of the Banjul Charter.<sup>320</sup> It is therefore not proposed to plough the same field again. Here, the distinctive features of the Charter will be highlighted and some comparisons drawn between it and other regional and international human rights instruments.

The preamble of the Banjul Charter is not only inspired by but also elaborates on the OAU Charter to the extent that it could be considered as an integral part of the latter just as the Universal Declaration of Human Rights is an integral part of the UN Charter. First, the preamble acknowledges:

- (a) that the OAU Charter strives for freedom, equality, justice and dignity;
- (b) that it seeks to eradicate colonialism and endeavours to improve the lives of the peoples of Africa.

The Banjul Charter reaffirms these principles through a commitment to eliminate colonialism in its various guises and all its forms of discrimination, including apartheid, and to dismantle aggressive foreign military bases. This

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<sup>320</sup> On the Banjul Charter generally see R Disa "Human and Peoples' Rights: Distinctive Features of the African Charter" 29 1985 *Journal of African Law* 72; Gittelman "The African Charter on Human and Peoples' Rights : A Legal Analysis" 22 1982 *Virginia Journal of International Law* 667; O Ojo and A Sesay "The OAU and Human Rights : Prospects for the 1980s and beyond" 8 1986 *Human Rights Quarterly* 89; U O Umzorike, "The African Charter on Human and Peoples' Rights" 77 1983 *American Journal of International Law* 902 and Mathole Motshekga "The African Charter on Human and Peoples' Rights - its Importance to Human Rights Thinking in South Africa" *Codicillus* XXX (October 1989) 31 *et seq.*

commitment is clearly an attempt to contribute to the maintenance of international peace and security.<sup>321</sup>

Furthermore, and perhaps most significantly, the Banjul Charter consolidated the interlinkage between the rule of law, the right of self-determination and human rights and firmly established the relationship between human and peoples' rights.<sup>322</sup> In short, the doctrine of human and peoples' rights embodied in the Banjul Charter holds, first, that civil and political rights (also known as first generation rights) cannot be disassociated from social, economic and cultural rights (also known as second generation rights) in their conception as well as in their universality. Thus the preamble stated that the satisfaction of the second generation rights is a guarantee for the enjoyment of the first generation rights.<sup>323</sup> Secondly, the preamble of the Banjul Charter, like that of the Universal Declaration of Human Rights, derived basic rights and freedoms from the attributes (i.e. worth and dignity) of the human personality and thus made them a common heritage of all members of the human family. Thirdly, the preamble firmly established the relationship between human and peoples' rights by stating that the reality and respect of the latter should necessarily guarantee the former. Fourthly, and lastly, the Banjul Charter stated more clearly than any of its predecessors that the enjoyment of rights and freedoms also implied the performance of duties on the part of all subjects.<sup>324</sup> Another distinctive feature of the Banjul Charter was the realisation that colonialism, neo-colonialism, apartheid and other forms of domination were the greatest impediments to the enjoyment of human and peoples' rights. Thus the preamble reaffirmed the duty of African States to eradicate these evils from Africa.

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<sup>321</sup> See Naldi *The Organisation of African Unity* 111-112.

<sup>322</sup> For a discussion of the term "peoples" see E Bondzie-Simpson "A Critique of the African Charter on Human and Peoples Rights" 1988 *Howard Law Journal* 656-657.

<sup>323</sup> This conception was subsequently reaffirmed by eminent Commonwealth jurists. See Commonwealth Secretariat *Judicial Colloquium in Bangalore* 24-26 February 1985.

<sup>324</sup> See Ziyad Motala "Human Rights in Africa : A Cultural, Ideological and Legal Examination" in 2 1989 *Hastings International and Comparative Law Review* 403.

In short, the Banjul Charter contains the basic civil and political rights and economic, social, and cultural rights postulated in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966).<sup>325</sup> Thus the Banjul Charter guarantees the first generation rights [Articles 2-13], the second generation rights [Articles 14-18], thirdly and perhaps more significantly, the third generation rights [Articles 19-24]. It is not proposed here to deal with all the three categories of the rights nor with any particular right or freedom in detail. The primary object of this analysis is to highlight the distinctive features of the Charter which relate to the concept of a constitutional state.

Article 1 of the Banjul Charter requires State parties to the Charter not only to recognise individual, people's and State's duties, rights and freedoms arising from the Charter, but also obligates them to give effect to these duties by incorporating them into their domestic laws and other measures.<sup>326</sup> In sum Article 1 makes the Charter a contract<sup>327</sup> between signatory States and reduces the rights and freedoms contained in the Charter to the substantive (or material) content of African human rights law. Article 2 directly responds to the colonial legacy of racial discrimination, degradation of persons by colonial authorities and general violations of civil and political rights. Thus it proposes procedures for the protection of the human personality and the administration of justice according to the law. More specifically, Article 2 prohibits all forms of discrimination based on race, ethnic group, colour, sex, language, religion, political or any other opinion, etc.<sup>328</sup> Article 3 guarantees the principle of non-discrimination embodied in Article 2 by not only reaffirming the equality of all persons before the law but also affording each person equal protection of the

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<sup>325</sup> See El-Ayouty *The OAU After Ten Years* 166.

<sup>326</sup> For a text see Rudolf Bernhardt and John Anthony Jolowicz (eds.) *International Enforcement of Human Rights* (1987) 250 *et seq.*

<sup>327</sup> See Okoye *International Law and the New African States* 126.

<sup>328</sup> Cf Article 2 of Universal Declaration of Human Rights. For text see Bernhardt and Jolowicz *International Enforcement of Human Rights* 164.

laws. To underline the protection of the individual Articles 4 and 5 recaptures and elaborates on the attributes of the human personality (viz. sanctity, integrity and dignity) which forms the foundation of the principle of humanity from which individual rights and freedoms are derived. In line with the worth and dignity of the human personality these Articles prohibit all forms of treatment or punishment which violates these attributes.<sup>329</sup> Article 4, in particular, prohibits any arbitrary deprivation of the right of the individual to life and violation of the integrity of his personality. The overall safeguard of individual liberty is embodied in Article 6 which incorporates the principle of legality (*nullum crimen, nulla poena sine lege*) in the following terms:<sup>330</sup>

"no one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

Furthermore, the charter incorporated two important procedural rules which guarantee the efficacy of the principle of legality.

These procedural rules are:

- (a) the right to be heard (*audi alterem partem*)<sup>331</sup> and
- (b) the principle of non-retroactivity of penal statutes.<sup>332</sup>

The former includes four procedural rights:

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<sup>329</sup> Cf Articles 3-5 of the Universal Declaration of Human Rights.

<sup>330</sup> Cf Article 11 of the Universal Declaration which reads:

"1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of an act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

<sup>331</sup> In its Latin dress this principle was formulated by Von Feuerbach *Lehrbuch des peinlichen Rechts* (1907) 20. This principle also found its way into article 7(1) of the European Convention on Human Rights (1950).

<sup>332</sup> See Article 7(1).

- (a) the right to an appeal to competent national institutions against violations of fundamental rights;<sup>333</sup>
- (b) the presumption of innocence until proved guilty by a competent court or tribunal;
- (c) the right to legal representation;<sup>334</sup> and
- (d) the right to a speedy trial by an impartial court or tribunal.<sup>335</sup>

Other first generation rights guaranteed by the charter include: the freedom of conscience;<sup>336</sup> freedom of association and the right to information and emigration.<sup>337</sup> These rights are only limited by the principle of social solidarity<sup>338</sup> which seeks to promote national unity and the integrity of African Nation States. Like the other regional human rights instruments the Banjul Charter obligated State parties to guarantee the independence of the judiciary in the enforcement of the first generation rights and to establish appropriate institutions for the promotion and protection of individual rights and freedoms.<sup>339</sup>

Furthermore, the Banjul Charter, unlike the other regional instruments, does not make provision for derogation from human rights in times of emergency.<sup>340</sup> The Charter compensated for this omission by making extensive use of "claw-back" clauses which made the enforcement of the right dependent on national law or at the discretion of the national authorities. Article 10(1) is one such example, stating that "Every individual shall have the right to free association provided that he abides by the law." It is submitted that these clauses were designed to cater for the one-party political systems which were arguably, in

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<sup>333</sup> The latter is a corollary of the principle of legality. See Jerome Hall "Nulla Poena Sine Lege" 47 1937 *The Yale Law Journal* 165.

<sup>334</sup> Article 7(1)(a).

<sup>335</sup> Article 7(1)(b).

<sup>336</sup> Article 7(1)(c).

<sup>337</sup> Article 7(1)(d).

<sup>338</sup> Article 8.

<sup>339</sup> Article 26.

<sup>340</sup> See Naldi *The Organisation of African Unity* 112-113.

some respects, incompatible with the first generation rights.<sup>341</sup>

Article 21 of the Universal Declaration of Human Rights granted every person the right to participate freely in the government of his country directly or through freely chosen representatives. This right has been incorporated in Article 13 of the Banjul Charter. Standing on their own Articles 13 and 21 do not take into account the situation of colonial and oppressed peoples. The Banjul Charter remedies this situation in terms of Articles 19 and 20. Article 19 provides for the equality of all peoples (including colonial peoples) and affords them the same respect and rights and secondly prohibits the domination of one people by another. In these respects, therefore, Article 19 recaptured Articles 1(2) and 55 of the UN Charter pertaining to the basis of friendly relations between nations. To guarantee the freedom and independence of colonial and oppressed peoples Article 20 not only guaranteed their right to political self-determination but also recognised their right of resistance against colonial or oppressive rule and a right to assistance of the State parties to the Banjul Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Furthermore, the Banjul Charter recaptured the right of economic self-determination embodied in the International Covenant on Economic, Social and Cultural Rights and reaffirmed the inalienability<sup>342</sup> of this right and provided for repatriation where the dispossessed people have suffered damages.<sup>343</sup> The Banjul Charter further distinguished itself from the other regional instruments in that it incorporated the right to development<sup>344</sup>, the right to peace and the right to a liveable environment.<sup>345</sup>

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<sup>341</sup> Note that in 1977 the ICJ had resolved that, in principle, the concept of a single-party democracy was consistent with the Rule of Law. See International Commission of Jurists *Human Rights in a One-Party State* (1978) 7.

<sup>342</sup> Article 21(2).

<sup>343</sup> Article 22.

<sup>344</sup> Article 21(1).

<sup>345</sup> Article 24.

A further distinctive feature of the Banjul Charter is that it stipulated "duties" that individuals owe to the family, society, the State, "other legally recognised communities" and the international community.<sup>346</sup> These include the duty to respect and consider fellow human beings without discrimination; to preserve the harmonious development of the family; to serve the national community; not to compromise the security of the State; to preserve and strengthen social and national solidarity; and to preserve and strengthen national independence and the territorial integrity of one's country.<sup>347</sup>

Whilst the European Convention provided for a court of human rights, the Banjul Charter seeks to protect the rights guaranteed through a Commission on Human and Peoples Rights composed of eleven members who serve in their personal capacities.<sup>348</sup> They are elected by secret ballot by the Assembly of Heads of State and Government from a list of persons nominated by the States' parties to the Charter.<sup>349</sup>

The Commission is empowered to receive, investigate, and endeavour to settle complaints concerning violations of the rights guaranteed in the charter. States' parties have the right to bring up complaints concerning other states' parties.<sup>350</sup> It would appear that the Commission can also entertain communications from individuals, groups of individuals, or organisations; but this is not explicitly stated.<sup>351</sup>

If no amicable settlement is found, the Commission shall prepare a report stating the facts and its findings and submit it to the States concerned as well as the assembly of Heads of State and Government. The report may include any recommendations that the Commission may deem appropriate.

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<sup>346</sup> Article 27.

<sup>347</sup> Article 28 and 29(1)-(5).

<sup>348</sup> Article 31.

<sup>349</sup> Article 33.

<sup>350</sup> Article 52.

<sup>351</sup> Article 53.

It was shown earlier that the UN approach to human rights prohibited any series of serious or massive violations of human and peoples' rights. To enforce this prohibition the Banjul Charter provided that when the Commission receives complaints suggesting the existence of "a series of serious or massive violations of human and peoples' rights" it shall draw the attention of the Assembly of Heads of States and Government to these situations. Article 58 then empowers the latter to ask the Commission to make an investigation. Last but not least, States undertook to submit every two years, from the date of the Charter came into force, a report on the legislative and other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed.<sup>352</sup> In other words, States parties recognised that their domestic legal systems had not yet achieved the constitutional state envisaged in contemporary international law and therefore they committed themselves to strive for its realisation.

### **3.3.3.5 General Conclusions**

The idea of human rights derived from the concept of the worth and dignity of the human personality which was originally espoused by the Hermetic and Stoic philosophers and later by the humanist philosophers - notably, Samuel Pufendorf and Hugo Grotius. During the seventeenth and eighteenth centuries, the right of self-determination and human rights found their way into the revolutionary constitutions of France and the USA. But third-world peoples were denied these rights by the imperialist and colonialist powers. The rights of African peoples, in particular, were limited to humanitarian treatment under the principle of trusteeship embodied in the Berlin Treaty of 1885.

During World War I a controversy broke out as to whether or not the right of self-determination, in particular, applied to Africans. The USSR and USA (for example) sought to extend the right to all peoples and nations while the UK and South Africa (for example) limited it to Europeans and former German

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<sup>352</sup> Article 62.

territories.

The struggles waged by colonial peoples during the inter-war period (1919-1939) and the atrocities committed by the Nazis during World War II forced the international community to recognise the right of colonial peoples to both political and economic self-determination. To give effect to this the UN adopted a deliberate decolonisation strategy and an international bill of rights to guarantee the right of colonial peoples to self-government and independence.

The UN Charter, unlike the Berlin Treaty of 1885 and the Covenant of the League of Nations of 1919, extended the right of self-determination to all peoples and nations and identified the right with human rights and fundamental freedoms, though it failed to set forth the rights and freedoms in question. In 1948 the Universal Declaration of Human Rights elaborated on the UN Charter by recapturing individual rights and freedoms embodied in the revolutionary constitutions of France and the USA and incorporating them, thereby making them an integral part of the United Nations Law. More specifically the Universal Declaration of Human Rights elaborated on the UN Charter by (a) deriving both the first and second generation rights from the principle of humanity and (b) underpinning the legitimacy and legality of governments on the will of the people. In short, the UDHR exploded the myth that human rights were an exclusive common heritage of European peoples and nations.

The UDHR had a profound influence on Western European and Latin American Countries resulting in the incorporation of both the first and second generation rights in the European and American Conventions on Human Rights.

During the fifties the UN became a forum for the further refinement and development of international human rights law. In particular the UN developed the principles of economic, social and cultural self-determination of peoples and nations. The principles of political and economic self-determination, inter alia,

were finally incorporated in the International Covenants of 1966 and reduced to mandatory rules of international law. To ensure the achievement of these rights the UN recognised the right of resistance (including armed struggle) of colonial or oppressed peoples. Furthermore, the UN charged member states with the duty of assisting colonial or oppressed peoples in their liberation struggles.

With respect to colonial and oppressive regimes the UN prohibited, in particular, racial discrimination and violations of the integrity of the territories of colonial or oppressed peoples. Finally and perhaps more importantly, the UN underpinned the legitimacy and legality of governments on both the right of self-determination and respect for the rule of law and human rights, thereby making these concepts the foundation of a modern constitutional state.

The international human-rights law, in particular the right of political and economic self-determination, gave much impetus to African struggles for self-government and independence. Upon independence many third-world countries received bills of rights from the UDHR through the European Convention on Human Rights.

But during the post-colonial era newly independent African States challenged some aspects of international law stating that circumstances unique to Africa required indigenous approaches to human rights. Thus during the second half of the sixties they made earnest efforts to develop an African Charter on Human and Peoples Rights. This Charter made a very significant contribution to international human-rights law by not only consolidating the interlinkage and inter-dependence of the first, second and third generation rights but also closely identifying the right of self-determination, rule of law and human rights and reaffirming them as hallmarks of a modern constitutional state. Furthermore, it imposed a duty on State parties to transform their States into constitutional states and provided for a monitoring system. In sum, international and regional human rights law created a new international constitutional order which all states and governments are required to strive for.

## CHAPTER IV

### THE RULE OF LAW AND COLONIAL ADMINISTRATION IN FOUR SOUTHERN AFRICAN TERRITORIES

#### 4.1 General

The dynamic concept of the rule of law has become an internationally acceptable organising principle of modern constitutionalism. This chapter traces the life of the traditional (Diceyan) and the dynamic concepts of the rule of law under colonial administration in Southern Africa. The chapter deals with South Africa, Southern Rhodesia (Zimbabwe), Bechuanaland (Botswana) and South West Africa (Namibia). More specifically, it deals with the evolution of institutions of government, resistance against colonial administration, the development of alternative constitutional visions and attempts by colonial (or white minority) governments to find internal settlements to prevent the implementation of the dynamic concept of the rule of law.

#### 4.2 Botswana

##### 4.2.1 Colonial Background

The territory of Bechuanaland came under the protection of the Crown in 1885 in terms of a treaty between the Chiefs and Great Britain.<sup>1</sup> The conclusion of the Treaty coincided with the signing of the Berlin Treaty which regulated, inter alia, the relationship between colonial powers and their overseas territories.

In 1891 Great Britain adopted an Order in Council which laid the foundation for the administration of Bechuanaland.<sup>2</sup> It vested the power of administration in the High Commissioner and also authorised him to appoint so many persons as

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<sup>1</sup> See *The Cape of Good Hope Government Gazette* no. 6583 (March 6 1885) 494.

<sup>2</sup> See M Hough *Botswana Konstitutionele Ontwikkeling* (1970) 3.

he pleased to be Deputy Commissioners, or Assistant Commissioners, or Resident Commissioners, or Judges, Magistrates, or other officers, and to define the districts within which such officers would respectively discharge their functions.<sup>3</sup> Further, the High Commissioner was authorised to legislate by proclamation provided that in issuing such proclamations he would respect any native laws or customs by which the civil relations of any "native" chiefs, tribes or populations under His Majesty's protection were regulated, except in so far as they were incompatible with the due exercise of his power and jurisdiction.<sup>4</sup>

In 1894 the Imperial Government sought to transfer Bechuanaland to the British South Africa company, but this failed due to, *inter alia*, opposition by African Chiefs.<sup>5</sup> From time to time after 1899 certain areas were created as blocks for white settlement (mostly Afrikaner farmers and ranchers) while others were set aside as tribal reserves.<sup>6</sup> The Bechuanaland Order in Council<sup>7</sup> defined as crown lands all lands over which the chiefs had abandoned their rights and jurisdictions.

As shown below,<sup>8</sup> Britain initially intended to incorporate the protectorates of Botswana, Lesotho and Swaziland into the Union of South Africa. Provision was made for the incorporation of these territories (known as High Commission Territories)<sup>9</sup> under Section 151 of the South Africa Act, 1909.<sup>10</sup> This section also

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<sup>3</sup> See Sections 2-3 of the 1891 Order in Council.

<sup>4</sup> See Section 4 of the 1891 Order in Council.

<sup>5</sup> See Hough *Botswana Konstitusionele Ontwikkeling* 4.

<sup>6</sup> See Marshall *From Independence to Statehood in Commonwealth Africa* 69.

<sup>7</sup> *Ibid.*

<sup>8</sup> See note 187 *infra*.

<sup>9</sup> These territories have been described as follows:

"In its character a British protectorate is a territory in which the Crown has acquired control of foreign relations and defence. Whatever other powers the Crown may have acquired (and they usually amount to a great deal more than this) are not essential to the protectorate status. For, legally, a protectorate is a dependency that has not been annexed; it is not part of the dominions of the Crown, and its inhabitants are not British subjects... whether because it was originally desired only to provide jurisdiction for British residents without undertaking the administration of the country, or because it was not desired to give the natives the status of British subjects, which would follow from annexation, or in order to leave the possibility of diplomatic retreat or for other

provided for the government of these territories after their incorporation into South Africa. It vested the powers of government in the Governor-General in Council and enjoined him to exercise those powers upon the terms and conditions embodied in the schedule to the South Africa Act, 1909. Article 7 of the Schedule vested the legislative authority in the Governor-General in Council and authorised him to make laws by proclamation for the peace, order and good government of the High Commission territories. The Schedule limited the powers of the Governor-General in Council by requiring him to lay his laws before both Houses of Parliament within seven days after the issue of the proclamation or, if Parliament be not then sitting within seven days after the beginning of the next session. Such laws were effectual unless Parliament passed a resolution in the same session requesting the Governor-General in Council to repeal the same, in which case they would be repealed by proclamation.

Article 2 the Schedule charged the Prime Minister with the administration of the High Commission territories. It required the Prime Minister to act on the advice of a commission consisting of not fewer than three members with a secretary appointed by the Governor-General in Council. Members of the Commission would also be appointed by the Governor-General and would hold office for ten years.

The incorporation clause notwithstanding, the High Commission territories objected to being included in the Union of South Africa due to its racial policies. Thus the United Kingdom continually deferred its decision on the matter despite South Africa's persistent request for incorporation.<sup>11</sup>

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reasons." See M Wight *British Colonial Constitutions* (1952) 96.

<sup>10</sup> Section 151 provided:

"The King, with the advice of the Privy Council, on addresses from the Houses of Parliament of the Union, transfer to the Union Government of any territories, other than the territories administered by the British South Africa company, belonging to or under the protection of His Majesty, and inhabited wholly or in part by natives, and upon such transfer the Governor-General in Council may undertake the government of such territory upon the terms and conditions embodied in the schedule of the Act"

<sup>11</sup> See Marshall *From Independence to Statehood in Commonwealth Africa* 17.

During the inter-war years the Imperial government introduced the system of indirect rule in Bechuanaland. In accordance with this system the Imperial government sought to make "Native authorities" the local agents of the colonial authorities and to lend their influence to the type of change the colonial administration thought desirable. To achieve this the Resident Commissioner, who was placed at the immediate apex of the territory's central government, introduced the Native Administration Proclamation<sup>12</sup> and the Native Tribunal Proclamation.<sup>13</sup> These two Proclamations sought to define the powers of the chiefs so as to bring them under control and in line with the concept of indirect rule. They made some radical changes in the indigenous form of government and its administration of justice.

In the mid-thirties, Chiefs Tshedi Khama and Bathoen II decided to sue the High Commissioner over the validity of Proclamations 74 and 75 of 1934. The chiefs' actions<sup>14</sup> were based on the following grounds:

- (a) that the High Commissioner, in these proclamations, purported to make alterations to certain "native" laws and customs, and that he had no power to do so because the Order-in-Council of 9 May, 1891, from which he derived his powers, directed him to respect "native" law and custom;
- (b) that the High Commissioner, in these proclamations, violated certain rights reserved to two "native" tribes and their chiefs by treaty with Great Britain, and
- (c) that the proclamations were void for uncertainty and unreasonableness.

In respect of the third ground, which the court considered first, it ruled that as the powers delegated to the High Commissioner by the Order-in-Council were discretionary, their exercise within the limit of discretion was not open to challenge in a court of law. Regarding the first ground, the court held that the use of the word "respect" in the Order-in-Council was not intended to forbid the

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<sup>12</sup> no 74 of 1934.

<sup>13</sup> no 75 of 1934.

<sup>14</sup> See *Tshedi Khama and Another v The High Commissioner in 1936 High Commission Territories Law Reports* (1926-53) 9.

alteration of "native" law and custom but rather to impose upon the High Commissioner the duty of treating the same with consideration, which the High Commissioner, in the opinion of the court, had done. The court referred the second question to the Secretary of State in conformity with the Foreign Jurisdiction Act of 1890<sup>15</sup> who concluded that the High Commissioner's proclamations were not limited by treaty or agreement.<sup>16</sup> The court confirmed that the Secretary's reply was conclusive against the plaintiffs, and dismissed their claims. Proclamations 32<sup>17</sup> and 34<sup>18</sup> tried to ameliorate the effects of the 1934 Proclamations by reinstating the *Kgotla* as the main consultative body and restoring its judicial function. But the traditional authorities remained very much subordinate to the territory's central government. Thus the Protectorates' system was unmasked as a colonial system neither more nor less than its counterpart in South Africa or elsewhere.<sup>19</sup>

#### 4.2.2 Evolution of Institutions of Government

The development of national institutions of government in Bechuanaland did not begin until 1920 when the Native Advisory Council was established administratively.<sup>20</sup> This body consisted of representatives of all tribes. Its

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<sup>15</sup> Section 4(1) of this Act provided:

"if any proceedings in a court in Her Majesty's dominions...any question arises as to the existence or extent of any jurisdiction of Her Majesty in foreign country a Secretary of State shall on the application of the court send to the court... his decision on the question and his decision shall for the purposes of the proceedings be final."

<sup>16</sup> On the legal significance of treaties or agreements between African chiefs and colonial powers, see John Mugambwa "Treaties or Scraps of Paper ? A Second Look at the Legal Character of the 19th century British/African colonial agreements." in 1987 *CILSA* [XX] 79 *et seq.*

<sup>17</sup> no 32 of 1943.

<sup>18</sup> no 34 of 1943.

<sup>19</sup> Thus Hough described High Commission Territories as follows:

"Kolonial protektorate is gebiede wat in elke opsig, behalwe in wetlike status, kolonies is. Die administrasie van die gebiede is soortgelyk aan dié van kroonkolonies en dit verskil slegs van laasgenoemde daarin dat hulle administrasie waarskynlik uit die Foreign Jurisdiction Act instede vanuit die British Settlements Act voortspruit. The Foreign Jurisdiction Act thus appears to make the jurisdiction, acquired by the Crown in a protected country, indistinguishable in legal effect from what might be acquired by conquest." See Hough *Botswana Konstitusionele Ontwikkeling* 5.

<sup>20</sup> no 9 of 1958.

function was to discuss with the Resident Commissioner all matters affecting African interests which the members desired to bring forward. In 1940 the name was changed to African Advisory Council. In 1958 the Bechuanaland Protectorate African Advisory Council Proclamation<sup>21</sup> made the African Advisory Council a statutory body. Section 2 of the proclamation described it as the official body representing the African people of the territory and stated that its function should be to advise the Resident Commissioner on matters directly and indirectly affecting the African residents of the Territory. The African Advisory Council consisted of:

- (a) the Deputy Resident Commissioner and not more than six public servants appointed by the Resident Commissioner;
- (b) chiefs of various tribes;
- (c) thirty one appointed or elected members from the twelve electoral divisions; and
- (d) not more than two non-official members appointed by the Resident Commissioner.

In 1920 an European Advisory Council was established administratively to which was elected one member from each of the electoral areas of the protectorate.<sup>22</sup> The European Advisory Council was made a statutory body by proclamation in 1947.<sup>23</sup> Section 2 of the proclamation declared the function of this body to be:

"to advise the Resident Commissioner on matters directly affecting the European residents of the Territory: provided that neither the High Commissioner nor the Resident Commissioner shall be under any obligation to accept the advice tendered by the Council".

The European Advisory Council consisted of the Deputy Resident Commissioner and six other officials appointed by the Resident Commissioner as well as seven

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<sup>21</sup> no 9 of 1958.

<sup>22</sup> See Marshall *From Independence to Statehood* 70.

<sup>23</sup> no 44 of 1947.

members<sup>24</sup> elected from one of the electoral divisions.<sup>25</sup> At this time the representation given to Europeans was remarkably restricted in nature,<sup>26</sup> particularly in view of the limited powers of the European Advisory Council.<sup>27</sup>

In 1950 a Joint Advisory Council was established administratively, consisting of eight members of the African Advisory Council and seven government officials.<sup>28</sup> On 12 April 1954 the South African government renewed its claim to the High Commission territories urging for the resumption of negotiations between itself and the United Kingdom. Once again the UK deferred its decision on the matter. South Africa suffered a major setback in April 1958 when the Joint Advisory Council resolved that in their opinion the time had come when a legislative council should be formed and empowered to assist in the government of Bechuanaland. The British government welcomed this resolution. Thus in April 1959 they informed the Joint Advisory Council that the Secretary of State for Commonwealth Relations would be happy to consider the proposal for the establishment of a legislative council for Bechuanaland. To that end the Resident Commissioner was requested to formulate and submit proposals to the High Commissioner after consultation with the Joint Advisory Council and consideration of any views submitted by interested persons in the protectorate.<sup>29</sup> A Constitutional Committee was appointed to assist the Resident Commissioner in the formulation of proposals. The Committee consisted of representatives of the Joint Advisory Council and government officials.<sup>30</sup> In May 1959 South Africa stopped its efforts to secure the incorporation when it became clear that a "first stage" Constitution would be granted to Basutoland by the United Kingdom.<sup>31</sup> However South Africa still

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<sup>24</sup> This number was increased to 8 in 1948. See Proclamation of 7 of 1948.

<sup>25</sup> These electoral divisions are described in Section 3 of Proclamation 44 of 1947.

<sup>26</sup> See Section 4 of Proclamation 44 of 1947.

<sup>27</sup> See Section 2 of Proclamation 44 of 1947.

<sup>28</sup> See § 2 of *Constitutional Proposals for the Bechuanaland Protectorate* 1960.

<sup>29</sup> See § 3 *ibid.*

<sup>30</sup> See § 4 *ibid.*

<sup>31</sup> For earlier details of the Incorporation Controversy see "Basutoland, the Bechuanaland Protectorate and Swaziland: History of discussions with the Union of South Africa 1909 to 1939" in *Command Papers of the United Kingdom Government* no 8707 of 1952.

aspired to some other form of South African jurisdiction such as "economic or constitutional guardianship" over Bechuanaland.<sup>32</sup>

These aspirations were dealt a deadly blow when the report of the Constitutional Committee was unanimously endorsed by the Joint Advisory Council and published as "Constitutional Proposals for the Bechuanaland Protectorate (Constitution) Order in Council 1960."<sup>33</sup>

For the purpose of this thesis the focus shall fall on the composition of the legislature and the executive and the status of hereditary rulers. The proposed Constitution empowered the High Commissioner, acting on the advice of a legislative council, to make laws for the peace, order and good government of the protectorate.<sup>34</sup> The Legislative Council would consist of thirty to thirty five members with the Resident Commissioner as President.<sup>35</sup> The other members of the Legislative council would include:

- (a) three ex-officio members, namely the Government Secretary, the Secretary for Finance and the Legal Secretary;
- (b) 21 elected members of whom 10 would be Europeans, 10 Africans and one Asian;
- (c) seven official nominees;
- (d) nominees of the High Commissioner.

The proposed Constitution abolished the European<sup>36</sup> and African<sup>37</sup> Advisory Councils. The latter was replaced by an African Council<sup>38</sup> composed of:

- (a) the Resident Commissioner as President and not more than seven other official members;
- (b) the chiefs of the eight principal tribes as permanent *ex-officio* members;

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<sup>32</sup> See *House of Assembly Debates* vol. 101 cols. 5254-5256.

<sup>33</sup> *Ibid* 503-513.

<sup>34</sup> See Section 6 of the South Africa Act, 1909.

<sup>35</sup> See Section 7.

<sup>36</sup> See Section 8.

<sup>37</sup> See Section 20.

<sup>38</sup> *Ibid*.

- (c) 32 members appointed or elected from 13 divisions in the protectorate, appointed or elected by the *Kgotlas* or tribal or district councils whatever the case might be; and
- (d) not more than two non-official members appointed by the Resident Commissioner.

The electoral system to the legislative council was discriminatory in that European members were elected directly by European voters in ten constituencies while African members were elected by an African Council and the Asian member would be elected by Asian voters.<sup>39</sup>

The constitutional proposals provided for an Executive Council<sup>40</sup> consisting of the Resident Commissioner; the Government Secretary; the Secretary for Finance; the Legal Secretary and two other officials appointed by the High Commissioner, together with four members nominated by the High Commissioner from among the unofficial members of the Legislative Council, of whom two would be European and two African. The Resident Commissioner reserved the right to hear representations from any person he pleased.<sup>41</sup> Also, he would reserve the right to reject the advice of the Executive Council.

Late in 1960 the Bechuanaland People's Party was formed. It protested and agitated against the new Constitution which was denounced as racial.<sup>42</sup> The main objections against the Constitution were:<sup>43</sup>

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<sup>39</sup> See Sections 8 and 9.

<sup>40</sup> See Section 17.

<sup>41</sup> See Section 18.

<sup>42</sup> See Marshall *From Independence to Statehood in Commonwealth Africa* 76.

<sup>43</sup> To pave the way for constitutional talks two orders were made:

- (a) The Bechuanaland (Bangwato Succession Amendment) Order 1963: Statutory Instruments 1963 no 1628 (vol. II) 3027. This order reinstated some powers of chiefs which were curtailed in 1952.
- (b) The Bechuanaland Protectorate (Constitution Amendment) Order 1963: Statutory Instruments 1963 no 1628 (III) 3027. This order amended the 1960 Order in Council by constituting the office of Her Majesty's Commissioner for Basutoland, the Bechuanaland Protectorate and Swaziland and conferred the necessary functions on him and made consequential amendments to the 1960 Order in Council.

- (a) that African members of the Legislative Council would not be directly elected;
- (b) that it was undemocratic in that it consolidated the old and simple system of African representation through chiefs who seldom consulted the people they were supposedly representing;
- (c) that chiefs should have abdicated some of their responsibilities to the masses and remained symbols of local unity in line with the British monarchy;
- (d) that the African Council was unnecessary and it prevented direct representation in the legislative Council;
- (e) that equal representation of Europeans and Africans was unfair as the latter were in the majority.

Notwithstanding this criticism the proposed Constitution came into force in 1961 and Seretse Khama was elected to the Legislative Council in his individual capacity and he was also appointed to the Executive Council.

Dissatisfaction with the Bechuanaland People's Party forced Seretse Khama to form the Bechuanaland Democratic Party as a counterweight against the BPP. In the meantime political unrest forced the Bechuanaland government to initiate moves for the review of the 1961 Constitution.

Meanwhile, in South Africa, during the debate on the Constitutional Bill in January 1961 the Prime Minister of South Africa stated that these territories would never be incorporated into South Africa as they were then being granted self-government by the United Kingdom. But in September 1963 he asked for British co-operation in planning the administration of the territories as an integral part of the South African Bantustan scheme. The UK rejected this proposal. The UK refused to transfer the High Commission territories to South Africa for the following reasons:<sup>44</sup>

- (a) the indigenous African population was opposed to incorporation into South Africa owing to its inhuman native policies;

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<sup>44</sup> See Marshall *From Independence to Statehood in Commonwealth Africa* 53-54.

- (b) the UK had hoped that eventually British, and not Afrikaner, native polices would prevail;
- (c) the British had envisaged a transfer of the High Commission territories to a Union under the Crown of Great Britain with safeguards that could be enforced by the British government. (This was made impossible by the achievement of legislative sovereignty by the Union of South Africa in 1931);<sup>45</sup>
- (d) the introduction of the policy of apartheid in 1948; and
- (e) the UN decolonisation strategy.

In the meantime (April 1963) the British Government directed the Resident Commissioner to initiate constitutional talks with a view to further political advance in Bechuanaland. In July 1963 preliminary talks were attended by the Resident Commissioner, representatives of the three major parties of the European and Asian Communities and the chiefs. Despite attempts by a group of Afrikaner farmers to obtain independence for the Tuli district, constitutional talks were successfully concluded in November 1963.<sup>46</sup>

The constitutional talks resulted in Bechuanaland Constitutional Proposals which were implemented by the making of the Bechuanaland Protectorate [Constitution] Order 1965.<sup>47</sup> This pre-independence Act made provision for a House of Chiefs in recognition of some support which they still command especially in the rural areas. This body was separate from the unicameral legislature and was given merely advisory responsibilities, and then only on chieftainship and tribal matters. Moreover, three months before independence the Chieftainship Act of 1965, was put into effect. This Act further tightened government control over the chiefs and rounded off the process of turning them into government agents.<sup>48</sup>

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<sup>45</sup> Note that in granting independence to South Africa the imperial British Government failed to give any safeguards to the black majority. See HA Wieschoff *Colonial Policies in Africa* (1944) 77.

<sup>46</sup> Marshall *From Independence to Statehood in Commonwealth Africa* 76.

<sup>47</sup> See AJGM Sanders "Chieftainship and Western Democracy in Botswana" in 1987 *CILSA* [XX] 365.

<sup>48</sup> *Ibid.*

Following a successful Constitutional Conference in London in February 1966 the Bechuanaland Protectorate achieved independence under the name of Botswana. The Bechuanaland Constitutional proposals were implemented by the Botswana Independence Act 1966<sup>49</sup> of the United Kingdom and the Botswana Independence Order 1966.<sup>50</sup> The former was an enabling Act which conferred sovereign status on Bechuanaland and made consequential amendments relating, *inter alia*, to citizenship, appeals, and so on. The latter fixed the date of independence for Botswana at 30 September 1966.

The Botswana Constitution Act of 1966 restored the sovereignty of the people of Bechuanaland which had been surrendered to Great Britain by the people of Botswana as a whole. To protect the citizens (including the white minority) the Constitution incorporated a bill of fundamental rights and freedoms of the individual.<sup>51</sup>

#### **4.2.3 General Conclusions**

The Imperial Government did not intend to colonise the High Commission territories nor did these territories intend to permanently surrender their sovereignty to Great Britain. The Imperial Government agreed to the eventual incorporation of these territories into South Africa in the hope that liberal democratic values would eventually prevail in South Africa. However, as the High Commission territories were in opposition to South Africa's racial policies the UK constantly deferred the incorporation of these territories into South Africa. Furthermore, the new international politico-legal order and its underlying human-rights philosophy forced the UK to begin to prepare Bechuanaland for self-government and independence contrary to the South Africa Act, 1909.

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<sup>49</sup> See *Bechuanaland Independence Conference Report* 1966.

<sup>50</sup> See Statutory Instruments 1966 no 1171.

<sup>51</sup> See Sections 3-16 of the Constitution of Botswana.

Thus the Imperial Government established parallel institutions (the white and African Advisory Councils) which were subsequently brought together as a bi-racial Joint Advisory Council. This Council introduced a New Constitution (with the approval of the UK) providing for direct representation for whites and indirect representation (through Chiefs) for Africans. The Africans objected to this system of representation on the grounds (a) that the chiefs seldom consulted the people they supposedly represented and (b) that the system did not provide for African majority rule. In the meanwhile the UK refused to incorporate Bechuanaland into South Africa in accordance with the will of the African majority and international human rights law. Thus the UK finally granted Bechuanaland independence and incorporated a bill of rights in the Independence Constitution.

It is remarkable, yet not totally beyond understanding,<sup>52</sup> that in the case of South Africa the UK granted self-government and finally independence to the white minority without any adequate safeguards for the black majority and contrary to their will. Hence the legitimacy crises of successive white minority governments.

The status of South Africa and Bechuanaland differed. However, by providing for the incorporation of Bechuanaland into South Africa Britain would have subjected the people of this territory to the overriding authority of the white minority government in South Africa. As in the case of South Africa the imperial government reserved the powers of disallowance over the acts of the Botswanan Parliament. (This meant that Britain could prevent South Africa from unilaterally incorporating Bechuanaland.) Indeed, Britain rejected South African attempts to incorporate Bechuanaland into a racially segregated society and eventually granted independence to Bechuanaland according to the wishes of the people of that territory. The Constitution of Bechuanaland (renamed

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<sup>52</sup> This can be subscribed to the fact that South Africa's colonisation predates that of Botswana by more than a century. There was a marked difference between "white" world opinion about "natives" in the nineteenth and early twentieth centuries and that after WW II.

Botswana at independence) contains a bill of rights similar to the European Convention of Human Rights and Fundamental Freedoms. In other words, this new Africa state incorporated universal human rights norms which had become the foundation of modern constitutional states.

### **4.3 Southern Rhodesia (Zimbabwe)**

#### **4.3.1 Colonial Background**

During the Anglo-Boer War<sup>53</sup> (1899-1902) the Imperial government began to increase its supervisory powers over the British South Africa Company.<sup>54</sup> In furtherance of this policy they granted as a parallel measure to Order in Council of 1898, a supplementary charter<sup>55</sup> in June 1900 varying terms of the original charter and setting out the British Government's new powers of control over the Board of Directors of the company. These powers included:

- (a) the termination of the company's power to make ordinances as for the date when the new legislative council should assemble;
- (b) directing the company to communicate the resolutions, minutes and orders of the proceedings of its Board of Directors or of any of its committees relating to the administration of Southern Rhodesia to the Secretary of State who was given power to amend or cancel them;<sup>56</sup>
- (c) the Secretary of State was given access to the company's records and a power of removal of any recalcitrant director or official.<sup>57</sup> The company was denied the right to establish or maintain any force or military police.<sup>58</sup>

After the Anglo-Boer War differences of opinion emerged between elected and nominated members of the legislative council. To deal with the situation the

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<sup>53</sup> During the war Southern Rhodesia fought on the side of Great Britain. See Marshall *From Independence to Statehood in Commonwealth Africa* 34.

<sup>54</sup> See Kenneth Young *Rhodesia and Independence* 1967 52 *et seq.*

<sup>55</sup> Published in *Command Papers of the United Kingdom Government* 7645 (1914).

<sup>56</sup> See Article 2.

<sup>57</sup> See Article 5.

<sup>58</sup> See Article 4.

Southern Rhodesia Order in Council 1903<sup>59</sup> was made, amending the 1898 order. A new Article 17A provided in subsection (1) that the Legislative Council should consist of the Administrator, the Resident Commissioner and 14 other members, of whom seven should be nominated and seven elected. The new Article also authorised the High Commissioner, with the approval of the Secretary of State to amend by proclamation any provision of the order of 1903 or 1898 relating to the Constitution of the legislative Council of the Council should resolve that such amendment be made provided that any resolution providing for the equality of nominated and elected member should be passed by a three-quarters majority of the whole legislative Council.

The continued dispute between the company and the elected members of the legislative council forced the former to concede the idea of eventual self-government of the white minority in Southern Rhodesia. Thus in 1907 the company agreed that the elected members should have a majority of seats in the legislative Council. In 1908 Southern Rhodesia attended the South African National Convention which adopted a draft constitution providing of its incorporation into the Union of South Africa.<sup>60</sup>

In 1911 the British Government granted the Southern Rhodesia Order in Council<sup>61</sup> which reduced the number of members of the executive Council appointed by the company from four to three<sup>62</sup> and reduced the overall membership of the Legislative Council to twelve, seven of whom were to be elected and five appointed by the company, with the approval of the Secretary of State.<sup>63</sup> Thus the white minority settlers achieved majority representation in

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<sup>59</sup> See Statutory Rules and Order 1903 no 122.

<sup>60</sup> The incorporation clause read:

"The King, with the advice of the Privy Council, may on addresses from the Houses of Parliament of the Union admit into the Union the territories administered by the British South Africa Company on such terms and conditions as to representation and otherwise in each case as are expressed in the addresses and approved by the King, and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland".

<sup>61</sup> See Statutory Rules and Order no 439 of 1911.

<sup>62</sup> See Section 2.

<sup>63</sup> See Section 3.

the Legislative Assembly.<sup>64</sup> But the effective control of the country remained in the hands of the company as the Order in Council had imposed restrictions on the Legislative council, which led to this system not lasting long.

In 1914 the High Commissioner made a declaration of British Government policy indicating that Responsible Government would be granted to Southern Rhodesia, though the incorporation of the territory into the Union of South Africa remained the ultimate goal. A Further Proclamation of 1914<sup>65</sup> provided for the increase of seats to a maximum of 15. The number of elected members, however, had only increased to 13 by 1920.

It was agreed during World War I that no major constitutional change should take place until the cessation of hostilities. Thus the Six Orders in Council issued between 1914-1918 related to minor issues.<sup>66</sup> In the meanwhile the settlers, through their elected representatives in the legislative council, had been raising the question of the ownership of the unalienated land of the territory disputing the claim to it by the British South Africa Company. This claim was based on the concessions obtained by the company from Lobengula. On 17 April 1914 the Legislative Council passed a resolution stating that the company did not own the unalienated land in Southern Rhodesia and when it ceased to be the government of that territory the ownership of the land should remain with the government.<sup>67</sup> But the Imperial Government refrained from settling the land question in isolation from any general settlement of all questions then remaining between the crown, the company and the settlers. It was therefore agreed that the question should be resolved by the Judicial Committee of the

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<sup>64</sup> The powers of the Legislative council were subject to a provision in the Order in Council that the Legislative council should not consider any vote, resolution or order for appropriation of any part of the public revenue or any tax that had not first been recommended to the council by the administrator during the same session. See Section 6.

<sup>65</sup> See Proclamation 47 of 1914.

<sup>66</sup> See Standing Rules and Orders (SRO) no 1270 of 1914 [relating to customs duties]; no 147 of 1915 [Auditor-General]; SRO no 475 of 1916 [police on active service]; SRO no 2223 of 1920 [native reserves]; SRO no 353 of 1921 [the Administrator] and SRO no 355 of 1923 [command of the police].

<sup>67</sup> See Marshall *From Independence to Statehood in Commonwealth Africa* 38.

Privy Council on a special reference under Section 4 of the Judicial Committee Act 1833. The reference was made in 1914.

The report of the Judicial Committee on the Land Reference was made in 1918.<sup>68</sup> The committee decided that the Crown, not the Chartered Company, owned the unalienated land. That decision deprived the company of one of its major assets. This factor, coupled with the continuing and increasing pressure of the elected members of the legislative council for the grant of responsible government, persuaded the company to surrender its political control over, and its administrative functions, in, Southern Rhodesia.

The General election of 1920 returned to the Southern Rhodesian legislative assembly an overwhelming majority of elected members in favour of Responsible Government. In May 1920 the Legislative Council passed a resolution requesting the Imperial Government to grant responsible government to Southern Rhodesia. The resolution claimed that the settlers were capable of fulfilling, in the interests of all the habitants of the territory, regardless of race, the duties of self-government and that they were equally as able to bear responsibility thereof as other peoples of the empire who had been granted self-government. The British High Commissioner delayed the granting of self-government to the Southern Rhodesia to 1923 on the ground that there was an influx of settlers into the territory who would need to be consulted on the New Constitution.

As in the case of South Africa, the Commissioner did not consider the alternative course of developing the territory towards self-government under the Crown with African participation or partnership. This approach was followed in the case of Botswana. Unlike in the case of Botswana this decision was based on the notion that Southern Rhodesia, like South Africa, was a white man's country. Thus Southern Rhodesia, like the Union of South Africa, fell under the category of British dominions.<sup>69</sup>

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<sup>68</sup> *Ibid* 39.

<sup>69</sup> *Ibid* 39-41.

As a result of the insistence of the settlers on responsible government the New Secretary of State for the Colonies (Mr Winston Churchill) appointed a committee under the chairpersonship of Lord Buxton<sup>70</sup> and commissioned it to consider the following matters:

- (a) when and with what limitations (if any) Responsible Government should be granted to Southern Rhodesia;
- (b) what procedure should be adopted with a view to working out the future constitution and
- (c) pending the coming into effect of responsible government what measures would be required to enable the British South Africa Company to carry on the administration.

The Buxton Committee recommended, first, that a scheme for responsible government should be drawn up in detail and placed before the electors of Southern Rhodesia for their acceptance or rejection and that their opinion be ascertained by means of a referendum rather than by a general election; secondly, the Committee made detailed recommendations as to conduct of the referendum and the material that should be placed before the voters; and thirdly, the Committee recommended the method of granting Responsible government, the main provisions ensuing from the Constitution. In Conclusion, the report commended the British South Africa Company for the Great Imperial, commercial, and colonising work that it had accomplished.

In October and November 1921 the elected members of the Legislative Council of Southern Rhodesia attended a conference with the Secretary of State in London. As a result of this conference a Draft Constitution for Responsible Government was drawn up. In January 1922 a White Paper<sup>71</sup> was published containing a Dispatch to the High Commissioner for South Africa transmitting

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<sup>70</sup> See the First Report of the Buxton Committee CMD 12 73 (1921) Appendix 1.

<sup>71</sup> See CMD 15 73 of 1922.

a draft order in Council annexing the territory of Southern Rhodesia to the Crown, draft letters patent providing for the Constitution of Responsible Government in the colony, draft letters patent constituting the office of Governor and draft royal instructions to the Governor. Many of the clauses of the draft letters patent for the constitution were derived from corresponding sections of the Constitutions of the Transvaal of 1906, Natal of 1893 as well as of the Southern Rhodesia Order in Council of 1898.<sup>72</sup> In other words, the constitution-making approach in Southern Rhodesia was modelled on the one adopted in the case of South Africa.

The letters conferred on the "people" of Southern Rhodesia (excluding Africans) a full and satisfactory control of their government and administration subject to the incorporation clause of the South Africa Act, 1909.<sup>73</sup> Thus the letters patent urged the colonial authorities to negotiate the terms of incorporation with South Africa and to ascertain the wish of the settlers by means of a referendum. A conference between the colonial authorities in Salisbury and General Smuts held in April 1922 proposed that Southern Rhodesia should become a province of the Union and have at first ten and later seventeen members in the Union Parliament and four in the Senate. The conference also proposed a Provincial Council for Southern Rhodesia as was the case with the provinces of the Union. In the meantime the Southern Rhodesian Legislative council had passed the Referendum Ordinance 1922. A referendum was duly held in October 1922 at which the majority of voters voted against incorporation in the Union of South Africa. Thus in 1923 Southern Rhodesia was granted self-government with certain reservations.<sup>74</sup> Although Southern Rhodesia as a Colonial territory fell under the same category as the Union of South Africa in 1931 Britain did not grant her legislative independence along with South Africa and other British dominions.

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<sup>72</sup> See Marshall *From Independence to Statehood in Commonwealth Africa* 44.

<sup>73</sup> See note 187 *infra*.

<sup>74</sup> Like South Africa it became a British colony subject to the Colonial Laws Validity Acts of 1865.

### 4.3.2 Evolution of Institutions of Government

In 1958 the struggle between Britain and Southern Rhodesia on the issue of independence began. Southern Rhodesia approached Britain for a revision of the Southern Rhodesian Constitution of 1923 with the object of achieving some degree of legislative sovereignty identical with that gained by South Africa in 1931. Negotiations between the Southern Rhodesian and the British Governments resulted in a series of constitutional conferences beginning in December 1960.<sup>75</sup>

In February 1961, Sandys, the British Commonwealth Relations Secretary and Whitehead, the Southern Rhodesian Prime Minister, announced an agreement in principle, on the decolonisation of Southern Rhodesia.<sup>76</sup> The leader of the then National Democratic Party, Mr Joshua Nkomo,<sup>77</sup> accepted that strategy. Pursuant to this agreement Britain published two white papers (Cmn. 1399 and 1400) on 13 June 1961. These papers contained the terms of the post-colonial Southern Rhodesian constitution approved by the House of Commons on 21 July 1961. Before the adoption of this constitution, a referendum of the electorate was taken on the 21st of July 1961, resulting in the acceptance of the new constitution by some 42,000 votes to 22,000. When the referendum took place all the balloting officers were instructed to ensure that each registered voter is given a ballot form and takes it to a cubicle and votes for or against the proposals contained in Parliamentary White papers published in the Government Gazette of the 30th of June 1961.

The first White Paper (Command 1399) professed to eliminate all the reserve powers then vested in the government of Great Britain save for certain matters set out in paragraph 50. This paragraph made it quite clear that under the new constitution Southern Rhodesia would be free to make amendments to any

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<sup>75</sup> See Marshall *From Independence to Statehood in Commonwealth Africa 44 et seq.*

<sup>76</sup> *Ibid.*

<sup>77</sup> But Nkomo later changed his mind.

section of the Constitution without reference to Britain with the exception of those affecting the position of the sovereign and the governor and the right of the British government to safeguard the position regarding certain international obligations and undertakings. This provision not only preserved the colonial status of Southern Rhodesia, but also failed to grant her a dominion status. In other words Great Britain did not grant Southern Rhodesia the status granted to South Africa and other dominions in 1931.

The colonial status of Southern Rhodesia was clarified further when the Constitutional Bill<sup>78</sup> was tabled in the House of Commons. The Bill failed to follow the White papers by including Section III in the New Constitution. This section reserved full power and authority to the Queen-in-Council to amend, add to or revoke the provisions of certain sections and also the power to vary or revoke section III, and any order in Council made by virtue of this section, provided that the Queen would not exercise these powers and authority for the purpose of amending section III or adding to it a reference to any Section of this Constitution not included in this section on the appointed day.

Another section made quite clear that no Bill could become law until it had the assent of the Governor in the Queen's name. It stated clearly that the executive authority of Southern Rhodesia was vested in the Queen and might be exercised on her behalf by the Governor or such other person as may be authorised by the Governor. The Governor also in the Queen's name could grant any person concerned in or convicted of any offence a pardon either free or subject to lawful conditions or could grant to any person a respite of a sentence. He could also substitute a less severe form of punishment; he could remit the whole or part of any sentence and the offences to which this section of the Constitution applied were offences against any law in force in Southern Rhodesia other than a law of the Federal Legislature.<sup>79</sup> It appears quite clearly from these provisions that Section III, increased the powers of the Queen - in reality the British Government - to alter the legislature and Executive of Rhodesia. Thus instead

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<sup>78</sup> See *Report of Southern Rhodesia Constitutional Conference* (London 1961).

<sup>79</sup> See note 83 *infra*.

of granting independence to Southern Rhodesia Britain tightened her colonial rule over the territory.

Henceforth Britain began to take positive steps to protect the interests of the people of Southern Rhodesia (including Africans) as a whole. She introduced a bill of rights to prevent discriminatory legislation and to safeguard from laws infringing his/her civil liberties every person in the Country whatever his/her race, tribe, place of origin, political opinion, colour or creed. Any aggrieved person could apply to the High Court for redress with an ultimate appeal to the Privy Council in London. The Constitution also provided for a Constitutional Council empowered to consider if any bill presented to the Legislative Assembly was consistent with the Declaration of Rights. The Constitutional Council in effect had some of the powers of the House of Lords in England.

The demands of the white minority in Southern Rhodesia for independence coincided with a shift in the British colonial policy resulting from the new international politico legal order.<sup>80</sup> The new order required metropolitan powers to grant unqualified independence to colonial countries and people.<sup>81</sup> Thus, instead of granting independence to the white minority in Southern Rhodesia, as was the case in South Africa in 1931,<sup>82</sup> the 1961-62 Constitution opened up the franchise for Africans to a greater extent than ever before. Under it the vote was extended to persons of all races registered on one of two rolls and extended to all citizens aged 21 or over. These constitutional reforms met severe resistance from the Dominion Party which became the Rhodesia Front (RF) in 1962. The RF, like the National Party of South Africa, opposed this franchise systems as it would eventually bring about black majority rule.

Thus in the 1962 elections the RF, like the National Party of South Africa in

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<sup>80</sup> See Chapter V below.

<sup>81</sup> This decolonisation strategy was based on the UN Declaration on the Granting Independence to Colonial Countries and Peoples of 14 December 1960.

<sup>82</sup> At the time the right of self-determination of African peoples was disputed by both Britain and South Africa who saw themselves as trustees or guardians of African peoples in terms of the Berlin Treaty as amplified by the Covenant of the League of Nations.

1948, campaigned on the basis of a racially-discriminatory programme. They based their programme on the following premises:<sup>83</sup>

- (a) that each community had the right to preserve its own identity, traditions, and customs provided it gave undivided loyalty to the Country;
- (b) that power should remain in responsible hands - that is, the white minority should hold on to the control of affairs and not hand over to the people not trained and not versed in the art of government;
- (c) that there should be no compulsory (though no voluntary) integration of black and white;
- (d) that the right of the government to provide separate amenities for black and white should be recognised.

After the dissolution of the Federation in 1963,<sup>84</sup> the Southern Rhodesian Government began lengthy negotiations with Britain on the issue of independence. The Rhodesian Government premised its talks on its racial policies. These negotiations failed as they were dramatically opposed to the new British policy.<sup>85</sup>

Thus on 11 November 1965 the Smith regime made a Unilateral Declaration of Independence (UDI) but retained allegiance to the British Crown as a member of the Commonwealth. This was a constitutional coup d'état committed in the face of the Constitution of 1961.<sup>86</sup> The British labour government reacted by passing the Southern Rhodesia Act 1965 affirming continuing UK responsibility and jurisdiction for and in respect of the colony. The Act made drastic modifications to the 1961 Constitution in order to deal with the situation created by rebellion. It deprived the Southern Rhodesia legislature of the power

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<sup>83</sup> See Kenneth Young *Rhodesia and Independence* (1967) 52 *et seq.*

<sup>84</sup> The Constitutional developments in the Federation of Nyasaland, Southern and Northern Rhodesia are left out of account as they are not relevant to this thesis. For a discussion of those developments, see Marshall *From Independence to Statehood in Commonwealth Africa* 112 *et seq.*

<sup>85</sup> See Young *Rhodesia and Independence* 52.

<sup>86</sup> See T O Elias *Africa and the Development of International Law* (1972) 111.

to make laws and vested those powers in Her Majesty in Council, suspended the ministerial system and provided for the exercise of ministerial functions by the British Commonwealth Secretary. The British government appointed Sir Humphrey Gibbs as the only legitimate Governor of the self-governing colony of Southern Rhodesia, a status he had held since 1923.

The Prime Minister, Harold Wilson, laid down six principles for negotiations between the British government and the rebel regime. These principles were:

- 1) the principle and intention of unimpeded progress to majority rule, already enshrined in the 1961 Constitution, would have to be maintained and guaranteed;
- 2) there would also have to be guarantees against retrogressive amendment of the Constitution;
- 3) there would be immediate improvement in the political status of the African population;
- 4) there would have to be progress towards ending racial discrimination;
- 5) the British Government would need to be satisfied that any basis proposed for independence was acceptable to the people of Rhodesia as a whole;
- 6) it would be necessary to ensure that, regardless of race, there was no oppression of a majority by minority or of minority by majority.

These terms proved to have been unacceptable to the Smith regime.<sup>87</sup>

At the Commonwealth Conference held in London in 1966 an ultimatum was issued to the white minority regime in Southern Rhodesia to settle on the basis of the foregoing six principles or face mandatory sanctions imposed by the United Nations before the end of 1966.<sup>88</sup> All subsequent efforts to restore legality to Southern Rhodesia failed. The whole question of the illegal Smith regime in Southern Rhodesia was put in issue in the case of *Madzimbamuto v*

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<sup>87</sup> *Ibid.*

<sup>88</sup> See Resolution 232 (1966) of December 1966.

*Lardner-Burke*.<sup>89</sup> The court held that the Smith regime was valid. Subsequently most Rhodesian judges acknowledged the illegal regime as the only lawful government of Southern Rhodesia, and recognised the Constitution promulgated by that regime as the only valid constitution, forcing the British Governor to leave the Country.<sup>90</sup>

In 1970 the illegal regime purported to adopt a republican Constitution (the 1969 Constitution) without even the very distant prospect of majority rule offered by the 1961 constitution. This constitutional dispensation introduced a franchise based on race, providing for eventual parity of African and European representation in the House of Assembly, and by excluding majority rule, further, the dispensation made the Declaration of Rights non-justiciable and designed the constitution to underpin an overtly discriminatory state system.<sup>91</sup> The Republican Constitution of 1969 did not envisage the return to legality under British colonial rule, however temporarily, so as to accept an independent constitution from the UK in the traditional manner.<sup>92</sup>

However, internal and international pressures against the Smith regime forced them to enter into talks with successive British governments.<sup>93</sup> These talks were designed to tinker with the 1961 Constitution in a way that would provide for an independence settlement consistent with the British "six principles" in terms of which majority rule would be delayed for many years after independence. However, one of the principles required a Constitutional Settlement acceptable to the Rhodesian people as a whole. This principle represented a major British colonial policy shift regarding the decolonisation of Southern Rhodesia as it accepted the principle of self-determination as embodied in the Declaration of Independence for Colonial Countries and Peoples.<sup>94</sup>

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<sup>89</sup> 1968 [2] SA 284 [RAD].

<sup>90</sup> See *R v Ndlou* 1968 [4] SA 515 [RAD].

<sup>91</sup> See Peter Slinn *Zimbabwe Achieves Independence* 1041-1042.

<sup>92</sup> See GA Resolution 2022 [XX].

<sup>93</sup> For a full discussion of these talks see Leo S Baron "The Rhodesian Saga" in 1969 *Zambian Law Journal* [Vol. 1 no 1] 38 *et seq.*

<sup>94</sup> Resolution 1514 [XV].

In 1971 the new Conservative Foreign and Commonwealth Secretary, Sir Alec Douglas-Home reached an agreement with Mr Ian Smith. In terms of that agreement the British Government would accept the Southern Rhodesian Constitution of 1969 as the constitutional framework for legal independence subject to amendments, which, while significant, were not likely to produce majority rule between thirty and fifty years. The implementation of this agreement was subject to the principle of self-determination for the people as a whole.<sup>95</sup> As an integral part of the agreement a commission under Lord Pearce visited Southern Rhodesia to test African opinion. The Pearce Commission found that the proposals were not acceptable to the African majority. Thus the British attempts to procure a constitutional settlement through bilateral dealings with the illegal regime failed.<sup>96</sup>

Then the regime vigorously pursued an alternative strategy designed to procure an "internal settlement" acceptable to a substantial section of the black majority inside the country. The settlement provided for majority rule but with adequate "safeguards" for the white community. Mr Ian Smith and a number of African political leaders, including Bishop Abel Muzorewa, who had emerged as a leader during the 1971 Douglas-Home proposals, signed the internal settlement agreement in March 1978. Like the Anglo-American proposals, this agreement provided for the establishment of a transitional administration to oversee the drafting of a new constitution to provide for "majority rule on the basis of universal adult suffrage". Further it allowed the 1969 Constitution to remain in force (and the Parliament elected thereunder to continue to sit) subject to minor modifications to accommodate the replacement of the existing ministry by a transitional government.<sup>97</sup>

The transitional government produced a Zimbabwe-Rhodesia constitution of 1979 which brought Muzorewa to power as the first black Prime Minister. The

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<sup>95</sup> This approach was consistent with the UN decolonisation strategy embodied in the Declaration on the Granting of Independence to Colonial Countries and Peoples. *Ibid.*

<sup>96</sup> See Peter Slinn *Zimbabwe Achieves Independence* 1042.

<sup>97</sup> *Ibid.*

majority of the provisions of the constitution were designed to limit the impact of the concession of majority rule and to ensure that the administration of the country remained in white hands. This was affected through reservation of white seats in parliament and the white veto guaranteed for a minimum period of ten years. But the Constitution also ensured that even after the expiry of that period the white privileges might be retained.<sup>98</sup>

### **4.3.3 General Conclusion**

The colonial character of Southern Rhodesia did not differ from that of South Africa, they were both acquired through conquest and annexation, forcibly depriving the indigenous African peoples of their land and the right to self-determination. The South Africa Act 1909 made provision for the incorporation of Southern Rhodesia into South Africa. The British government respected the right of self-determination of the white minority in South Africa and granted them self-government. In respect of Southern Rhodesia, unlike South Africa, Britain refused to grant independence to the white minority before black majority rule. There are two reasons for this: first, the rise of African nationalism and the resistance against colonialism and secondly, the international pressures for decolonisation. In short, Britain failed to grant independence to the white minority in Southern Rhodesia under the Statute of Westminster of 1931 as she was overtaken by the New International Politico Legal Order which developed after World War II. Thus during the sixties Britain felt obliged to find an internationally acceptable solution to the Southern Rhodesia question.

The Smith regime, like its South African counterparts, embarked on various internal settlements designed to bypass or qualify the right of self-determination of the black majority. The signatories to the Salisbury Agreement had hoped that their settlement would induce guerrillas to abandon the armed struggle and

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<sup>98</sup> See Blaustein A, Gisbert P & Franz H *Constitutions of the Countries of the World* (1986) 17.

the international community to recognise the Rhodesian Independence and lift economic sanctions. The internal settlement failed to achieve these goals. However, the election of a conservative government in May 1979 raised hopes in Salisbury that Britain might be prepared to confer legitimacy on the internal settlement arrangements by legislative action. On the contrary, the New British government adopted the firm view that Rhodesia could only be brought back to legality through a fresh constitutional settlement acceptable to all the Rhodesian parties and to the international community, particularly the Front Line States.<sup>99</sup> The internal settlement attempts failed to meet the requirements of an internationally acceptable constitutional order in that they severely restricted the civil and political rights of the black majority, and as in South West Africa and South Africa itself, were rejected by the national liberation movements and the international community on the ground that they did not satisfy the mandatory rule of self-determination and equal rights which had become the foundation of modern constitutional states.

#### **4.4 South West Africa (Namibia)**

##### **4.4.1 Origins and Nature of International Status**

The territory of South west Africa was a colony of Germany until 1915.<sup>100</sup> During World War I it was conquered by the Union of South Africa with the assistance of the indigenous population.<sup>101</sup> The territory remained under a military government established by South Africa until December 1920.<sup>102</sup>

At the Paris Peace Conference in 1919 President Wilson of the United States of America and the Dominion Prime Ministers hammered out a "great

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<sup>99</sup> See opening speech by Lord Carrington (Chairman) in *Zimbabwe Rhodesia Report of the Constitutional Conference Lancaster House* (London 1979) 6-7.

<sup>100</sup> See John Dugard *South West Africa/Namibia: Review of the International dispute* (1973) 2.

<sup>101</sup> See "Namibia the Historical Legacy" in Gerhard Töttemeyer, Vezera Kandetu and Wolfgang Werner (eds.) *Namibia in Perspective* (1987) 18.

<sup>102</sup> See Marshall *From Independence to Statehood* 28.

compromise" which produced a three-tiered system of mandates which reflected in a sliding scale a varied balancing of national and international interests. South West Africa became one of the C-mandated territories.<sup>103</sup> An understanding of the international status and constitution-making approaches in this territory requires a historical background of the mandate system.

The historical roots of the mandates system stretches to the concepts and principles enunciated in earlier international arrangements such as the Berlin Treaty of 1885.<sup>104</sup> None the less the system did not result from an organic development in international relations, but was a direct result of diplomatic events of World War I and the Paris Peace Conference.

The initiative came from General Smuts. Hardly a month after the war,<sup>105</sup> Smuts<sup>106</sup> published a small pamphlet entitled, "The League of Nations: A practical suggestion", which was destined to have a profound influence on the formulation of the mandates system. The key point was that the collapse of the old empires should not be made the occasion for "National annexation" of derelict territories. Further, Smuts declared that as Europe was being liquidated, the League of Nations must be the heir of that great estate. In other words, the League of Nations had to be made the reversionary, in the broadest sense, of the peoples and territories formerly belonging to Russia, Austria, Hungary and Turkey.<sup>107</sup> The Smuts plan clothed the League of Nations with the right of ultimate disposal in accordance with the principles of "no annexations,

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<sup>103</sup> See S Slonim "Origins of the South West Africa Dispute: The Versailles Peace Conference and the Creation of the Mandates System" in 1968 IV *The Canadian Yearbook of International Law* 115.

<sup>104</sup> See Pittman B Potter "Origin of the System of Mandates under the League of Nations" in 16 *American Political Science Review* [1922] 563. Also Luther H Evans "Some Legal and Historical Antecedents of the Mandatory System" in 5 *Proceedings of the Southwestern Political Association* [1924] 143.

<sup>105</sup> 11 November, 1918.

<sup>106</sup> See Jan C Smuts *The League of Nations: A Practical suggestion* [1918]

<sup>107</sup> The exclusion of African and Asian peoples from the Smuts plan was a deviation from the international "plan for the betterment of backward peoples" embodied in the Berlin Treaty. It was also opposed to President Wilson's plan which envisaged ultimate self-government and independence for all peoples and nations. See President Wilson "The origins of the Mandates System" 6 *Foreign Affairs* [1928] 281.

and self-determination of nations".<sup>108</sup> Since the peoples involved differed in their preparedness for self government, Smuts called for a scheme of graded mandates. The terms of each mandate would be spelled out in a special charter which would not only reserve ultimate control to the League, but would also call for periodic reports, and even for appeal against gross breaches of the mandate by the people of the mandated territory.

Smuts,<sup>109</sup> however, excluded Africa and the Pacific Islands from the mandates principle on the ground that

"The German colonies in the Pacific and Africa are inhabited by barbarians who not only cannot possibly govern themselves but to whom it would be impracticable to apply any idea of political self determination in the European sense ... The disposal of these colonies should be decided on the basis of the principles which President Wilson has laid down in the fifth of his celebrated fourteen points."

The Smuts plan was not only contrary to the Berlin Treaty of 1885 but also to the emerging progressive ideals of democracy, the right of self-determination of peoples, and protection of minority rights which had been confirmed by the Bolshevik Revolution of 1917.<sup>110</sup>

In addition, the Smuts plan was contrary to Wilson's fourteen points plan<sup>111</sup> which was set against the background of these ideals. Wilson's Points were enunciated before a joint session of Congress of January 8, 1918. The Fifth Point envisaged, contrary to the Smuts Plan, a free, open-minded, and absolutely impartial adjustment of all colonial claims, based on the principle that in determining all such questions of sovereignty the interests of the population concerned must have equal weight with the equitable claims of the government whose title was to be determined.

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<sup>108</sup> See Smuts *The League of Nations* 10.

<sup>109</sup> *Ibid* 12.

<sup>110</sup> See Slonim "The Origins of The South West Africa Dispute" 116.

<sup>111</sup> See Point 5. For a text see James Brown Scott (ed.) *Official Statements of War Aims and Peace Proposals (December 1916 to November 1918)* (1921) 234-39.

Shortly after the end of the war President Wilson visited Europe where he met Lloyd George (the British Prime Minister) who presented him with a copy of the Smuts plan and raised the topic of mandates for discussion. There was basic agreement on the principle to be applied, but Wilson rejected the case for South African annexation of South West Africa.<sup>112</sup>

After their meeting Wilson left for Paris and proceeded to draw up a draft covenant, incorporating therein much of the thought and language of General Smuts.<sup>113</sup> His reliance on Smuts' plan was particularly evident in regard to the mandates section, which was appended as a supplementary agreement to the body of the draft covenant.<sup>114</sup> Wilson's plan, however, extended the mandates system, with a clear pledge to the principle of self-determination, to all German colonies - including those in Africa and the Pacific - something which Smuts had specifically excluded. Smuts had envisaged a mandates system purely as a means of resolving the nationality problem of Eastern Europe and the near East, while Wilson regarded it as a concept of universal applicability and one that could resolve the colonial problem of Africa and the Pacific as well.<sup>115</sup> The first official American draft Covenant was circulated to the Allied governments on January 10, 1919.<sup>116</sup>

The Americans received the British "Draft Convention regarding the Mandates" on 25 January, 1919. The draft contained details regarding the proposed mandate system. Among other things, it dealt with two types of mandates. First, the "assisted states" for those mandates close to independence and secondly, "vested territories" for those areas requiring direct administration by the mandatory power. The state placed in charge of a "vested territory" would be invested with all powers and rights of sovereign government. Such a state would hold the territory "upon trust to afford the inhabitants peace, order and

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<sup>112</sup> See Slonim "The Origins of the South West Africa Dispute" 122.

<sup>113</sup> *Ibid* 125.

<sup>114</sup> See Potter "Origin of the System of Mandates under the League of Nations" 563.

<sup>115</sup> See Slonim "Origins of the South West African Dispute" 125.

<sup>116</sup> *Ibid*.

government".<sup>117</sup> It also provided for annual reports by a mandatory power and included a provision for the creation of a Commission to assist the League in its supervisory role and to receive the annual reports.<sup>118</sup>

Therefore there was in effect basic agreements between the United States and Great Britain on the mandates principle. During 1918 both powers advanced from a simple commitment to the ideal of self-determination to a recognition that this ideal would best be implemented through the creation of a mandates system integrally linked to the League of Nations. They also agreed on the general features of the system. The only outstanding issue centred on the extent of the mandates system, particularly the question of exceptions to allow for annexations in certain cases. This question was addressed at the Paris Peace Conference.

On 18 January 1919, the Peace Conference opened in Paris. The first major issue dealt with by the Conference was the disposition of colonial territories. There was general agreement on not returning the colonies to Germany. Great Britain, in particular, declared that she was prepared to accept the mandates system for those territories that had come under British control. Moreover, the mandates system, with its concern for native interests and equality of commercial access was, in essence, already a part of the British colonial system. But Britain felt that the territories conquered by the Dominions (including South Africa) should be treated differently. More specifically, Britain felt that South West Africa was a wilderness and could only be developed as an integral part of South Africa upon which it bordered. At the same time Smuts claimed South West Africa on the grounds of contiguity to the Union and undesirability of a separate administrative system.<sup>119</sup>

Although President Wilson was sympathetic (perhaps for personal reasons) with General Smuts, he opposed the annexation of South West Africa by South

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<sup>117</sup> *Ibid* 125-126.

<sup>118</sup> *Ibid* 126.

<sup>119</sup> *Ibid* 127.

Africa for various reasons. In January 1919 Wilson was forced to explain why mandatory control over South West Africa would be preferable to annexation:<sup>120</sup>

"South West Africa had very few inhabitants, and these had been so maltreated, and their numbers had been so reduced under German administration, that the whole area was open to development that could not yet be determined. Therefore, either it must be attached to its nearest neighbour and so establish what would seem to be a natural union with South Africa, or some institution must be found to carry out ideas all had in mind, namely, the development of the country for the benefit of those already in it, and for the advantage of those who would live there later. This he assumed to be the principle; it was not intended to exploit any people; it was not intended to exercise arbitrary sovereignty over any people.

The purpose was to serve the people in undeveloped parts, to safeguard them against abuses such as had occurred under German administration and such as might be found under other administrations. Further, where people and territories were undeveloped, to assure their development so that, when the time came, their own interests, as they saw them, might qualify them to express a wish as to their ultimate relations - perhaps lead them to desire their union with the mandatory power".

In the light of these considerations, Wilson envisaged that in the event South Africa became a mandatory of the League of Nations for South West Africa, the League would lay down certain general principles in the mandate - namely:

- (a) that districts be administered primarily with a view to the betterment of the conditions of the inhabitants;
- (b) that there should be no discrimination against the members of the League of Nations, so as to restrict economic access to the resources of the districts.

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<sup>120</sup> See Rogers Louis "The South West African Origins of the 'Sacred Trust' 1914-1919" in 66 *African Affairs-Journal of the Royal African Society* no 262 (January 1967) 33.

Subject to these limitations, the Union of South Africa would extend such of its laws as were to be applicable to South West Africa and administer it as an annex to the Union so far as consistent with the interest of the inhabitants. The fundamental idea, however, would be that the world was acting as trustee through a mandatory and would be in charge of the whole administration until the day when the true wishes of the inhabitants could be ascertained. Thus Wilson made it incumbent upon the Union of South Africa to make conditions so attractive that South West Africa would come into the Union of its free will.<sup>121</sup>

The public interest in these questions forced Great Britain to bring her war aims into alignment with those of the United States. In July 1917 the British Prime Minister, Lloyd George, announced that the desire and the wishes of the peoples must be the dominant factor in the determination of the fate of the German colonies. Finally, in his British War Aims' speech delivered on 4 January 1918 (a year before the Peace Conference), Lloyd George<sup>122</sup> declared:

"With regard to the German Colonies, I have repeatedly declared that they are held at the disposal of a conference decision which must have primary regard to the wishes and interests of the native inhabitants of such colonies. None of those territories are inhabited by Europeans. The governing consideration, therefore, in all these cases must be that the inhabitants should be placed under the control of an administration acceptable to themselves, one of whose main purposes will be to prevent their exploitation for the benefit of European capitalists or governments. The natives live in their various tribal organisations under chiefs and councils who are competent to consult and speak for their tribes and members and thus to represent their wishes and interests in regard to their disposal. The general principle of national self-determination is, therefore, as applicable in their cases as in those occupied European territories."

But Great Britain was not fully committed to the principle of national self-determination for African peoples in the former German colonies.

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<sup>121</sup> *Ibid* 33-34.

<sup>122</sup> *Ibid* 25.

Thus before his War Aims speech Lloyd George sent secret telegrams to the Governors-General of South Africa, Australia and New Zealand requesting them to provide evidence of anxiety of natives to "self-determine" themselves in favour of incorporation into the British Empire. The Governor-General of South Africa replied as follows:<sup>123</sup>

"I cannot see how the principle of 'national self-determination' could be applied to it [South West Africa] and it will always be more a European than a native territory, since, thanks to the Germans, there are comparatively few natives... while the natives, both Ovambos and the rest, would almost all certainly elect to remain under British rule, they could hardly be given a more influential voice than the German inhabitants. If the latter had to vote on the future of the territory the result would scarcely be in doubt, but if the territory were annexed to Union most of the Germans would probably remain and become loyal and useful citizens."

Consequently, South Africa and other dominions remained firm in their campaign to obtain the territories outright, without mandatory obligations. The British reiterated their acceptance of the mandates principle, stating that it was not very different from the principles laid down by the Berlin Conference.<sup>124</sup> To avoid a deadlock, General Smuts worked out a resolution heavily predicated on the earlier British draft convention, which in turn had been developed from the original Smuts plan. But in contrast to that plan, no explicit reference was made to the principle of self-determination, nor was the League classified as the ultimate reversionary. The object of the mandates system was couched in broad terms. The resolution was a compromise proposal designed, on the one hand, to meet the Wilson demands by defining specific international obligations to be assumed by the mandatory power, while on the other hand it refrained from imposing a uniform set of standards upon all mandatories indiscriminately. It made the degree of obligation vary in accordance with the type of mandate.

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<sup>123</sup> *Ibid* 26.

<sup>124</sup> See Slonim "The South West Africa Dispute" 128-129.

Three categories of mandates were designated, depending on the stage of development achieved. These mandates came to be known as Mandates A, B and C.<sup>125</sup>

Mandate A covered the territories severed from the Turkish Empire which were deemed to have reached a stage of provisional independence, so that the rule of the mandatory power would be limited to the rendering of administrative advice and assistance until such time as the mandate would be able to stand alone. Mandate B was made up of former German colonies in central Africa which required the mandatory to be responsible for administration, subject to conditions guaranteeing preservation of the open door policy as well as prohibition of the slave trade, traffic in arms and liquor, militarisation and fortification.<sup>126</sup> Mandate C consisted of such territories as South West Africa and the islands of the south Pacific which were scarcely populated or small in size, or remote from the centres of civilisation. This third category had to be administered under the law of the mandatory state as integral portions thereof subject to the safeguards mentioned above in the interests of the indigenous population. Finally, a formal resolution presented by Great Britain confirming the Mandates System was adopted and published (with minor changes) on 7 May 1919.<sup>127</sup>

#### **4.4.2 Evolution of International Institutions**

The Union of South Africa passed the South West Africa Mandate Act 49 of 1919 to empower the Governor-General to implement the Paris Peace Treaty and any mandate under the Treaty pertaining to South West Africa.<sup>128</sup> The Act authorised the Governor-General:

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<sup>125</sup> *Ibid* 133-134. See also Louis "The South West African Origins of the 'Sacred Trust' 1914-1919" 34.

<sup>126</sup> This prohibition was based on the provisions of the Berlin Treaty.

<sup>127</sup> See Slonim "The Origins of the South West Africa Dispute" 138.

<sup>128</sup> See the Preamble.

- (a) to make such appointments, establish such offices, issue such proclamations and regulations as were necessary to give effect to any of the provisions of the Treaty or to any mandate under the Treaty;
- (b) to give the Acts of the South African government overriding authority over those of the German colonial authorities.<sup>129</sup>

Further, the Act authorised the Governor-General to carry out the following functions by proclamation:

- (a) make laws applicable to the mandated territory;
- (b) delegate his authority in regard to (a) to any officer as he might designate to act under his instructions.<sup>130</sup>

The Act contained a penalty clause empowering the Governor-General to visit any breaches of its provisions with punishment. Any proclamation or regulation made under the Act had to be laid before parliament as soon as possible.<sup>131</sup> This provision left much to be desired as prejudicial consequences could result from the application of such laws before parliament intervened. Moreover, the Act provided for the extension of certain racially discriminatory South African laws to South West Africa. They included the provisions of all or any laws such as the Land Settlement Act of 1912, The Land Settlement Act of 1917, the Crown Land Disposal Ordinance of 1903 of the Transvaal and the Crown Land Disposal Amendment Ordinance of 1906 of the Transvaal.<sup>132</sup> Finally, it placed "native" reserves and the mineral wealth of the territory within the absolute powers of the Union Government.<sup>133</sup>

Although South Africa was at that stage not a sovereign state and so could not legislate extra-territorially, she passed the Bill into law. Notwithstanding this irregularity the Council of the League of Nations, apparently with the

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<sup>129</sup> See section 1.

<sup>130</sup> See section 2.

<sup>131</sup> See section 3.

<sup>132</sup> See Section 4(1).

<sup>133</sup> See Section 4(2).

concurrence of Great Britain issued South Africa with a formal mandate agreement.<sup>134</sup>

Under the Mandate for South West Africa the League of Nations recognised that Germany had renounced in favour of the Principal Allied and Associated Powers all her rights over her overseas possessions, including South West Africa, and these powers had agreed that in accordance with Article 22 of the Covenant of the League of Nations<sup>135</sup> a mandate should be given to the British Crown, and that South Africa should exercise the mandate on behalf of the Crown and that the terms of the mandate would be defined in the formal agreement.<sup>136</sup>

The Agreement granted Great Britain a mandate for and on behalf of South Africa (the Mandatory) over South West Africa. The mandatory was vested with

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<sup>134</sup> For a text of the Mandate see Marshall *From Independence to Statehood in Commonwealth Africa* 183-184.

<sup>135</sup> Article 22 reads:

"To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form the sacred trust of civilisation and that securities for the performance of this trust should be embodied in this covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as mandatories on behalf of the League.

There are territories, such as South West Africa ..., which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the mandatory, and other circumstances, can be best administered under the laws of the mandatory as integral portions of its territory, subject to the safeguard abovementioned, in the interests of the indigenous population.

In every case of mandate, the mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control, or administration to be exercised by the mandatory shall, if not previously agreed upon by the members of the League, be explicitly defined in each case by the council.

A permanent commission shall be constituted to receive and examine the annual reports of the mandatories and to advise the council on all matters relating to the observance of the mandates."

For a full text of the Covenant of the League of Nations see Ellis *The Origins, Structure and Working of League of Nations* 493 et seq.

<sup>136</sup> See the Preamble.

full powers of administration and legislation over German South West Africa as an integral portion of the Union of South Africa and authorised it to apply its own laws to the territory subject to such local modifications as circumstances required.<sup>137</sup> The powers of the mandatory were only limited by fundamental principles analogous to those embodied in the Berlin Treaty of 1885.<sup>138</sup> In those principles the mandatory was obliged:<sup>139</sup>

- (a) to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the mandate.
- (b) to prohibit slave trade and permit forced labour only for essential public works and services and the only adequate remuneration;
- (c) to control traffic in arms and ammunition in accordance with principles analogous to those laid down in the convention relating to the control of the arms traffic, signed on 10 September, 1919 or in any convention amending the former;
- (d) to prohibit the supply of intoxicating spirits and beverages to the African population;
- (e) to prohibit the military training of Africans, otherwise than for purposes of international police and the local defence of the mandated territory;
- (f) to prohibit the establishment of any military or naval bases or the erection of fortifications in the territory;
- (g) to guarantee, subject to certain reservations, freedom of conscience and the free exercise of all forms of worship; and
- (h) to allow all missionaries, nationals of any state member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling.

This "trust" agreement failed or neglected to set out in clear and concrete terms the international obligations of the mandatory. Instead, it detailed safeguards

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<sup>137</sup> See Article 2.

<sup>138</sup> See Lindley *The Acquisition and Government of Backward Territory in International Law* (1969) 334 .

<sup>139</sup> See Article 22 of the Covenant of the League of Nations in Ellis *The Origins, Structure and Working of the League of Nations* 493.

for the interests of the mandatory and the Allied and associated powers. A further and more serious omission is that it failed to set forth the right of self-determination of the African inhabitants of the mandated territory in clear and definite terms. This is not surprising as the provisions of the Mandates System were a compromise between the enlightened American and conservative South African war aims.<sup>140</sup>

Neither the Act nor the mandate affected the position of Walvis Bay which remained an enclave of the Union of South Africa. Upon the cessation of military government in 1920 the Act granted full legislative and executive powers to the administrator of the territory who was assisted by the Advisory Council.<sup>141</sup>

In June 1921 the South African Parliament passed the Treaties of Peace Act 32 of 1921. The object of this Act was to give effect to certain treaties of peace between the British Crown and other powers<sup>142</sup> and to extend the operation of the Treaty of Peace and South West Africa Mandate Act 49 of 1919.<sup>143</sup> The same parliament also passed the South West Africa Affairs Act 24 of 1922 which provided that the port and settlement of Walvis Bay, which then formed part of the province of the Cape of Good Hope, to be administered as if it were part of the mandated territory of South West Africa and as if inhabitants of the said port and settlement were inhabitants of the mandated territory; and that the powers conferred upon the Governor-General<sup>144</sup> by Act 35 of 1884 of the Cape might be delegated by the Governor-General to the administrator of the mandated territory to the extent that the administrator might, by the repeal,

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<sup>140</sup> See Louis "The South West African Origins of the 'Sacred Trust' 1914-1919" 32 *et seq.*

<sup>141</sup> See Marshall *From Independence to Statehood* 30.

<sup>142</sup> These treaties included the treaty of peace with Austria, signed at Saint German-en-laye, on 10 September 1919, the treaty of peace with Bulgaria, signed at Neuilly-Sur-Seine on 27 November 1919, etc. See the preamble.

<sup>143</sup> See the Preamble.

<sup>144</sup> The assertion that the powers had been conferred upon the Governor-General by Act 35 of 1884 was not strictly correct. That Act had conferred the powers on the Governor of the Cape Colony and all the powers, authorities and functions of the Governor-General had been transferred to the Governor-General by Section 16 of the South Africa Act 1909.

alteration, amendment or modification of the laws in force in the port or settlement, bring them in conformity with the laws of the mandated territory. This structure remained unaltered until the passing of the South West Africa Constitution Act 42 of 1925.

In its preamble the South West Africa Act recognises:

- (a) that the mandate issued by the Council of the League of Nations in pursuance of Article 22 of the Treaty of Versailles conferred full powers of administration and legislation to South Africa over the territory of South West Africa as an integral part of the Union;
- (b) that under the Treaty of Peace and South West Africa Mandate Act of 1919 the Governor-General of the Union of South Africa was authorised to give effect to this mandate.

Further, the Act recognised the international obligation of South Africa under the mandate<sup>145</sup> "to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory".

But the Act discriminated against the indigenous population by admitting only the European inhabitants of the territory to representation in its administration and legislature.<sup>146</sup>

The South West Africa Act of 1925 was modelled on dominion statutes such as the South Africa Act, 1909.<sup>147</sup> It vested the Governor-General with powers to establish the institutions of government, namely, the executive and the legislature with limited self-government. The Act excluded African inhabitants from the institutions of government and instead established a white's only advisory council to advise the colonial authorities on the administration of

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<sup>145</sup> Cf Article 6 of the Berlin Treaty 1885.

<sup>146</sup> See the preamble paragraph 3 of the South West Africa Act 42 of 1925.

<sup>147</sup> In this Act the State President of South Africa replaced the British Crown. For a detailed discussion of the parallel between South West Africa and the dominions see F Venter "Suidwes-Afrika: n Dominium van die Republiek?" in 6 *Speculum Juris* (1970) 70-78.

African affairs.<sup>148</sup> The legislature consisted of elected and nominated members and just as in the dominions the laws passed by the legislature were subject to powers of disallowance or reservation of the legislature.<sup>149</sup> In addition the High Court was authorised to pronounce upon the validity of any ordinances passed by the legislature.<sup>150</sup>

South Africa had hoped that eventually South West Africa would be incorporated into the Union (later the Republic) of South Africa. Thus it not only treated that territory as a dominion but also one of its provinces. Thus in 1962 it appointed a commission similar to the South African Native Commission of 1903 to investigate a uniform "native" policy. The South West Africa Commission was headed by Mr FH Odendaal.

In January 1964 the Odendaal Commission reported.<sup>151</sup> The main findings and recommendations of the Commission were that there were twelve different population groups in South West Africa, the divergencies between which, and the numerical predominance of one group, the Ovambo, rendered it impracticable for them to be represented in one central authority; and therefore that as far as practicable a "homeland" of which there should be ten must be created for each population group.

Further, Odendaal recommended that there should also be a white area which should include coloured townships in certain towns. This recommendation was clearly inspired by the homeland policy in South Africa which had already resulted in the granting of self-government to the Transkei in 1963.

Indeed, in 1965 Ovambo Chiefs had a sponsored visit to the self-governing territory of Transkei and on their return announced that they wished for their

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<sup>148</sup> See the preamble: fourth and last para of the South West Africa Act 42 of 1925.

<sup>149</sup> *Ibid* section 13.

<sup>150</sup> *Ibid* section 39.

<sup>151</sup> See Suidwes-Afrika/Namibie: *Verslag van die kommissie van ondersoek na die finansiële verhouding tussen sentrale, verteenwoordigende en plaaslike owerhede* Windhoek, 1980.

people similar constitutional and governmental structures to those in force there.<sup>152</sup>

In March 1968 the South African Parliament passed the South West African Constitution Act 39 of 1968, a consolidating Act which repealed the Acts of 1925 and other amending Acts. Then South Africa paved the way for the implementation of the homeland policy in South West Africa by passing the Development of Self-government for the Native Nations of South West Africa Act 54 of 1968. This Act provided for the creation of legislative and executive councils for the homelands and the eastern Caprivi strip. Amendments were made to this Act by the Development of Self-government for Native Nations in South West Africa Amendment Act 20 of 1973. This Act set out the conditions under which homelands that had achieved legislative councils could later be given self-government. The degree of self-government would be similar to that granted to the Transkei in 1963 and presumably the other "homelands" under the Homelands Constitution Act 21 of 1971. In May 1973 Ovamboland and Kavango both became self-governing on these terms.

In addition the South African Prime Minister established an Advisory Council in 1973. Invitations to be represented on the councils were extended to organisations representing the white and coloured groups, the African legislative councils, and Bantu authorities. Those political organisations which opposed the Odendaal plan and demanded a unitary state were not invited. They included the South West Africa People's Organisation (SWAPO) and South West Africa National Union (SWANU) and the National Convention of Freedom Parties.

The Advisory Council held several meetings in Namibia and South Africa. The Council reaffirmed that Namibia consisted of many ethnic groups and focused on the necessity for higher wages and improved race relations, admission of

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<sup>152</sup> See Marshall *From Independence to Statehood in Commonwealth Africa* 38.

blacks to white hotels and the control of towns and homelands. The Advisory Council failed to achieve anything of importance. Thus it failed to win popular support.<sup>153</sup>

In the meantime popular resistance to apartheid increased. Internally, the church leaders condemned the South African Government for having failed to take cognisance of human rights as declared by the United Nations Organisation in the year 1948 with respect to the African population. They objected to the denial of freedom of expression, movement and association, to the migrant labour system, job reservation and absence of the franchise.<sup>154</sup> In a simultaneous letter to their congregations, the church leaders inter alia rejected the South African system of self-government. The letter stated that the application of the homelands policy to South West Africa contributed to divisions between the races, and that leading small race groups to self-government and independence in the homelands would deny them the chance to take part in the development of the country.<sup>155</sup>

The church opposition to the migrant labour system was given forceful expression by a strike against contract labour in December 1971. By 1972 the strike had turned into a more general rebellion. The target widened to an attack on the entire system of apartheid, with its Bantustan structures and leaders.<sup>156</sup> Members of the Ovambo Legislative Assembly and their homesteads were attacked and burned down. The Bantu Investment Corporation was accused of exploiting the Ovambos and several stores were gutted by arson. The border fence established to prevent the infiltration of Swapo guerrillas was also cut as it was regarded as unconstitutional and undemocratic. Rejection of apartheid structures culminated in a boycott of the Bantustan elections in

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<sup>153</sup> Note that a planned National Council in South Africa did not even get off the ground as it was rejected by both homeland leaders and the 'mass democratic movement'.

<sup>154</sup> See JHP Serfontein *Namibia?* (1976) 54.

<sup>155</sup> *Ibid* 408.

<sup>156</sup> Richard Moorsam "Underdevelopment, Contract Labour and Worker consciousness in Namibia 1915-72" in 17 *Journal of Southern African Studies* (1977) 71-82.

Ovambo which were scheduled to be held in 1973.

These events were a clear message to the SA Government that its apartheid policies were being rejected. More specifically, the recommendations of the Odendaal Commission which not only set out to balkanise South West Africa along tribal lines but also envisaged the creation of a moderate petty bourgeois class in the rural areas by providing for a program of capital investment in those areas, was thoroughly discredited.<sup>157</sup> Moreover, the coup d'état in Portugal in April 1974 and subsequent independence for Angola and Mozambique in 1975 had changed the conditions for armed struggle in Southern Africa forcing South Africa to lose control of its periphery.<sup>158</sup> Consequently, the SA Government had to retreat from its earlier colonial strategy of establishing independent homelands and search for alternative models for political incorporation (or accommodation) of Africans.

In September 1974 the National Party of South West Africa issued a statement in which it stated that the time had come for the whites in the territory to take positive action to hold talks with members of other population groups with a view to reaching an agreement as to the political future of the territory. The constitutional talks envisaged would take the form of an ethnic convention, rather than negotiations between political parties. Thus the new strategy for maintaining white supremacy while appearing to negotiate the future of South West Africa was to embody ethnicity as the organising principle for any constitutional talks. This strategy was predicated on the fear that political representation would result in a united black front.<sup>159</sup>

The leader of the National Party in South West Africa, Dirk Mudge,<sup>160</sup> expressed the white fear of a united black front as follows:

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<sup>157</sup> See John Kane-Berman *Contract Labour in SWA* (1972) 36.

<sup>158</sup> See Wolfgang Werner "Ethnicity and Reformism in Namibia" in Töttemeyer *et al Namibia Perspective*.

<sup>159</sup> *Ibid* 72.

<sup>160</sup> See Dirk Mudge *The Political Future of SWA* (1975) 7.

"There is also another danger which may wreck the success of the consultations. That is group formation. And we should not think of the possibility of group formation amongst the black group only. Whites may also become involved. Group formation betrays motives which are not pure and which should be avoided. Co-operation between groups to protect certain common interests can, however, not be avoided entirely".

Here, the National Party had in mind group consultations rather than normal constitutional negotiations. Thus they opted for the principle of consensus decision-making which would ensure that the white delegation at the talks could veto any decision with which they did not agree.

In September 1975 a constitutional conference opened in the Turnhalle at Windhoek under the aegis of the administrator of the territory.<sup>161</sup> The conference was attended by representatives of all eleven South West African tribes and from the white and coloured populations. A number of committees were formed to investigate and make recommendations on various subjects including the solution of practices of discrimination, economic improvement, social advancement, education and finance. The conference also established a Constitutional Committee and charged it with the task of drawing up a constitution for South West Africa.<sup>162</sup>

The Turnhalle conference proposed a three tier government structure, rising from local government via ethnic representative authorities (the second tier) to a central government. In contrast to the Odendaal Commission, however, the Turnhalle extended the apartheid concept from a geographical to an ethnic one incorporating urban Africans.<sup>163</sup> In August 1977 the Constitutional Committee underpinned its constitutional proposals on the group-rights ideology. Thus it reaffirmed the apartheid notion of the interdependence of the different

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<sup>161</sup> Boule "The Turnhalle Testimony" *SALJ* Vol. 95 (1978) 49-62.

<sup>162</sup> See Marshall *From Independence to Statehood* 41-42.

<sup>163</sup> See Green, Reginald and Kijijunen, Kimmo "Unto What End? The crisis of colonialism in Namibia" in Green, Reginald, Kijijunen *et al* (eds.) *Namibia - The last Colony* (1981) 9.

population groups and proposed a system of government in which sufficient provision would be made for the protection of minority groups, especially in the central body.<sup>164</sup>

In 1977 the SA government began to implement the Turnhalle constitutional reforms. In June 1977 the SA parliament passed the South West Africa Constitution Amendment Act 95 of 1977. This Act authorised the State President to make laws by proclamations for the territory of South West Africa with a view to the eventual attainment of independence by this territory, the administration of Walvis Bay and the regulation of any other matter; and providing that any law made by any authority under the terms of section 38(1) of the South West Africa Constitution Act of 1968 should not be of force and effect until it had been approved by the State President.

On 7 November 1977 the Turnhalle Constitutional Committee formally dissolved. In the meantime the Administrator-General had effected some liberal changes in the laws of the territory, e.g., the abolition of the colour bar in marriage laws, the pass laws and granting Africans the right to buy land in urban townships and to obtain loans from financial institutions and relaxation of emergency regulations in the North.

On 27 January 1978 the SA State President in opening parliament stated that independence would be granted to South West Africa before the end of the year. That independence would be preceded by free elections for a constituent assembly which would decide on a constitution for South West Africa. The

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<sup>164</sup> The statement said:

"The Committee is in agreement that the date for independence for South West Africa can with a reasonable measure of safety be stated as 31 December 1978. Meanwhile negotiations will have to be entered into with South Africa regarding a variety of matters, for example, Walvis Bay, the South African railways, water and electricity supply, monetary and financial matters, security, etc. As soon as a constitutional basis has been agreed upon and the negotiations mentioned above, completed, we intend to establish an interim government in terms of such constitutional basis to attend to the transfer of function and the establishment of a permanent government based on a constitution to be finalised in the interim period." See Marshall *From Independence to Statehood in Commonwealth Africa* 42.

elections went ahead and polling ended on 8 December 1978. Swapo boycotted these elections.

The result of the election was that the Democratic Turnhalle Alliance won 41 of the 50 seats in the Assembly; the Aktur Party, which supported the SA National Party and polled most of the white votes, won 6 seats; and Herstigte Nasionale Party, the Coloured Namibian Christian Democratic Party and the Liberation Front won 1 each.

On 2 May 1979 the ruling Democratic Turnhalle Alliance adopted a motion in Windhoek calling for an assembly with legislative powers to be set up in Namibia in the place of the existing Constituent Assembly. The SA Government assented to the proposal. Consequently, on 14 May the Administrator-General of South West Africa proclaimed a National Assembly in the territory. It would consist of the 50 members of the existing Constituent Assembly plus another 45 members nominated to accommodate any other political parties which might wish to join. The Assembly would be a legislative body without official executive authority. In the meantime, Swapo intensified its armed campaigns killing a number of farmers and others in the outlying areas. To deal with the situation a modified form of martial law was declared over a security area stretching over half the country from Windhoek northwards.

The Turnhalle draft constitution was never implemented. The Constituent Assembly elected between 4 and 8 December 1978, did not convene to give further attention to the construction of an independence constitution. Instead on 25 May 1979, the Constituent Assembly was transformed into a National Assembly, with legislative powers at the national level, parallel to those of the Administrator-General.<sup>165</sup>

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<sup>165</sup> Appointed to administer the territory with full executive and legislative powers, save those in connection with external defence and foreign relations, with a view to its transition to independence. The office was created by the South African State President in Proclamation 180. In Proclamation 181 the Administrator-General is given wide-ranging competencies and powers: see *Official Gazette* 3642 of 26 August 1977.

The Administrator-General enshrined in law the Turnhalle proposals for a three-tiered government structure under Proclamation AG 8 of 1980. This Proclamation provided for the establishment of 'representative authorities for population groups.' In terms of the Proclamation each of the eleven representative authorities were given powers in regard to certain matters pertaining to what was perceived to be their own interests. Typically, those "own affairs" included matters of education, health, old age pension, social welfare services, agricultural support services, traditional law enforcement etc. The "own affairs" were to resort under the authority of second tier or representative government.

The 1980 Proclamation consolidated and enlarged the powers of chiefs and headmen. In contrast to earlier versions of homeland rule, the AG 8 of 1980 entrenched ethnicity more deeply by including urban members of defined ethnic groups. The new homeland system was no longer based on a certain territory, but on ethnic grouping and it operated extra-territorially. Thus the authority of representative authorities were to be extended to the various members of that population group, wherever they might be. The effects of AG 8, therefore, were that the homeland concept was extended to the urban Africans, thus increasing their political control by "ethnic" leaders.<sup>166</sup>

On 1 July 1980 a Council of Ministers with certain relatively broad executive functions was established. Elections to nine representative second-tier authorities based on the SWA "population groups" were also held in terms of Proclamation AG 8 of 1980. Although no elections were held among the Ovambo a representative authority was constituted for that group. This constitutional phase came to an end with the resignation of the Ministers' Council on 18 January 1982, and the resumption by the Administrator-General of all legislative and executive authority at a central level.<sup>167</sup>

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<sup>166</sup> See Werner "Ethnicity and Reformism in Namibia" 74.

<sup>167</sup> See Sean M Cleary "A Bill of Rights as a Normative Instrument: South West Africa/Namibia 1975-1988" in 3 1988 *CILSA* (XIX) 296.

On 18 November 1983 sixteen parties (eleven being constituent parties of the Democratic Turnhalle Alliance) or six political groupings - the DTA, the Labour Party, the National Party of South West Africa, the Rehoboth Liberated Democratic Party, the South West Africa National Union and the Swapo Democrats held a conference. This Multi-Party Conference (MPC) was boycotted by Swapo, the Damara Council and some other minor parties. The object of the MPC was to draft a "permanent constitution for the territory".<sup>168</sup> After initial debates, the MPC, on 24 February 1984, issued the Windhoek Declaration of Basic Principles. The philosophical underpinnings of the Declaration emerged from the objects of the conference - namely:<sup>169</sup>

"To draft a permanent constitution

- (a) within the framework of phase 1 of the western settlement plan;
- (b) consistent with the Universal Declaration of Human Rights;
- (c) in accordance with the international Covenant on Civil and Political Rights; and
- (d) in accordance with the ambitions and desires of the different groups mentioned in the Covenant above.

To create an economic order which aims at increasing our independence from foreign countries by developing and diversifying our economy mainly through our own efforts, and improving the quality of life of our people in all fields - from employment opportunities, health, education, housing to the rural economy. Both the public and private sector as well as foreign investment must serve this purpose. A sound, healthy and strong economy must be the basis of our economic thinking."

The Windhoek Declaration incorporated the Universal Declaration of Human Rights. But it also incorporated the International Covenants of Civil and Political

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<sup>168</sup> *Ibid* 297. Also see Marinus Wiechers "Namibia: The 1982 Constitutional Principles and their legal significance in [1989/1990] *South African Yearbook of International Law* 9.

<sup>169</sup> See Multi-Party Conference *Windhoek Declaration of Basic Principles* (1984).

Rights<sup>170</sup> "to accommodate Namibia's cultural diversity in the constitutional structure which the conference intended to establish." It appears quite clearly from the proposals that the Windhoek Declaration sought to concede individual rights but to counterbalance their political implications by interpreting the International Covenants of Human Rights so as to accommodate political minority rights. Such an interpretation would enable the internal parties to appear to uphold international human rights while maintaining its consociational or race and ethnic based constitution. It is submitted that Article 27 of the International Covenant of Civil and Political Rights does not provide for political minority rights and thus may not be used to support a consociational or race and ethnic based constitution.

Shortly after completing work on the Windhoek Declaration the Political Committee of the Multi-Party Conference (consisting of 18 persons representing all six institutions in the Conference) began work on a Declaration of Fundamental Rights. On 18 April 1984 the MPC reached agreement on a Bill of Fundamental Rights and Objectives.<sup>171</sup> On 25 March 1985 a delegation of party leaders<sup>172</sup> presented a set of proposals together with the proposed Bill of Fundamental Rights and Objectives, to the South African State President requesting him to institute a Transitional Government of National Unity consisting of a National Assembly of sixty-two members, from whose ranks would be drawn a cabinet of eight persons with eight deputy ministers to assist them. The proposals also called for the establishment of a Constitutional Council of sixteen party nominees, and a non-voting chairperson drawn from the ranks of the judiciary.

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<sup>170</sup> Article 27 of the Covenant reads:

"In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

<sup>171</sup> See "A Bill of rights as a Normative Instrument" 298.

<sup>172</sup> See *Multi-Party Conference MPC Proposals on the Issue of the Independence of South West Africa/Namibia* Windhoek 25 March 1985.

Of particular interest in these proposals is § 2.5 entitled "Entrenched Provisions". It stated that:

"The fundamental rights embodied in the Bill of Fundamental Rights and Objectives shall be entrenched in the Act of Proclamation of Establishment for the Transitional Government."

In respect to the draft constitution which the constitutional council was to be changed to prepare the § 263 provided that:

"The fundamental Rights embodied in the Bill of Fundamental Rights and Objectives shall be entrenched in the Independence Constitution."

The SA government included the MPC Bill of Fundamental Rights and Objectives in Proclamation R101 as an integral part of the constitution of the interim government.<sup>173</sup> Both the Proclamation and the Bill raised vehement opposition from other political parties in Namibia.<sup>174</sup>

The preamble and the first eleven articles of the MPC Bill constituted Annexure I to the South West Africa Legislative and Executive Authority Proclamation (R101 of 1985). Their entrenchment was affected in section 2, which accorded the National Assembly wide-ranging powers, including the power to amend or repeal and legal provision presently in force in the territory, including any act of the South African Parliament. However, the Assembly did not have the power to make any derogation from any fundamental right.<sup>175</sup>

The legislative protection of these fundamental rights was more limited than that provided for in article 12 of the MPC Bill of Fundamental Rights and Objectives.

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<sup>173</sup> See Wiechers "Namibia: The 1982 Constitutional Principles and Their Legal Significance" 9.

<sup>174</sup> *Ibid* 9-10.

<sup>175</sup> See Proclamation R101 1985 Section 2(2).

Existing laws in conflict with the provisions of the Bill of Rights were to remain in force until amended. The Assembly was also authorised to pass security legislation which infringed a fundamental right to a lesser degree<sup>176</sup> than the case previously. Because of the continuing Swapo armed resistance against these constitutional reforms the SA Government refrained from creating a situation whereby all existing laws were open to an immediate challenge, *inter alia*, by persons seeking to effect the collapse of the Transitional Government.<sup>177</sup> Thus some restrictive provisions were not enacted. Subject to these limitations, however, a number of major human rights judgements resulted, both in the Namibian courts and the South African Appellate division.<sup>178</sup>

The Multi-Party Conference initially requested the South African government to institute a constitutional council responsible for the drafting of a national constitution which would ultimately be submitted to the electorate for approval. The South African Government, however, felt that the "internal" leaders should themselves work out their constitutional future. Some six months after the installation of the interim government, the constitutional council was established by Act 8 of 1985 of the Namibian National Assembly, under the chairpersonship of Mr Justice VG Hiemstra and with the representatives of eighteen political parties.

The Constitutional Council worked for almost two years on a draft constitution. At the end of June 1987, the chairperson had to report to the Cabinet that it had failed to achieve unanimous support for its draft, since four of the eighteen participant parties refused to give their assent. Further, the draft constitution with its clear rejection of any form of institutionalised ethnic categories, failed to meet with the approval of the South African Government.<sup>179</sup>

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<sup>176</sup> See Proclamation R101 1985 Section 3(3).

<sup>177</sup> See Cleary "A Bill of Right as a Normative Instrument" 304.

<sup>178</sup> They include *State v Nathaniel and others* 1987 2 SA 225 (SWA); *Staat v Angula en Andere* 1986 2 SA 540 (SWA); *State v Heita and Other* 1987 1 SA 311 (SWA). For a discussion of these cases see Cleary *ibid* 305 *et seq.* See also Ruppel "A Bill of Rights: practical implications for legal practice - A Namibian Perspective" 1992 (1) *SAPR/PL* 51 ff.

<sup>179</sup> See Wiechers "Namibia: the 1982 Constitutional Principles and their Legal Significance" 10-12.

#### **4.4.2.1 Conclusion**

During World War I the principle of trusteeship embodied in the Berlin Treaty [1885] developed into the right of self-determination of peoples and Nations and became the primary aim of World War I. Hence, this war was called the war for self-determination. But at the end of the war there were differences of opinion whether the principle of self-determination applied to African peoples. The Soviet Union and the United States extended the principles to all humanity while the United Kingdom and South Africa sought to limit it to former German territories. The UK and SA limited the application of this principle as they wanted to annex some former German territories by force or at least by consent. Thus the Covenant of the League of Nations did not make the right of African peoples to self-determination a mandatory rule of international law. Furthermore, the right of the mandated territories to self-government and independence was couched in vague and uncertain terms.

In terms of the Mandates System South West Africa became a Mandate "C" territory - that is, it had to be administered as an integral part of an under the laws of the Union of South Africa. Here, the international community failed to provide safeguards against the subjection of the African population of Namibia to South African racial laws as the UK did in the case of the High Commission territories. Thus South Africa transplanted its racial laws to South West Africa with impunity. South Africa treated this territory as its dominion and introduced the homeland system to preserve white minority rule and deny the right of self-determination of the African people in the territory.

Popular resistance against apartheid in South West Africa, like in South Africa itself, forced the government to introduce constitutional reforms. In South West Africa, like in South Africa, the government used the homeland system as a building block for its constitutional reforms. Like its South African counterpart, the South West African homeland system was challenged, inter alia, on the ground that it violated international human-rights norms. Popular resistance

and armed campaigns against apartheid in South West Africa, coupled with the collapse of the South African buffer states of Mozambique and Angola forced South Africa to introduce further reforms hoping to defuse popular struggles and gain international recognition for the neo-colonial authorities in Windhoek.

The new approach was based on a divide-and-rule strategy which used ethnicity as an organising principle. This strategy reduced the Turnhalle negotiation forum to an ethnic rather than a National Convention. Thus the Turnhalle Constitutional Negotiations were essentially consultations of the South African Government with racial and ethnic groups in the territory, not constitutional negotiations properly so-called. The South African government merely sought to co-opt the various groups into apartheid structures in new forms.

Those constitutional negotiations resulted in the removal of statutory apartheid and the extension of the homeland-system into urban areas. The Turnhalle Constitution, like its South African counterpart, would have introduced the concepts of "own" and "general" affairs. Thus it introduced a kind of a coalition government in the form of a council of Ministers representative of their racial or ethnic constituencies. This system of government was essentially based on the group rights (or consociational) theory which the South African government was also implementing at home.

To lend credibility to race- (or ethnic) based constitutional reforms the Multi-Party Conference adopted certain international human-rights norms. But they interpreted these norms so as to justify the doctrine of human and group rights developed by the South African Law Commission. They sought to use this doctrine to freeze white domination and privilege and to introduce apartheid in new forms based on the principle of disassociation.

In all the efforts to find a negotiated settlement to the South West Africa question South Africa acted as a metropolitan power. Thus measures providing for negotiations emanated from South Africa and any settlement had to be

enacted by them. Thus continued armed actions by Swapo and the commitment of South Africa to a race- (and ethnic) based constitution resulted in the failure of the Turnhalle Conference to find an internationally acceptable settlement.

#### **4.4.3 General Conclusions**

Since South Africa assumed political control over South West Africa (now Namibia) she made various attempts to annex it contrary to the right of this territory to self-determination. After World War II South Africa transplanted the Bantustan system to South West Africa and tried to use it to bypass the right of self-determination of the Namibian people as it did in the case of blacks in South Africa. During the sixties the right of colonial and oppressed peoples to self-determination and equal rights became a mandatory rule of international law. This new international constitutional order and resistance against apartheid in Namibia forced South Africa to embark on internal reforms based on a consociational structure rooted in the policy of separate development. This structure used apartheid institutions as building blocks and thus essentially preserved white domination and privilege. Thus all the internal settlements were rejected by the people of Namibia and the international community.

### **4.5 South Africa**

#### **4.5.1 Colonial Background**

Originally the Cape colony was a Dutch possession (since the first settlement occurred in 1652). In January 1806 the Dutch forces at the Cape surrendered control of the colony to a British expeditionary force. Shortly thereafter the Cape colony was formally ceded to Britain by the Dutch after not being included in the territories to be returned to Holland under the Convention of London (13 August 1814). Under British control the Cape colony had attained Responsible government by 1872.

The Battle of Blood River of 16 December 1838 cleared the way for the settlement of Natal, the first of the Boer Republics. However, Britain refused to recognise it and in 1842 British troops occupied Natal. In 1843 Natal was formally annexed by the British government and in 1856 became a British colony. In 1893 Natal attained Responsible government.

After the Anglo-Boer War (1899-1902) the conquered Boer republics of the Transvaal and Orange River Colony were ruled by the High Commissioner with the aid of nominated executive and legislative councils.<sup>180</sup> In January 1906 the liberal administration of Henry Campbell-Bannerman took over from the conservative government and brought to an end the imperialist policy<sup>181</sup> and granted full responsible government to the Transvaal by letters Patent of 6 December 1906 and to the Orange River Colony by letters Patent of 5 June 1907. This was followed by the election of predominantly Afrikaner governments in the Transvaal and the Orange River colony in 1907 and in the Cape in 1908.

The South African Native Congress opposed the granting of responsible government to the colonies on the ground that it prematurely tended to eliminate the imperial factor or the prerogative of veto which was a repository of the Crown, and which had a moderating influence between blacks and the white colonists. In particular, the South African Native Congress opposed responsible government due to the very low moral tone of the average colonist in regard to the treatment of blacks and their feeling and demeanour towards blacks. Thus the Congress felt that they would request the British government to take over black administration rather than place it under the retrogressive policies advocated in Natal and the Transvaal colonies.<sup>182</sup>

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<sup>180</sup> See Marshall *From Independence to Statehood in Commonwealth Africa* vol. II (1982) 16.

<sup>181</sup> See Document 10: Resolutions of the South African Native Congress, April 10, 1906 [extracts] in Thomas Karis and Gwendolen M Carter *From Protest to Challenge: A Documentary History of African Politics in South Africa (1882-1964)* (1972) 46.

<sup>182</sup> See The Selborne Memorandum: A Review of the Mutual Relations of the British South African Colonies in *Command Papers of the United Kingdom Government* No. 3564 of 1907.

In 1906 The Orange River Native Congress had petitioned the Crown requesting that when self-government was granted the problem of black representation should be considered. The Congress feared that without some form of representation in the legislatures of the colony their interests would remain in jeopardy, and that however they might conform to the rules of civilised life they could never hope to enjoy privileges such as freedom of trade and ownership of land. It was further felt that the terms of the Vereeniging Peace Treaty compromised the claims of blacks to their legitimate franchise. Thus the Congress requested that when the imperial government prepared a constitution for the self-government of the Orange River Colony it should insert a clause either granting some representation to its black subjects or retain the black administration under its direct control until their enfranchisement is accomplished.<sup>183</sup> The imperial government ignored these requests and granted self-government to the former Boer Republics.

Soon after the granting of self-government to the British Colonies Lord Selborne was commissioned to investigate the relations between the four colonies and produced his memorandum<sup>184</sup> in 1907. The Selborne Memorandum recommended early political federation as an alternative to economic collapse. Soon thereafter Britain began to lead the four colonies towards a union without settling the question of African franchise. In May 1908 the representatives of the four colonies met in Pretoria where they agreed to call for a National Convention.<sup>185</sup> On 12 October 1908 the National Convention assembled in Durban under the chairmanship of Sir Henry de Villiers. The Convention was attended by white delegates representing the four colonies.<sup>186</sup>

During the four weeks of the Convention the question of African franchise was raised briefly. On 19 October Merriman moved that the existing colonial franchise laws should remain as they were subject to the proviso that they only

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<sup>183</sup> See Marshall *From Independence to Statehood* 16.

<sup>184</sup> See André Odendaal *Black Protest Politics in South Africa* (1984) 72.

<sup>185</sup> *Ibid* 12 *et seq.*

<sup>186</sup> See Peter Walshe *The Rise of African Nationalism in South Africa* (1987) 21.

be alterable under special conditions for amendment of the Union Constitution, namely, that the laws in question be alterable by a majority of not less than three-quarters of members of both houses sitting and voting together. On the other hand, Stanford moved that British subjects resident in South Africa should be entitled to the franchise rights irrespective of race or colour upon such qualifications as may be determined by the National Convention. In short, Stanford proposed the abolition of the colour-bar in all the colonies.

After a lengthy debate from 20 to 22 October the Convention accepted the Merriman proposal. Thus the Cape retained its qualified non-racial franchise while the Boer republics and Natal retained their Colour-bar clauses. The Convention adopted a draft constitution and referred it to their respective colonial parliaments for ratification. All four parliaments ratified it and referred it to the British Imperial Parliament for enactment. The British turned a blind eye to the colour-bar clause and enacted the draft as the South Africa Act 1909.<sup>187</sup>

While the National Convention was sitting in Durban the South African Native Convention was convened at Bloemfontein from 24 to 26 March 1909. The Native Convention adopted a resolution addressed to the all-White National Convention which was preparing a constitution for a unified South Africa. They resolved that all persons within the Union should be entitled to full and equal rights and privileges subject only to the conditions and limitations established by law and applicable alike to all citizens, without distinction of colour, class or creed.<sup>188</sup>

The Native Convention objected, in particular to the Colour-bar clauses 25, 33 and 44 of the draft South Africa Act and demanded that clause 35 entrenching the Cape franchise should be made unalterable.<sup>189</sup> The High Commission

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<sup>187</sup> *Ibid.*

<sup>188</sup> The South Africa Act made provision for the incorporation of the High Commission territories in terms of section 151.

<sup>189</sup> Marshall *From Independence to Statehood* 17.

territories of Basutoland, Bechuanaland and Swaziland all objected to being included<sup>190</sup> in the proposed new Union of South Africa. Despite these objections the draft was rapidly passed through the United Kingdom Parliament without amendment and received the royal assent on 20 September as the South Africa Act 1909 which established the four separate colonies of the Cape of Good Hope, Natal, the Transvaal and the Orange River Colony as constituent provinces of the Union of South Africa.<sup>191</sup>

In its preamble the South Africa Act 1909<sup>192</sup> stated that it was desirable for the welfare and future progress of South Africa to unite several British colonies under one legislative union under the Crown of Great Britain and Ireland. The preamble recognised that the four colonies were united on terms and conditions to which they had agreed by resolution of their respective parliaments. The preamble stated three objectives of the South Africa Act. First, to define the executive, legislative, and judicial powers to be exercised in the government of the Union; secondly, to provide for the establishment of provinces with powers of legislation and administration in local and other matters; and thirdly to provide for the eventual admission to the Union or transfer to the Union of such parts of South Africa as are not originally included therein.

Section 4 of the Act provided for the granting of self-government to the Union and for the appointment of the Governor-General. The constitution provided for three branches of government namely, the executive,<sup>193</sup> the legislature and the judiciary. It vested the executive government in the King and authorised him to administer the government in person or by a Governor-General as his representative.<sup>194</sup> The Governor-General was the appointee of the King and had such powers and functions of the King as His Majesty was pleased to assign to him.<sup>195</sup>

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<sup>190</sup> For a text see Document 1 (D.1) *ibid* 99 *et seq.*

<sup>191</sup> Part III

<sup>192</sup> Part IV.

<sup>193</sup> Part VI and articles 8 - 9.

<sup>194</sup> Section 12.

<sup>195</sup> Section 14.

The Governor-General acted on the advice of an executive council appointed by himself and holding office at his pleasure.<sup>196</sup> The Constitution also authorised the Governor-General to appoint heads of departments of State who also became members of the Executive Council.<sup>197</sup> Section 16 vested in the Governor-General or Governor-General in Council or any relevant authority all the powers, authorities, and functions which at the establishment of the Union were in any of the colonies vested in the Governor or in the Governor in Council, or in any authority of the colony.

The Act provided for a legislature comprising two houses of parliament - the House of Assembly and the Senate and the legislative power of the Union of South Africa in the King, the Senate and the House of Assembly.<sup>198</sup> The latter<sup>199</sup> consisted of directly elected members while the former consisted of nominated and indirectly elected members.

The Act vested parliament with full powers to make laws for the peace, order and good government of the Union<sup>200</sup> and authorised it to delegate specified powers<sup>201</sup> to the Provincial Councils.<sup>202</sup> It also transferred to the provincial councils all powers, and functions which at the establishment of the Union were in any of the colonies vested in or exercised by the Governor or Governor in Council, or any minister of the colony. All ordinances passed by a provincial council were to be presented by the administrator to the Governor-General in Council for his assent.<sup>203</sup> The South Africa Act established a Supreme Court of South Africa<sup>204</sup> consisting of a Chief Justice, the ordinary judges of appeal, and other judges of the several divisions of the Supreme Court of South Africa in the

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<sup>196</sup> Section 19

<sup>197</sup> Section 32.

<sup>198</sup> Section 24.

<sup>199</sup> Sections 59 and 85.

<sup>200</sup> Section 78.

<sup>201</sup> Section 81.

<sup>202</sup> Section 95.

<sup>203</sup> Section 96.

<sup>204</sup> Section 98.

provinces.<sup>205</sup> The South Africa Act also transformed the several supreme courts of the colonies into provincial divisions of the Supreme Court<sup>206</sup> and established an Appellate Division.

The Act entrenched the Cape franchise<sup>207</sup> and the equality of English and Afrikaans (initially Dutch).<sup>208</sup>

Finally, the South Africa Act provided for the incorporation of territories administered by the British South Africa Company<sup>209</sup> and territories other than those administered by the British South Africa Company. The former included Southern Rhodesia while the latter included the High Commission territories. In the event of the incorporation of the High Commission territories the South Africa Act vested their government in the Governor-General in Council upon the terms and conditions embodied in the Schedule to the South Africa Act.

There were a number of restrictions on both the legislative and executive powers of the Union government. These restrictions included the entrenchment of the Cape franchise<sup>210</sup> and language<sup>211</sup> and the repugnancy clause contained

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<sup>205</sup> Section 35.

<sup>206</sup> Section 118.

<sup>207</sup> Section 150.

<sup>208</sup> Sections 35, 135 and 137.

<sup>209</sup> See Schedule to the Act.

<sup>210</sup> Section 35 of the South Africa Act provided that:

"Parliament may by law prescribe the qualifications which shall be necessary to entitle persons to vote at the election of members of the House of Assembly, but no such law shall disqualify any person in the province of Cape of Good Hope who, under the laws existing in the colony of the Cape of the Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the province of the Cape of Good Hope by reason of his race or colour only, unless the bill be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

(2) No person who at the passing of any such law is registered as voter in any province shall be removed from the register by reason only of any disqualification based on race or colour.

<sup>211</sup> Section 137 provided that:

"Both the English and Dutch languages shall be official languages of the Union and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights, and privileges; all records, all journals, and proceedings of Parliament shall be kept in both

in the Colonial Laws Validity Act 1865,<sup>212</sup> and the subjection of the South African judiciary to British Privy Council.<sup>213</sup> However, in the course of time a convention had grown that the United Kingdom Parliament would not legislate for a dominion except where the subject-matter was outside the legal competence of its legislature (e.g. in the case of extra-territorial legislation) or legislation prohibited by the Colonial Laws Validity Act 1865, or legislation that involved foreign relations.<sup>214</sup>

Freed from the "imperial factor"<sup>215</sup> the South African government moved to consolidate white minority rule under the system established by the South Africa Act. For whites, not blacks, the South Africa Act had settled the franchise question postponed by the Vereeniging Peace Treaty. Thus soon after the formation of the Union the government shifted its focus to the vital issue of the land relationships between black and white. Around this question they spelled out their philosophy of unequal racial coexistence in all spheres of life.

Hardly a year after the establishment of Union they introduced the "Squatters bill" which was opposed by Africans on the ground that it would only benefit white mine owners and white farmers as it would force Africans off the land into white hands on terms that would be equivalent to slavery. African opposition notwithstanding, the Natives Land Act of 1913 was passed through Parliament. In June 1913, it became the law of the land and the main hallmark of the African policy of the Union government.

The kernel of the Land Act 27 of 1913 was the principle of territorial separation under which Africans and whites were to occupy and acquire land in separate,

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languages and all bills acts and notices of general public importance or interest issued by the Government of the Union shall be in both languages.

<sup>212</sup> The Act expressly conferred upon colonial legislatures the power of making laws even though repugnant to the English common law, but declared that a colonial law repugnant to the provisions of an Act of the Parliament of the United Kingdom extending to the colony either by express words or by necessary intendment would be void to the extent of such repugnancy". For a text see JP Verloren van Themaat *Staatsreg* (1956) Bylae IX article 48.

<sup>213</sup> See Part VI of the South Africa Act.

<sup>214</sup> See Marshall *From Independence to Statehood* 21.

<sup>215</sup> i.e. the power to disallow colonial laws repugnant to British laws.

designated areas. A commission was to be appointed to determine the exact designation of all land within the Union. In the interim, Africans were to be barred from purchasing land except from other Africans or in existing tribal reserves.

The clear impact of the legislation was to restrict African land ownership to the so-called "scheduled areas", representing only about 7,3 percent of the total area of South Africa, the bulk of which was the tribal reserves, the areas from which the Africans could not be pushed by the advancing white settlers in the nineteenth century. The Act also envisaged the release of additional land, the boundaries of which should be determined by an expert commission.<sup>216</sup> Further, the Act put an end to leasing arrangements by Africans in the Orange Free State and forbade the practice of tenant farming. Africans living on white-owned farms were left the alternatives of accepting labour service with white farmers, of seeking a share of communal land in the already overcrowded reserves, or migrating to burgeoning African locations on the outskirts of South African cities where freehold rights were scarce and only low-paid unskilled or semi-skilled work was possible. The imminent disenfranchisement and land dispossession of Africans had steered them towards greater unity which had resulted in the formation of the South African National Native Congress (SANNC) in 1912. In his opening address at the launch the convenor, Dr Pixley Isak ka Seme, pointing out that the Africans were treated as hewers of wood and drawers of water in the land of their birth and that they have no voice in the making of its laws and no part in their administration then called for national unity for the defence of the rights and privileges of Africans.<sup>217</sup>

In a series of meetings during the brief parliamentary debate on the 1913 Land Act, the SANNC repeatedly declared its opposition to the legislation. In the

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<sup>216</sup> See Karis and Carter *From Protest to Challenge* 62-63. The additional land was only released under the Land Act 18 of 1936 which increased the potential maximum African area to 13 percent.

<sup>217</sup> See Selope Thema "How Congress began" in *Drum* (August 1953).

months after its passage, the Congress drew attention to the great hardships the law was causing thousands of Africans.

At a meeting in 1914 the Congress decided to organise a deputation to protest the legislation within South Africa and if necessary to proceed to England. The domestic campaign concentrated upon resolutions and petitions. In a petition to the Prime Minister, General Botha, the Congress declared that the Africans objected strenuously to the Native Land Act of 1913 as primarily a measure to compel Africans to accept service with whites upon disadvantageous terms. It also sent a delegation to Great Britain to present its grievances to the King, Parliament, and British public opinion. This approach, like the domestic campaigns, had little, if any, effect.<sup>218</sup>

The insensitivity of Great Britain to black grievances notwithstanding, with the outbreak of World War I, Africans spontaneously declared their loyalty to the British cause and resolved to suspend the agitation against their disabilities for the duration of the war.<sup>219</sup> This, even though the war would undoubtedly weaken and overshadow their protest and resistance against land dispossession and disenfranchisement. This war (WW I) was described as the war for self-determination.<sup>220</sup> However, before the end of the war General Smuts<sup>221</sup> reaffirmed his government's racial policies in the following terms:

"We have realised that political ideas which apply to our white civilisation largely do not apply to the administration of native affairs. To apply the same institutions on an equal basis to white and black alike does not lead to the best results, and so a practice has grown in South Africa of creating parallel institutions - giving the natives their own separate institutions on parallel lines with institutions for whites. We have felt more that if we are to solve our native question it is useless to try to govern black and white in the same system. ... They are different not only in colour but in mind and in political capacity ...

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<sup>218</sup> Karis and Carter *From Protest to Challenge* 63-64.

<sup>219</sup> *Ibid* 64.

<sup>220</sup> See Omozurike *Self-determination in International Law* (1972) 20.

<sup>221</sup> Cited from Mokgethi Mothlobu *Black Resistance to Apartheid* (1985).

Thus in South Africa you will have in the long run large areas cultivated by blacks and governed by blacks, where they will look after themselves in all their forms of living and development, while in the rest of the country you will have your white communities which will govern themselves separately according to the accepted European principles."

When the Beaumont Commission appointed in terms of the Natives Land Act of 1913 made public in mid-1916 its recommendations for land delimitation, the Congress reacted sharply.

The Beaumont recommendations reflected the pressures of the entrenched white farmers and voters on the government. For instance, the areas it suggested for African occupation only slightly expanded the small amount scheduled for African ownership; furthermore, most of the recommended areas were recognisably inhospitable to human habitation or agriculture. The Congress stigmatised the land laws as a travesty of British rights and a return to the old system of the boer Republics. In fact, in 1917, the Botha government introduced the Native Administration Bill confirming the principle of territorial segregation.<sup>222</sup>

At the end of World War I the government made no effort to reward Africans for the wartime loyalty to the British cause. They merely suspended the Native Administration Bill (and a more limited Native Urban Areas Bill regulating African residence in the towns) pending agreement among white parliamentarians upon uniform terms by which segregation could be introduced for both land and politics in the light of the Cape franchise.

In the economic sphere sharp post-war dislocations fell particularly hard upon African workers. The well organised skilled and semi-skilled white workers were able to exert pressures, including strikes, to further their economic demands which often included additional entrenchment of their privileged

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<sup>222</sup> *Ibid.*

position. In contrast, the low-paid African workers, many of whom were housed in isolated compounds under strict controls, were hamstrung by the terms of the pass laws and by their labour contracts which provided no legal means of exerting pressure on their employers. A few attempts to exert pressures were forcibly suppressed.<sup>223</sup>

Following the Stallard Commission Report the government introduced two laws on the administration of African affairs.<sup>224</sup> These laws further encroached upon the African civil and political rights. In response the South African National Congress (renamed African National Congress) responded by adopting the Bill of Rights reaffirming the indisputable right of Africans to land and ownership, their inalienable right to the enjoyment of liberty, justice and equality before the law, equality of rights for all, equality of treatment and equality of citizenship irrespective of race, class, creed or origin, an equal right to participate in the government of the country and, in particular, the right to direct representation in all the legislative bodies of the land.<sup>225</sup>

These demands notwithstanding, the government introduced the Native Administration Act of 1927 consolidating its native policy. At a meeting convened to discuss the Native Administration Bill in 1926, the ANC called for more radical measures - other than petitioning and deputations - to meet the racist legislative programme of the Hertzog government. They adopted the creed of African nationalism and called for black majority rule under the "Black Republic" slogan. Here, the ANC clearly challenged the legitimacy of the Union government and their authority to legislate in respect of the African majority.<sup>226</sup>

In sum, the first years after the Union in 1910 saw the development of parallel

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<sup>223</sup> Karis and Carter *From Protest to Challenge* 65.

<sup>224</sup> See The Native Administration Act 23 of 1920 and the Native Urban Areas Act 25 of 1923.

<sup>225</sup> See James Leatt *et al Contending Ideologies in South Africa* (1986) 91.

<sup>226</sup> See Pallo Jordan "Socialist Transformation and the Freedom Charter" in *Whither South Africa* (1988) 97-98.

institutions of government - namely, white institutions of National government and African local government under white minority tutelage. The administration of African local affairs were based on the system of indirect rule, and modelled on the administration of the High Commission territories.

Africans were mostly relegated to urban locations (or townships) and "native" reserves. The resulting land hunger and loss of sovereignty steered Africans towards greater unity and the formation for the African National Congress (ANC) with the primary object of defending African civil and political rights and to strive for participation in the government and economic life of the country.

The legislative programme of the Union Government confirmed earlier African fears of Afrikaner rule and its inhuman practices. The ANC protests against racial discrimination by the Union Government fell on the deaf ears of the Imperial British Government. None the less during World War I Africans fought on the side of the Allied Forces in defence of the right of peoples and nations to self-determination and independence. But at the end of the war Britain allowed the Union government to proceed with its racial policies and disregarded African protests. Furthermore, Britain failed or neglected to intervene when the Union Government used force to suppress African opposition to oppressive white minority rule.

In response the ANC adopted a Bill of Rights reasserting the inalienable rights of the African people, in particular, the principles of equality and non-discrimination and the right to participate in the government of the country through directly elected representatives. Finally when the government consolidated the system of indirect rule the ANC demanded the right of African peoples to self-determination and black majority rule.

#### **4.5.2 Evolution of Colonial and post-Colonial Institutions of Government and Black Resistance**

Despite African opposition to racially discriminatory laws and their demand for

the right of self-determination, the imperial government led South Africa to independence along with other self-governing dominions. This process began at the end of World War I when the Allied Forces recognised the contribution of the dominions, especially Ireland, Canada, New Zealand, Australia and South Africa, to the war by giving them independent representation at the Peace Conference.<sup>227</sup> These dominions were admitted to the League of Nations on condition that they would observe international obligations.

At the 1926 Imperial Conference, South Africa (and Ireland) called for a definition of the relationship between Britain and the dominions.<sup>228</sup> The Conference defined and incorporated the definition in the Balfour Declaration which read:<sup>229</sup>

"They [the colonies or dominions] are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British commonwealth of nations."

The Balfour Declaration paved the way for the dominions to achieve independence.

After the Imperial Conference of 1926 the Conference on the operation of dominion legislation was appointed. Its report,<sup>230</sup> completed in 1929, was considered and approved by the Imperial Conference of 1930,<sup>231</sup> and the conclusions of the conferences were later put into statutory form as the Statute

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<sup>227</sup> See Article 2 of the Covenant of the League of Nations in Howard Ellis *The Origins, Structure and Working of the League of Nations* (1928) 493.

<sup>228</sup> See *Defenders of the Constitution Publication Crisis - The Real Issues* (Unpublished manuscript ) 16.

<sup>229</sup> See Extract from the Imperial Conference, 1926 *Summary of Proceedings* CMD 2768 (1926) in Marshall *From Independence to Statehood in Commonwealth Africa* 136.

<sup>230</sup> See *Command Papers of the United Kingdom Government* 3479 (1930).

<sup>231</sup> See *Report in Command Papers of the United Kingdom Government* 3717 (1930).

of Westminster of 1931.<sup>232</sup> This Statute removed all restrictions on the powers, legislative<sup>233</sup> and executive, of a self-governing dominion and gave statutory effect to the conventions and practices that had grown up over the years whereby many restrictions had been relaxed and certain powers of the United Kingdom government had ceased to be exercised.<sup>234</sup> Consequently the Statute of Westminster declared and enacted that the parliament of a dominion [including South Africa] had full power to make laws having extra-territorial operation<sup>235</sup> and that no Act of Parliament of the United Kingdom passed after the commencement of the Statute would extend, or be deemed to extend, to a dominion as part of the law of that dominion, unless it was expressly declared in that Act that that dominion had requested and consented to the enactment of such a law.<sup>236</sup>

To consummate its legislative sovereignty under the Statute of Westminster the Union Parliament enacted the Status of the Union Act 69 of 1934.<sup>237</sup> The objects of this Act were threefold.<sup>238</sup> First, to declare the status of South Africa, secondly to adopt the Statute of Westminster for South Africa, and thirdly to adapt the South Africa Act 1909 to the new situation.<sup>239</sup> In its preamble, the Status of the Union Act affirmed the Balfour Declaration, the resolutions of the 1929/30

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<sup>232</sup> For a text of the statute see Marshall *From Independence to Statehood in Commonwealth Africa* 142-146.

<sup>233</sup> Section 2 of the Statute of Westminster provides:

"2(1) The Colonial Validity Act 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a dominion.

(2) No law and Provision of any law made after the commencement of this Act by the Parliament of a dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the dominion."

<sup>234</sup> See Marshall *From Independence to Statehood* 21.

<sup>235</sup> Section 3.

<sup>236</sup> Section 4.

<sup>237</sup> For a text see Marshall *From Independence to Statehood* 147-149.

<sup>238</sup> See the preamble.

<sup>239</sup> On this period of history in general see Verloren van Themaat *Staatsreg* [3rd ed.] Durban (1981) 205-212.

Imperial Conference and the achievement of legislative sovereignty by the Union Parliament in terms of the Statute of Westminster.

In its operative provisions it vested sovereign legislative powers in the Union Parliament as follows:<sup>240</sup>

"The Parliament of the Union shall be the sovereign legislative power in and over the Union, and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom and Northern Ireland passed after the eleventh day of December, 1931, shall extend, or be deemed to extend, to the Union as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union."

The Act vested the executive government of Union in regard to both domestic and foreign affairs in the King acting on the advice of Union Ministers and charged the Governor-General or his representative with the administration of the affairs of the Union.<sup>241</sup>

The Status of the Union Act was complemented by the Royal Executive Functions and Seals Act 70 of 1934.<sup>242</sup> This Act made the Prime Minister of the Union the Keeper of the great seal and signet of the Union, thus indicating the seat of formal and actual power in the Union.<sup>243</sup> Further, it vested the powers of the King in Council in the Governor-General in Council. These statutes, in conjunction with the Statute of Westminster 1931, ensured that the legislature and executive of the Union were no longer subordinate to any legislature or executive outside the Union. However, South Africa remained a dominion under the Crown and a member of the British Empire, but she was "autonomous" and "freely associated" as such.<sup>244</sup>

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<sup>240</sup> Section 2.

<sup>241</sup> Section 4.

<sup>242</sup> For the text see Marshall *From Independence to Statehood* 150-152.

<sup>243</sup> Section 5.

<sup>244</sup> See preamble of the Status of the Union.

Following the achievement of independence from Britain the Hertzog-Smuts coalition in which Hertzog now for the first time commanded a two-thirds majority of the joint membership of both houses of parliament pursued their policy of political segregation with even more vigour. In May 1935 a joint select committee of parliament tabled two measures: The representation of Natives Bill and the Native Trust and Land Bill. The first bill, a modified version of Hertzog's original proposal of 1926, provided for the exclusion of future African voters from the common roll with the 11 000 Africans already on the roll to remain there. As compensation, all Africans in South Africa were to elect four white senators (and possibly latter two additional white senators) through a cumbersome indirect process.<sup>245</sup> Later the government offered the compromise proposal that was finally enacted - namely a separate roll on which qualified Cape Africans voted for three white members of the House of Assembly and two white members of the Cape Provincial Council.<sup>246</sup> In addition the Act created the Native's Representative Council consisting of indirectly elected Africans throughout the Union sitting with four Africans nominated by the government and with native commissioners under the chairmanship of the Secretary of Native Affairs.<sup>247</sup> The Native's Representative Council was merely an advisory body concerned with matters affecting Africans. Thus the Representation of Natives Bill dealt a deadly blow to the hopes of Africans that the Cape franchise would be a useful lever for the eventual extension of the franchise to all Africans.<sup>248</sup>

The government convened a conference of chiefs and leaders in the Transvaal and Orange Free State to hear their views on the bills.<sup>249</sup> In a resolution unanimously adopted at the close of the conference the chiefs and leaders declined to express any definite opinion on the bills noting that: they were only

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<sup>245</sup> See Karis and Carter *From Protest to Challenge* 3.

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid* 4.

<sup>248</sup> *Ibid.*

<sup>249</sup> For the text of the Report see Document 6.1 *New Report and Resolution of the Conference of Chiefs and Leaders in the Transvaal and Orange Free State* convened by the Government 6-7 September 1935.

given two weeks notice of the conference; they were not supplied with copies of the bills in advance; the policy underlying the bills was one of political, territorial and economic segregation; and that it was the intention of the government to further amend the Native Urban Areas Act to complete its general policy. Thus the chiefs and leaders resolved that due to the importance and gravity of the situation, the very limited time at their disposal and the fact that the policy affected their posterity, they were unable to give a matured and considered decision on the fundamental principles and details involved. The conference cited the following reasons for their decision:

- (a) The chiefs and delegates were not conversant with the principles involved;
- (b) They had no time to obtain the mandate of the people they represented;
- (c) The Bills were not available in the vernacular and were, therefore, beyond the comprehension of the majority of the chiefs and the delegates.

The position of the chiefs was reinforced by the ANC in 1935. In mid-December 1935 the ANC convened the All African Convention in Bloemfontein, bringing together Africans from all shades of the political spectrum and from all sections of South Africa. The All African Convention (AAC) adopted a resolution on the "franchise Bill".<sup>250</sup> In the preamble the AAC noted that the policy of political segregation of the white and black races embodied in the Representation of Natives in the Senate Bill was not calculated to promote harmony and peace between the two races as it would create two South African nations with conflicting interests. They noted further:

- (a) that the creation of two separate states was undesirable and impractical and was not even contemplated under the Land and Trust Bill;
- (b) that the denial to the African people of participation in the government of the country of which they are an integral part, on the basis of common citizenship, is not only immoral and unjust, but would sow the seeds of discontent and

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<sup>250</sup> For a text of the report see Document 9 *The All African Convention Proceedings and Resolutions of the AAC* 15-18 December, 1935.

unrest;

- (c) that the denial to a people of the right to work through constitutional channels for the improvement of its conditions already proved dangerous in Europe during the first half of the nineteenth century.

The AAC further noted that the Hertzog bill sought to set up whites as trustees of African people and to relegate the latter to a permanent position of a child race. Such a trust was rejected, *inter alia*, on the ground that where a trustee, as in the context of South Africa, formed part of the permanent population, the conflict of interests militates against the utmost good faith which a trustee ought to show in the discharge of his or her duties and responsibilities.

Under these circumstances the AAC advocated a formula of interim power-sharing based on the principle of partnership in all councils of the state. The AAC refuted the argument that the South African conception of trusteeship was identical with that evolved and pursued in other British colonies such as Nigeria, Uganda etc. The AAC maintained that in these other territories Great Britain followed a policy of trusteeship, which would be eventually superseded by full partnership, namely responsible government and dominion status.<sup>251</sup> Thus in these territories African interests were paramount in theory and very largely in practice, there were no rights, duties and obligations which were closed to Africans merely on the grounds of race or colour.<sup>252</sup>

The AAC took the view that as the interests of blacks and whites in South Africa were inextricably interwoven attempts to deal with them separately would defeat their own objects and the placement of the destinies of the underprivileged group in the hands of the dominant white group, however well-intentioned, was fundamentally wrong and unjust.

In the light of these considerations the AAC resolved that the only way in which

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<sup>251</sup> Note that the full partnership approach was applied in the South Africa colonies regarding the white population.

<sup>252</sup> This approach was consistent with Article CCII of the Covenant of the League of Nations.

the interests of the various races which constitute the South African nation can be safeguarded was by the adoption of a policy of political identity, ensuring the ultimate creation of a South African Nation in which, while the various racial groups may develop on their own lines, socially and culturally, they will be bound together by the pursuit of common political objectives. Thus the AAC further resolved that a single political identity could only be achieved by the extension of the rights of citizenship to all the groups. However, the AAC accepted a qualified franchise during the transitional period. The AAC reiterated its opposition to the abolition of the Cape native franchise pointing out that it was a matter of such vital importance to all the African people of South Africa that it could not bargain or compromise with the political citizenship of the African people by sacrificing the franchise, as was proposed by the Representation of Natives Bill.

Finally, the AAC contended that no permanent or peaceful solution of the franchise or land question was possible unless it was the result of mutual agreement between representatives of whites and blacks, which was only possible through negotiations. Thus the AAC called on the government to consider calling together a conference on these matters.

Notwithstanding vehement African opposition to political and land segregation the Union government passed the Representation of Natives Act 12 of 1936 and the Native Trust and Land Act 18 of 1936.<sup>253</sup> In the same year one of the aggrieved Africans, Ndlwana, challenged the constitutionality of the Representation of Natives Act on the ground that it had been enacted contrary to parliamentary procedure. The Supreme Court confirmed the legislative sovereignty of the Union Parliament and the demise of the "imperial factor":<sup>254</sup>

"An Act of Parliament in the case of a sovereign law-making body proves itself by mere production of the printed form published by proper authority ...

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<sup>253</sup> For a critical background of these Acts see Essy Letsoalo *Land Reform in South Africa - A Black Perspective* (1987) 1 *et seq.*

<sup>254</sup> See *Ndlwana v Hofmeyer* NO 1937 AD 229 at 237.

Parliament's will, therefore, as expressed in an Act of Parliament, cannot now in this country, as it cannot in England, be questioned by a court of law, whose function it is to enforce that will, not to question it ... It is obviously senseless to speak of a sovereign law-making body as *ultra vires*. There can be no exceeding of power when that power is limitless."

The deference of the judiciary to the legislature vested absolute arbitrary powers in the South African Parliament, enabling it to enact any law it pleased, however absurd and unreasonable.<sup>255</sup>

The rise of African nationalism and anti-colonialism during the inter-war years (1919-1939)<sup>256</sup> and, in particular, the promulgation of the Atlantic Charter (1941)<sup>257</sup> provided the ANC with a new weapon against the racial policies of the Union government. The ANC's position was also reinforced by the fact that the pronouncements of the Union government and, more significantly, the Allied Forces, sought to base the post-World War II International politico-legal order on the principles enunciated in the Atlantic Charter.<sup>258</sup>

In view of the proposed new International politico-legal order and the participation of Africans in the war efforts of various allied nations, the ANC decided to convene a conference of leaders of African thought to discuss the problems of the Atlantic Charter in its relation to Africa in particular and the

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<sup>255</sup> In an earlier decision the Supreme Court enunciated this doctrine of parliamentary sovereignty in the following terms:

"Once we are satisfied on a construction of the Act, that it gives the Minister an unfettered discretion, it is no function of a court of law to curtail its scope in the least degree; indeed it would be quite improper to do so. The above observation is, perhaps, so trite that it needs no statement; yet in cases before the courts when the exercise of a statutory discretion is challenged, arguments are sometimes advanced which do seem to me to ignore the plain principle that parliament may make any encroachments it chooses upon the life or property of any individual subject to its sway, and that it is the function of courts of law to enforce its will": See *Sachs v Minister of Justice* 1934 AD 11.

<sup>256</sup> See Pallo Jordan "Socialist Transformation and the Freedom Charter" in 1986 *Africa Journal of Political Economy* 148-150.

<sup>257</sup> See Karis and Carter *From Protest to Challenge* 211.

<sup>258</sup> *Ibid* 211-212.

place of the African in post-war reconstruction. The terms of reference of the conference were:<sup>259</sup>

- (a) to study and discuss the problems arising out of the Atlantic Charter in so far as they relate to Africa, and to formulate a comprehensive statement embodying an African Charter, and
- (b) to draw up a Bill of Rights which Africans are demanding as essential to guarantee them a worthy place in the post-war world.

The Atlantic Charter committee convened by the President General of the ANC, AB Xuma, met in Bloemfontein on 13 - 14 December 1943. Delegates from different parts of South Africa participated in the conference which divided its work into two parts: (a) the consideration and interpretation of the Atlantic Charter; and (b) the formulation of a Bill of Rights. In dealing with the first part, the conference discussed the Articles of the Atlantic Charter<sup>260</sup> one by one and made certain observations under each Article. The work of the conference was informed by the internationally acknowledged position that in the post-war world population groups and peoples should enjoy the freedoms and liberties which the war fought to establish.<sup>261</sup>

At the Atlantic Charter Conference the ANC adopted an all-African approach. First, they demanded that the status and independence of Abyssinia (now Ethiopia) and her right to sovereignty should be safeguarded - and that her economic independence and access to the sea should be respected. Secondly, the conference urged that as a fulfilment of the war aim of the Allied Nations, namely to liberate territories and peoples under foreign domination, the former Italian colonies in Africa should be granted independence and their security

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<sup>259</sup> See document 296 "African Claims in South Africa", including "The Atlantic Charter from the standpoint of Africans within the Union of South Africa" and "Bill of Rights", adopted by ANC Annual Conference.

<sup>260</sup> For an original text of the Atlantic Charter see 1941 *AJIL* 35 suppl.19. On the Atlantic Charter, see also Chapter III paragraph 3. 2.1 *supra*.

<sup>261</sup> For a discussion of the war aims see Chapter III paragraph 3.2.1 *supra*.

provided for under the future system of world security. Thirdly, the conference disapproved the negotiations between the Union of South Africa and Great Britain for the incorporation of the High Commission territories as South Africa's reward for participation in the war. They took the view that Africans were not parties to the incorporation agreement and thus they regarded the schedule as morally and politically not binding on them.<sup>262</sup> They resolved to deprecate any action on the part of Great Britain which would extend European political control at the expense of African interests.

Further, the conference urged that all territorial changes should be effected in consultation and in accord with the freely expressed wishes of the African peoples. Again and perhaps more significantly, the conference urged colonial powers to promote the objective of self-government for colonial peoples. In line with this objective the conference reaffirmed the right of self-determination of peoples and nations. It observed that:<sup>263</sup>

"In the African continent in particular, European aggression and conquest has resulted in the establishment of alien governments which, however beneficent they might be in intention or in fact, are not accountable to the indigenous inhabitants. Africans are still very conscious of the loss of their independence, freedom and the right of choosing the form of government under which they will live. It is the inalienable right of all peoples to choose the form of government under which they will live and therefore Africans welcome the belated recognition of this right by the Allied Nations."

Pursuant to the right of African peoples to self-determination the conference urged colonial powers to accord Africans sovereign rights and allow them to establish administrations of their own in other parts of Africa and to afford

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<sup>262</sup> For text of the Schedule [or agreement] see Eybers *Select Constitutional Documents Illustrating South African History 1795-1910* (1918) 555-559.

<sup>263</sup> See the "Third point - The Right to Choose the Form of Government" in Karis and Carter *From Protest to Challenge* 214.

Africans full citizenship rights and direct participation in all the councils of state in African countries, especially South Africa, where politically entrenched white minorities ruled a majority of the indigenous black populations.<sup>264</sup>

The Africans' claims also urged colonial powers to respect the right of African peoples to economic self-determination<sup>265</sup> and workers' rights. Thus they demanded (a) the removal of the colour bar; (b) training in skilled occupations; (c) remuneration according to skill; (d) a living wage and all other workers' benefits; (e) proper and adequate housing for all races and colours.<sup>266</sup> Finally, the African claims condemned the suppression of legitimate ventilation of grievances by oppressed, unarmed and disarmed sections of population, and incorporated a bill of rights.<sup>267</sup>

The ANC Bill of Rights deals with citizenship rights; land; industry and labour; commerce; education; public health and medical services and discriminatory legislation. In its opening paragraph it states that African people in the Union of South Africa urgently demand the granting of full citizenship rights such as are enjoyed by all Europeans in South Africa. More specifically, it demanded (a) the abolition of political discrimination based on race, such as the Cape "Native" franchise and the Native Representative Council under the Representation of Natives Act; and the extension to all adults, regardless of race, of the right to vote and be elected to parliament, provincial councils and other representatives institutions; (b) the right to equal justice in courts of law, including nomination to juries and appointment as judges, magistrates, and other court officials; (c) freedom of movement; (d) freedom of press; (e) recognition of the sanctity and inviolability of the home as a right of every family; (f) the right to own, buy, hire or lease and occupy land and all other forms of immovable as well as movable property; (g) the right to engage in all

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<sup>264</sup> *Ibid* 215.

<sup>265</sup> See the "Fourth-Point - The Open Door Policy in Trade and Raw Materials" *ibid* 215.

<sup>266</sup> See the "Fifth Point - The Abandonment of the Use of Force" *ibid* 217.

<sup>267</sup> For a full text of the Bill of Rights see *ibid* 217-222.

forms of lawful occupations, trades and professions, on the same terms and conditions as members of other sections of the population; (h) the right to be appointed to and to hold office in the civil service and in all branches of public employment on the same terms and conditions as Europeans; (i) the right of every child to free and compulsory education and of admission to technical schools, universities, and other institutions of higher learning; and (j) equality of treatment with any other section of the population in the state social services and the inclusion on an equal basis with Europeans in any scheme of social security.

In addition to the foregoing civil and political rights the Bill Rights embodied, *inter alia*, the following social and economic rights:

- (a) a fair redistribution of land as a prerequisite for a just settlement of the land question;
- (b) the right to own, buy, hire or lease and occupy land individually or collectively both in rural and urban areas;
- (c) the right to Land Bank facilities, state subsidies and other privileges provided to European farmers;
- (d) equal pay for equal work.

In its closing paragraph the Bill of Rights summarised the demands of African people in definite and emphatic terms. First, it stated that African people regard as fundamental to the establishment of a new order in South Africa the abolition of all enactments which discriminate against the African on grounds of race and colour. It also condemned and rejected the policy of segregation in all aspects of national life in as much as that policy was designed to keep the African in a state of perpetual tutelage and militated against his normal development. Secondly, it protested strongly against discourteous, harsh and inconsiderate treatment meted out to Africans by officials in all state and other public offices and institutions. It found that such obnoxious practices were irreconcilable with democratic and civilised standards and were contrary to human decency. Thus it demanded the repeal of a host of racially

discriminatory laws.<sup>268</sup> On 16 December 1945 the ANC adopted the African claims and published them. However, the African claims did not form the basis of ANC policy until 1949<sup>269</sup> when the ANC, responding to pressure from the Youth League,<sup>270</sup> adopted the African claims in its programme of action. In its preamble it stated that:

"The fundamental principles of the programme of action of the African National Congress are inspired by the desire to achieve national freedom. By national freedom we mean freedom from white domination and the attainment of political independence. This implies the rejection of the conception of segregation, apartheid, trusteeship, or white leadership which are all in one way or another motivated by the idea of white domination of the white over the blacks. Like all other people the African people claim the right of self-determination."

With this object in mind the ANC adopted the Bill of Rights contained in the African claims of 1945.

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<sup>268</sup> These laws included the Representation of Natives Act of 1936, the Land Acts of 1913 and 1936, the Pass Laws, Natives Urban Areas Acts of 1923, the Natives Administration Act 1927 and the Mines and Works Act 1926.

<sup>269</sup> See S. Trapido "African Opposition in South Africa 1949-1961" in University of London Institute of Commonwealth Studies October 1967 - March 1968 no. 4 *Collected Seminar Papers on Opposition in the New African States* 98-99.

<sup>270</sup> The ANCYL recaptured African Nationalism dating back to the late twenties and stated it in the following terms:

"The starting point of African Nationalism is the historic and even prehistoric position. Africa was, and still is, a black man's continent. The Europeans who have carved up and divided among themselves, dispossessed by force of arms the rightful ownership of the land from the rightful owners-the children of the soil. Today, they occupy large tracts of Africa. They have exploited resources of Africa, not for the benefit of the African peoples but for the benefit of the dominant white race and their kin overseas. Although conquered and subjugated Africans have not given up and will not give up their claim to Africa.

The fact that their land has been taken away and their rights withheld does not take away their right to their land. They will suffer white oppression and toleration of white domination as long as they have not got the material force to overthrow it. Possibility of compromise will be based inter alia, on the preparedness of the Europeans, (1) to agree to an equitable and proportional redivision of the land, and (2) to assist in the establishment of a free people's democracy in South Africa particularly and in Africa generally".

See Exhibit TT in 1960 *Treason Trial Exhibits* (VII) 138-139. Also *Document 48 Congress Youth League Manifesto* issued by the Provincial committee of the Congress Youth League, March 1944 in Karis and Carter *From Protest to Challenge* 300-307.

In the meantime Afrikaner nationalism grew in leaps and bounds and the National Party (led by Malan) came to power on the platform of Apartheid (1948)<sup>271</sup> which negated the right of self determination of the black majority. In line with this policy of apartheid the government introduced a host of laws aimed at consolidating social,<sup>272</sup> residential,<sup>273</sup> cultural,<sup>274</sup> economic,<sup>275</sup> and political apartheid<sup>276</sup> with the ultimate goal of ending all interaction between racial groups except on a superficial level in the work place.

To consolidate the sole political power of the Afrikaner minority the Minister of the Interior introduced a Bill purporting to remove Coloured voter in the Cape Province from the common voters' roll. During the first reading of the bill the leader of the opposition, Mr JGN Strauss, Q.C. contended that the Bill had to be passed in conformity with the entrenched sections of the constitution. On 10 April 1951, the speaker of the House of Assembly ruled that the entrenched provisions were no longer valid on account of the Statute of Westminster 1931. Thus Parliament enacted the Separate Representation of Voters Act of 1951 according to the ordinary,<sup>277</sup> rather than the entrenched procedures. The Supreme Court declared the Act null and void throwing the country into an unprecedented constitutional crisis.<sup>278</sup>

On the day on which the court handed down its decision Dr Malan declared:<sup>279</sup>

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<sup>271</sup> See Ivor Wilkins and Hans Strydom *The Super-Afrikaners* (1978) 35 *et seq.*

<sup>272</sup> In terms of the Prohibition of Mixed Marriages Act 55 of 1949, the Immorality Amendment Act 2 of 1950 (S 26) which forbade marriage and extramarital sexual intercourse between whites and blacks, Asiatic and coloureds. The Reservation of Separate Amenities Act 49 of 1953 was the primary source of "petty apartheid". This legislation enforced the segregation of lifts, toilets, parks, beaches, cinemas etc.

<sup>273</sup> In terms of the Group Areas Act 41 of 1950 which provided for racially segregated areas.

<sup>274</sup> In terms of the Bantu Education Act 47 of 1953 and the extension of University Education Act 45 of 1959 both of which allowed for segregated education.

<sup>275</sup> In terms of the Native Labour Act 48 of 1953 and the Industrial Conciliation Act 28 of 1956 which segregated trade unions and forbade blacks to strike.

<sup>276</sup> Bantu Local Authorities Act of 1952.

<sup>277</sup> The procedure required a simple majority of the members present, provided such members constituted a quorum.

<sup>278</sup> See *Harris v Minister of the Interior* 1952 (2) 428 (A).

<sup>279</sup> See *House of Assembly Debates* (78) col. 3124 (25 March 1952)

"neither Parliament nor the people of South Africa will be prepared to acquiesce in a position where the legal sovereignty of the lawfully and democratically elected representatives of the people is denied, and where appointed judicial authority assumes the testing right, namely, the right to pass judgement on the exercise of its legislative powers by elected representatives of the people - It is imperative that the legislative sovereignty of parliament should be placed beyond any doubt, in order to ensure order and certainty."

Parliament employed its absolute power to enlarge the senate and thus secure the required two-thirds majority for passing legislation touching on entrenched clauses.<sup>280</sup> Following heavy constitutional battles the Supreme Court held that Parliament could virtually do what it pleased as long as it followed the prescribed procedure.<sup>281</sup>

The Separate Representation of Voters Act was reinstated under the South Africa Act Amendment Act 9 of 1956, with a two third majority at a joint sitting of Parliament.

The policy of apartheid resulted in the defiance campaigns of the first half of the fifties. These campaigns were brought to an end by the combination of the Suppression of Communism Act 44 of 1950 and the Criminal Law Amendment Act of 1953. Notwithstanding the suppression of anti-apartheid organisations and activities, the ANC consulted widely with the masses and convened a Congress of the people in Kliptown, Johannesburg in 1955. The Congress adopted the Freedom Charter<sup>282</sup> containing their vision of a free and independent South Africa. This vision was based on the basic human and peoples rights - notably, (a) the right to self-determination; (b) the principles of equality and non-discrimination; (c) the right to development, peace and security; (d) the integrity of the South African territory; and (e) the inalienable

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<sup>280</sup> See HJ May *The South African Constitution* 3rd ed. (1955).

<sup>281</sup> See *Collins v Minister of the Interior and another* 1957 (1) SA 552 (a) 565 D.

<sup>282</sup> On the history of the Freedom Charter see Gilbert Marcus "The Freedom Charter: A Blueprint for a Democratic South Africa" (occasional papers 9 June 1985).

right of the African majority to their land. In 1956 the ANC adopted the Freedom Charter as its policy document. In the same year the leadership of the Congress Alliance was detained and prosecuted for high treason. Their case was only concluded in 1960.<sup>283</sup>

During the years after World War II several factors brought South Africa under increasing pressure. These factors included the increased interest in human rights in the world at large, the reaction against racial discrimination caused by the Nazi's treatment of the so-called "inferior" races; and the emergence to independence and international status of a considerable number of former African colonies. The newly independent African states drew attention to, and brought about the condemnation of, the South African policy of apartheid and its denial of equal rights and opportunities to its non-white subjects, phenomena which had caused little comment before the war in a world where such treatment had been commonplace.

The Afro-Asian members of the British Commonwealth repeatedly condemned South Africa for the refusal to change her racial policies or to alleviate the position of her black population. Great Britain and the other dominions were also compelled to support, albeit in more moderate and conciliatory terms, the views of the Afro-Asian members of the Commonwealth on the subject.<sup>284</sup> Attacks on South Africa reached their peak in February 1960 when the British prime minister, Harold MacMillan, issued a warning to South Africa in his "Wind of change" speech<sup>285</sup> in the South African Parliament.

The repeated condemnations of South Africa within the Commonwealth fuelled republican sentiments among the white ruling group. Thus, in 1960 they held a referendum on the issue of a republic. The result was a vote (of whites only) of 52,14 percent in favour of a republic and 47,42 percent against. Initially, the government wanted to become a republic, like India, within the Commonwealth.

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<sup>283</sup> See Muriel Horrell "Terrorism" in *South African Race Relations Survey* (1968) 1 et seq.

<sup>284</sup> See Marshall *From Independence to Statehood* 24-25.

<sup>285</sup> For a text of the speech see Marshall *ibid* 153-157.

Soon after the referendum the Government began to give legal effect to the decision of the white minority. In January 1961 a Bill for a republican constitution was introduced into the House of Assembly. In the meantime the Prime Minister, Hendrik Verwoerd, had gone to London to attend in March the Commonwealth Prime Ministers' Conference (formerly known as the Imperial conference). At this conference the attack of the Afro-Asian members on South Africa for its racial policy were renewed with increased force, compelling Verwoerd to withdraw South Africa's request of continued membership of the Commonwealth. On 31 May 1961 South Africa was proclaimed a republic outside the Commonwealth.<sup>286</sup>

In the meantime African resistance to apartheid reached a peak, forcing the government to declare a state of emergency<sup>287</sup> in 1960 and to introduce the Unlawful Organisations Act<sup>288</sup> under which the ANC and PAC were outlawed. The banning of these organisations brought to a halt the previously lawful political activity directed against apartheid.<sup>289</sup>

At the consultative conference of African leaders<sup>290</sup> held in December 1960 delegates reaffirmed the need for African unity and pledged themselves to work for it on the basis of the following broad principles:

- (a) the removal of the scourge of apartheid from every phase of national life;
- (b) the immediate establishment of a non-racial democracy; and
- (c) the effective use of non-violent pressures against apartheid.

The Conference observed that:

- (i) the absence of fundamental rights and in particular the right to have a say in the

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<sup>286</sup> *Ibid* 24-25.

<sup>287</sup> See John Dugard *Human Rights and the South African Legal Order* (1978) 112.

<sup>288</sup> See Act 34 of 1960.

<sup>289</sup> See Mathole Serofo Motshekga "The South African State Security Legislation and the Principle of Legality" in *Jahrbuch für Afrikanisches Recht* (1980) 88.

<sup>290</sup> See Karis and Carter *From Protest to Challenge* 626-627.

affairs of the country was the basic cause of suffering, strife, racial tension and conflict in the country;

- (ii) that the banning of the ANC and PAC aggravated the situation;
- (iii) that the passage of the South Africa Constitution Act 1961 was a climax of the deteriorating situation in South Africa; and
- (iv) that the decolonisation process in South Africa was diametrically opposed to that in other parts of Africa.

Thus the Conference resolved not to accept the result of the whites only referendum of 1960 and to call the African people to attend a Conference representative of African people in urban and rural areas whose purpose would be, *inter alia*, to demand the calling of a national convention, representing all the people of South Africa, wherein the fundamental rights of the people will be considered. A copy of the resolution was sent to the United Nations with the request that the UN send a commission of observers to Pondoland and to use its good offices to curb the alarming military operations against unarmed people which constituted a treat to peace in South Africa. The All-in Africa Conference<sup>291</sup> was held in Pietermaritzburg from 25-26 March 1961. The Conference noted that after holding a referendum among the white minority the government decided to proclaim a republic on 31 May 1961 and that a new Constitution was under discussion in a whites only parliament. Fearing that such a republic would continue even more intensively the policies of racial oppression, political persecution and exploitation and the terrorisation of black people, the Conference called on all the African people irrespective of their political, religious or other affiliations to unite to speak and act with a single voice.

Finally the conference refuted<sup>292</sup> the legitimacy of the South Africa Constitution Act 1961 and demanded:

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<sup>291</sup> *Ibid* 632-633.

<sup>292</sup> In this connection the Conference declared:  
"that no constitution or form of government decided without the participation of the African people who form an absolute majority of the population can enjoy moral validity or merit support either within South Africa or beyond its borders".

"that a National Convention of elected representatives of all adult men and women on an equal basis irrespective of race, colour, creed or other limitation, be called by the Union Government not later than May 31, 1961; that the Convention shall have sovereign powers to determine, in any way the majority of the representatives decide, a new non-racial democratic constitution for South Africa."

Further the Conference resolved that should the minority government ignore their demands they would:

- (a) stage country-wide demonstrations on the eve of the proclamation of the Republic in protest against that undemocratic act;
- (b) call on all Africans not to cooperate or collaborate in any way with the proposed republic;
- (c) call on Coloureds, Indian communities and all democratic Europeans to join forces with Africans in opposition to White minority rule; and
- (d) call on the international community to impose sanctions on the White minority government whose disregard of all human rights and freedoms constituted a threat to world peace.

Soon after the proclamation of the Republic on 31 May 1961,<sup>293</sup> the ANC abandoned its peaceful struggle and embarked on an armed struggle. On 6 December 1961 the ANC formed a military wing. Announcing the formation of Umkhonto We Sizwe, the ANC<sup>294</sup> stated that:

"The time comes in the life of any nation when there remains only two choices: submit or fight. That time has now come to South Africa. We shall not submit and we have no choice to hit back by all means within our power in defence of our people, our future and our freedom ... we are striking out along a new road for the liberation of the people of this country. The government policy of force,

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<sup>293</sup> The Republic of South Africa Act 32 of 1961 made changes to the South Africa Act, 1909 but in a large measure preserved the existing central and provincial government structures.

<sup>294</sup> See Gavin Cawthra *Brutal Force - the Apartheid War Machine* (1986) 15.

repression and violence will no longer be met with non-violent resistance only. The choice is not ours; it has been made by the nationalist government which has rejected every peaceful demand by the people for rights and freedom and answered every such demand with force and yet more force.”

The resort to armed struggle by the ANC (and PAC) ushered a new era in the history of the South African struggle against “apartheid colonialism.”

To deal with the new situation the government introduced numerous draconian laws, notably the Sabotage<sup>295</sup> and Terrorism Acts.<sup>296</sup> A South African lawyer Glenn Moss,<sup>297</sup> analysed thirty trials involving politically motivated offences during the period 1976-79 and concluded that the conflict in South Africa had reached the proportions of a low intensity civil war.

Internal and international pressures during the second half of the seventies forced the government to introduce some constitutional reforms. They introduced the Republic of South Africa Constitution Act 110 of 1983.<sup>298</sup> In line with the consociational theory<sup>299</sup> this Constitution provided for the establishment of a tri-cameral (i.e. three-house) parliament - one for Whites, one for Coloureds and another for Indians. Under the terms of this constitution, each house would discuss its own matters (i.e. own affairs<sup>300</sup>) while joint deliberation would occur on matters of common interest.<sup>301</sup> Article 16 gave the State President the competence to designate a matter as the own affair of a particular group, thus reserving for him the power to “launder contentious matters

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<sup>295</sup> See Section 21 of the General Law Amendment Act 76 of 1962 and Section 17 of the General Law Amendment Act of 1963.

<sup>296</sup> See Section 6 of The Terrorism Act 83 of 1967. This section was subsequently substituted by Section 29 of the Internal Security Act of 1982 (formerly the Suppression of Communism Act 44 of 1950).

<sup>297</sup> See Richard Leonard *South Africa at war* (1986) 23.

<sup>298</sup> For a detailed discussion of this constitution see Carpenter *Introduction to South African Constitutional Law* (1987) 277 ff (especially 280-291). See also LJ Boulle *South Africa and the Consociational Option* (1984) 149 *et seq.*

<sup>299</sup> See Boulle *South Africa and the Consociational option.*

<sup>300</sup> See section 14.

<sup>301</sup> Article 15 states that matters not falling under “own affairs” as described in article 14, are general affairs.

through the House of Assembly.”<sup>302</sup> The government also rejected proposals for a Bill of Rights on the ground that it was based on a humanist philosophy which was unacceptable to South Africa and that it negated the doctrine of parliamentary sovereignty which formed the cornerstone of the South African legal system.

The Constitution distributed the parliamentary seats in such a way that the coloureds and Indians would never be able to threaten the power of the white minority. The government rejected calls for the creation of a fourth chamber for the African majority arguing that they will exercise their political rights in the homelands.

#### **4.5.2.1 Colonial Institutions of Black Rural Government**

##### **4.5.2.1.1 South Africa**

The institutions of black local government in South Africa date back to pre-union native policy. They grew out of the system of indirect rule. This system emerged from the forward looking policy of Sir George Grey (1854) who proposed to gain an influence over all black communities included between the then existing boundary of the Cape of Good Hope and the colony of Natal. This policy led to a series of annexations which began in 1855, and ended in 1894 with the acquisition of Pondoland. In the process friendly communities were confirmed in the occupation of land while rebellion was usually punished by confiscation. At the same time large tracts of land were set aside for European settlement and ownership.

##### **4.5.2.1.1.1 Ciskei**

George Grey introduced institutions of a civil nature in British Kaffraria (later

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<sup>302</sup> See LJ Boule “The RSA Constitution: Continuity and change” in *South Africa, a plural society in transition* (1985) 6 - 7.

Ciskei) for black communities. He appointed European magistrates to control the districts. These magistrates presided over all trials. The chiefs were allowed to be present at all trials, but were not greatly encouraged to do so. The government paid them stipends instead of their customary court fees. In 1866 Ciskei became an integral part of the Cape colony, and thereafter, but with minor exceptions, colonial law applied to the exclusion of indigenous law. The process of detribalisation was greatly accelerated, as the judicial, and also, in large measure, the administrative functions of the chief were assumed by the magistrate.

#### **4.5.2.1.1.2 Transkei**

Following the annexation of the Transkeian territories in 1877 the principle that European magistrates should gradually replace African chiefs was applied more vigorously than in the Ciskeian territories, though indigenous law was always to be administered in civil cases. In criminal matters it was replaced, in 1866, by a special Transkeian Penal code, which applied to both Blacks and Whites. In contrast to the colony proper, legislation was enacted by proclamation of the governor, and, prior to Union, no Acts of parliament were enforced unless expressly extended to these territories. The social status of Paramount Chiefs was recognised by the payment of stipends and by frequent consultation, while minor chiefs were appointed government headmen, and, as such, were still to play an important, though somewhat minor role in the administration of the affairs of black communities.

As early as 1882 one of the pioneer European administrators, Captain Matthew Blythe, had anticipated that to maintain closer contact with African opinion a sort of municipal council should be formed in each district. In 1894 Cecil Rhodes chose the district of Glen Grey, in the Ciskei, to introduce such a council. The district was divided into arable and grazing land. The grazing (or pasture) land was held in common by the community while the arable was divided into individual holding on the principle of one person one plot. For each

plot an annual quitrent was payable to the government. The holders of these plots were prohibited from alienating or mortgaging their plots.

In each location the plot holders were to elect a location board. For the district as a whole, a body called the Glen Grey District Council was set up. This council comprised six members nominated by the location boards and six by the Governor, with the district magistrate as chairperson. The council was empowered to levy local rate and to impose a labour tax on all adult male Africans employed outside the district. Before the Glen Grey Act came into force in Glen Grey it was actually applied by proclamation to the four Western districts of the Transkei.

Each district council in the Transkei comprised six members, two being government nominees and four nominated from among their own number, by a meeting of all the headmen of the district. Since 1906, however, council ratepayers, in districts where individual quitrent tenure was applied, selected three representatives from each location who combined to nominate four of their number for council membership. In every case the district council was presided over by the local magistrate.

The most original feature of the council system was the institution of the Transkei General Council consisting of the Chief Magistrate, the Magistrates of the districts concerned, one member appointed by the Governor from each district, two members nominated by each district, and two members nominated by each of the District Councils. The revenue of the General Council was derived primarily from the proceeds of an annual local rate payable by each adult person widowed or unmarried, occupying a separate portion of land or a hut in a council area. Expenditure might be incurred, subject to government approval, for such purposes as roads, dipping tanks, afforestation and agricultural improvements, including agricultural education.

The object of the council system was to give Africans a voice in the management of their own affairs. The system was extended to other areas east of the Kei as and when the moment seemed opportune. By 1903, Councils were

established in thirteen districts and the central body was renamed the Transkeian Territories General Council. This body discussed general policy and authorised services paid for out of the common treasury. The District councils, on the other hand, were the executive organs of the general Council, performing a variety of duties on its behalf and also serving as a forum for the expression of local opinion.<sup>303</sup>

#### 4.5.2.1.1.3 Natal

The colony of Natal was annexed in 1843. Lieutenant Governor Scott<sup>304</sup> summarised the intentions of the Cape government at the time of annexation as follows:

- (1) to adjust claims between Europeans and Africans;
- (2) claims of Africans to land which they held or occupied were to be respected;
- (3) no pains to be spared to secure protection and justice to African communities around Natal;
- (4) Africans not to be restricted in locating themselves to any spot or district;
- (5) government not to disturb them in their occupations or selections;
- (6) if Africans desired grants in title they were to get them on the same terms as the farmers.

It was therefore the desire of the imperial government to protect the interests of the indigenous communities in Natal. To that end Great Britain sent Theophilus Shepstone to Natal as a "Diplomatic Agent to the Native Tribes" in 1845.<sup>305</sup> Shepstone was specifically mandated to provide for the peace and good government of the colony. This was in line with the principle of trusteeship which formed the basis of colonial administration.

Contrary to this principle the Governor of the Cape, Dr Cloete, instructed

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<sup>303</sup> See Evans *Native Policy in Southern Africa* (1934) 2-10. Also see Francois Venter *Die Staatsreg van Afsonderlike Ontwikkeling* (1981) 131 *et seq.*

<sup>304</sup> See JR Sullivan *The Native Policy of Sir Theophilus Shepstone* (1928) 34.

<sup>305</sup> *Ibid.*

Shepstone to arrange for the settlement of Africans in Natal on the lands set aside as locations. Shepstone forcibly removed Africans to locations for three reasons:

- (1) to ensure the steady supply of labour;
- (2) to divide them in order to hold them in subjection;
- (3) to ensure that the general "crown lands" might be more available for colonists.

Thus the location system was set aside principally in the interests of the European settlers.

Shepstone maintained that granting of the European franchise to Africans would transfer legislative power to blacks and that in South Africa the white man must rule. Thus he adopted the policy of control based on the principle of personal rule.<sup>306</sup> This principle was "derived" from the belief that tribalism was the universal system of social organisation among the Bantu and that each member of a tribe recognised and gave willing allegiance to the chief as the hereditary representative of the tribal spirit. The individual was nothing, the tribe everything. Further, it was believed that the tribe system embodied an unbroken chain of responsibility from the individual to the chief i.e. a system whereby a man is bound to report to his immediate superior any crime he was aware of or any exceptional circumstance. The successive links in the chain were from the individual to kraal head, from the kraal head to headman, from headman to the chief and from the chief to supreme (or paramount) chief. Failure to report involved punishment. This principle of communal (or collective) responsibility was viewed as fundamental to the administration of African law and justice and to the economic organisation of African communities. It was therefore concluded that "all Native laws are based on the theory of absolute power residing somewhere".<sup>307</sup>

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<sup>306</sup> *Ibid* 66 *et seq.*

<sup>307</sup> This was a misinterpretation of traditional African constitutionalism. See GMB Whitefield *South African Native Law* (1929) 2.

Following the establishment of African locations in Natal Shepstone consolidated the system of indirect control of African communities by restoring traditional rule. He recognised or appointed chiefs and proclaimed the Lieutenant-Governor the Supreme Chief in the place of the former Zulu King.<sup>308</sup> Further, Shepstone recognised indigenous law, subject of course to the doctrine of repugnancy.<sup>309</sup> Although the chiefs' judicial authority was reserved their jurisdiction was nowhere expressly defined and they were under the control of white magistrates. The Supreme Chief assumed all the traditional powers and authority of the paramount chief and thus substituted him as court of appeal for chiefs' courts as well as for magistrates' courts.

The Code of Native Law<sup>310</sup> passed under the provisions of Law 44 of 1887 vested the following powers in the supreme chief:

- (a) To exercise in and over all Africans in the colony of Natal all political powers and authority, subject to the provisions of Section 7 of Law 44 of 1887.
- (b) To preside over tribes, or sections of tribes; and also divide existing tribes into two or more parts, or amalgamate tribes or parts of tribe into one tribe, as necessity or the good government of the Africans might, in his opinion, require.
- (c) To remove (as Supreme chief in Council) any chief found guilty of any political offence, or for incompetency or other just cause, from his position as such chief, and might also order his removal with his family and property, to another part of the colony.
- (d) To call upon chiefs, district headmen, and all other Africans to supply armed men or levies for the defence of the colony, and for the suppression of disorder and rebellion within its borders, and might call upon such chiefs, district headmen, and all other natives to personally render such military and other services.

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<sup>308</sup> See Section 7 of the Native Administration Act 44 of 1887.

<sup>309</sup> According to this doctrine indigenous law was recognised provided it was not "repugnant to the general principles of humanity and civilisation": see Sullivan *The Native policy of Theophilus Shepstone* 67.

<sup>310</sup> See GW Eybers *Select Constitutional Documents Illustrating South African History 1795-1910*, 254 -255.

- (e) To call upon all Africans to supply labour for public works, or for the general needs of the colony.

The law authorised the Secretary for Native Affairs or the administrators of Native law or other officers to execute the orders and directions of the Supreme Chief, or the Supreme Chief in Council.<sup>311</sup> In respect of all such acts the various officers employed were regarded as the deputies or representatives of the Supreme Chief, or of the Supreme Chief in Council, as the case might be. The Act also authorised the Supreme Chief to punish through a fine or imprisonment, or both, for disobedience of his orders or for disregard of his authority.<sup>312</sup>

Further, the Supreme Chief (acting in conjunction with the Natal Native Trust) might, when he deemed it expedient in the general public good, remove any tribe or tribes, or portion thereof, or any African, from any part of the colony or location, to any other part of the colony on such terms and conditions and arrangements as he might determine.<sup>313</sup> The Supreme Chief was not subject to the Supreme Court or to any other court of law in the colony of Natal, for, or by reason of, any order or proclamation, or of any other act or matter whatsoever, committed, ordered, permitted, or done either personally or in Council.<sup>314</sup>

#### **4.5.2.1.1.4 Boer Republics**

In the Boer republics too, the indigenous law was originally not recognised. In the Transvaal republic change was brought about by law 4 of 1885 which recognised the application of indigenous law in civil disputes where the parties involved were black, subject of course to the doctrine of repugnancy. As in Natal the President became the paramount chief, assuming all the powers and authority of a paramount chief in indigenous law. The law provided for the

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<sup>311</sup> See Section 37 of the Code of the Native Law.

<sup>312</sup> See Section 39.

<sup>313</sup> See Section 37.

<sup>314</sup> See Section 46.

appointment of superintendents of Native affairs to whom final appeals lay and commissioners charged with the duty of administering indigenous law. In other areas this duty was entrusted to magistrates *ex officio*. In addition to commissioners' courts, provision was furthermore made for the institute of chiefs' courts which had concurrent jurisdiction with commissioners' and magistrates' courts. The chiefs' courts were courts of first instance in civil matters between blacks.<sup>315</sup>

#### 4.5.2.1.1.5 Post 1902 Native Policy

It is apparent from the foregoing exposition that indigenous systems were governed by a mass of diverse colonial legislation. The move towards a uniform native policy began in 1903 when the South African Customs Conference<sup>316</sup> held in Bloemfontein resolved that in view of the coming federation of South African colonies, it was desirable that a South African commission be constituted to gather accurate information on affairs relating to Native administration and to offer recommendations to the several governments concerned with the object of arriving at a common understanding on questions of Native policy.

Following this resolution the South African Affairs Commission came into being. The Commission comprised representatives of all four colonies. It travelled widely throughout South Africa to collect evidence. In 1905 it submitted its report which rejected the principle of political equality between Africans and Europeans and recommended separate voters' rolls for them. The Commission also recommended the restriction of the African franchise in the Cape as it was pregnant with future danger. The Commission made it absolutely clear that whatever representation was eventually granted to Africans had to keep them out of real political power.<sup>317</sup> Various Native congresses had appeared before the Commission and aired African grievances and views on inter-colonial matters

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<sup>315</sup> See GJ van Niekerk "Indigenous Law in South Africa" in *Codicillus* XXXI no.1 (May 1990) 38-39.

<sup>316</sup> See A7 - 1903 *Cape of Good Hope Minutes of Custom Union Conference* opened at Bloemfontein [on 10 March 1903] 9 - 11.

<sup>317</sup> See André Odendaal *Black Protest Politics in South Africa* [1984] 46.

urging the government to extend the Cape franchise to other colonies and demanding land rights and greater economic and educational opportunities. The Commission ignored these demands.<sup>318</sup>

Upon the recommendations of the South African Native Affairs Commission the South Africa Act, 1909 provided for a uniform Native policy. Section 147 of the South Africa Act provided that:

" The control and administration of Native Affairs ... shall vest in the Governor-General in Council, who shall exercise all special powers in regard to Native administration hitherto vested in the governors of the colonies or exercised by them as Supreme Chiefs and any lands vested in the Governor or Governor and Executive Council of any colony for the purpose of reserves for Native locations shall vest in the Governor-General in Council, who shall exercise all special powers in relation to such reserves as may hitherto have been exercisable by any such Governor or Governor and Executive council, and no lands set aside for the occupation of Natives which cannot at establishment of the Union be alienated except by an Act of the colonial legislature shall be alienated or in any way diverted from the purposes for which they are set apart except under the authority of an Act of Parliament."

This provision was informed by both the Shepstone Native policy and the South African Native Affairs Commission.<sup>319</sup>

#### **4.5.2.1.1.6 Post Union Rural Native Administration**

As stated, the Native Land Bill, which became law in June 1913, was the Hallmark of the African policy of the Union government, this being the principle of territorial separation under which Africans and Europeans were to occupy

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<sup>318</sup> *Ibid*

<sup>319</sup> See Sullivan *The Native Policy of Theophilus Shepstone*.(1928).

and acquire land in separate designated areas.<sup>320</sup> The Land Act also envisaged the release of additional land, whose boundaries should be determined by a commission. In terms of this provision, the government appointed the Beaumont Commission which released its report for land delimitation in mid 1916. The areas suggested for African occupation only slightly expanded the small amount scheduled for African ownership under the 1913 Land Act. However, nothing was done until the 1930s when the Hertzog Land legislation of 1936 increased the potential maximum African area to 12,3 %. This area provided a territorial basis for black local government in South Africa.<sup>321</sup>

In line with General Smuts' philosophical basis of black local government in South Africa, the government introduced the Native Administration Bill of 1917.

The first section of the Native Administration Bill confirmed the principle of territorial segregation, while the second section formulated a plan for African Administration. This plan placed administration in the designated African areas under a permanent commission of whites chaired by the Minister of Native Affairs. The Governor-General was to be given authority to legislate for these areas by proclamation, a provision which, in effect, would have given almost unlimited powers to the union government. As a first step towards African involvement in this white-directed process, the measure proposed the gradual introduction of local Native Councils (roughly corresponding to those already in existence in the Transkei) through which Africans could voice opinions. The Bill was suspended at the end of the war pending a decision by parliament.<sup>322</sup> After the war parliament passed the Native Affairs Act 23 of 1920. This Act provided for the establishment of the Native Affairs Commission composed of whites who were supposed to be independent experts on African matters, and further authorised the Governor-General, on the recommendation

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<sup>320</sup> The Act gave legal effect to the recommendations of the South African Native Commission. See Karis and Carter *From Protest to Challenge* 62.

<sup>321</sup> See Motganthi Motlabi *Black Resistance to Apartheid* (1985).

<sup>322</sup> See Karis and Carter *From Protest to Challenge* 64.

of this Commission, to establish local councils over areas set apart for Africans. These councils, like the Commission itself, were merely advisory bodies.<sup>323</sup>

The Native Affairs Act of 1920, as amended, provided that whenever it appeared that any of the powers conferred upon councils can, in any two or more areas for which local councils have been established, be more advantageously exercised by a single body with jurisdiction over all those areas, the Governor-General may, with the approval of the Native Affairs Commission, establish such a body to be called the General Council of such areas. This General Council consists of such number of representatives from each of the local councils as the Governor-General, with the advice of the Native Affairs Commission, may determine. An officer of the public service designated by the Minister of Native Affairs acted as chairperson.<sup>324</sup> The principles which guided the Native Affairs Commission in the discharge of its functions were apparently inspired by the Covenant of the League of Nations. These principles are:

- (1) that the Commission was established primarily and essentially to be the friend of the Native peoples, and, as such, the needs aspirations and progress of the Natives should be considered sympathetically by it;
- (2) that the Commission was the adviser of the government in matters affecting the interests of the Natives;
- (3) that it should strive to educate public opinion so as to bring about the most harmonious relations possible between the white people and the black people in South Africa.

The Commission also conducted its affairs on the basis of the principle of consultation with the people. Apart from travelling widely and discussing with the people the Commission summoned conferences of Native persons and bodies representative of Native opinion, with the object of enabling the government to gauge more accurately the state of Native thought and feeling, and of affording to those not otherwise represented the opportunity of expressing their views.<sup>325</sup>

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<sup>323</sup> *Ibid.*

<sup>324</sup> See Evans *Native Policy in Southern Africa* 15-16

<sup>325</sup> See HJ May *The South African Constitution* [1955] 318.

Seventeen years after Union the Government added new features to Native administration and consolidated the administrative systems which applied to the four colonies. This was achieved through the Native Administration Act 38 of 1927.<sup>326</sup> Section 1 of this Act made the Governor-General the Supreme chief of all Natives in the provinces of Natal, Transvaal and Orange Free State and vested him, in any part of the said provinces, with all such rights, immunities, powers, and authorities in respect of all Natives as were vested in him in respect of Natives in the province of Natal.<sup>327</sup> Under Section 2(7) chiefs were appointed by the Governor-General. This section reads:

"The Governor-General may recognise or appoint any person as a chief or headman in charge of a tribe or of a location and is hereby authorised to make regulations prescribing the duties, powers and privileges of such chiefs or headmen. The Governor-General may depose any chief or headman so recognised or appointed".

This provision effectively reduced African chiefs to agents of the dominion administration and almost destroyed the hereditary basis of chieftainship. Further, the Native Administration Act gave the Governor-General wide powers to remove any chiefs or tribe or section of a tribe from one place to another<sup>328</sup> and to summarily arrest and detain any person whom he considered to be a threat to public peace.<sup>329</sup> Moreover, the Act authorised the Governor-General to legislate by proclamation over all African areas already scheduled under the Land Act of 1913 and all future African areas<sup>330</sup> and excluded the jurisdiction of the Supreme Court in respect of the powers of the Governor-General and his deputies.

The Native Administration Act also established a special legal and court system

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<sup>326</sup> See Venter *Die Staatsreg van Afsonderlike Ontwikkeling* 103.

<sup>327</sup> See May *The South African Constitution* 309.

<sup>328</sup> See Section 5(9).

<sup>329</sup> See Section 8.

<sup>330</sup> See Section 25(1).

for blacks.<sup>331</sup> These "special" courts, which had jurisdiction over cases between Africans, were designed to suit the 'psychology' of the African, recreating as nearly as possible the atmosphere of the tribal court to which Africans were accustomed to submit their disputes.<sup>332</sup> These special courts (known as Commissioners' Courts)<sup>333</sup> dealt with criminal offences and the pass laws, sending hundreds of thousand of "illegal" African workers to face jail sentences each year.<sup>334</sup>

Even when deciding civil cases between Africans, the special courts never performed by any means remotely comparable to traditional tribal courts, which generally reflected the interdependence of the courts' officers (chiefs and elders) and the community, including opposing parties in a dispute. Segregated from the community, these presiding officers conducted formalistic proceedings in which the party who is represented almost invariably prevailed over the unrepresented party, despite the claim that litigants did not need lawyers.<sup>335</sup>

The rapid growth of the African population forced the Government to release additional land to blacks under the Native Trust and Land Act 18 of 1936. This Act provided for the addition of so-called open areas to the land "scheduled" for blacks in terms of the 1913 Act. The purpose of the Act was to create separate "states" for Blacks for the purpose of control and administration. In the same year (1936) the government introduced the Representation of Natives Act which provided for the representation of Cape Africans in the House of Assembly and the Provincial Council. The Act also provided for the institution of a Native Representative Council. This Council had no legislative functions and could only advise the Minister on matters

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<sup>331</sup> See Section 11(1).

<sup>332</sup> See Raymond Suttner "The Social and Ideological Function of African Customary Law in South Africa" 1984 (1) *Social Dynamics* 49-51.

<sup>333</sup> See Cloete *Central, Provincial and Municipal Institutions of South Africa* (1982) 198.

<sup>334</sup> See S Greenberg *Legitimizing the Illegitimate State, Markets, and the Resistance in South Africa* (1987) 89.

<sup>335</sup> See Heinz J Klug "The South African Judicial Order and the Future: A Comparative Analysis of the South African Judicial and Judicial Transitions in Zimbabwe, Mozambique and Nicaragua" 1988 2 *Hastings International and Comparative Law Review* 201.

concerning blacks. The relationship between the council and the government worsened until the council was eventually abolished in 1951.

When the National Party came to power in 1948 it decided to consolidate the policy of racial segregation (henceforth known as apartheid). First, the policy of apartheid sought to separate blacks from whites and secondly to divide the blacks ethnically into different nations. The statutory pillar of political separation of blacks and whites was the Bantu Authorities Act 68 of 1951. This Act discarded the British native policy of eventual assimilation of blacks into the colonial political institutions and consolidated the system of self-rule by rural black communities according to their traditional equivalents of public law.<sup>336</sup>

The intention was to give the traditional tribal chiefs-in-council certain local management powers and to develop the whole black management system step by step by in the traditional way. The hierarchy of authorities which could be instituted statutorily consisted of three levels. The lowest level was the tribal authority which disposed of local management power which basically amounted to the rendering of aid to the chief or headman and advising government institutions at higher levels. The Act required the tribal authority to exercise its power in accordance with African Customary Law. The second level consists of regional authorities instituted with regard to two or more areas over which tribal authorities had been appointed.<sup>337</sup> The members of regional authorities were elected from among the captains, chiefs and councillors. The function of the regional authority was to advise the Government on the general interests of Africans within the specific area of the regional authority. They also had executive functions regarding roads, hospitals, water supply, education and

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<sup>336</sup> Venter summed up the character of law as follows:

"The Bantu Authorities Act 68 of 1951 heralded the new approach regarding the government of blacks in South Africa. The British Colonial ideas of inculcating an appreciation for liberal democracy in the people of Africa was discarded, and a system of self-rule by rural black communities according to their traditional equivalents of public law was taken as a point of departure." See Dion A Basson and Henning P Viljoen *South African Constitutional Law* (1988) 309.

<sup>337</sup> See Section 2.

others.<sup>338</sup> The most important power of the regional authorities was to issue ordinances and levy taxes.<sup>339</sup> However, their ordinances had to be approved and published by the Governor-General. The highest level (i.e. third level) was the territorial authorities which were instituted with regard to two or more regions for which regional authorities had been instituted.<sup>340</sup> Just like the regional authorities the territorial authorities also had legislative powers to issue ordinances and levy taxes. Their other function was to guide the tribal and regional authorities in their areas, give advice to the Government and, since 1959, maintain close links with the Commissioner-General. The Government exercised a great degree of control<sup>341</sup> over these "Bantu" Authorities and also acted as guardians of Africans as shown above. This guardian/ward relationship was rejected by Africans.

The report of the Commission of enquiry into the socio-economic development of the Bantu areas (known as the Tomlinson Commission) of 1954 identified seven so-called heartlands for various African ethnic groups within the borders of South Africa in which the different groups could govern themselves to an increasing extent.<sup>342</sup> The government accepted this recommendation and established it in the Promotion of Black Self-Government Act 46 of 1959 which divided the African population into eight national units and granted each of them a specific area in which a degree of self-government could be exercised within the framework of the Bantu Authorities Act of 1951. The Promotion of Black Self-Government Act also provided for the institution of the office of Commissioner-General. The function of the Commissioner-General was to serve as a type of a diplomatic representative for each of the National units and to advise these units, help them to develop a judicial authority and keep the union government posted of their needs. In the light of developments in Africa and

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<sup>338</sup> See Section 5

<sup>339</sup> See Section 6.

<sup>340</sup> See Section 2.

<sup>341</sup> See para 4.2.1 *supra*.

<sup>342</sup> See Petrus Arnold Pienaar *The Nation-State Concept Applied to the Xhosa National Unit* (1979) 57.

the growing demands for decolonisation the government proposed to develop these homelands to full independence.<sup>343</sup>

Hardly two years after the proclamation of the Republic of South Africa the Government passed the Transkei Constitution Act 48 of 1963 granting self-government to the Transkei. This involved the transformation of the territorial authority into a legislative assembly with the power to make laws on a variety of subjects, including the amendment of legislation of parliament obtaining in Transkei. The Act entrusted a cabinet with executive powers. This Act made Transkei a self-governing territory within the Republic of South Africa with its own national symbols, a citizenship of its own and with the real possibility of eventually becoming an independent state.

In 1971 the South African Parliament passed the Bantu Homelands Constitution Act 21 of 1971 (later renamed the National States Constitution Act) which made it possible to transform a territorial authority by proclamation into a legislative assembly with extended legislative powers. But the powers of such legislative assemblies were not as wide as those of a self-governing territory. These responsibly governed territories obtained an executive council, which was not quite a cabinet, however. Thus not all the other homelands could, like Transkei, progress directly from territorial authority status to self-government. A responsibly governed territory qualified, in terms of chapter 2 of the National States Constitution Act to become, by proclamation, a self-governing territory with the Republic of South Africa in a form similar to that of the Transkei in 1963. Finally a number of these self-governing territories achieved their "independence" from South Africa in terms of various Status Acts.<sup>344</sup>

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<sup>343</sup> See Basson and Viljoen *South Africa Constitutional Law* 310.

<sup>344</sup> See MP Vorster and M Wiehers (eds.) *The Constitutions of Transkei, Bophuthatswana, Venda and Ciskei* (1985) 6-10.

#### **4.5.2.1.2 Conclusion**

In summary, colonial powers conquered and subjugated hereditary rulers and divided their kingdoms into small chieftainships. The colonial authorities deposed those chiefs that resisted colonial rule and appointed other persons as chiefs. Henceforth the chieftainship derived from appointment or recognition by the colonial authorities. Thus chiefs became the agents of and derived their powers from the colonial administration. In other words they became part and parcel of the colonial machinery.

The colonial authorities instituted the location (or township) system and subjected Africans living in these areas to arbitrary administrative rule and economic exploitation contrary to the principle of trusteeship embodied in the Berlin Treaty (1885) and the Covenant of the League of Nations. District Councils were excluded from the central political process and accommodated in an advisory council system which served a consultative forum without any executive powers. The law vested absolute arbitrary powers in the Governor-General or his deputies (as the Supreme chief of all Africans) and placed his powers beyond the reach of the Supreme Court. The relationship between black local government and the white institutions of government was based on consultation through a Native Commission composed of whites. Thus the colonial authorities debased the system of hereditary rule and its judicial system. These "reforms" culminated in the Native Representative Council through which Africans could be consulted nationally. This forum was also rejected as it had no executive powers and as Africans demanded direct representation in all bodies of state.

Following the introduction of Apartheid in 1948 the "native" reserves were transformed into homelands (modelled on the British dominions) some of which (viz. the TBVC States) were granted independence. Like the Union of South Africa (which achieved independence through the Statute of Westminster) the TBVC States achieved their independence through various "Status Acts". In

other words, South Africa was divided into a white South African territory and African "colonial" territories within its borders. The "internal" decolonisation of these territories was modelled on the relationship between the British Imperial Government and its dominions including South Africa and Australia. The "internal" decolonisation of the homelands was designed to bypass the demand of the African majority for self-determination and independence from white domination. This homeland system violated the integrity of South Africa and the basic human and peoples' rights of the black majority.

In short, the granting of independence to the homelands (and in fact to South Africa itself) was illegitimate as it was not based on the will of the people as a whole. Thus the Status of South Africa Act of 1934 (following the Statute of Westminster of 1931) and the various "status" Acts through which the TBVC States achieved their independence were ineffectual.

#### **4.5.3.1 Urban Local Government**

As shown above section 147 of the South Africa Act, 1909 vested in the Governor-General-Council the control and administration of Native affairs throughout the Union of South Africa. Section 85 of this Act granted provincial councils power to make ordinances in relation to local authorities and all matters which in the opinion of the Governor-General-in Council were of a merely local or private nature. Section 135 of the Act provided for the continuity of colonial laws. Thus since the formation of the Union local authorities derived their powers of regulation in Native matters from laws which were characterised by wide divergencies of policy between the legislatures of the pre-union colonies.

The growth of mining, industrial and farm activities brought a huge influx of migrants of all races to the urban areas. For Africans this was a chance of escaping high land taxes imposed in the rural agricultural areas and the diminishing farm lands as a result of land ownership restrictions on them. The

African migrants to urban areas were settled in the locations created under the Land Acts of 1913 (and 1936). Initially, however, the colonial authorities neglected urban African local government and entrusted it to the adjoining white local authorities. These authorities were responsible for establishing locations for each of the various African ethnic groups and for providing single and family housing plus essential services to residents. The African locations were dormitory towns for the provision of labour to the white communities and the industry. The authorities only began to address the question of Urban African Local Government towards the end of World War I. They introduced the Native Administration Bill of 1917 which, *inter alia*, dealt with the place of Africans in non-African areas and specified that only limited categories should be given permission to reside outside the designated African lands. At the end of the war they suspended the bill (and a more limited Native Urban Areas Bill regulating African residence in the towns) pending agreement among white parliamentarians upon uniform terms by which segregation could be introduced for both land and politics in light of the distinctive position of Africans in the Cape Province.<sup>345</sup>

In 1922 the Stallard Commission<sup>346</sup> recommended that Urban Africans should be regarded as temporary sojourners in urban areas and that separate administrative bodies should be set up for them. In line with these recommendations the authorities passed the Natives (Urban Areas) Act 21 of 1923 to deal with urban African local government.<sup>347</sup>

According to its preamble the Native (Urban Areas) Act was passed to provide for improved conditions of residence for natives in or near urban areas and the better administration of Native affairs in such areas; of the registration and better control of contracts of service with Natives in certain areas and the regulation of the influx of natives into and their residence in such areas.

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<sup>345</sup> See Karis and Carter *From Protest to Challenge* 64.

<sup>346</sup> See TP1 - 1922 § 42.

<sup>347</sup> See MP Olivier "Enkele Regsaspekte van die verblyfposisie van swartes in stedelike gebiede" paper presented on 16 August 1984 at the Conference organised by the Unisa Legal Aid Centre.

The Native Urban Areas Act of 1923 enacted the recommendation of the Stallard Commission that blacks were temporary sojourners in urban areas. Thus blacks had to be confined to rural reserves and only be admitted to urban areas on the basis of a migratory labour system. However, the urban locations and reserves remained part of and were administered by the white municipalities. Thus some of the wealth of the white municipalities were spent on the poor black townships. In their administration of black townships the municipalities were advised by advisory committees which had no executive powers.<sup>348</sup>

Notwithstanding the influx control regulations the number of blacks in the urban areas increased rapidly during the thirties. This could be attributed to land hunger and the economic inviability of rural reserves. This influx forced the Young-Barrett Committee (1937) to acknowledge the permanency of blacks in urban areas. To deal with this situation the Government tightened its influx control regulations under the Native (Urban Areas) Consolidation Act 25 of 1945.<sup>349</sup>

The Native (Urban Areas) Consolidation Act authorised the Governor-General to confer or exercise by proclamation certain powers of control, whereby the black population would be limited to the number legitimately required for the needs of the white community: Further, the Governor-General was authorised to declare by proclamation in the Government Gazette that from a specified date all blacks within the limits of any urban area or specified portion thereof were to reside in a location, native village or native hostel. Employers of blacks were also restricted in regard to the number of blacks who may reside on the property where they were employed.

The Native (Urban Areas) Consolidation Act provided for the establishment by

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<sup>348</sup> See H J May *The South African Constitution* 2nd ed. (1949) 319.

<sup>349</sup> See §§ 17 and 49 of the departmental Young-Barrett Committee of 1937 and §§ 28 and 30 of UG 28 of 1948.

an urban local authority of a native advisory board for every location or native village under the control of that urban local authority or for any portion of an urban area in which blacks reside. The board consisted of not less than three blacks resident in the areas as well as of a chairperson who may be a white person and who usually was a member of the urban local authority or the superintendent of the location or village. The boards usually consisted of three members elected yearly by the registered occupiers of property in the location or village, and three members appointed by the urban local authority. These boards, like their predecessors under the Native Urban Areas Act of 1923, were merely advisory bodies without executive powers.<sup>350</sup>

Following the accession to government by the National Party in 1948 Parliament passed the Native Laws Amendment Act 54 of 1952 and tightened the restrictions on the right of blacks to remain in urban or proclaimed areas. It provided that no Native could remain for more than 72 hours in an urban or proclaimed area under a local authority unless he was born and permanently resided in such area, or has worked there continuously for one employer for not less than ten years, or has lawfully remained continuously in such area for a period of not less than fifteen years without having been sentenced to imprisonment for more than seven days or to a fine with an option for more that imprisonment for a month attached to it, or lawful permission has been granted to him to remain in the area. The Act also provided that where a black person had been granted a permit to remain in any area the purpose of seeking work, the validity of such permit would be limited to 14 days.

The Act also contained provisions in regard to idle and undesirable blacks in urban or proclaimed areas. It declared that whenever an authorised officer had reason to believe that any Native in such area was an idle or undesirable person in that he was habitually unemployed and had no sufficient honest means of livelihood, or because of his own misconduct (such as by gambling,

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<sup>350</sup> For a general discussion of the Act see HJ May *The South African Constitution* 20-21.

drinking or addition to drugs) he failed to provide for his own or his dependants' support,<sup>351</sup> such authorised officer could without warrant arrest such a black person and have him brought before a magistrate or Native commissioner. Such a person was then required to give a good and satisfactory account of himself and if he failed to do so, the magistrate or Native commissioner would declare him to be an idle or an undesirable person and have him removed to his home or to a work colony, farm colony, refuge, rescue home or similar institution,<sup>352</sup> or if he agreed to enter a contract of employment with an approved employer, ordered him to enter such employment.

Following the proclamation of the Republic of South Africa in 1961 the Government introduced Urban Councils under the Black Urban Councils Act 79 of 1961. These councils, like their predecessors, remained essentially advisory and consultative, with the result only a limited number were in fact established.<sup>353</sup> The failure of these Councils forced the government to transfer the control and administration of urban Africans to the central government. This system of direct rule was achieved through the Administration of Black Affairs Act 45 of 1971.

The Administration of Black Affairs Act of 1971 sought to solve the problems regarding urban African local government by establishing administration boards and transferring the administration of black communities to them. The central government exercised overall control over these communities through the Department of Co-operation and Development. The administration boards implemented the policy of this department.<sup>354</sup>

During the seventies pressures for decolonisation and the meaningful

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<sup>351</sup> See Section 23 of Act 25 of 1945, as amended by Acts 42 of 1946, 54 of 1952, and 67 of 1952.

<sup>352</sup> Such orders were subject to appeal to or review by the Supreme Court.

<sup>353</sup> See DJ Hitge "Political Development on Local Government" paper presented on 10 August 1984 at the conference organised by the Unisa Legal Aid Centre .

<sup>354</sup> *Ibid.*

involvement of blacks in government forced the South African government to begin a process of "internal decolonisation" of local government. The process began with the devolution of power of local government to black councils under the Community Councils Act 125 of 1977. Under this Act a total of 232 Community Councils were established but they generally lacked executive powers and could at most be regarded as semi - local authorities. Although these community councils were subject to the control of administration boards they were considered, by the authorities, to form the basis for community and political responsibility at grassroots level.<sup>355</sup>

The introduction of the Community Councils in 1977 unleashed vehement opposition from black communities which resulted in the formation of alternative administrative and judicial structures. The first alternative structures were the Soweto Civic Association and the Port Elizabeth Black Civic Organisation. These mass formations were followed by the launch of the United Democratic Front (UDF) which was formed to co-ordinate the activities of these organisations and to address the central question of state power.<sup>356</sup>

To deal with the situation the government introduced a number of reform initiatives. One of this initiatives was based on the report of the Riekert Commission, which was appointed to investigate urban policy. Riekert proposed the relaxation of restrictions on the mobility of urban black labour whilst at the same time advocating for the intensification of control over non-urban labour. He proposed dividing the African population into urban insiders with permanent rights to live in urban areas, and "rural outsiders" with even less access to the urban areas than before.

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<sup>355</sup> See Richard Humphries "Intermediate State Responses to the Black Local Authority Legitimacy Crisis" in Heymans and Töttemeyer (eds.) *Government by the People* (1988) 105 *et seq.*

<sup>356</sup> See Hoarse Campbell "Challenging the Apartheid Regime from below" in Peter Anyang Nyongo (ed.) *Popular Struggles for Democracy in Africa* (1987) 142-143. Also see Howard Barell "The United Democratic Front and National Forum, their Emergence, Composition and Trends" in 1981 *South African Review* II 6 *et seq.*

The Riekert reform proposals dovetailed with the concessions offered to the workers and trade unions by the Wiehahn Commission in that the right in the urban areas was complemented by trade union, property, and local government rights to live permanently in the urban areas that traditional apartheid had hitherto denied "temporary sojourners".<sup>357</sup>

Riekert did not question the cornerstone of the apartheid policy - namely, the Bantustan system. Urban Africans were to exercise their political rights in Urban African Councils whilst national political rights were still to be expressed through the TBVC and National States.<sup>358</sup>

The Riekert proposals were given substantive content by three "Koornhof" Bills introduced into Parliament in 1980. Owing to wide-spread resistance these bills were withdrawn and reintroduced in 1982 as the Black Communities Development bill, the Black Local Authorities Bill, and the Orderly Movement and Settlement of Black Persons Bill.<sup>359</sup>

The "Koornhof" Bills related to the establishment of new local government structures. The Black Local Authorities Act 102 of 1982, in particular, provided the mechanism for replacing the discredited Community councils with a system of local government similar to that of whites, without giving these bodies the financial resources to deliver urban services at a rate people could afford.

The Black Local Authorities Act of 1982 contains provisions which are of legal and constitutional importance. Section 23 sets out the rights, powers, functions, duties and obligations of local authorities. It automatically endows town councils with certain powers enlisted in the schedule of the Act. It also authorises village councils to acquire similar power by virtue of a notice published by the Minister in the Gazette.

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<sup>357</sup> See M Swilling *The Politics of Statement* (1988) 3.

<sup>358</sup> See D Hindson and M Lacey *Influx Control and Labour Allocation : Policy and Practice since the Riekert Commission* (1983) 97-113.

<sup>359</sup> *Ibid.*

In 1984 the powers of administration were transferred from administration Boards (now known as Development boards) to the Black local authorities. The development boards were then expected to confine their role to the establishment of housing schemes and the training of local government personnel.<sup>360</sup>

The underlying philosophy of Black local authorities was to enable each person to participate on a democratic basis and within group context in local government decision-making affecting his or her interests. This system of local government came to be called local self-government as it was designed to afford local black communities the greatest possible degree of self-determination at local level.

This local government approach derived from the racial policies which required local government administrative structures to contribute towards:

- (a) the realisation of individual and group on local levels;
- (b) the elimination of group domination as far as possible;
- (c) the promotion of order and stability and
- (d) co-operation with other local authorities.

Elections for the new Black Authorities were scheduled for the latter part of 1983 to coincide with the introduction of the tricameral parliament.<sup>361</sup>

A further devolution of powers to the Black Local Authorities was effected by Section 29 of the Black Communities Act 104 of 1984 which supplemented and substituted Section 11 of the Black (Urban Areas) Consolation Act 25 of 1945. Section 29 of the Black Communities Development Act specifically provided that Development Boards (which replaced Administration Boards) should as far

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<sup>360</sup> See JC Bekker "Law and Local Government" paper delivered on 10 August 1984 at the Conference organised by the Unisa Legal Aid Centre, 67.

<sup>361</sup> See Hitge *Political Development on Local Government Level 4-6*.

as is practicable act in consultation with Black Local Authorities. It also required Development boards to apply the provision of the Black Local Authorities Act of 1982.<sup>362</sup>

The Black Communities Development Act of 1984 devolved fiscal powers to Development Boards. Henceforth, these boards were expected to raise their own money. In the meantime the Provincial authorities had taken away levies on employers and sold local sources of income such as beerhalls and bottle stores. Consequently, it became extremely difficult for the Black Local Authorities to generate any income. To contend with the situation they increased rentals and service charges and imposed levies, taxes and surcharges on their respective communities.<sup>363</sup> Consequently, rentals increased rapidly during the first half of the eighties. This rapid increase sparked off rent boycotts which threw black local government in South Africa into an unprecedented crisis. The rent boycott still persists in many black townships.

To remedy the situation the government introduced the Regional Services Council Act 109 of 1985.<sup>364</sup> A Regional Services Council (RSC) consists of nominees of Blacks, Coloured, Indian and White local authorities. In other words the RSCs bring together local authorities representing different racial groups into a single body. These RSCs were established as "general affairs" bodies designed to allocate funds in the form of grants rather than loans. Thus they act as a kind of mechanism for the partial redistribution of wealth in the region where they exist.

The chairpersons of the RSCs were appointed by provincial administrators in their respective provinces. These administrators, in turn, were appointed by the State President. The establishment of the RSCs introduced a regional

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<sup>362</sup> See Bekker *Law and Local Government* 67.

<sup>363</sup> See Black Sash *You and Your Local Authority* (1988).

<sup>364</sup> For a general discussion see Alison Todes, Vanessa Watson and Peter Wilkinson "Local Government Restructuring in South Africa" in *Regional Restructuring under Apartheid* (1987) 115 *et seq.*

subsection within the provincial government. Thus the RSCs indirectly linked the BLAs with the central government. The functions of the RSCs include:

- (a) the delivery of bulk services on a regional basis;
- (b) to facilitate greater racial interaction for different group;
- (c) to develop urban infrastructure in areas of greatest need through the collection and distribution of new sources of revenue;
- (d) to act as financial agencies that raise money through a double tax levied on employers (turnover and wage taxes), and then allocate money in the form of grants to various townships for capital development projects, particularly the provision of bulk infrastructure.

The voting power in the RSCs is based on the economic strength of each constituent local authority. As the white local authorities have more economic power they decide how much of the money collect from levies (paid by business on turnover and wages) will be spent in the black areas. The RSC system, therefore, not only preserved racially-based local authorities but also white minority rule based on economic power.<sup>365</sup> If the white-dominated RSCs refused to spend money in a particular way the black councils had no power to force it to do so. This meant that black councils were wholly dependent on the goodwill of white councils. The inadequacy of the support received by BLAs from the RSCs is evidenced by the ongoing rent boycotts and the failure of the RSCs to intervene decisively. Notwithstanding the illegitimacy and inviability of the RSCs and BLAs the Government sought to use these structures as building blocks for a new South African Constitution. On 26 October 1988 some South Africans went to the polls to vote separately for Black, Indian, Coloured or White councillors in racially separated local authorities. The BLAs elected on the that day were expected to choose a group of people (called an electoral college) which would in turn elect nine black representatives to sit on the

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<sup>365</sup> See Planact Workshop on Local Government For Ga-Rankuwa Civic Association, paper presented on 26 October 1990, Medunsa, Workshop III: Local Government in the Homeland Context" organised by the Community Law Centre, Institute for Public Interest Law and Research, Pretoria.

proposed National Council which was supposed to make proposals for a new constitutional system in South Africa. This meant that any black person who wanted to have a say in who should represent black people in the National Council would have to participate in the local authority elections.<sup>366</sup> The National Council was rejected by all major black leaders who found that it was not a legitimate and appropriate body for drawing up a new constitution for a post-apartheid South Africa.

#### **4.5.3.2 Conclusion**

In summary, Africans were admitted to urban areas as temporary sojourners on the basis of a migratory labour system. Their affairs were initially administered by white municipalities acting on the advice of Councils modelled on the Glen Grey Council System. Africans were subjected to a system of influx control which reduced them to objects. During the seventies the government began a process of "internal decolonisation" of the dormitory townships (i.e. urban locations). Hardly a decade thereafter it became abundantly clear that these dormitory towns were not economically viable. The creation of these "towns", contrary to the will of the people and due to their economic inviability resulted in a vehement popular opposition beginning from the second half of the seventies.

The government attempted to deal with this crisis by granting Africans the right of permanent residence in urban areas and by creating community councils through which the Africans could be consulted. It was then maintained that Africans would exercise their powers in the homelands. Continued resistance against these separate administrative structures forced the government to upgrade the community councils and rename them Black Local Authorities. These new structures, modelled on the white local authorities, were to serve as "own affairs" bodies in line with the consociational theory underlying the constitutional reforms initiated during the second half of the seventies.

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<sup>366</sup> See Black Sash *You and Your Local Authority* 9 et seq.

Popular resistance against the Black Local Authorities and the tricameral parliament resulted in country-wide rent boycotts which plunged black local government into an unprecedented crisis. The government attempted to deal with economic crisis of the BLAs by creating Regional Services Councils (RSCs). The RSCs failed to resolve the crisis of the BLAs but at least served as a mechanism whereby the rich white municipalities partially distributed their financial resources to the poor black townships.

The legitimacy crisis and economic inviability of the BLAs and RSCs notwithstanding, the government sought to use them as building blocks of a new constitution substituting the discredited tricameral parliament.

During the second half of the eighties the government introduced the concept of a National Council designed to serve as a negotiation forum for a new constitution accommodating the African majority. The National Council was expected to be an interim mechanism towards the realisation of a confederal state of Southern African States based on the consociational theory. Such a State would bring together the TBVC states, the tricameral parliament and regions composed of BLAs in an overarching system which would operate, at the national level, more or less like the RSCs. In other words, this would be a "South African" Regional Services Council which would not only preserve apartheid and white domination but also permanently deprive the black majority in South Africa of their right to self-determination (as defined in this thesis).

#### **4.5.4 General Conclusions**

Great Britain acquired sovereignty over the whole territory of South Africa through conquest. The British colonial power recognised only the right of the white minority to self-determination. Thus in 1908 they allowed the four colonies to call a National Convention (excluding the black majority) empowered to draw up a constitution for the Union of South Africa. The Convention (with the approval of the imperial authorities) postponed the African franchise

question indefinitely. After Union the British began to lead South Africa to legislative independence under white minority rule. To accommodate the disenfranchised blacks the Union Government introduced a system of black local government which culminated in the discredited black local authorities and the National States. The other black communities (Indian and Coloureds) were included in the central political process through the tricameral parliament. In short the South African constitutional system denied the black majority genuine civil and political rights and established separate constitutional structures to accommodate their political aspirations. This constitutional dispensation failed to meet the requirements of the traditional (or Diceyan) concept of the rule of law in its substantive sense in that it deprived Africans of civil liberties and granted Indian and Coloureds qualified rights which subjected them to the overriding authority of white minority governments.

## **CHAPTER V**

### **THE ROLE OF THE INTERNATIONAL COMMUNITY IN DEFENCE OF THE DYNAMIC CONCEPT OF THE RULE OF LAW: LESSONS FROM ZIMBABWE AND NAMIBIA**

#### **5.1 Zimbabwe**

##### **5.1.1 General**

The Post World War II linkage of the rule of law, the right of peoples (and nations) to self-determination and human rights (or in short the evolution of the dynamic concept of the rule of law) and their elevation to mandatory rules of contemporary international law established additional international legal norms for the creation of constitutional states in colonial territories and territories under racist regimes.

During the sixties the dynamic concept of the rule of law became, by and large, the organising principle for newly independent African countries. This chapter examines, compares and contrasts the implementation of the dynamic concept of the rule of law in the creation of constitutional states in Zimbabwe, Namibia and South Africa. In each case, a brief historical background of the settlement proposals and their underlying international legal norms will be outlined, and a critical analysis is made of the interim measures of the Independence Constitutions and the impact of the International legal norms on the resulting constitutions.

##### **5.1.2 The United Nations Involvement in the Southern Rhodesian Constitutional Crisis**

Originally Southern Rhodesia was not included in the United Nations (UN) list

of non-self governing territories.<sup>1</sup> However, the promulgation of the Rhodesian Constitution of 1961 kindled international interest in the Rhodesian problem of self-determination.<sup>2</sup> By and large, this interest was sparked by petitions made by African political leaders to the UN General Assembly. These petitions, inter alia, forced the General Assembly to intervene.<sup>3</sup>

The UN General Assembly passed resolution 1747 (XVI) declaring, amongst others, that the territory of Southern Rhodesia was a non-self-governing territory within the meaning of chapter XI of the Charter of the United Nations.<sup>4</sup> Following the adoption of this resolution, a debate continued in the General Assembly in which many speakers argued that this resolution had effectively established the juridical status of Rhodesia and that Britain therefore had power to intervene to impose a constitutional settlement in the same way as she had previously intervened in other places.<sup>5</sup> Britain rejected this argument maintaining that neither she nor the United Nations had power to intervene in Rhodesia. Britain based the non-existence of the UN power to intervene on the principle of non-interference in the domestic affairs of member states which is embodied in Article 2(7) of the UN Charter. This argument notwithstanding, the General Assembly passed further resolutions confirming its declaration in Resolution 1747 (XVI) and requesting Britain to take urgent measures to resolve the Rhodesian problem.<sup>6</sup> As the Rhodesian problem was one of the right of self-determination of peoples<sup>7</sup> the majority of UN member states argued that the principle of domestic jurisdiction in Article 2(7) did not preclude the UN from discussing and passing resolutions on Rhodesia. Thus the General Assembly used the right of peoples to self-determination as an effective basis to found international jurisdiction on the Rhodesian Independence Crisis.

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<sup>1</sup> See 1962 YBUN 559.

<sup>2</sup> See Nkala *The United Nations, International Law and the Rhodesian Independence Crisis* (1985) 31.

<sup>3</sup> See 1962 YBUN 428.

<sup>4</sup> of 28 June 1962.

<sup>5</sup> See 1962 YBUN 428.

<sup>6</sup> *Ibid.*

<sup>7</sup> Articles 1(2) and 55 of the UN Charter.

In 1963 the Special Committee on Colonialism drew the attention of the Security Council to the explosive situation in Southern Rhodesia. Taking account of this, the General Assembly also expressed deep concern at the explosive situation existing in Rhodesia owing to the denial of political rights to the vast majority of the African population and the entrenchment of the minority regime in power.<sup>8</sup>

On May 6, 1965 the Security Council adopted Resolution 202 which recalled earlier General Assembly resolutions and the resolutions of the Special Committee regarding the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>9</sup>

Furthermore, the Security Council endorsed the requests which the General Assembly and the Special Committee had repeatedly addressed to the United Kingdom of Great Britain and Northern Ireland to obtain:

- (a) the release of all political prisoners, detainees and restrictees;
- (b) the repeal of all repressive and discriminatory legislation, and in particular the Law and Order (Maintenance) Act and the Land Apportionment Act;
- (c) the removal of all restrictions on political activity and the establishment of full democratic freedom and equality of political rights.

The Security Council noted that the Special Committee had drawn its attention to the grave situation in Southern Rhodesia and, in particular, the serious implications of the election which was due to take place on 7 May, 1965 under the 1961 Constitution which had been rejected by the majority of the people of Southern Rhodesia and the abrogation of which had repeatedly been called for by the General Assembly and the Special Committee since 1962.

Deeply disturbed by the looming UDI, the Security Council requested the United

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<sup>8</sup> See Nkala *The United Nations, International Law and the Rhodesian Independence Crisis* (1985) 37.

<sup>9</sup> SI 1965 No. 1952.

Kingdom government and all States members of the United Nations not to accept a Unilateral Declaration of Independence for Southern Rhodesia by the white minority government. Further, the Security Council requested the United Kingdom government (a) to take all necessary action to prevent a Unilateral Declaration of Independence; (b) not to transfer under any circumstances to its colony of Southern Rhodesia, as then governed, any of the powers or attributes of sovereignty, but to promote the country's attainment of independence by a democratic system of government in accordance with the aspirations of the majority of the population. Finally, the Security Council requested the United Kingdom to enter into consultations with all concerned with a view to convening a conference of all parties in order to adopt new constitutional provisions acceptable to the majority of the people of Southern Rhodesia, so that the earliest possible date might be set for independence. The Security Council decided to keep the question of Southern Rhodesia on its agenda.

Initially, Great Britain rejected all attempts to involve her in the Rhodesian Independence Crisis, arguing that neither she nor the UN had power to intervene in the affairs of Rhodesia. She sought to preclude the UN involvement on the basis of the principle of domestic jurisdiction embodied in Article 2(7) of the UN Charter.<sup>10</sup>

Following the Unilateral Declaration of Independence (UDI) on 11 November 1965, Britain abandoned its worn-out argument that the Rhodesian Crisis was a matter of domestic jurisdiction in which United Nations intervention was precluded. Thus Britain took the Rhodesian problem to the United Nations Security Council. In his address to the Security Council, Mr. Stewart, the British Foreign Secretary, stated two main reasons for referring the Rhodesian problem to the United Nations. First, that an attempt to establish in Africa an illegal regime based on minority rule is a matter of world concern, and second, that the measures taken by the United Kingdom against the Smith regime required

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<sup>10</sup> *Ibid.*

United Nations support to be effective. In his statement to the Security Council Mr. Stewart stated that since the UDI the only lawful Government of Southern Rhodesia was the Government of the United Kingdom.<sup>11</sup>

On 16 November the British Parliament passed the Southern Rhodesia Act, 1965 declaring that Rhodesia continued to be part of Her Majesty's dominions, and conferring executive and legislative authority to be exercised on behalf of the British Government by a Secretary of State. The Act further empowered the British Government to make orders in Council with reference to Rhodesia as appeared necessary and expedient. In pursuance of this power the British government made the Southern Rhodesia (Constitution) Order, 1965.<sup>12</sup>

Following the proclamation of the UDI the Security Council passed resolution 216 (1965) without making any prior determination that the Rhodesian situation constituted a threat to international peace under Chapter VII of the UN Charter. In Resolution 216 (1965) the Security Council decided to condemn the UDI made by the racist minority and to call upon all States not to recognise the illegal racist minority regime in Southern Rhodesia and to refrain from rendering any assistance to it. This was followed by Resolution 217 of 1965 in which the Security Council recorded its deep concern with the situation in Southern Rhodesia where the illegal authorities had proclaimed a UDI which the administering power (the government of the United Kingdom of Great Britain and Northern Ireland) regarded as a rebellion. The Security Council noted that the administering power had taken certain measures<sup>13</sup> to deal with the situation and made a determination that the situation constituted a threat to international peace and security. Further, it reaffirmed Resolutions 216 and 1514 (XV) and condemned the UDI as devoid of legal validity. Thus the Security Council called on the United Kingdom government (a) to quell the rebellion and (b) to take other appropriate measures to end the rebellion. As the working of

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<sup>11</sup> *Ibid* 39.

<sup>12</sup> See Marshall *From Independence to Statehood in Commonwealth Africa* vol II (1982) 143-144.

<sup>13</sup> See note 11 *supra*.

the 1961 Constitution had broken down, the Security Council further called on the United Kingdom government to take immediate measures in order to allow the people of Southern Rhodesia to determine their own future in accordance with Resolution 1514 (XV) of 1960. Finally, the Security Council imposed sanctions on the illegal regime in Salisbury.

In 1966<sup>14</sup> and 1968<sup>15</sup> the Security Council adopted resolutions imposing mandatory economic sanctions on Rhodesia under chapter VII of the UN Charter, describing the Smith regime as illegal but omitted calls to States to withhold recognition. This omission was cured by Resolution 277 (1970) adopted after the proclamation of Rhodesia as a republic.<sup>16</sup> The Resolution of 1968 was particularly significant as it also recognised the legitimacy of the struggle of the people of Southern Rhodesia to secure the enjoyment of their rights as set forth in the Charter of the United Nations and in conformity with the objectives of General Assembly Resolution 1514 (XV) of 14 December 1960. Further, and perhaps more significantly, the Security Council called on the United Kingdom as the administering power in the discharge of its responsibility to take urgently all effective measures to bring to an end the rebellion in Southern Rhodesia, and enable the people to secure the enjoyment of their rights as set forth in the Charter of the UN and in conformity with the objectives of the General Assembly Resolution 1514 (XV).

In 1970 the Security Council adopted two other resolutions on Southern Rhodesia. The first Resolution<sup>17</sup> noted with grave concern that the measures thus far taken had not succeeded to bring the rebellion to an end and that some states had failed to prevent trade with the Smith regime contrary to resolutions of the Security Council and to their obligations under Article 25 of the Charter of the United Nations. Furthermore the resolution noted the continued repression of the black majority and reaffirmed its recognition of their

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<sup>14</sup> See Resolution 232 adopted on the 16 December 1966.

<sup>15</sup> See Resolution 253 adopted on 29 May 1968

<sup>16</sup> This was effected by the Constitution of Rhodesia Act 54 of 1969.

<sup>17</sup> See Resolution 277 adopted on 18 March 1970.

legitimacy of their struggle and the duty of the United Kingdom to discharge her responsibility in respect of the people of Southern Rhodesia. The Security Council reaffirmed these positions in Resolution 288 of 1970.<sup>18</sup> This Resolution urged all states "not to grant any form of recognition" to the Smith regime and reminded states of their obligations under Article 25 of the UN Charter to act in accordance with decisions of the Security Council. Subsequent resolutions<sup>19</sup> did not expressly refer to the non-recognition of Rhodesia but instead called on states to carry out their obligations under the Charter, which by necessary implication included non-recognition.

The Security Council used the terms "regime" or "authority" in Southern Rhodesia as it viewed this territory as a British colony subject to the authority of the United Kingdom, the administering power.<sup>20</sup> In short, therefore, the resolutions of the Security Council were a denial of the statehood of an independent Southern Rhodesia and the non-recognition of the authority purporting to act as government of that territory. Resolution 277 (1970) declared that the decision directing states not to recognise the "illegal regime" was adopted under chapter VII of the Charter. Moreover, Resolution 288 (1970) emphasised that it was incumbent on states to comply with this obligation under article 25 of the Charter. It is therefore clear that by 1970, if not earlier, UN member states were legally obliged not to recognise either the state of Rhodesia or its government.<sup>21</sup>

### **5.1.3 The Impact of Contemporary International Law on the Constitutional Status of Southern Rhodesia**

It emerges quite clearly from the foregoing analyses of Security Council

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<sup>18</sup> Adopted on 17 November 1970.

<sup>19</sup> Resolutions 218 (1972), 320 (1972), 388 (1976), 409 (1977), 423 (1978), 437 (1978). In Resolution 448 (1979) the Security Council labelled the 1979 elections, which resulted in Bishop Muzorewa becoming Prime Minister, as "null and void" and called upon states not to recognise his "government".

<sup>20</sup> See Resolution 217 of 1965.

<sup>21</sup> See Dugard *Recognition and the United Nations* (1987) 95.

resolutions that new international legal norms have emerged which deny statehood to any entity which suppresses the right of self-determination and systematically violates human rights. Hence, the territory of Rhodesia which, like South Africa, met all the requirements for statehood as contained in the Montevideo Convention of 1933<sup>22</sup> was denied the right to statehood.

The normative basis for the UN sanctions campaign and its non-recognition of Rhodesia is to be found in Resolution 1514 (XV) (The Declaration on the Granting of Independence to Colonial Countries and Peoples) of 1960. Thus after the UDI, resolutions of the General Assembly reaffirmed "the inalienable right of the people of Zimbabwe to freedom and independence in conformity with the provisions of General Assembly Resolution 1514 (XV) of 1960,<sup>23</sup> condemned Rhodesian independence under minority rule as contrary to Resolution 1514 (IV),<sup>24</sup> stressed that Resolution 1514 (XV) envisaged independence under majority rule,<sup>25</sup> and denounced Rhodesia's policies of racial discrimination and segregation.<sup>26</sup> Security Council resolutions on the other hand condemned the minority regime in Southern Rhodesia as illegal,<sup>27</sup> reaffirmed the applicability of Resolution 1514 (XV) to Southern Rhodesia,<sup>28</sup> and castigated the Smith regime's violation of human rights.<sup>29</sup>

The most definite and emphatic exposition of the new international-law norm for the recognition of states found expression in Fawcett<sup>30</sup> who argues that:

"to the traditional (international law) criteria for the recognition of a regime as a new State must now be added the requirement that it shall not be based upon

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<sup>22</sup> *Ibid.*

<sup>23</sup> 2151 (XXI), 2383 (XXIII), 2508 (XXIV), 2652 (XXV).

<sup>24</sup> 2662 (XXII), 2383 (XXIII), 2652 (XXV).

<sup>25</sup> 2138 (XXI), 2262 (XXII), 2383 (XXIII), 2508 (XXIV).

<sup>26</sup> 2262 (XXII).

<sup>27</sup> 216 (1965), 217 (1965).

<sup>28</sup> 217 (1965), 232 (1966), 277 (1970), 288 (1970), 318 (1972), 328 (1973).

<sup>29</sup> 277 (1970).

<sup>30</sup> See "Security Council Resolutions on Rhodesia" 1965-66 *BYIL* 112-113, and JES Fawcett *The Law of Nations* (1968) 38-39. Fawcett's views have been criticised by Devine "The Requirements of Statehood re-examined" 1971 34 *Modern Law Review* 410.

a systematic denial in its territory of certain civil and political rights, including in particular the right of every citizen to participate in the government of his country, directly or through representatives elected by regular equal and secret suffrage."

Fawcett argues, further, that this new international-law norm was responsible for the non-recognition of Rhodesia.

In similar vein Crawford<sup>31</sup> argues that:

"where a particular territory is a self-determination unit as defined, no government will be recognised which comes into existence and seeks to control the territory as a State in violation of self-determination. This principle does not - at this stage of the development of international law and relations - constitute a principle of law with respect to existing states. But the evidence in favour of this principle as it applies to self-determination units, and in particular to non-self governing territories, though it may be restricted to the one case of Rhodesia, is consistent and uniform. It appears then that a new rule has come into existence, prohibiting entities from claiming statehood if their creation is in violation of an applicable right to self-determination."

It follows from the resolutions cited above and the arguments of legal scholars that Rhodesia established a clear precedent for the non-recognition as a State of an entity brought into being in violation of the norms contained in Resolution 1514 (XV).

#### **5.1.4 The Commonwealth Intervention in the Rhodesian Crisis**

##### **5.1.4.1 General**

The non-recognition of Rhodesia, a substantial increase in guerrilla pressures

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<sup>31</sup> See James Crawford *The Creation of States in International Law* (1979) 105.

and mandatory sanctions forced the Smith regime (and South Africa) to support efforts to find an internationally acceptable solution to the Rhodesian problem. The first initiative was taken by Dr. Henry Kissinger, the then United States Secretary of State, in the middle of 1976. Dr. Kissinger met Mr. Smith in South Africa on 19 September 1976 and presented him with the following peace proposals:

- (1) Rhodesia agrees to majority rule within two years.
- (2) Representatives of the Rhodesian government will meet immediately at a mutually agreed place with African leaders to organise an interim government to function until majority rule is implemented.
- (3) The interim government should consist of a Council of State, half of whose members will be black and half white with a white chairman without a special vote. The White and African sides would nominate their representatives. Its functions will include: legislation, general supervisory responsibilities and supervising the process of drafting the constitution.

The interim government should also have a Council of Ministers with a majority of Africans and an African first Minister. For the period of the interim government, the Ministers of Defence and of Law and Order would be white. Decisions of the Council of Ministers should be taken by two-thirds majority. Its functions should include delegated legislative authority, and executive responsibility.

- (4) The United Kingdom will enact enabling legislation for the process to majority rule. Upon enactment of that legislation, Rhodesia will also enact such legislation as may be necessary to the process.
- (5) Upon the establishment of the interim government, sanctions will be lifted and all acts of war, including guerrilla warfare, will cease.
- (6) Substantial economic support will be made available by the international community to provide assurance to Rhodesians about the economic future of the country. A trust fund will be established outside Rhodesia which will organise and finance a major international effort to respond to the economic opportunities of the country and to the effects of the changes taking place.

The Smith regime accepted these peace proposals subject to their being accepted by the other parties involved and subject to the lifting of sanctions and the cessation of the armed struggle.

On 26 September 1976 the Frontline States put forward proposals at considerable variance with the Kissinger proposals. On 28 October 1976 the United Kingdom government convened an All-Party Conference (including representatives of the Frontline States) in Geneva. A day thereafter (29 October 1976) the two main liberation movements (Zanu and Zapu) in Rhodesia formed a Patriotic Front against the Smith regime.<sup>32</sup>

On 10 March 1977 the United Kingdom and the United States of America agreed to work together on a joint peace initiative to achieve a negotiated settlement in Rhodesia, the objective being independence with majority rule in 1978. In April 1977 Dr. Owen, the new Foreign and Commonwealth Secretary in the United Kingdom Labour government, toured Southern Africa and met all the parties to the problem as well as the Presidents of the Frontline States, the Prime Minister of South Africa and the Commissioner for External Affairs of Nigeria. Dr. Owen set out the elements which, taken together, could in the view of the two governments comprise a negotiated settlement, as follows:

- (1) A constitution for an independent Zimbabwe which would provide for -
  - (a) a democratically elected government, with the widest possible franchise;
  - (b) a Bill of Rights to protect individual human rights on the basis of the Universal Declaration of Human Rights. The Bill would be made subject to special legislative procedures and it would give the right to an individual who believed his rights were being infringed to seek redress through the Courts;
  - (c) an independent judiciary.
- (2) A transition period covering the surrender of power by the then present regime, the installation of a neutral caretaker administration whose primary role, in

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<sup>32</sup> *Ibid.*

addition to administering the country, would be the organisation and conduct of elections in conditions of peace and security and the preparation of the country for the transition to independence. This period, it was envisaged, would be as short as possible, and in any case not more than six months.

- (3) The establishment of an internationally constituted and managed development fund (the Zimbabwe Development Fund).

Following the tour, Dr. Owen and Mr. Cyrus Vance, the United States Secretary of State, met in London on the 6 May 1977 and agreed to carry forward their consultations with the parties on the basis of these proposals. To this end they established a joint consultative group. The group met all parties on a number of occasions in London and in Africa and carried out detailed technical discussions with them. In parallel, the governments of interested countries were informed generally of the progress of the consultations.

On the basis of these consultations, the United Kingdom and United States governments decided to put forward firm proposals based on the following elements:

- (1) The surrender of power by the illegal regime and a return to legality.
- (2) An orderly and peaceful transition to independence in the course of 1978.
- (3) Free and impartial elections on the basis of universal adult suffrage.
- (4) The establishment by the British government of a transitional administration, with the task of conducting the elections for an independent government.
- (5) A United Nations presence, including a United Nations force, during the transition period.
- (6) An independence constitution providing for a democratically elected government, the abolition of discrimination, the protection of individual human rights and the independence of the judiciary.
- (7) A Development Fund to revive the economy of the country which the United Kingdom and the United States view as predicated upon the implementation of the settlement as a whole.

The proposed transitional agreements included the establishment of the office of Resident Commissioner who would be the representative of the Crown in Southern Rhodesia and in whom would be vested responsibility for all executive and legislative functions of the government of the country. However, the Resident Commissioner would exercise his powers subject to any instructions that he might be given by the United Kingdom government except so far as the constitution otherwise expressly provided. On 1 September 1977 Field Marshal Lord Carver was named as the Resident Commissioner designate.

These proposals were rejected by the Smith regime which embarked on efforts to find an internal settlement which, as shown above, failed to produce an internationally acceptable settlement.<sup>33</sup>

#### **5.1.4.2 The Lancaster Agreements**

Following her election as British Prime Minister, Mrs. Margaret Thatcher concerned herself with the Rhodesian problem. Despite her election promises that her government would recognise the Muzorewa regime, Mrs. Thatcher succumbed to international opinion against any British recognition of the Muzorewa regime. Consequently, in her opening address to the Commonwealth Conference held in Lusaka from 1 to 7 August 1979, Mrs. Thatcher committed her government to "genuine black rule in Zimbabwe" and "legal independence" (for Zimbabwe) on the basis which the Commonwealth and the international community as a whole would find acceptable. Following this address, President Nyerere of Tanzania put a new proposal for the settlement of the Rhodesian crisis. The essentials of Nyerere's proposals were for the British government to draw up "a genuine majority rule constitution". This constitution was then to be laid before all the parties to the dispute and after agreement on the constitution had been reached, the British government, as the relevant colonial authority, would call an election under international supervision.<sup>34</sup> Following a

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<sup>33</sup> *Ibid* 155-157.

<sup>34</sup> See Seamus Cleary *Zimbabwe is born* (1980) 7-8.

due consideration of the proposal the Commonwealth heads of government passed, inter alia, the following resolutions: (a) a recognition that the internal settlement constitution was defective in certain important respects; (b) the acceptance that it was the constitutional responsibility of the British government to grant legal independence to Zimbabwe on the basis of majority rule; (c) a recognition that the search for a lasting settlement must involve all parties to the conflict and (d) a welcome to the British government's indication that an appropriate procedure for advancing towards all the objectives stated would be for them to call a constitutional conference to which all the parties would be invited.<sup>35</sup>

The Lusaka Accord<sup>36</sup> which was embodied in paragraph 15 of the Heads of Government Communiqué issued at the end of the August meeting provided a framework for the Lancaster House Constitutional Conference which was convened by the British government in pursuit of the resolutions of the Commonwealth heads of governments. The Lancaster House Conference brought together the Muzorewa regime and the Patriotic Front comprising Zapu and Zanu, the two national liberation movements.

Pursuant to the Lusaka Accord the British government convened the Lancaster House Conference which commenced on 10 September 1979. The purpose of the Conference was to discuss and reach agreement on the terms of an independence constitution, and that elections should be supervised under British authority to enable Rhodesia to proceed to legal independence and the parties to settle their differences by political means.<sup>37</sup>

At the opening of the Conference the British government put forward constitutional proposals in accordance with the principles which were agreed

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<sup>35</sup> See Marshall *From Independence to Statehood in Commonwealth Africa* 164.

<sup>36</sup> See (1979) 5 C.I.B. 1333.

<sup>37</sup> See *Zimbabwe Rhodesia Report of the Constitutional Conference Lancaster House* (1979) 1.

at Lusaka and which formed the basis for other independence constitutions in Africa and elsewhere.<sup>38</sup>

In his opening address to the Lancaster House Conference the chairperson, Lord Carrington, recognised that the conference was taking place within the framework set out in the Lusaka Accord. The essential elements of this Accord were summarised as follows: the attainment for the people of Zimbabwe of genuine black majority rule through the adoption of a democratic constitution including appropriate safeguards for minorities; the transition to independence under such a constitution being the responsibility of the British government which would also supervise, prior to independence, the holding of free and fair elections with the presence of Commonwealth observers.<sup>39</sup> This framework, therefore, made Great Britain accountable to her Commonwealth partners as to the performance of her final major act of decolonisation.<sup>40</sup>

In terms of the proposals Britain, as the constitutional authority for Southern Rhodesia, took direct responsibility for the independence constitution. Their constitutional proposals took into account points made during consultations with all interested parties. However, the proposals were intended to give effect to the six principles which successive British governments had accepted as the proper basis for independence.<sup>41</sup> The British proposals provided (a) for an independent constitution modelled on the internal constitution<sup>42</sup> but with changes designed to remove the defects in the latter which were regarded as inconsistent with the principle of genuine majority rule; (b) for interim arrangements for the pre-independence period during which Rhodesia would return to legality under a British governor who would be responsible for the supervision of free elections; and (c) for a cease-fire which was to take effect

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<sup>38</sup> *Ibid* 9.

<sup>39</sup> See Peter Slinn "Zimbabwe Achieves Independence" (School of Oriental Studies, University of London, April 1989).

<sup>40</sup> *Ibid*.

<sup>41</sup> See *Zimbabwe Rhodesia Report of the Constitutional Conference* 10.

<sup>42</sup> I.e. the constitution of Zimbabwe Rhodesia Act No 12 of 1979.

between the Rhodesian security forces and the forces of the Patriotic Front soon after the governor had been installed in Salisbury and which would be monitored by a military force under British command.<sup>43</sup>

In the course of the proceedings the Conference reached agreement on (a) a summary of the Independence Constitution, (b) arrangements for the pre-independence period and (c) a cease-fire agreement. In concluding the agreement the parties undertook (a) to accept the authority of the Governor; (b) to abide by the Independence Constitution; (c) to comply with the pre-independence arrangements; (d) to abide by the cease-fire agreement; (e) to campaign peacefully and without intimidation; (f) to renounce the use of force for political ends; (g) to accept the outcome of the elections and to instruct any forces under their authority to do the same.<sup>44</sup>

Soon after the conclusion of the agreement the British Parliament passed the Southern Rhodesia Act 1979.<sup>45</sup> This was an enabling Act giving power to Her Majesty in Council (inter alia) (a) to provide a constitution for Zimbabwe on the day on which Southern Rhodesia became independent as a republic under the name of Zimbabwe; (b) to revoke the constitution order in Council of 1961 and to make transitional arrangements in connection with the coming into effect of the new constitution, and (c) to make provision for the government of Southern Rhodesia in the period up to independence.

#### **5.1.4.3 The Transitional Arrangements**

The parties agreed to the Independence Constitution subject to agreements on the arrangements for implementing it. The constitution gave effect to the principle of genuine majority rule and gave the government of Zimbabwe the powers to carry out the policies on the basis of which it was elected. Having

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<sup>43</sup> See *Zimbabwe Rhodesia Report on Constitutional Conference* 1-2.

<sup>44</sup> *Ibid.*

<sup>45</sup> See *Statutory Instrument* 1979 No 1571.

resolved the question of majority rule the British government left it to the people of Zimbabwe as a whole to decide through free and fair elections the issue of who was to form the future independent government. On its part the British government undertook (a) to transfer power to whatever leaders were elected by the people of Zimbabwe in elections held under these conditions and supervised under the British government authority and (b) to afford all parties an opportunity to take part on equal terms in elections held on the basis of the Independence Constitution which all parties had agreed to abide by.

The British government rejected the transitional arrangements of the Patriotic Front which proposed, inter alia, complex power-sharing arrangements in the interim and restructuring of the police and security forces in advance of the election. First, the British government maintained that the purpose of the pre-independence arrangements was to allow the parties to put their case to the people under fair conditions. They took the view that the pre-independence period should not be concerned with the remodelling of the institutions of government, but merely to level the playing field in order to allow all the parties to put their policies to the people. They maintained further that the remodelling of institutions of government would be a matter for the independence government elected by the people of Rhodesia. Secondly, the British government proposed that the administration of Rhodesia during the elections should be entrusted to the authority of the British government, while the leaders of all parties explain their case to the people. Thirdly, that the interim period be as short as possible and fourthly and finally, that both sides accept the authority of the British government and its determination to ensure the impartiality of the election process.

In line with the Lusaka Accord the British government would appoint a Governor under an Order in Council which would confer on him legislative and executive authority. In short, the Governor would be empowered to rule by decree. Thus, he would have powers to make laws by ordinance for the peace, order and good governance of Rhodesia. No other body (including the Rhodesian

Parliament) would exercise any legislative authority. These transitional arrangements also vested executive authority in the Governor and subjected all public officers and authorities in Rhodesia, including the civil service, the police, and the defence forces, to his directions. The Patriotic Front forces too, were placed under his command. Thus, the Rhodesian government had to surrender its "sovereignty" to the British government acting through the Governor. The appointment of the Governor, the making of the Independence Constitution and the holding of elections under it and the granting of independence to Rhodesia required British legislation.<sup>46</sup> Thus on 3 December 1979 the British government passed the Southern Rhodesia Constitution (Interim Provisions) Order 1979<sup>47</sup> making temporary provisions for the government of Southern Rhodesia and in particular providing for a Governor for Southern Rhodesia in whom full legislative and executive powers together with the exercise of the prerogative of mercy were vested.<sup>48</sup> This means that during the interim period Rhodesia would resume the status of a British colony and would be ruled directly by a British Governor, unaided by any representative institutions.<sup>49</sup>

A day before the Governor arrived the Rhodesian Parliament hurriedly passed an Act to amend the 1979 Constitution. This Amendment Act, the Constitution of Zimbabwe Rhodesia Amendment (No 4)<sup>50</sup> declared that "Zimbabwe Rhodesia shall cease to be an independent state and shall become part of Her Majesty's dominions". Thus, this Act reversed the Unilateral Declaration of Independence of 1965, withdrew certain parts of the 1979 Constitution and provided for a Governor to assume all legislative and executive powers. The agreed new constitution was annexed in a schedule and Parliament dissolved.<sup>51</sup>

On its part Britain had already dealt with the status of this colony under the

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<sup>46</sup> *Ibid* 628-631.

<sup>47</sup> See *Statutory Instrument* 1979 No 1571.

<sup>48</sup> Also see Marshall *From Independence to Statehood in Commonwealth Africa* 166.

<sup>49</sup> See Blaustein A, Gisbert P & Franz H *Constitutions of the Countries of the World* (1987) 17-18.

<sup>50</sup> See Act 44 of 1979.

<sup>51</sup> See Blaustein, Gisbert and Franz *Constitutions of the Countries of the World* 17.

Southern Rhodesia Act of 1965. Thus on 6 December 1979 the British Government issued the Zimbabwe Constitution Order 1979,<sup>52</sup> embodying the Independence Constitution whose operation was suspended until independence day had been fixed by Parliament.

#### 5.1.4.4 The Electoral Process

The Lusaka Accord and the Lancaster House agreement vested the constitutional responsibility to establish just conditions for independence in the British government. In terms of these agreements the British government was obliged to organise and conduct free and fair elections and to supervise such elections with Commonwealth observers.<sup>53</sup> Thus the British government deemed it unnecessary to accept complex power-sharing arrangements which were proposed by the Patriotic Front.<sup>54</sup>

In preparation for the elections certain parts of the Independence Constitution were progressively brought into force under the terms of the Southern Rhodesia (Constitution of Zimbabwe) Elections and Appointment Order 1979.<sup>55</sup> This measure empowered the Governor to make arrangements for the holding of a general election of the members of the House of Assembly provided for under the new Constitution and for the election and appointment of members of the Senate. The general election itself was conducted under the Electoral Act 1979 as amended by a number of ordinances enacted by the Governor. These Ordinances, in accordance with the Lancaster House agreements, vested responsibility, under the supervision of the Governor, for "ensuring the free and fair conduct of the elections" in the British Election Commissioner.<sup>56</sup> The Election Commission and Election Council Ordinance,<sup>57</sup> as its name indicates, provided for an election commissioner and his staff and functions and elections

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<sup>52</sup> *Statutory Instrument* 1979 No 1600.

<sup>53</sup> See *Report of the Constitutional Conference Lancaster House* (1979) 11.

<sup>54</sup> See Marshall *From Dependence to Statehood in Commonwealth Africa* 628.

<sup>55</sup> See Slinn *Zimbabwe Achieves Independence* 1051.

<sup>56</sup> See The Election Commissioner and Election Council Ordinance No. 2 of 1979.

<sup>57</sup> *Ibid.*

council and its functions as well as modifications to the Electoral Act of 1979. These provisions were designed to regulate the elections to be held before independence.

The various Ordinances promulgated by the Governor (a) regulated, inter alia, the conduct of elections in terms of the Lancaster House agreement,<sup>58</sup> (b) provided for certain aspects of the conduct of the Commonwealth monitoring forces,<sup>59</sup> (c) provided for the use of party names registered under the Act,<sup>60</sup> and (d) contained measures for the prevention of disruptive activities and the penalties therefore. Polling took place in February 1980 with an estimated 94 percent of the electorate voting. The Zanu (PF) party under Robert Mugabe won an overall majority obtaining 57 of the 80 seats allocated to Africans in the 100 member House of Assembly. The remaining Nationalist parties obtained 20 (Zapu, PF) and 3 (UANC) seats. The reserved 20 white seats were won by Ian Smith.

Following the elections victory of the Zanu (PF) party the Governor appointed Robert Mugabe the Prime Minister of the newly independent state of Zimbabwe. Mr. Mugabe formed a broadly-based government including 16 members of his party, 4 members of the Zapu (PF) party and two white Rhodesians. On 17 April 1980, Zimbabwe obtained its legal independence when the Governor transferred power to the government of Robert Mugabe under the Independence Constitution.<sup>61</sup>

#### **5.1.4.5 Main Features of the Independence Constitution**

##### **5.1.4.5.1 General**

One of the major questions in the decolonisation of Zimbabwe was what would happen to the white minority in the event of black majority rule. This question

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<sup>58</sup> See The Elections (Procedure) Ordinances 1979, 1980, No. 2, 1980.

<sup>59</sup> See the Commonwealth Ordinance 1980 No. 3 of 1980.

<sup>60</sup> See The Elections (Party Names) Ordinance No. 4 of 1980.

<sup>61</sup> See Marshall *From Dependence to Statehood in Commonwealth Africa* 169-70.

was incorporated among the six principles set by Britain for granting independence to Zimbabwe under a majority rule constitution. The desired protection of the white minority was stated as a requirement that there should be no oppression of the majority by the minority or of the minority by the majority. To that end the Independence Constitution incorporated structures of government and a Declaration of Rights which guaranteed white minority rights. Some aspects of these structures and the Declaration are analysed in this section to assess their impact on the dynamic concept of the Rule of Law.

#### **5.1.4.5.2 Structures of Government**

The Independence Constitution is based on the doctrine of separation of powers. It provided for the Executive,<sup>62</sup> independent judiciary<sup>63</sup> and a Parliament.<sup>64</sup> For the purpose of this thesis the focus falls on the composition and operation of Parliament as it embodied the constitutional guarantees which were adopted to protect white minority rights.

The Zimbabwean Parliament consists of the Senate<sup>65</sup> and House of Assembly.<sup>66</sup> In order to guarantee the representation of the white minority in Parliament, the Independence Constitution provided for a Delimitation Commission which divided Zimbabwe into eighty common roll constituencies and twenty white roll constituencies.<sup>67</sup> In line with this racial quota representation the constitution provided for separate voters' rolls for blacks and white; a bi-cameral legislature consisting of a 100-member House of Assembly<sup>68</sup> and a 40-member Senate.<sup>69</sup> Twenty of the seats in the House of Assembly were to be filled by whites while

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<sup>62</sup> See section 64.

<sup>63</sup> See sections 79-87.

<sup>64</sup> See section 32.

<sup>65</sup> See section 33.

<sup>66</sup> See section 38.

<sup>67</sup> Section 60(1) and (2).

<sup>68</sup> Section 38(1).

<sup>69</sup> Section 33(1).

80 are filled by blacks.<sup>70</sup> In the Senate 10 of the seats were reserved for whites<sup>71</sup> and 10 for chiefs.<sup>72</sup>

These arrangements could not be altered in the first seven years of independence save on the affirmative votes of all members of the House of Assembly and two-thirds of the Senate.<sup>73</sup> In effect therefore, whites were assured of reserved quotas of seats in both Houses of Parliament for the first seven years of Zimbabwe's independence. After the expiry of this period, the quotas could be abolished by the affirmative votes of 70 members of the House of Assembly and two-thirds of the Senate members.

Through their special representation in Parliament the white minority were empowered to block changes implied in the new democratic order or to slow down the pace of changes which they found unacceptable to them. In other words, the white minority was enabled to limit the impact of black majority rule and to delay the realisation of certain aspirations of the black majority.

Upon the expiry of the seven years the Zimbabwe Parliament passed an Amendment Act<sup>74</sup> which ended the special representation of whites in Parliament by abolishing the twenty reserved House of Assembly seats and the ten reserved Senate seats. The twenty House of Assembly seats were to be filled on a non-constituency basis, with the 80 elected members of the House sitting as an electoral college to vote for candidates to occupy the twenty seats. The plenary House of Assembly would further sit as a college to elect candidates to fill the ten Senate posts previously reserved for whites, but in the event the House of Assembly did not have to conduct such an election as the amending Act deemed the ten sitting white senators to have been elected under the new constitutional provisions.

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<sup>70</sup> See section 38(1)(a).

<sup>71</sup> See section 33(1)(b).

<sup>72</sup> See section 33(1)(c).

<sup>73</sup> See section 52.

<sup>74</sup> See Zimbabwe Constitution Amendment Act No. 6 of 1987.

The opposition to having special representation for whites was that such an arrangement might encourage them to have an insular attitude towards any future constitutional changes. It was also feared that whites could well have regarded their entrenched representation as capable of being extended and thereby restricting the representativity and democratic nature of the Zimbabwean Parliament.<sup>75</sup> On the contrary, the passage of the Constitutional amendment abolishing the reserved white seats did not, on the whole, lead to a racial conflict between black and white. Instead, of the seventy eight members of Parliament who voted for the bill, eight were whites.<sup>76</sup>

It would appear, therefore, that the reservation of seats for the white minority in Zimbabwe served as a confidence-building measure which assisted the white minority to accept the transfer of power to the people of Zimbabwe as a whole. However, the power of the majority remained subject to limitations embodied in the Declaration of Rights, especially the property-rights clause.

## **5.2 Namibia**

### **5.2.1 Introduction**

#### **5.2.1.1 Background**

When the United Nations was being established in San Francisco, a preparatory Commission was set up with the purpose of arranging and preparing for the convocation of the first session of the General Assembly.<sup>77</sup> One of the tasks of this Commission was to prepare for the transfer of "certain functions from the League of Nations to the United Nations."<sup>78</sup> The Commission passed a resolution in which the mandatory powers were called upon to submit trusteeship

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<sup>75</sup> See Luke Mhlaba "The Transitional Period in Retrospect, with Particular Reference to the Constitution and Minority Rights." Paper read at Conference on Zimbabwe's First Decade of Political Independence: Lessons for South Africa and Namibia, Harare 1990, 18.

<sup>76</sup> *Ibid* 20.

<sup>77</sup> See Ian Brownlie *Basic Documents in International Law* [1972] 63.

<sup>78</sup> *Ibid*.

agreements in the course of the first session of the General Assembly.<sup>79</sup> South Africa abstained at each stage of the deliberations in order to preserve its freedom of action in respect of Namibia.<sup>80</sup>

In the final session of the League the future of the mandate' system came under discussion again. The representatives of the other powers administering mandates stated their intention of bringing the territories under the United Nations Trusteeship system. On the other hand South Africa revealed its intention to annex Namibia. In this regard the South African representative stated that:<sup>81</sup>

"It is the intention of the Union government, at the forthcoming session of the United Nations General Assembly ... to formulate its case for according South West Africa a status which it would be internationally recognised as an integral part of the Union ... In the meantime, the Union will continue to administer the territory scrupulously in accordance with the obligations of the Mandate, for the advancement and promotion of the inhabitants, as she has done in the past six years when meeting of the Mandates Commission could not be held."

However, it is significant to note that South Africa did not regard the dissolution of the League as terminating its obligations under the mandate system. In the words of the South African representative:<sup>82</sup>

"The Union government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future of the territory."

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<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid* 68.

<sup>82</sup> *Ibid.*

In essence, these two statements clearly expressed the desire of South Africa to annex Namibia, while explicitly stating its recognition that whether the League existed or not it had obligations both to the inhabitants and the international community and that any change in the status of the territory would have to be agreed upon with the international community.<sup>83</sup>

When World War II began, the League of Nations and the Mandate Commission became ineffectual and the Union of South Africa stopped sending even the annual reports. During the Second World War, the League became completely useless and died thereafter.

In the final League session held on 18 April 1946 a final resolution was adopted which embodied the notion of a "sacred Trust" contained in Article 22 of the Covenant of the League of Nations. The resolution read:<sup>84</sup>

"The Assembly: .....

3. Recognises that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;
4. Takes note of the expressed intentions of the members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned in the respective mandates, until other arrangements have been agreed between the United Nations and the respective mandatory powers."

Meanwhile the United Nations was established under a Charter which was signed at San Francisco on 26 June 1945. The UN Charter contained a number of distinctive features. First, the Charter reveals the differences in conception with regard to the international accountability of dependent and trust

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<sup>83</sup> See TD Gill *South West Africa and the Sacred Trust 1919-1972* (1984) 19.

<sup>84</sup> Brownlie *Basic Documents in International Law* 70.

territories. While Article 22 of the Covenant of the League made no provision for the independence of the mandated territories, Article 16 of the UN Charter expressly committed the trust authority

"to promote the political, economic, social and educational development of the inhabitants of the trust territories, and their progressive development towards self-government and independence."

However, the UN Charter did not provide for the continuance of the mandates.

Instead, chapter XII initiated an International Trusteeship system. Article 75 of the Charter provides for the administration and supervision of such territory (to be known as Trust Territory) as may be placed under the International Trusteeship System by subsequent agreement. The object of the Trusteeship System is the same as the object of the Mandate System, and Article 77(1) provides that:

"The Trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements: (a) territories now held under mandates; (b) territories which may be detached from enemy States as a result of the Second World War; and (c) territories voluntarily placed under the System by States responsible for their administration."

However, Article 77(2) provided that:

"It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms."

Furthermore, Article 79 provided that:

"The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the States directly concerned, including the mandatory power in the case of

territories held under mandate by a member of the United Nations, and shall be approved as provided for in Articles 83 and 85.”

These sections notwithstanding the rights of the affected peoples were protected by Article 80(1) which provided that:

“Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which members of the United Nations may respectively be parties.”

To give effect to the Trusteeship system chapter XIII of the UN Charter established a Trusteeship Council which substituted the Mandate Commission of the League of Nations.

The Trusteeship Council under the authority of the UN General Assembly, (a) considers the reports of the administering authorities; (b) accepts petitions, and examines them in consultation with the administering authorities; (c) provides for periodical visits to the respective trust territories at times agreed upon with the administering authorities, and (d) takes these and other actions in conformity with the terms of the trusteeship agreements.

Last but not least, the voting procedure of both the Trusteeship Council and the General Assembly was one in which majority decisions had force, in contrast to the necessity of unanimity in the League Council and Permanent Mandate Commission.<sup>85</sup>

The UN Charter included as an annexure the Statute of a new court called the International Court of Justice. By chapter XIV this Court was established as the

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<sup>85</sup> See S Slonim *South West Africa and the United Nations; an International Mandate in Dispute* (1973) 60. Also see Articles 18 and 89 of the Charter.

judicial organ of the UN to function in accordance with the Statute annexed to the Charter and forming part of it. All member countries (of which South African was one) were deemed to have subscribed to the Statute when they subscribed to the Charter. Each member undertook to comply with the decisions of the International Court of Justice, in any case to which it is a party and, on failure, the Security Council is to decide what action to take. The ICJ has two major functions: (a) to give advisory opinions on any legal question if invited by the General Assembly or the Security Council; and (b) to decide any contentious matter between two Member States. South Africa is an original signatory of the UN Charter and is bound by all the conditions of the Charter and the annexures thereto (thus also by the decisions of the International Court of Justice).

### **5.2.3 South West Africa and the International Court of Justice**

#### **5.2.3.1 The United Nations and the Mandate System**

In Chapter 3 (paragraph 3.4.1) above it was shown that South Africa assumed obligations of a mandatory power over Namibia under Article 22 of the Covenant of the League of Nations. In Chapter 2 (paragraphs 2.1 and 2.2.1) it was shown that after World War II the UN was formed which de facto, not de jure, became a successor of the League. Consequently, no arrangements were made for a formal transfer of the powers and functions of the League to the UN - especially the mandate system.

The UN Charter, unlike the Covenant of the League, was designed to promote the decolonisation of countries and the realisation of the right of self-determination of colonial peoples.<sup>86</sup> Furthermore, under the Covenant, the

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<sup>86</sup> See Du Pisani *SWA/Namibia, The Politics of Continuity and Change* [1986] 110. Also see Articles 1(2) and 55 of the UN Charter.

administration of colonial territories fell under the domestic jurisdiction of member countries while under the UN Charter it fell under the system of international accountability. Chapter XI of the Charter dealt with the non-self-governing territories under which the mandated territory of South West Africa fell. Although the international accountability for these territories was limited the mandatory powers were obliged to discharge their obligations towards the peoples of these territories in terms of the provisions of the UN Charter. Moreover, Articles 73 and 74 of the Charter provided that the interests of these peoples should enjoy preference to any others. As a member of the UN South Africa was bound by these provisions.

Shortly after the formation of the United Nations, the General Assembly, on several occasions during its meetings, passed several resolutions<sup>87</sup> recommending that South West Africa should be placed under the International Trusteeship system and that the United States of America should propose the terms of agreement. South Africa did not take note of these recommendations. Although South Africa had accepted the validity of her obligations under the Covenant even after its demise<sup>88</sup> she changed her attitude after the dissolution of the League.

The attitude of South Africa was informed by the apparent vacuum which developed between the dissolution of the League and the coming into effect of the International Trusteeship agreements under chapter XII of the UN Charter. South Africa argued that, although the principles in chapters XI, XII and XIII of the UN Charter corresponded to those embodied in Article 22 of the Covenant of the League there was no legal obligations on her to place South West Africa under a trusteeship system as the UN was not a legal successor of the League. This attitude was surprising as South Africa had signed a final Resolution of the League recognising the continued existence of her obligations under Article 22.<sup>89</sup>

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<sup>87</sup> See Resolution 65(I) of 14 December 1946, 141(II) of 1 November 1947, 227(III) of 26 November 1948 and 337(IV) of 6 December 1949.

<sup>88</sup> See note 83 *supra*.

<sup>89</sup> *Ibid.*

For South Africa the said Final Resolution, the Covenant and the UN Charter did not create any legal obligation to conclude a trust agreement with the UN regarding South West Africa, even though the mandatory powers (including South Africa) had agreed to respect the mandates clause until corresponding trusteeship agreements were concluded.<sup>90</sup>

### 5.2.3.2 History of the Dispute

During the General Assembly's first session in 1946, South Africa proposed the incorporation of Namibia into the Union of South Africa claiming that the majority of Namibians desired the change.<sup>91</sup> In fact the annexation of Namibia was unanimously endorsed by the white-only territorial legislative assembly while consultations with the black majority were conducted through chiefs who were neither educated nor conversant with constitutional or international affairs.<sup>92</sup> South Africa sought to base the annexation of Namibia on the outcome of this controversial "referendum" arguing (in the person of General Smuts) that the referendum had offered the people of Namibia an opportunity to exercise their right of self-determination.<sup>93</sup>

Even without questioning the validity of consultations with the black majority the General Assembly rejected the South African argument outright. The General Assembly came to the conclusion that the black majority in Namibia had not yet secured political autonomy or reached a stage of political development enabling them to express a considered opinion which the Assembly could recognise on such an important question as incorporation of their territory. Thus the Assembly found itself unable to accede to the

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<sup>90</sup> *Ibid.*

<sup>91</sup> See *General Assembly Official Records* 1st session (2nd part) Fourth Committee Pt 1 231-5 (Doc. A/123). Also see John Dugard (ed) *The South West Africa/Namibia Dispute; Documents and Scholarly Writings on the Controversy Between South Africa and the United Nations* (1973) 104-9.

<sup>92</sup> See Michael Scott *Shadow over Africa* (1950) 10-14.

<sup>93</sup> See *Union of South Africa Debates of the House of Assembly* (21 February - 5 June 1947) Vol 60 Cols 1319-1354.

incorporation of Namibia into the Union of South Africa. Instead, it recommended that this territory be placed under the international trusteeship system and suggested that South Africa submit a proposal on the trusteeship agreement for its consideration.<sup>94</sup>

Six months after the adoption of this resolution South Africa informed the UN that it had decided not to proceed with the annexation of Namibia but to maintain the status quo and to continue to administer the territory in the spirit of the mandate. Also, South Africa undertook to submit reports on its administration of the territory for the information of the United Nations.<sup>95</sup> In response, the General Assembly of the UN again urged that Namibia be placed under the trusteeship system. Furthermore, the General Assembly authorised the Trusteeship Council to examine the report submitted by South Africa and to submit its observations to the Assembly.<sup>96</sup>

In 1947 South Africa submitted its first report on its administration of Namibia. The Trusteeship Council examined the document, requested supplementary information and adopted observations on the report for the third session of the General Assembly.<sup>97</sup> The observations of the Trusteeship Council, inter alia, noted:

- (1) that the indigenous inhabitants of the territory had no political rights; neither franchise nor representation in the administration and legislature, nor eligibility to public office.
- (2) that whites, who constituted some 10 percent of the population, owned over half the occupied land;
- (3) that the Namibian budget allocated only about 10 percent of public funds for blacks although they constituted nearly 90 percent of the population.

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<sup>94</sup> See General Assembly Resolution 65(I) (1946).

<sup>95</sup> See General Assembly Official Records, 2nd session 4th Committee (Doc A/334) 134-5.

<sup>96</sup> See General Assembly Resolution 141(II) 1947.

<sup>97</sup> See 3rd session supp no 4 43-5.

Consequently, the Trusteeship Council recommended the abolition of both urban segregation and the system of native reserves in the rural areas, and urged immediate provision of the education of African children.

The General Assembly noted the Council's observations and requested the Secretary-General to forward them to the South African government. In the same resolution the Assembly recommended that Namibia be placed under the trusteeship system and that Pretoria should continue to submit annual reports on its administration of the territory.<sup>98</sup>

In 1948 the National Party came to power on the platform of apartheid. A representative of this government informed the General Assembly during its 1948 session that South Africa intended to form a closer bond with Namibia by granting it representation in the South African Parliament.<sup>99</sup> The following year (1949) South Africa made provision for six white members to be elected to the House of Assembly from South West Africa and for two (white) Senators to be elected and another two to be nominated.<sup>100</sup> In the same year South Africa informed the Secretary-General of the UN that she would no longer send any reports to the UN on her administration of Namibia. Nevertheless, South Africa denied that these moves were intended to unilaterally change the legal status of Namibia in violation of the mandate.<sup>101</sup>

In its letter of July 11 1949, addressed to the General Assembly, South Africa rejected the supervisory jurisdiction of the UN in Namibia. She stated that:<sup>102</sup>

"The Union Government have at no time recognised any legal obligations ... to

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<sup>98</sup> See General Assembly Resolution 227(III) 1948.

<sup>99</sup> See *General Assembly Official Records* (4th session, 4th committee, annex to summary records of 1949 meeting) Doc A/929 7-8.

<sup>100</sup> See South West Africa Affairs Amendment Act 23 of 1949.

<sup>101</sup> See United Nations Institute for Namibia *Namibia: A Direct United Nations Responsibility* (1987) 170-1.

<sup>102</sup> See *General Assembly Official Records* 4th session fourth committee, Annex to Summary records (1949 Doc A/929) 7-8.

supply information on South West Africa to the United Nations, but in a spirit of goodwill, co-operation and helpfulness offered to provide ... reports ... with the clear stipulation that this would be done on a voluntary basis ... and on the distinct understanding that the United Nations has no supervisory jurisdiction in South West Africa."

Furthermore, the letter criticised the Trusteeship Council for unjustified criticism and censure of South Africa's administration in both Namibia and South Africa itself. Also, the letter challenged the competency of the Trusteeship Council to make recommendations on matters of internal administration of Namibia.

However, South Africa reaffirmed its assurances that South Africa intended to administer the territory in the spirit of the mandate and that the new arrangement for closer association of South West Africa with South Africa did not mean incorporation or absorption of the former by the latter.

Upon receipt of the letter the Trusteeship Council announced that it could no longer exercise its functions - due to the South African challenge of its competency to make recommendations on the administration of Namibia.<sup>103</sup> In turn, the General Assembly expressed its regret at this decision and then reiterated all its previous resolutions and invited South Africa to resume its reports and to comply with the relevant General Assembly resolutions.<sup>104</sup>

## **5.2.4 Namibia in the International Court of Justice**

### **5.2.4.1 General**

The dispute between South Africa and the UN over Namibia forced the UN to approach the International Court of Justice, its judicial organ, for advisory

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<sup>103</sup> See Trusteeship Council Resolution III (V) (22 July 1949) (Official Records of the General Assembly).

<sup>104</sup> See General Assembly Resolution 337 (VI) 1949.

opinions which were pronounced in 1950, 1955 and 1956. In 1962, 1966 and 1971 the International Court of Justice also handed down judgements on Namibia.

It is not intended in this chapter to make any critical study of these advisory opinions and judgements. Too much has been written on the opinions and judgements to merit any such study. Here, it is proposed to provide a brief summary of the questions submitted to the Court and the holdings of the Court with a view to trace the evolution of the UN jurisdiction over Namibia.

#### **5.2.4.2 The 1950 Advisory Opinion**

In response to the defiant attitude of South Africa regarding the supervisory jurisdiction of the UN over Namibia, the General Assembly requested the International Court of Justice for legal advice on the international status of Namibia and the legal obligations of the Union of South Africa arising therefrom, in particular, (a) whether South Africa continued to have international obligations under the mandate for South West Africa and, if so, what were these obligations; (b) whether the provisions of chapter XII of the UN Charter were applicable and, if so, in what manner to the territory of South West Africa, and (c) whether South Africa had the competence to modify the international status of Namibia

The International Court of Justice handed down its Advisory Opinion on 11 July, 1950 in an eight to six decision. The Court held that South African was not obliged to place the mandate under the trusteeship system.<sup>105</sup> The basis of the Court's arguments rested on the premise that Articles 75 and 77 of the UN Charter were permissive in their wording ("as may be placed thereunder").<sup>106</sup> Further, the Court found that while the Charter had clearly predicted that the natural place for all mandated territories was within the trusteeship system, and

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<sup>105</sup> See *ICJ Reports* (1950) 110.

<sup>106</sup> *Ibid* 139.

that this could only take place after successful negotiations between the mandatory power and the UN, the mandatory powers were under no legal obligation to place mandates under the trusteeship system.<sup>107</sup> However, these findings did not mean that South Africa had ceased to be subject to any legal obligations with regard to her international accountability.

The Court distinguished two sorts of obligations resulting from the Mandate Agreement. The first obligation was directly related to the administration of the territory and corresponded to the sacred trust of civilisation referred to in Article 22 of the Covenant.<sup>108</sup> The second obligation concerned the machinery of implementation of the sacred trust and corresponded to the securities for the implementation of the trust.<sup>109</sup> With regard to the first group of obligations the Court took the view that they were the material obligations of the mandatory.<sup>110</sup>

"to promote to the utmost the material and moral well-being, and the social progress of the inhabitants."

These obligations had been worked out in the further articles of the mandate with specific reference to arms and alcohol traffic, slave trade, freedom of conscience and worship and more. Further, the Court stated categorically that:<sup>111</sup>

"These obligations represent the very essence of the sacred trust of civilisation. Their *raison d'être* and original object remain in force. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because these supervisory organs had ceased to exist. This view is confirmed by Article 80(I) of the UN Charter which maintains the rights of states and peoples and the terms of international agreements until the territories in question are placed under the Trusteeship System."

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<sup>107</sup> *Ibid* 140.

<sup>108</sup> *Ibid* 133.

<sup>109</sup> *Ibid*.

<sup>110</sup> See Slonim *South West Africa and the United Nations* 369.

<sup>111</sup> See *ICJ Reports* (1950) 133.

In short, the Court found that South Africa had no right to unilaterally alter the status of Namibia.

In other words, while South Africa was not bound to bring the mandate within the trusteeship system, she was still subject to the obligations that were part of the sacred trust of civilisation, as embodied in the Mandate Agreement. The Court put this in more definite and emphatic terms:<sup>112</sup>

"The authority which the Union Government exercises over the territory is based on the Mandate. If the Mandate lapsed, as the Union contends, the latter's authority would equally have lapsed. To retain the rights derived from the mandate and to deny the obligations thereunder could not be justified."

Then the Court turned to the question of the degree of supervision that the General Assembly was authorised to exercise over the administration of the Mandate.

Regarding this question, the Court found that since Namibia was still subject to the Mandate Agreement:<sup>113</sup>

"The degree of supervision should not therefore exceed that which applied under the Mandate System, and should conform as far as possible to the procedure followed in this respect by the Council of the League. These observations are particularly applicable to annual reports and petitions."

The Court also found that South Africa was still subject to the compulsory jurisdiction of the International Court in any dispute between itself and another member of the League of Nations.<sup>114</sup>

In the light of these considerations the Court concluded that South Africa was

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<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid* 138.

<sup>114</sup> *Ibid.*

only competent to modify the international status of Namibia with the consent of the UN.<sup>115</sup>

The 1950 Advisory Opinion was a turning point in the UN efforts to bring Namibia under the trusteeship system. Basing its considerations on Article 80(1) of the UN Charter the Court found that the UN had succeeded the League as a supervising body with regard to the mandate. The essential point in this regard was that South Africa held the territory solely in trust for the international community, and was therefore not able to alter the status of the territory without the concurrence of the international community. In the view of the court the fact that the League which acted for the international community in 1919 did not exist in 1950, did not change this basic premise. In the opinion of the Court South Africa was not in Namibia as mandatory power on the basis of a contractual relationship with the League, but as the exerciser of the Sacred Trust embodied in the Covenant of the League and the Mandate agreement.<sup>116</sup> As the Court put it:<sup>117</sup>

"It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar though not identical supervisory functions."

Five judges dissented in part while various commentators offered a number of interpretations to explain the succession of the UN to the League of Nations.<sup>118</sup> For the purpose of this thesis it is not necessary to explore these dissenting opinions and commentaries.

Suffice it to say that the Courts Finding on the question of succession was based on the principle of effectiveness of the original treaties which set up the

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<sup>115</sup> Slonim 118.

<sup>116</sup> See *ICJ Reports* 135-137.

<sup>117</sup> *Ibid.*

<sup>118</sup> See Slonim *South West Africa an International Mandate in Dispute* 120.

mandate system. The Court recognised that the abolition of international supervision would effectively terminate the whole mandate status. Thus the Court was compelled to read into the original documents a principle of succession in international organisation in order to give effect to the original obligations assumed under the mandate. Consequently the Court concurred with the General Assembly in providing a legal basis for the UN supervision of the Mandate of Namibia, making it more difficult for South Africa to annex this territory.

Meanwhile two factors reinforced demands for the implementation of the Advisory Opinion of 1950. These factors were (a) the growing opposition to the apartheid system by the disenfranchised black majority in South Africa, and (b) international pressure from anti-colonialist states that the Advisory Opinion should be given immediate and direct effect. These states found that the Opinion spoke for itself, and saw no need to enter into tortuous negotiations with the South African government to find the best means of effecting United Nations supervision.<sup>119</sup> Thus states relied on the holding of the ICJ that the United Nations was entitled to exercise supervision in the execution of the mandate, but that this supervision must resemble as far as possible that which was exercised by the League Council and the Permanent Mandate Commission.<sup>120</sup> On the other hand Western powers preferred negotiations with South Africa as the best way of working out a form of UN supervision, as far as that could be achieved, in accordance with League practice.<sup>121</sup> Following a deadlock between the anti-colonialist states and Western colonial powers (as well as the United States), the General Assembly passed a compromise resolution accepting the Advisory Opinion (1950) and urging South Africa to take the necessary steps to give effect to the opinion, including the transmission of reports and petitions, established an Ad hoc Committee of five states<sup>122</sup> to

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<sup>119</sup> *Ibid* 126.

<sup>120</sup> See Gill *South West Africa and the Sacred Trust* 31.

<sup>121</sup> Slonim *South West Africa an International Mandate In Dispute* 126.

<sup>122</sup> Amongst others Denmark, Thailand and Uruguay. See Gill *South West Africa and the Sacred Trust* chapter 7 note 6.

confer with South Africa concerning the procedural measures necessary for implementing the Advisory Opinion and as far as possible, in accordance with the procedure of the former Mandate System, to examine reports and petitions that may be submitted to the Secretary-General.<sup>123</sup>

South Africa rejected this opinion arguing that the United Nations had no right to exercise supervision over the administration of the territory, and repeating that the Mandate had lapsed. Protracted negotiations which followed resulted in the suspension of negotiations. When negotiations were resumed in the years 1952 and 1953 neither party was willing to compromise. Hence, the talks deadlocked again making it impossible for the Ad hoc Committee to reach an acceptable agreement with guarantees for international supervision by the UN of the Mandatory power. The resulting anger and frustration led to a hardening resolve by the General Assembly to implement the 1950 Opinion with or without South African co-operation.

Thus on 28 November 1953 the General Assembly established a Committee on South West Africa.<sup>124</sup> This Committee consisted of representatives of 8 countries.<sup>125</sup> The new Committee differed from the Ad hoc Committee in that the latter had placed the emphasis upon negotiations with South Africa while the former was primarily of a supervisory nature.<sup>126</sup> The task of the new Committee was to imitate the Permanent Mandate Commission by examining information in the scope of the former questionnaire regarding the administration of the territory, by examining reports and petitions concerning South West Africa, and relaying this information to the General Assembly in periodic reports.<sup>127</sup>

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<sup>123</sup> *Ibid* 127.

<sup>124</sup> *Ibid* 148.

<sup>125</sup> Including Brazil, Mexico, Norway, Pakistan, Syria, Thailand and Uruguay. See Gill *South West Africa and the Sacred Trust* 34.

<sup>126</sup> Slonim *South West Africa an International Mandate in Dispute* 141 note 2.

<sup>127</sup> *Ibid* 141-142.

The Committee began by requesting South Africa to resume negotiations with a view to implementing the Advisory Opinion and to submit a report concerning conditions in the mandate.<sup>128</sup> From the outset South Africa refused to cooperate with the Committee and, in particular, refused to recognise the obligation to submit reports and petitions to the Committee.<sup>129</sup> In the light of this attitude the Committee decided to independently assess the conditions in the territory.<sup>130</sup> Using South African documentation and statistics as well as independent sources of information, the Committee released a report with detailed information concerning the political, social and economic conditions prevailing in the territory.<sup>131</sup> The scathing attack of the report on South African administration of the territory led the General Assembly to conclude that the Administration of South West Africa is in several aspects not in conformity with the obligations under the mandate.<sup>132</sup>

#### **5.2.4.3 The 1955 Advisory Opinion**

The Committee of South West Africa was also tasked to draw up procedural rules for the General Assembly to examine and review petitions and reports submitted by the Committee.<sup>133</sup> According to the 1950 Advisory Opinion these rules had to conform as far as possible to the procedure followed by the Council of the League of Nations. These observations were particularly applicable to annual reports and petitions.

A major controversy ensued with regard to the interpretation of the committee's special rule F which dealt with the voting procedure to be applied in the review of reports and petitions. South Africa took the view that the Court had meant that any voting procedure would have to embody the League practice of

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<sup>128</sup> *Ibid* 144.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

unanimity, implying automatically that South Africa would exercise a veto over any resolutions pertaining to such reports. Other delegations held the view that the reservation "as far as possible" concerning the procedure to be followed by the General Assembly left the way open to apply the normal voting rules envisaged in Article 18 of the Charter of the UN.<sup>134</sup>

The South West Africa Committee offered a compromise in the form of a voting procedure providing for a two-thirds majority regarding reports and petitions, subject to concurrence by South Africa.<sup>135</sup> The non-aligned group opposed any form of veto by South Africa while Western powers called for another Advisory Opinion by the Court on the matter. A deadlock on the issue was averted when the General Assembly decided to refer the question of the voting procedure to the Court.<sup>136</sup>

The Court adapted the textual interpretation of its 1950 Opinion and handed down a unanimous opinion confirming the right of the General Assembly to take decisions relating to reports and petitions by a two-thirds majority vote.<sup>137</sup> The essence of the 1950 and 1955 Advisory Opinions was that South Africa was still subject to international accountability with regard to the mandate. Quite naturally, this could not continue under the UN as it did under the League. The ICJ had given the General Assembly the latitude to find a new form in which to clothe the basic principle with the reservation that the supervision should comply "as far as possible" with that exercised by the League.<sup>138</sup>

The Tenth session of the General Assembly held in 1956 addressed three major issues. First, the 1955 Advisory Opinion, secondly the report of the South West Africa Committee on General Conditions in the Mandate, and thirdly, the question of admissibility of oral hearings of petitions by the South West Africa

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<sup>134</sup> For a text see *The Europa World Yearbook 1993* vol 1 (1993) 9-16.

<sup>135</sup> Slonim *South West Africa an International Mandate in Dispute* 144-145.

<sup>136</sup> *Ibid.*

<sup>137</sup> See *Voting Procedure Opinion 1955, ICJ Reports* 124.

<sup>138</sup> Slonim *South West Africa an International Mandate in Dispute* 154.

Committee. With regard to the 1955 Opinion South Africa, which had not participated in the 1955 ICJ proceedings, refused to accord the opinion any acceptance. In the South African view, the Opinion had done no more than interpret an already incorrect 1950 opinion.<sup>139</sup>

The report of the South West Africa Committee was presented in the wake of South African obstruction and lack of co-operation.<sup>140</sup> The report was highly critical of South African administration of Namibia, accusing the Union government of favouring only the European inhabitants of the territory and of neglecting the welfare of the other communities.<sup>141</sup>

With regard to the third question, regarding the reservation clause, the practice had been that petitions in the time of the League Council could only be submitted in writing by the mandatory to the Permanent Mandate Commission.<sup>142</sup> Given the lack of consensus between South Africa and the UN and the UN members inter se the General Assembly was once again compelled to submit the matter to the International Court of Justice which decided narrowly in an eight to five opinion that oral hearings of petitions were not contrary to the 1950 opinion.<sup>143</sup>

On this occasion the court abandoned its textual interpretation of the 1950 Opinion, replacing it with an approach which took the entire 1950 Opinion into account, and analysed its general meaning.<sup>144</sup> The Court found, in particular, that the general meaning of the 1950 Opinion had been "to safeguard the sacred trust of civilisation through the maintenance of effective international supervision of the administration of the mandated territory".<sup>145</sup>

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<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid* 155.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid* 158.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid* 159.

#### 5.2.4.4 The Contentious Proceedings on Namibia

##### 5.2.4.4.1 Background

Attempts by the South West Africa Committee to induce South Africa to negotiate or submit reports concerning the mandate failed in 1956 as it did in previous years.<sup>146</sup> In the light of the intransigence of the South African Government the Committee submitted another report based on publicly available information released by the South African Government, and other independent sources. The report, like its predecessors, criticised the South African Government for failing to meet the obligations of the Mandate.<sup>147</sup>

The new and most significant part of this report was the reference made to South Africa's introduction of its apartheid policies to Namibia.<sup>148</sup> Though not explicit, the introduction of apartheid to Namibia had already become clear after the introduction of the Native Affairs Administration Act of 1954. The passage of this Act meant that henceforth the administration of black affairs in both South Africa and Namibia would fall under the same apartheid administrative bodies. This uniform application of apartheid policies in both South Africa and Namibia confronted the South West Africa Committee, for the first time, with the issue of apartheid in the South West Africa dispute. Between 1945 and 1955 the conflict had centred on the issues of the maintenance of South West Africa's legal status as a territory subject to international supervision distinct from the Union of South Africa.<sup>149</sup> According to the Committee the application of apartheid policies in Namibia was<sup>150</sup>

"neither in conformity with the principles of the mandate system nor with the Universal Declaration of Human Rights, nor with the Advisory Opinions of the International Court of Justice, nor with the resolutions of the General Assembly."

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<sup>146</sup> See Slonim *South West Africa an International Mandate in Dispute* 167.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> See Gill *South West Africa and the Sacred Trust*.

<sup>150</sup> Cited from Gill *ibid* 41.

This finding of a violation of international law, in particular the Universal Declaration, led the General Assembly to pass another resolution (1956) on the dispute.

In its 1956 resolution the General Assembly requested the Committee to investigate ways in which South Africa could be induced to co-operate, if need be, by contentious proceedings in the Court.<sup>151</sup> In August 1957 the Committee submitted in addition to its regular report on Conditions, its findings concerning the possibilities of legal action against South Africa to the General Assembly.<sup>152</sup> To avert a looming deadlock on the issue, the General Assembly adopted a compromise resolution calling for a delay in the detailed consideration of legal action until the next session of the General Assembly. In addition, a Good Offices Committee was set up with wide powers of negotiation to attempt to find a "just and reasonable" solution to the problem.<sup>153</sup> The Committee tried in vain to find a solution.<sup>154</sup>

Following the failure of all other efforts to resolve the conflict, the room was then open to contentious proceedings. Thus on 17 November 1959 the General Assembly adopted a resolution drawing<sup>155</sup>

"The attention to the conclusions of the special report of the Committee on South West Africa covering the legal action open to member states to refer any dispute with the Union of South Africa concerning the interpretation or application of the Mandate for South West Africa to the International Court of Justice for adjudication in accordance with Article 7 of the mandate read in conjunction with Article 37 of the Statute of the Court."

The door to a compromise solution which would have maintained the status quo closed on 4 November 1960 when Ethiopia and Liberia instituted

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<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid* 171-2.

<sup>153</sup> *Ibid* 172.

<sup>154</sup> See Gill *South West Africa and the Sacred Trust* 42.

<sup>155</sup> *Ibid* 43.

contentious proceedings against the Union of South Africa before the International Court of Justice. The papers before the Court contained nine basic submissions upon which they wished the Court to give its ruling.<sup>156</sup> These submissions were:

- [1] South West Africa is a territory under Mandate.
- [2] The Union continues to have international obligations stated in Article 22 of the Covenant and in the Mandate agreement, with supervisory functions to be exercised by the United Nations to which annual reports and petitions are to be submitted.
- [3] The Union has practised apartheid, in violation of Article 2 of the Mandate and Article 22 of the Covenant, and it has the duty forthwith to cease such practice.
- [4] The Union has violated Article 2 of the Mandate and Article 22 of the Covenant by failing to promote to the utmost the material and moral well-being and social progress of the inhabitants of the territory and has a duty forthwith to proceed to carry out these obligations.
- [5] The Union has, by word and action, treated the territory in a manner inconsistent with its international status and has impeded opportunities for (the development and exercise of) self-determination and has a duty to desist from such acts.
- [6] .....
- [7] The Union has failed to submit annual reports to the General Assembly, in violation of Article 6 of the Mandate.
- [8] The Union has failed to transmit petitions to the General Assembly, in violation of its obligations as mandatory, and has the duty to submit same to the General Assembly.
- [9] The Union has attempted to modify substantially the terms of the mandate without Assembly consent, in violation of Article 7 of the Mandate.

The three basic premises of these submissions were, first, that the mandate continued to exist under international law. Secondly, that the principle of the

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<sup>156</sup> See *ICJ Reports* (1962) 324.

sacred trust and its corollary, international accountability, was applicable to the territory, and thirdly, that the Union had failed to promote the well-being of the territory's inhabitants.

In effect, Ethiopia and Liberia were asking the Court to confirm and extend its 1950 Advisory Opinion by ruling that the Mandate continued to be in force, and by defining the Mandatory's obligations with regard to international accountability and the promotion of the welfare of the inhabitants of the territory. Thus, the applicants brought the fundamental issue of apartheid policies for the first time to the consideration of the ICJ.<sup>157</sup>

South Africa responded to the application by raising four preliminary objections:<sup>158</sup>

- (1) that since the dissolution of the League the Mandate was not a treaty in force (under Article 37 of its Statute, the Court had no jurisdiction to hear an issue arising under such a treaty) and, in any case, Article 7 of the Mandate, which gave jurisdiction to the Court to hear contentious cases under treaties, no longer existed;
- (2) that neither Liberia nor Ethiopia was "another member of the League of Nations" and Article 7 authorised only such members to bring proceedings before the Court;
- (3) that the conflict between the two African states and the Union was not the kind of dispute to which Article 7 of the Mandate applied because no material interest of the applicant governments or of their citizens was involved; and
- (4) that the conflict did not meet the requirement of Article 7 that it cannot be settled by negotiations.

The Court overruled these objections by a vote of eight to seven.<sup>159</sup>

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<sup>157</sup> See Gill *South West Africa and the Sacred Trust* 45.

<sup>158</sup> See *ICJ Reports* (1962) 326-7.

<sup>159</sup> *Ibid* 347.

In overruling the first objection the Court stood by its holding in the 1950 Advisory Opinion in which it was held unanimously that Article 7 of the Mandate was still in force. The Court also rejected South Africa's contention that it continued to have rights over the territory without any corresponding legal obligations.<sup>160</sup> All in all, the Court found, first, with an eight to seven majority, that it had jurisdiction to adjudicate upon the merits of the dispute and secondly, that Article 7 of the Mandate was still in force and that according to Article 37 of the Statute of the Court, the Court had a right to hear the case. The Court reached this decision by reasoning that there was a dispute between parties which could not reasonably be expected to be resolved by means of negotiations. Furthermore, the Court emphasised the role of "the sacred trust of civilisation" laid down upon the League and its member states, as a manifestation of organised international community. After examining the features of the Mandate, the Court proceeded to examine and reject in turn the four basic objections that had been submitted by South Africa.<sup>161</sup>

Following the rejection of its basic objections, South Africa replied to the original submissions of applicants. She maintained that the apartheid issue was not justiciable, basing her argument on the claim that she was applying in good faith its theory of development to the territory. Further, South Africa stressed the relatively good conditions in Namibia compared with many other countries.

Applicants' arguments on the other hand, boiled down to two theses. First, that the allocation of rights, status, duties and so on, on the basis of race or caste rather than individual merit was contrary to an international norm of conduct that had developed over the years and had become a part of the law of nations, and secondly, that the effects of apartheid resulted factually in treatment which did not meet the well-being and social progress standard of Article 2 of the Mandate.

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<sup>160</sup> *Ibid* 330-35.

<sup>161</sup> *Ibid* 335-42.

Thus Counsel for the applicants requested the Court to find (a) that the respondent (South Africa) by laws and regulations, and official methods and measures had practised apartheid, i.e. had distinguished as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the territory, and (b) that the respondent, by virtue of economic, political, social and educational policies applied within the territory, by means of laws and regulations, and official methods and measures has, in the light of applicable international standards or international legal norm, or both, failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the territory.<sup>162</sup> The respondent's invitation to the Court to see conditions in Namibia and to compare them with those in Ethiopia and Liberia and possibly other African countries, was rejected by eight to six votes.<sup>163</sup>

The Court reached its judgement on the South West Africa case on 18 July 1966 after litigation lasting five years. A divided Court found, with the President's casting vote, that applicants had not established any legal right or interest appertaining to them in the subject matter of the present claims and that, accordingly, the Court must decline to give effect to them.<sup>164</sup> This judgement was criticised by various commentators on the ground that it reversed the 1962 judgement contrary to the principle of *res judicata*, which assures the parties to a dispute that a judicial decision is final.<sup>165</sup>

### 5.2.5 Revocation of the Mandate

When the ICJ finally decided in 1966 not to rule on the merits of the South West Africa cases,<sup>166</sup> the General Assembly decided to revoke the Mandate of South Africa over Namibia. On 27 October 1966, it adopted Resolution 2145

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<sup>162</sup> See *ICJ Reports* (1962) 9.

<sup>163</sup> *ICJ Reports* (1962) 9.

<sup>164</sup> See *Cornell LQ* Vol 52 (1967) 652-3.

<sup>165</sup> *Ibid* 657-66.

<sup>166</sup> See *ICJ Reports* (1966) 6.

[XXI), revoking the Mandate, and took over the administration of Namibia. Through this action the UN conclusively accepted its direct and unique responsibility for the territory. In justifying this action the preamble of the Resolution recited, inter alia, the deteriorating and explosive situation in Namibia; the failure of South Africa to administer the territory in accordance with the Mandate, the United Nations Charter, and the Universal Declaration of Human Rights; the application of apartheid and racial discrimination (a crime against humanity) to the territory; the efforts of the UN to bring about changes in the administration of the territory; the obligations of the UN to the people of Namibia; the jurisdiction of the General Assembly over Namibia; and its right to take appropriate action.

In its operative paragraphs Resolution 2145 (XXI) reaffirmed the applicability to Namibia of the United Nations Declaration on Decolonisation<sup>167</sup> as well as the right of the Namibian people to self-determination, freedom and independence; reaffirmed the international status of Namibia; declared that South Africa had not fulfilled its obligations under the Mandate, thereby disavowing it; revoked the South African Mandate over Namibia; stated that South Africa had no other right to administer the territory; placed Namibia under the direct responsibility of the United Nations and resolved that the United Nations must discharge these responsibilities with respect to South West Africa; and established an Ad hoc committee to recommend practical means by which South West Africa should be administered, so as to enable the people of the territory to exercise their right of self-determination and to achieve independence and to report back to a special session of the Assembly not later than April 1967.

The Ad Hoc Committee met in 1967 and made three proposals<sup>168</sup> which were considered by the General Assembly in 1967. Following the recommendations of the Committee, the Assembly adopted Resolution 2248 (S-V) on 19 May 1967.

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<sup>167</sup> See General Assembly Resolution 1514 (XV) 1960.

<sup>168</sup> See United Nations Institute for Namibia *Namibia: A Direct United Nations Responsibility* 152.

The resolution established a United Nations Council for South West Africa and charged it with the following powers:<sup>169</sup>

- (1) To administer South West Africa until independence, with the maximum possible participation of the people of the territory;
- (2) To promulgate such laws, decrees and administrative regulations as are necessary for the administration of the territory until a legislative assembly is established following elections conducted on the basis of universal adult suffrage;
- (3) To take as an immediate task all the necessary measures, in consultation with the people of the territory, for the establishment of a constituent assembly to draw up a constitution on the basis of which elections will be held for the establishment of a legislative assembly and a responsible government;
- (4) To take all the necessary measures for the maintenance of law and order in the territory;
- (5) To transfer all powers to the people of the territory upon the declaration of independence.

The Resolution stipulated that the Council for Namibia would be responsible to the General Assembly and that the Council would entrust administrative tasks to a Commissioner for South West Africa. The Commissioner would be appointed by the General Assembly, but would be responsible to the Council.

The Resolution requested (a) the Council, which would be based in Namibia, to contact South African authorities to lay down procedures for the transfer of the territory to the UN and (b) to proceed to the territory at once to ensure, *inter alia*, the withdrawal of South African police and other civil and military personnel and to replace them by personnel operating under the authority of the Council, with preference being given to indigenous persons. Furthermore, the Resolution called on South Africa to comply without delay with Resolution 2145

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<sup>169</sup> See *General Assembly Resolution 2248 (S-V) 1967*.

and facilitate the transfer of the territory to the Council and requested the Security Council to enable the Council to discharge its functions and asked member states for their co-operation. Finally, the General Assembly declared that Namibia should become independent in accordance with the wishes of the people and that the Council shall do all in its power to enable independence to be obtained by June 1968.<sup>170</sup>

Since the adoption of Resolution 2145 (XVI) South Africa's legal status in Namibia changed from that of a mandatory into that of an illegal occupying power, like that of Nazi occupiers of Western Europe during World War II.<sup>171</sup> This Resolution gave the Council powers to administer Namibia in the place of South Africa. Thus a mission was dispatched to Namibia to take over the administration, but was not allowed to enter the territory by the South African authorities.<sup>172</sup>

Meanwhile, South Africa introduced its draconian security laws to Namibia, notably, the Terrorism Act of 1967, as a reaction to the increasing opposition to its racial policies in Namibia. The detention and prosecution of Namibians under this Act provoked the International Community forcing the Security Council to adopt a resolution noting the revocation of the Mandate by the General Assembly, and calling for the release and repatriation of incarcerated Namibians who were being held illegally under South African laws.<sup>173</sup>

South Africa ignored this resolution as it had done with so many others in the past<sup>174</sup> and proceeded with the trial. Thirty defenders were found guilty and received either life imprisonment or long prison terms.

When the Security Council reconvened in February 1968, it adopted a

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<sup>170</sup> *Ibid.*

<sup>171</sup> See *Namibia: A Direct UN Responsibility* 155.

<sup>172</sup> *Ibid.*

<sup>173</sup> See Gill *South West Africa and the Sacred Trust* 75.

<sup>174</sup> See *S v Tuhadeleni* 1967 (4) SA 511 (TPD).

resolution condemning the trial as an illegal act and a flagrant violation of the rights of the South West Africans concerned, the Universal Declaration of Human Rights and the international status of the territory now under direct United Nations responsibility.<sup>175</sup> This resolution was significant in that the Security Council found that South Africa's conduct in Namibia was illegal. In the same year (1968) South Africa exacerbated the situation by introducing the Bantustan system which was followed by the adoption of the South West Africa Affairs Act of 1969 which tied Namibia legislatively, administratively and financially closer to South Africa than ever before.

Consequently, the Security Council adopted Resolution 246 of 20 March 1969 that specifically recognised that the General Assembly had revoked South Africa's Namibian Mandate, that the continued presence of South Africa in Namibia was unlawful and urged South Africa to withdraw immediately and declared that her actions designed to destroy the national unity and territorial integrity of Namibia through the establishment of Bantustans were contrary to the provisions of the UN Charter. Furthermore, the resolution declared that if South Africa failed to comply, the Security Council would meet immediately to determine upon necessary steps or measures in accordance with the relevant provisions of the Charter. When South Africa failed to comply, the Security Council adopted Resolution 269 of August 1969 which declared that the continued occupation of Namibia by South Africa constituted an aggressive encroachment on the authority of the United Nations, a violation of the territorial integrity and a denial of the political sovereignty of the people of Namibia, and requested all states to increase their moral and material assistance to the people of Namibia in their struggle against foreign occupation. Again, the Resolution threatened that in the event of failure of South Africa to comply with the Resolution, the Security Council would meet immediately to determine upon effective measures.

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<sup>175</sup> See *Security Council Resolution 246 of 14 March 1968*.

South Africa responded to this resolution by issuing a "Reply to the Secretary-General of the United Nations (Security Council Resolution 169 of 1969)" explaining why she would not comply with this resolution. Thus the Security Council adopted Resolution 276 of 30 January 1970. Paragraph 2 of this Resolution declared that all acts taken by South Africa on behalf of or concerning Namibia after the termination of the Mandate were illegal and invalid, while paragraph 5 called on all states; particularly those which had economic and other interests in Namibia, to refrain from any dealings with the government of South Africa which were inconsistent with paragraph 2 of this Resolution. In addition, paragraph 6 of the Resolution established an Ad Hoc Sub-Committee of the Security Council to study ways and means by which the relevant resolutions could be effectively implemented and to submit its recommendations in three months.

Upon receipt of the Report of the Sub-Committee, the Security Council adopted two resolutions incorporating most of the proposals made in the report. The first, Resolution 283 of 1970, in summary, requested states to refrain from diplomatic, consular, or other relations with South Africa implying recognition of its authority over Namibia; to issue a formal declaration that they did not recognise any authority of South Africa over Namibia and that they considered Pretoria's continued presence in the territory illegal; to terminate diplomatic and consular representation relating to Namibia and withdraw any mission or representative from the territory; to end all dealings with respect to Namibia by companies under their control; to withhold government loans, credit guarantees and other financial support from their nationals if such support would facilitate trade or commerce in Namibia; to ensure that companies under their control cease all further investments, including concessions, in Namibia; to withhold from their nationals protection of investments or concessions in Namibia against claims of a future lawful government; to start a review of all bilateral treaties between themselves and South Africa insofar as they applied to Namibia; to discourage tourism and emigration to Namibia, and so on. Further, the Resolution re-established the Sub-Committee to explore further ways and means

to implement United Nations Resolutions. The second, Resolution 284 of 1970, called on the Security Council to submit to the International Court of Justice a request for an Advisory Opinion to determine the legal consequences for states of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 of 1970.

On 21 June 1971 the ICJ handed down its Advisory Opinion with a majority of 13 to 2 votes, finding that South Africa's presence in Namibia was illegal, and that consequently South Africa had a legal duty to withdraw its administration forthwith. The Court also found by a smaller 11 to 4 majority that all other states including non-members of the United Nations, should recognise the aforementioned illegality and had a legal duty to refrain from any action which would imply recognition of South Africa's presence in Namibia.<sup>176</sup>

After rejecting South Africa's objections on various matters<sup>177</sup> the Court said that the object of the opinion was to guide the Security Council on a legal issue and help in the forming of its own opinion, and not to rule on a judicial dispute. For this reason the Court rejected South Africa's objections regarding both its jurisdiction and judicial property. Then, the Court went on to review the history and legal purpose of the Mandate and reaffirmed its 1950 stance that the Mandate continued after the dissolution of the League in 1946. It went on to state that the United Nations had succeeded the League with regard to the supervision of Mandates on the basis of Article 80(1) of the Charter, the final session of the League, and its own earlier Advisory Opinions.<sup>178</sup> Further, and perhaps most significantly, the Court stated that there could be no doubt that the ultimate objective of the Mandate system had been to provide for the independence of the peoples concerned.<sup>179</sup>

In October 1971 the Security Council, acting on the recommendations made by

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<sup>176</sup> See the Namibia Opinion (1971) 58.

<sup>177</sup> See the Namibia Opinion (1971) 23-24.

<sup>178</sup> *Ibid* 22.

<sup>179</sup> *Ibid*.

the re-established Sub-committee, noted with appreciation the Advisory Opinion of 1971 and declared its agreement with it. In addition, Resolution 301 of 1971 reaffirmed that Namibia was the direct responsibility of the United Nations and that General Assembly Resolution 1514 (XV) on the decolonisation applied; reaffirmed the national unity and territorial integrity of Namibia; condemned all moves to destroy that unity and integrity, such as the establishment of Bantustans; declared that South Africa's continued occupation of Namibia constituted an internationally wrongful act and a breach of international obligations; called on South Africa to withdraw; and declared that refusal to withdraw could create conditions detrimental to the maintenance of peace and security in Southern Africa. Furthermore, the Resolution reaffirmed Resolution 283, reiterating some of its provisions and declared that franchises, rights, titles or contracts relating to Namibia granted by South Africa after the adoption of General Assembly Resolution 2145 (XXI) were not subject to protection or espousal by their states against claims of a future lawful government of Namibia.

## **5.2.6 The Evolution of the Namibian Settlement Plan**

### **5.2.6.1 General**

The 1971 Advisory Opinion did not only settle important legal issues but also gave impetus to the General Assembly and the Council for Namibia to consider ways of strengthening the United Nations' own machinery relating to Namibia.<sup>180</sup> In 1972 the General Assembly invited SWAPO to participate in an observer capacity in discussions on Namibia.<sup>181</sup> The following year (1973) the General Assembly recognised SWAPO as the authentic representative of the Namibian people.<sup>182</sup>

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<sup>180</sup> See *Namibia: A Direct United Nations Responsibility* 188.

<sup>181</sup> See General Assembly Resolution 3031 (XXVII) 1972 6 preamble para. 6.

<sup>182</sup> See General Assembly Resolution 3111 (XXVIII) (1973) I, paras 2, 18.

The increasing repression by South African authorities in their attempt to contain the growing demand for Namibian independence forced the Security Council to adopt Resolution 366 of 1974<sup>183</sup> which laid the foundation for the Namibian Settlement plan. This Resolution condemned (a) South Africa's illegal occupation of Namibia, (b) the illegal and arbitrary application by South Africa of racially discriminatory and repressive laws and practices in Namibia and demanded first, that South Africa make a solemn declaration that it will comply with the resolutions and decisions of the United Nations and the Advisory Opinion of 21 June 1971 in regard to Namibia and that it recognises the territorial integrity and unity of Namibia as a nation, such declaration to be addressed to the Security Council; secondly, the Resolution demanded that South Africa take the necessary steps to effect the withdrawal of its illegal administration maintained in Namibia and to transfer power to the people of Namibia with the assistance of the United Nations.<sup>184</sup>

Furthermore, the Resolution required South Africa to remove obstacles for the transfer of power to the Namibian people by:

- (a) complying fully, in spirit and in practice, with the provisions of the Universal Declaration of Human Rights;
- (b) releasing all Namibian political prisoners, including those imprisoned or detained in connection with offences under so-called internal security laws, whether such Namibians have been charged or tried or are still held without charge and whether held in Namibia or South Africa;
- (c) abolishing the application in Namibia of all racially discriminatory and politically repressive laws and practices, particularly Bantustans and homelands;
- (d) according unconditionally to all Namibians currently in exile for political reasons full facilities for return to their country without risk of arrest, detention, intimidation or imprisonment.

Finally, the Security Council decided to remain seized of the matter and to meet

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<sup>183</sup> of 17 December 1974.

<sup>184</sup> This demand is based on Resolution 264 and 269 of 1969.

again on or before 30 May 1975 to review the situation and consider appropriate measures under the UN Charter.

Meanwhile South Africa invaded Angola forcing the General Assembly to adopt a Resolution urging the Security Council to take effective action under its Resolution 366 of 1974 and, in particular, calling for an arms embargo against South Africa to compel her to comply with this Resolution and withdraw its administration from Namibia.<sup>185</sup> The following year [1976] the General Assembly completed its process of recognition of SWAPO by designating it as the sole and authentic representative of the Namibian people and invited it to participate as an observer in the work of the General Assembly and of all international conferences convened under the auspices of the Assembly.<sup>186</sup>

As the South African invasion of Angola faltered and the Turnhalle Constitutional Conference stalled the Security Council met and adopted Resolution 385 of 1976.<sup>187</sup> This was a key Security Council Resolution in Namibian history which sets out the basic legal framework for the transfer of power from South Africa to the Namibian people. The Resolution reaffirmed the legal responsibility of the United Nations over Namibia and condemned (a) the continued illegal occupation of Namibia by South Africa; (b) the illegal and arbitrary application by South Africa of racially discriminatory and repressive laws and practices in Namibia; (c) the South African military build-up in Namibia and any utilisation of the territory as a base for attacks on neighbouring countries; (d) South Africa's failure to comply with the terms of Security Council Resolution 355 (1974); and (e) all attempts by South Africa calculated to evade the clear demands of the United Nations for the holding of free elections under United Nations supervision and control in Namibia.

Furthermore, the Resolution set out the appropriate procedure for the transfer

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<sup>185</sup> See General Assembly Resolution 3399 (XXX) 1975.

<sup>186</sup> See General Assembly Special Resolution 31/146 (1976) para 2; and 31/152 of 1976.

<sup>187</sup> of 30 January 1976.

of power in accordance with international law. It declared that the people of Namibia must be enabled freely to determine their own future, that it is imperative that free elections under the supervision and control of the United Nations be held for the whole of Namibia as one political entity, that in determining the date, timetable and modalities for the election there shall be adequate time, to be decided upon by the Security Council, for the purpose of enabling the United Nations to establish the necessary machinery within Namibia to supervise and control the elections, as well as to enable the people of Namibia to organise politically for the purpose of such elections. To this end the Security Council demanded that South Africa urgently make a solemn declaration accepting the procedure for holding free elections and recognising the territorial integrity and unity of Namibia as a nation. Finally, the Security Council reiterated its demand that South Africa remove the obstacles enumerated in Resolution 366 of 1974.

Whilst resolutions calling for an arms embargo against South Africa were being vetoed in the Security Council and Henry Kissinger's shuttle diplomacy failed to yield positive results, a negotiating team (known as the Contact Group) was formed.<sup>188</sup> The Contact Group consisted of representatives of Canada, the Federal Republic of Germany, Britain, France and the United States of America. This Contact Group, consisting of Security Council members as it were, started a new drive for the settlement of the Namibian conflict in April 1977.<sup>189</sup>

The Contact Group consulted the various parties involved in the Namibian situation with a view to encouraging agreement on the transfer of authority in Namibia to an independent government in accordance with Resolution 385 [1976], adopted unanimously by the Security Council on 30 January 1976. Following these consultations the Contact Group drew up a proposal for the settlement of the Namibian question designed to bring about a transition to independence during 1978 within a framework acceptable to the people of Namibia and thus to the International Community.

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<sup>188</sup> See *Namibia: A Direct United Nations Responsibility* 209-210.

<sup>189</sup> *Ibid* 212.

On 10 April 1978 the Contact Group placed their proposal for a settlement before the Security Council.<sup>190</sup> The proposal dealt with, inter alia, (a) the electoral process; (b) removal of obstacles to free and fair elections; (c) cessation of hostilities, and (d) transitional arrangements.<sup>191</sup>

Following the acceptance of the proposal by South Africa and SWAPO the Security Council adopted Resolution 431 of 1978<sup>192</sup> requesting the Secretary-General to submit a report with recommendations on the implementation of the settlement proposal. By this resolution, the Security Council also requested the Secretary-General to appoint a special representative for Namibia to ensure the early independence of the territory.

The Secretary-General appointed Mr. Martii Ahtisaari as the UN Special Representative for Namibia and instructed him to lead a survey mission to Namibia. The Secretary-General used the mission's findings to prepare a report to the Security Council of 29 August 1978.<sup>193</sup> SWAPO accepted the report while South Africa raised several objections regarding the role of the UN in the implementation of the settlement proposal. South Africa's objections notwithstanding, the Security Council adopted Resolution 435 of 1978.<sup>194</sup> This resolution reaffirmed the legal responsibility of the UN over Namibia, and approved the report of the Secretary-General for the implementation of the proposal for the settlement of the Namibian situation.

The Security Council reiterated that its objective was the withdrawal of South Africa's illegal administration of Namibia and the transfer of power to the people of Namibia with the assistance of the United Nations in accordance with Resolution 385 of 1976. To that end the Security Council decided to establish

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<sup>190</sup> See UN Doc S/2636 [10 April 1978].

<sup>191</sup> For a full-text of the proposal see *Namibia: A Direct United Nations Responsibility* appendix 1.

<sup>192</sup> of 27 July 1978.

<sup>193</sup> See UN Doc S/12827 [29 August 1978].

<sup>194</sup> of 29 September 1978.

under its authority a United Nations Transition Assistance Group (UNTAG) to assist the UN Special Representative to carry out his mandate to ensure the early independence of Namibia through free and fair elections under the supervision and control of the United Nations. The Security Council welcomed Swapo's co-operation and readiness to sign and observe a cease-fire and called on South Africa to co-operate in the implementation of this resolution. Finally, the Security Council declared that all unilateral measures taken by the illegal administration in Namibia in relation to the electoral process, including the unilateral registration of voters, or transfer of power, were null and void. In December 1978, South Africa too, accepted the United Nations plan for the independence of Namibia.

However, there were several obstacles to the implementation of the settlement plan. These included the Walvis Bay question and the internal elections organised by South Africa. South Africa claimed that Walvis Bay was part of the Cape Province and two months after accepting the settlement proposal, South Africa began to register voters to elect a constituent assembly as part of its plan for an internal settlement outside the framework of the United Nations. With regard to Walvis Bay the Security Council adopted Resolution 432 of 1978<sup>195</sup> declaring that the territorial integrity and unity of Namibia must be assured through the reintegration of Walvis Bay within its territory and that South Africa must not use Walvis Bay in any manner prejudicial to the independence of Namibia or the viability of its economy. On the other hand, the proposed internal elections challenged the authority of Resolution 435 (1978) which provided that all unilateral measures taken by the illegal administration in Namibia in relation to the electoral process, including unilateral registration of voters, or transfer of power would be null and void. Following the failure of the Contact Group to find a compromise solution, the Security Council adopted Resolution 439 of 1978 condemning South Africa's decision to hold elections in contravention of the UN resolutions and declaring such elections null and void.

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<sup>195</sup> of 27 July 1978.

Nevertheless, South Africa went ahead with the elections. But thereafter, South Africa announced that she was willing to accept the UN plan for the independence of Namibia.

The principal objective of the UN plan for the independence of Namibia was embodied in paragraph 2 of Resolution 435 (1978) which stated clearly that the principal objective of the UN with regard to Namibia was to secure the withdrawal of South Africa's illegal administration and the transfer of power to the Namibian people.

The implementation of the UN plan would involve the following stages:

- (1) Cease-fire agreement between SWAPO and South Africa, followed by a restriction of their forces to base.
- (2) Withdrawal from Namibia of all but 1 500 South African troops within twelve weeks. The rest would be withdrawn after the certification of the election.
- (3) Demobilisation of the citizen and ethnic forces and the dismantling of their command structures.
- (4) Return of Namibian refugees and release of all political prisoners and detainees.
- (5) Free and fair elections for a Constituent Assembly, and
- (6) Formulation and adoption of a constitution for Namibia by the Constituent Assembly.

During the transitional period Namibia would be administered by an Administrator-General appointed by South Africa. However, the powers and functions of the Administrator would be limited in three major respects. First, all his acts with a bearing on the political process would be under UN supervision and control, secondly, he would exercise his responsibility to maintain law and order under the control and supervision of the UN and thirdly, the Special Representative could at any time instruct the UN personnel to accompany members of the police force in the discharge of their duties.<sup>196</sup>

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<sup>196</sup> See *Namibia: A Direct United Nations Responsibility* 212.

On 22 December 1978 South Africa formally communicated to the Secretary-General its decision to co-operate in the implementation of Resolution 435 (1978).<sup>197</sup> Following this discussion the UN Special Representative visited South Africa and Namibia to begin consultations on the requirements for the deployment of UNTAG. During these consultations the major questions raised by both sides related to the impartiality of the UN and the interpretation of the clause "restriction to base" which appeared both in the Contact Group settlement proposal and in the report of the Secretary-General of August 1978.

In November 1980, the Secretary-General reported to the Security Council that one of the main obstacles in the negotiating process was the acute distrust and lack of confidence among the parties. To overcome this, the Secretary-General proposed the holding of a pre-implementation meeting in which all the parties concerned in the envisaged election to the Constituent Assembly could be included.<sup>198</sup> The pre-implementation meeting was held in Geneva from 7 to 14 January 1981. The delegates participating in the meeting included the South African Administrator-General, Danie Hough, and the President of SWAPO, Sam Nujoma. Observers included representatives of the Frontline States, the Contact Group, OAU and Nigeria. The aim of the meeting was to secure firm agreement on a date for a cease-fire to begin implementing Resolution 435 (1978) and to achieve Namibia's independence before the end of 1981. The South African delegation at the meeting reopened the question of impartiality, claiming that the UN had disqualified itself from supervising free and fair elections in Namibia because of its recognition of SWAPO.<sup>199</sup> For its part SWAPO reiterated its willingness to sign a cease-fire and agree to a date for implementing Resolution 435 (1978).<sup>200</sup> Thus, the pre-implementation meeting failed to achieve its main objective. The failure of this meeting drew a sharp reaction from the General Assembly which adopted a strongly worded resolution holding South Africa responsible for the failure and calling upon the Security Council to immediately

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<sup>197</sup> See UN Doc S/12983, annex 1 [23 December 1978].

<sup>198</sup> See UN Doc S/14266 [24 November 1980].

<sup>199</sup> See notes 182 and 186 *infra*.

<sup>200</sup> See UN Doc S/14333 [19 January 1981].

impose mandatory sanctions to secure compliance with UN resolutions relating to Namibia.

In April 1981 the Security Council considered the Namibian question but failed to take a decision because of the triple veto of France, the United Kingdom and the United States of America. At that time, the new Reagan administration in the United States of America was formulating its new policy of constructive engagement in Southern Africa. With the explicit encouragement of the United States, South Africa began to link the independence of Namibia with the presence of Cuban troops in Angola. The Security Council met again from 21 to 30 April 1981 to consider the Namibian question. But it failed to take any decision due to the western vetoes.

In May 1981 the Contact Group issued a communiqué stating that in order to strengthen the United Nations plan for the independence of Namibia, it was necessary to establish an understanding among all the parties about the shape of the future independent Namibia.<sup>201</sup> Accordingly, the Contact Group announced that their governments were preparing proposals for constitutional arrangements which could, in their view, enhance the prospects of achieving a negotiated settlement. By September 1981 the Contact Group had come under the influence of the American policy of constructive engagement which placed a high value on South Africa's alliance with the West and sought to diminish, at any cost, what it perceived as the growing Soviet influence in Southern Africa. The Contact Group, under the conspicuous leadership of the United States, announced a new initiative which included a set of constitutional principles for the constituent assembly and a timetable to resolve the remaining issues.

The Contact Group proposal comprised three phases. During phase I the parties would agree to a set of constitutional principles for the constituent assembly.

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<sup>201</sup> See UN Doc S/14474 (6 May 1981).

This phase would be completed by 31 December 1981. The second phase would be completed by March 1982. This phase would include negotiations on specific arrangements for a cease-fire and the status and composition of UNTAG. The third phase would commence with a public commitment by all parties to the beginning of the implementation of Resolution 435 (1978) and would last until independence. It was envisaged that the implementation would start sometime in 1982.

SWAPO and the Frontline States rejected the idea that the constituent assembly should be bound in advance by rules elaborated in the course of the negotiations. They saw this as not only a negation of the sovereign powers to be vested in the constituent assembly, but also as inconsistent with the United Nations plan for the independence of Namibia and as an attempt to amend Resolution 435 of 1978. As some of the ideas were acceptable to SWAPO, and the Frontline States, they accepted the constitutional proposals as guidelines.<sup>202</sup>

In July 1982 the Contact Group communicated to the Secretary-General the text of the constitutional principles accepted by all the parties to the negotiations. The proposals entitled "Principles concerning the Constituent Assembly and the Constitution for an independent Namibia"<sup>203</sup> consisted of part A (Constituent Assembly) and part B (Principles for a constitution for an independent Namibia). Part A provided for elections for the election of a Constituent Assembly which would adopt a constitution for an independent Namibia in accordance with Resolution 435 of 1978. Such a constitution would then determine the organisation and powers of all levels of government. Furthermore, part A.1 provided for an electoral process based on the following principles:

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<sup>202</sup> See Namibia: A Direct United Nations Responsibility 221.

<sup>203</sup> See "Principles concerning the Constituent Assembly and the Constitution for an independent Namibia" in Bureau for Information *Namibian Independence and Cuban Troop Withdrawal* (Pretoria 1989) 45.

- (1) Every adult Namibian will be eligible, without discrimination or fear of intimidation from any source, to vote, campaign and stand for election to the Constituent Assembly.
- (2) Voting will be by secret ballot, with provisions made for those who cannot read or write.
- (3) The date for the beginning of the electoral campaign, the date of elections, the electoral system, the preparation of voters rolls and other aspects of electoral procedures will be promptly decided upon so as to give all political parties and interested persons, without regard to their political views, a full and fair opportunity to organise and participate in the electoral process.
- (4) Full freedom of speech, assembly, movement and press shall be guaranteed.
- (5) The electoral system will seek to ensure fair representation in the Constituent Assembly to different political parties which gain substantial support in the election.

Part A.2 of the proposals required the Constituent Assembly to formulate the constitution for an independent Namibia in accordance with the principles in part B below and to adopt the constitution as a whole by a two-thirds majority of its total membership.

Part B contained the following principles for a constitution for an independent Namibia:

- (1) Namibia will be a unitary, sovereign and democratic state.
- (2) The constitution will be the supreme law of the state. It may be amended only by a designated process involving the legislature and/or votes cast in a popular referendum.
- (3) The constitution will determine the organisation and powers of all levels of government. It will provide for a system of government with three branches: an elected executive branch which will be responsible to the legislative branch; a legislative branch to be elected by universal and equal suffrage which will be responsible for the passage of all laws; and an independent judicial branch which will be responsible for the interpretation of the constitution and for ensuring its supremacy and the authority of the law. The executive and legislative branches

will be constituted by periodic and genuine elections which will be held by secret vote.

- [4] The electoral system will be consistent with the principles in A.1 above.
- [5] There will be a declaration of fundamental rights, which will include the rights to life, personal liberty and freedom of movement; to freedom of conscience; to freedom of expression, including freedom of speech and a free press; to freedom of assembly and association, including political parties and trade unions; to due process and equality before the law; to protection from arbitrary deprivation of private property or deprivation of private property without just compensation; and to freedom from racial, ethnic, religious or sexual discrimination. The declaration of rights will be consistent with the provisions of the Universal Declaration of Human Rights. Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights.
- [6] It will be forbidden to create criminal offences with retrospective effect or to provide for increased penalties with retrospective effect.
- [7] Provision will be made for the balanced structuring of the public service, the police service and the defence services and for equal access by all to recruitment of these services. The fair administration of personnel policy in relation to these services will be assured by appropriate independent bodies.
- [8] Provision will be made for the establishment of elected councils for local and/or regional administration.

The Contact Group had also proposed an electoral system for electing members of the Constituent Assembly.

They proposed a mixed electoral system, with half the members of the Constituent Assembly to be elected by proportional representation on a national basis and half on the basis of single-member constituencies. SWAPO rejected this electoral procedure on the ground that it was not only complicated but also designed to have the white vote counted as a bloc via proportional representation, while at the same time giving black candidates opposed to SWAPO a chance to appeal for votes on tribal or ethnic basis. Instead of this system, SWAPO proposed either proportional representation or single-member constituencies, not a combination of the two. As the counter-proposal from

SWAPO was not acceptable to South Africa, the Contact Group gave up in June 1982, and suggested that the question of the electoral system be settled in accordance with Resolution 435 of 1978.

Meanwhile the Reagan administration had launched a major diplomatic offensive in an attempt to win African support for the linkage of Namibian independence and Cuban troop withdrawal. In a joint declaration Angola and Cuba listed the following four conditions under which Cuban troops would withdraw from Angola:<sup>204</sup>

- (1) Unilateral withdrawal of South African troops from Angolan territory.
- (2) Strict implementation of Resolution 435 of 1978.
- (3) An end to the acts of aggression against Angola by South Africa, the United States and their allies.
- (4) Cessation of South African aid to UNITA and all other counter-revolutionary armed bands.

At a summit meeting in Lusaka on 4 September 1982 the OAU rejected the "linkage" proposal as unacceptable and inconsistent with the UN plan for the independence of Namibia. In its Tripoli Declaration later in September the OAU rejected the attempts to link Namibia's independence to external and irrelevant issues.<sup>205</sup>

The Security Council met again in May 1983 to consider the question of Namibia. The Secretary-General submitted a report to the Council in which he confirmed that substantial progress had been made on nearly all aspects concerning the implementation of the UN plan but also pointed out that, during the same period, the "linkage" proposal had created an impasse in the negotiations. The Secretary-General stated that this issue had not been envisaged in previous stages of the negotiations as it was clearly outside the scope of Resolution 435 of 1978. In conclusion the Secretary-General's report

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<sup>204</sup> See IDAF Briefing paper [November 1982] no 6.

<sup>205</sup> *Ibid.*

stated that, as far as the UN was concerned, the only outstanding issues were the choice of the electoral system and the settlement of some final problems relating to the status and composition of UNTAG.

On 31 May 1983, the Security Council unanimously adopted Resolution 532 calling upon South Africa to make a firm commitment as to its readiness to comply with Security Council Resolution 435 of 1978, and requesting the Secretary-General to undertake consultations with the parties to the proposed cease-fire with a view to securing the speedy implementation of the UN plan. The Secretary-General's consultations and visit to South Africa resulted in the settlement of all major outstanding issues relating to UNTAG. In his report to the Security Council the Secretary-General stated that the choice of the electoral system was still the only outstanding issue. However, he also reported that the "linkage" proposal still constituted an obstacle to the implementation of Resolution 435 of 1978.<sup>206</sup>

Finally, the Security Council rejected the notion of "linkage" and called for the immediate implementation of Resolution 435 of 1978.<sup>207</sup> In Resolution 539 of 1983<sup>208</sup> the Security Council rejected the linkage of Namibian independence to the Cuban troop withdrawal and warned that if South Africa continued obstructing the negotiating process, the Security Council would meet to consider appropriate measures under the Charter of the United Nations. South Africa rejected this Resolution declaring that it was determined to act against terrorists even if this brought it into conflict with the whole world, and further stated that South Africa would not succumb to the Security Council threat.

In December 1983, the Secretary-General of the UN informed the Security Council that South Africa was still not prepared to comply with Resolution 539 of 1983 and therefore the negotiations had once again stalled. Thus the

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<sup>206</sup> See UN Doc S/15943 (29 August 1983).

<sup>207</sup> See UN Doc S/16106 (31 October 1983).

<sup>208</sup> See UN Doc S/16237 (29 December 1983).

rejection of the linkage proposal by the International Community failed to persuade South Africa to abandon its stance. Following a major armed attack on SWAPO bases in Southern Angola, the government of Angola approached the Security Council on 14 December 1983 requesting that an urgent meeting of the Security Council be convened to deal with the situation in Southern Angola. The Security Council met between 16 and 20 December 1983 to consider the situation in Southern Angola. At the end of these meetings the Security Council adopted Resolution 545 of 1983 which strongly condemned South Africa's military occupation of Angola, describing it as a flagrant violation of international law.

South Africa ignored this Resolution and continued its military offensive against Angola until early 1984. In response the Security Council adopted Resolution 546 of 1984 which strongly condemned South Africa for its occupation of the Angolan territory and for using the international territory of Namibia as a springboard for perpetrating armed attacks against Angola. On 31 January 1984 South Africa announced that it would immediately begin the withdrawal of its forces from Angola. Following this announcement South Africa and Angola met in Lusaka on 16 February 1984. At those meetings, attended by a mediator in the person of US Assistant Secretary of State for African Affairs Chester Crocker, the two countries signed the Lusaka Agreement relating to practical measures to supervise the withdrawal of South African troops. Under this agreement a joint monitoring commission was established to supervise the disengagement process, and South Africa agreed to implement Resolution 435 of 1978.

Under the Lusaka Agreement South Africa was obliged to complete the withdrawal of her troops from Angola by 31 March 1984. Despite its public pronouncements to the contrary South Africa did not honour this agreement. Throughout 1984 South Africa and the United States continued to insist on the withdrawal of Cuban troops from Angola as a pre-condition to the implementation of Resolution 435 of 1978.

Rejecting the linkage proposal of Angola in his letter of 26 November 1984 addressed to the Secretary-General of the UN, President dos Santos outlined the steps taken by his government to secure the full implementation of Resolution 435 of 1978.

Furthermore, President dos Santos reiterated his government's rejection of the linkage proposal stating that Angola and Cuba, in the exercise of their Sovereignty, would begin withdrawing Cuban troops as soon as South Africa withdraws from Angola, ceases its acts of aggression against Angola, stops providing logistical support for UNITA bands and lastly implements Resolution 435 of 1978 leading to the independence of Namibia. South Africa rejected these proposals demanding instead that all Cuban troops should be withdrawn from Angola within 12 weeks of the start of implementation of Resolution 435 of 1978.

Meanwhile, South Africa proceeded with its internal settlement plans which resulted in the installation of an interim government of national unity in Namibia which the Security Council declared null and void on 3 May 1985.<sup>209</sup>

On 19 June 1985 the Security Council adopted Resolution 566 of 1985 which commended SWAPO for its preparedness to co-operate fully with the United Nations Secretary-General and his special representative, including its expressed readiness to sign and observe a cease-fire agreement with South Africa.<sup>210</sup> Furthermore and perhaps more significantly, the Security Council recalled Resolutions 1514 (XV) of 14 December 1960 and 2145 (XXI) of 27 October 1966 as well as other related resolutions.<sup>211</sup> Last but not least, the Security Council Resolution recalled the statement of the President of the Security Council of 3 May 1985, on behalf of the Council, which, inter alia, declared the establishment of the so-called interim government in Namibia to be null and void.

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<sup>209</sup> See statement of the President of the Security Council S/17151 of 3 May 1985.

<sup>210</sup> See Reports of the Secretary-General S/16237 and S/17242.

<sup>211</sup> These resolutions are: 268(1969), 276(1970), 301(1971), 385(1976), 431(1978), 432(1978), 435(1978), 532(1983) and 539(1983).

The Security Council expressed first, its concern at the tension and instability created by the hostile policies of the *apartheid* regime throughout Southern Africa and the mounting threat to the Security of the region and its wider implications for international peace and security resulting from that regime's continued utilisation of Namibia as a springboard for military attacks against and destabilisation of African states in the region and secondly, the Security Council reaffirmed the legal responsibility of the United Nations over Namibia and the primary responsibility of the Security Council for ensuring the implementation of its resolutions, in particular resolutions 385 of 1976 and 435 of 1978 which contained the United Nations Plan for Namibian independence.

The Security Council noted that 1985 marked the fortieth anniversary of the founding of the United Nations as well as the twenty-fifth anniversary of the adoption of the Declaration on the Granting of Independence to Colonial Countries and peoples and expressed grave concern that the question of Namibia had been with the Organisation since its inception. Thus the Council welcomed the then emerging and intensified world-wide campaign of people from all spheres of life against South Africa in a concerted effort to bring about an end to the illegal occupation of Namibia and of apartheid. Against this background, the Security Council condemned South Africa for its continued illegal occupation of Namibia in flagrant defiance of resolutions of the General Assembly and decisions of the Security Council of the United Nations, and reaffirmed the legitimacy of the struggle of the Namibian people against the illegal occupation of Namibia by South Africa and called upon all states to increase their moral and material assistance to them.

Further and more significantly, the Security Council condemned South Africa for its installation of a so-called interim government in Windhoek and declared this action constituted a direct affront to it and a clear defiance of its resolutions, particularly resolutions 435 of 1978 and 439 of 1978. Then the Security Council declared the installation of the interim government to be illegal and null and void and stated that neither the UN nor its member States or

representative or organ would recognise that government. Hence, the Council demanded that South Africa immediately rescind her illegal and unilateral establishment of a so-called interim government of National Unity in Namibia and condemned her obstruction of the implementation of Security Council resolution 435 of 1978 by insisting on conditions contrary to the provisions of the United Nations plan for the independence of Namibia. Furthermore, the Security Council rejected South Africa's linkage proposal as incompatible with resolution 435 1978, other decisions of the Security Council and the resolutions of the General Assembly on Namibia, including General Assembly Resolution 1514 (XV) of 14 December 1960 and declared that the independence of Namibia could not be held hostage to the resolution of issues that are alien to Security Council Resolution 435 of 1978.

Finally, the Security Council reiterated that its resolution 435 of 1978, embodying the UN plan for the Independence of Namibia was the only internationally accepted basis for a peaceful settlement of the Namibian problem and demanded its immediate and unconditional implementation, and affirming that all outstanding issues relevant to Security Council Resolution 435 of 1978 had been resolved, except for the choice of the electoral system. Thus the Security Council decided to mandate the Secretary-General to resume immediate contact with South Africa with a view to obtaining its choice of the electoral system to be used for the election, under United Nations supervision and control, for the Constituent Assembly, in terms of Resolution 435 of 1978, in order to pave the way for the adoption by the Security Council of the enabling resolution for the implementation of the United Nations' Independence plan for Namibia.

Then the Security Council demanded that South Africa co-operate fully with the Security Council and the Secretary-General in the implementation of the present resolution and strongly warned South Africa that failure to do so would compel the Security Council to meet forthwith to consider the adoption of appropriate measures under the United Nations Charter, including chapter VII as additional

pressure to ensure South Africans compliance with the abovementioned resolution.

In response to this Resolution (566 of 1985) South Africa advised the Secretary-General in a letter dated 12 November 1985 that after Consulting the "Government of National Unity in Windhoek," it had decided to select "a system of proportional representation as a framework for elections" and added the explanation that the aforesaid consultation took place, in accordance with "South Africa's practice of consulting the leaders of South West Africa on matters affecting the future of the territory and has been guided by their wishes."<sup>212</sup> Brian O'Linn<sup>213</sup> observed quite correctly that South Africa did not consult with SWAPO, the CDA under the leadership of Mr. Peter Kalangula of Ovambo or the Damara Raad under the leadership of Mr. Justus Garoeb, which parties were not represented in the so-called Government of National Unity and together probably represented the majority of Namibians. Nevertheless, SWAPO promptly accepted South Africa's decision.<sup>214</sup> In a letter dated 26 November 1985 from the Secretary-General of the UN to the Minister of Foreign Affairs of South Africa, it was confirmed that the issue of the electoral system had been settled and that all outstanding issues pertaining to Resolution 435 of 1975 had been resolved. In the same letter the Secretary-General also proposed that "we now proceed to establish the earliest possible date for a cease-fire and the implementation of the Security Council Resolution".

In a further response to this proposal, South Africa, in a letter dated 3 March 1986 conveyed to the Secretary-General the following text of a statement in Parliament by the South African State President:

"Just about eight years ago, the United Nations Security Council adopted Resolution 435 which was intended to provide a definite programme for the

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<sup>212</sup> See Security Council Document S/17627 dated 11 December, 1985.

<sup>213</sup> See Bryan O'Linn *What is Resolution 435 of 1978 and why has it not been implemented?* (1986) 66.

<sup>214</sup> *Ibid.*

independence of South West Africa/Namibia. Those who know the history of this matter know that the fact that the territory has not yet attained independence cannot be laid at South Africa's door. The last remaining obstacle to the implementation of the International Settlement Plan is the continuing threat posed to South West Africa/Namibia and to our region by the presence of the Cubans in Angola. Despite the progress which has been made in bilateral discussions since October 1984, when Angola agreed in principle to the withdrawal of the Cubans in conjunction with the implementation of the Settlement Plan, the Angolan Government has yet to agree to a satisfactory timetable for Cuban withdrawal. The people of South West Africa/Namibia have waited long enough for independence. In a serious attempt to facilitate a resolution of this difficult problem, I propose that 1 August 1986 be set as the date for commencement of implementation of the Settlement Plan based on United Nations Security Council resolution 435 (1978), provided a firm and satisfactory agreement can be reached before that date on the withdrawal of the Cubans."

In a letter dated 13 March 1986 addressed to the Secretary-General by President dos Santos of the Peoples Republic of Angola, the Angolan Government again formally rejected the linking of Cuban withdrawal from Angola with implementation of Resolution 435 of 1978. At the same time, however, the Angolan Government offered its co-operation in the negotiation process aimed at implementing Resolution 435 of 1978 and creating a climate for lasting peace in Southern Africa. It reiterated its conditions for a gradual withdrawal of Cuban troops from Angola and for a global peace agreement for South Western Africa (Angola and Namibia) as contained in the text of the document submitted in November 1974 to the Secretary-General and enumerated the subsequent negotiation between Angola, the USA Government and even with South Africa demonstrating the Angolan Government's will to settle.

On 5 March 1986 the Secretary-General of the United Nations issued an official press statement indicating its readiness to begin implementation of Resolution 435 of 1978 on 1 August 1986, but without preconditions. The 1st of August came and passed without progress.

Following the study of the reports of the Secretary-General of 31 March 1987 (S/18767) and 27 October 1987 (S/19234) the Security Council adopted Resolution 601 of 1987 which, inter alia, strongly condemned South Africa for its continued illegal occupation of Namibia and its stubborn refusal to comply with the resolutions and decisions of the Security Council (in particular resolutions 385 of 1976 and 435 of 1978 and affirmed that all outstanding issues relevant to the implementation of its resolutions 435 of 1978 had been resolved as stated in the abovementioned reports of the Secretary-General. The Security Council welcomed the express readiness of SWAPO to sign and observe a cease-fire agreement with South Africa, (in order to pave the way for the implementation of Security Council resolution 435 of 1978); and decided to authorise the Secretary-General to proceed to arrange a cease-fire between South Africa and SWAPO in order to undertake the administrative and other practical steps necessary for the emplacement of the United Nations Transition Assistance Group. This resolution laid down a firm foundation for the implementation of the UN Independence Plan for Namibia.

## **5.2.7 The Implementation of the United Nations Settlement Plan for Namibia**

### **5.2.7.1 General**

The Security Council resumed its consideration of the Namibian question in October 1987. It adopted Resolution 601 of 1987 which recalled and reaffirmed its earlier resolution on this question. In particular this resolution reaffirmed the legal and direct responsibility of the UN over Namibia, affirmed that all outstanding issues relevant to the implementation of its Resolution 435 of 1978 had been resolved and furthermore, the Security Council welcomed the expressed readiness of SWAPO to sign and observe a cease-fire agreement with South Africa, in order to pave the way for the implementation of its Settlement Plan for Namibia. Then the Council authorised the Secretary-General to proceed to arrange a cease-fire between South Africa and SWAPO in order to undertake the administrative and other practical steps necessary for the

emplacement of the UN Transition Assistance Group. Finally the Security Council urged States Members of the UN to render all the necessary practical assistance to the Secretary-General in the implementation of Resolution 601(1987) and requested him to report on the progress.

In November 1987 the President of SWAPO assured the Secretary-General of his fullest co-operation in respect of the Mandate entrusted to him by Resolution 601 of 1987. The President of SWAPO, Mr. Sam Nujoma, reiterated the readiness of his organisation to proceed immediately to sign and observe a cease-fire agreement with South Africa in accordance with the Namibian Settlement Plan.

On 18 February 1988 the Secretary-General of the UN and the President of Angola, Mr. José Eduardo dos Santos, met in Luanda to review developments in Angola and Namibia. At this meeting President Dos Santos expressed support for the efforts of the Secretary-General to facilitate a peaceful settlement and committed his Government to support the action of the UN to bring about peace in the South Western region. Also, President Dos Santos informed the Secretary-General that Angola was prepared to take new practical steps towards the initiation of peace talks with the Government of South Africa.

A further meeting between the Secretary-General of the UN and the President of SWAPO took place on 18 February 1988. At this meeting the President of SWAPO informed the UN Secretary-General that, while all constructive efforts to break the impasse were welcome, no solution to the Namibian problem was acceptable outside the framework of Resolution 435 of 1978. In subsequent discussions the South African permanent representative to the UN informed the Secretary-General of the UN that prior to the implementation of the Namibian settlement plan (embodied in Resolution 435 of 1978) all Cuban troops had to be withdrawn from Angola.

The reaffirmation of the linkage between the Namibian Independence Plan and

Cuban troop withdrawal was discussed at tripartite meetings of Angola, Cuba and South Africa held in London, Cairo, New York and Geneva between 3 May and 5 August 1988. The three delegations reached agreement, subject to ratification by their respective Governments, on a basic document entitled "Principles for a peaceful settlement in South Western Africa." This document was approved by the Governments concerned and released publicly by mutual agreement on 20 July 1988.

Hardly a month thereafter the parties to this accord agreed on a sequence of steps necessary to prepare the way for the independence of Namibia in accordance with Security Council Resolution 435 of 1978 and to achieve peace in South-Western Africa. They agreed to recommend to the Secretary-General the date of November 1988 for the implementation of Security Council Resolution 435 of 1978. Also, the parties approved, subject to ratification by their respective Governments, the text of the tripartite agreement concluded in New York and published on 20 July 1988.

On the other hand, Angola and Cuba reiterated their decision to subscribe to a bilateral accord which would include a timetable acceptable to all parties for the phased and total withdrawal of Cuban troops from Angola. The parties approved a comprehensive series of practical steps that would enhance mutual confidence, reduce the risk of military confrontation and create the conditions in the region necessary to conclude the negotiations. The approval of these measures gave effect to a *de facto* cessation of hostilities. These agreements were embodied in the Geneva Protocol of 5 August 1988, which was approved by the Governments of Angola, Cuba and South Africa. On 8 August 1988, these three Governments and the Government of the United States of America issued a joint statement on the outcome of their negotiations.<sup>215</sup> On the same day South Africa confirmed to the Secretary-General of the UN, in terms of the provisions of paragraph 5 of the Geneva Protocol, its commitment to adopt the

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<sup>215</sup> See S/20109.

necessary measures of restraint in order to maintain the existing de facto cessation of hostilities. On 12 August 1988, the President of SWAPO also informed the Secretary-General of the UN<sup>216</sup> that his organisation had agreed to comply with the commencement of the cessation of all hostile acts, in accordance with the Geneva agreement. He also stated that SWAPO would be ready to continue to abide by that agreement until the formal cease-fire under Resolution 435 of 1978. However, he stated that SWAPO's combat actions against the South African forces in Namibia would only hold provided that South Africa also showed the necessary political will to do the same. Finally, all parties to the talks confirmed their recommendation of the date of 1 November 1988 for the beginning of the implementation of Security Council Resolution 435 of 1978, in accordance with the Geneva Protocol.

Meanwhile a meeting of the Heads of State of the front-line States held at Luanda on 8 August 1988 requested the Secretary-General of the UN to take measures aimed at the implementation of the Namibian Settlement Plan.

Following several consultations with the South African Government the Secretary-General dispatched a technical mission to Namibia from 2 to 23 October 1988. The parties agreed to finalise for signature the draft agreement on the status of UNTAG, in order to establish the legal status of UNTAG and its personnel in Namibia. In his discussions with South Africa the Secretary-General confirmed to the State President that agreement had been reached on the system of proportional representation for the envisaged elections. Also, the Secretary-General confirmed that the text of the principles concerning the Constituent Assembly and the Constitution of an independent Namibia<sup>217</sup> constituted an integral part of the UN settlement plan.

With regard to the question of impartiality raised by South Africa the Secretary-General gave assurances to all concerned of the complete impartiality of the UN

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<sup>216</sup> See S/20129.

<sup>217</sup> See S/15287.

in the implementation of the Namibian Independence Plan. The Secretary-General emphasised that he expected the same from all South African officials in the discharge of their responsibilities in Namibia during the transitional period. So far as the UN was concerned he stressed that all the parties in Namibia would be treated equally on the commencement of implementation of the UN Plan. More specifically, he confirmed to the State President that the United Nations would place all the political parties of Namibia on an equal footing during the transitional period leading to independence. The members of the Security Council supported the actions of the Secretary-General and urged the parties to co-operate with him in the immediate, full and definitive implementation of the UN Plan.

Following the signing of the Geneva Protocol on 5 August 1988, delegations of Angola, Cuba and South Africa, through the mediation of the Government of the United States, held five meetings at Brazzaville from 24 August to 13 December 1988 to continue negotiations towards the implementation of the UN Plan.

On 13 December 1988, the Governments of Angola, Cuba and South Africa signed the Brazzaville Protocol by which the parties agreed to recommend to the Secretary-General that 1 April 1989 be established as the date for the implementation of UN Plan. As agreed in Brazzaville the parties met on 22 December 1988 in New York at the UN Headquarters for the signing of the tripartite agreement prepared in Geneva in August and for signature by Angola and Cuba of a bilateral agreement relating to the withdrawal of Cuban troops from Angola.<sup>218</sup> Meanwhile the Security Council had adopted Resolution 626 of 1988<sup>219</sup> establishing under its authority the United Nations Angola Verification Mission (UNAVEM) to verify implementation of the bilateral agreement. In its Resolution 628 of 1989 the Security Council welcomed the signature of the tripartite and bilateral agreements and expressed its full support for them.

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<sup>218</sup> See S/20345.

<sup>219</sup> of 20 December 1988.

Following the signing of these agreements South Africa agreed to recommend to the Secretary-General that 1 April 1989 be the date for the implementation of the UN Plan.

On 16 January 1989 the Security Council unanimously adopted Resolution 629 of 1989 regarding the levelling of the playfield for free and fair elections. The Security Council expressed concern at the increase in the police and paramilitary forces and the establishment of the South West Africa territory force since 1978, and stressed the need to ensure conditions under which the Namibian people will be able to participate in free and fair elections under the supervision and control of the United Nations. Also, the Security Council noted that these developments needed a re-examination of the requirements for UNTAG effectively to fulfil its mandate which included, inter alia, keeping borders under surveillance, preventing infiltration, preventing intimidation and ensuring the safe return of refugees and their free participation in the electoral process.

Furthermore, the Security Council emphasised its determination to ensure the early independence of Namibia through free and fair elections under the supervision and control of the United Nations, reaffirmed its legal responsibility over Namibia and then decided that 1 April 1989 shall be the date on which implementation of the UN Plan would begin. To that end the Security Council requested the Secretary-General to proceed to arrange a formal cease-fire between SWAPO and South Africa and called upon the latter to reduce immediately and substantially the existing police forces in Namibia with a view to achieving a reasonable balance between these forces and UNTAG so as to ensure effective monitoring by the latter.

#### **5.2.7.2 The Role of the Administrator-General**

The settlement proposal vested the responsibility for the administration of Namibia during the transition in the Administrator-General as the

representative of South Africa in the territory. The Administrator-General was required to work closely with the Special Representative of the UN Secretary-General in order to ensure the orderly transition to independence. In general, the tasks of the Administrator-General related to administration and removal of obstacles for the implementation of the UN plan.

These tasks included the following:

- \* to administer the day-to-day running of the territory during the transitional period;
- \* to prepare regulations in regard to the procedures to be followed during the election;
- \* to repeal all remaining discriminatory or restrictive laws, regulations, or administrative measures which might abridge or inhibit the objective of free and fair elections;
- \* to make arrangements for the release, prior to the beginning of the electoral campaign, of all alleged Namibian political prisoners or detainees held by the South African authorities so that they can participate fully and freely in the electoral campaign without risk of arrest, detention, intimidation or imprisonment;
- \* to prepare for the reception of Namibian refugees or Namibians detained or otherwise outside the territory who return to Namibia;
- \* to ensure the good conduct of the police forces, who are primarily responsible for maintaining law and order in Namibia during the transition period and take the necessary action to ensure their suitability for continued employment during the transition period.

With regard to the administration of Namibia during the transition period it is noteworthy that all political office bearers in the territory (both South African and Namibian) were required to vacate their positions before the date of implementation of the settlement agreement. In other words, the authority of the South African Government and its bantustans was scaled down (or reduced) to administrative powers which were vested in the Administrator-General. However, the position of tribal authorities such as traditional chiefs and

headmen remained unaltered and they were not effected by the requirements regarding political parties as such.

### **5.2.7.3 Levelling the Playing Field**

The Administrator-General and the UN Special Representative were required to co-operate in the levelling of the playing field for free and fair elections. In other words, they were required to ensure impartial and equal treatment of all parties. Thus the following impartiality and equal treatment provisions were agreed to:

- \* The UN Special Representative had to satisfy himself at each stage of the process as to the fairness and appropriateness of all measures affecting the political process at all levels of administration before such measures take effect;
- \* that freedom of speech, assembly, movement and press are guaranteed;
- \* that all discriminating or restrictive laws, regulations or administrative measures which might abridge or inhibit free and fair elections must be respected;
- \* that the Administrator-General must make arrangements, prior to the start of the election campaign, for the release of all alleged Namibian prisoners or detainees. Similarly, all detainees held in SWAPO camps be released.
- \* that all Namibians in exile shall have the right to peaceful return to Namibia in order that they may participate freely in the election without risk of arrest, detention, intimidation or imprisonment;

The impartiality and equality of treatment clauses did not only apply to the South African government and its Black authorities but also to SWAPO, especially with regard to its international status as the sole and authentic representative of the Namibian people.

With regard to SWAPO the Secretary-General was required

- (a) to initiate a review of all programmes of organs of the UN with respect to Namibia to ensure that they were administered on an impartial basis and
- (b) to seek the co-operation of the executive heads of the specialised agencies and

other organs and bodies within the UN System to ensure that their activities with respect to Namibia were conducted impartially. In particular the status of SWAPO was de-escalated in that, first, consideration of the question of Namibia at the regular general assembly were suspended during the transition period, secondly, the UN or any of its agencies would not provide funds for SWAPO or any other party during the transition period, thirdly, the UN Council for Namibia has to refrain from engaging in all public activities once the Security Council meets to authorise implementation, fourthly, the Commissioner for Namibia and his office would suspend all political activities during the transition period and fifthly, SWAPO would voluntarily forego the exercise of the special privilege granted to it by the general assembly (viz, that of the sole and authentic representative of the people of Namibia) including participation as an official observer in the General Assembly and in other bodies within the United Nations System.

#### **5.2.7.4 Requirements of Free and Fair Elections**

As said above, the electoral campaign was scheduled to start on 1 July 1989. Prior to the commencement of this campaign certain measures were to be taken in order to meet the objective of free and fair elections. These measures included:-

- \* the repeal of all remaining discriminatory or restrictive laws, regulations or administrative measures,
- \* the release of all alleged Namibian political prisoners or detainees;

Other measures which were to be taken within six weeks of the Commencement of the UN plan to meet the objective of free and fair elections included:-

- \* arrangements for the peaceful return of all Namibian refugees or Namibians detained or otherwise outside the territory without the risk of arrest, detention, intimidation or imprisonment and for the attestation of the voluntary nature of the decision of those Namibians who decide not to return to the territory.

## **5.2.8 The Role of the United Nations Transitional Assistance Group**

The Special Representative of the UN Secretary-General was assisted in the discharge of his functions by the United Nations Transition Assistance Group (UNTAG) which consisted of a military and a civilian component. The tasks of each of the components are summarised below.

### **5.2.8.1 The Military Component**

The tasks of the Military Component of UNTAG derived from paragraph 8 of the settlement proposal and were set out in more detail in the annex to this proposal.<sup>220</sup> These tasks were further elaborated in the UN Secretary-General's report of 1978.<sup>221</sup> These tasks can be summarised as follows:

- \* to monitor the cessation of hostile acts by all parties;
- \* to monitor the restriction of South African Defence Force (SADF) troops to base and their subsequent reduction to the agreed strength of 1 500 men, who would be restricted to certain agreed locations;
- \* to monitor such SADF military personnel as continue to perform civilian functions during the transitional period;
- \* to monitor the dismantling of the command structures of citizen forces, commando units and ethnic forces (including the South West Territory Force (SWAFT), the withdrawal of all SADF personnel attached to those forces, and the confinement of all the arms and ammunition of such forces to agreed locations;
- \* to monitor the restriction of SWAPO troops to base in Angola and Zambia;
- \* to keep the borders under surveillance and prevent infiltration; and
- \* to ensure that all military installations along the Northern borders were deactivated or placed under United Nations supervision and to provide security for vital installations in the Northern border area.

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<sup>220</sup> See S/12636.

<sup>221</sup> See S/12827.

In addition, the task of the military component was to assist and support the civilian component of UNTAG in the discharge of their tasks.

#### **5.2.8.2 The Role of the Civilian Component**

The Civilian Component of UNTAG consisted of two elements, viz, a civilian police and an administrative element. The concept of civilian police derived from paragraph 9 of the settlement proposal<sup>222</sup> which provided that:

"primary responsibility for maintaining law and order in Namibia during the transition period shall rest with the existing police forces. The Administrator-General to the satisfaction of the United Nations Special Representative, shall ensure the good conduct of the police forces and shall take the necessary action to ensure their suitability for continued employment during the transition period. The Special Representative shall make necessary arrangements when appropriate for United Nations personnel to accompany the police forces in the discharge of their duties. The police forces would be limited to the carrying of small arms in the normal performance of their duties."

Paragraph 10 of the settlement proposal also provided that the

"Special Representative will take steps to guarantee against the possibility of intimidation or interference with the electoral process from whatever quarter."

The specific tasks of the civilian police monitors were described in paragraph 29 and 30 of the Secretary-General's report of 29 August 1978.<sup>223</sup> These tasks can be summarised as follows:-

- \* To satisfy himself that the Administrator-General ensured the good conduct of the police force;

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<sup>222</sup> See S/12636.

<sup>223</sup> See S/12869.

- \* To satisfy himself that the Administrator-General takes the necessary action to ensure the suitability of the police for continued employment during the transition period;
- \* To make arrangements when appropriate for United Nations personnel to accompany the police forces in the discharge of their duties.

The administrative element of the Civilian Component of UNTAG was particularly important to the electoral process. It has the task of assisting the Special Representative of the UN in regard to the following:

- \* Supervision of all aspects of the electoral process, considering the fairness and appropriateness of the electoral procedures, monitoring the balloting and counting of votes and investigating complaints in this connection;
- \* Advising as to the repeal of discriminatory laws and measures which may inhibit free and fair elections;
- \* Ensuring the absence of and investigating complaints relating to intimidation or restrictions on freedom of speech, movement or political assembly which may impede the objective of free and fair elections;
- \* Assisting in arrangements for the release of alleged Namibian political prisoners or detainees and for the peaceful and voluntary return of Namibian refugees or Namibians detained or otherwise outside the territory.
- \* Assisting in arrangements proposed to and implemented by the Administrator-General to inform and instruct the electorate as to the significance of the election and the procedures for voting.

These transitional arrangements brought about the successful implementation of UN Security Council Resolution 435 of 1978, leading to the elections, the drafting of a constitution and finally to the independence of Namibia on 21 March 1990.

However, Namibian independence was not achieved without a hitch. First, even before implementation there was a dispute about the size of UNTAG. The Western powers demanded a cut in the size of UNTAG from 7 500 to 4 650,

fuelling anxieties especially among African States about the capacity of UNTAG to restrain the activities of South African controlled police.<sup>224</sup> Secondly, the first day of implementation did not produce a cease-fire, but rather a bloody fire-fight between returning SWAPO guerrillas and para-military police; and thirdly, throughout the elections there were allegations of violence and intimidation on the part of Koevoet, a counter-insurgency unit incorporated into the police.<sup>225</sup>

There are several factors which made these hitches understandable as the elections were run by South Africa (through its Administrator-General) which a few months previously had been actively at war with SWAPO, the largest party contesting them.<sup>226</sup> The restoration of direct colonial rule through the South African appointed Administrator-General illustrated the complexity of the situation in Namibia.

However, the independence of Namibia on 21 March 1990, a few days ahead of schedule was a remarkable example of international co-operation in conflict resolution between formerly deeply hostile forces, and the capacity of the UN to play an effective role in organising, supervising and controlling an election process.

This election took place in November 1989. Ninety seven (97) percent of the electorate cast their votes for the 72-seat Constituent Assembly. SWAPO won 41 seats while the DTA won 21 seats. Thus SWAPO failed to achieve the two-thirds majority required under Resolution 435 of 1978 to adopt the independence Constitution. The UN Special Representative, Martii Ahtisaari pronounced the election as free and fair.<sup>227</sup>

On 16 February 1990 the Constituent Assembly adopted a Constitution by

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<sup>224</sup> See Security Council Resolutions 628, 629, and 632 of 1989.

<sup>225</sup> See Hatchard and Slinn *Namibia: The Constitutional Path to Freedom* 142.

<sup>226</sup> These incidents are documented in *The Report of the Commonwealth Observer Group on Namibia* Commonwealth Secretariat, 1989.

<sup>227</sup> See Hatchard and Slinn 143-144.

consensus. Then Sam Nujoma, President of SWAPO was elected unanimously as the first President of Namibia. On 21 March 1990, Mr. Nujoma was sworn in by the UN Secretary-General, Peres de Cuellar, as a symbol of the role of the UN in the independence process.<sup>228</sup>

### 5.2.9 The Drafting Process

The Constituent Assembly met for the first time on 21 November, 1989 in the Tintenpalast and adopted a Constitution on 21 March 1990. The actual drafting was done in a multi-party standing Committee assisted by three South African legal experts<sup>229</sup> and by the Commonwealth Secretariat.<sup>230</sup>

At the first sitting of the Constituent Assembly SWAPO proposed that the independence constitution should be based on the 1982 Constitutional principles.<sup>231</sup> This proposal was unanimously adopted. During subsequent investigations the status of these principles was enhanced to such an extent that they were invoked in the formulation of each provision of the Constitution.<sup>232</sup>

Some additional factors that enhanced the status of and respect for the 1982 Constitutional principles were the conditions and atmosphere under which the deliberations of the Constituent Assembly took place. These factors include: the international media coverage of the proceedings, the high expectations of the Namibian people as well as the supervision of the Special Representative of the UN. Supervision and control over observation of the principles was an integral part of the task of the UN Special Representative. More specifically, the

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<sup>228</sup> *Ibid.*

<sup>229</sup> They were Arthur Chaskalson, SC, of the Legal Resources Centre, Professor Gerhard Erasmus (University of Stellenbosch) and Professor Marinus Wiechers (University of South Africa).

<sup>230</sup> See Hatchard and Slinn 144.

<sup>231</sup> See Gerhard Erasmus "The Namibian Constitution and the application of International Law" *SAYIL* vol. 15 (1989/90) 92.

<sup>232</sup> See Gerhard Erasmus "Die grondwet van Namibië, Internasionale Proses en Inhoud" 1990 3 *Stellenbosch Law Review* 12.

principles were to be applied as part of the settlement of the Namibian Situation in accordance with Security Council Resolution 435.<sup>233</sup> The principles were to be applied as part of the Resolution 435 machinery which stated that the task of the Special Representative was

"...to ensure the early independence of Namibia through free and fair elections under the supervision and control of the United Nations."

It followed from this that the Special Representative was entitled to monitor the whole electoral process including the implementation of the 1982 Constitutional principles. Thus Erasmus correctly observed that (a) control over compliance with the 1982 principles was part of the UN responsibility (through its Special Representative) over Namibia and (b) that this interpretation was in line with the UN's own attitude since 1966 that the final authority and responsibility for the Namibian independence rested with it. Consequently, the UN wrote the rules for Namibian independence and assumed the responsibility to ensure compliance with them.<sup>234</sup>

The Standing Committee agreed to use the SWAPO draft Constitution as a working document. However, as SWAPO had failed to achieve the required two-thirds majority required for adopting the Constitution it needed and sought the co-operation of other parties for the adoption of each and every clause with or without modifications or amendments.<sup>235</sup>

The 1982 principles attached important significance to the protection of human rights. It required the incorporation of a justifiable bill of rights in the Independence Constitution. Furthermore, and perhaps more significantly, it required the bill to conform, at least in broad terms, with the Universal Declaration of Human Rights of 1948 and related documents. Thus they also

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<sup>233</sup> *Ibid* 13.

<sup>234</sup> *Ibid*.

<sup>235</sup> See Hatchard and Slinn 145.

spelled out a list of fundamental rights such as the right to life, personal liberty and freedom of movement; freedom of conscience, freedom of expression including the freedom of assembly and association including the right to form political parties and trade unions, due process of law and equality before the law, protection of private property against arbitrary expropriation or expropriation without adequate compensation and a prohibition against discrimination based on race, ethnicity, religion or sex. They also prohibited retrospective penal legislation.

It is quite evident that the 1982 principles envisaged a Constitutional State based on far more than the Diceyan concept of the rule of law. Hence, the emphasis falls on classical, civil and political rights. There is no mention of social and economic rights. It was stated that the Constitution should provide for a balanced re-structuring of the public service, the police and for equal competition by all in the employment by these sectors. Provision is made for the supervision of the human resources, policies and practices of these sectors. These provisions were designed to address the imbalances of the past rather than protect social and economic rights.

Within these guidelines vigorous debate took place within the Standing Committee on such key issues as the powers and mode of election of the chief executive, whether the legislature should be unicameral or bicameral, provision for detention without trial and the timing of regional elections. In general terms, SWAPO favoured a strong executive presidency and a single chamber legislature elected on a Constituency basis, while other parties were anxious to limit the powers of the executive and favoured a National Assembly elected on the basis of proportional representation and a regionally-based second chamber with strong powers of legislative review.<sup>236</sup> However, the failure of SWAPO or any other party to win a two-thirds majority led to compromises which appear below in the analysis of the Namibian Constitution.

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<sup>236</sup> See SWAPO Election Manifesto, *The Namibian*, 22 January 1990, *Times of Namibia*, 26 January, 1990.

There are some significant distinctive features between the Namibian and Zimbabwean Constitution drafting processes. First, the Namibian Constitution is said to fairly represent at least the wishes and aspirations of the elected representatives of the people of Namibia and should therefore enjoy, subject to limitations imposed by the 1982 principles, an autochthonous legitimacy denied to the Zimbabwean Independence Constitution. In the case of Zimbabwe the drafting process remained in the hands of Britain, the departing colonial power, and the working document used was generated by the illegitimate and illegal Muzorewa/Smith regime, rather than by democratically elected representatives of the majority. The Zimbabwe/Rhodesia Constitution which served as the working document was designed to concede majority rule with the maximum degree of minority control. This would be tantamount to conducting the deliberations in the Tintenpalast in Windhoek on the basis of the draft Constitution prepared under the auspices of the National Assembly of South West Africa/Namibia in 1987.

The inherently undemocratic nature of the Zimbabwean drafting process led the first freely-elected government to perceive the Lancaster-House (or independence) Constitution as interim, imposed arrangements with fundamentally objectionable features to be removed at the earliest opportunity. Thus, for the first ten years of Zimbabwean independence, a series of changes have been made directed towards the still incomplete process of the achievement of an autochthonous Constitution involving, inter alia, the creation of an executive presidency, the removal of reserved seats for the white minority and the abolition of the Senate. The objectionable character of some aspects of the Zimbabwean independence Constitution also led to confrontation between the Government and a judiciary which was determined to uphold the Supremacy of the Constitution.

One main distinctive shortcoming in both the Zimbabwean and Namibian drafting processes was the participation of civil society. For instance, during the Tintenpalast deliberations, the press observed that Namibians were aware

of the lessons to be learned from the Zimbabwean experience and expressed the hope that their manner of drafting and adoption of the Constitution would produce a truly consensual framework for the evolution of democratic political structures and the economic and social consolidation of free society. However, in the Namibian drafting process civil society was conspicuous by its absence. No wonder that the National Union of Namibian Workers, the country's trade Union Federation, concerned about the protection of workers' rights, called for the promotion of public debate on the draft Constitution.<sup>237</sup>

The failure (or neglect) to involve civil society in the drafting process led to accusations that the Standing Committee of the Namibian Constituent Assembly was not accessible to the people at large and that there was no genuine attempt on the part of the Constituent Assembly to involve the public in the finalisation of the Constitution.<sup>238</sup>

## **5.2.10 Main Features of the Constitution**

### **5.2.10.1 General**

It is not proposed to make a critical analysis of all provisions of the Namibian Constitution. The focus falls on the main features of the Constitution with a view to identifying the key principles on which the Constitution is built. In particular, it is proposed to determine the extent to which the contemporary doctrines of democracy, rule of law and international human rights and, in particular, the 1982 Constitutional principles found expression in the Constitution. The analysis of the Constitution will be based on themes rather than sections. These themes will include; the form of state, national territory, language, citizenship, human rights, state of emergency and national defence, organs of state, principles of state policy, amendment of the Constitution, transitional provisions and the incorporation of international law. Each of these themes is dealt with separately below.

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<sup>237</sup> See Hatchard and Slinn 146.

<sup>238</sup> See *The Namibian*, 11 and 19 January, 1990.

### 5.2.10.2 The Form and Character of State

The underlying values of the Namibian Constitution derive directly from the Universal Declaration of Human Rights<sup>239</sup> and the African Charter on Human and People's Rights related international human rights instruments. For instance, the preamble of Namibian Constitution,<sup>240</sup> like that of the Universal Declaration, begins by acknowledging that the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation (or prerequisite) for freedom, justice and peace. Both documents derive these rights from the worth and dignity of the human personality.<sup>241</sup> This emerges more clearly in Article 7 of the Universal Declaration which states that: "All human beings are born free and equal in dignity and rights. They are endowed of with reason and conscience and should act towards one another in a spirit of brotherhood."

Two other regional human-rights instruments that derive human rights from the worth and dignity of the human personality are the American Convention on Human Rights<sup>242</sup> and the African Charter on Human and People's Rights.<sup>243</sup> These Regional Instruments, like the Universal Declaration and the Namibian Constitution not only derive human rights from the worth and dignity of the human personality but also recognises and acknowledges their universal

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<sup>239</sup> See Centre for the Study of Human Rights *Twenty-Four Human Rights Documents* Columbia University 1992 6.

<sup>240</sup> For a text see *SAYIL* vol.15 (1989/90) 301 ff.

<sup>241</sup> *Ibid.* The International Covenant on Economic, Social and Cultural Rights states this in the following definite and emphatic terms:

"... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. And.... that these rights derive from the inherent dignity of the human person."  
See para. 1 and 2 of the preamble.

<sup>242</sup> Paragraph 2 reads that "...the essential rights of man are not derived from one being a national of a certain state, but are based upon the attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states."

<sup>243</sup> Paragraph 6 of the Preamble reads: "... that fundamental human rights stem from the attributes of the human beings, which justifies their national and international protection..."

character. On the contrary the European Convention on Human Rights tends to regard human rights as a European [or Western] heritage.<sup>244</sup> More specifically, the rights that the Namibian Constitution (and the human-rights instruments mentioned above) derive from the worth and dignity of the human personality include:- the right to life, the right to liberty, and the pursuit of happiness.<sup>245</sup> The Namibian Constitution extends these rights to all persons without discrimination based on race, colour, ethnic origin, sex, religion, creed or social or economic status.<sup>246</sup>

This provision is quite clearly informed by Article 2 of the Universal Declaration which human rights universal, but also their respect obligatory. This Article reads:<sup>247</sup> "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, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty." The American Convention on Human Rights<sup>248</sup> and the African Charter on Human and People's Rights<sup>249</sup>

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<sup>244</sup> This appears in the sixth paragraph of the preamble which urges:

"The governments of European Countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain rights stated in the Universal Declaration."

<sup>245</sup> Cf the preamble of the American Declaration of Independence.

<sup>246</sup> See paragraph 2 of the preamble.

<sup>247</sup> See article 2 of the Universal Declaration.

<sup>248</sup> Article 7(1) reads:

"The State Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination by reason of race, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

<sup>249</sup> Article 2 reads:

"Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

contain similar provisions. The former emphasises the universality of the obligation to respect human rights by defining "person" as every human being rather than citizen.<sup>250</sup>

Paragraph 3 of the Preamble links these universally recognised rights with the principles of democracy, the rule of law and human rights. It states that these rights are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary. In other words, the preamble of the Namibian Constitution envisages a constitutional state.

Furthermore, the preamble of the Namibian Constitution, like the African Charter on Human and People's Rights<sup>251</sup> links the rule of law and the struggle for the right of self-determination and independence. Thus the preamble attributes the achievement of human rights by the people of Namibia to their victory over colonialism, racism and apartheid and expresses their commitment to constitutionalise these rights. No wonder that the people of Namibia committed themselves to promote the principles of self-determination, national unity and territorial integrity<sup>252</sup> embodied in the Declaration on the Granting of Independence to Colonial Countries and Peoples. In their efforts to rid their country of the racism, racial segregation and divided loyalties created by apartheid the people of Namibia committed themselves to strive for national

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<sup>250</sup> Article 1(2) of the American Convention reads:

"For the purposes of this Convention, 'person' means every human being."

<sup>251</sup> See the last but two paragraphs of the preamble.

<sup>252</sup> In line with the Declaration on the Granting of Independence to Colonial Countries and Peoples, Article 1(4) of the Constitution asserts the territorial integrity of Namibia in the following terms:

"The National territory of Namibia shall consist of the whole of the territory recognised by the international community through the organs of the United Nations as Namibia including the enclave, harbour and port of Walvis Bay, as well as the off-shore islands of Namibia, and its Southern Boundary shall extend to the middle of the Orange River."

See in general Erasmus "Die Grondwet van Namibië" 3 1990 *Stellenbosch Law Review* 289-290. Walvis Bay and the islands have been incorporated into the National territory under an agreement signed by South Africa and Namibia.

reconciliation, peace, unity and a common loyalty to a single state. Finally, Namibians resolved to constitute the Republic of Namibia as a sovereign, secular, democratic and unitary state securing to all its citizens justice, liberty, equality and fraternity and then accepted and adopted the constitution as the fundamental law of the sovereign and independent Republic of Namibia.<sup>253</sup>

Article 1 of the Constitution incorporates the constitutional state envisaged in the preamble in more definite and emphatic terms. It reads:

- “1 The Republic of Namibia is hereby established as sovereign, secular, democratic and unitary state founded upon the principles of democracy, the rule of law and justice for all.
2. All power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the state.
3. The main organs of the state shall be the Executive, the legislature and the judiciary.
4. ....
5. ....
6. This constitution shall be the supreme law of Namibia.”

The linkage of the doctrines of human rights, democracy and the rule of law in the Namibian Constitution as the foundation of the Namibian Constitutional State and in particular, the inclusion of the rule of law in the preamble of the Constitution is:<sup>254</sup>

“An acknowledgement of the Status which the doctrine has acquired, particularly since World War II, the embodiment of universally accepted standards of human rights protection, in consequence of its inclusion in the Universal Declaration of Human Rights. The Constitution thus remains, in Kelsens terms, the Namibian Grundnorm, while the principles stated in sub-article (1) point to the ideals in which the Constitution is rooted.” ✓

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<sup>253</sup> See Erasmus “Die Grondwet van Namibië” 3 1990 *Stellenbosch Law Review* 290-292.  
<sup>254</sup> See Carpenter “The Namibian Constitution- ex Africa Aliquid Novi after all?” 1989/90 *SAYIL* 29.

It is evident from the foregoing analysis of the preamble and Article 1 of the Namibian Constitution that Namibia is the first African State to establish a constitution based on the modern concept of the rule of law that emerged after World War II. In other words, the Namibian Constitution has incorporated the fundamental values of modern constitutionalism embodied in the Universal Declaration of Human Rights and Regional Human Rights Instruments.<sup>255</sup>

### **5.2.10.3 Language**

The language question in Namibia is a curious one. Article 3(1) states that the sole official language of Namibia shall be English. This, even though it is not the spoken language of the majority of Namibians.<sup>256</sup> Provision is however made for the use of “any other language” as a medium of instruction in both private and state subsidised schools.<sup>257</sup> The passing of legislation by the Parliament authorising the use of other languages for legislative, judicial and administrative purposes in regions where the language is spoken by a substantial component of the population is permitted by Article 3(3).<sup>258</sup>

### **5.2.10.4 Citizenship**

The Namibian Constitution contains detailed provisions for the acquisition and loss of citizenship.<sup>259</sup> Provision is made for the acquisition of citizenship by birth, whether before or after independence. However, children of diplomats, career representatives of other countries, police, military or security unit of other countries or illegal immigrants are not allowed to acquire citizenship by birth. Persons that qualify for citizenship by descent are required to register their birth either in Namibia or an embassy, consulate or the like. Persons who do not qualify for citizenship by descent or birth may nevertheless acquire it by registration if they had been ordinarily resident in Namibia for five years before

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<sup>255</sup> See paragraph 7 of the preamble.

<sup>256</sup> The majority of the whites speak either Afrikaans or German, while the black population speak a variety of indigenous languages.

<sup>257</sup> See article 3(2).

<sup>258</sup> See Erasmus “Die Grondwet van Namibië” 292.

<sup>259</sup> *Ibid* 292-294.

independence, provided that they applied for citizenship within a year after independence and renounced the citizenship of any other country of which they were citizens.<sup>260</sup>

The five year residence qualification up to and including independence also applies to persons enabled to claim citizenship by registration by application within twelve months after independence. Thus an expatriate South African who had worked in Namibia for the requisite period could claim citizenship under this provision provided, however, that he/she renounced his/her existing citizenship. The impact of the restrictions on dual citizenship is limited by the fact that they apply only where a person voluntarily acquires the citizenship of another country or takes up permanent residence abroad after independence. Moreover, persons who are citizens by birth or descent are not affected by these.<sup>261</sup>

The dual citizenship provisions of the Namibian Constitution reflect both the need to confer citizenship on persons with a genuine connection with the country and also SWAPO anxiety about the position of peoples whose loyalty might lie elsewhere.<sup>262</sup> The Zimbabwean government too, was so anxious about dual citizenship that within three years after independence they amended the Constitution to prohibit dual citizenship.<sup>263</sup>

Prospective citizens by marriage are treated differently. Although such persons must apply for citizenship like any other person for naturalisation the resident requirement in their case is only two years instead of five. It is also particularly interesting that this provision do not only apply to married women but all non-citizens who marry citizens.

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<sup>260</sup> See Carpenter 31.

<sup>261</sup> See Hatchard and Slinn 151.

<sup>262</sup> *Ibid.*

<sup>263</sup> See Constitution of Zimbabwe Amendment (no 3) Act 1983, Citizenship of Zimbabwe Act 1984.

Any person may acquire Namibian citizenship by naturalisation after a period of continuous residence of at least five years. Such person may be required to meet requirements pertaining to health, morality, security or legality of residence. The possibility exists for persons to acquire citizenship on the strength of special skill, experience or service rendered to the Namibian nation. This power, vested in the legislature, could be used to exclude would be immigrants who are indigent, illiterate or untrained in any skilled occupation. Such a prohibition could affect black people from neighbouring countries which supported Namibia during its struggle for independence. Namibian citizenship is lost when a citizen voluntarily renounces his or her citizenship. The legislature is also empowered to enact legislation to the effect that Namibian citizenship may be lost on acquisition of the citizenship of another country, service in the armed forces of another state without the leave of the government or permanent residence in another country. However, such legislation may not deprive a Namibian by birth or descent of his or her citizenship. In other words, a Namibian citizen by birth or descent who acquires the citizenship of another country may hold dual citizenship. The Constitution does not provide for deprivation of citizenship by reason of conviction of a serious crime. This such legislation would be unconstitutional or more specifically in conflict with the Declaration of Rights. The acquisition and loss of citizenship provisions in Namibia and Zimbabwe further demonstrates the incorporation of non-racialism and non-discrimination and their translation into constitutional reality in modern African constitutionalism.

#### **5.2.10.5 Human Rights**

The fundamental human rights and freedoms, their protection and enforcement and derogations thereof in exceptional circumstances are contained in articles 5-25.<sup>264</sup> The Constitution protects mostly first generation rights, second and third generation rights appearing as principles of state policy (in Chapter 11), thus not being judicially enforceable.

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<sup>264</sup> See Erasmus "Die Grondwet van Namibië" 294-299.

Article 5 states that the fundamental rights and freedoms contained in the Constitution shall be binding on the legislature, the executive and the judiciary. Further, all organs and agencies of the government are bound by these, as well as private individuals and legal persons. Thus the organs of government in whose care the government of Namibia is entrusted are all bound in their actions by the constraints laid upon them in the Constitution.

Article 6 states that the right to life is respected and shall be protected. The death sentence is expressly forbidden, this prohibition seemingly being extended to such sentences passed down by (military) court marshals. The Universal Declaration states in article 3 that everyone has the right to life. The broad phrasing of this article leaves it open to judicial interpretation as to whether or not it would include the death sentence's prohibition. By contrast, the European Convention expressly made provision for the imposition of a sentence of death by a court. Further provision is made for the deprivation of life in cases of self-defence, lawful arrest or in riot situations. This position was changed in 1983 with the adoption of Protocol VI which states in article 1 that the death penalty shall be abolished and that no one shall be condemned to such penalty or executed. However, according to article 2, a state may make provision in its law for the death penalty in respect of acts committed in time of war or imminent threat of war, provided that such penalty is applied in instances laid down in the law and in accordance with its provisions.

Personal liberty is protected by article 7, with the only derogations thereof allowed being those according to procedures established by law.<sup>265</sup> The European Convention states that deprivations of one's personal liberty may only be done in accordance with procedures prescribed by law, and then only in exceptional circumstances.<sup>266</sup>

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<sup>265</sup> See article 9 of the UDHR.

<sup>266</sup> *Inter alia* after a conviction by a competent court, for contempt of court, upon reasonable suspicion of the person having committed an offence. See article 5(1)(a)-(f).

Respect for human dignity is guaranteed by article 8, including during judicial proceedings or other proceedings before any organ of state, and during the enforcement of penalties.<sup>267</sup> Further, article 8(2) specifically outlaws torture, cruel, inhuman or degrading punishment.<sup>268269</sup>

Article 9 proscribes slavery and forced labour. The article goes on to describe what shall not be included under forced labour: labour required in consequence of a sentence or order of a court; labour required in the interest of hygiene; labour required of persons in lawful detention; labour required by members of the security force in pursuance of their duties, or of conscientious objectors in lieu of military service; labour required during a period of public emergency; and labour required as part of communal or other civic obligations. Article 4 of the European Declaration also prohibits slavery, servitude and forced labour, the latter also being extensively defined.<sup>270</sup>

Article 10 contains an equality clause,<sup>271</sup> stating that all persons are equal before the law and may not be discriminated against on grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.<sup>272</sup> Article 23(2) contains a proviso to this article empowering the legislature to enact measures aimed directly or indirectly at the advancement of persons who have been disadvantaged by past discriminatory laws or practices and to correct social, economic and educational imbalances and imbalances in the structure of the public service, defence force, police force and prison service. Thus policies of affirmative action are allowed notwithstanding the provisions of article 10.<sup>273</sup>

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<sup>267</sup> See article 8(1).

<sup>268</sup> The same is stated almost verbatim in article 5 of the UDHR and article 3 of the European Declaration.

<sup>269</sup> See in this regard *Ex Parte Attorney General, Namibia: In re Corporal Punishment by Organs of the State* 1991 (3) SA 76 [NMSC], where it was found that corporal punishment is a form of cruel and inhuman punishment. See also *TCOEIB* 1993 (1) SACR 274 (NM).

<sup>270</sup> See article 4(3)(a)-(d). See also article 4 of the UDHR.

<sup>271</sup> In this regard see article 14 of the European Convention which contains materially the same provisions.

<sup>272</sup> Carpenter states that this is the closest that the Namibian Constitution gets to recognising minority or group rights. The protection is however accorded to individuals and no recognition is granted to the groups separate identity. See Carpenter 33.

<sup>273</sup> See article 14 of the European Convention, which does not contain any provisions concerning affirmative action. See also article 2 of the UDHR. The latter may conceivably allow for policies of affirmative action under article 29(2) which allows for "such limitations as are

Arbitrary arrest and detention are proscribed by article 11.<sup>274</sup> It would seem, given article 7, that the inclusion of this article would be "an instance of legislation *ex abundanti causa*".<sup>275</sup> However, taking into account the history in South Africa of detentions without trial according to procedures established by law, it would appear to be necessary to highlight the fact that not only are arbitrary arrests and detention proscribed, but that any arrest and detention will be subject to the due process provisions contained in the article: these being that the person concerned be informed in a language they understand of the reason for the action;<sup>276</sup> that he or she be brought before a judicial officer within a reasonable time and that any further detention must be authorised by judicial officer and not an organ of the executive.

Article 12 guarantees due process before the law. The Constitution statutorily enshrines certain basic principles of common law, such as that a person accused of an offence is entitled to a fair and public hearing by a competent, impartial and independent court or tribunal established by law, and within a reasonable time (failing which the accused shall be released); that every accused is presumed innocent until proven guilty; that an accused is entitled to call witnesses, to cross-examine state witnesses and to a fair opportunity to prepare his or her defence and to be represented by legal council of his or her choice; that no-one can be compelled to give testimony against himself or his spouse; that no-one should be liable to be tried for an offence of which he has already been convicted or acquitted; and that the rule *nulla poena sine lege* will be observed.<sup>277</sup> It is in this article (amongst others) that one clearly sees the influence of the European Convention, which in article 6 contains materially the same provisions as does the Namibian Constitution in article 12.<sup>278</sup>

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determined by law... and of meeting the just requirements... and the general welfare in a democratic society."

<sup>274</sup> See *Djama v Government of the Republic of Namibia and others* 1993 (1) SA 387 (Nm).

<sup>275</sup> Carpenter 33.

<sup>276</sup> See article 6(3)(a) of the European Convention.

<sup>277</sup> See sections 10 and 11 of the UD for similar provisions.

<sup>278</sup> The European Convention goes further than the Namibian Constitution in regards to the protection of due process in that it guarantees the right, upon conviction, to appeal to a higher tribunal. See article 2(1) of Protocol VII (1984).

Article 13 protects the individual's right to privacy specifically against such intrusion by organs or agencies of the state, save as in

- (1) accordance with the law;
- (2) as is necessary in a democratic society;
- (3) in the interest of national security,
- (4) public safety, or
- (5) the economic well-being of the country,
- (6) for the protection of health or morals,
- (7) for the prevention of disorder or crime, or
- (8) for the protection of the rights and freedoms of others.

Criticism can be given against the wide ambit of the derogation clause. *Carpenter*<sup>279</sup> shows that the presence of the criterion of necessity in a democratic society could, by a court of law, be interpreted legalistically, and gives as an example the decision in *Government of Bophuthatswana v Segale*,<sup>280</sup> where the Appellate Division was prepared to accept that action was necessary in a democratic society if the executive said it was. A literalist approach such as this leads to doubts as to the efficiency of the protection afforded individuals by a bill of rights.<sup>281</sup> This has however not been the case as the court stated in *Government of the Republic of Namibia and Another v Cultura 2000 and Another*<sup>282</sup> that the Constitution is not to be given a narrow, mechanistic, rigid and artificial interpretation. It should rather be interpreted so as to enable it to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation. It would thus appear as though the derogations afforded in article 13 are of an internationally acceptable standard as this article is almost identical in content to that of article 8 of the European Convention.<sup>283</sup>

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<sup>279</sup> *Carpenter* 36.

<sup>280</sup> 1990 1 SA 434 (BA).

<sup>281</sup> See AM Dhlamini "Growth by Stifling" 1990 *THRHR* 121, and Carpenter "Constitutional Interpretation in Bophututswana - What price a Bill of Rights" 15 *SAYIL* (1989-90) 169-175.

<sup>282</sup> 1994 (1) SA 407 (Nms).

<sup>283</sup> See also article 12 of the UD. It is interesting to note that the African Charter does not protect the right to privacy of an individual.

The rights of the family are protected in article 14. This article (which corresponds verbatim with article 16 of the UD) guarantees that spouses are equal in every aspect of marriage. This raises questions as to, for example, the position of the husband as head of the family, the domicile of the wife and the position of the father as legal guardian of minor children<sup>284</sup> in respect to the common law will change.<sup>285</sup> Further, the article states that spouses shall enter into marriage voluntarily. This means that arranged marriages in accordance with indigenous legal systems would not be allowed.

Article 14(3) recognises the family as the natural and the fundamental group of society, which is entitled to protection by the state. This provision should however not be construed so as to give every such family a claim against the state for housing or monetary support. The result of such an interpretation would be an intolerable burden on the economic resources of the state. It would appear that the article is geared towards the protection of the family as a singular unit, with the prevention of its dissolution as its main aim.

Jaichand<sup>286</sup> states with reference to article 16 of the UD that this article would include protection for children as they are members of the society of the future and therefore need the protection of both laws and society. Article 15 of the Namibian Constitution deals specifically with the rights of children. Children have the right to a name, nationality, and the right to know and be cared for by their parents. Further protection is confined largely to protection against economic exploitation and legislation providing for preventative detention (presumably except in a place of safety or a reformatory) of children under sixteen years of age. These provisions are to be found in the Declaration of the Rights of the Child<sup>287</sup> under principle 3 (the right to a name and nationality) and

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<sup>284</sup> In this regard see article 5(1) of protocol VII (1984) of the European Convention which gives spouses equal rights and responsibilities in their relations with their children.

<sup>285</sup> With regard to the husbands position as head of the family and the determination of the wife's domicile in accordance with the common law in South Africa, the position has been statutory changed through article 30 of the Fourth General Amendment Act 132 of 1993.

<sup>286</sup> See Robertson (ed.) *Human Rights for South Africans* (1990) 111.

<sup>287</sup> GA Resolution 1386(XIV) of 20 November, 1959.

principle 9 (protection against economic exploitation). The right of a child to know its parents would seem to indicate that adopted children will be entitled to know the identity of their biological parents. This right would not seem to be extended to children born out of incest or rape due to the proviso "subject to legislation enacted in the best interests of children".

Article 16 protects the right of individuals<sup>288</sup> to own property. This right is subject to the restriction that the state may expropriate property in the public interest subject to the payment of just compensation.<sup>289</sup> Although Carpenter argues that it would have been preferable to permit expropriation "for public purposes" rather than "in the public interest" since the latter term is much wider and can be construed to encompass virtually all forms of dispossession; it is submitted that the latter seems to be generally accepted as it appears in the European Convention<sup>290</sup> and in essence in the African Charter.<sup>291</sup>

The freedom to participate in peaceful political activity is protected in article 17. This includes the right to join and form political parties and to participate in the conduct of public affairs, either directly or through freely chosen representatives. The Franchise is extended to every citizen over the age of eighteen years and the right to stand for public office to every citizen over the age of twenty-one years. These rights may only be abrogated, suspended or impinged upon by Parliament on grounds of infirmity or "on such grounds of public interest or morality as are necessary in a democratic society." It is interesting to note that the UD in article 21(3) goes further than article 17 of the

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<sup>288</sup> Carpenter states that the concept of communal rather than private ownership of fixed property has therefore not found its way into the Namibian Constitution.

<sup>289</sup> See *Government of the Republic of Namibia and Another v Cultura 2000 and Another* 1994 (1) SA 407 (Nms).

<sup>290</sup> See article 1 of Protocol 1 (1952) of the European Convention on Human Rights, which reads:

"No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law ...".

<sup>291</sup> See article 14 which reads that property " may only be encroached upon in the interest of public need or in the general interest of the community ...".

Namibian Constitution by stating that elections shall be periodic and genuine, and shall be held by secret ballot or by equivalent voting procedures.<sup>292</sup>

Article 18 guarantees administrative justice. The basic tenets of the Administrative Law (ie that administrative bodies and officials must act fairly and reasonably and must comply with the requirements as laid down by law, and that persons aggrieved by the exercise of such acts and decisions shall have recourse to the courts) are constitutionally guaranteed. This is explained by the fact that in the absence of such guarantees it is possible for the legislature to: (1) exclude rules aimed at fair and reasonable administrative action, and (2) to exclude the court's jurisdiction to review administrative action. Read in conjunction with article 25(4) the aggrieved party could be awarded monetary compensation for a transgression of this article, thus making financial recompense for unlawful administrative action reasonably easily obtainable.

Article 19 protects the right of every person to enjoy or practice any culture, language, tradition or religion.<sup>293</sup> This right is placed subject to the condition that such rights do not impinge upon the rights of others or the national interest. Thus any tradition or practice in conflict with these provisions are not permitted. Article 27(1) of the UD states that everyone has the right to freely participate in the cultural life of the community. Staniland<sup>294</sup> states that the primary meaning of this provision is that any individual has the right to cultural freedom regardless of race, gender, religion or any other such distinction. Article 19 of the Namibian Constitution seems to be in accordance with this.

Article 20 states that all persons have the right to education.<sup>295</sup> Primary

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<sup>292</sup> The European Convention states in this regard that free elections must be held at reasonable intervals by secret ballot. See article 3 of Protocol 1 (1952).

<sup>293</sup> See *Government of the Republic of Namibia and Another v Cultura 2000 and Another* 1994 (1) SA 407 (Nms).

<sup>294</sup> Robertson (ed.) *Human Rights for South Africans* (1990) 200.

<sup>295</sup> See article 26 of the UD.

education (which is not defined) is compulsory and free of charge. The minimum education a child may receive is primary education, or failing that, the child must be educated until he or she attains the age of sixteen years. Private educational facilities may be established, provided that:

- a) they register with the appropriate government department;
- b) their standard of education is not inferior to that in government schools;
- c) they have no restrictions with respect to admission of pupils or the recruitment of staff based on race or colour.

The European Convention guarantees for everyone the right to education.<sup>296</sup> However, it does not prescribe a minimum educational qualification that is compulsory. Further, the European Convention makes it obligatory for states, in respect to the provision of education, to respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. No such obligation is placed on the Namibian Government, although a similar provision is to be found in the UD under article 26(3) which states that parents "have a prior right to choose the kind of education that shall be given their children."

Article 21 contains provisions for the protection of certain fundamental freedoms. The article states that all persons shall have the right to:

- "a) freedom of speech and expression, which shall include freedom of the press and other media;<sup>297</sup>
- b) freedom of thought, conscience and belief, which shall include academic freedom;<sup>298</sup>
- c) freedom to practise any religion and to manifest such practice;<sup>299</sup>
- d) assemble peaceably and without arms;<sup>300</sup>

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<sup>296</sup> See article 2 of Protocol 1 (1952).

<sup>297</sup> See article 10(1) of the European Declaration, see also article 19 of the UD.

<sup>298</sup> *Ibid* article 9(1), see also article 18 of the UD.

<sup>299</sup> *Ibid*.

<sup>300</sup> See article 20 of the UD.

- e) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties;<sup>301</sup>
- f) withhold their labour without being exposed to criminal penalties;
- g) move freely through Namibia;<sup>302</sup>
- h) reside and settle in any part of Namibia;<sup>303</sup>
- i) leave and return to Namibia;<sup>304</sup>
- j) practice any profession, or carry on any occupation, trade or business."

With reference to article 21(b), Carpenter states that freedom of conscience should not be interpreted in such a way as to render conscription unconstitutional.

The freedoms enumerated in article 21 are not unlimited as they are rendered subject to article 21(2) which provides that they are subject to the law of Namibia which may impose such reasonable restrictions as are necessary in a democratic society and are in the interests of the sovereignty and integrity of Namibia, national security, public order, decency and morality, or relate to contempt of court, defamation or incitement to commit an offence.

Article 22 prescribes the conditions which legislation has to meet if its object is the curtailment of the rights and freedoms protected in Chapter 3. The article states that any law providing for such limitations:

- 1) must be of general application;
- 2) may not negate the essential content of the right or freedom concerned;
- 3) may not be aimed at a particular individual;
- 4) must specify the ascertainable extent of such limitation; and
- 5) must identify the provision on which authority to enact the limitation is based.

The limitation that the legislation must be general and not of individual application ensures that no victimisation takes place. The requirement relating

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<sup>301</sup> *Ibid* article 11(1).

<sup>302</sup> See article 2 of Protocol IV (1963), see also article 13 of the UD.

<sup>303</sup> *Ibid*.

<sup>304</sup> *Ibid* article 2(2), see also article 13 of the UD.

to the essential content of the right derives from the concept of *Wesengehalt* which is to be found in the constitution of the Federal Republic of Germany. These restrictions ensure that an important factor in the achievement of both procedural and substantive justice, namely legal certainty, is achieved.

Article 23 concerns apartheid and affirmative action. Sub-article (1) states that the practice of racial discrimination and apartheid may be rendered a punishable offence by the Namibian Parliament and a penalty imposed which "Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people of such practices." Sub-article (2) makes provision for affirmative action stating that nothing in article 10 shall prohibit such legislation being enacted.

The Namibian Constitution contains in article 24 a derogation clause. This article must be read in conjunction with article 26 which makes provision for extraordinary measures which may be adopted in times of public emergency, a state of national defence or martial law. In terms of article 24 nothing done in terms of article 26 will be deemed to be in conflict with the Constitution if the measures are taken whilst the country is in a state of national defence or when a declaration of national emergency is in force. Article 26(1) provides that the President may by proclamation in the Gazette declare a state of emergency "at a time of national disaster or during a state of national defence or public emergency threatening the life of the nation or the constitutional order."

The President may, in terms of article 26(5)(a) and during such extraordinary times as mentioned above, make such regulations as he or she deems necessary. This may include the detention of individuals. Such detentions are however subject to the conditions as laid down in article 24(2) which require that: within the time period of five days at the most the detainee must be furnished, in a language he or she understands, with a statement specifying in detail the grounds upon which they are detained and, at their request, this statement must be read to them; notification of any such detention must be

published in the Gazette within fourteen days; the Advisory Board, established in terms of article 26(5)(c), must review the detention not more than one month after the commencement of the detention and every three months thereafter, this board being competent to order the release of a detainee if it is not satisfied that the detention is reasonably necessary; and that the detainee shall be offered the opportunity for the making of representations as may be desirable (presumably this refers to the President or the Advisory Board.)

Article 26(5)(b) confers wide ranging powers on the President who may suspend the operation of any rule of common or statutory law or any fundamental right or freedom protected by the Constitution, for such a time and subject to such conditions as are reasonably justifiable for the purpose of dealing with the situation at hand; subject to the proviso that the President may not act contrary to the provisions of article 24(3).

Article 24(3) entrenches certain fundamental rights and freedoms, these being: article 5 (which states that all the rights and freedoms contained in the declaration of rights must be respected by the government in all its three branches); article 6 (life); article 8 (liberty); article 9 (slavery and forced labour); article 10 (equality and freedom from discrimination); article 12 (fair trial); article 14 (family rights); article 15 (children's rights); article 18 (administrative justice); article 19 (cultural rights); article 21(a) (freedom of speech and expression), (b) (freedom of thought, conscience and belief), (c) (freedom of religion) and (e) (freedom of association). This article thus provides wide ranging protection for the individual under the Constitution. This protection should remain unchallenged save for the total collapse of the constitution of Namibia.

Article 25 provides for the justiciability of the Constitution. Namibia, like Zimbabwe, has opted for enforcement of the Constitution by the ordinary courts rather than by a special constitutional court. The courts have not only the power to declare a statute or executive matter invalid as being contrary to the provisions of the Constitution, but may, in terms of article 25(1)(a) also refer

such statute or executive matter back to either the parliament or the executive (as the case may be) to correct any defect in the said statute or action as may be required by the court. Pertaining to laws in force prior to the date of Independence, article 25(1)(b) states that such laws shall remain in effect until amended, repealed or declared unconstitutional. Here again the court has the option of either invalidating the law or allowing parliament to correct the defect.

An issue worth noting is the question which arises as to the status of common law rules or laws which, while clearly in conflict with the Constitution, have not yet been repealed or declared unconstitutional by the court. Carpenter<sup>305</sup> suggests that the answer lies in a literal interpretation of article 25(1)(b) and article 140(1), the latter reading:

"Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent court."

Thus the law would remain in force until the legislature or judiciary removed it.<sup>306</sup> By removing the power to decide the issue from the hands of the administration who could then decide the issue on a day to day basis, one is promoting legal certainty. This also ensures that the doctrine of the separation of powers as provided for in article 1(3) is maintained.

Access to the courts is provided for in article 25(2) to persons whose rights and freedoms have been infringed, or who fear they may be infringed. Further provision is made for access to the Omdudsman (created in terms of Chapter

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<sup>305</sup> Carpenter 41.

<sup>306</sup> Carpenter finds the solution to this issue in the distinction between formal and material law validity: the Constitution enjoying formal validity from the date of its commencement, yet achieving material law validity only at such a time as the courts lay their seal on it. *Ibid.* The opposite could however also be said, namely that the Constitution is materially valid, with laws enjoying formal validity. Laws would attain material validity once they withstood the test of Constitutionality. (The author subscribes to the latter).

10), for either legal assistance or advice. This provision reinforces article 24(3), thus making it clear that derogations from or suspensions of fundamental rights and freedoms may not have the effect of denying individuals access to legal help or a court of law.

One may ask the question as to what extent interpretations of the Universal Declaration and the European Convention will influence interpretations of the Namibian Constitution?. Due to the fact that the provisions of the European Convention formed an integral part in the framing of the Namibian Constitution, it is submitted that the judgements of the European Court should play a very persuasive role in the interpretation of the Namibian Constitution.

#### **5.2.10.6 State of Emergency.**

The powers of the Executive in this regard are not absolute.<sup>307</sup> In terms of article 27(3) the President, in consultation with the Cabinet, may declare a state of emergency by proclamation in the Gazette at a time of national disaster or during a state of national defence or public emergency. This declaration will cease to have effect unless it is ratified by a two-thirds majority of all members of the National Assembly within seven days if the Assembly is in sitting or within thirty days if it is not. The resolution of the Assembly itself is valid for six months, after which the state of emergency must again be renewed by a two-thirds majority. Further, it must be remembered that the role of the courts in this regard will be decisive, this being due to the fact that article 24(3) and article 25(2) prohibit ouster clauses seeking to exclude the court's jurisdiction when the infringement of any fundamental right or freedom is at issue, further, article 22 serves to ensure that no fundamental right or freedom's essence is encroached upon.<sup>308</sup>

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<sup>307</sup> See Erasmus "Die Grondwet van Namibië" 299-300.

<sup>308</sup> See also in this regard the discussion of article 5(c) *supra*.

### 5.2.10.7 Organs of the State

#### a) *The President.*

The President<sup>309</sup> is both head of state and head of the government, and the executive power vests in him or her and the cabinet. The President's term of office is five years (barring death, resignation or removal). The supremacy of the Constitution is emphasised in the constitutional requirement for the removal of a President from his or her office. Article 29(2) states that a President may only be removed from office by a resolution passed with a two-thirds majority of all the members of the National Assembly, confirmed by a two-thirds majority of all the members of the National Council, impeaching the President on the grounds of

- a) violation of the Constitution; or
- b) a serious violation of the law of the land; or
- c) such gross misconduct or ineptitude as to render the President unfit to hold office with honour and dignity.

Article 32 sets out the functions and powers of the President.

Further, in terms of article 32(4)(a) the President is empowered to appoint judges, the Ombudsman and the Prosecutor-General, on recommendation of the Judicial Service Commission. Such Commission shall consist of the Chief-Justice, a judge appointed by the President, the Attorney-General and two members of the legal profession nominated in accordance with an Act of Parliament by the professional organisation representing the interests of the legal profession.<sup>310</sup>

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<sup>309</sup> On the Executive in general see Erasmus "Die Grondwet van Namibië" 300-302.

<sup>310</sup> See article 32(4)(a).

*b) The Cabinet*

Article 35 provides that the Cabinet is comprised of the President, the Prime Minister<sup>311</sup> and the Ministers appointed by the President from the ranks of the National Assembly. Article 40 lays out the duties and functions of the Cabinet. Most of these duties and functions may be described as standard functions of the executive<sup>312</sup> (such as directing the activities of of the ministries, initiating legislation, being responsible to the legislature for state expenditure and government policy, advising the President and so on).

Mentioned in this article is also the individual and collective responsibility of the Cabinet to Parliament, as well as the prohibition on members of the Cabinet enjoying paid employment or participating in any other activity which could lead to a conflict of member's official and private interests. Ministers are further prohibited from using their positions or any information gained as members of the Cabinet to enrich themselves.

*c) The National Assembly.*

In terms of article 44 the legislative authority in Namibia is vested in the National Assembly, this being empowered to make laws with the assent of the President and in certain circumstances subject to the powers of the National Council. Certain principles of democracy are enshrined in article 45 which states that the National Assembly shall be representative of all the people of Namibia and is to be guided in the execution of its duties by the objectives of the Constitution (and by its obligatory provisions as well),<sup>313</sup> by the public interest and by their own conscience.<sup>314</sup>

All Namibians who qualify in terms of article 17 for the franchise elect, by direct

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<sup>311</sup> On the office of the Prime Minister see article 36.

<sup>312</sup> Carpenter 48.

<sup>313</sup> See article 25.

<sup>314</sup> See paragraph 3 of the Preamble

and secret ballot, seventy-two members of the National Assembly. The President can then appoint not more than six additional members by virtue of their special expertise, status, skill or experience. In line with the above mentioned democratic principles, these members, who are thus not elected by the people of Namibia, have no vote and are not taken into account for the purposes of determining specific majorities which are required by law.

Members vacate their seats on becoming disqualified, on resignation, on removal by the Assembly in terms of its rules and standing orders, if the member is absent without leave for ten consecutive sitting days, and if the political party which nominated the member informs the Speaker that he or she is no longer a member of that party. Thus the free mandate system falls away. This is due to the fact that territorial representation has been replaced with a system of proportional representation. The parliamentary representative represents the party that nominated him or her and not the constituents of a particular geographical area.<sup>315</sup> Thus when a member of Parliament crosses the floor to an opposing political party, the chances are that his or her constituents will no longer feel as though he or she is their representative.<sup>316</sup>

As with the President, the powers of the National Assembly are also limited by the Constitution. The President must in terms of article 56(1) assent to all Bills passed by the Namibian Parliament. As Carpenter states,<sup>317</sup> "this assent is by no means a mere formality." A Bill approved by a two-thirds majority of all the members of the Assembly and confirmed by the National Council, the President has no option but to assent to.<sup>318</sup> Where it is approved by less than a two-thirds majority, and confirmed, the President may decline his assent and inform the

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<sup>315</sup> In a system of territorial representation the parliamentary representative represents his or her constituents in principle but his or her party in practice.

<sup>316</sup> There were instances in pre-independence Namibia where constituents sought to force their elected parliamentarian who had thrown his lot in with that of an opposing party to resign. See *Du Plessis NO v Skrywer NO* 1980 2 SA 52 (SWA), [1980 3 SA 863 (A)].

<sup>317</sup> See Carpenter 50.

<sup>318</sup> See article 56(2).

Speaker accordingly.<sup>319</sup> The Bill is then returned to the National Assembly for reconsideration, or approval in its original form, or the National Assembly may decline to pass it. If the National Assembly approves the Bill, no further confirmation by the National Council is required, but if the Bill is passed by less than a two-thirds majority the President retains the discretion to refuse his or her assent. In this case the Bill will lapse.<sup>320</sup>

The Constitution further limits the powers of the National Assembly by vesting the President with the right to judge the constitutionality of a Bill. Article 64 gives the President the right to withhold assent if he or she is of the opinion that the bill is in conflict with the Constitution. Upon such refusal the President must inform the Speaker, who in turn informs the National Assembly and the Attorney-General. The Attorney-General may take appropriate steps to have the matter settled judicially. If the Court finds that the Bill is in conflict with the Constitution, it lapses and the President may not assent to it. On a finding that it is not unconstitutional, the President is obliged to give his or her assent if it has been passed with a two-thirds majority in the Assembly, if this has not occurred he may withhold his or her assent upon which occurrence articles 56(3) and (4) then apply.

For the purpose of this thesis no in-depth analysis of the National Council is necessary, save what has already been dealt with; yet it should be noted further that the National Council has no original legislative jurisdiction.

#### *d) The Judiciary*

Article 78 states that the judicial power vests in the Courts of Namibia, consisting of a Supreme Court, a Higher Court and Lower Courts.<sup>321</sup> Sub-article (2) states that the courts "shall be independent and subject only to the

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<sup>319</sup> See article 56(3).

<sup>320</sup> See article 56(4).

<sup>321</sup> On the Judiciary in general see Erasmus "Die Grondwet van Namibië" 306-309.

Constitution and the law." The independence of the judiciary is highlighted in sub-article (3) which prohibits members of the Cabinet, the Legislature or any other person from interfering with the Judges or judicial officers in the execution of their duties. As stated before, the ordinary courts of Namibia are vested with the power of constitutional judicial review.<sup>322</sup>

#### **5.2.10.8 Principles of State Policy.**

Chapter 11 deals with the Principles of State Policy.<sup>323</sup> This Chapter can best be described as a "statement of intention which has been accorded special validity and permanence by its inclusion in the Constitution itself."<sup>324</sup> In short, it is a blueprint for future state action. It is submitted that the promotion of the welfare of its people is of paramount importance to the state, the government and the constitution. The Namibian Constitution has however spelt out the policies which the state is to follow in this regard, and also constitutionally enshrined them in article 95. Among the issues dealt with in this provision are: the achievement of sexual equality; the improvement of health standards; the encouragement of trade unions; membership of the International Labour Organisation; the plight of senior citizens, the unemployed, the disabled, the indigent and the disadvantaged; legal aid; a decent living wage; educational standards; and the protection of the environment and the ecosystem.

As can be seen, these interests concern second and third generation human rights (ie socio-economic and environmental rights.) These are not included under the Namibian Constitution's bill of rights and are thus not judicially enforceable. The reason for this is that their enforcement is often too difficult a task to achieve, and also as it would place an unbearable strain on the Namibian economy.

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<sup>322</sup> See *Federal Convention of Namibia v Speaker, National Assembly of Namibia, and Others* 1994 (1) SA 177 (Nm).

<sup>323</sup> In general see Erasmus "Die Grondwet van Namibië" 309-313.

<sup>324</sup> See Carpenter 56.

Article 96, which deals with foreign relations states that Namibia shall follow a policy of non-alignment; promote international co-operation, peace and security; create and maintain just and mutually beneficial relations amongst nations; foster respect for international law and treaty obligations; and encourage the settlement of international disputes by peaceful means.<sup>325</sup>

Article 97 deals with the question of asylum, article 98 with the principles of economic order and article 99 with foreign investment.

Article 101 makes provision for the application of the principles contained in Chapter 11. This article makes it clear that the provisions in Chapter 11 are not judicially enforceable, but are intended to act as guidelines. Due to the fact that the Courts will be able to have regard to the said principles in interpreting any law based on them, the principles will in effect have the force of presumptions of statutory interpretation and should thus, in time, gain the force of law through judicial precedent.<sup>326</sup>

#### **5.2.10.9 Amendment of the Constitution.**

Amendments of the Constitution are provided for in Chapter 19.<sup>327</sup> Article 131 is of such cardinal importance in the Constitution that it deserves to be quoted in full:

"No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect."

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<sup>325</sup> This article corresponds materially to the Charter of the United Nations, especially those provisions stating the aims and objectives of the UN.

<sup>326</sup> Carpenter states that this will prove to be of immense importance in the field of judicial review of administrative action in particular. See Carpenter 57.

<sup>327</sup> In general see Erasmus "Die Grondwet van Namibië" 315.

Thus enhancement or extension of the protection given under Chapter 3 is allowed, but any diminution thereof is prohibited. Thus the protection granted under Chapter 3 is irrevocably and firmly entrenched in the Constitution.

The Constitution, under article 132, does allow for the amendment of other provisions, but subject to considerable restraints.<sup>328</sup> A Bill purporting to amend the Constitution must be specific and may not deal with any matter other than the proposed repealment or amendment. It must be approved by a two-thirds majority of the total number of members of the National Assembly and a two-thirds majority of the total number of members of the National Council. In the event that the required majority is not secured in the National Council, the President may call a referendum over the Bill in question. If approved by a two-thirds majority of the votes cast, the Bill is deemed to have been duly passed and is given to the President for his assent. Sub-article (4) prohibits absolutely any amendment of the provisions concerning the required majorities (in sub-articles (2) and (3)) above. Further protection of Chapter 3 is given by subarticle (5)(a) which states that the entrenched position of article 131 cannot be altered.

The above mentioned provisions clearly entrench the idea of a Constitutional State in the Namibian Constitution.

#### **5.2.10.10 Transitional Provisions.**

Chapter 20, entitled "The Law in Force and Transitional Provisions", makes provision for the conversion of the Constituent Assembly to the first National Assembly, for the election of the first President by the Constituent Assembly and for the implementation of the Constitution.<sup>329</sup>

Until such time as the first National Council has been elected, the National Assembly would exercise all legislative authority. Article 137 provides for the

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<sup>328</sup> Carpenter 59.

<sup>329</sup> In general see Erasmus "Die Grondwet van Namibië" 314-315.

election of the first Regional Councils and the first National Council.

Judicial continuity is provided for by article 138; the judges holding office at the date of independence continued in office and all laws governing jurisdiction, procedure and so on remained in force. Criminal prosecution started before independence continued as if they had been started after independence. All criminal offences committed before the date of independence would remain thus, provided they would have been crimes according to the law of Namibia, had it been in existence at that time. Article 140 (read with article 60) made provision for the continued applicability of laws in force prior to independence, subject to the Constitution, until such time as they are repealed, amended or declared unconstitutional. Thus the status quo was maintained for transitional purposes. Article 142 provides for the appointment of the first Chief of the Defence Force, Inspector-General of Police, and Commissioner of Prisons; these being appointed by the President in consultation with the leaders of all political parties represented in the National Assembly.

In terms of article 143 existing international agreements binding on Namibia remain in force, unless and until the National Assembly, acting under article 63(2)(d)<sup>330</sup> decides otherwise.

#### **5.2.10.11 Incorporation of International Law.**

Article 144 states that the general rules of international law and international agreements binding on Namibia under the Constitution shall form part of the law of Namibia, unless the Constitution or an act of parliament provide otherwise.<sup>331</sup>

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<sup>330</sup> The National Assembly shall have the power ... " (d) to consider and decide whether or not to succeed to such international agreements as may have been entered into prior to Independence by administrations within Namibia... ".

<sup>331</sup> See in this regard Erasmus "Die Grondwet van Namibië" 315 - 317.

### **5.2.10.12 General Clauses**

Article 145 contains two saving clauses. The first of these clauses indemnifies the government against any obligations to any other states or persons (arising out of acts or contracts of prior administrations) which would not have been regarded as binding in terms of international law. The second clause states that nothing in the Constitution shall be construed as giving recognition of the government of South Africa's administration of Namibia. It is true that the Constitution makes provision for the transition from the South African administration to the Namibian administration,<sup>332</sup> and that this would amount to de facto recognition of the former's administration, thus one must interpret article 145(2) as a rejection of the de jure administration by South Africa of Namibia.

The definition of "parliament" in article 146(2)(a) gives further evidence of the limitations placed on the legislature when it states that the National Assembly (after the election of the first National Council) shall act "subject to the review of the National Council."

### **5.3 Conclusions**

As shown, the Namibian Constitution contains a remarkable number and variety of checks and balances. These include a justiciable declaration of fundamental rights and freedoms based largely on the successful European Convention on Human Rights (1950) and the Universal Declaration.. Like the European model, no provision is made for second and third generation rights in this bill. These rights (being mainly socio-economic and environmental of nature) do however find recognition under Chapter 11 as principles of state policy.

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<sup>332</sup> See article 140(2)-(5).

The checks and balances include an executive President who can do little of his own volition, having to act in consultation with various other organs of the state. The legislative powers of the National Assembly are limited by the power of review of the National Council and the possible Presidential review, and further, by the constitutional review of all relevant legislation by the judiciary. The Ombudsman is there as a source of assistance for individuals who feel aggrieved and who do not wish to take recourse in the courts. These constitutional protection mechanisms (amongst others) would seem to give the individual a large degree of protection, while the principles of democracy and the rule of law have further been entrenched.

## CHAPTER VI

### THE DYNAMIC CONCEPT OF THE RULE OF LAW IN SOUTH AFRICAN CONTEXT

#### 6.1 General

The dynamic concept of the rule of law links human rights, democracy and the right of peoples to self-determination and independence. In this chapter we examine how that linkage evolved and finally informed the creation of a Constitutional State in South Africa. First the Chapter will trace the UN and the OAU decolonisation strategies and their impact on Apartheid colonialism; secondly the Chapter will trace the reception of the international bill of rights and its impact on municipal concepts of a bill of human rights; thirdly the convergence of those municipal concepts; fourthly the liberalisation of South African politics which resulted in negotiations between the South African government and the National Liberation Movements; fifthly the dynamic concept of the rule of law in the South African context, and in particular, the dynamic concept of the rule of law and the final constitution-making process: its limitations, opportunities and implications for the Reconstruction and Development programme.

#### 6.1.1 South Africa and the United Nations Decolonisation Strategy

The influence of the post-World War II politico-legal order spread to South Africa soon after the establishment of the United Nations. The UN concerned itself with the racial situation in the South in the three resolutions on the South African racial conflict.<sup>1</sup> It stated, firstly, that it is the higher interest of humanity to put an immediate end to religious and so-called racial persecution and discrimination.<sup>2</sup> Secondly, peace could not be secured solely by collective

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<sup>1</sup> See chapter 3 *supra*.

<sup>2</sup> See Resolution 103 (I) of 19 November 1946.

security arrangements against breach of international peace and acts of aggression, but also by the observance of all principles and purposes established in the Charter of the United Nations,<sup>3</sup> and thirdly, that in multi-racial society harmony and respect for human rights and freedoms and the peaceful development and unified community are best assured when patterns of legislation and practice are directed towards ensuring the equality before the law of all persons regardless of race, creed or colour, and with economic, social, cultural and political participation of all racial groups on the basis of equality.<sup>4</sup>

In 1953 the UN General Assembly reaffirmed all three resolutions after realising that the policies of apartheid and their consequences were not only contrary to the UN charter and the Universal Declaration on Human Rights, but also that these policies were unlikely to be acceptable to the black majority. Thus the General Assembly resolved to request the Union Government to reconsider the components of its policy towards various ethnic groups in South Africa.<sup>5</sup> The UN Commission<sup>6</sup> for South Africa reinforced the position of the General Assembly in its second report which concluded that the principles incorporated in the provisions of the charter concerning human rights and fundamental freedoms have become, even outside the United Nations Charter, the general principles of law recognised by civilised nations. This conclusion made the UN Charter and the Universal Declaration directly applicable to the resolution of the South African constitutional conflict. Thus the commission suggested three steps for addressing the conflict within the UN politico-legal framework. First, the holding of an interracial conference with the assistance of the UN, secondly, an economic integration designed to alleviate the serious suffering caused to the black people by the dispersal and inadequacy of the reserves, their over-population in relation to their natural resources, the quality of their soil and their economic and technical development and also by the discriminatory measures against black workers employed in industry in the white areas, and

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<sup>3</sup> See Resolution 377 A (V) section E of 3 November 1950.

<sup>4</sup> See Resolution 616 B (VII) of 5 December 1952.

<sup>5</sup> See Resolution 616 B (VIII) of 8 December 1953.

<sup>6</sup> See Sohn and Buergenthal *International Protection of Human Rights* (1973) 665.

thirdly, that the need to ensure equal economic opportunities for all, regardless of differences of race, colour or belief should not delay steps to achieve political equality.

During the consideration of the commission's report on the racial situation in South Africa, the Union government claimed that the inclusion of an item on apartheid on the agenda infringed the provisions of Article 2(7) of the UN Charter which provides for the principle of non-interference in the internal affairs of members states. Apparently the General Assembly rejected this argument. The General Assembly discussed the commission's report and finally adopted a resolution which, firstly, endorsed the commission's finding that the new law and regulations which were being adopted by the Union government<sup>7</sup> were incompatible with the obligations of that government under the UN Charter and that the policy of apartheid constituted a grave threat to the peaceful relations between ethnic groups in the world;<sup>8</sup> and secondly, the General Assembly accepted the idea of an interracial conference proposed by the commission and accordingly invited the Union Government to reconsider its position in the light of the principles expressed in the United Nations Charter, taking into account the pledge of all member states to respect human-rights and fundamental freedoms without distinction as to race.<sup>9</sup> Finally, the General Assembly requested the Commission to keep under review the problem of race conflict in South Africa.

In terms of this Mandate the Commission made a thorough study and analysed a series of new legislative measures adopted by the Union Government which it (the Commission) considered to be inconsistent with the obligations of that government under the UN Charter and the Universal Declaration. In its third report resulting from this study the Commission affirmed that the continuation of the policy of apartheid constituted a serious threat to the national life within

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<sup>7</sup> See chapter 3 on a host of apartheid legislation adopted during the first half of the fifties.

<sup>8</sup> See Resolution 820 (IX) 9 GA OR Suppl. no. 21 (A/2890)1954.

<sup>9</sup> *Ibid*

the Union of South Africa and recommended that the General Assembly consider the matter under Article 14 of the Charter.<sup>10</sup> After considering this report the General Assembly expressed concern about the failure or neglect of the Union Government to observe its obligations under the UN Charter<sup>11</sup> and further called on the Union Government to take joint and separate action in cooperation with the UN<sup>12</sup> for the realisation of the principle of equal rights and self determination in South Africa<sup>13</sup> and, in addition, to 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
- (c) universal respect for, and observance of, human rights and fundamental freedoms for all without discrimination as to race, sex, language or religion.

In this resolution, therefore, the General Assembly, linked the principle of self-determination and human rights embodied in the UN Charter and Universal Declaration and made them directly applicable to South Africa. Here, for the first time the General Assembly reduced the post World War II politico-legal order to a fundamental basis for the creation of a new constitutional order in South Africa.

In 1957 the General Assembly deplored the continued failure and neglect of the Union Government to observe her obligations under the UN Charter and appealed to her to observe those obligations.<sup>14</sup> The appeal was followed by a 1958 general call upon all members to bring their policies into conformity with their obligations under the UN Charter and to promote the observance of human rights and fundamental freedoms.<sup>15</sup> In addition, the General Assembly

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<sup>10</sup> See Sohn and Buergenthal *International Protection of Human Rights* 665.

<sup>11</sup> See suppl. No. 19 (C/3116) at 1955.

<sup>12</sup> This call was made under Articles 56 of UN Charter.

<sup>13</sup> These obligations are embodied in Article 55 of the UN Charter.

<sup>14</sup> See Resolution 1016 (XI); II GAOR, suppl. No. 17(A/13572)5-6 (1957).n

<sup>15</sup> See Sohn and Buergenthal *op cit.*

expressed its regret and concern that South Africa had not yet responded to its appeals to observe its obligations under the UN Charter.

Following the racial disturbances of 1960<sup>16</sup> the UN Security Council<sup>17</sup> recognised, first, that the large scale killings of unarmed and peaceful demonstrators against racial discrimination and segregation had been brought about by the racial policies of the government; and secondly that the situation in South Africa was a threat to international peace and security. Hence, the Security Council directly linked the creation of a new constitutional order to peace and stability in South Africa and called on the Union Government to initiate measures aimed at bringing about racial harmony based on equality in order to ensure that the racial conflict did not continue or recur and, in particular, to abandon its policies of apartheid and racial discrimination. Instead, the Union Government embarked on :

- (a) the persecution and repression of opponents of the policies of apartheid;
- (b) the vigorous implementation of those policies; and
- (c) an alarming and unprecedented build-up of military and police forces. These developments increased the intensity of UN action against apartheid in South Africa.

For instance, in 1963 the Security Council noted with great concern the arms build-up by South Africa, which arms were being used to defend the policies of apartheid,<sup>18</sup> and reiterated its call on the Union Government to abandon its apartheid policies and free all persons imprisoned, interned or subjected to other restrictions for having opposed the policy of apartheid.<sup>19</sup> In addition, the Security Council imposed an arms embargo against South Africa.<sup>20</sup>

At the end of 1963 the Security Council<sup>21</sup> reaffirmed its earlier resolutions<sup>22</sup> and

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<sup>16</sup> See John Dugard *Human Rights and the South African Legal Order* (1978) 1.

<sup>17</sup> See Resolution 134 (1960) of 1 April 1960.

<sup>18</sup> See Resolution 181 (1963) of 7 August 1963.

<sup>19</sup> See par. 2 *Ibid.*

<sup>20</sup> See par. 3 *Ibid.*

<sup>21</sup> See Resolution 182 (1963) of 4 December 1963 (S/5471).

<sup>22</sup> In particular Resolution 181 (1963) of 7 August 1963.

recognised the need to eliminate discrimination in regard to basic human rights and fundamental freedoms for all individuals within the territory of the region and stated that the policies of apartheid and racial discrimination practised by South Africa was abhorrent to the conscience of humanity and that therefore a positive alternative to these policies had to be found through peaceful means.

To that end the Security Council urgently requested the South African government to cease forthwith its continued imposition of discriminatory and repressive measures which were contrary to the UN Charter and Universal Declaration of Human Rights. Here the Security Council, for the first time, endorsed the applicability of the post World War II politico-legal order to South Africa in clear terms. Further, the Security Council reiterated its call for the release of political prisoners and detainees, mandated the Secretary General to establish a group of experts and charge them with the task of examining methods of resolving the South African racial conflict through full, peaceful and orderly application of human rights and fundamental freedoms to all inhabitants of South Africa as a whole, regardless of race, colour or creed, and to consider the role of the UN in the process. Finally the Security Council invited the South African government to assist the group of experts in order to bring about a peaceful and orderly transformation and requested the Secretary-General to monitor efforts towards the implementation of this resolution and to report to the Security Council not later than 1 June 1964.

In a June 1964 Resolution<sup>23</sup> the Security Council noted with great concern the Rivonia trial<sup>24</sup> instituted against the leadership of the African National Congress (ANC) on the basis of arbitrary state security laws and urged the South African government:

- (a) to renounce the execution of persons sentenced to death for acts resulting from their opposition to the policy of apartheid;
- (b) to terminate the trial instituted within the framework of those arbitrary laws;

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<sup>23</sup> See Resolution 190 [1964] of 9 June 1964[S/5761].

<sup>24</sup> *Ibid* par. 3.

and

- (c) to grant an amnesty to all persons already imprisoned, interned or subjected to other restrictions for having opposed the policy of apartheid, particularly to the accused in the Rivonia trial.

On the 18 June 1964 the Security Council adopted another resolution<sup>25</sup> on the race conflict in South Africa. The resolution reaffirmed that the policies of apartheid were contrary to the principles and purposes of UN Charter and the Universal Declaration of Human Rights and condemned those policies and legislation supporting them and urgently reiterated its appeal to the South African government for the release of political prisoners and detainees.

Furthermore, and perhaps more significantly, the resolution endorsed the recommendation of the group of experts that:

"All the people of South Africa should be brought into consultation and should thus be enabled to decide the future of their country at the national level."

In this regard the Security Council requested the Secretary-General to consider the role that the UN might play and gave the South African government and ultimatum to respond to the call for national consultation on the future of South Africa.

The Security Council's call for a national consultation on the future of South African indicated repeated demands of the ANC for a non-racial convention<sup>26</sup> which had culminated in the 1961 All-Africa Conference held in Pietermaritzburg.<sup>27</sup> In particular, the Resolution signalled a common understanding between the ANC and the Security Council that the authority of government must be based on the will of the people of a particular country as a whole regardless of their race, colour or creed. The policy of apartheid suffered

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<sup>25</sup> See Resolution 191 (1964) of 18 June (S/5773).

<sup>26</sup> In this regard see Chapter 4 par. 2.2 note 293.

<sup>27</sup> *Ibid.*

a further setback when colonial issues, including the issue of apartheid and racism in South Africa, were removed from the restrictions of the domestic jurisdiction clause of Article 2(7) of the Charter. Furthermore, sovereignty was vested in the people of the territory and not in the colonial power while national liberation movements were given interim personality as representatives of the peoples of the territories in question. The impetus for this development came from the struggles of the peoples of Angola, Mozambique and Guinea-Bissau in the sixties. Both the Security Council and the General Assembly extended that formula to other situations.<sup>28</sup>

For instance, at its twentieth session in 1965 the General Assembly for the first time recognised the

"legitimacy of the struggles by the peoples under colonial rule to exercise their right to self-determination and independence."

and at the same time invited

"all states to provide material and moral assistance to the national liberation movements in colonial territories."

The following year (1966), the General Assembly went a step further and stated that the preservation of colonialism and its manifestation, including racism and apartheid, were incompatible with the United Nations Charter and the Declaration on Decolonisation.<sup>29</sup> It was further declared that colonialism threatened international peace and security and that the practice of apartheid constituted a crime against humanity; a characterisation which was to have important legal repercussions later.<sup>30</sup>

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<sup>28</sup> See Kader Asmal "The Legal Status of National Liberation Movements" in *Law and Politics in South Africa*, JSAS Conference held in London, 6-8 April 1984, 2 *et seq.* Also see GA Resolution 2105 [XX].

<sup>29</sup> See Declaration on the Granting of Independence to Colonial Countries and Peoples of 16 December 1960.

<sup>30</sup> *Ibid.*

The struggle for self-determination and independence by peoples under colonial and racist rule received a further impetus from the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966 which made the right of self-determination a mandatory (or peremptory) rule i.e. *ius cogens*<sup>31</sup> of customary international law.<sup>32</sup> The Human Rights Committee<sup>33</sup> observed the linkage between the right of self-determination and individual rights in both Covenants and stressed that

"the right of self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights."

South Africa could not escape the impact of this mandatory norm of customary international law as the Covenants did not limit the right of self-determination<sup>34</sup> to colonial peoples, but extended it to peoples under racist regimes.<sup>35</sup>

No wonder that during the seventies the Security Council endorsed the legitimacy of the struggle of the oppressed people of South African for self-determination and independence. In its 1970 Resolution<sup>36</sup> the Security Council not only recognised the legitimacy of the South African national liberation struggle, but also affirmed that the struggle was waged in pursuance of the human and political rights set forth in the UN Charter and the Universal Declaration of Human Rights. Hence, the Security Council reaffirmed its earlier calls for a national consultation on the future of South Africa. In other words, it specifically supported the ANC call for a non-racial national convention including all the people of South Africa.

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<sup>31</sup> See Kader Asmal "The Illegitimacy of the South African Apartheid Regime: International Law Perspectives" [paper read at a conference entitled "Consultation on the Legitimacy of the South African Government" Harare 4-8 September 1989] 5.

<sup>32</sup> See Robert McCorquodale "South Africa and the Right of Self-Determination" in 10 1994 *SAJHR* 5 note 5.

<sup>33</sup> Cited in Robert McCorquodale "South Africa and the Right of Self-Determination" in 10 1994 *SAJHR* 5

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid* 6.

<sup>36</sup> See Resolution 282 [1970] of 23 July 1970.

In the same year, 1970, South Africa's policy of apartheid received a deadly blow from the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations and the definition of aggression.<sup>37</sup> The Declaration reaffirmed the principles of the territorial integrity of colonial territories and the right of self-determination of peoples under colonial rule. Like the two international Covenants, the Declaration applied the right of self-determination to "all peoples" without any restrictions as to their colonial status. This made the Declaration directly applicable to South Africa thus depriving it of any claims of protection under article 2(7) of the UN Charter.

More specifically, the Declaration dealt a deadly blow to the policy of separate development by proclaiming that every state had

"a duty to promote the realisation of the principles of equal rights and self-determination of people and states and that no action shall be taken to disrupt the territorial integrity or national unity of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

The General Assembly's definition of aggression provided that nothing in the definition could prejudice the right of self-determination, freedom and independence of the peoples under colonial and racist regimes or other forms of alien domination. The test for suppression of self-determination, within the meaning of international law was primarily whether the government was indigenous and not restricted to one race or minority of the population to the exclusion of the majority of the people. The South African policy of apartheid failed this test as it excluded the black majority from the central political process within a united South Africa.

Hence, from the seventies the UN began to consider the South African government as illegitimate while recognising the South African national

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<sup>37</sup> See GA Resolution 2625 (XXV) of 24 October 1970.

liberation movements (the ANC and PAC) as the authentic representatives of the oppressed people of South Africa.<sup>38</sup> For instance, the General Assembly adopted a resolution proclaiming its full support for the national liberation movements of South Africa, as the authentic representatives of the South African people in their just struggle for freedom.<sup>39</sup> Henceforth, the UN recognised national liberation movements as instruments for the realisation of the right of self-determination of peoples under colonial and racist rule. Thus, in a series of annual resolutions on the Declaration on the Granting of Independence to Colonial Countries and Peoples, the General Assembly reaffirmed its support for national liberation movements in Africa.<sup>40</sup>

South African national liberation movements gained a political high ground in 1973 when Article 1(1) of the International Convention on the Suppression and Punishment of the Crime of Apartheid declared that apartheid was a crime against humanity and that inhuman acts resulting from the policies and practices of racial segregation and discrimination were crimes violating principles of international law, in particular the purposes and principles of the UN Charter.<sup>41</sup> Consequently the UN General Assembly rejected South Africa's credentials in 1974<sup>42</sup> and then suspended her voting rights.<sup>43</sup> The large-scale killing and wounding of Africans in Soweto following the callous shooting of African people including school children and students demonstrating against racial discrimination on the 16 June 1976 intensified international efforts

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<sup>38</sup> See Kader Asmal "The Illegitimacy of the South African Apartheid Regime: International Law Perspectives" 5.

<sup>39</sup> See Kader Asmal "Apartheid South Africa: The illegitimate Regime" in Centre Against Apartheid, notes and documents from the World Conference for Action Against Apartheid (UN Publ. Conf. 6, November 1977).

<sup>40</sup> See Travers "The Legal Effect of United Nations Action in Support of the Palestine Liberation Organisation and the National Liberation Movements of Africa" in 17 *Harvard International and Comparative Law Quarterly* 462.

<sup>41</sup> See Robert McCorquondale "South Africa and the right of self-determination" in 10 1994 *SAJHR* 12.

<sup>42</sup> See GA Resolution 3206 (XXIX) of 30 September 1974. For a discussion of this resolution see Erasmus "The Rejection of Credentials - a Proper Exercise of General Assembly Powers and Suspension by Stealth?" 7 1981 *SAYIL* 40. Also see Suttner "Has South Africa been illegally excluded from the United National General Assembly?" 1984 *CILSA* 279.

<sup>43</sup> See Neville Botha "The Coming of Age of Public International Law in South Africa" 18 1992/93 *SAYIL* 36.

towards the elimination of apartheid and the creation of a democratic state in South Africa. Hardly three days after the Soweto uprising<sup>44</sup> the Security Council adopted a resolution<sup>45</sup> which condemned mass suppression brought about by the continued imposition by the South African government of apartheid and racial discrimination in defiance of the resolution of the Security Council and the General Assembly, re-affirmed that the policy of apartheid was a crime against conscience and dignity of mankind and seriously disturbed international peace and security. Further, it recognised the legitimacy of the struggle of the South African people for the elimination of apartheid and racial discrimination. Finally, the resolution called upon the South African government urgently to end violence against the African people and to take urgent steps to eliminate apartheid and racial discrimination.

Despite international condemnation the South African government intensified repression against any form of resistance against its apartheid programme. This repression resulted in the banning of 19 organisations in 1977.<sup>46</sup> The massive repression of opponents of apartheid and arms build-up by South African prompted the Security Council to adopt another resolution.<sup>47</sup> This resolution reaffirmed the UN framework for the settlement of the South African constitutional conflict in more emphatic and definite terms. First, it reaffirmed the Security Council's recognition of the legitimacy of the struggle of the South African people for the elimination of apartheid and the establishment of a democratic society in accordance with their inalienable human and political rights as set forth in the Charter of the United Nations and the Universal Declaration of Human Rights. Secondly, it reaffirmed that the policy of apartheid was a crime against the conscience and dignity of mankind and was incompatible with the right and dignity of man, the Charter of the United Nations and the Universal Declaration of the Human Rights, and seriously disturbed international peace and security. Thirdly, it recognised the legitimacy

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<sup>44</sup> *Ibid* 150 *et seq.*

<sup>45</sup> See Resolution 392(1976) of June 1976.

<sup>46</sup> See Johan Dugard *Human rights and the South African Legal Order* 102.

<sup>47</sup> See Resolution 417 (1977) of 31 October 1977.

of the struggle of the South African people for the elimination of apartheid and for the establishment of the desired non-racial and democratic state in South Africa. More specifically, the resolution demanded that South Africa should take measures immediately to eliminate the policy of apartheid and grant to all South African citizens equal rights, including political rights, and a full and free voice in the determination of their destiny.

These measures included:

- (a) granting of an unconditional amnesty to all persons imprisoned, restricted or exiled for their opposition to apartheid;
- (b) cessation forthwith of its indiscriminate violence against peaceful demonstrators against apartheid, murders in detention and torture of political prisoners;
- (c) abrogation of the bans on political parties and organisation and the new media opposed to apartheid;
- (d) termination of all political trials;
- (e) provision of equal education opportunities to all South Africans.

This time it became absolutely clear the Security Council needed genuine negotiations between the South African government and leaders of the national liberation movements. In this regard it urgently called upon South Africa to release all political prisoners, including Nelson Mandela and all other black leaders with whom it had to deal in any meaningful discussion of the future of the country.

Instead of taking the necessary steps to abolish apartheid and enter into genuine negotiations with the leaders of the national liberation movements, the South African government began to speed up the implementation of its policy of separate development, believing that it would be in line with international expectations in the field of self-determination and human rights.<sup>48</sup> To that end

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<sup>48</sup> The implementation of this policy in terms of the Promotion of Black Self-Government Act (1959) began with the passage of the Transkei Constitution Act of 1963. This process was extended by the Bantu Homelands Constitution Act 21 of 1971, and culminated in the various

South Africa began to grant its Bantustans independence hoping that they would be recognised as independent states.<sup>49</sup> On the contrary, the UN adopted a series of resolutions calling for the non-recognition of the Bantustans concerned.

For instance, two days after the granting of independence to Transkei, the General Assembly adopted a resolution<sup>50</sup> condemning "the establishment of Bantustans as designed to consolidate the inhuman policies of apartheid, to destroy the territorial integrity of the country, to perpetuate white minority domination and to dispossess the African people of South Africa of their inalienable rights", rejecting Transkei's "independence" as "invalid", and called upon all governments 'to deny any form of recognition to the so-called independent Transkei'.<sup>51</sup> The following year, in response to the granting of independence to Bophuthatswana, the General Assembly again denounced Bantustans and called upon states to deny any form of recognition to the so-called "independent" Bantustans.<sup>52</sup> When Venda became independent in 1979 the President of the Security Council issued a statement reaffirming the inalienable rights of the African majority.<sup>53</sup> A similar statement was issued on the occasion of Ciskei's independence. This statement added to the reasons for the denunciation of "independent homelands" the fact that the homeland policy "seeks to create a class of foreign people in their own country".<sup>54</sup>

Subsequent resolutions of the General Assembly condemned homeland independence and called for their non-recognition. In one resolution the policy of "bantustanisation" and denationalisation of Africans was characterised as "an

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"Status Acts" in terms of which Transkei, Bophuthatswana, Venda and Ciskei became independent" states.

<sup>49</sup> See John Dugard *Recognition and the United Nations* (1987) 99.

<sup>50</sup> See Resolution 31/6A.

<sup>51</sup> The call for non-recognition of Transkei was subsequently endorsed by the Security Council in Resolution 402 (1976).

<sup>52</sup> See Resolution 32/105N of 14 December 1977.

<sup>53</sup> The President of the Security Council issued a statement denouncing the "independence" of both Venda (S/13549 of 21 September 1979) and Ciskei (S/14794 of 15 December 1981).

<sup>54</sup> S 14794. This statement was made at the 2315th meeting of the Security Council that the existence of such "states" threatens international peace under Article 39 of the Charter.

international crime",<sup>55</sup> while another resolution on decolonisation declared that "bantustanisation is incompatible with the genuine independence, national unity and sovereignty".<sup>56</sup> None of these resolutions are mandatory under Chapter VII of the UN Charter.<sup>57</sup> However, it is obvious, first that they acquire binding force under article 25 of the Charter, in terms of the test enunciated by the International Court of Justice in its 1971 Opinion on Namibia<sup>58</sup> and secondly, that arguably, the creation of homeland-states violates norms in international law dealing with self-determination and human rights, which have their basis in the Charter or custom, and that states are under general legal obligation to withhold recognition of such an illegality.<sup>59</sup> In summary, the resolutions of both the Security Council and the General Assembly indicate clearly that the creation of the homeland states is contrary to several norms in the field of self-determination and human rights.<sup>60</sup>

Although South Africa is not a colonial power within the orthodox meaning of the term, it is evident from the foregoing resolutions and legal literature that it is a colonial state of a special type within the context of Resolution 1514(IX). South Africa became a self-determination unit under this resolution because in the African-Law context the subject of self-determination was delimited according to territorial criteria, namely, the existing colonial boundaries.<sup>61</sup> So it was colonies (including South Africa), not traditional political units, that became independent.<sup>62</sup>

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<sup>55</sup> Resolution 37/69A of 9 December 1982.

<sup>56</sup> Resolution 37/4f3 of 3 December 1982.

<sup>57</sup> As they are not preceded by any finding in the Security Council that the existence of such "states" threatens international peace under Article 39 of the Charter.

<sup>58</sup> See "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)" *ICJ Reports* 16, 62053. Also see Rosalyn Higgins "The Advisory on Namibia: Which United Nations resolutions are binding under Article 22 of the charter?" 1972 21 *ICLQ* 270.

<sup>59</sup> See Henry J Richardson "Self-determination, International Law and the South African Bantustan Policy" 1978 17 *Columbia Journal of Transnational Law* 185, 202-204. Also Konrad Ginther "Das Anerkennungsverbot der Homelands" 1980 23 *German Yearbook of International Law* 323.

<sup>60</sup> See Dugard *Recognition and the United Nations* 103.

<sup>61</sup> See AJGM Sanders "The Swaziland Deal" and "The International Law Principle of the Self-determination of Peoples" October 1971 *Codicillus* 35.

<sup>62</sup> *Ibid.*

The resolutions calling for the non-recognition of homelands-states are also premised on the fact that South Africa is a self-determination unit.<sup>63</sup> The principal reasons for the non-recognition of these homeland-states are:<sup>64</sup>

- (1) That the granting of independence to the homeland-states violates the prohibition on the territorial fragmentation of self-determination units contained in the Declaration on the Granting of Independence of Colonial Countries of 1960<sup>65</sup> and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 1970.<sup>66</sup> The prescription that the right of self-determination should be exercised without "disruption of the national unity and territorial integrity" of a self-determination unit<sup>67</sup> has served as a guideline to the UN in its approach to the non-recognition of homeland-states. This is evident in the General Assembly resolution which condemn "the establishment of Bantustan as designed ... to destroy the territorial integrity of the country".<sup>68</sup>
- (2) That in the establishment of homeland-states the people of South Africa have been permitted to "freely determine their political status, as required by Resolution 1514 (XV) of 1960. More specifically, it is argued that the South African government violated the basic precept of self-determination enunciated by Judge Dillard in the Advisory Opinion on Western Sahara. The learned judge<sup>69</sup> stated that "it is not for the people to determine the destiny of the people." This aspect of the denial of self-determination, though not mentioned in General Assembly or Security Council resolutions, is implied in the condemnation of Bantustan on the ground that they serve "to dispossess the African people of South Africa of their alienable rights."<sup>70</sup> This is reaffirmed by

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<sup>63</sup> See Dugard *Recognition and the United Nations* 103.

<sup>64</sup> For a full discussion see Dugard *Recognition and the United Nations* 104-108.

<sup>65</sup> GA Res. 1514 (IX) of December 16 1960.

<sup>66</sup> GA Res. 2625 (XXV).

<sup>67</sup> See GA Res. 1514 (XV).

<sup>68</sup> See GA Res. 31/6A (1976) and 32/105N (1977). Also resolutions of the General Assembly adopted by the General Assembly before the independence of Transkei likewise appose the territorial fragmentation of South Africa: Resolution 2775E (XXVI) and 34/1D (XXX).

<sup>69</sup> See 1975 *ICJ Reports* 12, 122.

<sup>70</sup> See GA Res. 31/31/6A (1976 and 32/105N(1977)).

the Declaration of Lagos<sup>71</sup> which denies that the homeland policy represents a genuine exercise self-determination.

- (3) That the establishment of the homeland-states furthers the goals of apartheid, a policy which has been characterised as unlawful or contrary to the Charter and basic norms of international court of justice,<sup>72</sup> the political organs of the UN,<sup>73</sup> international conventions<sup>74</sup> and the writings of jurists.<sup>75</sup> A further ground, closely related to the above, advanced for non-recognition is that the creation of homeland-states violates a number of fundamental human rights.<sup>76</sup>

During the early eighties the UN intensified its efforts to counter the constitutional reforms of the South African government and to find an alternative constitutional settlement for South Africa. In 1980 the Security Council adopted a resolution<sup>77</sup> which located the desired constitutional settlement within the UN politico-level framework.. The Resolution reaffirmed the Security Council recognition of the legitimacy of the struggle of the South African people for the elimination of apartheid and the establishment of a democratic society in accordance with their inalienable human and political rights as set forth in the Charter of the United Nations and the Universal

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<sup>71</sup> It states:

"The people concerned have not determined their political status or done so freely. the delineation of the territories, the allocation of the population to these territories and the political status of the Bantustan been solely determined by the white minority and its Parliament."

See "Declaration of the Seminar on the Legal Status of the Apartheid Regime and Other Aspects of the Struggle against Apartheid" held at Lagos, Nigeria, from 13 to 16 August 1984 A/39 423-S/16709, at 7.

<sup>72</sup> See "Legal Consequences for States of Continue Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)" 1971 *ICJ Report* 1971 57.

<sup>73</sup> For instance in 1970 the General Assembly affirmed that apartheid "is a crime against the conscience and dignity of mankind and, like Nazism, is contrary to the principles of the Charter"; GA Resolution 2627 (XXV). Today resolutions label apartheid as a crime against humanity and deny the "legitimacy" of the South African government. See GA Res. 39.72A(1984).

<sup>74</sup> The International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) declares that "apartheid is a crime against humanity" and that inhuman acts resulting from the policies and practices of apartheid...are crimes violating the principles of international law" (Art 1). The International Conventions on the Elimination of all forms of Racial Discrimination (1966) also condemns the policy of apartheid (Art 3).

<sup>75</sup> See Dugard *Recognition and the United Nations* 106.

<sup>76</sup> *Ibid.*

<sup>77</sup> See Resolution 473 (1980) of 13 June 1980.

Declaration of Human Rights.<sup>78</sup> Furthermore, the Resolution reaffirmed that the policy of apartheid was a crime against the conscience and dignity of humanity and was incompatible with the rights and dignity of human personality, the Charter of the United Nations and the Universal Declaration of Human Rights. Under those circumstances, the Resolution recognised the legitimacy of the struggle of the South African people to eliminate the illegal Constitutional order based on the policy of apartheid and for the establishment of a democratic society in which all the people of South Africa as a whole, irrespective of race, colour or creed, will enjoy equal and full political and other rights and participate freely in the determination of their destiny.

The Security Council observed that the violence and repression by the South African government and its continuing denial of equal human and political rights to the black majority aggravated the situation and thus called upon the South African government to create the necessary climate for a peaceful resolution of the conflict. More specifically, the Security Council called upon South Africa, first to take immediate measures to eliminate the policy of apartheid and grant to all South African citizens equal rights, including equal political rights, and a full and free voice in the determination of their destiny. Security Council's call upon the South African government to release all political prisoners, including Nelson Mandela and all other black leaders was a clear signal that the Security Council would not accept any constitutional settlement between the government and the Bantustan leaders.

The cumulative effect of these resolutions totally delegitimized the South African constitutional order and legitimised the struggle of the majority of the people of South Africa led by their natural liberation movements.

In other words, the South African government was reduced to a *de facto* government while the national liberation movements were given the right to overthrow it by any means possible, including armed struggle.

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<sup>78</sup> See Resolution 38/11 of 15 November 1983.

Meanwhile popular resistance against apartheid and the international "de-recognition" of the South African constitutional order threw South Africa into an unprecedented Constitutional crisis which shifted the balance of forces towards a democratisation transformation.

In response to the constitutional proposals of 1983<sup>79</sup> which resulted in the tricameral parliamentary<sup>80</sup> system the General Assembly adopted a resolution which solemnly declared that:

"...only the total eradication of apartheid and the establishment of a non-racial democratic society, based on majority rule, through the full and free exercise of adult suffrage by all the people in a united and non-fragmented South Africa lead to a just and lasting solution of the explosive situation in South Africa."

Thus the General Assembly requested the Security Council to consider (as a matter of urgency) the serious implications of the so-called constitutional proposals and to take measures (in accordance with the UN Charter) to avert the further aggravation of tension and conflict in South Africa and in Southern Africa as a whole.

The Security Council<sup>81</sup> recalled earlier resolutions calling upon the South African government to abandon apartheid and seek a lasting solution within the UN constitutional framework and observed that the so-called new Constitution, approved on 2 November 1983 in a referendum by the white voters, excluded the indigenous African majority, depriving it of all fundamental rights, and further entrenched apartheid, transforming South Africa into a country for whites only. Thus the Security Council declared first, that the so-called new Constitution was contrary to the principles of the Charter of the United Nations, secondly, that the results of the referendum of 2 November 1983 were of no

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<sup>79</sup> See Resolution 473 (1980) of 13 June 1980.

<sup>80</sup> See Resolution 38/11 of 15 November 1983.

<sup>81</sup> See Security Council Resolution 554 (1984).

validity whatsoever and that the enforcement of the Constitution would further aggravate the situation. Thus the Security Council rejected and declared null and void the so-called "New Constitution" and the elections which were to be organised for the Coloured and Indian communities.

Furthermore, the Security Council rejected any so-called negotiated settlement based on Bantustan structures or on the so-called "New Constitution" and affirmed the call of General Assembly<sup>82</sup> for the total eradication of apartheid and the establishment of a non-racial democratic society based on majority rule, through the full and free exercise of universal adult suffrage by all the people in a united and unfragmented South Africa, could lead to a just and lasting solution of explosive situation in South Africa. Finally, the Security Council urged all governments and organisations not to recognise the results of the so-called "elections" and to take appropriate action, in co-operation with the UN and OAU to assist the oppressed people of South Africa in their legitimate struggle for a non-racial and democratic society. Also, this resolution called for a settlement within an internationally acceptable constitutional framework.

The African block in the UN opposed the 1983 South African Constitutional reforms which sought to entrench and perpetuate the apartheid system. This constitution, which had been endorsed by a white minority electorate declared the 24 million black South African aliens in their own country. It provided for the establishment of a so-called tricameral (i.e. three-house) Parliament - one for whites, one for coloureds and one for those of Asian origin. But blacks, according to the regime, did not deserve to have any kind of representation.

Under the tricameral Constitution, each house would discuss its own matters. However, the house for whites had *de facto* and *de jure* control over general affairs (i.e. matters of mutual concern to all three houses) which control could not be challenged by the coloureds and the people of Asian origins since the

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<sup>82</sup> See note 79 *supra*.

seats in the Parliament had been distributed in such a way that the whites were always able to retain a parliamentary majority. Thus, the so-called New Constitution effectively created a tri-racial based constitution that excluded the African majority in violation of the principles of equality and self-determination of all the people of South African both black and white.<sup>83</sup> In other words, the 1983 Constitution violated the UN Charter and Universal Declaration of Human Rights as well as the internationally acceptable Lusaka Manifesto of 1969.<sup>84</sup> Thus the UN correctly declared the 1983 Constitution null and void and of no consequence.<sup>85</sup> This declaration therefore reduced the South African government to a *de facto* government.

Nevertheless, the regime continued to defend its constitutional reforms on grounds that a substantial percentage of the African population (referring to the TBVC States) had themselves opted for political independence. The regime regarded this as the clearest possible manifestation of the right of African people to self-determination and argued that the time had come to include in the overall pattern of multi-national development and co-operative co-existence of the coloured and the Indian people in the decision-making process in a meaningful way. In line with this confederal Constitutional principle, the regime stated that this Constitutional architecture has been given a horizontal and vertical aspect which spread political power across the country's communities through the autonomous institutions in their national states, to the African people and through the new tricameral Parliament to Coloured and Indian communities. That the Constitutional dispensation delegated political power downwards from the first to the third tier/level of government. To that end, legislation had been passed granting black local government power ostensibly the same as those of white local authorities.<sup>86</sup>

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<sup>83</sup> See UN Chronicle vol. XXI number 6/1984 at 12.

<sup>84</sup> For a discussion on the Lusaka Manifesto see par. 5.3 *infra*.

<sup>85</sup> However, one German writer took the view that the UN did not have the authority to nullify the South African Constitution. See Klaus Stern "The South African Constitution - external appraisal" in 1985 *TSAR* 260 *et seq.*

<sup>86</sup> See the Black Local Authorities Act 102 of 1982.

The General Assembly saw through those constitutional manoeuvres and not only confirmed its 1983 Resolution,<sup>87</sup> but also requested the Security Council to consider the serious situation that resulted from the imposition of the so-called New Constitution and to take all necessary measures to avert the further aggravation of tension and conflict in South Africa. Responding to that request, the Security Council<sup>88</sup> confirmed its 1983 Resolution in more definite and emphatic terms. First, the resolution declared the so-called New Constitution contrary to the principles of the UN Charter and re-affirmed the provisions of the Universal Declaration of Human rights, particularly article 21, paragraph 1 and 3, which recognised:

- # the right of every person to take part in the government of his or her country, directly or through freely chosen representatives; and
- # that the will of the people was the basis of the authority of the government.

Hence, the Security Council commended the massive united resistance of the oppressed people of South Africa and, in particular, the Indian and Coloured communities for their full-scale boycott of the elections held under the so-called New Constitution. Then the resolution re-affirmed the legitimacy of the struggle of the people of South Africa for the full exercise of their right to self-determination and the establishment of non-racial democratic society in an unfragmented South Africa.

Finally, the Security council re-affirmed that the eradication of apartheid and the establishment of a non-racial, democratised society based on majority rule, through the full and free exercise of adult suffrage by all the people in a united and fragmented South Africa - could lead to a just, equitable and lasting solution of the South African conflict. Also, the Security Council reaffirmed its call upon all governments and organisations to take appropriate action within the international framework to assist the oppressed people of South Africa in

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<sup>87</sup> See GA Res. 39/2 adopted on the 28th September 1984.

<sup>88</sup> See Security Council Resolution 556 (1984).

their legitimate struggle for the full exercise of the right to self-determination, for that purpose, the Security demanded the immediate eradication of apartheid and the necessary step towards the full exercise of the right of self-determination in an unfragmented South Africa.

To achieve these, the Security Council renewed its call for the removal of obstacles to a negotiated constitutional settlement in South Africa. More specifically it demanded:

- (a) The dismantling of the Bantustan structures as well as the cessation of uprooting, relocation and denationalisation of the indigenous African people;
- (b) The abrogation of bans and restrictions on political organisations, parties, individuals and news media oppressed to apartheid; and
- (c) The unimpeded return of all exiles.

The cumulative effect of these resolutions totally delegitimized the South African Constitutional order and legitimised the struggle of the majority of the people of South Africa led by their National liberation movements. In other words, the South African government was reduced to a *de facto* government while the national liberation movements were given the right to overthrow it by any means possible, including armed struggle.

#### **6.1.1.1 South Africa and the Organisation of African Unity's Decolonisation Strategy**

The emergence of the United Nations system during the forties reinforced African struggle for their right of self-determination and equal rights. This resulted in the achievement of independence by a large number of African colonial territories and the formation of the Organisation of African Unity (OAU) in 1963,<sup>89</sup> when the OAU was formed the UN had already moved away from its

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<sup>89</sup> See Zdenek Cervenka *The Organisation of African Unity and its Charter* (1969) 1 et seq.

colonialistic conception of international law embodied in Article 73 of the UN charter which speaks of the "progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement."<sup>90</sup> This principle of "gradualism" was reversed after the Sharpeville massacre by the Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>91</sup> This declaration signified the radicalisation of the principle of self-determination in the context of decolonisation. This radicalisation which occurred largely as a response to the situation in South African meant a departure from the principle of gradualism. Henceforth, decolonisation would be speeded up, self-determination became an international legal right and the principle of equal rights and self-determination of the people became normative basics for the establishment of African states within the framework of the UN and the OAU.<sup>92</sup>

Within this framework, matters concerning the protection of human rights and the right of peoples to decide their destiny in a colonial or quasi-colonial (e.g. South Africa) context no longer belonged to the internal affairs of states.<sup>93</sup>

The charter of the OAU is couched in terms that licences it to interfere in the affairs of colonial and quasi-colonial countries. For instance, one of the major purposes of the OAU was to eradicate all forms of colonialism in Africa and each member state solemnly pledged their adherence to the principle of the total emancipation of the African territories which were still dependent.<sup>94</sup>

According to these objectives and principles the OAU confirmed from the very beginning South Africa was disqualified from becoming a member of the OAU,

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<sup>90</sup> See Konrad Ginther "The question of legitimacy of the South African Government from the point of view of International Law" in Christine Lienemann-Perrin & Wolfgang Lienemann (eds.) *Political Legitimacy in South Africa* (1988) 58-61.

<sup>91</sup> See note 65 *supra*.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> See Article III.

not because it was not an independent and sovereign state, but because it did not meet the criteria of legitimacy based on the post World War II concept of the Rule of Law.<sup>95</sup>

Instead the OAU, like the UN, recognised the national liberation movements (viz. the ANC and PAC) as the legitimate representatives of the African peoples struggling for their right of self-determination. This special nature of South African colonialism forced the OAU, like the UN, to adopt the interpretation of the right of self-determination embodied in the Freedom Charter which extended this rights to all the people of South Africa both black and white.<sup>96</sup> This interpretation informed the OAU decolonisation strategy of South Africa.

In 1969 independent East and Central African States adopted the Lusaka Manifesto setting out their policy towards colonialism and white minority rule in Southern Africa. The signatories of the manifesto embraced the right of self-determination and equal rights contained in the UN Charter and Universal Declaration of Human Rights.<sup>97</sup> Furthermore, the manifesto specifically stated, first, their belief that all men have equal rights to human dignity and respect, regardless of colour, race, religion or sex.<sup>98</sup> Secondly, that all men have the right and the duty to participate as equal members of the society, in their own government, and thirdly, that no individual or group has any right to govern any other group of adults, without their consent, and further affirmed that only the people of a society, acting together as equals, can determine what is, for them, a good society and a good social, economic, or political organisation.

The signatories to the Lusaka Manifesto committed themselves to work for the right of self-determination of peoples under colonial and racist regimes in Southern Africa.

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<sup>95</sup> See Chapter 3 *supra*.

<sup>96</sup> *Ibid.*

<sup>97</sup> See Louis B. Sohn (ed.) *Basic Documents of African Regional Organisations* vol. 7 (1971) 141 *et seq.*

<sup>98</sup> See par 2.

In line with this stand, they also opposed any kind of racialist majority-government which adopted a philosophy of deliberate and permanent discrimination between its citizens on the grounds of racial origin.

To resolve the racial conflicts in Southern Africa the Lusaka Manifesto demanded an opportunity for all the people of South Africa, working together as equal individual citizens (not groups), to work out for themselves the institutions and systems of government under which they will, by general consent, live together and work together to build a harmonious society.<sup>99</sup>

The Manifesto acknowledged white minority fears and the need to accommodate such fears in any interim arrangements towards a new Constitution. However, it was made abundantly clear that any constitutional arrangements within the countries concerned which wished to be accepted into the Community of Nations had to be based on an acceptance of the principles of human dignity and equality. In other words, these prerequisites for freedom and justice formed that basis of a regionally [African] acceptable constitutional order.<sup>100</sup> Furthermore, the Lusaka Manifesto accepted the colonial territories of South Africa and Rhodesia as whole self-determination units. This position presupposed the total rejection of Bantustan programme in South Africa and Namibia.

Although the OAU supported the national liberation movements in their struggle against colonial and racist regimes, the Manifesto urged the peoples of Southern Africa living under colonial and racist rule to use peaceful methods of struggle even at the cost of some compromise on the timing of change. Like the UN and OAU, the East and Central African States did not consider the principle of non-interference in the internal affairs of members states as relevant. In their manifesto, therefore, they stated that in the case of South Africa, the

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<sup>99</sup> This paragraph endorsed the Declaration on the Granting of Independence to Colonial Countries and Peoples 1514 (XV).

<sup>100</sup> In other words, the Lusaka Manifesto indigenised the Post World War II politico-legal values.

international community had a responsibility to assist the victims of apartheid in defence of humanity itself.

Consequently the signatories to the Manifesto asserted that the validity of the principles of human equality and dignity extended to South Africa just as they did to other colonial territories of Southern Africa and embraced these principles as prerequisites for a peaceful development which every nation and state must make a deliberate attempt to implement. Finally, the signatories to the Manifesto reaffirmed their commitment to the principles of human dignity, self-determination and non-racialism and their resolve to work for the extension of these principles within their own nations and throughout the continent. In the same year (1969) the Lusaka Manifesto was endorsed by the Heads of State and government of the OAU as well as the General Assembly of the United Nations which recommended it to the attention of all states. Subsequently, African states unanimously agreed that all the peoples of Southern Africa (including South Africa) have a right to self-determination and that a policy of racial discrimination was contrary to the adopted standards of international law.<sup>101</sup>

In 1975 the OAU adopted the Declaration of Dar-Es-Salaam on Southern Africa which reaffirmed the Lusaka Manifesto and their belief in a peaceful resolution of the conflicts in Southern Africa. In the Dar-Es-Salaam Declaration the OAU adopted a new strategy on apartheid. First it reaffirmed that the OAU, like the UN, was dedicated to the principle of full equality for the people of South Africa, irrespective of race or colour. Secondly, it refused to acquiesce the denial of human equality and human dignity which was represented by the system of apartheid and reiterated that, like the UN, it opposed the regime in South Africa, not because it was white, but because it rejected and fought against the principles of human equality and national self-determination. Finally the Declaration reaffirmed the OAU's total rejection of apartheid in all of its manifestations, including Bantustans. Henceforth, the OAU lent its support to South Africa's National liberation movements through its liberation committee.

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<sup>101</sup> See AJGM Sanders "The Swaziland Land deal" and "The International Law Principle of Self-determination of Peoples" 35.

### **6.1.1.2 General Conclusions**

The post-World War II politico-legal order inextricably linked the rule of law, democracy and human rights and made them applicable to all member states whether or not they participated actively in the evolution of the rules of customary international law in question. Thus South Africa, whose credentials were only suspended in 1974, had all the time been obliged to respect and adjust her legal order to the international human rights law. Hence, the sustained efforts of the UN to extend the right to political participation to all the people of South Africa regardless of race or colour did not fall within the domestic jurisdiction clause which outlawed interference in the internal affairs of member states. It is therefore submitted that the UN and OAU have always had the right to intervene in South African affairs on behalf of the black majority that lived under racist rule.

The difference between South Africa and other colonies, such as Zimbabwe and Namibia, however, was that South Africa was already an independent state and member of the UN. Thus the UN defence of the right of self-determination and equal rights in South Africa was not strictly speaking an act of decolonisation as the British, the colonial power, had already granted independence to South Africa. The case of South Africa, therefore, was not about the transfer of power to the indigenous black majority, but the extension of the right to participate in government and equal rights for all the people of South Africa, black and white. In other words, South Africa was obliged to adjust her legal and constitutional order to meet international requirements for political legitimacy.

## **6.1.2 The Impact of International Human Rights Law on the South African Legal System**

### **6.1.2.1 Background**

The relationship between domestic legitimacy and international law was

established by the United Nations Charter as a result of the horrors of World War II.<sup>102</sup> This development brought human rights and state legitimacy into direct focus. World War II gave conclusive evidence of the close relationship between the outrageous behaviour of a government towards its own citizens and the core concerns of international law, namely, the protection of human rights and the maintenance of international peace and security. For the first time, the international community not only recognised the *nexus* between the State's internal behaviour and broader interests of humanity, but also incorporated it in the preamble of the UN Charter which reaffirmed the faith of member states in fundamental human rights in the dignity and worth of the human person and in the equal rights of men and women.<sup>103</sup>

The notion of a crime against humanity which emerged from the International Military Tribunal at Nuremberg affirmed the existence of certain fundamental human rights and principles superior to the law of the state and protected by international criminal sanctions, even if their violation was in pursuance of the law of the State.<sup>104</sup> One of the most important human rights that emerged after World War II was the right to participate in government. The institutionalisation of the policy of apartheid in 1948 violated this fundamental right. As we saw above,<sup>105</sup> the UN opposed the policy of apartheid from the outset. In response to the charge that apartheid unfairly discriminated against blacks, South Africa claimed that apartheid was a purely domestic matter which fell outside the competence of the UN, and that Article 2(7) of the UN Charter was an absolute, overriding provision which took precedence over the human rights provisions.<sup>106</sup>

That response was untenable as the UN Charter had established a clear and definite link between the State legitimacy and the policy of apartheid in South Africa as it did Nazism and state legitimacy in Germany. This link found a

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<sup>102</sup> See Chapter 3 par. 3.3.2.2 *supra*.

<sup>103</sup> See Dugard *International Law: a South African Perspective* (1994) 200.

<sup>104</sup> *Ibid.*

<sup>105</sup> See Chapter 6 par. 5.2 *supra*.

<sup>106</sup> *Ibid.* Also see Dugard *International Law* 18.

definite and more emphatic expression in the Declaration on Decolonisation and the 1966 Covenants which established a direct link between the right to political participation and the right to self-determination.<sup>107</sup> Furthermore, both the Universal Declaration and the 1966 Covenants guaranteed the right to political participation which apartheid denied to the majority of South Africans. Article 21 of the Universal Declaration provided that:

“[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

Similarly, Article 25 of the ICCPR stated that:

“every person shall have the right and opportunity without any distinction mentioned in Article 21 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs directly or indirectly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot guaranteeing the free expression of the will of the electors ...”.

South Africa claimed that, through her policy of separate development, she was striving for the peaceful realisation of self-determination and majority rule.<sup>108</sup>

Quite clearly, the South African interpretation of the right of self-determination differed from that of the international community. As we saw above,<sup>109</sup> a succession of resolutions by the General Assembly and the Security Council had

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<sup>107</sup> See Declaration on the Granting of Independence to Colonial Countries and Peoples of 16 December 1960.

<sup>108</sup> See Dugard *International Law* 77-78.

<sup>109</sup> *Ibid* and par. 5.2 *supra*.

stated that the South African government was breaching the right of self-determination by its policy of apartheid, including the establishment of Bantustans. The international community applied the right of self-determination to South Africa as her policy of apartheid was a means whereby Africans, Coloureds and Indians were subject to subjugation, domination and exploitation by the white government. Moreover, this policy was declared a crime against humanity. Hence, the UN linked the right of self-determination and the policy of apartheid and took the view that the domestic jurisdiction clause 2(7) of the UN Charter did not apply to South Africa. Thus it could be argued that if South Africa had signed the ICCPR, it would have been obliged to adapt its legal order to establish institutions, laws and procedures in order to conform to international human rights norms, as article 2(2) of the ICCPR contains an incorporation clause which reads:

"Where not already provided for by existing legislative or other measures, each state party to the present Covenant undertakes to take the necessary steps, in accordance with its Constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant."

During the nineties, the UN General Assembly began to translate its concern for electoral politics into reality. In Resolution 45/150 of 18 December 1990, it requested the UN Secretary-General to seek the views of member states and other bodies concerning suitable approaches that would permit the UN to respond to the requests of members states for electoral assistance. Following the report of the Secretary-General, the UN General Assembly adopted a Resolution entitled Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections.<sup>110</sup> This Resolution dealt another deadly blow to South Africa by re-emphasising that under the UN Charter all states enjoy sovereignty and equality, and that each state, in accordance with the will of all its people, is

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<sup>110</sup> See GA Resolution 46/137 1991.

entitled to freely choose and develop its political, social, economic and cultural system. The Resolution did not only reaffirm the right of self-determination of all the peoples within a self-determination unit such as South Africa, but also reiterated and re-emphasised the conviction that periodic and genuine elections were a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed. Finally, the General Assembly expressed the linkage between the right to participate in government and enjoyment of human rights in general in clear and definite terms:<sup>111</sup>

"...the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights."

In practical terms, South Africa failed to pass this test in that her electoral process did not provide all the people (both black and white) an equal opportunity to become candidates and put forward their political views, either individually or in co-operation with others. In other words, the right of self-determination in the South African context belonged to all the people, not to groups.

From the point of international law, the right to political participation and periodic elections have become a basic feature of democratic governance. They have crystallised out as norms of customary international law. Hence, the UN has observed several elections since World War II. These observer missions took place in both dependent and independent countries, e.g. Zambia, Angola, Namibia. A number of principles and standards emerged from these observer missions. They include the requirements that elections must be: (a) free from discrimination towards or against voters and candidates; (b) held at reasonable times and intervals; (c) be by secret ballot and (d) be based on universal and

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<sup>111</sup> *Ibid.*

equal suffrage. These principles have become rooted in international law through repeated reaffirmation by the General Assembly, overwhelming support thereof by the majority of states, regional and international organisations.<sup>112</sup>

#### **6.1.2.2 The Reception of the International Concept of a Bill of Rights in South Africa**

As shown above,<sup>113</sup> the reception of customary international law in South Africa was inhibited by the invocation of the domestic jurisdiction clause by the South African authorities. This standard defence met with UN resistance from the outset. In 1946 the Economic and Social Council<sup>114</sup> established the Commission on Human Rights to give substance to international human rights. The task<sup>115</sup> of the Commission was to make proposals and recommendations and to submit reports regarding the following matters: (a) an international bill rights; (b) international declarations or agreements regarding civil rights, the legal position of women, freedom of information etc.; (c) the protection of minorities; and (d) the prevention of discrimination on grounds of race, sex, language or religion.

The activities of the Commission resulted in the adoption by the General Assembly of the Universal Declaration of Human Rights on 10 December 1948. The Universal Declaration of Human Rights (UD) gave substance to the concept of human rights, in particular to the human rights provision of the UN Charter<sup>116</sup> and formed part of what became known as the International Bill of Rights. This Bill consists of four major United Nations legal instruments, namely: (a) the Universal Declaration of Human Rights of 1948; (b) the International Covenant on Economic, Social and Cultural Rights of 1966; (c) the International Covenant on Civil and Political Rights of 1966 and (e) the First

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<sup>112</sup> See Rwelamira and Ailola "International Monitoring of Free and Fair Elections" in Steytler *et al Free and Fair Elections* (1994) 270.

<sup>113</sup> See par. 5.2 *supra*.

<sup>114</sup> Article 2 (7) of the UN Charter.

<sup>115</sup> Article 62 of the UN Charter.

<sup>116</sup> In terms of article 68 of the UN Charter.

Optional Protocol to the International Covenant on Civil and Political Rights of 1966. These legal instruments define and guarantee the protection of human rights and fundamental freedoms.

South Africa is a co-author of the International Bill of Rights. The second clause of the preamble of the UN Charter, which contains the first explicit reference to human rights, was drafted by a former South African Prime Minister, Field Marshall Jan Smuts. At the 6th plenary session (1 May 1948) of the San Francisco Conference at which the UN Charter was drafted, Field Marshal Smuts<sup>117</sup> reportedly suggested "that the Charter should contain at its very outset, and in the preamble, a declaration of human rights and of common faith which had sustained the Allied Peoples in their bitter and prolonged struggle for the vindication of these rights and that faith ... we have fought for justice and decency and for the fundamental freedoms and rights of man, which are basic to all human advancement and progress and peace."

In 1946 when South Africa was challenged to treat its Indian citizens in conformity with the relevant provisions of the UN Charter,<sup>118</sup> Smuts took the view that the provisions concerned did not create any special obligations for UN members. Smuts based this view on the absence of a widely accepted definition of human rights and fundamental freedoms.<sup>119</sup> In 1948 the Universal Declaration of Human Rights provided the necessary definition, making this Declaration the basic international statement of the inalienable and inviolable rights of all members of the human family. The Declaration clearly intended to serve as a common standard of achievement for all peoples and Nations in an effort to secure universal and effective recognition and observance of the rights and freedoms of all. Thus the Declaration provided the definition that Smuts sought as a prerequisite to the enforceability of human rights. South Africa however continued to ignore its obligations in this regard and instead

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<sup>117</sup> Economic and Social Council Resolution 5 (1) of 5 February 1946.

<sup>118</sup> Articles 1 and 55.

<sup>119</sup> Titus *The Applicability of the International Human Rights Norms to the South African legal System* 153 note 5.

introduced its policy of apartheid which institutionalised racism, discrimination, sexism and the forcible denial of the right of self-determination to the majority of its people.

For many decades South Africa refused to become a party to any of the recognised international human rights instruments. For instance, South Africa is not a party to both the Political and Economic Covenants which provide for the right of self-determination and the protection of specified rights and freedoms.<sup>120</sup> Both Covenants have provisions barring all forms of discrimination in the exercise of human rights and have the force of law for the countries which ratify them.

As shown above,<sup>121</sup> the International Covenant on Economic Social and Cultural Rights (ICESCR) protects economic, social and cultural rights such as the right of every human person to work and to free choice of employment; to fair wages; to form and join labour unions; to social security; to an adequate standard of living; to freedom from hunger; to health and education. States that have ratified this Covenant acknowledge their responsibility to promote better living conditions for all their people, regardless of race, colour or creed. The Covenant imposes a responsibility on governments to see to employment opportunities, a social security system, housing, education, health etc. Quite naturally South Africa could not have accepted such a responsibility without negating its racist policies.

The first generation rights are couched in peremptory (mandatory) language while the second generation rights are couched in permissive language.<sup>122</sup> That

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<sup>120</sup> For instance, article 55(c) whereby the members of the UN (including South Africa) committed themselves to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

<sup>121</sup> See Chapter 3 par. 3.2.4 *supra*. See also Newell M Stulz "Evolution of the United Nations Anti-apartheid regime" in 13 *Human Rights Quarterly* (1991) 2-3.

<sup>122</sup> The first generation rights are formulated as "Everyone has the right to ..."; "All persons ..." and "Anyone ..." etc., while the second generation are formulated as "Each State Party ... undertakes to..." and "The State Parties ... recognise ...".

is, the first generation rights impose duties on governments whilst the second generation rights are merely a common standard of achievement and are not directly applicable to the individual. However, this cannot be said without qualification.

Article 2(3) of the ICECSR stipulates that the rights in the Covenant will be exercised without discrimination of any kind. It is therefore possible to submit discriminatory practices in terms of the rights under the Covenant in National (or municipal) courts. Thus article 2(3) provides a detour for the justiciability of the human rights provisions of the Covenant. This found support in Dutch case law. In the *Broeks Case*<sup>123</sup> the issue was whether legislation providing for social security violated the prohibition against discrimination contained in article 26 of the International Covenant of Civil and Political Rights (ICCPR) and the guarantee given therein to all persons regarding equal and effective protection against discrimination. The Committee answered the questioned positively and ordered the Dutch Government to offer Mrs Broeks an appropriated remedy. In the *Zwaan Case*<sup>124</sup> the Committee observed that the Covenant did not establish social security schemes, but that once these were established, only distinctions based on reasonable and objective criteria were allowed. In its General Comment 3 of 1990 the Committee of Experts<sup>125</sup> expressed the justiciability of some human rights provisions of the ICESCR in more definite and emphatic terms.<sup>126</sup>

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<sup>123</sup> *Broeks v The Netherlands* Communication no 172/1984. 2 Selected Decisions of the Human Rights Committee under the Optional Protocol (October 1982 - April 1998), United Nations (New York - 1990) 196 -201.

<sup>124</sup> *Zwaan de Vries v The Netherlands* Communication 182/1984. *Ibid* 209-214.

<sup>125</sup> The Committee of Experts was elected by the Economic and Social Council to monitor compliance with states Parties obligations under the ICESCR.

<sup>126</sup> It stated:

"Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the National legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognised without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those State parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of articles 2(1), 2(3), 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognised in that Covenant are

The International Covenant on Civil and Political Rights deals with the so-called classical rights, generally known as the first generation rights which require governments not to interfere in the private life of the individual (i.e. it places a negative commitment on the government concerned). As shown above,<sup>127</sup> the rights involved are, *inter alia*, the right of every human person to life, liberty and security of person; to privacy; to freedom from cruel, inhuman or degrading treatment and from torture; to freedom from slavery; to immunity from retroactive sentences; to freedom of thought, conscience and religion; to freedom of opinion and expression; to liberty of movement, including the right to emigrate; to peaceful assembly and to freedom of association.

The Covenant also has a First Optional Protocol<sup>128</sup> which provides for individuals under certain circumstances to file complaints of human rights violations by ratifying states. That is, individuals are entitled to file complaints against their governments in case of alleged violations. The complaints are then considered by the Human Rights Committee. As South Africa has not ratified the Covenant this right of recourse was not available to South African citizens under the apartheid regime.

### **6.1.2.3 South African Concepts of a Bill of Rights and the International Bill of Rights**

As shown in Chapter III, the end of World War II heralded a new era in which racial discrimination and the denial of human rights were no longer accepted

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violated, shall have effective remedy." (Article 2(3)(a)). In addition, there are a number of other provisions, in the Covenant on Economic Social and Cultural Rights, including articles 3, 7(a)(1), 8, 10(3), 13(2)(a), 13(3), 13(4) and 15(3) which would seem to be capable of immediate application by judicial and other organs in many National legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain. See Phillips Alston "The International Covenant on Economic, Social and Cultural Rights" in *Manual on Human Rights Reporting* UN Centre for Human Rights, and *UN Institute for Training and Research* Geneva, UN (New York 1991) 39-77.

<sup>127</sup> See Chapter 3 par. 3.2.4 *supra*.

<sup>128</sup> Adopted and opened for signature, ratification and accession by GA Resolution 2200 A (XXI) of 16 December 1966.

as matters of exclusive domestic concern.<sup>129</sup> More specifically, the UN Charter (unlike the Covenant of the League of Nations) internationalised human rights<sup>130</sup> while the Universal Declaration of Human Rights spelled out these rights in more definite and emphatic terms. South Africa refused to endorse the Universal Declaration of Human Rights. Nonetheless, the Declaration strengthened the hand of domestic and international anti-apartheid organisations. Thus as the policy of apartheid began to unfold opponents of apartheid placed human rights on their political agenda's.<sup>131</sup> For instance, in 1955 the Congress Alliance convened and adopted a Freedom Charter which was amongst the most advanced documents of its time. This document spelled out in clear and coherent language, economic and social rights that were only to become internationally agreed upon in the sixties and people's rights that were only to be formulated in the seventies and eighties.<sup>132</sup> While domestic and international organisations advanced in terms of human rights South Africa retreated into the policy of apartheid which invoked the law and legal institutions to promote racial discrimination and political repression. This abuse of state authority resulted in the Constitutional Crisis of the fifties.<sup>133</sup> In the wake of the Constitutional Crisis and the suppression of the ANC-led Congress Alliance following the 1956 Treason Trial, interest in a bill of rights was revived by the Molteno Commission of Enquiry<sup>134</sup> established by the newly formed Progressive Federal Party. The Molteno Commission found that a sovereign Parliament was inappropriate to South Africa and recommended a bill of rights, protected by judicial review in a federal South Africa. The approval of the Molteno recommendations by the Progressive Federal Party made a bill of rights and judicial review important part of the South African constitutional/political debate.

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<sup>129</sup> Also see John Dugard "Changing Attitudes Towards a Bill of Rights in South Africa" Centre for Applied Legal Studies, University of Witwatersrand, 1994 5 *et seq.*

<sup>130</sup> See Articles 1 and 55 of the UN Charter.

<sup>131</sup> See John Dugard "A Bill of Rights for South Africa" in *Cornell International Law Journal* (Vol. 23) 446.

<sup>132</sup> *Ibid.*

<sup>133</sup> See John Dugard *Human rights and the South African Legal Order* (1978) chapter 2.

<sup>134</sup> See Molteno Commission Report on Franchise Proposals and Constitutional Safeguards (1960).

The Progressive Federal Party and the Natal Provincial Council made attempts to introduce a Bill of Rights into the Republican Constitution of 1961 which was rejected by the black majority as it excluded them from participation in the political process. The liberal forces failed dismally as the National Party government was not interested in the general protection of rights and liberties, except for those of the chosen few. During the sixties and seventies the NP government passed repressive security laws that authorised indefinite detention without trial. Thousands of persons were detained, others were tortured, and some fifty detainees died in suspicious circumstances.<sup>135</sup> During the seventies a new human rights movement towards the adoption of a universally accepted concept of a bill of human rights began to emerge. In 1970 the then Minister of Foreign Affairs Mr RF (Pik) Botha expressed his regret in his maiden speech in the House of Assembly that the South African government had failed to support the Universal Declaration of Human Rights in 1948 and suggested that South Africa should identify itself to a greater extent with the Declaration.<sup>136</sup>

That shift towards universal accepted human rights was sparked off by the development of international human rights law which culminated in two landmark international judicial decisions. First, in the Barcelona Traction Case<sup>137</sup> the International Court of Justice held, *inter alia*, that the rule against racial discrimination entailed obligations *erga omnes* of all states in the world. In the Namibia Case<sup>138</sup> of 1971 the International Court of Justice found that because South Africa had applied apartheid in South West Africa/Namibia the Security Council had lawfully terminated the Mandate under which South Africa had been administering the territory. The Court also held that all states (including those who are not members of the United Nations) were barred *erga omnes* from acting as though South Africa was in lawful control of South West

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<sup>135</sup> e.g. Steve Biko who died while in police custody in 1977.

<sup>136</sup> See *House of Assembly Debates* vol. 29 Cols. 2164-6 (21 August 1970).

<sup>137</sup> See *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain)*(second phase) 1970 ICJ 3, 32 (pars. 33-34).

<sup>138</sup> See *Advisory Opinion Legal Consequences for States of the continued Presence of South Africa in Namibia(South West Africa) notwithstanding Security Council Resolution 76(1970)*, 1971 ICJ 1.56 (par 126).

Africa/Namibia. The effect of these decisions was that apartheid and racial discrimination were regarded under international law as constituting a violation of the norms of *ius cogens*.<sup>139</sup>

The repression of the second half of the seventies intensified the human-rights debate within South Africa itself. The first national conference on human rights was held in Cape Town in 1979. At that Conference Mr Louis Henkin,<sup>140</sup> an international human rights expert, advocated the Covenant on Civil and Political Rights as a framework over within which to begin, as opposed to the United States Constitution<sup>141</sup> which was revered by the liberal forces which advocated a bill of rights for South Africa. While echoing the call of South African liberals for the adoption of a bill of rights Mr Henkin<sup>142</sup> cautioned that a bill of rights was no better than what was in it. He thus commended that International Covenant on Civil and Political Rights as being a better text on which to draw, better than the United States Constitution.<sup>143</sup>

The Cape Town conference brought human rights into the centre-stage of the Constitutional debate that preceded the adoption of the 1983 Constitution. In this debate the concept of a bill of human rights featured prominently and enjoyed support not only from the liberals,<sup>144</sup> but also from some Afrikaner jurists.<sup>145</sup> The heated human-rights debate notwithstanding, in 1982 the

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<sup>139</sup> See J Dugard *Recognition and the United Nations* 156-58; J Crawford *The Creation of States in International Law* (1979) 226-27 and Johan van der Vyver "Statehood in International law" 5 1991 *Emory International Law Review* 84-88.

<sup>140</sup> See Louis Henkin "International Instruments for the Protection of Human Rights" in Forsyth and Schiller (eds.) *Human Rights: the Cape Town Conference* (1979) 224-235.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> It is interesting to note that the US government only ratified the International Covenant on Civil and political Rights on 8 June 1992 and that it has not yet ratified the International Covenant on Economic, social and Cultural Rights which imposes a responsibility on governments to safeguard the rights of their Citizens to jobs, education, housing, and an adequate standards of living. See Jimmy Carter (US President 1977-1980) "US Finally ratifies human rights covenant" in *Christian Science Monitor* (CH) Monday June 29 (1992) 19.

<sup>144</sup> See Corbett "Human Rights : The Road ahead" 1979 *South African Law Journal* 192,201.

<sup>145</sup> See SC Jacobs (ed.) *'n Nuwe Grondwetlike Bedeling in Suid Afrika* (1981) 51.

Constitutional Committee of the President's Council published a report<sup>146</sup> which showed quite clearly that the government did not accept the idea of a bill of rights protected by judicial review. They rejected it on the ground that it was based on a humanist philosophy which emphasised individual rights whereas the Afrikaner with his Calvinist background was more inclined to place the emphasis on the State and its maintenance. Thus the South Africa Constitutional Bill [passed on 9 September 1983] did not include a bill of rights.<sup>147</sup> In 1984 the then Minister of Justice, Kobie Coetsee justified the omission of a bill of rights from the 1983 Constitution on grounds similar to those of Field Marshall Smuts, namely the undefinable nature of human rights.<sup>148</sup> These grounds were unsound as the Universal Declaration and the two Covenants had subsequently defined and elaborated the on the concept of a bill of human rights.

Meanwhile, according to widely held belief, popular and international pressures had begun to force the South African government to reconsider its position. Consequently on 23 April 1986 Mr Kobie Coetsee announced in Parliament that he had instructed the South African Law Commission to investigate and to make recommendations on the definition and protection of group rights in the South African Constitutional dispensation and the possible extension of existing protection of individual rights, as well as role courts of law could play in that regard.<sup>149</sup>

The announcement caused scepticism in legal circles<sup>150</sup> as the government, and

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<sup>146</sup> See *Second Report of the Constitutional Committee of the President's Council* PC 4/1982, chapter 9, par 9.10.

<sup>147</sup> See 108 *Hansard* Cols. 11181-494 [August (1983) 15-17].

<sup>148</sup> See Titus *The Applicability of the International Human Rights norms to the South African Legal system* (1994) 157. Also see (the then Minister of Justice) Coetsee "Hoekom nie 'n Verklaring van Menseregte nie?" in 1984 *Tydskrif vir Regswetenskap* 5.

<sup>149</sup> See *House of Assembly Debates* (23 April 1986) Cols. 4014-15. The announcement caused scepticism in legal circles. See Dugard "A Bill of Rights for South Africa: can a Leopard change its spots?" 2 1986 *South African Journal on Human Rights* 275.

<sup>150</sup> See Johan van der Westhuizen "Constitutional Options for Post-Apartheid South Africa" in 40 1991 *Emory Law Journal* 3 755 and Dugard "A Bill of Rights for South Africa: Can the Leopard change its spots" in 1986 *South African Journal on Human Rights* 275.

Mr Coetsee in particular, were well known opponents of the idea of a bill of human rights.<sup>151</sup> The unexpected endorsement of the idea of a Bill of Rights and the emphasis on group rights indicated that the government had laboured under the misconception that White privileges and political domination could be guaranteed under the auspices of a bill of rights.<sup>152</sup>

The announcement of Mr Coetsee was followed by the Pretoria Human-Rights Conference<sup>153</sup> which focused on the South African municipal legal order. The liberals and Afrikaner jurists attempted to use the Pretoria Conference to develop an internal concept of a bill of rights rather than incorporate the international bill of rights advocated by Henkin. Three main options emerged at the Conference. First, the incorporation of a bill of group and individual rights in the 1983 Constitution; secondly, a fully-fledged bill of rights which would effectively destroy the apartheid-based political order and gain acceptance and confidence as a tool with which apartheid was destroyed; and thirdly, the introduction of a limited bill of rights as a starting point and an interim strategy which would do away with objectionable laws and create a climate and legal framework for negotiations involving, *inter alia*, the ANC. The Anti-Bill of Rights Committee (composed of members of the now defunct Democratic Lawyers Congress and the Intervarsity Law Students Council) and black lawyers in general rejected the introduction of a bill of rights into a racist tri-cameral constitution which vested ownership of 87% of the land and 90% of its productive capacity in the white minority and entrenched apartheid and the Bantustan system.<sup>154</sup>

In response to the human-rights debate and suggestion of a negotiated settlement, the ANC proclaimed<sup>155</sup> that the liberation struggle would not end

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<sup>151</sup> See note 20 *supra*.

<sup>152</sup> See Van der Westhuizen "Constitutional Options for a Post-Apartheid South Africa" 756.

<sup>153</sup> See Johan Van der Westhuizen and Henning Viljoen (eds.) *A Bill of Rights for South Africa* [Proceedings of Symposium held at the University of Pretoria on 1 and 2 May 1986] (1988).

<sup>154</sup> See DH van Wyk "Menseregtehandves en Politieke idioom" *Ibid* 87.

<sup>155</sup> See Dugard "Changing attitudes towards a bill of rights in South Africa" *op cit*.

until South Africa was transformed into a united, democratic and non-racial country, and that the transformation of South Africa into a non-racial, democratic community was the only solution that would enable all its people, both black and white to live as equals in conditions of peace and equality, and that the overwhelming majority of the South African population had accepted that the Freedom Charter provided a reasonable and viable framework for the construction of a new society.

In 1988 both the government and the ANC embarked on major projects regarding human rights. In May 1988 an advisory body to the State President, called the President's Council, acting in terms of section 78(1) of the Republic of South Africa Constitution Act 110 of 1983, advised the State President that it would conduct an enquiry in the public interest into "viable constitutional models available for the further development of the Republic of South Africa."<sup>156</sup> The Constitutional Committee of the Council seemingly preoccupied itself with the insoluble problem of retaining white domination, or at least white privileges, in a political system that would afford full citizenship and extend democracy to Blacks who made up close to 80% of the South African population. The Council never finished its business. It was overtaken by the report of the South African Law Commission which was released in March 1989. The Law Commission produced a working paper on Group and Human Rights (the Working Paper).<sup>157</sup> The Working Paper<sup>158</sup> examined the philosophy of human rights, international and foreign methods of protecting human rights, current South African attitudes towards human rights, and the nature of the rights to be protected. It concluded with a draft bill of rights<sup>159</sup> and a discussion of various methods for implementing such an instrument.

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<sup>156</sup> See General Notice 303 Government Gazette 11288 May 5 1988.

<sup>157</sup> See South African Law Commission, Working Paper 25, Project 58: Group and Human Rights (August 31, 1989).

<sup>158</sup> This working paper is also known as the Olivier Report (Mr Justice Olivier was the chairman of the Commission.)

<sup>159</sup> See chapter 15 of the Working Paper.

The draft bill of rights focused on individual rights and endorsed the first generation rights found in most international instruments and bills of human rights. It proclaimed the rights to life (but failed to outlaw capital punishment), liberty, privacy, and a fair trial. It guaranteed the freedoms of speech, assembly, association, and movement and condemned torture and cruel, inhuman, or degrading treatment. Furthermore, the draft bill recognised equality before the law and outlawed discrimination based on race or gender and more significantly, the bill asserted:<sup>160</sup>

"the right of all citizens over the age of eighteen years to exercise the vote on a basis of equality in respect of all legislative institutions at regular and periodical elections and at referendums."

While incorporating the first generation rights the Commission excluded the second generation rights on the ground that such rights were non-justiciable and therefore belonged to a political manifesto rather than a bill of rights.<sup>161</sup>

The overall findings of the South African Law Commission<sup>162</sup> were based on the premise that South Africa, as then constituted, could not accommodate a genuine and credible bill of rights. The Commission argued that any meaningful protection of human rights presupposed adherence to the principle of non-discrimination, and the free and full participation of all the citizens of a political community in the constitutional structures of the country. Hence, the Commission was in favour of human rights protection as part of the constitutional arrangement in post-apartheid South Africa. Also the Commission held the view that a bill of rights could be introduced only as the outcome of a negotiated settlement based on consensus between all political groupings in South Africa.

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<sup>160</sup> *Ibid* art 20 at 474.

<sup>161</sup> See Dugard *A Bill of Rights for South Africa* 449.

<sup>162</sup> See Van der Westhuizen "Constitutional Options for Post-Apartheid South Africa" 756.

Many people, especially black lawyers, believed that the Law Commission would produce a report that exalted group rights, and by necessary implication Afrikaner group rights, over individual rights. Others harboured misgivings about the legitimacy of the Commission itself. It was for these reasons that many black lawyers declined to make representations to the Commission.<sup>163</sup> To the surprise of both government and its opponents the Commission rejected the idea of protecting racially defined group interests under the auspices of a bill of rights.<sup>164</sup> Furthermore, group interests founded on considerations other than race, such as freedom of religion and cultural rights, or the special rights of women or of workers, could be protected adequately by allocating the corresponding rights to individuals and by leaving it up to the persons concerned to exercise those rights, on the basis of freedom of association within the group of their own choice. Although the bill did not directly protect group rights, it gave limited protection through a provision recognising "the right of every person or group to disassociate himself or itself from other individuals or groups....".<sup>165</sup> Where, however, such disassociation resulted in racial, religious, linguistic, or cultural discrimination no public funds would be allocated to such an enterprise. That provision had clearly anticipated racially exclusive private schools with no public financing.<sup>166</sup> Although the Olivier Commission accepted the concept of a bill of rights it was abundantly clear that the thrust of its approach was to contain the human rights movement within the South African municipal order, rather than incorporate the international bill of rights.<sup>167</sup>

No wonder that the Commission did not rule out segmentation of the South African population along racial lines for purposes of a constitutional system of power-sharing (Consociationalism), holding that questions as to the structures

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<sup>163</sup> See Dugard *A Bill of Rights for South Africa* 449.

<sup>164</sup> The Commission stated that South African law was "oriented towards the individual" and "does not recognise the legal subjectivity of an amorphous group such as, for example, a racial group, an ethnic group[or] a Cultural group ...". See Working Paper 383.

<sup>165</sup> Art 17 at 474.

<sup>166</sup> See Dugard *A Bill of Rights for South Africa* 450.

<sup>167</sup> See Titus *The Applicability of the International Human Rights Norms to the South African legal system* 159-161.

of government did not come within its mandate.<sup>168</sup> The Olivier Report also received equivocal reception from Government. While government accepted the need to protect individual rights, there were signs that they were dissatisfied with the Commission's refusal to accord equal status to the protection of group rights. This equivocation was evident in Mr de Klerk's opening address to Parliament on February 2, 1990. Mr de Klerk declared that

"[t]he government accepts the principle of the recognition and protection of the fundamental individual rights which form the Constitutional basis of most Western democracies. We acknowledge, too, that the most practical way of protecting those rights is vested in a declaration of rights justiciable by an independent judiciary. However, it is clear that a system for the protection of the rights of individuals, minorities and National entities has to form a well-rounded and balanced whole. South Africa has its own National Composition, and our Constitutional dispensation has to take this into account. The formal recognition of individual rights does not mean that the problems of a heterogeneous population will simply disappear. Any new Constitution which disregards this reality will be inappropriate and even harmful.

Naturally, the protection of collective, minority and natural rights may not bring about an imbalance in respect of individual rights. It is neither the government's policy nor its intention that any group in whichever way it may be defined shall be favoured over or in relation to any of the others."<sup>169</sup>

Although the South African Law Commission and Government had finally accepted the concept of a bill of human rights it is abundantly clear that their concept was still largely informed by the idea of group rights especially with regard to future Constitutional options. We shall come back to this issue in the following paragraph.

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<sup>168</sup> See Working Paper par. 13.15

<sup>169</sup> See *South African Debates of Parliament* vol. 1 Cols. 1-8 (2nd Session, 9th Parliament, 90).

In January 1988 the ANC published Guidelines for a Democratic South Africa based on the 1987 Statement on Negotiations.<sup>170</sup> These Guidelines were issued to encourage National debate on the form that a post-apartheid society should take.<sup>171</sup> The Guidelines paid homage to the Freedom Charter (1955) and declared that the Charter had to be converted from a vision for the future into a Constitutional reality.<sup>172</sup>

The centrality of the Freedom Charter in the ANC's concept of a bill of human rights appeared quite clearly in the Guidelines<sup>173</sup> which stated:

“The Constitution shall include a Bill of Rights based on the Freedom Charter. Such a Bill of Rights shall guarantee the fundamental human rights of all citizens irrespective of race, colour, sex or creed and shall provide appropriate mechanisms for their enforcement.”

The Guidelines guaranteed the first generation rights such as freedom of association, expression, thought, worship, and the press.<sup>174</sup> These freedoms were, however, subject to the qualification that advocacy of the practice of racism, fascism, nazism or the incitement of ethnic or regional exclusiveness or hatred would be outlawed.<sup>175</sup>

Moreover, the Guidelines denounced the Constitutional protection of group rights as such protection would perpetuate the *status quo*.<sup>176</sup> However, in line

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<sup>170</sup> "Comments on the Constitutional Guidelines of the African National Congress" in 1989 *South African Journal of Human Rights* 133 *et seq.*

<sup>171</sup> As they put it: "The ANC is of the opinion that the drafting of a Constitution for a democratic South Africa may only be the task of elected representatives of all the people of our country in a Constituent assembly. These guidelines are being tabled for discussion by all our people, irrespective of their political inclinations, ideological leanings or party affiliations. They are meant to set in motion a process of National debate. It is hoped that finally a position will emerge out of these discussions which would reflect the broadcast National Consensus. It is in this spirit that these guidelines have been tabled for consideration by all South Africans."

<sup>172</sup> "Comments on the Constitutional Guidelines of the African National Congress" in *South African Journal on Human Rights* 129.

<sup>173</sup> *Ibid* note 46 at 131.

<sup>174</sup> *Ibid* par 1.

<sup>175</sup> *Ibid* par k.

<sup>176</sup> *Ibid* at 130 [prefatory note].

with article 21 of the International Covenant on Civil and Political Rights (1966) the Guidelines recognised the linguistic and cultural diversity of the all the people of South Africa and required facilities for free linguists and cultural development for all.<sup>177</sup>

As shown above,<sup>178</sup> the South African Law Commission distanced itself from international human rights norms<sup>179</sup> while the liberals, in particular John Dugard,<sup>180</sup> argued for international norms of human rights through the doors of the USA and the UK and, like the Olivier Commission, steered away from the second generation rights. The shortcomings of the establishment and the liberals in this regard left the ANC as the only champion of the first, second and third generation rights contained in the International Bill of Rights.

This was evident in the ANC Bill of Rights<sup>181</sup> formally launched in Johannesburg on 28 January 1991. The Bill of Rights included the entire known range of first generation civil and political rights, as well as second generation economic, social and cultural rights, and even third generation rights. The ANC's Commitment to universally accepted human rights norms developed through its experience as a major non-racial representative organ of the people of South Africa in the international arena. As Prof. Asmal put it:

"... Its [ANC] participation in the debates and discussions around apartheid and racialism in the international arena over the past three decades has also enabled it to draw on internationally accepted concepts of human rights, combining the first, second, and third generation rights into an integrated if not indivisible basis for a dignified life for all our fellow citizens."

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<sup>177</sup> *Ibid* par g at 131.

<sup>178</sup> See Titus *The Applicability of the International Human Rights Norms to the South African legal System* 159-162.

<sup>179</sup> *Ibid* 178.

<sup>180</sup> *Ibid* 179.

<sup>181</sup> See ANC Constitutional Committee, *A Bill of Rights for a New South Africa* (1990).

This found support in the introductory note to the ANC draft Bill of Rights.<sup>182</sup> The note stated that in preparation of the document heavy reliance was placed upon the Universal Declaration of Human Rights, the ICCPR and the ICESCR.

Furthermore, the note stated that they also drew upon the European Commission on Human Rights (ECHR) and the African Charter of Human and People's Rights, as well as provisions dealing with protection of human rights, in many Constitutions, ranging from India to the then West Germany, from the USA to Namibia.

Finally, Kader Asmal was appreciative of the fact that the changed politico-legal climate in South Africa was due partly to the impact of the international legal order of human rights. In particular, Prof. Asmal observed that the legal order of human rights enabled the political and legal organs of the UN to emphasise the criminality, illegality or illegitimacy of the South African regime with all that such characterisation implied. Enunciating the same appreciation as Prof. Asmal the ANC President, Nelson Mandela,<sup>183</sup> signalled South Africa's movement towards the incorporation of the International Bill of Rights and its return to the fold of the international community. In his address to the UN General Assembly in December 1991 President Mandela stated that South Africa had started its final lap towards the realisation of the goals enshrined in the UN Charter and the Universal Declaration of Human Rights. The President stated:<sup>184</sup>

"We are taking the final steps towards ending the apartheid system of white minority domination. Acting together, we have the possibility to bring into being a new country which you will be proud and happy to readmit into the ranks of the Assembly."

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<sup>182</sup> See Dr Zola Skweyiya "Introductory note to a Bill of Rights for a New South Africa: A Working Document by the ANC Constitutional Committee [1990]" iii in 3 1991 *African Journal of International and Comparative Law* 602.

<sup>183</sup> See "Taking the final steps Towards Ending Apartheid; Objective Justice, A United Nations Review Dedicated" in David Phillips *Nelson Mandela Speaks - forging a Democratic, non-racial South Africa* (1994).

<sup>184</sup> *Ibid.*

Although the establishment and the liberals on one side and the ANC on the other side accepted the concept of a Bill of Human Rights, it is clear that they differed on the degree to which such a concept should incorporate the international bill of rights. We shall come back to this question below.

#### **6.1.2.4 The Status of Human Rights Instruments in South Africa**

As shown in Chapter III, South Africa was a co-founder of the United Nations and a signatory of its Charter. Articles 55 and 56 of the Charter obliged member states to promote universal respect for, and observance of human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion. South Africa, however, did not take any steps to incorporate these provisions into South African law. The National Party government that came into power on the platform of the policy of apartheid abstained from voting on the General Assembly's Universal Declaration in 1948. Subsequently, the National Party government refused to become a party to or did not support the major human rights treaties which comprise the *corpus* of International Human Rights Law (IHRL). These treaties include:-

- a) The Charter of the United Nations;<sup>185</sup>
- b) The Universal Declaration of Human Rights;<sup>186</sup>
- c) International Covenant on Civil and political Rights;<sup>187</sup>
- d) The International Covenant on Economic, Social and Cultural Rights;<sup>188</sup>
- e) The European Convention for the Protection of Human Rights and Fundamental

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<sup>185</sup> In spite of the animosity between the UN and SA over the years, South Africa remained a member state. Her membership continued even after the rejection of her credentials. See in general Erasmus "The rejection of credentials: a proper exercise of General Assembly powers or exclusion by stealth?" 7 1981 *SAYIL* 40 and Suttner "Has South Africa been illegally excluded from the United Nations General Assembly?" 1984 *CILSA* 279.

<sup>186</sup> See GA Res. 217 A (iii) UN Doc A/810 (1948). As the Declaration is not a treaty to which a state may accede South Africa cannot now "join" the Universal Declaration.

<sup>187</sup> See GA Res. 2200 21 UN GAOR Suppl. 16 at 52; UN Doc A/6316 (1966). This Covenant should be read with the Optional Protocol GA Res. 2200 21 UN GAOR Suppl. 16 at 59, and the Second Optional Protocol UN Doc A/44/824 (1989).

<sup>188</sup> 19 December 1966, 993 UNTS 3.

Freedoms;<sup>189</sup>

- f) The American Convention on Human Rights;<sup>190</sup>
- g) The African Charter on Human and People's Rights;<sup>191</sup> and
- h) Regional Charters.<sup>192</sup>

The failure (or neglect) on the part of South Africa to incorporate IHRL meant that there was little scope for human rights in South Africa especially as a result of the apartheid policy.

International Law played little part in the advancement of human rights due to both non-incorporation into South African law and South Africa's reliance on the domestic jurisdiction clause.<sup>193</sup> The non-incorporation by itself, as will be shown below, did not prevent South African Courts from invoking IHRL. The Domestic jurisdiction clause too did not prevent this occurring either as the days of regarding such rights as a purely "domestic concern"<sup>194</sup> are well and truly past.<sup>195</sup> It is true that in modern times human rights are invariably embodied in a constitution that is a piece of National legislation - and would, therefore, in strict terms constitute municipal law. However, these rights which started off as constitutional rights in a specific country have expanded to constitutional rights in a number of countries and eventually mutated into what Henkin<sup>196</sup> described as " ...a universal conception and a staple of international

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<sup>189</sup> 1950 213 UNTS 221.

<sup>190</sup> 22 November 1969, OA STS 36.

<sup>191</sup> 27 June 1981 OAU Doc CAB /leg/67/3/ Rev. 5 (1981).

<sup>192</sup> For example, the Conference on Security and Co-operation in Europe: Final Act (the Helsinki Accords) 1 August 1975. See 73 Department of State Bulletin 323 (1975); Arab Charter of Human Rights.

<sup>193</sup> For discussion of this clause see par. 5.2 *supra*.

<sup>194</sup> This is the traditional argument based on article 2(7) of the Charter of the United Nations which, in the interests of state sovereignty, prohibits intervention "in matters which are essentially within the domestic jurisdiction of any State ...". As shown above it was raised by South Africa with monotonous regularity in rejecting UN intervention against its policy of apartheid. See Neville Botha "The Coming of Age of Public International Law in South Africa" 18 1992/3 SAYIL 36, and Jacqueline Casette "United Nations Observer Mission in South Africa - A significant event" 18 1992/3 SAYIL 1 *et seq.*

<sup>195</sup> See, for instance, *Flilartiga v Pena Irala* 1980 ILM 966 and Botha "Human Rights, torture, customary international law" 6 1980 SAYIL 150.

<sup>196</sup> See Louis Henkin *The Age of Rights* (1990) cited in Titus *op cit* 13-14 and Lillich "Sources of human rights law and the Hong Kong Bill of Rights" 10 1990-91 *Chinese Year book of International Law and Affairs* 27.

...law". In other words, IHRL is a separate branch of public law deriving from the Constitutional will of States aimed at the protection of the individual in the face of sovereign might.

During the early seventies the South African government began to feel the impact of IHRL. The impact forced her to begin to move away from the domestic jurisdiction towards the recognition of IHRL. For instance, in his maiden speech in the House of Assembly, Mr RF Botha, expressed his regret that the South African government had failed to support the Universal Declaration of Human Rights of 1948 and suggested that South Africa should identify itself to a greater extent with the Declaration.<sup>197</sup>

Instead South Africa argued that its policies did not offend the norm of non-discrimination and that the government was moving away from discrimination on the grounds of race.<sup>198</sup> Thus the South African Government was not yet ready to recognise IHRL as universally (or generally) understood.

The official interpretation of IHRL and its non-incorporation notwithstanding, South African courts were not powerless to invoke the principles of IHRL in other ways. Dugard<sup>199</sup> observes "that for over a hundred years South African Courts have simply assumed that rules and principles of customary international law might be applied by municipal Courts as if they were in some way part of South African Law. Consequently they have not required international law to be proved as a foreign legal system."

Hence, in 1971 in *South Atlantic Islands Development Corporation Ltd v Buchan*<sup>200</sup> the Court refused to admit an affidavit from an expert on international law was not foreign law and therefore could not be proved by affidavit. Dugard concluded, therefore, that South African courts have shown

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<sup>197</sup> See House of Assembly Debates vol. 29 Cols. 2164-6 [21 August 1970].

<sup>198</sup> Unfortunately this referred to the decolonisation of South Africa based on the principle of separate development which resulted the creation of the TBVC states. See John Dugard *International Law - A South African Perspective* 77-78.

<sup>199</sup> *Ibid* 42.

<sup>200</sup> 1971 (1) SA 234(c) at 238 P-F. For an early dictum that international law need not be proved see *Maynard v The Field Cornet of Pretoria* [1894] 1 SAR 232.

strong support for the doctrine of incorporation (or the monist approach) in respect of customary international law. In most cases our courts have simply applied customary international law without questioning its place in our legal order.<sup>201</sup>

From 1971 the courts have expressly asserted that international law forms part of our law and that it is the duty of a municipal court "to ascertain and administer the appropriate rule of international law".<sup>202</sup> This clear affirmation of the monist position has been diluted by a few judicial *dicta* couched in terms of the dualist (or adoption) theory. For instance, in the case of *Parkin v Government of the Republique Democratic du Congo*<sup>203</sup> the Court stated that the answer to the problem before the court was to be found in international law to the extent that our common law recognises such international law.<sup>204</sup> Also, and perhaps most unfortunately, the most authoritative Appellate Division *dictum* on the subject has been interpreted as lending support to both dualist and monist approaches.<sup>205</sup>

In the case of *Nduli v Minister of Justice*<sup>206</sup> Rumpff CJ declared (without reference to earlier cases<sup>207</sup>) that:

"[W]hile it is obvious that international law is to be regarded as part of our law, it has to be stressed that the *fons et origo* of this proposition must be found in Roman-Dutch law."

In the *Trendtex Corporation* (like the *South Atlantic Islands*) case the court affirmed the monist position in the following terms:<sup>208</sup>

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<sup>201</sup> See Dugard *International Law* 42 note 38.

<sup>202</sup> See *South Atlantic Islands Development Corporation Ltd v Buchan op cit.*

<sup>203</sup> 1971 (1) SA 259 (W).

<sup>204</sup> At 261 A.

<sup>205</sup> On these approaches see Titus *The Applicability of the International Human Rights Norms to the South African Legal System* 28 *et seq.*

<sup>206</sup> 1978 (1) SA 893 (A).

<sup>207</sup> These cases are *South Atlantic Islands Development Corporation Ltd v Buchan op cit* and *Trendtex Trading Corporation v Central Bank of Nigeria* 1977 Q B 529 (CA) at 553-554.

<sup>208</sup> At 553-554.

"A fundamental question arises for decision: what is the place of international law in our English law? One school of thought holds to the doctrine of incorporation. It says that the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in Conflict with an Act of Parliament. The other school of thought holds to the doctrine of transformation. It says that the rules of international law are not to be considered as part of English law except in so far as they have been already adopted and made part of our law by the decisions of judges, or by Act of Parliament or long established custom. The difference is vital when you are faced with a change in the rules of international law. Under the doctrine of incorporation, when the rules of international change, our English law changes with them. But, under the doctrine of transformation, the English law does not change. It is bound by precedent... . As between these schools of thought, I now believe that the doctrine of incorporation is correct. Otherwise I do not see that our courts could ever recognise a change in the rules of international law."

The judicial *dictum* in Nduli's case does not affirm the monist approach as clearly stated in the Trendtex Trading Corporation case.<sup>209</sup>

Instead the judicial *dictum* in the Nduli case reaffirmed the monist approach on the one hand lend support to the dualist approach on the other.<sup>210</sup> In short the monist approach states that customary international law forms part of our law without any act of incorporation whilst the dualist approach holds that some act of adoption is a pre-condition of the acceptance of international law as part of our law by its insistence that the *fons et origo* of thus proposition must be found in Roman-Dutch law. The dualist approach received further support from the concession by Counsel for appellants that<sup>211</sup>

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<sup>209</sup> *Ibid.*

<sup>210</sup> See Dugard *International Law* 43.

<sup>211</sup> At 906 D. This statement echoes those English decisions that had generally been invoked in support of the dualist adoption theory. See for instance, *Chung chi Cheing v R* [1939] AC 160 (AL) at 167-8 and *Compania Naviera Vascongado* [1938] AC 485 at 502.

"according to our law only such rules of customary international law are to be regarded as part of our law as are either universally recognised or have received the assent of this country."

Consequently, two schools of thought developed regarding the status of customary international law in South African law.

Although the majority of the nations of the world regarded customary public international law as binding an acrimonious debate still raged in South African academic circles.<sup>212</sup> The debate manifested itself in two schools of thought. Ironically, both schools relied on the same authority.<sup>213</sup> The first school of thought, advocated by Dugard,<sup>214</sup> held that international law was part of our law whilst the second school, advocated by Booysen,<sup>215</sup> held that international law was a source of law available to the courts in appropriate cases. While Basin<sup>216</sup> hailed the *dictum* of Rumpff CJ as support for the dualist position Dugard<sup>217</sup> took the view that a careful examination of the same suggested a totally different conclusion. According to Dugard<sup>218</sup> Rumpff CJ did not say that the source (*fons et origo*) of international law was Roman-Dutch law (which would undoubtedly have lent support to the dualist approach), but that the source of the proposition that international law was to be regarded a part of our law derived from Roman-Dutch law, not English law. Hence, Dugard<sup>219</sup> concluded that (with the exception of Booysen) it was widely accepted that South Africa follows a monist approach in respect of customary

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<sup>212</sup> See Neville Botha "The Coming of Age of Public International Law in South Africa" 41.

<sup>213</sup> Viz. Nduli's case *Ibid.*

<sup>214</sup> See Dugard "The Place of Public International Law in South African Law" in Visser (ed.) *Essays in Honour of Ellison Kahn* (1989).

<sup>215</sup> See H Booysen "Is Gewoonteregtelike Volkereg Deel van ons Reg" 1975 *THRHR* 315. For recent views on this see DJ Devine "What Customary International Law is part of South African Law?" 1987-88 *SAYIL* 119, Rosalie P Schaffer "The interrelationship between Public International Law and the Law of South Africa: An Overview" 1983 *International Comparative Law Quarterly* 277 and most recently Booysen "Jurisdiction to try Abducted Persons and the Application of International Law in South African Law" 17 1990/91 *SAYIL* 133.

<sup>216</sup> See H Booysen *Volkereg en Sy Verhouding tot die Suid Afrikaanse Reg* (1989) 69-70.

<sup>217</sup> See Dugard *International Law* 43.

<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid* 44.

international law and that Nduli's case provided authority for the proposition that international law formed part of our law without the need for any act of transformation.<sup>220</sup>

No wonder that judicial decisions since Nduli's case have cited this case as authority for the monist approach.<sup>221</sup>

The Approach of the South African judiciary to customary international law was finally spelled out in *S v Petane*.<sup>222</sup> *In casu* the Court considered the question whether the 1977 Protocol 1 to the Geneva Conventions of 1949 had become part of customary international law, by examining resolutions of the General Assembly, state practice, and the writings of jurists. In the course of this judgement Conradie stated:<sup>223</sup>

"I am ... prepared to accept that customary international law may ... be created very quickly, but before it will be considered by our municipal law as being incorporated into South African law the Custom, whether created by *usus* and *opinion juris* or only by the latter, would at the very least have to be widely accepted."

It is quite clear from the foregoing discussions that customary international law has always been part of South African law, and that the courts have been open to apply those norms of IHRL that had acquired the status of custom unless they were in conflict with legislation. However, as the apartheid legal order violated almost every right recognised in the Universal Declaration of Human Rights, there was little scope for the application of customary norms. Also,

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<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid* note 51. Also see Botha *op cit*. For an exception to this approach see the Prize Jurisdiction Act 3 of 1968.

<sup>222</sup> 1988 (3) SA 51 (C).

<sup>223</sup> At 57H-I. Another case that affords a good illustration of the manner in which customary international law could be ascertained is *Nkondo v Minister of Justice & another* 1980 (2) SA 895.

where legislation was silent our courts showed no inclination to invoke customary rules.

For instance, in *S v Petane*<sup>224</sup> the court rejected the argument that the rights contained in the Universal Declaration of Human Rights had acquired the status of customary law. In *S v Rudman Cooper J*, without even examining foreign case law, dismissed the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European and American Conventions as instruments inspired by laudable ideals which do not form part of customary international law.<sup>225</sup>

Although South Africa had signed and ratified the UN Charter<sup>226</sup> it had not incorporated it into municipal law by statute. The relationship between IHRL and municipal law under South African law found a definite and emphatic expression in *Pan American World Airways incorporated v SA Fire and Accident Co-Ltd*.<sup>227</sup> In this case Steyn CJ stated that it was trite law:

"... that in this country the conclusion of a treaty, convention or agreement by the South African government with any other government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded are not embodied in our law except by legislative process.

In the absence of any enactment giving [its] relevant provisions the force of law, [it] cannot affect the rights of the subject."

On the ground of this decision South African courts could not directly invoke the human rights clauses of the UN Charter.

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<sup>224</sup> 1988 (3) SA 51 (c) at 58 G-J.

<sup>225</sup> 1989 (3) SA 368 at 376 A-B.

<sup>226</sup> See par 5.2 *supra*.

<sup>227</sup> 1965 (3) SA 150 A.

However, the clauses which assert the principle of non-discrimination might be invoked to interpret an ambiguous statute in accordance with the presumption that the legislature does not intend to violate international law.<sup>228</sup> The South African Supreme Court found an opportunity to apply this reasoning in the case of *S v Werner*.<sup>229</sup> This case involved the interpretation of the Group Areas Act.

It was argued in court that the Act did not expressly authorise discrimination, yet the proclamation of the Group area concerned was discriminatory. Thus the Act was considered to be ambiguous and requiring to be interpreted as closely as possible with South Africa's obligations under the human rights provision of the UN Charter and that this required the court to insist on an equality of treatment of all races in the implementation Act. The Court was thus invited to be guided by unincorporated treaty obligations in interpreting an ambiguous statutory provision. An additional argument was that the proclamation was invalid on the ground of unreasonableness. Such unreasonableness occurs where a subordinate law-making body acts without regard to the international obligations of the State in terms of the UN Charter. Both the trial court and the Appellate Division held the Act was not ambiguous and therefore that it did not allow recourse to a presumption of compliance with international obligations. The courts simply held that the Group Areas Act was not ambiguous and by implication allowed discrimination and manifest injustice.

In the trial court Le Roux J stated that it was unnecessary to consider arguments advanced on the ground that<sup>230</sup>

"[W]hen an Act of our own Parliament authorises something, then in my opinion

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<sup>228</sup> See GE Devenish *Interpretation of Statutes* (1992) 212; HR Hahlo and Ellison Kahn *The South African legal system and its background* (1968) 114, 211; and *Maynard v The Field Cornet of Pretoria* (1894) 1 SAR 214.

<sup>229</sup> The Case is reported in *S v Adams; S v Werner* (1981) (1) SA 187 (A). Also see *S v Werner* 1980 (2) SA 313 (W) at 328 C.

<sup>230</sup> at 328 (own translation from Afrikaans text).

it cannot be influenced by controversial obligations in the Charter of the United Nations."

On appeal Rumpff CJ<sup>231</sup> declared that:

"The argument that international relations, e.g. the Charter of the United Nations, must be used as norm is, in the circumstances, unacceptable. A proclamation in terms of the Group Areas Act must be tested against the provisions of the Act, an Act, which explicitly provides for the creation and development of group areas for different ethnic groups."

The South African Law Commission<sup>232</sup> summarised this law-is-law approach of South African courts to the protection of human rights as follows:

"There is full recognition of a respect for the rights of the individual as recognised in our Common Law. The courts see it as their task to protect these rights, and it is said that the courts form the bulwark between the individual and the executive. However, where there is an Act of Parliament that apparently infringes one or more of the recognised human rights, the courts will carefully examine the Act in question and even interpret it strictly so as to curtail the infringements as far as possible. If however, it appears at the end of the examination that it was the intention of the legislature to infringe the rights in question, the court is powerless and must enforce the provisions of the Act however unjust the result may be."

International human rights conventions and declarations which are not binding on South Africa either through custom or treaty might be invoked by courts as a guide to judicial policy in the formulation of a rule of law.<sup>233</sup> For instance, in

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<sup>231</sup> *Ibid.*

<sup>232</sup> See *Working Paper 25* par 8.22 at 169.

<sup>233</sup> See *Blathway T v Cawley (Baron) and others* 1976 Ac 397 (HL) at 426.

*S v Khanyile*<sup>234</sup> Didcott J invoked the International Covenant on Civil and Political Rights and the European Convention on Human Rights to support a finding that an indigent person might not be sentenced to a substantial term without legal representation. This reasoning was rejected by the Eastern Cape<sup>235</sup> and Natal<sup>236</sup> divisions of the Supreme Court as well as the Appellate Division.<sup>237</sup> In the case of Labour law<sup>238</sup> and prisoners rights<sup>239</sup> South African courts have successfully invoked unincorporated conventions.

The failure or neglect of the South African judiciary to incorporate the international human rights norms was untenable as South Africa was a signatory to the UN Charter that had been recognised as an important source of obligations for states, including those aspects that related to human rights. The provisions of the UN Charter that deal with human rights figure quite prominently in the statement of purpose of the UN.<sup>240</sup> South Africa, as a member state was obliged to act in accordance with these obligations and it was her legal duty to respect and observe human rights. Moreover, under article 55 of the UN Charter, South Africa was obliged to promote respect for and observance of human rights and fundamental freedoms. This duty was further emphasised in article 56 in which all member states pledged to take joint and separate action in co-operation with the UN for the achievement of the purposes set out in article 55. These provisions gave legal character to the argument that South Africa's disregard or violations of human rights were destructive to both

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<sup>234</sup> 1988 (3) SA 795 (N).

<sup>235</sup> See *S v Rudman* 1989 (3) SA 368 (ECP).

<sup>236</sup> *S v Dadla* 1989 SA 172.

<sup>237</sup> See *S v Mthwana* 1992 (1) SA 343 (A).

<sup>238</sup> See *Metal and Allied Workers Union v Stobar Reinforcing (Pty) Ltd* 1983 4 ILJ 84 (IC), *United African Motor and Allied Workers Union v Fodens SA (Pty) Ltd* 1983 4 ILJ 212 (IC). Also see DJG Woolfrey "The Application of International Labour Norms to South African" 12 1986/87 *SAYIL* 135.

<sup>239</sup> In *S v Staggie* 1991 (1) SACR 669 C Conradie J applied a provision of the SMR which declares that corporal punishment is completely prohibited as a punishment for disciplinary offences in prison to the interpretation of Section 54 (2)(d) of the Correctional Services Act of 1959.

<sup>240</sup> See Articles 1(3), 13, 62(2) and (3) and 68.

the moral and legal character of the human rights provisions of the UN Charter. It is therefore submitted that South Africa's reliance on the domestic jurisdiction clause had never been justified.<sup>241</sup>

#### **6.1.2.5 Constitutional Options for a Post Apartheid South Africa**

Popular struggles and international pressures against apartheid during the first half of the eighties plunged South Africa into an unprecedented Constitutional Crisis. In particular, the crisis resulted from the "nullification" of the 1983 Constitution, rejection of the Bantustan and racially based local authorities by the UN Security Council and mass actions which rendered the country ungovernable.<sup>242</sup> These factors shifted the balance of power in the country towards a democratic transformation.<sup>243</sup>

As a result of the crisis different quarters presented Constitutional models either to try to extricate the apartheid system from its impasse, or to design a Constitution for a post-apartheid South Africa.<sup>244</sup> The Crisis also aroused the interested of the international organisations. For instance, in October 1985 the Commonwealth sent the Eminent Persons Group (EPG) to South Africa to seek a Commitment from the South African government for real change in its policies.<sup>245</sup> The EPG reached a deadlock with the government when they identified two non-negotiable positions - namely, (a) the concept of group rights on which apartheid and its bantustan system were based, and (b) that the racially-based tricameral parliamentary system (which had been rejected by both the UN security Council and the overwhelming majority of South Africans) would serve as the basis for further Constitutional reform.

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<sup>241</sup> See Steytler "Free and fair polling" 221.

<sup>242</sup> See Mark Swilling "Living in the Interregnum: Crisis, Reform and the Socialist alternative in South Africa" in *Third World Quarterly* (1986) 408 *et seq.*

<sup>243</sup> See Zola Skweyiya "The ANC Constitutional Guidelines: a Vital Contribution to the Struggle against Apartheid" in *Harare Conference on the Role of Law in a Society in Transition* (1989) *et seq.*

<sup>244</sup> *Ibid.*

<sup>245</sup> See The Commonwealth Report *Mission to South Africa* (1986) 123.

These non-negotiable positions of the South African government led the EPG to the conclusion that while the government claimed to be ready to negotiate, it was in truth not yet prepared to negotiate fundamental change, nor to countenance the creation of genuine democratic structures, nor to face the prospect of the end of white power in the foreseeable future. It became abundantly clear to the EPG that the government reform programme did not seek to end apartheid, but rather to give it a less inhuman face and that its quest was power-sharing without surrendering overall white control.

In 1986 the National Party government speeded up its reform programme. As mentioned above on 23 April 1985 Mr Coetzee announced in Parliament that he had instructed the South African Law Commission to investigate and to make recommendations on the definition and protection of group rights in the context of the South African Constitutional dispensation and the possible extension of the existing protection of individual rights, as well as the role the courts could play in that regard. Meanwhile the NP government's power-sharing constitutional option received a further impetus at the National Party Federal Congress held on 12 and 13 August 1986.

The National Party Congress issued a Manifesto containing the main features of the NP vision of a future South African Constitutional dispensation and their programme of action.<sup>246</sup> Although their Constitutional option preserved the policy of apartheid they recognised the equality of all racial groups and sought to use them as building blocks for a Consociational democracy which would allow all four racial groups to share power. Thus at the Federal Congress the NP not only reaffirmed its policy of apartheid but also adopted three principles which would underpin its power-sharing Constitutional model. The principles were:

- (a) the sovereignty of the law as the basis for the protection of fundamental rights of both individuals and groups;
- (b) the equality of all population groups regardless of race, ethnic group, colour or

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<sup>246</sup> See *Manifesto of the National Party - Elections 6 May 1987*.

- creed; and
- (c) the rights of each population group to self-determination and participation in the government of the country, provided no group dominated others.<sup>247</sup>

The NP used its 1986 Manifesto for the 1987 general elections.

Between the years 1986 and 1987 the NP and the ANC entered into dialogue which involved the jailed ANC leader Mr Nelson Mandela. No wonder that the ANC promptly responded to the government's statements on negotiations. In their own statement on negotiations (of 9 October 1987) the ANC, like the EPG, expressed serious doubts as to Pretoria's willingness to engage in meaningful negotiations for the termination of apartheid institutions and practices.

Furthermore, the ANC observed that the government's perception of negotiations remained focused upon two objectives: (a) to defuse the struggle inside South Africa by holding out false hopes of a just political settlement which Pretoria had every intention to block, and (b) to defeat the continuing campaign for comprehensive and mandatory sanctions. The ANC statement reaffirmed its vision of the post-apartheid South Africa embodied in the Freedom Charter and emphasised that the ANC would not be willing to enter into secret negotiations with the South African authorities on the Constitutional future of the country. However, the ANC reaffirmed its willingness to participate in genuine (open and official) negotiations, provided their aim was to transform South Africa into a united, non-racial democracy. For that purpose the ANC insisted that the future Constitutional arrangements had to define and treat all South Africans as equal citizens, without regard to race, colour or ethnicity. Moreover, the ANC reaffirmed its commitment to the concept of a bill of human rights to safeguard the rights of the individual, and opposed any attempt to perpetuate the apartheid system through the concept of so-called group or minority rights.

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<sup>247</sup> *Ibid* 6-7.

By the end of 1987 through the ANC externally and the Mass Democratic Movement inside South Africa had gained a moral and political high-ground over the National Party government and demonstrated that apartheid could not be reformed and that it had to be completely dismantled. Meanwhile an HSRC Report<sup>248</sup> confirmed that the majority of both black and white communities rejected the tricameral parliamentary system. In response the government established a special department (in January 1988) within the Ministry of Constitutional Development and Planning and tasked it to study alternative Constitutional models.<sup>249</sup> The establishment of that department coincided with the publication of the ANC Constitutional Guidelines for a Democratic South Africa. In May 1988 an advisory body to the State President, called the President's Council, acting in terms of section 78(1) of the Republic of South Africa Constitution Act 110 of 1983, advised the State President that it would conduct an inquiry in the public interest into "viable Constitutional models available for the further development of the Republic of South Africa."<sup>250</sup> While the Constitutional Committee of the President's Council was preoccupied with the development of Constitutional arrangements which could protect the interests and privileged positions of whites, Parliament passed the Promotion of Constitutional Development Act of 1988.<sup>251</sup>

The Act provided for the establishment of a multi-racial National Council and tasked it *inter alia*, to draft a new Constitution that would allow all four racial groups to participate in process of government on the basis of the NP formula of Consociational democracy.

The Promotion of Constitutional Development Act was fundamentally flawed because it did not provide for the unbanning of the National liberation movements and for participation in the Constitution making process by the

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<sup>248</sup> See Skweyiya note 58 *supra*.

<sup>249</sup> See Nic J Rhodie "Reform: The Way to a Democratic Socio-political order in South Africa" H C Marais (ed.) *South Africa - Perspectives on the Future* (1989)171.

<sup>250</sup> See *General Notice 303 Government Gazette* 11288 May 5 1988.

<sup>251</sup> Act 86 of 1988.

genuine and democratically elected leaders of the South African Community. The government sought to introduce a new Constitutional dispensation through the offices of black participants of its own choice.<sup>252</sup> Many of the black leaders singled out in the Act to participate in the design of a new Constitution had almost no credibility in the black community because they had allowed themselves to be co-opted into apartheid structures. Some of the leaders concerned, including Dr Mangosuthu Buthelezi, then chief Minister of KwaZulu and leader of the Inkatha Movement, made it publicly known that they would not serve on the Council. It is not surprising, in light of this, that President PW Botha's National Council never got off the ground.<sup>253</sup> The efforts of PW Botha's administration to get negotiations off the ground on their own terms failed dismally. The failure once more afforded the ANC a moral and political high ground.

The ANC, unlike the government, embarked on consultations with the Mass Democratic Movement inside the country<sup>254</sup> as well as the international community.<sup>255</sup> These consultations resulted in the Harare Declaration and the UN Consensus Resolution on South Africa which provided an international framework for a constitutional settlement in South Africa. When the Declaration was submitted to the UN for consideration it was pointedly observed that<sup>256</sup>

"endorsement by the UN would establish an international benchmark on negotiations to be used as a standard by which to judge any proposal emanating

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<sup>252</sup> See Van der Westhuizen "Constitutional Options for a Post-Apartheid South Africa" 759 note 56.

<sup>253</sup> *Ibid.*

<sup>254</sup> The ANC Convened a two-day meeting in Lusaka, Zambia on 6 June 1989 with Cosatu and the UDF to formulate a proposal on negotiations for submissions to the OAU summit to be held in Harare on 29-31/71 1989. The proposal was adopted and published as the Declarations of the OAU Ad-Hoc Committee on Southern Africa on the question of South Africa. See *Discussion paper: The MDM meets the ANC SASPU National* (August/September 1989) 26 et seq. For a text of the Declaration see *Setshaba* (October 1989) 2-5.

<sup>255</sup> See Alan Dunn "World sets deadlines" *Pretoria News* Wednesday 4 October 1989, and "Wooing the World" *New Nation* September (1989) 15-21. Also see "South Africa: De Klerk faces the big heat" *Africa Confidential* 22 September 1989 vol. 30 no. 19.

<sup>256</sup> See Unisa Tutorial Letter 103/1994 (Department of Constitutional and Public International Law) 4.

from Pretoria, so if Pretoria wishes to negotiate on terms of its own choosing, it has weeks rather than months in which to derail the ANC plan and present one of its own".

In December 1989, the UN General Assembly endorsed the Harare Declaration in its Resolution on Apartheid and its Destructive Consequences in South Africa.

In its preamble the Resolution reaffirmed that in its efforts to find a negotiated peaceful settlement in South Africa (and elsewhere) the UN was guided by the fundamental and universal principles enshrined in the UN Charter and the Universal Declaration of Human Rights and reiterated that the apartheid system was an obstacle to the achievement of the fundamental objectives of justice, human dignity and peace by the people of South Africa. Furthermore, the preamble reaffirmed:

"the right of all peoples, including the people of South Africa, to determine their own destiny and to work out for themselves the institution and the system of government under which they will, by general consent, live and work together to build a harmonious society."

Also, the preamble reaffirmed the UN's commitment to do everything possible and necessary to assist the people of South Africa, in such a way as they decided, through their genuine representatives, determined to achieve their right of self-determination.

The preamble noted that the International Community made those commitments because of its belief that all people were equal and had equal rights to human dignity and respect, regardless of colour, race, sex or creed and that all men and women had the right and duty to participate in their own government, as equal members of society, and that no individual or group of individuals had any right to govern others without their democratic consent, and reiterated that the apartheid system violated all these fundamental and

universal principles. Thus the General Assembly affirmed that apartheid was a crime against the conscience and dignity of humanity stating that it would continue to support the victims of apartheid as its duty carried out in the name of humanity. Then the General Assembly endorsed the Harare Declaration and the Lusaka Manifesto.<sup>257</sup> In an apparent endorsement<sup>258</sup> of the Dar-Es-Salaam Declaration, the Assembly acknowledge other changes towards peaceful change that had taken place in Southern Africa.

In its operative paragraphs, the Resolution observed that there was a real possibility to end apartheid through negotiations if there was demonstrable readiness on the part of the South African regime to engage in negotiations genuinely and seriously, as the majority of South Africans had always preferred a peaceful political settlement. Thus the Resolution encouraged the people of South Africa, as part of their legitimate struggle, to join together to negotiate an end to the apartheid system and agree on all the measures necessary to transform their country into a non-racial democracy. The Resolution, like the 1987 ANC statement on negotiations, held that the goal of any negotiations should not be the amendment or reform of the apartheid system but its elimination.

Hence, the General Assembly supported the position of the people of South Africa who demanded a new Constitutional Order based on fundamental and universal principles embodied in the UN Charter and the Universal Declaration of Human Rights. Hence, the General Assembly held the following fundamental principles to be of importance to the creation of a new constitutional order in South Africa:

- (a) South Africa shall become a united, non-racial and democratic state;
- (b) All its people shall enjoy common and equal citizenship and nationality, regardless of race, colour, sex or creed;

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<sup>257</sup> See Willem de Klerk *FW de Klerk: The Man in his time* (1991) 55-60.

<sup>258</sup> August 1989.

- (c) All its people shall have the right to participate in the government and administration of the country on the basis of universal and equal suffrage, under a non-racial voters' roll, and by secret ballot, in a united and non-fragmented South Africa;
- (d) All its people shall have the right to form and join any political party of their choice, provided that this is not in furtherance of racism;
- (e) All shall enjoy universally recognised human rights, freedoms and civil liberties, protected under an entrenched bill of rights;
- (f) South Africa shall have a legal system that will guarantee equality of all before the law;
- (g) South Africa shall have an independent and non-racial judiciary;
- (h) There shall be created an economic order that will promote and advance the well-being of all South Africans;
- (i) A democratic South Africa shall respects the rights, sovereignty and territorial integrity of all countries and pursue a policy of peace, friendship and mutually beneficial co-operation with all people.

The General Assembly adopted these principles as a possible basis for an internationally acceptable constitutional settlement for South Africa that is to say, a "holy law"<sup>259</sup> for South Africa.

Then, the General Assembly called upon South Africa to create a climate for negotiations by removing certain obstacles. They included:

- (a) Releasing all political prisoners and detainees unconditionally and refraining from imposing any restrictions on them;
- (b) Lifting all bans and restrictions on all proscribed organisations and persons;
- (c) Removing all troops from the townships;
- (d) Ending the state of emergency and repealing all legislation, such as the Internal Security Act, designed to circumscribe political activity;
- (e) Cease all political trials and executions for politically motivated crimes.

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<sup>259</sup> See Willem de Klerk "The Process of Political Negotiation: 1990-1993" in Bertus de Villiers *Birth of a Constitution* (1994) 4.

The General Assembly believed that these measures were necessary for a climate for free political discussion which was an essential condition to ensure that the people themselves participated in the process of remaking South Africa.

Furthermore, the General Assembly spelled out guidelines to the process of negotiations between the national liberation movements and the South African regime. The process required three agreements. First, an agreement on the mechanism for the drawing up of a new constitution, based on, amongst others, the principles enunciated above, and the basis of its adoption; secondly, an agreement of the role to be played by the international community in ensuring a successful transition to a democratic order; and thirdly, an agreement of the transitional arrangements and modalities for the process of drawing up and adoption of a new Constitution, and for the transition to a democratic order, including the holding of elections. Finally, the General Assembly adopted a programme of actions based on the implementation of the Declaration.

## **6.2 The Birth of a New Constitution**

### **6.2.1 Background**

The Collapse of the PW Botha's attempts to negotiate on his own terms forced the government to realise that the National Liberation Movements (especially the ANC) held the key to the future of South Africa. Hence, exploratory talks took place between the ANC (through its jailed leader, Mr Nelson Mandela) and the government in May 1988 (other sources state July 1989 as the correct date).<sup>260</sup> Upon his election as the leader of the National Party on 2 February 1989 Mr FW de Klerk immediately made fresh efforts to get negotiations off the ground. In a speech given on his election day he emphasised a total change in South Africa's goals.<sup>261</sup> The new goals would include:

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<sup>260</sup> See David Phillips *Nelson Mandela Speaks - forging a Democratic, non-racial South Africa* 163-4.

<sup>261</sup> See Van der Westhuizen "Constitutional Options for a Post Apartheid South Africa" *op cit*.

- (a) a country free of antagonisms of the past, domination and oppression and a country that would find expression in a true democracy;
- (b) a plan of action that would address the genuine grievances hampering negotiations;
- (c) normalisation of international relations; and
- (d) elimination of domination in politics by either the majority or the minority.

Hardly two weeks before the adoption of the Harare Declaration Mr PW Botha resigned as State President (on 14 August 1989) and Mr FW de Klerk was elected by the Parliamentary Electoral College as the seventh State President of the Republic of South Africa (this following the National Party victory in a “general election” on 6 September 1989). With the adoption of the Harare Declaration hardly a week<sup>262</sup> before his election as State President Mr de Klerk and his administration saw the writing on the wall and responded positively to the prerequisites for negotiations spelled out in the document (especially obstacles to negotiations contained in the Declaration and earlier UN Resolutions), for instance, the release of political prisoners, the unbanning of organisations and persons, the removal of certain legislation and so forth.<sup>263</sup>

At his inauguration as State President on the 20 September 1989 de Klerk undertook to repeal discriminatory legislation, release security prisoners and to end the State of Emergency as soon as possible. Also, he undertook to work out Constitutional proposals which would protect all people, including minorities, by means of Constitutional checks and balances and a bill of rights.<sup>264</sup> In his first opening-of-Parliament speech<sup>265</sup> following his election as leader of the ruling National Party, Mr de Klerk committed himself

- (a) to abolish apartheid; and
- (b) to create conditions that would be conducive to securing the climate for a

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<sup>262</sup> *Ibid.*

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*

<sup>265</sup> See *South African Debates of Parliament* vol. 1 Cols. 1-8 (2nd session, 9th Parliament, 90)

negotiated settlement of the South African Constitutional problem on the basis of a non-discriminatory democracy.

Willem de Klerk<sup>266</sup> observed quite correctly, that the NP Government's radical change in policy towards negotiations was not only the result of pressure from the ANC, the international Community and the changes in Eastern Europe but also of the emerging cracks within the ruling party itself.

During the 1990 Parliamentary session the de Klerk administration repealed several remaining laws that sanctioned racial discrimination. These laws included:-

- (a) the Reservation of Separate Amenities Act,<sup>267</sup>
- (b) the Group Areas Act of 1966,<sup>268</sup> and
- (c) the Land Acts of 1913 and 1936.<sup>269</sup>

In a direct response to the Harare Declaration and the UN Consensus Resolution on Apartheid and its Destructive Consequences, and in particular, to create a favourable climate for settling the Constitutional problem through negotiations, the government released its political prisoners,<sup>270</sup> most notably Mr Nelson Mandela.<sup>271</sup>

The De Klerk government also lifted all banning orders that had restricted the

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<sup>266</sup> See De Klerk "The Process of Political Negotiation: 1990-1993" 4-5.

<sup>267</sup> See Discriminatory legislation regarding Public Amenities Repeal Act 121 of 1990.

<sup>268</sup> See Group Areas Act 36 of 1966.

<sup>269</sup> See Black Land Act 27 of 1913 and the Development Trust and Land Act 18 of 1936. The following year February 1, 1991 he announced that the population Registration Act would be replaced by regulations to facilitate the racial criteria of political rights under the 1983 Constitution.

<sup>270</sup> See Human Rights Index (1 October 1989-28 February 1990) in 1990 *South African Journal of Human Rights* 121, 128 and Human Rights Index (1 March 1990-30 June 1990) in 1990 *South African Journal of Human Rights* 325-326.

<sup>271</sup> Mr. Mandela was released on 11 February 1990. See Van der Westhuizen "Constitutional Options for a Post-Apartheid South Africa" 761 note 64.

political activities of individuals<sup>272</sup> and organisations,<sup>273</sup> notably those that had outlawed the ANC, the PAC and the SACP,<sup>274</sup> and made provision for the return of political refugees to South Africa with immunity.<sup>275</sup>

It is abundantly clear from the preceding paragraphs that the de Klerk government, unlike that of his predecessor, demonstrated good faith and a determination to enter into negotiations with all political groups in the country to design an entirely new Constitutional dispensation for post-apartheid South Africa. This act of good faith and determination ushered in a negotiation process that can be divided into three phases: (1) the Talks about Talks phase, (2) the Constitutional Negotiations phase and (3) the Transitional phase. These phases [and the role of the international Community in them] will be discussed below.

## **6.2.2 Landmarks in the Negotiations Process**

### **6.2.2.1 The Talks About Talks Phase**

In the 1990 opening-of-parliament speech Mr de Klerk removed obstacles to negotiations and opened the door for the Talks about Talks phase. This phase started with a meeting between the two main players - the government and the ANC - in May 1990 at Groote Schuur (in the Cape Province). The two sides held the first talks in 78 years in what was considered as the beginning of a process to clear all the obstacles to negotiations. Following the talks the two parties agreed on the Groote Schuur Minute which declared, *inter alia*, the parties<sup>276</sup> commitment towards the resolution of the existing climate of violence and intimidation, as well as their commitment to stability and to a peaceful process of negotiations.

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<sup>272</sup> See Government notice R 231 and R 232 in *Government Gazette* 12287 of February 3 1990.

<sup>273</sup> See Government Notice R 229 in *Government Gazette* 12287, February 3 1990.

<sup>274</sup> The SACP was banned by the Suppression of Communism Act 44 of 1950, and the ANC and PAC were banned in terms of the Unlawful Organisations Act 34 of 1960.

<sup>275</sup> See the Indemnity Act 35 of 1990.

<sup>276</sup> See De Klerk "The Process of Political Negotiation: 1990-1993" 6.

The Groote Schuur meeting also formed Working Groups and tasked them to identify further obstacles which were to be removed before Constitutional negotiations could begin.

The reports of the Working Groups resulted in the Pretoria Minute which was signed on 6 August 1990. In terms of this agreement the ANC and government reaffirmed the Groote Schuur Minute and the ANC announced that it would suspend all armed actions with immediate effect.

During the following few months after the signing of the Pretoria Minute the "talks about talks" deadlocked on various issues. The main bones of contention were (a) the meaning of "armed actions" and (b) the failure of the government to grant indemnity to returned exiles. These snags were addressed in the DF Malan Accord which was signed on 12 February 1991. In terms of the Accord the ANC agreed to cease all armed action and related activities, while the government agreed to deal with the return of exiles and the release of political prisoners more comprehensively.<sup>277</sup>

The DF Malan Accord notwithstanding, violence within the country continued to increase leading to a worsening of relations between the ANC and the government. To address the problem of violence the government unilaterally convened a Conference on Violence and Intimidation on 24-25 May 1991 at the CSIR in Pretoria. In protest against that unilateral action by the government the ANC and the churches boycotted the conference. Although the Conference failed, it provided a mechanism for consultation with the churches and business who were involved in another initiative.

The church and business initiative led to a second conference which was held in Sandton in June 1991. At that Conference five sub-committees were appointed to address specific aspects of the peace process. The reports of those

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<sup>277</sup> *Ibid.*

sub-committees culminated in the integrated Peace Accord which was signed on 14 September 1991. The Accord was signed by 36 parties and organisations (excluding the Conservative Party and other rights-wing parties and organisations, as well as the PAC) at the National Peace Convention which was held at the Carlton Hotel in Johannesburg. The aim of the peace accord was to set out the codes of conduct, procedures and mechanisms to achieve the common purpose of ending political violence. Thus at the Convention a National Peace Committee was established and tasked to monitor and make recommendations on the implementation of the Peace Accord and to ensure compliance with the Code of Conduct for political parties and organisations. In terms of the Accord Mr Justice Richard Goldstone was appointed as a one-man Commission of enquiry into the ongoing violence in the country. The peace Accord signified the end of the "talks about talks" phase and opened the door to Constitutional negotiations.

#### **6.2.2.2 The Constitutional Negotiations Phase**

The "talks about talks" phase affirmed the position of the Harare Declaration (and the UN Consensus Resolutions) that the main role-players in the negotiation process were the National Liberation Movements (led by the ANC) and the government. In line with its leadership role the ANC led the formation of the Patriotic Front in Durban from 25 to 27 October 1991. The Patriotic Front Conference brought together political, labour, women's, religious, youth, professional, sports, cultural and business formations as well as organisations of traditional leaders. The Conference reaffirmed:

- (a) the commitment of the majority of South Africans shared by the international Community<sup>278</sup> to the establishment of a non-racial, non-sexist, democratic, unfragmented and unitary country;
- (b) the illegality and illegitimacy of the National Party government;

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<sup>278</sup> See *The Patriotic Front/United Front Conference Declaration* adopted at the Patriotic/United Front Conference held in Durban on the 25-27 October 1991.

- (c) noted that the governments' Constitutional proposals sought to entrench minority privilege and white domination; and
- (d) recognised the need for the transfer of power to all the people through a mechanism in which all the people (both black and white) would elect by proportional representation and through universal suffrage, a Constituent Assembly that would draft and adopt a democratic constitution which shall constitute the basis for unifying the country around a common patriotism.

In order to ensure that elections for the Constituent Assembly would be free and fair and to prevent the incumbent government from presiding over or manipulating the transition through the misuse of its *de facto* control over state power and resources, the Patriotic Front Conference called for the establishment of a sovereign interim government/transitional authority that would at least assume control over security forces and related matters, the electoral process, state media and defined areas of budget and finance, as well as secure international participation. Finally and perhaps most significantly the Conference demanded a speedy holding of an All-Party Congress/Pre-Constituent Assembly (APC/PCAM), a mechanism to set in motion the process leading to a democratically elected Constituent Assembly which would effect the desired transfer of power to the people. More specifically, the APC/PCAM would be tasked to work out modalities for transferring power to the people. Such modalities would centre around: the establishment of an elected Constitutional Assembly based on one person one vote with a single voters' roll; constitutional principles within the framework outlined in the Harare Declaration and the UN Consensus Resolutions on South Africa; an interim Government/Transitional Authority; the role of the international community; the re-incorporation of the Bantustans and a definite time-frame. The Patriotic Front Conference was particularly significant as it not only brought together all the oppressed majority across the colour and political divide but also united them around a common perspective of majority rule based on universally accepted constitutional principles.<sup>279</sup>

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<sup>279</sup> *Ibid.*

The Patriotic Front Conference paved the way for preparatory talks (held on 29 and 30 November 1991) which resulted in the establishment of the Convention for a Democratic South Africa. The Convention (later known as Codesa I) brought together nineteen (19) political parties/organisations/governments which became the founding members of Codesa. Political parties and organisations on both the extreme left (e.g. PAC) and the extreme right (e.g. the AWB) did not participate in the establishment of Codesa.

At its first meeting held on 20-21 December 1991 Codesa I adopted a Declaration of Intent which was signed by all the participating parties, except the government of Bophuthatswana and the Inkatha Freedom Party (IFP). With the adoption of the Declaration Codesa was effectively established as a negotiating forum which had to set the process in motion for the drawing up (and establishing) a democratic Constitution for South Africa.

The Declaration of Intent<sup>280</sup> incorporated (with some modifications) the Constitutional principles contained in the Harare Declaration and the UN Consensus Resolutions and various human-rights norms embodied in the international human rights law. The Declaration captured the ideas of a united South Africa with a single citizenship, freedom, equality and security for all regardless of race, colour, sex or creed, and above all, the need to abolish apartheid or any other form of discrimination. The latter appears to be a compromise between the white minority and black majority to ensure that white minority domination should not be replaced by black majority domination. How this was achieved will appear in the analysis of the Constitutional principles below. The Declaration did not only recognise the need to heal the divisions of the past, to secure the advancement of all, and to establish a free and open society based on democratic values but contrary to the apartheid jurisprudence recognised the dignity, worth and rights of the individual as the basis of freedom, justice and peace. Also, the Declaration

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<sup>280</sup> For a text of the Declaration see *ANC Negotiations Bulletin* no. 10 (18 May 1992) 1.

committed its signatories to improve the quality of life of all the people through policies that will promote economic growth and human development and ensure equality of opportunities and social justice for all South Africans. These principles are clearly informed by the preamble of the UN Charter and further reflect the impact of international human-rights law on South Africa. In a clear and unequivocal response to the demands of the International Community (especially the Harare Declaration and numerous UN Resolutions) the Declaration recognised the need to create a climate conducive to peaceful constitutional change by eliminating violence, intimidation and destabilisation and by promoting free political participation, discussion and debate and the set in motion the process of drawing up and establishing a constitution that would incorporate the universally accepted Constitutional principles which would mark a clear break with apartheid constitutionalism.

The Constitutional principles concerned were:

- (a) that South Africa will be a united, democratic, non-racial and non-sexist state in which sovereign authority is exercised over the whole of its territory;
- (b) that the constitution will be the supreme law and that it will be guarded over by an independent, non-racial and impartial judiciary;
- (c) that there will be a multi-party democracy with the right to form and join political parties and with regular elections on the basis of universal adult suffrage on a common voters roll: in general the basic electoral system shall be that of proportional representation;
- (d) that there shall be a separation of powers between the legislature, executive and judiciary with appropriate checks and balances;
- (e) that the diversity of languages, cultures and religions of the people of South Africa shall be acknowledged;
- (f) that all shall enjoy universally accepted human rights, freedoms and civil liberties including the freedoms of religion, speech and assembly, protected by an entrenched and justiciable Bill of Rights and a legal system that guarantees equality of all before the law.

In summary, these principles (a) endorsed the universally accepted vision of a post-apartheid South Africa, (b) outlawed the doctrine of parliamentary sovereignty and substituted it with the sovereignty of the law, and (c) incorporated international human rights law with due regard to the rights of all sections of the population. Finally, the Declaration shifted the balance of power from the tricameral parliament to Codesa by empowering it to draft the text of all legislation required to give effect to the agreements reached in Codesa I and making those agreements binding on all parties.

However, in Constitutional terms Codesa I did not have any original authority, nor statutory or executive powers. Thus it could not make and enforce any laws. This meant that the implementation of its agreements, depending on their nature, had to be vested in the apartheid institutions of authority. This was also the case in Namibia and Zimbabwe during their negotiations phase. This approach guaranteed Constitutional continuity and an orderly transition.

The negotiations structures of Codesa I included a plenary (including all 19 parties), a Management Committee and five Working Groups. Each Working Group was assigned specific terms of reference. The mandate of Working Group 1 was to investigate the creation of a favourable climate for free political activity. In turn the Group established a number of sub-committees concerned with specific issues such as the completion of the reconciliation process, the role of security forces, the socio-economic process and the creation of opportunities for political organising. The Group reached agreement on a wide range of issues, like the way in which a state of emergency would be handled if the need arose. Also, the Group put forward proposals for the removal of remaining discriminatory legislation and framed a definition of political intimidation. Amongst others the Group proposed the establishment of a task group to invite a neutral, independent international body to monitor the electoral process. The Group also played a significant role in the promotion of gender equality through the Gender Advisory Committee. Thus the group clearly recognised and acknowledged the role of the international Community in settling domestic Constitutional disputes in both dependent and independent states.

Working Group 2 was tasked to investigate and make recommendations about a set of general Constitutional principles which should serve as the framework for a new Constitution,<sup>281</sup> and in the context of such principles to identify key problems and issues that required attention on the one hand and the areas of commonality and agreement on the other. The second task of Working Group 2 was to investigate and to make recommendations regarding the appropriate body to draft a new constitution (and the process whereby that would take place). Here too, the Group was tasked to identify areas of communality and agreement and areas of disagreements. The commitment of all the participating parties to end apartheid in line with the demand of the overwhelming majority of South Africans and the international Community (especially the UN) was reflected by the remarkable measure of agreement which was reached at an early stage on the following Constitutional principles :

- (a) South Africa shall be a united, democratic, non-racial, non-sexist and sovereign state;
- (b) the Constitution shall be the Supreme Law of the Land and shall include a judicially enforceable bill of fundamental rights guaranteeing universally recognised human rights, freedoms and civil liberties, including freedom of religion, speech and assembly;
- (c) that the diversity of languages, cultures and religions within the country shall be recognised and afforded equal status;
- (d) that the doctrine of separation of powers, with appropriate checks and balances shall be adhered to;
- (e) that the legislature shall function on the basics of a multi-party democracy, regular elections, universal suffrage, a common voters' roll and a system of proportional representation;
- (f) that the judiciary shall be independent, non-racial and impartial and the legal system shall guarantee equality for all before the law; and finally
- (g) that all South African shall enjoy common citizenship.

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<sup>281</sup> Cf. the role played by the so-called 1982 principles in the Namibian Constitution-making process. See Van Wyk "The Making of the Namibian Constitution: lessons for Africa" 1991 *CILSA* 341 and Wiechers "Namibia: the 1982 Constitutional Principles and their legal Significance" 1989/90 *SAYIL* 1.

Although Working Group 1 reached agreement with ease on Constitutional principles it encountered serious problems on a number of issues. First, the relationship between the three tiers of government; the ANC favoured a unitary state, the NP and IFP favoured a federal state and Bophuthatswana government opted for a Confederation which was originally advocated by the NP. This was not surprising as a Confederation would perpetuate Bantustans (especially the TBVC states including Ciskei, Venda, Transkei and Bophuthatswana) through the backdoor. However, Venda and Transkei rejected the Confederation of state alongside the ANC.

The second bone of contention was the effective participation of minorities in the new constitutional dispensation. The Working Group agreed that there should be effective participation of political parties and that such participation should be consistent with democracy. This approach, however, did not adequately address the problem of representation of minorities as envisaged by the establishment parties and administrations. For instance, South African whites in general, and the NP and other white minority political parties in particular, were concerned about the possibility of being swamped by the numerically superior blacks as they still interpreted the South African political landscape in racial terms despite their advocacy of non-racism and opening-up of their parties to all races.

The NP sought to limit the impact of majority rule by introducing a bicameral system in which both the interim legislature and the new Parliament would consist of a representative lower house/National Assembly plus a higher house/Senate with representation loaded in favour of minorities, and that the senate should possess a legislative veto. This proposal found opposition from the ANC-led patriotic front which remained implacably opposed to a bicameral Constitutional Assembly in any form. However, the ANC supported the idea of a bicameral legislature and the idea of a regionally elected second chamber without veto powers. A major deadlock in Working Group II emerged on the issue of the majority required to approve a new constitution. The government

and its allies demanded a 75 percent majority, and the ANC and its allies a two-thirds majority. This deadlock nearly caused Codesa 2 (held on 15 May 1992) to flounder completely. It was saved by the personal intervention of both Messrs. FW de Klerk and NR Mandela.<sup>282</sup>

Other contentious issues facing Working Group II were the issue of self-determination (propagated by the conservative parties which rejected "black" majority rule outright) for the Afrikaner people, the right of the Zulu King to participate in Codesa and the right of the Zulus to self-determination, affirmative action and economic policy. Although there was consensus in the desirability of a justiciable bill of rights the parties disagreed on whether or not the so-called second generation or "red" rights (socio-economic rights) and third generation or "green" rights (environmental rights) should enjoy Constitutional protection. Furthermore, the IFP rejected the idea of a democratically elected Constitutional Assembly drawing up a Constitution. They felt that approach would defeat their object of curtailing the power of a popularly elected assembly. Also, the IFP felt that as they were committed to a federal state the form of state had to be settled at an early stage in the proceedings.

The assignment of Working Group III was that of making transitional Constitutional arrangements pending the finalisation of the Constitution. This Working Group identified two preliminary stages for the transition to democracy. The first stage was the pre-interim stage which involved the preparations for holding free and fair elections. This exercise was also described as levelling the playing field for free and fair elections. The second stage was the interim period between the elections and the adoption of a new Constitution. The main proposal that emerged from Working Group III was that a Transitional Executive Council (TEC) should be established with a number of subcouncils to deal with matters such as regional and local government, finance, law and order, defence, foreign affairs, elections etc. The Group also proposed

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<sup>282</sup> See Carpenter and Beukes "The Path to Constitutional Democracy" in 1992 *Journal of African Law* vol. 36 171.

the formation of an independent election commission to assisting in levelling the playing field.

Working Group IV was tasked to deal with the future of the TBVC states. Its subcommittees dealt with matters such as the way in which the will of the citizens of the TBVC states could be tested, citizenship and the implications of possible reincorporation of the TBVC states. Here, public international law impacted directly on the deliberations. For instance, the ANC-led Patriotic Front took the view that all negotiations had to be conducted on the basis of the 1910 boundaries of the Union of South Africa. This was a clear affirmation of the principle of the territorial integrity of South Africa which manifested itself in the non-recognition of the Bantustans by the international community.

Last but not least, Working Group V concerned itself with timeframes and the implementation of the new constitution. Working Group V could not make much progress as its work depend on agreements by the other four working groups. At Codesa II held on 15-16 May 1992 Working Groups I, II and III tabled their draft agreements. Working Group II on the Constitution-making body failed to table a draft agreement as it had deadlocked. As a result of the deadlock in Working Group II Codesa II did not enter into any agreements, each of the Working Groups formed part of single package and they had no mandate to enter into piecemeal agreements. The ANC saw the Constitution-making body and the Constitution-making process as the heart of the negotiation while all other agreements (e.g. climate creation, interim government) were merely designed to facilitate Constitution-making.<sup>283</sup> Hence in its annual statement (8 January 1992) the ANC stated that:

"There cannot be any point in setting up an interim government if this principle (the principle of democratically elected Constitution-making body) has not been adopted."

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<sup>283</sup> See *ANC Negotiations Bulletin* no. 10 (18 May 1992) 1.

The ANC negotiators were guided by this approach throughout the negotiations.<sup>284</sup>

At face value that impasse in Codesa II resulted from the disagreement between the ANC and government on the majority required to approve a new Constitution. As said above, the government and its allies demanded 75 percent majority, and the ANC and its allies a two-thirds (66.7 percent) majority. The problem was however much more deeper that. As the ANC stated<sup>285</sup> the core of the negotiations was the Constitution-making process. In other words the question of how political power was to be apportioned.<sup>286</sup>

The government had entered negotiations with the purpose not of transferring power to the majority, but of striking a unique power-sharing deal which would ensure a powerful role for the white minority in the future.<sup>287</sup> Hence the government rejected what it called simple majority rule and proposed its own constitutional principles<sup>288</sup> different from those contained in the Harare Declaration and the UN Consensus Resolutions. The government model of majority rule was based on a constitution which would entrench the position of minority parties in government and restrain majority parties through a maize of checks and balances. Their proposals included: a transitional government of an enforced coalition for up to ten years, with a multi-party executive, a rotating presidency, and a strong emphasis on devolution of power to regional authorities; to this was added a bicameral parliament, the first house to be elected by proportional representation (which enhances the role of minorities), the second to be the seat of minorities, in which each party receiving a specified minimum support in elections would receive an equal number of seats; the second house would effectively have the power to veto legislation by the first house.<sup>289</sup>

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<sup>284</sup> *Ibid.*

<sup>285</sup> *Ibid.*

<sup>286</sup> See Meredith *South Africa's New Era* (1994) 45.

<sup>287</sup> *Ibid.*

<sup>288</sup> *Ibid* 46.

<sup>289</sup> See Meredith *South Africa's New Era* 46.

The government apparently sought to give Codesa more or less the same status with the Turnhalle multi-party forum in South West Africa/Namibia.<sup>290</sup> Hence, they saw the purpose of Codesa as that of settling in a multi-party forum, as many of the abovementioned constitutional details as possible before negotiations moved to a democratically elected Constitution-making body where the influence of the National Party would be substantially reduced (a constitution-making process known as *pouviour constitue*). Thus the NP wanted to secure its future before relinquishing sole power. In addition, they wanted the transition to take a long period. On the other hand the ANC had entered negotiations with the aim of moving the process on rapidly from Codesa to an interim government and to an elected assembly empowered to determine a new Constitution (a constitution-making process known as *pouviour constituante*). The ANC wanted a clean break with the past and saw Codesa's role as merely to decide on measures which were needed before a Constitution-making body could be elected.<sup>291</sup> At the second sitting of Codesa held on 15 and 16 May 1992 the radically opposed approaches to negotiations by the ANC and government resulted in an impasse.

The ANC identified four major obstacles to a negotiated settlement and blamed the government for them. They included<sup>292</sup>

- (a) unacceptably high percentages to draft a Constitution, in essence a veto through the back door;
- (b) entrenched regional and local boundaries and powers to be determine in the interim and to be binding on the future democratic Constitution;
- (c) an undemocratic and unelected senate with veto powers; and
- (d) a determination that the interim Constitution, a mechanism to ensure continuity during the transition, had wide veto powers and so became a permanent feature remaining in force indefinitely.

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<sup>290</sup> See chapter 4 par. 4.2 *supra*.

<sup>291</sup> See Meredith *South Africa's New Era* 46.

<sup>292</sup> See David Phillips *Nelson Mandela Speaks - forging a Democratic, non-racial South Africa* (1994) 163-4.

Commenting on these obstacles the ANC President,<sup>293</sup> Mr Nelson Mandela, reaffirmed the ANC's position that agreements reached at Codesa could only be treated as a whole package and that therefore the breakdown over the Constitution-making body affected the entire process. Also, the President reaffirmed the ANC view that the National Party was trying to hold on to power at all costs by introducing minority veto powers in a variety of ways that could only result in a paralysis of decision-making, strife, and great instability. Having reached an impasse Codesa II mandated its management Committee to resolve all outstanding matters of the Working Groups. Its immediate task was to examine and co-ordinate all the agreements reached in the Working Groups created by Codesa 1 and to set up a mechanism which would draft all the legislation required by agreements reached thus far. In order to fulfil its brief the Management Committee had a mandate to establish structures such as technical committees or sub-committees to assist it in its task. Also, the Management Committee was mandated to convene a third plenary session of Codesa in order to implement transitional measures leading to the drafting of a new Constitution.

### **6.2.3 The Breakdown in Constitutional Negotiations and the Intervention of the International Community**

When CODESA 2 reached deadlock on 16 May, amid acrimonious exchanges, the ANC was already preparing alternative plans. The ANC plans involved a campaign of mass action, a series of rolling strikes, demonstrations and boycotts across the country. The campaign was intended to force the government to back down at the negotiating table. While some sections of the ANC alliance regarded mass action as a necessary component of the negotiating process others considered it as the Leipzig option, that is, a means to bring down the government, rather than just gaining compromises. When the Campaign was launched many townships were already in turmoil. The National

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<sup>293</sup> *Ibid* 164.

Peace Accord (NPA) had proved fruitless, many of its Committees were close to collapse and the death toll, since its introduction, had risen to 1500. The violence on the reef continued unabated, resulting in at least 260 attacks on township residents by hostel dwellers between July 1990 - April 1992. The date chosen for the start of the mass action campaign was 16 June, the anniversary of the beginning of Soweto revolt in 1976. While the ANC proclaimed the mass stayaway it organised a success; the government claimed that the stayaway would have happened on that date anyway. On the 17 June 1992 an incident of grave brutality, like the Sharpeville (1960) and Soweto (1976) massacres, took place in Boipatong near Vanderbijlpark.. On the night of the 17 June 1992 a group of hostel dwellers attacked a nearby shack settlement, kicking in doors, smashing windows and then hacking, stabbing and shooting residents at random in a killing spree that lasted for more than four hours. That killing spree left 45 residents dead..

The police were accused of collusion in the killing of the residents who were mostly women and children.. Two days later three people died when police opened fire on a crowd which had gathered to protest at the massacre.<sup>294</sup>

On the 23rd June 1992 the National Executive Committee (NEC) of the ANC met to discuss the implications of the Boipatong massacre.<sup>295</sup> At the end of the meeting they reaffirmed the ANC's commitment to a negotiated resolution of the conflict, but resolved to break off all negotiations and make the following fourteen demands.

- (1) the creation of a democratically elected and sovereign Constituent assembly to draft and adopt a new Constitution;
- (2) the establishment of an interim Government of National Unity;
- (3) the immediate termination of all covert operations including hit squad activity;
- (4) to disarm, disband and confine to barracks all special forces as well as

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<sup>294</sup> Meredith *South Africa's New Era* 49-50.

<sup>295</sup> See *ANC Negotiation Bulletin* no. 12 14 July [1992] 1.

- detachments made up of foreign nationals;
- (5) to suspend and prosecute all officers and security force personnel involved in violence;
  - (6) to ensure that all repression in some of the self-governing states, and in the so-called independent states, is ended forthwith;
  - (7) the immediate implementation of the programme to phase out the hostels and convert them into family unit accommodation;
  - (8) the installation of fences around these establishments;
  - (9) guarding of these hostels by security forces on a permanent basis, monitored by multi-lateral peace structures, and the expulsion of those who occupy the hostels illegally;
  - (10) regular searches of hostels with the participation of multi-lateral peace structures;
  - (11) banning the carrying of all dangerous weapons in public on all occasions, including so-called cultural weapons;
  - (12) the establishment of an international commission of enquiry into the Boipatong Massacre and all acts of violence as well as the international monitoring of the violence;
  - (13) release all political prisoners forthwith;
  - (14) repeal all repressive legislation..

The decision of the ANC (NEC) and the foregoing demands were endorsed by the Tripartite Alliance and the Patriotic Front.<sup>296</sup>

The demands of the ANC were delivered to Mr de Klerk in the form of a memorandum dated 26 June 1992. On the 2 July 1992 Mr de Klerk replied to the ANC's memorandum, but failed (or neglected) to address the demands. Instead, Mr de Klerk merely denied ANC charges of government complicity and involvement in the violence. He refused to commit his government and party to the democratic principle of majority rule and merely accused the ANC of stalling the process of negotiations.<sup>297</sup>

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<sup>296</sup> *Ibid.*

<sup>297</sup> See *ANC Negotiations Bulletin* no. 12 14 July (1992) 1.

In his letter dated 9 July, 1992 (being a reply to Mr de Klerk's letter of 2 July 1992) Mr Mandela stated the ANC's negotiational position in definite and more emphatic terms and challenged Mr de Klerk claim that his government was committed to Constitutionality and a transitional government while the ANC insisted on an unstructured and immediate transfer of power before a proper transitional Constitution was negotiated.<sup>298</sup> Mr Mandela accused Mr de Klerk of distorting the purpose of negotiations as set out in the Declaration on Intent adopted by Codesa 1. He noted that WG 2 was specifically charged with the task of determining the set of general Constitutional principles consistent with and including those in the Declaration of Intent, as well as the form and content of the Constitution-making body/processes, and further, that the question of a transitional government was the subject matter of one of those created by Codesa 1. Mr Mandela challenged Mr de Klerk for trying to elevate transitional arrangements above the question of the Constitution-making body which he (Mr Mandela) regarded as the primary focus of negotiation. With regard to the latter, Mr Mandela challenged Mr de Klerk to pronounce himself in keeping with basic democratic principles and (in particular and perhaps most significantly) declared that:<sup>299</sup>

"A democratic Constitution will be fatally flawed if the body charged with drafting and adopting it is itself [un-democratic]- be it in its composition or the way in which it is to function....."

It is the authority of the people, through their elected representatives that gives a Constitution its fundamental legitimacy. Our position is founded on basic features of any democratic structure charged with the task of Constitution making."

Mr Mandela then listed the basic features<sup>300</sup> in question and observed, first, that Mr de Klerk was opposed to a sovereign and democratically elected Constitution-making body and; secondly, that he was trying to pre-empt the work of the

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<sup>298</sup> See Phillips *Nelson Mandela Speaks* 180.

<sup>299</sup> *Ibid* 182-183.

<sup>300</sup> *Ibid* 183.

Constituent Assembly by the Codesa process; thirdly, that, besides subjecting the work of the Constituent Assembly to the veto of a regionally elected senate he (Mr de Klerk) sought to entrench federalism by subterfuge; fourthly, that the question of the form of government, be it federal or unitary of whatever, was a matter that should be left to a democratically elected Constitution-making body; and finally, Mr Mandela concluded that the manner in which Mr de Klerk elevated the transitional arrangements to the central focus of negotiations betrayed his preoccupation with obtaining guarantees of a constitutionally entrenched role for the National Party which would remain a minority party in the event of a democratic Constitution.

With regard to Mr de Klerk's claim that the ANC was insisting on "an unstructured and an immediate transfer of power" Mr Mandela recalled that long before Codesa was established, the ANC proposed that there should be an interim Government of National Unity so as to ensure that no party occupied the position of player and referee. Furthermore, Mr Mandela traced the idea of a Government of National Unity to the Harare Declaration thereby underlying the role of the international community in the process. Mr Mandela stated that an interim Government of National Unity was put forward not as an end in itself, but as a means by which a democratically elected and sovereign Constituent Assembly could be brought into being for the purposes of drafting and adopting a democratic Constitution for a united, non-racial, and non-sexist South Africa.

Finally Mr Mandela traced the ANC's linkage of the transitional arrangements with the question of a Constitution-making body to the paragraph 1.12 of the report of WG 3 which read:

"The following agreements were reached with regard to the first stage of the transition. These agreements and their implementation are dependant upon agreement being reached by Codesa in respect of the second stage of the transition, including an interim Constitution, and general Constitutional principles."

The ANC interpreted this paragraph to mean that the implementation of transitional constitutional structures were dependent on an agreement on the Constitution-making body. This then was the crux of the matter through the eyes of the ANC and they would not return to the negotiating tables unless and until the deadlock was resolved and the violence ended.

Meanwhile the ANC proposed an international monitoring force to the OAU meeting in Dakar where the latter agreed to raise the matter with the UN Security Council.<sup>301</sup> Subsequently, the ANC requested to address a special session of the UN Security Council.<sup>302</sup> The ANC used its address to the Council to invite the UN to play a role in the transition to democracy in South Africa contrary to the South African claim that the UN was precluded by article 2(7) of its Charter to interfere in the domestic matters of South Africa.<sup>303</sup> As the South African traditional defence in this regard has been dealt with elsewhere<sup>304</sup> we shall only focus on the ANC's motivation for the involvement of the International Community in the transition to democracy in South Africa. In its address to the Security Council the ANC recalled that the UN had been seized with the question of South Africa for more than four decades as the people of South Africa had been subjected to the policy of Apartheid which the UN had declared a crime against humanity. The ANC noted, first that the UN Security Council and General Assembly had assumed the responsibility to adopt measures directed at ending the apartheid crime against humanity and helping to transform South Africa into a non-racial democracy and, secondly, that objective had not yet been achieved. More specifically, it was noted

- (a) that South Africa continued to be governed by a white minority regime;
- (b) that the overwhelming majority of the people were still denied a vote and the right to determine their destiny;
- (c) that representatives of the South African government attending the Security

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<sup>301</sup> See *ANC Negotiations Bulletin* no. 12 (of 14 July 1992) 3.

<sup>302</sup> See Phillips *Nelson Mandela Speaks* 188.

<sup>303</sup> *Ibid.*

<sup>304</sup> See chapter 4 par. 4.2 *supra*.

Council meeting represented the system of white minority rule to which the UN was opposed and;

- (d) that the white minority continued to govern the country under a Constitution which the Security Council had declared null and void. For these reasons the ANC requested the Security Council to continue looking for ways and means by which it could help to expedite the process leading to the democratic transformation of South Africa.

Then the ANC turned to the crisis situation of the negotiations process. The ANC identified two major problems facing South Africa - namely, the deadlock in Codesa and the violence engulfing black townships. With regard to the deadlock the ANC told the Security Council that the ruling white minority government continued to look for ways and means by which it could guarantee itself the continued exercise of power, regardless of its electoral support. For that purpose the regime insisted that the political majority, no matter how large, should be subjected to veto by minority political parties. The ANC rejected this and demanded a firm commitment by government to full democracy based on internationally accepted principles, and an acceptance of a sovereign and democratic Constitution-making body. With regard to violence the ANC gave details about the deaths and injuries over a period of six years and pointed out that the control of state power by the National Party allowed them the space to deny and cover up the role of government and its surrogates, the security forces and the police, in fostering and fomenting the violence. Then the ANC recalled that UN Declaration on Apartheid and its Destructive Consequences in Southern Africa required both the regime and the national liberation movements to end the violence, remove obstacles to negotiations and ensure that a proper climate for negotiations existed.

Finally, the ANC recalled earlier decisions of the Security Council to help the people of South Africa to transform their country into a non-racial democracy and then expressed the belief that that commitment placed an urgent obligation on the Council to intervene in the South African situation to end the violence. According to the ANC the UN interest in a peaceful settlement based on the UN

Consensus Resolution and various Security Councils resolutions justified a firm and speedy intervention by the Security Council. This was a direct challenge to the government which had protested the illegality of the General Assembly's actions in passing the 1989 Declaration which it rejected as *ultra vires* the United Nations Charter. Nevertheless, the ANC maintained that the violence, like the system of apartheid itself, was a direct challenge to the authority of the Security Council and a subversion of its global tasks of furthering peace and promoting the objectives contained in both the UN Charter and the Declaration on Human Rights. For these reasons the ANC urged the Security Council first to request the Secretary-General to appoint a Special representative on South Africa and task him (or her) to investigate the situation in South Africa with a view to helping the Council to decide on the measures it should take to help end the violence, and secondly, that the Council should then take the necessary decisions to implement such measures, including the continuous monitoring of the situation, to ensure the effectiveness of the measures concerned. Finally, the ANC reaffirmed its commitment to the UN Consensus Resolutions and, in particular, to the need for a climate conducive to negotiations and a genuinely democratic outcome of such negotiations.

In response to the appeal by the ANC the Security Council passed a unanimous resolution on South Africa on the 16th August 1992. This Resolution recalled the Security Council resolutions 392 (1976), 473 (1980), 554 (1984) and 556 (1984) and noted first the escalating violence in South Africa and its consequences for the peaceful negotiations aimed at creating a democratic, non-racial and united South Africa, and secondly that its continuation would seriously jeopardise peace and security in Southern Africa. Then the Security Council recalled the 1989 Declaration<sup>305</sup> which called for negotiations in South Africa to take place in a climate free of violence, expressed the concern that the break in negotiations and condemned the escalation of violence especially the Boipatong Massacre of 17 June 1992. Finally, the Security Council

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<sup>305</sup> See UN Chronicle (December 1992) 14.

- (a) urged the South African authorities to take immediate measures to bring an effective end to the ongoing violence and to bring those responsible to justice;
- (b) called upon all the parties to cooperate in combating violence and to ensure the effective implementation of the National Peace Accord;
- (c) invited the Secretary General to appoint a Special Representative who would recommend, after discussion (*inter alia*) with the parties, measures which would assist in bringing an effective end to the violence and in creating conditions for negotiations leading towards a peaceful transition to a democratic, non-racial and united South Africa.

Further, the Security Council underlined the need to resume negotiations as speedily as possible, urged the international Community to maintain sanctions for the purpose of bringing an early end to apartheid and committed itself to remain seized of the matter until a democratic, non-racial and united South Africa was established.

Immediately after the adoption of Resolution 765 (1992) the Secretary-General appointed Mr Cyrus Vance as his special representative under the terms of paragraph 4 of the said resolution and mandated him to visit South Africa. During his mission to South Africa (21 - 31 July) Mr Vance held meetings with the then South African President FW de Klerk and other senior government officials, as well as with representatives of political parties, church groups, business and trade union organisations, and leading individuals. The Vance mission submitted their report to the Secretary-General who then prepared a report for the Security Council.<sup>306</sup>

On 7 August 1992 the Secretary-General reported that the reasons for violence in South Africa were complex and deep and that the special desperation that resulted from apartheid could in the long run only be remedied by rapid progress towards the creation of a democratic, non-racial and united South

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<sup>306</sup> *Ibid.*

Africa. Furthermore, the Secretary-General observed that this was the goal not only of the negotiations within Codesa but also of the international community as a whole. To that end the Secretary-General recommended the deployment of UN observers (reinforced by other appropriate international organisations) in various parts of the South Africa and urged the major parties to return as early as possible to the negotiating table stressing that the task of conducting those negotiations was "uniquely the responsibility of South Africans themselves." Also, the Secretary-General recommended the immediate release of all remaining political prisoners as that would contribute greatly to improve the political climate, creating trust and burying the unhappy past.

The Secretary-General conceded that the Codesa process was fraught with shortcomings. However, he recommended that the process had to be pursued, improved, better co-ordinated and made much more transparent in order to encourage non-participants like the PAC and CP to join. Also, the Secretary-General recommended the establishment of a deadlock-breaking mechanism at the highest political level and the appointment of an imminent and impartial person to draw the strings together and to provide the impetus and cohesion needed to be successful. Finally, the Secretary-General highly commended the Goldstone Commission of Enquiry into Public Violence and Intimidation and recommended, firstly that its recommendations (especially those relating to a total ban on the public display of dangerous weapons and the security of hostels) should be fully and speedily implemented by the South African Government and parties; secondly that the Commissions code of conduct for mass action demonstrations could also do much to control violence and that the leaders of major political parties had to take firm steps to stop their supporters from participating in acts of violence; and thirdly, an investigation into the activities of certain armed formations such as MK, AZAPLA, the KwaZulu police and certain private security firms. Finally, the Secretary-General recommended that UN missions should be undertaken quarterly in order to provide regular, impartial and objective information to the Security Council.<sup>307</sup>

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<sup>307</sup> *Ibid.*

In response to the Report of the Secretary-General the Security Council adopted Resolution 772 (1992) of 17 August 1992. This Resolution:

- (a) reaffirmed resolution 765 (1992),
- (b) reaffirmed the determination of the Security Council to help the people of South Africa in their legitimate struggle for a non-racial, democratic society,
- (c) recognised that the people of South Africa expected the United Nations to assist with regard to the removal of all obstacles to the resumption of the process of negotiations,
- (d) recognised the concerns of the people of South Africa about violence and, in particular, the issues of the hostels, dangerous weapons, the role of the security forces and other armed formations, the investigation and prosecution of criminal conduct, mass demonstrations and the conduct of political parties,
- (e) recognised the need to strengthen and reinforce the indigenous mechanisms set up under the National Peace Accord in order to enhance their capacity in the building of peace, and finally
- (f) the resolution underlined the need for co-operation of all the parties to ensure the resumption of the negotiation process as speedily as possible.

In response to this the Security Council:<sup>308</sup>

- (a) authorised the Secretary-General to deploy UN observers in South Africa to help end the spiralling cycle of violence,
- (b) invited the Secretary-General to assist in strengthening the structures set up under the 14 September 1991 National Peace Accord (NPA) aimed at facilitating the socio-economic development and reconstruction in South Africa,
- (c) called upon the South African government, parties and organisations to extend their full co-operation to the UN observers to enable them to carry out their tasks effectively, and finally
- (d) also invited international organisations, such as the Organisation of African Unity (OAU), the Commonwealth and the European Community, to consider deploying their own observers in South Africa, in co-ordination with the UN and the structures set up under the NPA.

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<sup>308</sup> *Ibid.*

Also, the Security Council decided to remain seized of the matter until a democratic, non-racial and united South Africa was established. In other words, the Security Council reaffirm the vision of the national liberation movements for a post-apartheid South Africa as also embodied its earlier resolutions.<sup>309</sup>

On 9 September 1992 the Secretary-General deeply deplored the killing of a least 28 people and the wounding of nearly 200 in Ciskei during a demonstration on 7 September organised by the African National Congress. On the same day it was announced that 50 UN observers were being sent to South Africa. On the 10 September 1992 the Security Council emphasised the responsibility of the South African authorities for the maintenance of law and order and called on them to "take all measures to end the violence and to protect the right of all South Africans to engage in peaceful political activity without fear of intimidation of violence."<sup>310</sup>

Allowing the deployment of a United Nations Observer Mission in South Africa was a significant victory for the people of South Africa, especially the ANC which had been calling for the UN intervention in South Africa. More specifically, allowing the deployment of UN observers was an belated acknowledgement by South Africa that the domestic jurisdiction clause (article 2(7)) did not exempt her from the human rights provisions of the UN Charter and the Universal Declaration of Human Rights. In other words, South Africa finally accept the binding force of international human rights law.

It has been argued by some<sup>311</sup> that the then government's consent to the deployment of the United Nations Observer Mission to South Africa (UNOMSA) was a political decision motivated by expedience and did not reflect a belated acceptance of the view that the UN, as the body primarily responsible for the maintenance of international peace and security, had a responsibility to ensure

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<sup>309</sup> *Ibid.*

<sup>310</sup> *Ibid.*

<sup>311</sup> See Jacqueline Casette "United Nations Observer Mission in South Africa - a Significant event" , in 18 (1992/1993) *SAYIL*.

peaceful transition to democracy in South Africa in accordance with the principles of the Charter. Although political expediency might have been a factor it has been shown that international human rights law acquired a binding force on South Africa and that the increase of international pressures from the seventies forced South Africa to accept the jurisdiction of the UN over its domestic matters. Hence, when the UN Security Council heeded the ANC call for the involvement of the international community to help curb the violence after the Boipatong massacre South Africa had no choice but to meet the demand. South Africa's willingness to involve the UN and other missions was evident in a proclamation issued by the State President on 12 May 1993. The proclamation officially accorded the international missions the privileges and immunities contained in the Convention on the Privileges and immunities of the United Nations.<sup>312</sup>

### **6.3 Distinctive Features of the new Constitution**

#### **6.3.1 General**

The deepening crisis and the intense international pressures forced the ANC and the government to consider the resumption of negotiations. Before they resumed negotiation they held numerous bilateral meetings which prepared compromises.<sup>313</sup> Following those bilateral meetings the ANC and the government met on 26 September 1992 and adopted a Record of Understanding<sup>314</sup> which contained the salient features of their settlement proposals. The two parties agreed, first, that there was a need for a democratic Constituent Assembly/Constitution-making body and that for such a body to be democratic it had:

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<sup>312</sup> See Proclamation no. 41 GG 14809 of 12 May 1993.

<sup>313</sup> See De Klerk "The Process of Political Negotiation: 1990-1993" 8.

<sup>314</sup> See report of the meeting between the State President of the Republic of South Africa and the President of the African National Congress held at the World Trade Centre on the 26 September 1992.

- (a) to be democratically elected;
- (b) to draft and adopt the new Constitution, implying that it had to sit as a single chamber;
- (c) to be bound only by agreed Constitutional principles;
- (d) to have a fixed time frames;
- (e) to have adequate deadlock breaking mechanisms;
- (f) to function democratically (i.e. arrive at its decisions democratically with certain agreed to majorities); and
- (g) to be elected within an agreed predetermined period.

Secondly, the two parties agreed that during the interim/transitional period there would be Constitutional continuity and no Constitutional hiatus. In consideration of this principle it was further agreed that:

- (a) the Constitution-making body/Constituent Assembly would also act as the interim/transitional Parliament; and
- (b) there would be an interim/transitional government of National Unity and the Constitution-making body/Constituent Assembly *cum* interim/transitional Parliament and the interim/transitional government of National Unity would function within a Constitutional framework/transitional Constitution which would provide for National and regional government during the period of transition and would incorporate guaranteed justiciable fundamental rights and freedoms.

The issue of a unicameral or bi-cameral Parliament was left open.

Thirdly, the two parties agreed on a phased release of political prisoners. Fourthly, government agreed to address the issue of problematic areas and to allow the United Nations observers to witness the progress in co-operation with the Goldstone Commission and the National Peace Secretariat. Fifthly and finally government agreed (a) to prohibit countrywide the carrying and display of dangerous weapons at all public occasions (subject to exemptions based on Goldstone Guidelines) and (b) to accept the right of all parties and organisations

to participate in peaceful mass action in accordance with the provisions of the National Peace Accord and the recommendations of the Goldstone Commission. On its part the ANC reaffirmed its commitment to the Code of Conduct for political parties arrived at under the National Peace Accord and the agreement reached on 16 July 1992 under the auspices of the Goldstone Commission as important instruments to ensure democratic political activity in a climate of free political participation.

Meanwhile, Joe Slovo<sup>315</sup> (chairman of the South African Communist Party) suggested that in order to break the deadlock in the negotiations it might be necessary for the ANC to offer the government a Sunset Clause in a new Constitution which would entrench power-sharing for a period. In other words, Slovo abandoned the idea of a seizure of power and accepted the NP idea of power-sharing.<sup>316</sup> In addition he suggested that the ANC might also have to give ground by offering guarantees on regional government and an amnesty for security officers, and by honouring the contracts of civil servants, either by retaining them or compensating them. Slovo argued that the ANC was not dealing with a defeated enemy and that the revolutionary seizure of power was not realistic and argued that the capacity of the white civil service, army and police to destabilise a newly born democracy was so enormous that it was necessary to settle for less by inserting a sunset clause in the new Constitution to provide for compulsory power-sharing for a fixed number of years.<sup>317</sup>

Following thorough discussions within ANC structures the NEC of the ANC adopted Slovo's compromise solution in a document entitled "Negotiations: A strategic Perspective".<sup>318</sup> In this document the ANC argued, in particular, in favour of a government of National Unity and suggested that the ANC and government address these matters in bilateral meetings before including other

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<sup>315</sup> See Meredith *South Africa's New Era* 56.

<sup>316</sup> *Ibid.*

<sup>317</sup> Meredith *South Africa's New Era* 56-57.

<sup>318</sup> See African National Congress Negotiations; A strategic perspective (as adopted by the National Working Committee on 18 November 1992)

parties in a multi-party forum. Mr de Klerk added to the momentum of a negotiated settlement by committing himself to a clear time frame for the establishment of a Government of National Unity by the year 1994. His proposed time scale for change issued at the end of November 1992 included:<sup>319</sup>

- (a) a large number of bilateral talks and a multiparty negotiation Conference before the end of March 1993;
- (b) the institution of a transitional Executive Council and an Electoral Commission in June 1993;
- (c) the adoption in September 1993 of an Interim Constitution which made provision for a Constitution-writing body;
- (d) a general election to be held in March/April 1994; and
- (e) the institution of a government of National Unity by the middle of 1994.

Through a large number of bilateral meetings the ANC and government<sup>320</sup> reached common ground on the outline of a new order which involved the following elements: (a) a Transitional Executive Council which would prepare the way for elections to a Constituent Assembly; (b) an Interim Government which would:

- (i) comprise all parties winning an agreed share of the vote;
- (ii) rule South Africa for five years while a final Constitution was drawn up; and
- (iii) allow a strong role for regional government providing enhanced security for minority and regional interests.

Last but not least the parties also agreed that the final constitution would be based on a set of principles agreed to previously at the multiparty negotiations which would launch the whole process.

The use of bilateral talks to address the South African question reaffirmed the position of the Harare Declaration (and UN Consensus Resolutions) - namely,

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<sup>319</sup> See De Klerk "The Process of Political Negotiation: 1990-1993" 8.

<sup>320</sup> See Meredith *South Africa's New Era* 58.

that the National Liberation Movement(s) and the South African government were the major role players. In fact Mr de Klerk had come to realise that an agreement with the ANC formed the whole basis of a negotiated settlement. In particular he realised that the ANC had massive internal and international support and that it was also the key to international recognition and the lifting of sanctions.<sup>321</sup>

As the resolution of the South African conflict was no longer a purely domestic matter the government needed the ANC, more than the IFP, to deliver and internationally acceptable settlement. To the NP government the IFP was only required for the purpose of forging an electoral alliance of regional black leaders for the purpose of advancing its original Consociational proposals.<sup>322</sup> Hence, in December 1992 when Chief-Minister Buthelezi unveiled proposals of his own for an autonomous region for KwaZulu/Natal and threatening a UDI, Mr de Klerk repudiated him publicly. When Mr Buthelezi realised that his former ally, the NP government, had thrown his lot in with the ANC he clubbed together with other TBVC states and the white right-wing parties to form the Concerned South African Group, also known as COSAG. The link between the COSAG members was their belief in the idea of ethnic self-determination which would reduce a new South Africa to an ethnic federation or confederation.<sup>323</sup> These parties supported their idea of ethnic self-determination so that they could later secede and form, for instance, a Volkstaat for right-wing Afrikaners and a Zulustate for KwaZulu/Natal,<sup>324</sup> as the basis of a Confederal State.

Following the adoption of the Record of Understanding the ANC began a process of selling its settlement deal to its own structures and the Patriotic Front.<sup>325</sup> The second Patriotic Front (PF) Conference endorsed the Record of Understanding and, more specifically;

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<sup>321</sup> *Ibid.*

<sup>322</sup> *Ibid* 59.

<sup>323</sup> *Ibid.*

<sup>324</sup> See John Dugard "Human Rights and the Rule of law in Post-Apartheid South Africa" in *South Africa's Crisis of Constitutional Democracy* (1994) 135-6.

<sup>325</sup> See Meredith *South Africa's New Era* 67.

- (a) the idea of a Constituent Assembly elected on a basis of one-person, one-vote in a common voters' roll;
- (b) that such an assembly be bound only by broad Constitutional principles;
- (c) the need for a Transitional Executive Council and substructures as well as an independent Electoral and media Commissions to ensure free and fair elections;
- (d) the idea of a government of National Unity;
- (e) the need to end the violence; and
- (f) to involve the international Community both in efforts to eradicate violence and ensure free and fair elections.<sup>326</sup>

Although the PAC did not attend the second PF Conference its resolutions united an overwhelming majority of the extra-parliamentary parties and organisations and threw their full weight behind the ANC/NP settlement deal and thus paved the way for a negotiated settlement. For that purpose a Multiparty Negotiating Forum met on 1 and 2 April 1993. The Forum brought together an even more representative forum of the political spectrum than the cross-section at Codesa. The Forum included notably both the right-wing and extreme left-wing parties - namely, the Conservative Party (and Afrikaner Volksunie) and the PAC respectively. Also, the Forum opened the door for traditional leaders such as the Zulu Monarch, King Goodwill Zwelithini. All in all 26 political parties and organisations were represented in the Forum.<sup>327</sup>

Hardly ten days after the sitting of the Multi-party Forum the Secretary-General of the South African Communist Party and an ANC (NEC) member was gunned by a Conservative element at his Boksburg home. The assassination of Chris Hani infuriated the black masses and brought the country to the brink of racial conflict. The situation was saved by Nelson Mandela's personal appeal and his declaration of a week-long campaign of mass protest, including a national stay away and memorial services. This campaign harassed the tide of outraged and thus prevented a highly possible outbreak of racial violence throughout the country.

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<sup>326</sup> See ANC Negotiations Bulletin no. 23 5 April 1993.

<sup>327</sup> See Meredith *South Africa's New Era* 61-62.

The assassination of Chris Hani made demands for freedom more militant than ever before. In all gatherings the demand was that Hani's blood must deliver freedom and nothing else. His assassination was therefore a single event that provoked a dramatic shift in the balance of power and also proved to all South Africans, both black and white, that Mr Nelson Mandela did not only hold the balance of power but was also a guarantee of security. Mandela<sup>328</sup> moved quickly to exploit his authority and demanded swift and tangible progress in the negotiations process. Henceforth, the negotiations process moved ahead swiftly.

On 7 May 1993 the Negotiating Council (a joint Committee) established seven technical committees to facilitate multi-party talks. The Committees were divided into three categories, dealing respectively with violence, constitutional matters and the election. Two Committees were tasked to deal with Constitutional matters. The first committee dealt with fundamental human rights during the transition and the second with matters such as the form of state, the Constitution-making body/Constituent Assembly, the interim/transitional regional government and the future of the TBVC states. The other four technical committees dealt with electoral issues. At its meeting held on 18 May 1993 the Negotiating Council mandated its Technical Committee on Constitutional Affairs to place at the top of its agenda the issues of Constitutional principles, the form of State and self-determination. At the same meeting the Technical Committee on the Repeal of Legislation Impeding Political Activity and Discriminatory Legislation was mandated to study all existing laws and subordinate legislation in South Africa, the self-governing territories, local authorities and provincial administrations with a view to their repeal or amendment.

A major breakthrough in the negotiation process came on the 3 June 1993 with the adoption of a "Resolution on an election date". The Resolution set the date for the first democratic election in South Africa for 27 April 1994. On 30 June

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<sup>328</sup> *Ibid* 65.

22 out of 26 parties represented in the Negotiating Council adopted the so-called Resolution (21) on steps to be taken for the purposes of establishing a new Constitutional order adopted by the Negotiating Council. It was agreed that the Interim Constitution would provide for, *inter alia*, strong government on both the central and regional level, judicially enforceable fundamental rights, a Constitutional court/tribunal to ensure the justiciability of Constitutional principles and of the fundamental rights embodied in the Constitution itself. Meanwhile the negotiations process suffered a major setback with the withdrawal of the CP and IFP and the formation of the Freedom Alliance which demanded the right of ethnic self-determination for its participating member organisations. Nevertheless negotiations continued and agreements were reached.<sup>329</sup>

In September 1993 the Negotiating Council adopted four bills which were enacted by the South African Parliament. These four Acts were: the Independent Electoral Commission Act,<sup>330</sup> the Transitional Executive Council Act,<sup>331</sup> the Independent Media Commission Act,<sup>332</sup> and the Independent Broadcasting Authority Act.<sup>333</sup> These legislation was intended to level the political playing field and create the framework for the conduct of a free and fair election. As there was no outside power like the UK in the case of Zimbabwe or the UN in the case of Namibia it was necessary to ensure that these transitional measures were adopted to ensure that no political party or organisation (especially the government and the TBVC administrations) did not have undue advantages in the run-up to and during elections.

On 17 November 1993 the plenary session of the Multi-party Negotiating process finalised the interim Constitution Bill and the Electoral Bill. These bills were enacted by the South African Parliament during November and December

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<sup>329</sup> See Willem de Klerk "The Process of Political Negotiation: 1990-1993" 8-9.

<sup>330</sup> Act 150 of 1993.

<sup>331</sup> Act 151 of 1993.

<sup>332</sup> Act 148 of 1993.

<sup>333</sup> Act 153 of 1993.

1993.<sup>334</sup> On the 27 and 28 April 1994 general elections took place for both National and regional governments. The polling proceeded peacefully resulting in the establishment of a government of National Unity.

In the following paragraphs we shall examine the main features of the New Constitutional State and in particular the impact of the dynamic concept of the rule of law and international human rights law in its creation.

### **6.3.2 Structure of the new Constitution**

The Constitution of the Republic of South Africa (Act 200 of 1993) was adopted in November 1993. It consists of 251 articles (divided into 15 chapters) and 7 schedules.<sup>335</sup> It is not proposed to deal with all these articles and schedules, but rather to provide an overview of the Constitution based on the following themes: firstly, the nature of the state; secondly, fundamental rights and freedoms; thirdly, enforcement mechanisms; fourthly, organs of the government; and lastly, the constitution making process.

The objects of this paragraph are manifold, namely: to identify the elements of international human rights law in the Constitution, and avenues of their incorporation; to identify elements of the Dynamic Concept of the Rule of Law in the Constitution; to assess the possible impact of the rule of law and human-rights law on the interpretation of the Constitution and further constitution-

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<sup>334</sup> See Willem de Klerk "The Process of Political Negotiation: 1990-1993" 9.

<sup>335</sup> The chapters are entitled: Constituent and Formal Provisions (Chapter 1); Citizenship and Franchise (Chapter 2); Fundamental Rights (Chapter 3); Parliament (Chapter 4); The Adoption of the New Constitution (Chapter 5); The National Executive (Chapter 6); The Judicial Authority and the Administration of Justice (Chapter 7); The Public Protector, Human Rights Commission, commission on Gender Equality and Restitution of Land Rights (Chapter 8); Provincial Government (Chapter 9); Local Government (chapter 10); Traditional Authorities (Chapter 11); Finance (Chapter 12); Public Service Commission and Public Service (Chapter 13); Police and Defence (Chapter 14) and General and Transitional Provisions (Chapter 15). The Schedules include: Part 1; Definitions of Provinces, and Part 2; Contentious Areas (Schedule 1); System for Election of National Assembly and Provincial Legislatures (Schedule 2); Oaths and Affirmations of Office (Schedule 3); Constitutional Principles (Schedule 4); Procedure for Election of President (Schedule 5); Legislative Competence's of Provinces (Schedule 6) and Repeal of Laws (Schedule 7).

making processes; and to compare the impact constitutional principles in Zimbabwe, Namibia and South Africa on the right of peoples to self-determination and equality.

### 6.3.2.1 The Nature of the State

The Preamble does not enjoy the same status as the other provisions of the Constitution, the Constitutional Principles and the Schedules. However, it embodies important features of the Constitution. It provides for the need to create a new order in South Africa after centuries of Colonial oppression and autocratic rule under the apartheid system. Furthermore, the preamble prescribes the values of the new order, including:- a common South African citizenship; a sovereign and democratic constitutional state; and equality between men and woman and people of all races so that all citizens can enjoy and exercise their fundamental rights and freedoms. The preamble makes it abundantly clear that the 1993 Constitution is interim and thus also deals with the further constitution-making process, structures and constitutional principles.<sup>336</sup> The idea of National Unity embodied in the preamble is elaborated on and further embodied in the National Unity and Reconciliation clause. This clause, together with concepts of a democratic constitutional State, equality, fundamental rights, national unity and reconciliation embody the essence of the new South African state.<sup>337</sup>

The concept of a Constitutional State (that is the *Rechtsstaat* of the European legal tradition) is traceable to the nineteenth century.<sup>338</sup> The concept was developed as a reaction to the horrors of National Socialism and found a definite and emphatic expression in the German Constitution of 1949.<sup>339</sup> As stated in

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<sup>336</sup> See Dion Basson *South Africa's Interim Constitution* (1994) 2.

<sup>337</sup> See Dawid van Wyk "Tussentydse Gedagtes oor 'n Tussentyds Grondwet" in 3 1994 *THRHR* 368.

<sup>338</sup> See Blaauw "The *Rechtsstaat* idea compared with the Rule of Law as a paradigm for the protection of Rights 1990 *SALJ* 78.

<sup>339</sup> *Ibid.*

chapter 2 above, the ideal of a Constitutional State (or *Rechtsstaat*) requires that the fundamental rights of citizens should be properly protected against infringement, especially by the State authorities, and that government authority should accordingly be bound to give effect to the legal values of the equality, freedom and dignity of every citizen.<sup>340</sup> The ideal of a Constitutional State finds expression in Chapter 3 of the Constitution which protects fundamental rights. Also, the ideal of a Constitutional State gives effect to the legal value of representative government in terms of which participatory rights embodied in the Universal Declaration of Human Rights are recognised. The Constitutional principles in Schedule 4 also give effect to and protect the legal value of representative government. However, it also protects the rights of political minorities in terms of the World Trade Centre agreement.<sup>341</sup>

### **6.3.2.2 The Form of State**

One of the most contentious issues at the World Trade Centre negotiations was the question on the form of state - namely, whether it should be a unitary or a federal state. It is not proposed here to open that debate, let alone enter into it. Suffice it to say that article 1 states that:

- “(1) The Republic of South Africa shall be one, sovereign state.
- (2) The national territory of the Republic shall comprise the areas defined in Part 1 of Schedule 1.”

The word “sovereign state” refers to external sovereignty, that is, the state is sovereign and independent vis-à-vis other states.<sup>342</sup> The idea of “oneness” of South Africa in this article (though apparently relating to a united, rather than a unitary state) rules out the possibility of South Africa consisting of more than one independent state as it was envisaged by the freedom Alliance during the

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<sup>340</sup> See Johan Kruger “Regstaat, Kultuurstaat, Welvaartstaat: Bestanddele van 'n nuwe Staatsmodel” in 1994 1 *Stellenbosch Law Review* 16-17.

<sup>341</sup> See Basson *South Africa's Interim Constitution* 2.

<sup>342</sup> *Ibid* 3.

multi-party negotiations. It means, for instance, that the new South Africa cannot consist of independent states forming a so-called confederation of states, based upon a confederal agreement or treaty between the confederating states.<sup>343</sup> Article 1 not only reunifies South Africa but also protects its territorial integrity in line with various United Nations and OAU Resolutions.<sup>344</sup> Accordingly, the national territory of the Republic of South Africa is the territory of one indivisible state. The fact that South Africa shall be one sovereign state is also one of the constitutional principles with which the final constitution will have to comply.<sup>345</sup>

As said above, the words “sovereign state” refer to external sovereignty. It says nothing about the divisibility of internal sovereignty (that is sovereignty in the sense of the highest authority within the state) and accordingly it says nothing about the form of state proper, that is, whether South Africa shall be a unitary or a federal state.<sup>346</sup> In a unitary state sovereignty is indivisible while in a federal state sovereignty is divided between the composite federating states and the central government.<sup>347</sup>

### **6.3.2.3 The Principle of Constitutional Supremacy and the demise of the doctrine of Parliamentary Sovereignty**

As shown above,<sup>348</sup> South Africa inherited the Westminster Constitutional system from Britain in 1910 (through the passing of the South Africa Act of

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<sup>343</sup> This interpretation has serious implications for the *Volkstaat* concept. We shall therefore come back to it when we deal with the right of peoples to self-determination and the *Volkstaat* concept under the interim Constitution.

<sup>344</sup> See in general pars. 5.2 & 5.3 *supra*.

<sup>345</sup> See Constitutional Principle 1 which reads:

“The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.”

<sup>346</sup> On possible Federal features of the interim Constitution see Basson *South Africa's Interim Constitution* 184-188. See also Constitutional Principles XVI to XXVII.

<sup>347</sup> On federalism see Kader Asmal “Federalism and the proposals of the National and Democratic Parties” in *South Africa's Crisis of Constitutional Democracy* (1994) 47 ff.

<sup>348</sup> See chapter 4 par. 4.1 *supra*. See also *Harris v Minister of the Interior* 1952 (2) SA 428 (A), *Minister of Interior v Harris* 1954 (4) SA 769 (A) and *Collins v Minister of the Interior* 1957 (1) 552 (A).

1909 by the British Parliament). Parliament was never democratically elected and became an instrument of oppression in the hands of a white minority who were the only persons allowed to vote. Again, when the 1983 Constitution (Act 110 of 1983) was introduced, the black majority were expressly excluded from representation in Parliament, while provision was made for the inclusion of coloureds and Indians

The exclusion of testing powers of the courts by the doctrine of Parliamentary Sovereignty subjected citizens to the whims of a racial minority which controlled the omnipotent Parliament and created a system of racial segregation based upon unequal treatment in order to retain power in the hands of the minority. This white minority regime did not hesitate to pass draconian measures which infringed upon human rights and freedoms in order to keep the illegitimate and iniquitous system intact. The Supreme Court merely had the so-called procedural testing rights in terms of which the courts were able to investigate whether an instrument which purported to be an Act of Parliament was passed according to the constitutionally prescribed procedure.<sup>349</sup>

These procedural testing powers, however, proved to be hopelessly inadequate to prevent widespread infringements upon human rights. Meanwhile, as far as testing of the area of power or contents of Acts of Parliament was concerned, Parliamentary Sovereignty remained fully in force. Thus the judicial organs of state remained largely impotent against the legislative onslaught on human rights and fundamental freedoms.<sup>350</sup>

The introduction of the principle of Constitutional Supremacy under article 4 of the interim Constitution as well as a justiciable Bill of Rights (Chapter 3)

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<sup>349</sup> See Basson *South Africa's Interim Constitution* 16-17.

<sup>350</sup> See the provisions pertaining to fundamental rights which are entrenched and protected judicially even against unconstitutional Parliamentary Acts (Chapter 3 and 7) as well as the provisions which entrench the provisions of the interim Constitution themselves by way of strictly prescribed procedures (involving special majorities) which are required for amendments to the Constitution (see the commentary on sections 62 and 74 by Basson *op cit*).

signalled the demise of Parliamentary Sovereignty. Article 4 makes provision for the Principle of Constitutional Supremacy in the following terms:

- “(1) This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of its inconsistency.
- (2) This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government.”

In terms of the provisions of this article the interim Constitution ranks as the supreme law in the hierarchy of laws.

In other words, no law (including an Act of Parliament) ranks higher in status than the interim Constitution. The introduction of the principle of Constitutional Supremacy, therefore, marked a radical departure from the doctrine of Parliamentary Sovereignty. The supremacy of the Constitution is reflected in various other provisions of the interim Constitution.<sup>351</sup> The inflexibility of the interim Constitution entrenches the principle of Constitutional Supremacy and ensures that the Constitution cannot be easily amended by way of ordinary legislative procedures as was the case under the previous dispensation.<sup>352</sup>

In practice, the principle of the Supremacy of the Constitution means that in the event of any law or act being inconsistent with the interim Constitution, such law or act is of no force or effect unless otherwise provided, expressly or by necessary implication. The substantive testing powers of the courts apply to both the acts of the previous and present Parliament Article 232(2), however, provides for a presumption of validity, rather than invalidity. It requires that in the event of a law being *prima facie* inconsistent with the interim Constitution,

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<sup>351</sup> See Basson *op cit* 7-8.

<sup>352</sup> On the effects of the declaration of invalidity of laws under the interim Constitution see Basson *South Africa's Interim Constitution* notes on section 98(6).

a more restricted interpretation is preferred if the law is reasonably capable of such an interpretation.<sup>353</sup>

As said above, the preambular paragraph mandates the Constituent Assembly to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional principles. A question which arises is whether or not an act would be unconstitutional if it is inconsistent with the Schedules to the interim Constitution, and in particular Schedule 4 containing these principles? This question is answered by section 233(4) which states that a provision contained in any schedule (including the National Unity and Reconciliation clause) shall not by reason of the fact that it is contained in a schedule have a lower status than any other provision of the interim Constitution.

#### **6.3.2.4 Citizenship and the Franchise**

Under apartheid blacks associated with the TBVC states were deprived of both their citizenship and nationality. On the other hand, blacks associated with the self-governing states retained their South African nationality for external purposes, but lost their internal South African citizenship rights.<sup>354</sup> Consequently, blacks were supposed to exercise all their political rights in the homelands and remain without any political rights, such as the right to vote and the right to own land, which are rights usually associated with citizenship. Moreover, When the TBVC states achieved “independence” blacks associated with them lost their South African citizenship and became citizens of these states.<sup>355</sup> The interim Constitution abandons these distinctions by providing that every South African shall be entitled to enjoy all the rights, privileges and benefits of South African citizenship.<sup>356</sup> It is clear that the rights of “citizenship” in this provision are intended to include the rights of citizens

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<sup>353</sup> *Ibid* 8.

<sup>354</sup> See John Dugard *International Law* 348.

<sup>355</sup> See Basson *South Africa's Interim Constitution* 10.

<sup>356</sup> Section 5.

abroad, that is, the rights attached to nationality<sup>357</sup> such as the right to a passport and the right to protection by one's state while abroad.<sup>358</sup>

The repeal of the National States Citizenship Act and the Status Acts which gave birth to the TBVC states restored South African nationality (and citizenship) to all persons who were deprived of their South African nationality as a result of the creation of the TBVC states contrary to international human rights law.<sup>359</sup> This is confirmed by the Restoration and Extension of South African Citizenship Act 196 of 1993. As a result, the separation of nationality citizenship in South African law no longer exists. Thus South African nationals are those persons who have acquired South African nationality by birth, descent or naturalisation in terms of the South African Citizenship Act.<sup>360</sup> They enjoy the full rights of citizenship, including the franchise.<sup>361</sup> The franchise allows black South Africans, in line with the Universal Declaration of Human Rights, to exercise their participatory democratic rights, that is, the right to vote.

### **6.3.2.5 The Fundamental Bill of Human Rights**

#### **6.3.2.5.1 The Reach of the Bill of Rights**

The South African interim Constitution contains a Bill of Rights<sup>362</sup> and provides

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<sup>357</sup> See Basson *op cit* 10.

<sup>358</sup> *Ibid* 173.

<sup>359</sup> See Dugard *International Law* 348.

<sup>360</sup> Act 44 of 1949. This Act remains in force in terms of section 229 of the interim Constitution.

<sup>361</sup> See sections 5, 6, 20 and 21 of the interim Constitution.

<sup>362</sup> See Chapter 3 of the Constitution.

for the establishment of a Constitutional Court<sup>363</sup> with the power to test the validity of all laws and executive actions against the prescriptions in the constitution. The Bill of Rights is justiciable and the fundamental rights contained therein are accordingly protected and enforced by the Constitutional Court and the Supreme Court<sup>364</sup> in terms of its concurrent jurisdiction.

The introduction of Chapter 3 (the Bill of Fundamental Human Rights) heralded a fundamental break with our legal tradition. More specifically, it marked the transition from a constitutional system based on Parliamentary Sovereignty to a system according to which the constitution is supreme and judicial testing of Parliamentary Acts against the entrenched Bill of Rights became the norm.<sup>365</sup> Section 7(1) of Chapter 3, like section 4, states that the Bill of Rights binds all legislative and executive organs of the state at all levels of government. However, unlike section 4, it does not include the judicial organs. A similar provision in the Canadian Constitution has been interpreted so as to include the judicial organs of the state.<sup>366</sup>

The Bill of Fundamental Rights will have a major impact on our legal system. the Bill as enforced by the courts will act as a guarantor of the values and rules of our society. The Constitution, and more specifically the fundamental rights contained therein, will override the will of Parliament as expressed in legislation. As a result, the courts will have the last say on the validity of all legislation. The Courts will virtually become a third chamber of Parliament or a kind of negative legislature. They will rule on contentious political, personal and economic issues, the rights of employers and employees, police officers and suspects, property owners and the landless and educators and scholars.<sup>367</sup>

In addition, and perhaps most significantly, the Constitutional Court rule on the

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<sup>363</sup> See section 98(2).

<sup>364</sup> See section 101(3)(a).

<sup>365</sup> See Haysom "The Bill of Fundamental Rights: Implications for legal practise" February 1994 *De Rebus* 125. See also Basson *South Africa's Interim Constitution* 14.

<sup>366</sup> See Haysom "The Bill of Fundamental Rights: Implications for legal practice" 125.

<sup>367</sup> *Ibid.*

democratic process itself. The constitution prescribes that the final Constitution, which will be drawn up by the Constituent Assembly, shall comply prescribed constitutional principles.<sup>368</sup> The second Constitutional principle states:<sup>369</sup>

“Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution.”

In other words, the Constitution prescribes that internationally accepted fundamental rights shall be included in any future Constitution.<sup>370</sup>

The principle of judicial review of legislation contained in the Constitution may take the form both of anterior review (article 98(3)) - that is, the submission of a Bill to the Constitutional Court to confirm the Constitutional validity of such a Bill prior to its promulgation, or posterior review - that is, review of existing legislation and Common Law by the courts.<sup>371</sup>

The Constitution not only makes the Bill of Rights binding upon both the legislative and executive branches of government, but also explicitly introduces new requirements of procedural fairness in the field of administrative law and requires that any administrative action which affects the rights or interests of citizens must be justiciable in relation to the reasons given for it.<sup>372</sup>

It follows from the foregoing paragraphs that the Bill of Rights will have a vertical application, that is, an application between the citizens and the government. A question which remains is whether the Bill of Rights will also apply horizontally? In other words, can one citizen bring an application that his

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<sup>368</sup> *Ibid.*

<sup>369</sup> See Basson *South Africa's Interim Constitution* Schedule 4.

<sup>370</sup> See Johan Kruger “Die beregting van fundamentele regte gedurende die oorgangsbedeling” 57 1994 *THRHR* 397.

<sup>371</sup> See Haysom “The Bill of Fundamental Rights: Implications for legal practise” 125.

<sup>372</sup> *Ibid.*

fundamental rights have been infringed by another citizen? In this regard the Bill of Rights confines its reach to the law only, including the common law, which is contrary to the fundamental rights, in enforcing his or her rights against other citizens. The rights contained in the Bill of Rights are available to all natural persons. the question arises as to which of these rights will be available to artificial or juristic persons?<sup>373</sup>

Section 7(1) provides that Chapter 3 of the Constitution is binding on all legislative and executive organs of the state. A similar provision in the Namibian Constitution reads:<sup>374</sup>

“The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, legislature and judiciary and all other organs of the government and its agencies and, where applicable to them, by all natural and legal persons in Namibia... “.

In contrast to its Namibian counterpart the South African section 7(1) is silent on juristic persons. Section 7(1) should be distinguished from section 7(3) which reads:

“Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits.”

In other words, the fundamental rights, to the extent that they are capable of application to bodies corporate, extend, *inter alia*, to companies and closed corporations.<sup>375</sup>

As shown above, in its classical concept a Bill of Rights operates only as between state and individual. It restrains the state, generally speaking, from infringing, by way of legislative or executive act, any of the fundamental rights

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<sup>373</sup> *Ibid.*

<sup>374</sup> See Chapter 8 section 5.

<sup>375</sup> See Monty Knoll “Challenges for the Judiciary arising from the new Constitution: business implications” May 1994 *De Rebus* 376.

of the individual which the bill enacts. This is what is generally known as “vertical” operation. In the interim Constitution there is a departure from this principle.<sup>376</sup> Section 33(4) provides:

“[T]his Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1).”

Those bound in terms of section 7(1) are “all legislative and executive organs of government”. These last-mentioned words give expression to the principle of vertical operation.

The departure permitted in terms of section 33(4) extends the operation of Chapter 3 to all bodies and persons other than the organs of state as does the Namibian Constitution. This is known as “horizontal” operation. Section 33(4) means that conduct or actions by groups (including juristic persons such as companies) or by individuals, which unfairly discriminate against an individual or group of persons, are prohibited - and of course, the prohibition is constitutionally entrenched.

What constitutes unfair discrimination will no doubt depend on the circumstances of each case. In borderline cases the competent courts will have to grapple with the problem. In this task section 8(4) will be of assistance to the courts. It reads:

“*Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.”

Once the court finds discrimination on any of the grounds specified to have been proved *prima facie* this clause shifts the burden to the defendant or respondent to prove that the discrimination was not fair. The grounds of

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<sup>376</sup> *Ibid.*

discrimination specified in subarticle (2) of article 8 are: race, gender, sex, ethnic or racial origin, colour, sexual orientation, age disability, religion, conscience, belief, culture and language. Section 8 is the section of the Chapter on Fundamental rights which provides for equality before the law and equal protection of the law of every person.

#### **6.3.2.5.2 The Constitutional State and Fundamental Human Rights**

The principle of Parliamentary Sovereignty and its abuse by previous governments confirm:

- a) the need to protect the individual against the state;
- b) the need to prohibit the reduction of the subject to a mere object of state power;  
and
- c) the need to protect the individual as the weaker subject in public law relationships.<sup>377</sup>

These needs raise a normative question - namely, whether or not the individual subject (and his or her fundamental human rights and freedoms) are adequately protected against the abuse of state power? If the answer is in the affirmative (as it is under the interim Constitution) we have what is called due process of law (or Constitutionalism) in the United States of America and what is called the *Rechtsstaat* (Constitutional State) in European legal literature.<sup>378</sup>

In essence, it means that the basic relationship in the state is a legal relationship governed or ruled by the law, where the government is bound by particular legal values in the exercise of its authority which ensures that the exercise of government authority results in not only a formally (or procedurally), but also a materially just situation. Hence, there is a distinction between a formal and a material Constitutional State.

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<sup>377</sup> See Basson *South Africa's Interim Constitution* 18.

<sup>378</sup> *Ibid.*

The principle of a Constitutional State (*Rechtsstaatprinzip*) is based on a normative or value-orientated approach to the law.<sup>379</sup> This approach departs from the premise that there is a higher law (also known as Natural Law) which contains certain *a priori* legal values with which positive law must comply in order to be valid.<sup>380</sup> These legal values have been traced to a variety of sources including Western tradition (more specifically the Western religious, philosophical and moral convictions) as well as ancient Greco-Roman and African (Hermetic) philosophy. These legal values include freedom and equality (which underlie the concept of justice) both of which derive from the worth and dignity of the human personality. The third legal value which achieved recognition after centuries of struggle is the right to democratic governance.

The principle of a *Rechtsstaat* (Constitutional State) is clearly a normative concept which rejects the notion of uncontrolled and arbitrary exercise of government power. The Constitutional State achieves this through a justiciable Bill of Rights. In other words, a Bill of rights is a constitutional mechanism whereby the individual subject can be assured that the state authorities have no choice but to treat him or her justly. Accordingly, the introduction of an entrenched and enforceable Bill of Rights was a *sine qua non* for the creation of a constitutional state in South Africa where the fundamental rights of the subjects of the state are protected against the abuse of government power by an independent and impartial judiciary and where legal values such as freedom and equality prevail.

The interim Constitution places great emphasis on civil and political rights (the first generation or blue rights) which are associated with the so-called liberal democracies. As in the Namibian Constitution, South Africa's interim Constitution gives attention to the second and third generation human rights, although the attention given is by no means exhaustive. As shown above,<sup>381</sup> the

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<sup>379</sup> *Ibid* 19.

<sup>380</sup> See A C Basson "Die Ontwikkeling van Ekonomiese Regte" in *South African Public Law* vol. 8 no. 2 (1993) 219.

<sup>381</sup> See Chapter 3 par. 3.3.3.3 *supra*.

Banjul Charter brings out the interrelationships between the three generations of human rights quite clearly. It has been generally recognised and acknowledged that without the proper realisation of second generation human rights, the dignity of every person suffers where attention is not given to fundamental human rights such as the right to work, the right to shelter, the right to health and the right to education which are commonly associated with the welfare state. In other words, a Constitutional State must recognise all three generations of human rights, and not one at the expense of the others. Therefore, a *Rechtsstaat* must also become a *Soziale Rechtsstaat*.

### **6.3.2.5.3 Locus Standi**

Section 7(4)(b) introduces innovative provisions regarding the issue of standing (*locus standi*) in cases where the courts have been called upon to deal with constitutional matters pertaining to the infringement of or threat to the fundamental rights contained in Chapter 3. Originally, the South African law pertaining to *locus standi* operated restrictively and a direct and substantial interest of a litigant (usually amounting to an infringement of a subjective right of the litigant) was required for *locus standi*. The interim Constitution has expanded the *locus standi* with regard to constitutional matters before the courts where the dispute relates to the alleged infringement of or threat to the fundamental rights enshrined in the interim Constitution. The Constitution introduces a class action, whereby a person acts in the interest of a class or group; and an *actio popularis*, where a person acts on behalf of the public, that is, in the public interest. As these kind of actions could be abused, the courts will have to develop criteria for limiting the actions so as to prevent frivolous cases.

The Bill of Fundamental Rights of the interim Constitution incorporates a wide range of fundamental human rights derived from a variety of international and regional human rights instruments.<sup>382</sup> It is neither proposed to trace the origins

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<sup>382</sup> See Dugard *International Law - A South African Perspective* 349-350.

of each clause or to discuss all the clauses as they have already been thoroughly canvassed by other authors.<sup>383</sup> Here we only mentioned the rights concerned and then focused on those aspects that relate to the dynamic concept of the rule of law.

#### 6.3.2.5.4 Distinctive Features of the Bill of Fundamental Rights

Chapter 3 gives effect to the notion of the fundamental equality of all men and women (irrespective of race, colour or creed)<sup>384</sup> by providing that:<sup>385</sup>

“[E]very person shall have the right to equality before the law and to equal protection of the law”

and expressly prohibiting discrimination on a wide range of grounds<sup>386</sup> subject to an affirmative action provision.<sup>387</sup> Chapter 3 protects all three generations of human rights which were so long denied the majority of South Africans. The Chapter protects a wide range of civil, political, economic and social rights. These include the right to life;<sup>388</sup> human dignity;<sup>389</sup> privacy;<sup>390</sup> freedom and

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<sup>383</sup> See Chachalia, Cheadle *et al* *Fundamental Rights in the New Constitution* (1994) and Basson *South Africa's Interim Constitution* 13 -58.

<sup>384</sup> This notion is derived from the UN Charter and the Universal Declaration of Human Rights.

<sup>385</sup> See section 8(1).

<sup>386</sup> These grounds include race, gender sex (sic), ethnic or social origin, colour, sexual orientation, age, disability, conscience, belief, language and culture. See section 8 (2).

<sup>387</sup> The affirmative action clause (also found in the Namibian Constitution) provides:-

“(3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

(4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.”

<sup>388</sup> Section 9.

<sup>389</sup> Section 10.

<sup>390</sup> Section 13.

security of person,<sup>391</sup> which includes the right not to be detained without trial (except during a state of emergency). The use of forced labour,<sup>392</sup> torture of any kind or cruel, inhuman or degrading treatment or punishment is prohibited.<sup>393</sup>

As regards political rights, all citizens have the right to vote; to freely make political choices; the right to form, to participate in the activities of, and to recruit new members for political parties.<sup>394</sup> Also, Chapter 3 protects the rights to freedom of religion and opinion,<sup>395</sup> assembly,<sup>396</sup> association,<sup>397</sup> movement<sup>398</sup> and residence.<sup>399</sup> In view of the draconian legislation that governed South Africa for decades and the resulting abuses suffered by many at the hands of the security forces, the authors of the Bill of Human Rights incorporated strong provisions relating to detention.<sup>400</sup> Thus every person detained has the right, amongst others, to be informed promptly of the reasons for detention; to be detained under conditions consonant with human dignity (including medical treatment at State expense); to consult with legal practitioner of his or her choice or be provided with one free of charge where substantial injustice would otherwise result, and to be given the opportunity to communicate with and to be visited by close relatives, a religious counsellor and a medical practitioner of his or her choice.

Economic rights embodied in the Bill include the right of every person freely to engage in economic activity and to pursue a livelihood anywhere in South Africa;<sup>401</sup> the right to fair labour practices<sup>402</sup> and the right of workers to form

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<sup>391</sup> Section 11.  
<sup>392</sup> Section 12.  
<sup>393</sup> Section 11.  
<sup>394</sup> Section 21.  
<sup>395</sup> Section 14.  
<sup>396</sup> Section 16.  
<sup>397</sup> Section 17.  
<sup>398</sup> Section 18.  
<sup>399</sup> Section 19.  
<sup>400</sup> Section 25.  
<sup>401</sup> Section 26.  
<sup>402</sup> Section 27.

and join trade unions;<sup>403</sup> the right to organise and bargain and to strike for the purpose of collective bargaining.

The right to private property is dealt with concisely. The Bill recognises expressly the right to acquire, hold and dispose of rights in property subject to the power of expropriation for the public purposes upon payment of “just and equitable” compensation. A newly established Commission on Restitution of Land Rights will be entitled to investigate and mediate upon claims from any person or community concerning the restitution of the right in land from the National Government.<sup>404</sup>

Chapter 3 also recognises social and cultural rights which entitle all persons to basic education and equal access to educational institutions. It also recognises the right to establish where practicable educational institutions based on a common culture, language or religion provided that there is no discrimination on the ground of colour or race.<sup>405</sup> Academic freedom in institutions of higher learning is also expressly recognised. With regard to language rights the Bill provides that “every person shall have the right to use the language and to participate in the cultural life of his or her choice”.<sup>406</sup> In addition there are detailed provisions for the development of language policy at national and regional levels. Unlike previous South African Constitutions, the interim Constitution makes English and Afrikaans just two of the eleven official languages at the national level.<sup>407</sup>

The rights of children<sup>408</sup> are also specifically protected including the right to parental care and protection from exploitative labour practices. However,

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<sup>403</sup> *Ibid.*

<sup>404</sup> Section 28.

<sup>405</sup> Section 32.

<sup>406</sup> Section 31.

<sup>407</sup> Section 3. See also J Hatchard “Statute Note: The Constitution of the Republic of South Africa” in 1994 *Journal of African Law* vol. 38 74.

<sup>408</sup> Section 30.

family rights are not specifically addressed as in the Banjul Charter.<sup>409</sup> As regards the rights of women, discrimination on grounds of sex is specifically prohibited and they are also covered by the affirmative action clause.<sup>410</sup> In addition, the Constitution provides for the establishment of a statutory Commission on Gender Issues and empowers it to make recommendations regarding proposed legislation on the status of women. Last but not least, the Constitution makes provision for the third generation rights - for instance, the right to healthy environment.

#### **6.3.2.5.5 Limitations on Fundamental Human Rights**

Fundamental rights are not absolute under the interim constitution. Section 33 provides for a method (or mechanism) for the Courts to implement when they are called upon to decide the question of when a limitation on a fundamental right will be legitimate and valid. In other words, section 33 is a general limitations to be placed on all the fundamental rights contained in the Bill of Rights.<sup>411</sup>

Section 33 guarantees that any limitation, which shall be only by law of general application, shall not negate the essential content of the right in question and shall be permissible only to the extent that it is an open and democratic society based on freedom and equality” In respect of certain specified rights (relating primarily to free and fair political activity) section 33(1)(b) prescribes an additional strict requirement that the limitation must be “necessary”.

In addition to these limitations there are others placed upon some of the fundamental rights.<sup>412</sup> For instance, the affirmative action clause (section 8(3)) limits the equal treatment clause (section 8(2)); the socio-economic rights are

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<sup>409</sup> *Op cit.*

<sup>410</sup> See section 8(3)(a).

<sup>411</sup> See Basson *South Africa's Interim Constitution* 49.

<sup>412</sup> *Ibid.*

sometimes limited by the word “basic” which indicate that only minimum standards are to be met or these rights are usually recognised only where it is reasonably practicable. Furthermore, the right to economic activity (section 26) is limited by socio-economic goals (section 26(2)) and the right to property is subject to expropriation, provided that the requirements which are spelt out in section 28(2) and (3) are met.<sup>413</sup>

Haysom<sup>414</sup> observes that limitations on fundamental rights are either expressly provided for or necessarily implied by other fundamental rights. For instance, freedom of expression may stand in opposition to the right to privacy. Religious and cultural rights may stand in opposition to gender or equality. Freedom of association may stand in conflict with racial equality as section 33(4) expressly allows for the potential enactment of statutory measures to prohibit private discrimination, notwithstanding the freedom of association provisions. Finally, section 33(5)(b) serves to insulate much of the current labour legislation from the reach of the Bill of Rights until these laws are repealed or amended by the legislature.

The South African courts<sup>415</sup> with constitutional jurisdiction to protect the fundamental rights will be called upon to give content and meaning to the limitations clause (section 33) and to resolve the conflict between fundamental rights by ranking them in order of priority and by determining the extent of their utilisation and enjoyment.

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<sup>413</sup> Section 28 provides that:-

“(1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.

(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with the law.

(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of the acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.”

<sup>414</sup> See Haysom “The Bill of Fundamental Rights: Implications for the Legal Practice” 128.

<sup>415</sup> *Ibid.* See also Basson *South Africa's Interim Constitution* 49.

In the interpretation of the limitations clause in section 33 the courts could benefit from decisions of foreign jurisdictions which contain similar limitations. For instance, section 1<sup>416</sup> of the Canadian Constitution places fundamental rights subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Although by no means identical to the Canadian limitations clause, the South African limitations clause<sup>417</sup> states that a fundamental right may be limited by a “law of general application” provided that such limitation is:

- “(1) reasonable; and
- (2) justifiable in an open and democratic society based on freedom and equality...”.

A similar clause is found in some of the limitation clauses contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms. For example, article 9 of the Convention states that limitations must be “necessary in a democratic society.” A similar clause is found in article 19(2) of the German Constitution. This clause mirrors section 33 of the South African interim Constitution requiring that a limitation shall not negate (violate) the “essential content” of the right in question. However, the South African limitations clause is unique in that it further requires that a limitation upon certain specified fundamental rights must pass the further (stricter) test of also being necessary.

As the South African limitations clause is not precisely the same as the others the question arises whether or not the concept “necessary” (indicating a stricter test) should be given the same meaning as the same concept in the European Convention where the only difference is that the European Convention requires that the limitation must be necessary in a democratic society. To highlight the

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<sup>416</sup> It reads:

“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such limits as can be demonstrably justified in a free and democratic society.”

<sup>417</sup> See section 33.

possible interpretations which the competent South African courts will attach to the limitation clause (section 33), it is necessary to refer to Canadian and European jurisprudence in this regard. The structure of the South African Bill of Rights is similar to that contained in the Canadian Charter of Rights.<sup>418</sup> The Canadian Supreme Court approached this structure by requiring a two-stage process of analysis. The first stage embodies an enquiry whether or not the impugned law violated any of the guarantees contained in the Charter. When this question was answered positively, then the question arose whether or not the law could still be accommodated in terms of the limitations clause.<sup>419</sup> In the case of *R v Oakes*<sup>420</sup> the Canadian Supreme Court enquired whether or not an infringement constituted a permissible limitation under article 1.

Turning to the limitation clause the Court held that the onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation.<sup>421</sup> The Court then went on to observe that:

“to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied

First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be 'of sufficient importance to warrant a constitutionally protected right or freedom... '.

The standard must be high in order to ensure that the objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain section 1 protection. It is necessary, at a minimum, that an objective relates to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important.

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<sup>418</sup> This is because of the influence that the Canadian Charter exercised on the drafters of the South African Bill of Rights. See Cachalia, Cheadle *et al* *Fundamental Rights in the New Constitution* [1994] 5.

<sup>419</sup> It should be emphasised, however, that section 1 of the Canadian Charter of Rights is not identical to the South African limitations clause in section 33.

<sup>420</sup> 26 DLR (4th) 200.

<sup>421</sup> See Basson *op cit* 50-51.

Secondly, once a sufficiently significant objective is recognised, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test...'. Although the nature of the proportionality text will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.

Secondly, the means, even if rationally connected to the objective in the first sense, should impair 'as little as possible' the right or freedom in question... .

Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of sufficient importance."

In the case of *Sunday Times v United Kingdom*<sup>422</sup> the European Human Rights Court found an opportunity to interpret the concepts "reasonable", "justifiable" and a "democratic society". In this case the British Common-law rules relating to contempt of court were applied in such a manner that they prohibited the Sunday Times from publishing certain facts regarding a medicine while a case regarding it was *sub judice*. The Sunday Times approached the European Human Rights Court on the grounds that the Common-law rule in question was not a limitation clause as envisaged by the European Human Rights Convention as it was a Common-law, not a statutory, rule. The Court rejected the argument of the Sunday Times and found that the Common-law rule concerned a legal rule which sought to limit a fundamental right and is binding if

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<sup>422</sup> *Sunday Times v United Kingdom* (1979-1980) Z EHRR 245. For a discussion of the case see Diamond "Voorlopige aantekeninge oor hoofstuk 3 van die nuwe Grondwet" in May 1994 *De Rebus* 343.

- (a) it is adequately accessible to the public so as to enable them to be fully knowledgeable about it; and
- (b) if the rule is so accurately formulated that the subject can regulate his conduct accordingly.

The Court found in the Sunday Times case that these two requirements were met.<sup>423</sup> Furthermore, it was found that the concept “reasonable” included the following elements:

- a) The legal rule must be rationally connected to a legitimate governmental purpose;
- b) The effect of the limiting legal rule must not result in a disproportionate limitation of the fundamental right.

The concept of “justifiability” implies that the court should weigh three factors against one another. These factors are:-

- (I) the importance of the Constitutional right under discussion;
- (II) the degree of the infringement on the fundamental right by the limiting rule;
- (III) the importance of the objective that the state wishes to promote.

If the third factor weighs heavier than the first and second factors then the infringement will be justified.

The concept “democratic society” refers to the values which democratic societies in general attach to a particular fundamental right. The concept “necessary” includes more than the concept “reasonable” and it has been found in judicial decisions that where “necessity” is required before an infringement could be justified there must be a “pressing social need” for such an infringement.

Although the South African limitations clause is more detailed, Diamond<sup>424</sup>

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<sup>423</sup> *Ibid*

<sup>424</sup> See Diamond note 422 *supra*.

suggests that the concepts discussed above will form the basis for its interpretation.

## **6.4 Enforcement Mechanisms**

### **6.4.1 The Public Protector**

Section 110 makes provision for the establishment and appointment of the Public Protector. This office is usually referred to as an ombudsman internationally. In terms of section 243 the former Ombudsman (appointed in terms of the Ombudsman Act, 118 of 1979) will continue will continue his functions until the appointment of the first Public Protector in terms of section 110. The Public Protector is appointed by the President from a nomination by a joint committee of the Houses of Parliament and approved by the National Assembly and the Senate in a joint sitting by a majority of at least 75 per cent of the members present. To ensure the impartiality and independence of this office, subsection (6) determines that the remuneration and other terms and conditions of employment of the Public Protector must be prescribed by an Act of Parliament and may not be reduced or altered during the Public Protector's term of office.<sup>425</sup> Further, the Public protector may only be removed from office by the President and then only on the grounds of misbehaviour, incapacity or incompetence, which grounds are to be determined by a joint committee of the Houses of Parliament, and only after being requested to do so by both the National Assembly and the Senate.

That the independence and impartiality of the Public Protector is highly valued is evident in section 111 which requires him or her to be both independent and impartial and to perform his or her powers and functions subject only to the interim Constitution and the Law. Further, subsection (2) prescribes that the Public Protector (as well as his or her staff) must "have such immunities and

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<sup>425</sup> This provision is similar to that with regard to judges as prescribed in section 104(2).

privileges as may be assigned to them by an Act of Parliament for the purpose of ensuring the independent and impartial exercise and performance of their powers and functions.”

Further, all organs of state are enjoined not to interfere with the Public Protector in his or her task and must give reasonable assistance as may be required.

The powers and function of the Public Protector are listed in section 112. They are aimed at securing the watchdog function over public functionaries and accordingly the Public Protector is empowered to act on his or her own initiative or on receipt of a complaint in matters involving amongst others:

- (I) maladministration;
- (II) abuse of power or unfair conduct (including undue delay);
- (III) corruption with regard to public money;
- (IV) improper enrichment or advantage (or promise thereof) in the public administration; and
- (V) any act or omission of a public functionary which results in improper prejudice to any other person.

The Public Protector may:

- a) endeavour to resolve any dispute or rectify any act or omission by mediation, conciliation or negotiation, or advising on remedies, or any other expedient means;
- b) bring the matter to the attention of the relevant authorities charged with prosecution;
- c) refer any matter to the appropriate public body or authority affected by it or make an appropriate recommendation regarding the redress of any prejudice to such body or authority.

Subsection (5) however makes it clear that the powers and functions of the Public Protector do not oust the jurisdiction of the courts to hear the matter or

cause. Further, to ensure accountability, the Public Protector must report once every year in writing on his or her activities to Parliament.<sup>426</sup>

#### **6.4.2 The Commission on the Restitution of Land Rights**

Section 122 makes provision for the establishment of a Commission on the Restitution of Land Rights by an Act of Parliament which shall:<sup>427</sup>

- “(a) investigate the merits of any claims;
- (b) mediate and settle disputes arising from such claims;
- (c) draw up reports on unsettled claims for submission as evidence to a court of law and to present any other relevant evidence to the court; and
- (d) exercise and perform any such other powers and functions as may be provided for in the said Act.”

A person or a community shall be entitled to claim restitution of a right in land from the state if they were dispossessed of such a right at any time after 19 June 1913, and the dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of the dispossession.<sup>428</sup> Further, no such claim shall be justiciable by a court of law unless the claim has been dealt with by the Commission on the Restitution of Land Rights.<sup>429</sup>

#### **6.4.3 The Human Rights Commission**

The Human Rights Commission is established by section 115. The eleven members shall be appointed by the President from a nomination by a joint committee of the Houses of Parliament composed of one member of each party represented in Parliament and willing to participate in the committee, and

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<sup>426</sup> See section 112(6).

<sup>427</sup> See section 122(1).

<sup>428</sup> See section 121(2). See also the Land Restitution Bill of 1994.

<sup>429</sup> See Section 121(6).

approved by a 75 per cent majority of the members present at a joint meeting of the National Assembly and the Senate.

The powers and functions of the Human Rights Commission, listed in section 116, are not a *numerus clausus* and further powers and functions may be assigned to it by law. In general its competencies and duties include the promotion of the observance of, respect for and the protection of fundamental rights and the development of an awareness of fundamental rights.<sup>430</sup>

Basson<sup>431</sup> states that the Commission on Human Rights will be able to play a very constructive role in the promotion and protection of fundamental rights, including socio-economic and environmental rights (so-called second and third generation rights). Further, it is important to note that the Commission is also competent to monitor international human rights law which forms part of South African law or other relevant norms of international law, in that if it is of the opinion that any proposed legislation might be contrary to the above or Chapter 3, it shall report that fact to the relevant legislature.<sup>432</sup> Another important function of the Human Rights Commission is to investigate at its own initiative or on receipt of a complaint any alleged violation of human rights and assist persons affected thereby to secure redress or direct a complaint to an appropriate forum.<sup>433</sup> The Human Rights Commission must report once every year to the President on its activities, which report the President shall cause to be tabled promptly in the National Assembly and the Senate.<sup>434</sup>

#### **6.4.4 The Constitutional Court**

Without a doubt the most important enforcement mechanism is the

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<sup>430</sup> For a more detailed analysis of the Commissions functions see Basson *South Africa's Interim Constitution* 169-171.

<sup>431</sup> *Ibid* 171.

<sup>432</sup> See section 116(2).

<sup>433</sup> See section 116(3).

<sup>434</sup> See section 118.

Constitutional Court.<sup>435</sup> It is not proposed to give a detailed analysis of the powers, functions and functioning of the Constitutional Court, save to highlight certain important provisions.<sup>436</sup> The Constitutional Court has jurisdiction as a court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of the interim Constitution, including:<sup>437</sup>

- “(a) any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3;
- (b) any dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state;
- (c) any enquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution;
- (d) any dispute over the constitutionality of any Bill before Parliament or provincial legislature...;
- (e) any dispute of a constitutional nature between organs of state at any level of government;
- (f) the determination of questions whether any matter falls within its jurisdiction; and
- (g) the determination of any other matters as may be entrusted to it by this Constitution or any other law.”

Further, the Constitutional Court has jurisdiction in constitutional matters in essentially three areas: first (as stated above) the Constitutional Court is a Court of Final Instance in all matters related to the interpretation, protection and enforcement of the provisions of the interim Constitution; secondly, it is a Court of Reference in constitutional matters regarding all the issues which fall within

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<sup>435</sup> Although the Supreme Court also has concurrent jurisdiction with the Constitutional Court (in terms of section 98(3)) over certain constitutional matters, it is not proposed here to deal with these provisions. For a detailed analysis of these provisions see Basson *South Africa's Interim Constitution* 145-161.

<sup>436</sup> For a detailed analysis in this regard see Basson *South Africa's Interim Constitution* 139-149.

<sup>437</sup> See section 98(2).

its exclusive jurisdiction;<sup>438</sup> and thirdly, the Constitutional court may be a Court of Direct Access in constitutional matters which fall within its jurisdiction.

#### **6.4.5 The Commission on Gender Equality**

The Commission on Gender Equality is established in section 119. The object of this Commission is to promote gender equality and to advise and to make recommendations to Parliament or any other legislature with regard to any laws or proposed legislation which affect gender equality and the status of women. The composition, powers, functions and functioning of the Commission on Gender Equality are not spelt out in the provisions of the interim Constitution and an envisaged Act of Parliament will deal with these issues.

### **6.5 The Place of Public International Law in South African Municipal Law**

#### **6.5.1 General**

Unlike its predecessors,<sup>439</sup> the 1993 South African Constitution expressly recognises international law and the role it has to play in municipal law.<sup>440</sup> Public international law features in four separate areas of the 1993 Constitution. The first is in chapter 3 (Fundamental Rights), the second in chapter 8 (dealing with the Human Rights Commission),<sup>441</sup> the third in chapter 14 (dealing with Police and Defence),<sup>442</sup> and the fourth in chapter 15 (which deals with General

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<sup>438</sup> See Basson *South Africa's Interim Constitution* 144-145 on the Constitutional Courts exclusive jurisdiction.

<sup>439</sup> Since Union in 1910 South Africa has had three constitutions, the 1910, 1961 and 1983 constitutions. In none of these documents is public international law mentioned *eo nomine*.

<sup>440</sup> See Dugard *International Law* 339

<sup>441</sup> Section 116(2) which provides:

"If the commission is of the opinion that any proposed legislation might be contrary to chapter 3 or to norms of international human rights law which form part of South African law or to other relevant norms of international law, it shall immediately report that fact to the relevant legislature."

<sup>442</sup> See section 227(2)(d) which provides:

"(2) The National Defence Force shall - ...

...

(d) not breach international customary law ...".

and Transitional Provisions). It is not proposed to determine the effect of Public international law in all four areas.<sup>443</sup>

Section 231(4) of the 1993 Constitution makes it abundantly clear that international law is to play a major role in the new South African legal order, particularly in the field of human rights. It provides that:

"(t)he rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or Act of Parliament, form part of the law of the Republic."

This provision confirms the common-law position. However, as the 1993 Constitution is the supreme law of the land,<sup>444</sup> the provision gives customary international law a more elevated status.<sup>445</sup>

Under section 231(4) the status of customary public international law as part of our law is now firmly settled. It does not make any hierarchical distinction between common law, statute and customary international law and it may be accepted that the three will function together on an equal footing.

Customary public international law is no longer subject to the *stare decisis*<sup>446</sup> principle (in that only the Constitution or an Act of Parliament may override it). Thus the courts will still be required to determine which rules of Customary

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<sup>443</sup> For a discussion of the effect of Public International law on the police and defence see Neville Botha "The Role of Public International law in the South African Defence Act 44 of 1957" [Department of Constitutional and Public International law, Unisa]

<sup>444</sup> See section 4.

<sup>445</sup> See section 227(2)(e) which provides:  
"The National Defence Force shall - ...

...

[e] in armed conflict comply with its obligations under international customary law and treaties binding on the Republic; ...".

See also Dugard *International Law* 34.

<sup>446</sup> In terms of this principle lower courts are bound by the decision of superior courts. In effect this means that if a superior court were to find that a certain principle did not constitute customary international law, all courts of equal or lower status would be bound by the decision

international law are binding on South Africa.<sup>447</sup> Under the previous Constitutional dispensation customary international law was overridden by statute, common law, precedent and the so-called "act of state". Under the 1993 Constitution only the Constitution itself or an Act of Parliament may prohibit the application of international customary law. The effect of this provision is that in the future a court of law will not be bound by a decision such as *S v Petane*.<sup>448</sup>

In the past the attitude of the State towards humanitarian law<sup>449</sup> was extremely restrictive. The 1993 Constitution incorporates humanitarian law.<sup>450</sup> In brief, humanitarian law resulted from the prevalence of wars of National Liberation Movements (NLM), which led to demands for the extension of the privileges attached to international armed conflicts to members of NLM's. Consequently, additional Protocol 1 to the Geneva Convention extends the application of the Geneva Conventions of 1949 to<sup>451</sup>

"armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."

To benefit from this provision an NLM is required to deposit a declaration accepting the obligations under the law of Geneva with the Swiss Federal Council.<sup>452</sup> Members of the NLM then become entitled *inter alia*, to be treated as prisoners of war by the Colonial/racist power and not as terrorists.

In 1980 Oliver Tambo, the late President of the African National Congress, deposited a declaration with the President of the Red Cross (and not the Swiss Federal Council) in which the ANC declared that it intended to respect and be

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<sup>447</sup> Dugard *International Law* 340.

<sup>448</sup> *Ibid.*

<sup>449</sup> Botha *op cit.*

<sup>450</sup> See section 231(4)(e) *supra.*

<sup>451</sup> Article 1(4)

<sup>452</sup> Article 9(3).

guided by the general principles of international humanitarian law applicable in armed conflicts and to respect the rules contained in the Geneva Conventions of 1949 and additional Protocol 1 of 1977 wherever practically possible.<sup>453</sup>

South Africa was a party to the major humanitarian treaties, apart from the 1977 Protocols. However, she never incorporated these treaties into municipal law by legislation. The 1949 Geneva Conventions were published twice for general information in the government gazette,<sup>454</sup> but that did not constitute legislative incorporation.<sup>455</sup> Despite this, where our courts dealt with aliens they referred to both the Hague Regulations and the Geneva Conventions of 1929 as if they were part of our law.<sup>456</sup>

Interestingly, when they failed to accord the members of the NLM's the privileged treatment of prisoners of war. The South African government not only refused to sign the 1977 protocols, but also rejected this development in humanitarian law and continued to treat the escalating conflict as an internal war to which only the common article 3 of the Geneva conventions at most was applicable. The issue was raised before South African and Namibian court on a number of occasions.<sup>457</sup>

### 6.5.2 Treaties

Section 231(1) governs the applicability of Public international law on pre-Constitution and post-Constitution Acts of Parliament. Section 231(2) and (3) govern the position with regard to treaties. As with earlier constitutions, the President negotiates and signs international agreements.<sup>458</sup> Under the 1993 constitution, however, section 231(2) provides that parliament decides on the

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<sup>453</sup> See Dugard *International Law* 333-334.

<sup>454</sup> *Ibid* 335.

<sup>455</sup> *Ibid.*

<sup>456</sup> *Ibid.*

<sup>457</sup> *Ibid* 336-337.

<sup>458</sup> See section 82(1)(i).

ratification of or accession to treaties. Under the previous dispensation Parliament did not play this role. In other words, section 231(2) gives the legislature a role which was previously played by the executive.

Dugard<sup>459</sup> draws a distinction between two types of ratification of treaties, namely the international and constitutional ratification. The former applies to those treaties, which apart from the signatory, also require ratification to bring them into force internationally. This does not, however, give the treaty National application. The latter (i.e. Constitutional ratification) gives the treaty National application. This represents a radical departure from previous practice and a democratisation of the treaty process. In effect, this treaty process will mean that far more treaties will form part of the law of South Africa and will have to be considered by both practitioners and the judiciary.<sup>460</sup>

Whatever method is used to incorporate treaties, the number of treaties incorporated into municipal law will increase, and any human rights convention ratified by Parliament will immediately become part of municipal law.

### **6.5.3 Avenues for the Incorporation of Public International Law**

In the preceding paragraphs we showed the convergence of constitutional options in South Africa. That convergence was most evident than on the need for a Bill of Rights. Although the form and content remained contentious, it was quite evident that it would be inspired by international human rights law. This was borne out by the proposals of both of the major parties, namely the ANC and the NP. In the introduction to their Working document on a Bill of Rights for New South Africa, the ANC states that:<sup>461</sup>

"[w]e have relied heavily on the Universal Declaration of Human Rights and the

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<sup>459</sup> Dugard *International Law* 342-343.

<sup>460</sup> Botha *op cit.*

<sup>461</sup> See ANC Working Document on a Bill of Rights for a new South Africa (Centre for Development studies)[UWC] 1990 iii-v.

two International Covenants of 1966 and have also drawn upon the European Convention of Human Rights and the African Charter of Human and Peoples' Rights."

Like the ANC, the South African Law Commission is indebted to international human rights law in both of its reports.<sup>462</sup> Also, and perhaps more significantly, the National-party government's proposals on a Charter of Fundamental Rights of 2 February 1993 betrays the influence of these conventions.<sup>463</sup> Hence, Dugard maintains that IHRL will guide the interpretation of the South African bill of rights whether or not South Africa accedes to the major human rights conventions which comprise the *corpus* of IHRL.<sup>464</sup>

During the apartheid era South Africa refused to subject itself to either Constitutional or international law restraints in the field of human rights. The situation has changed dramatically since 1990. Now South Africa accepts the need to protect human rights by both national and international means. The Bill of Rights contained in Chapter 3 of the 1993 Constitution not only provides evidence of South Africa's commitment to human rights but also lays the foundation for accession to major human rights conventions which comprise the *corpus* of IHRL.<sup>465</sup>

As shown above,<sup>466</sup> chapter 3 (fundamental rights) of the 1993 Constitution includes very few second generation rights.<sup>467</sup> However, it would seem there is no obstacle in the way of South Africa's accession to the International Covenant on Economic Social and Cultural Rights as it only requires a progressive

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<sup>462</sup> See Working Paper 25, Project 58 (Group and Human Rights) interim Report 1992.

<sup>463</sup> For instance, article 4 explicitly refers to the ICCPR.

<sup>464</sup> See Dugard *International Law* 230. For specific incorporation of international human rights conventions and foreign constitutions see Lourens Du Plessis "The genesis of the provisions concerned with the application and interpretation of the chapter of fundamental rights in South Africa's transitional constitution" 1994 *TSAR* 718.

<sup>465</sup> *Ibid* 349-350.

<sup>466</sup> See par. 6.3.5.3.4 *supra*.

<sup>467</sup> See sections 26 (economic activity), 27 (labour relations), 31 (language and culture), and 32 (education) deal with second-generation rights.

realisation of the second-generation rights.<sup>468</sup>

Already international human rights Law has had a marked influence on chapter 3 of the 1993 Constitution. For instance, several of its provisions are modelled on those of the International Covenant on Civil and Political Rights and, in particular, the property rights clause (section 28) contains an expropriation clause that reflects international law standards. The provisions of Chapter 3 are sufficiently similar to those of the ICCPR and the European Convention to ensure that the jurisprudence of the Human Rights Committee and the European Court of Human Rights will guide South African Courts and lawyers.<sup>469</sup> This appears quite clearly in section 35<sup>470</sup> which provides that :

"[I]n interpreting the provisions of this chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and *shall*, where applicable have regard to public international law applicable to the protection of the rights entrenched in this chapter, and *may*, have regard to comparable foreign case law." (italics added)

In addition, the Human Rights Commission<sup>471</sup> is required to measure any proposed legislation against the Bill of Rights or norms of international human rights law which form part of South African law or other relevant norms of international law and to report any conflict between such norms and the proposed legislation to the relevant legislature.<sup>472</sup> Provision is also made for the recognition of humanitarian law governing armed conflict.<sup>473</sup>

The South African Bill of Rights is not only inspired by international human rights law, but also draws heavily on the language and structure of major human rights Conventions. Thus even if there was no reference to international

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<sup>468</sup> See Dugard *International Law* 350.

<sup>469</sup> *Ibid.*

<sup>470</sup> *Ibid.*

<sup>471</sup> See section 115.

<sup>472</sup> See section 116(2).

<sup>473</sup> See section 227(2)(e).

law in Chapter 3 South African Courts would still be obliged to turn to international human rights law for guidance.<sup>474</sup> The Zimbabwean and Namibian Bills of Rights do not contain an express direction to apply international law. However, the courts of Zimbabwe and Namibian have not hesitated to draw on international human rights treaties, customary law, and the decisions of the European Court of Human Rights to assist them in interpreting their Bills of Rights.<sup>475</sup> These Courts relied on, *inter alia*, the presumption in favour of compliance with international law,<sup>476</sup> the similarity of the domestic provisions to those in international human rights conventions,<sup>477</sup> or the legislative history of the Bill of Rights.<sup>478</sup> Furthermore, section 35(1) strengthens the role of international law in the interpretative process as it obliges courts to apply international law where it is applicable.

As every section of chapter 3 has some counterpart in an international human rights instrument or is governed by general principles of international law there will hardly be any situation where public international law is not applicable under section 35(1).

Dugard maintains that section 35(1) does not limit a courts enquiry to treaties to which South Africa is a party or to customary rules that have been accepted by South African courts. He argues, firstly that the phrase "where applicable" does not impose such a limitation, and secondly, that the fact that the authors

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<sup>474</sup> See John Dugard "International Human Rights" in *Rights and Constitutionalism : The New South African Legal Order* (unpublished manuscript) 193.

<sup>475</sup> *Ibid.*

<sup>476</sup> See Dugard *International law* 47 and 226.

<sup>477</sup> See *S v A Juvenile* 1990 [4] SA 151 (ZSC) at 155 G-1, 1591; *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 [3] SA 76 (NMS) at 87 B-C.

<sup>478</sup> See *Minister of Home Affairs v Fisher* [1980] AC 319 at 328-9. In this case Lord Wilberforce held that in interpreting the Bermuda Constitution Act it was necessary to recall that it was influenced by the European Convention on Human Rights and the Universal Declaration of Human Rights, and that "these antecedents ... call for a generous interpretation, avoiding what has been called the 'austerity of legalism, suitable to give to individuals the full measure of the fundamental rights and freedoms' contained in the constitution." This *dictum* was approved in *Minister of Defence, Namibia v Mwandighi* 1992 [2] SA 355 (NMS) at 362-3 and *ANC (Border Branch) v Chairman, Council of State of Ciskei* 1992 [4] SA 434 (CK) at 447. Also see the *dictum* of Friedman J in *Nyamakazi v President of Bophuthatswana* 1992 [4] SA 540 (B) at 570 H.

of the constitution did not intend to qualify the applicable rules of international law is confirmed by section 116(2), which directs the Human Rights Commission to judge South African legislation by the “norms of international human rights law which form part of South African law.”

According to Dugard this means that South African Courts will be required to consult all the sources of international law recognised by article 38(1) of the Statute of the International Court of Justice, i.e.

- “(a) international Conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognised by civilised nations;
- (d) ... 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.”

Thus Dugard concludes that while a court is obliged to consider only bilateral treaties to which South Africa is a party, it is apparently required to consider all relevant general or multilateral treaties, whether South Africa is a party to the multilateral treaty in question or not. Dugard draws this Conclusion from the use of the term “public international law” without qualification in section 35(1) and the language of section 116(2). He further points out that to limit multilateral treaties to those South Africa is a party to (or may become a party to) would prevent a court from considering the jurisprudence of the European Commission and Court of Human Rights, which provides a most valuable source of international human rights law.

The guidance that South African Courts may obtain from the European Court of Human Rights is quite evident in Zimbabwean<sup>479</sup> and Namibian<sup>480</sup> case law

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<sup>479</sup> See *S v Ncube* 1988 (2) SA 702 (ZS) at 714-717; *S v A Juvenile* 1990 (4) SA 151 (ZS) at 156, 161, 167- 168, 170-173.

<sup>480</sup> See *Ex parte Attorney-General, Namibia: In re Corporal punishment by Organs of State* 1991 (3) SA 76 (NMS) at 87-8, 90.

on human rights. Similarly, South African courts could obtain such guidance in the interpretation clause which directs the Courts to “have regard to public international law”.<sup>481</sup> Section 35(1) does not require the courts to conduct an enquiry into whether a particular principle contained in one or more human rights conventions is backed by sufficient practice (*usus*) and *opinio iuris* to qualify as a customary rule binding on South Africa.<sup>482</sup>

Thus South African courts may simply seek guidance in the language employed by *inter alia* the European Convention and the European Court of Human Rights.<sup>483</sup> This approach emerged quite clearly in the courts of Zimbabwe and Namibia on the question whether corporal punishment constituted a form of inhuman or degrading treatment or punishment.

In *S v Ncube*<sup>484</sup> and *S v A Juvenile*<sup>485</sup> the Zimbabwe Supreme Court invoked the decision of the European Court of Human Rights in *Tyler v United Kingdom*<sup>486</sup> to support its finding on the unconstitutionality of corporal punishment. The supreme Court of Namibia adopted a similar approach in *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State*.<sup>487</sup> Also, the supreme Court of Zimbabwe relied on a judgement<sup>488</sup> of the European Court of Human Rights and dissenting opinions in the Human Rights Committee on the death row question. The Supreme Court of Zimbabwe<sup>489</sup> relied on this foreign human rights jurisprudence in holding that a prolonged period on the death row constituted inhuman or degrading treatment or punishment in violation of the Bill of Rights. On the basis of this foreign jurisprudence the court set aside the death sentences imposed on four prisoners who had spent between 52 and 72

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<sup>481</sup> See section 35(1).

<sup>482</sup> See John Dugard “International Human Rights” 194.

<sup>483</sup> *Ibid.*

<sup>484</sup> 1988 (2) SA 702 (ZS) at 714-15, 719-21.

<sup>485</sup> 1990 (4) SA 151 (ZS) at 156, 161, 167, 170, 171-3.

<sup>486</sup> ECHR, series A, vol. 26, Judgement of 25 April 1978.

<sup>487</sup> 1991 (3) SA 76 (NMS) at 87-88, 90.

<sup>488</sup> See *Soering v United Kingdom* ECHR series A, vol. 161, Judgement of July 1989.

<sup>489</sup> See *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe and Others* 1993 Z SACR 423 (25).

months on death row and substituted sentences of life imprisonment.

As the European Convention on Human Rights forms part of the municipal law of many European States it is applied directly by the municipal courts of many states. Seeing that these decisions constitute a source of public international law they will be relevant to the inquiry to be conducted under section 35(1) or alternatively they will qualify as foreign case law under this section. All in all, in interpreting the Bill of Rights South African courts are therefore required to have regard to treaties, customary law, general principles of law recognised by civilised nations, the writings of jurists and foreign case law.

Section 35(1) does not compel South African courts to apply norms of international law. It merely obliges them to "have regard" to such norms, where applicable in their search for an interpretation of the Bill of Rights that will "promote the values which underline an open and democratic society based on freedom and equality...". However, when South Africa incorporates human rights conventions which comprise the *corpus* of International Human Rights law in terms of section 231(3) South African Courts will be obliged to apply them as they would an ordinary statute. Consequently, international human rights norms will then have a double statutory basis in municipal law. There could be no doubt, therefore, that the IHRL which has hitherto been disregarded by our courts and repudiated by the previous "Parliament and Executives alike will play a central role in Constitutional litigation."<sup>490</sup>

#### **6.5.4 Interpreting the 1993 Constitution**

In paragraph 8.3 it was shown how sections 35 and 231 provided avenues for the incorporation of public international law in the 1993 constitution. Here it is necessary to focus on the interpretation of the Constitution in general and the Bill of Rights in particular.

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<sup>490</sup> See Dugard "International Human Rights" *op cit* 194 *et seq.*

Before the adoption of the 1993 Constitution the principle of literal interpretation was firmly entrenched in our law.<sup>491</sup> However, section 4(1) of the 1993 constitution states that the Constitution shall be the supreme law of the Republic. Section 35(1) of the Constitution provides for the following with regard to the Bill of Rights :

“In interpreting the provisions of this chapter a court of Law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter (3), and may have regard to comparable foreign case law.”

Section 35(3) which deals with the interpretation of legislation in general, provides that:

“[i]n the interpretation of any law and the application and development of the common law, and customary law, a court of law shall have due regard to the spirit, purport and objects of this Chapter.”

These provisions challenge the principle of textualism or literal interpretation.<sup>492</sup>

The challenge to the principle of textualism is particularly significant as both the Constitutional Court and ordinary Courts will be concerned with the interpretation and the application of the Constitution in general and Chapter 3 in particular. Section 103 of the Constitution provides that if a party before a court of law alleges that the legislation in question is in conflict with the Constitution, and the presiding officer is of the opinion that it is in the interest of justice, the case may be postponed to enable the matter to be referred to either the provincial or local division of the supreme court or the constitutional

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<sup>491</sup> See *Public Carriers Association v Toll Road Concessionaries* 1990 (1) SA 925 (A) at 934 J.

<sup>492</sup> CJ Botha “Interpretation of the Constitution” (paper read at a Conference entitled “Towards the New Constitution” organised by the Verloren van Themaat Centre for Public Law Studies, Unisa 28-29 March 1994) 1.

court for a decision regarding the validity of the legislation in question. Read with section 35(3) this means that all judicial officers could be called upon to interpret not only the Constitution, but also other legislation with due regard to the "spirit and objects of the Bill of Rights."<sup>493</sup> The purposive and flexible interpretative methodology flowing from the 1993 Constitution negate the above mentioned interpretation principle.<sup>494</sup>

The purposive methodology will require that the courts not only get acquainted with international human rights law in terms of section 35, but also reacquaint themselves with public international law in general, since it becomes part of South African Law in terms of section 231. As Botha correctly observed:<sup>495</sup>

"[a] way must be found to reach the lost generations of international lawyers, judges, advocates, magistrates, attorney, students and law teachers. We will all be called upon not only to reconceptualise our notions of international law as such, but also to reassess the very basis from which our legal system operates. It is only to be hoped that we will be sufficiently open to meet these challenges."

There are several reasons why the traditional South African approach to legislative interpretation cannot be applied to the 1993 Constitution. Firstly, the doctrine of parliamentary sovereignty has given way to the principle constitutional supremacy. The Nazi notion of Law-is-Law has been abolished. The Constitution is the supreme law of the land, against which all legislative, executive and judicial acts will be tested.<sup>496</sup> Secondly, the constitution is the fundamental law of the land and as such it embodies the values of society such

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<sup>493</sup> See also *Ntenti v Chairman, Ciskei Council of State* 1993 (4) SA 546 (CKGD) 555 I-J and 556 A where Heath J stated that the constitution is the source of the fundamental rights, reflecting the norms against which the other legislation is to be tested. This applies to legislation and governmental actions, as well as to the judiciary in applying and interpreting the laws of the country. With regard to Criminal justice in the lower courts under a supreme constitution in South Africa, see Southwell and Van Rooyen "The procedural management of Constitutional issues in criminal trials in a future South Africa: a Cost - effectiveness study" 1993 *CILSA* 346-351.

<sup>494</sup> See Neville Botha "The Role of Public International law in the South African Defence Act of 1957" (Department of Constitutional and Public International Law, Unisa)

<sup>495</sup> *Ibid.*

<sup>496</sup> *Ibid* 3.

as freedom, equality and justice. These values are embodied in the Bill of Rights which, like the Constitution, is fundamental, and thirdly, the courts will be bound by peremptory rules of International Human Rights law.

As shown in the previous paragraph, in interpreting the Constitution South African courts could learn a great deal from their Zimbabwean and Namibian counterparts. The Supreme Courts of Namibia and Zimbabwe have made a successful transition from the doctrine of parliamentary sovereignty to Constitutional supremacy. In a number of cases<sup>497</sup> the courts in Namibia and Zimbabwe applied virtually all the international human rights instruments and case law applicable, and referred to a wide selection of foreign case law dealing with constitutional adjudication. Furthermore, it was interesting to note that a large number of the decisions referred to were from so-called "third-world countries" which have made the transition from parliamentary sovereignty to Constitutional supremacy.

The principles of Constitutional interpretation expounded by Southern African Courts are briefly discussed below. As a general point of departure the police state based on the doctrine of parliamentary sovereignty has now been replaced by a constitutional state (*Rechtsstaat*) based on the principle of Constitutional supremacy. The impact of this principle on Constitutional interpretation was expressed in definite and emphatic terms in *S v Acheson*.<sup>498</sup> Mahomed AJ summed it up as follows:

"[T]he Constitution of a Nation is not simply a statute which mechanically defines the structures of government and the relations between the governed. It is a 'mirror reflecting the National soul'; the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and

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<sup>497</sup> See *Ex parte Attorney General, Namibia: In re Corporal Punishment by Organs of the State* 1991 (3) SA 76 (NMSC); *Ncube, Tshuma, Ndhlovu* 1988 (2) SA 702 (ZSC) and *S v A Juvenile* 1990 (4) SA 151 (ZSC) (corporal punishment), *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General, Zimbabwe* 1993 (4) SA 239 (death penalty as inhuman and degrading punishment); *Ntenti v Chairman, Ciskei Council of State* 1993 (4) SA 546 (CKGD) (limitation of state liability) and *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 (BGD).

<sup>498</sup> 1991 (2) SA 805 [NM] 813 A-C.

disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion."

The supremacy of the Constitution (including a bill of fundamental rights) requires that individual rights should prevail over the interests of the state. This means that, for the first time in South Africa, state absolutism will be buried forever subject only to the limitations provided for in section 33.<sup>499</sup>

A number of rules of Constitutional interpretation or Guidelines have been developed for courts which are entrusted with the awesome and onerous task of being the guardians of a constitution containing a bill of rights.<sup>500</sup> These rules (or guidelines) include:

- (a) all legislation must be consistent with the Constitution otherwise it will be *ultra vires* and the courts will declare it null and void and of no force and effect;
- (b) the Constitution must be liberally construed, taking into account its terms and spirit, the intention of the framers and the objectives and reasons for its legislation;
- (c) the Constitution must be interpreted in the context and setting existing at the time when the case is heard, and not when it was passed, otherwise the growth of society will not be taken into account; and
- (d) a law that ignores the legal and moral standards of the fundamental human rights contained in the Constitution cannot be just. If a violation of those rights cannot be justified by the limitation clause (section 33) it must be struck down. The onus to prove that the violation of a fundamental right is justified rests on the state.

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<sup>499</sup> Unfortunately Galgut AJA in *Government of Bophuthatswana v Segale* 1990 (1) SA 434 (BA) held the opposite and incorrect view that the legislature in 1977 did not intend that individual rights could take precedence over the interests of the state. This orthodox view was also confirmed in *Mokwele v Government of the Republic of Bophuthatswana* 1994 (1) SA 503 (B).

<sup>500</sup> See *Ntenti v Chairman, Ciskei Council of State* 1993 (4) SA 546 (CK) at 554-5.

Finally, South Africa has established a Constitutional State based on the dynamic concept of the rule of law.

## **6.6 The Dynamic Concept of the Rule of Law and the Current Constitution-making Process in South Africa**

### **6.6.1 General**

The 1993 South African Constitution is an interim or transitional Constitution and will only last for a maximum period of five years. The interim Constitution gives effect to the agreement reached at the Multiparty negotiation process [which produced the transitional Constitution] on a so-called two-phase constitution-making process whereby the said negotiation forum would draw up and adopt the interim Constitution which was then ratified by Parliament under the 1983 Constitution, Act 110 of 1983.<sup>501</sup> This procedure was also followed in Zimbabwe where the Lancaster agreement was ratified by the Rhodesian Parliament to enable it to surrender sovereignty to the new state and terminate its own existence.<sup>502</sup> In South Africa, however, it is strictly speaking not the creation of a new State.<sup>503</sup> Hence, Van Wyk maintains that:<sup>504</sup>

“the Constitution is, after all, an Act of Parliament under the old system, and as such it fulfils the crucially important requirement of Constitutional Continuity. On the other hand, however, it also represents a fundamental break with the old order of parliamentary sovereignty and its peculiar way of legislative drafting.”

The preamble of the interim Constitution provides binding guidelines for the writing and adoption of the final Constitution. The requirement of Constitutional Continuity is embedded in the preamble which makes it

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<sup>501</sup> See Basson *South Africa's Interim Constitution* 1-2.

<sup>502</sup> See Chapter 5 par. 2.1.4.2 *supra*.

<sup>503</sup> As South Africa had been an independent State and a member of the United Nations.

<sup>504</sup> See Dawid Van Wyk “Introduction to the South African Constitution” in *Rights and Constitutionalism: The New South African Legal Order* (unpublished manuscript)159.

abundantly clear that the 1993 Constitution provides for the continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution.<sup>505</sup> The preamble underlines the fact that the members of the Constituent Assembly (as the representatives of all the people of South Africa)<sup>506</sup> are mandated to write and adopt the final Constitution in accordance with a “solemn pact” recorded as Constitutional principles.<sup>507</sup> This solemn pact and the provisions that require the Constitutional Court to certify that the new Constitution complies with the Constitutional principles are the only provisions of the interim Constitution which are entrenched and protected against any amendment whatsoever.<sup>508</sup> Furthermore, the preamble refers to the need to create a new order in South Africa (to replace the oppressive and autocratic rule that prevailed under apartheid Colonialism) and it prescribes the values of the new order.<sup>509</sup>

The Constitution-making process envisaged by the Constitution is part and parcel of a process that started in 1990 in an attempt to normalise the political situation and enable all the people of South Africa to realise their right of self-determination and equal rights. Hence, it is proposed here to describe the constitution-making structures and procedures, the Constitutional principles governing the process and the values of the new order in order to determine whether or not the evolving Constitutional order will meet the requirements of the dynamic concept of the rule of law.

### **6.6.2 Constitution-making Structures and Procedures**

At the Multi-party Negotiating Process (the MPNP) two diametrically opposed views were presented with regard to the structures and procedures for the

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<sup>505</sup> See Basson *South Africa's Interim Constitution* 1.

<sup>506</sup> See the preamble last but one paragraph.

<sup>507</sup> These principles are contained in schedule 4 of the Constitution. This schedule has the same status as any provision of the Constitution. See Basson *South Africa's Interim Constitution* 348.

<sup>508</sup> See sections 73 and 74.

<sup>509</sup> See Basson *South Africa's Interim Constitution* 1.

writing and adoption of the new Constitution.<sup>510</sup>The liberationist group (led by the ANC) held the view that the Constitution should be drawn by a Constituent Assembly democratically elected by all the people of South Africa as the liberationist group and the International Community had demanded over many decades. This method of Constitution-making (also known as *pouvoir constituant*) is the most democratic because the Constitution is drawn up and adopted by the representatives of the people who are chosen in terms of democratic elections (as occurred in Namibia).<sup>511</sup>This method legitimises the Constitution as it would be based on the will of all the people as envisaged by the Universal Declaration of Human Rights and related human rights conventions.<sup>512</sup>

The "Establishment Parties" held the opposite view and argued for a Constitution to be drawn up by the MPNP itself. According to this group the final Constitution would be drawn up and adopted by the MPNP and then elections would be held in terms of that Constitution. This method (also known as *pouvoir constitué*) was used in Namibia by the Turnhalle Conference and in Zimbabwe by the Lancaster Conference. The process of *pouvoir constitué* differs from that of *pouvoir constituant* in that the constitution is not drawn up at a certain historical moment by a newly-elected Constituent Assembly but originates from the colonial order through amendments to the Constitution which are effected by the existing structures. This process was rejected because the illegitimacy of the tricameral system and Bantustan system would tarnish the legitimacy of the new constitution.<sup>513</sup> In particular, it would encroach upon the rights of self-determination of all the people of South Africa. However, the MPNP did not accept the first process lock, stock and barrel. Instead they adopted a compromise two-phase process of Constitution-making which contained elements of both.<sup>514</sup>

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<sup>510</sup> *Ibid* 96.

<sup>511</sup> See Chapter 5 par. 2.2.9 *supra*.

<sup>512</sup> See article 21 of the UDHR.

<sup>513</sup> See Basson *South Africa's Interim Constitution* 97.

<sup>514</sup> *Ibid*.

According to this agreed two-phase process of Constitution-making the present interim Constitution was drawn up and adopted by the MPNP and enacted by the Tricameral Parliament. Elections were then held to elect the present three-tier government of National Unity. The Constitutional Assembly (consisting of the Senate and National Assembly sitting together)<sup>515</sup> has now began the task of drawing-up the final Constitutional for South Africa subject to prescribed majorities, Constitutional principles etc. The Constitutional Court must certify that the final Constitutional complies with the Constitutional Principles embodied in Schedule 4.<sup>516</sup>

### **6.6.3 The Nature of the State and Constitutional Principles**

The preamble of the interim Constitution prescribes the values which should underpin the final Constitutional - that is, the new South African Constitutional dispensation.<sup>517</sup> It states that:<sup>518</sup>

"there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic Constitutional State in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms."

More specifically, this provision replaces the autocratic apartheid rule based on the doctrine of parliamentary sovereignty with a Constitutional State (*Rechtsstaat*) based on the legal values of democracy, dignity, equality and freedom, and furthermore, and perhaps more significantly, promoting the principle of national unity regardless of race, gender and so on.

The fourth Constitutional Principle incorporates the principle of Constitutional

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<sup>515</sup> See section 68.

<sup>516</sup> See section 71.

<sup>517</sup> See Basson *South Africa's Interim Constitution* 2.

<sup>518</sup> *Ibid* 1.

Supremacy that replaced the doctrine of Parliamentary sovereignty. This is the principle that marks the break with the apartheid past. The principles also requires a legal system that ensures the principle of Constitutional Supremacy. To achieve this the preamble ensures that the interim constitution is based on constitutional principles which shall also be binding on the Constituent Assembly when it draws up the final constitution.

The underlying values of the new constitutional order were dealt with above, in particular, when chapter 3 (Fundamental Rights) was addressed. These legal values and the Constitutional Principles will shape the nature of our new Constitutional order. As the legal values have already been dealt with the focus will now shift to the Constitutional principles.

The Constitutional principles contained in schedule 4 of the interim Constitution are of critical importance as no final Constitutional text will be of force and effect unless it has been certified by the Constitutional Court to be in compliance with them.<sup>519</sup>

The idea of Constitutional principles is not new to Southern Africa. In Zimbabwe and Namibia, as we saw above,<sup>520</sup> Constitutional principles were adopted. In South Africa the First Constitutional principles were embodied in the Declaration of Intent which was adopted by Codesa. However, to accommodate the "new" parties that joined the MPNP (which replaced Codesa) the "new" Negotiating Council began to investigate Constitutional principles that would form the essence of a future democratic dispensation. The principles identified by Codesa were not automatically accepted by the "new" parties that joined the negotiating process. On 2 July 1993, 17 November 1993, and again in March and April 1994, a set of thirty three Constitutional principles was accepted by the Negotiating Council. The Negotiating Council agreed that the

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<sup>519</sup> See section 71(1) and (2).

<sup>520</sup> See Chapter 5 paragraphs 2.1 and 2.2.

thirty-three principles would be applicable to the transitional as well as all future Constitutions, and that any Constitutional provision (whether on a National or provincial level) inconsistent with the principles would be invalid.<sup>521</sup>

#### **6.6.4 Application of Constitutional Principles**

As shown above,<sup>522</sup> the MPNP adopted a two-phased approach to the Constitution-making process. Phase one entailed the completion of an interim Constitution that complied with the Constitutional principles. This Constitution came into force in April 1994 replacing the 1983 Constitution. The representatives that have been elected according to the interim Constitution have a dual function. On the one hand, they are acting as members of the National legislature and, on the other hand, are members of the Constituent Assembly (which is made up of the National Assembly and Senate in a joint sitting) that is currently drawing up a final Constitution for South Africa. The second phase will end when the final Constitution becomes operational.

The Constituent Assembly is required to draw up the final Constitution within two years.<sup>523</sup> However, Constitutional Principles XXXII and XXXIII entrenches the idea of a government of National Unity for 5 years. These principles determine how the National Executive shall be composed and that it shall function in the manner provided for by the transitional Constitution,<sup>524</sup> and that no election shall take place before April 1999 unless a motion of no confidence in the National executive is passed by Parliament. The following has been provided regarding the legal status of the Constitutional principles:

- (a) The Constitutional Assembly will be bound by the Constitutional Principles

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<sup>521</sup> See Bertus de Villiers "The Constitutional Principles: Content and significance" in *Birth of A Constitution* 41.

<sup>522</sup> See Basson *South Africa's Interim Constitution* 96 ff.

<sup>523</sup> See section 73(1).

<sup>524</sup> On the National Executive in general see Basson *South Africa's Interim Constitution* 107 ff.

which will constitute an annexure to the Constitution;<sup>525</sup>

- (b) While the new Constitution is being drawn-up, any provision can be referred to the Constitutional Court at the request of one-third of the Constituent Assembly in order to obtain a ruling on whether the provision in fact complies with the requirements of the Constitutional principles;<sup>526</sup>
- (c) A new Constitution or any part of a new Constitution will become operational only once the Constitutional Court has certified that it complies with the Constitutional principles;<sup>527</sup>
- (d) The ruling of the Constitutional Court will be binding and no other court can have such a ruling investigated;<sup>528</sup>
- (e) The Provincial Constitutions will also have to comply with the Constitutional principles;<sup>529</sup>
- (f) No amendment that is aimed at reducing the binding nature of the Constitutional Principles will be permitted.<sup>530</sup>

It follows from the solemn pact (i.e. Constitutional Principles) contained in scheduled 4 of the interim Constitution (and the experiences of Zimbabwe and Namibia) that representatives of all the people of a self-determination unit are entitled to limit their right of self-determination to accommodate the fears and aspirations of sections of the population. In paragraph 9.5 below we focus specifically on a number of the Constitutional Principles to determine the impact of the principles concerned on popular sovereignty or right of self-determination.

#### **6.6.5 The Dynamic Content of the Rule of Law and the Content of the Constitutional Principles**

The Constitutional Principles consists of thirty-four items, of which the special

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<sup>525</sup> Section 71.

<sup>526</sup> See section 71(4).

<sup>527</sup> See section 71(2).

<sup>528</sup> See section 71(3).

<sup>529</sup> See section 160(3).

<sup>530</sup> See section 74.

part on provincial government is made up of further subitems. These principles set out the most important elements of a Constitutional State.

More specifically, the first principle incorporates the legal values of the new constitutional dispensation, while the second principle not only incorporates the idea of human rights, but international human rights law and obligates the Constituent Assembly to incorporate international human rights law into the final Constitution. The third principle endorses the UN Charter and Universal Declaration of Human Rights by specifically prohibiting racial, gender and other forms of discrimination, affirming equality before the law, an equitable legal process and affirmative action.<sup>531</sup>

The principles also incorporate the doctrine of separation of powers between the legislature, executive and judiciary including checks and balances designed to ensure accountability, responsiveness and openness.<sup>532</sup> The principle of Constitutional supremacy is reinforced by an independent and impartial judiciary that has the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.<sup>533</sup> This justiciable Bill of Rights represents a radical departure from the law-is-law doctrine that was developed by our courts during the Constitutional Crisis of the fifties.<sup>534</sup> Principles VIII and XI incorporate *inter alia*, the legal values of an open and democratic governance enshrined in article 21 of the Universal Declaration of Human Rights and other human rights conventions. They guarantee a representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters roll, and, in general proportional representation.<sup>535</sup>

To safeguard an open, accountable and democratic governance the ninth

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<sup>531</sup> See Constitutional Principle V.

<sup>532</sup> See Constitutional Principle VI.

<sup>533</sup> See Constitutional Principle VII.

<sup>534</sup> See Basson and Viljoen *South African Constitutional Law* (1988) 227-234.

<sup>535</sup> See Constitutional Principle VIII.

principle guarantees freedom of information.<sup>536</sup> In addition the tenth Constitutional principle guarantees procedural legality with regard to all law-making activities by the three tiers of government.<sup>537</sup>

In line with article 27 of the Covenant on Civil and Political Rights, Constitutional Principles XI and XII guarantee language, cultural and religious rights and afford the bearers of these rights collective self-determination in forming, joining and maintaining organs of civil society on the basis of non-discrimination and free association.<sup>538</sup>

Provision is also made for the protection of political minorities by guaranteeing their participation "in a manner Consistent" with democracy.<sup>539</sup> The principles relating to traditional authorities<sup>540</sup> and community self-determination<sup>541</sup> seem to limit the right to democratic governance of all the people.<sup>542</sup> As this matter is more complex than meets the eye it will be addressed at some length below.

One of the most contentious issues during negotiations on Constitutional Principles was the question of principle and detail. The COSAG Alliance demanded that the Constitutional Principles should contain a guarantee on the nature of the future Constitutional dispensation, namely that it should be a federation. For the COSAG Alliance it did not suffice that there should merely be a guarantee that there would be three levels of government with guaranteed powers. They insisted on the express use of the word "federation."<sup>543</sup>

A compromise was, however, hammered out and embodied in Constitutional Principles XVIII-XXIII. These principles deal with aspects on the form of state including boundaries of provinces and procedures for their alteration. The

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<sup>536</sup> See Constitutional Principle XI.

<sup>537</sup> See Constitutional Principle X.

<sup>538</sup> See Constitutional Principle XI-XII.

<sup>539</sup> See Constitutional Principle XIV.

<sup>540</sup> See Constitutional Principle XIII.

<sup>541</sup> See Constitutional Principle XXXIV.

<sup>542</sup> See Constitutional Principle XVII.

<sup>543</sup> See de Villiers "The Constitutional Principles : Content and significance" 40.

powers and functions of national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegated basis.<sup>544</sup> The allocation of powers between national and provincial governments shall be based on : (a) financial viability; (b) effective public administration; (c) the promotion of national unity and legitimate provincial autonomy and (d) the acknowledgement of cultural diversity.<sup>545</sup>

Provision is also made for specific criteria for the allocation of powers as well as the right to set norms and standards for the exercise of powers and performance of functions.<sup>546</sup> In summary, the criteria for the allocation of powers and functions makes the form of state neither unitary nor federal.<sup>547</sup> Provision is also made for a deadlock breaking mechanism in case of disputes regarding the allocation of powers and functions.<sup>548</sup> Furthermore, the principles deal with fiscal relations,<sup>549</sup> powers and functions of local government,<sup>550</sup> workers' and employers' rights, civil service<sup>551</sup> and security forces.<sup>552</sup>

Most of the Constitutional Principles reflect proven democratic notions and values<sup>553</sup> inherent in a Constitutional State based on the principle of Constitutional supremacy. Furthermore, and perhaps most significantly, the 34th principle recognises the right of the South African people as a whole to self-determination.<sup>554</sup> However, this right has been qualified in two respects. First, the right of democratic governance at all three levels of government has been tempered by a provision on traditional leadership which was inserted to

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<sup>544</sup> See Constitutional Principle XVIII.

<sup>545</sup> See Constitutional Principle XX.

<sup>546</sup> See Constitutional Principle XXI.

<sup>547</sup> For a discussion of this question see Ron Walts "Is the new South African Constitution federal or unitary?" in De Villiers *Birth of A Constitution* 89 *et seq.*

<sup>548</sup> See Constitutional Principle XXIII.

<sup>549</sup> See Constitutional Principle XXV.

<sup>550</sup> See Constitutional Principle XXIV.

<sup>551</sup> See Constitutional Principle XXVIII.

<sup>552</sup> See Constitutional Principle XXXI.

<sup>553</sup> See Van Wyk "Introduction to the South African Constitution" 159.

<sup>554</sup> See Constitutional Principle XXXIV.

appease the IFP.<sup>555</sup> This provision stipulates that the Constitution has to recognise and protect provincial provisions on the “institution, role, authority and status of a traditional monarch.”<sup>556</sup> The right to democratic governance of all the people is further, and perhaps more seriously, limited by the right of ethnic/racial self-determination.<sup>557</sup>

## **6.6.6 Towards Ethnic Constitutionalism: Prospects and Obstacles**

### **6.6.6.1 General**

The interim Constitution and, in particular, the Constitutional principles preserves the territorial integrity and political national unity of the Republic of South Africa within the 1910 external boundaries. The form of the State developed is neither unitary nor federal. However, it opens the door for federalism and Confederalism as it recognises both the right of self-determination of all the people of South Africa as well as ethnic (or Community) self-determination.

In this regard the 34th Constitutional principle provides:-

- “(1) This schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said rights, Constitutional provision for a notion of the right to self-determination by any Community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.
- (2) The Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the Community concerned for such a form of self-determination.
- (3) If a territorial entity referred to in paragraph 1 is established in terms of this

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<sup>555</sup> See Van Wyk "Introduction to the South African Constitution" 159.

<sup>556</sup> See section 2 of the Constitution of the Republic of South Africa Second Amendment Act 3 of 1994.

<sup>557</sup> See Constitutional Principle XXXIV.

Constitution before the new Constitutional text is adopted, the new Constitution shall entrench the continuation of territorial entity, including its structures, powers and functions."

Although this right of ethnic self-determination could apply to any community in South Africa (especially the Zulus as represented by the IFP) it seems to be limited to the Afrikaner Community. Hence, Chapter IIA provides for the establishment of a *Volkstaat* Council as a mechanism for the realisation of the Afrikaner right of self-determination. Section 184B(3) foresees an Act of Parliament to provide for the procedures to be followed by the Council in the pursuit of its objective, which is to promote a *Volkstaat* for those who want it.

In this thesis it has been shown that all the people of South Africa (both black and white) are the bearers of the right of self-determination within the 1910 external boundaries. The recognition of Community (or ethnic) self-determination raises two major questions. First, whether the universally accepted right of self-determination includes the right to secession and secondly, whether the recognition of ethnic self-determination would be compatible with the right of the people as a whole to self-determination and thirdly and finally, how will such a right affect the form of State?

#### **6.6.6.2 The Right of Ethnic Self-determination in the International-Law Context**

Prior to World War II minorities received special protection including the right to self-determination.<sup>558</sup> After World War II the authors of the Universal Declaration of Human Rights made the quantum leap into the new age of human rights for all, instead of particular groups. The new approach found a definite and emphatic expression in a study by the United Nations Secretariat which concluded its review of the League's system in 1950. The study

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<sup>558</sup> See Patrick Thornberry *Minorities and Human Rights law* [1991]12.

concluded that.<sup>559</sup>

"this whole system was overthrown by the second World War. All the international decisions reached since 1944 have been inspired by a different philosophy. The idea of a general and universal protection of human rights is emerging. It is therefore no longer only the minorities in certain countries which receive protection, but all countries...".

Hence, since the promulgation of the Universal Declaration of Human Rights, the protection of minorities has more or less been absorbed into the wider concept of human rights.<sup>560</sup>

According to the new approach to minority (or group) rights the concept of human rights does not retain the Status of a separate institution of international law although the term minority is still used in treaty law. The first premise of the new system of human rights is that justice is meted out to members of minority groups on the basis of their basic humanity rather than as members of such groups. Thus they are entitled without discrimination to a full range of civil, political, economic, social and cultural rights set out in the major human rights conventions have now become part of South African law, Members of the Afrikaner Volk are fully entitled and are already enjoying these rights as individuals.<sup>561</sup>

The shift of emphasis in the protection from group protection to the protection of individual rights and freedoms departed from the premise that whenever someone's rights were violated or restricted on the ground of race, religion or national origin or culture - the matter could be taken care of by protecting the rights of the individual, on a purely individual basis, mainly by invoking the principle of non-discrimination. This shift is rooted in the UN Charter<sup>562</sup> and the

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<sup>559</sup> *Ibid.*

<sup>560</sup> *Ibid* 13.

<sup>561</sup> *Ibid.*

<sup>562</sup> See Article 1 (3)

Universal Declaration.<sup>563</sup> All of them incorporated the rule of non-discrimination on grounds of race, sex, language, religion or similar grounds.<sup>564</sup>

Proposals for the inclusion of an article on National minorities in the Universal Declaration were rejected. However, the General Assembly stated that the fate of minorities had to be considered.<sup>565</sup> Thus when the commission on human rights was established in 1946, it was authorised to create a sub-commission on Prevention of Discrimination and Protection of Minorities. This Committee played a critical role in the preparation of Article 27 of the Covenant on Civil and Political Rights. The article provides:

"In those States in which ethnic religious or linguistic minorities exist, person belonging to such minorities shall no be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

There are different interpretation to article 27. Some argue that it deals with individual rights, and excludes direct protection of groups as envisaged by the UN Charter<sup>566</sup> and the Universal Declaration.<sup>567</sup> Others see the Wording of Article 27 as an attempt to avoid giving any group an international personality.<sup>568</sup>

Be that as it may, the protection of minorities by article 27 of the Covenant on Civil and political Rights seems to relate to Cultural, rather that political self-determination. Hence, minorities are not accorded the requisite international personality and are required to exercise their rights to language, culture and religion within the existing State. As minorities do not have an international personality and the right of political self-determination they could therefore not have the right of secession. This question was addressed satisfactorily by the

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<sup>563</sup> See Article 2 (1).

<sup>564</sup> See Natan Lerner *Group Rights and Discrimination in International Law* (1991)14

<sup>565</sup> See GA Res. 217 C III (1948).

<sup>566</sup> See Lerner *Group Rights and Discrimination in International law* 15

<sup>567</sup> *Ibid.*

<sup>568</sup> *Ibid.*

Declaration on Principles of International law Concerning friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (the "Declaration on Friendly Relations").<sup>569</sup> Neither of the purposes set forth by the Declaration on Friendly Relations suggests that self-determination is intended to provide every ethnically distinct people with its own State. In fact (as Hannum<sup>570</sup> correctly observed) the particular mention of the "distinct" status of "a Colony or other self-governing Territory" suggests a limited scope for the right of self-determination. Similarly, Hannum<sup>571</sup> suggests that the use in the same paragraph of the singular "people" suggests that various minorities within a territory may not enjoy the same right of self-determination as that possessed by the people as a whole.

Hence, the Declaration on Friendly Relations places the goal of territorial integrity or political/National unity as principle superior to that of self-determination. This goal, however, apply to those states which conduct themselves

"in compliance with the principle of equal rights and self-determination of peoples and (are) thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."<sup>572</sup>

It follows from this that a State will not be considered to be representative if it formally excludes a particular group from participation in the political process, based on that Group's race, creed, or colour.<sup>573</sup> For instance, as was the case in South Africa or Southern Rhodesia under the Smith regime. The new South Africa, on the contrary can be said to be representative of all the people as envisaged by the Declaration on Friendly Relations. It is also suggested that the language of the common article 1 of the ICCPR and ICESCR is evidence of the

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<sup>569</sup> See Hurst Hannum "Rethinking self-determination" in *Virginia Journal of International law* (vol. 34 number 7 Fall 1993)16.

<sup>570</sup> *Ibid.*

<sup>571</sup> *Ibid.*

<sup>572</sup> See GA Res. 2625.

<sup>573</sup> See Hannum "Rethinking self-determination" 17.

Universality of the right of self-determination and that the reference to "all people and the fact that the article is found in human rights treaties intended to have universal applicability suggest a scope beyond that of decolonisation."<sup>574</sup>

Furthermore and, perhaps more significantly, the interpretation of the common articles 1 of the ICCPR and ICESCR by the Human Rights Committee<sup>575</sup> makes it abundantly clear that the right of self-determination has two aspects - namely, the external and internal aspects. The former include the right of a nation to be free from external influence, and potentially the right to secession. The latter include the right to democracy, i.e. the right to participate in one's own government. The right to democracy (or democratic governance) has already won explicit recognition in the Helsinki Final Act<sup>576</sup> Principle VIII of the Act States:

"By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status without external interference, and to pursue as they wish their political, economic, social and cultural development."

The Helsinki Agreement provides that "all" people "always" have the right to determine their own internal and external political Status. This goes beyond the terse formulation of the 1966 Covenants. However, this does not derogate from the Covenants. The formulation of the Helsinki Agreement must be understood in the context of the Soviet domination of Eastern Europe. Thus Hannum correctly observed that the formulation of the Helsinki Agreement<sup>577</sup>

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<sup>574</sup> *Ibid* 19.

<sup>575</sup> *Ibid* 25 note 105.

<sup>576</sup> See the Final Act of the Conference on Security and Co-operation in Europe (CSCE Final Act"), adopted in 1975 in Helsinki by 35 European states, as a regional, political document rather than a Universal, legally binding agreement. The parties to the agreement included Canada and the United States but did not include Albania, Conference on Security and Co-operation in Europe; Final Act, 1 August 1975, 14 ILM 1292.

<sup>577</sup> See Hannum "Rethinking self-determination" 29.

"must be understood in the Context of the principles of the inviolability of frontiers (principles III) and the territorial integrity of states (principle IV) also proclaimed in the Helsinki Final Act. Again, the proper interpretation of the right of self-determination turns on the definition of "peoples". There is no indication that sub-state groups are to determine their political status or pursue political and economic development without reference to the larger population of the State."

This understanding found support in the November 1990 Charter of Paris<sup>578</sup> which reaffirmed

"the equal rights of peoples and their right to self-determination in conformity with the charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States."

Thus there was no suggestion at Helsinki or in subsequent CSCE meetings that the right of self-determination could justify secession by an oppressed minority.<sup>579</sup>

It appears from the foregoing discussion that the remedy for oppressed minorities is not secession, but the right to democratic governance. As Franck observed,<sup>580</sup> a right to democratic governance is emerging as a norm of customary international law. This right formed the content of the right of self-determination and, in my view applies to both dependent and independent countries. Franck<sup>581</sup> correctly observed that:

"The Covenant [on civil and Political Rights] clearly intends to make the right of self-determination applicable to the citizens of all nations, entitling them to

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<sup>578</sup> See Conference for security and Co-operation in Europe : Charter of Paris for a new Europe Nov. 21 1990 30 ILM 190 1197 (adopted at the meeting of the heads of government of the participating States of the CSCE).

<sup>579</sup> *Ibid.*

<sup>580</sup> See Thomas M Franck "The emerging Right to Democratic Governance " in 1992 (86) *American Journal of International Law*, 46 and 52.

<sup>581</sup> *Ibid* note 144.

determine their collective political status through democratic means ... when the covenant came into force, the right of self-determination entered its third phase of enunciation: it ceased to be a rule applicable only to specific territories (at first, the defeated European powers; later, the overseas trust territories and colonies) and became a right of everyone. *The right now entitles peoples in all states to free, fair and open participation in democratic process of governance freely chosen by each state.*" (italics added).

In summary, the right to democratic governance has become one of the legal values underlying a Constitutional state based on the principle of Constitutional supremacy. This right applies to both dependent and independent countries and subordinates minorities to governments representative of all the people within a given self-determination unit.

The right to democratic governance implies that the denial of a claim to self-determination by only a portion of the entire population of the state (where the latter had already been recognised by the international community as representing its people as in South Africa) denial of self-determination to the Group (e.g. the Afrikaner Group) can be seen as merely supporting the self-determination of the larger "people",<sup>582</sup> that is, the people of South Africa as a whole as envisaged in the Freedom Charter.

It must be noted, however, that secession is not presently recognised as a right under international law, nor does international law prohibit it. As Espiell puts it:

"The express acceptance in ... [relevant United Nations resolutions] of the principles of the national unity and the territorial integrity of the State implies non-recognition of the right of secession. The right of peoples to self-determination, as it emerges from the United Nations, exists for people under colonial and alien domination, that is to say, who are not living under the legal form of a State. The right to secession from an existing State Member of the

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<sup>582</sup> See Hannum "Rethinking self-determination" 41.

United Nations does not exist as such in the instrument or in the practice followed by the organisation, since to seek to invoke it in order to disrupt the National unity and the territorial integrity of a State would be a misapplication of the principle of self-determination contrary to the purposes of the United Nations Charter.”

Other authors have argued for recognition of a "right to secession" as part of the right of self-determination, but such a right does not yet exist.<sup>583</sup>

The principle of *uti possidetis* limits the exercise of the right of self-determination to the territory within existing borders. The main thrust of the rule is to avoid frontier conflict amongst neighbouring states and to maintain the political unity of states. The rule has been given approval by both the OAU and UN General Assembly. The Declaration on Friendly Relations States the rule as follows:

"[n]othing in the foregoing paragraph shall be construed as authorising or encouraging any action which will dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples described above and thus possessed of a government representing the whole peoples belonging to the territory without distinction as to race, creed or colour."

In terms of this rule, therefore, separatist groups do not have the right to break away from their parent states, as by so doing they would be disrupting the political unity and territorial integrity of the parent states.<sup>584</sup> In other words, under international law the right to self-determination does not entail a corresponding right to secede.

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<sup>583</sup> *Ibid* note 171.

<sup>584</sup> See Dumazi Manganye "The Application of *uti Possidetis* and South African's internal Border" in *Codicillus* vol. XXXV no 2 October 1994 54.

### 6.6.6.3 The Right of Ethnic Self-determination in Eastern Europe

In the main the right of self-determination and claims to secession were addressed in the context of decolonisation. Recently the issue arose in the post colonial case of Yugoslavia. The former Yugoslavia consisted of six Republics and two autonomous regions.<sup>585</sup> The Republics and provinces were populated by different ethnic groups.<sup>586</sup>

The Serbians were in the majority in the former Yugoslavia while the Croats and the Slovenes were in the minority. For fear of domination by the Serbs the Croats and Slovenes sought a loose federation to dilute Serbian influence. Conversely, the Serbians sought tighter federation to preserve their centralised control of the economy and domination of Yugoslavian life.<sup>587</sup> Failure to agree on the future of the Yugoslavian Federation led the Croats and Slovenes to declare independence on 25 June 1991.<sup>588</sup>

The breakaway of Croatia and Slovenia was rejected by the international community which insisted that Yugoslavia remain intact to safeguard the principle of territorial integrity which prohibits unilateral amendment of boundaries.<sup>589</sup> The reluctance of the international Community to recognise the two republics was not only based on the rule of *uti possidetis* but also on the fear of violence in Europe and the precedence that independence would establish for the multitudes of separatist ethnic groups in Europe.<sup>590</sup> This fear was justified as the fall of communist regimes in 1989 had resulted in the rise of Nationalism and demands for recognition by many ethnic groups which

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<sup>585</sup> See Weller "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia" 1992 (86) *American Journal of International Law* 569.

<sup>586</sup> *Ibid.*

<sup>587</sup> *Ibid* 569-570.

<sup>588</sup> See Iglar "The Constitutional Crisis in Yugoslavia and the international law of self-determination: Slovenia's and Croatia's right to secede" 1992 (15) *Boston College of International and Comparative Law Review* 213.

<sup>589</sup> *Ibid.*

<sup>590</sup> *Ibid.*

either sought the restructuring of governments or redrawing of boundaries.<sup>591</sup>

Croatia and Slovenia based their right to self-determination and to secession under the 1946 Constitution. According to the Constitution the seceding republics required the approval of other republics and the federal government and in addition they had to negotiate a procedure for a transition acceptable to the other interested parties.

Following armed clashes between federal Yugoslav forces and Slovenian forces and the seizure of substantial Croatian territory by Croatian Serbs, the European Community<sup>592</sup> adopted “a common position on the process of recognition” of new states in Eastern Europe and Soviet Union:

“The [European]Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their readiness to recognise, subject to the normal standards of international practice and the political realities in each case, those new states which, following the historic changes in the region, have Constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiation.”

Therefore, they adopted a common position on the process of recognition of these new states, which requires: - respect for the provisions of the charter of the United nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;

- guarantees for the rights of the ethnic and national groups and minorities in

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<sup>591</sup> See Manganye "The Application of Uti Possedetis and South Africa's internal border" note 41

<sup>592</sup> See Hannum "Rethinking self-determination" 52.

- accordance with the commitments subscribed to in the framework of the CSCE;
- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreements;
- commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes the community and its Member States will not recognise entities which are the result of aggression. They would take account of the effects of recognition on neighbouring states.

By Resolution 713 the United Nations Security Council endorsed the Declaration of the Conference on Security and Co-operation in Europe (CASE) that no territorial gains or changes within Yugoslavia brought by violence would be acceptable.<sup>593</sup>

Thus the security Council confirmed the application of the *uti possidetis* rule outside the Colonial Context by protecting former provincial or federal boundaries from forcible change.<sup>594</sup>

Furthermore, and perhaps most significantly, it is noteworthy that the CSCE Declaration<sup>595</sup> does not refer to the right of self-determination and right of secession. Also, the cases of Yugoslavia and the Soviet Union were formally considered both by the new states themselves and by the international community to be instances of dissolution rather than secession.<sup>596</sup>

In August 1991 the European Commission established an Arbitration Commission and tasked it, first, to determine the legal status of the Socialist Federal Republic of Yugoslavia and secondly, to decide whether the Serbian population in Croatia and Bosnia-Herzegovina were entitled to the benefits of

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<sup>593</sup> See Weller *op cit* 50.

<sup>594</sup> See Manganye *op cit* 57.

<sup>595</sup> See Hannum "Rethinking self-determination" 53.

<sup>596</sup> *Ibid.*

self-determination. With regard to the first question the commission (a) found that the federation was in a state of disintegration<sup>597</sup> (b)endorsed the principle of *uti possidetis* when it pointed out that in the absence of "an agreement to the contrary, the former boundaries acquired the character of international law"<sup>598</sup> and (c) the Commission went on to state that although the principle *uti possidetis* initially applied to the process of decolonisation it constituted a general principle of international law as declared by the ICJ.<sup>599</sup>

With regard to the right of self-determination of the Serbian populations of Bosnia and Croatia the Commission<sup>600</sup> observed that:

"Whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis*) except where the States concerned agree otherwise."

The Commission concluded that Serbs in Bosnia-Herzegovina and Croatia had "the right to recognition of their identity under international law" and "where appropriate, the right to choose their nationality" but not the right to secede.<sup>601</sup>

Finally, the Commission interpreted the right of self-determination in the Common Articles 1 of the 1966 Covenants as serving to "safeguard human rights" furthermore, the Commission observed that "[b]y virtue of that right every individual may choose to belong to whatever ethnic, religious or language Community he or she wishes."<sup>602</sup> It follows quite clearly from the Yugoslavian and other Eastern European cases that minority do not have the right to self-determination and the corresponding right to secede. However, as part of their

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<sup>597</sup> *Ibid.*

<sup>598</sup> See Hannum "Rethinking self-determination" 53.

<sup>599</sup> See Weller "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia" 590-592.

<sup>600</sup> See Conference on Yugoslavia Arbitration Commission, Opinion no 2 Jan 11 1992 in Hannum "Rethinking Self-determination" note 214.

<sup>601</sup> *Ibid* note 215.

<sup>602</sup> *Ibid.*

right to internal democracy States representing the people as a whole have the right to provide for the right to secede subject to the consent of all the people and to certain procedures. Where no such agreement exists the minorities are only entitled to universally recognised human rights short of the right to self-determination.

#### **6.6.6.4 Ethnic Self-determination in the African Context**

As shown above<sup>603</sup> the OAU and UN confirmed the rule of *uti possidetis* in the context of decolonisation. Thus separatist groups in Africa did not enjoy much support. For instance, the attempted secession of Biafra from Nigeria and Katanga from the former Belgian Congo. In the case of Katanga the United Nations even intervened in support of the Central Congolese government.<sup>604</sup> Recently, however, Alemante G. Selassie<sup>605</sup> has called for a new approach to constitutionalism in Africa which goes beyond the discourse of individual rights and embrace the collective rights of ethnic groups.

Selassie<sup>606</sup> argues that the particular rights that a State may choose to recognise will vary from country to country as the needs and characteristics of ethnic groups vary. Selassie uses the current approach of the Ethiopian Government to illustrate his point. The Ethiopian Transitional Period Charter that came into effect to lead the country through a transition to democracy following nearly two decades of military dictatorship and ethnic strife recognises the right of an ethnic group:

- (a) preserve its identity and have it respected, promote its culture and history, and use and develop its language;
- (b) administer its own affairs within its own defined territory and effectively

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<sup>603</sup> See paragraphs 5.2 & 5.3 *supra*.

<sup>604</sup> See Hannum "Rethinking self-determination" 50.

<sup>605</sup> See Alemante G. Selassie "Ethnic Identity and Constitutional Design for Africa" in *Stanford Journal of International Law* (Fall 1992) 35.

<sup>606</sup> *Ibid.* Also See Douglas Sanders "Collective Rights" 13 *Human Rights Quarterly* 382.

- participate in the Central government on the basis of freedom and fair and proper representation, and
- (c) exercise its right of self-determination of independence when the concerned [ethnic Group] is convinced that the above rights are denied, abridged or abrogated.

The Ethiopian Charter also affirms individual rights contained in the Universal Declaration of Human Rights<sup>607</sup>

According to Selassie the Ethiopian Charter indicate and emerging trend among Constitution-makers in Africa to Consider seriously the collective claims of ethnic groups.<sup>608</sup>

He claims that the Namibian Constitution of 1990 provides for similar rights but in a diluted form.<sup>609</sup>In his view the affirmations of ethnic (or group)rights impliedly rejected the traditional African view that official recognition of ethnic diversity is incompatible with the goals of nation-building, political stability, and modernisation.<sup>610</sup>Selassie<sup>611</sup>believes that recognition of both individual and Group rights is the means by which individual identity may be respected, collective survival ensured, and assimilation resisted.

AS shown in the case of Yugoslavia international law does not recognise the right of self-determination and the corresponding right of secession for minorities within the framework of an existing state. Nevertheless, the Ethiopian Charter not only grant the right of self-determination to minorities, but also grants ethnic groups the right to secede when their rights are denied

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<sup>607</sup> See GA Res. 217 (III).

<sup>608</sup> See Selassie "Ethnic Identity and Constitutional Design in Africa" 36.

<sup>609</sup> He cites Article 19 which provides that: "every person shall be entitled to enjoy practice, profess, maintain, and promote any culture, language, tradition or religion subject to the terms if this Constitution and further subject to the Condition that the rights of others or the National interest".

<sup>610</sup> See Selassie *op cit* 37.

<sup>611</sup> *Ibid* 38.

or abridged or abrogated.<sup>612</sup>

Creating a Constitutional right to secede is also inconsistent with the practice of modern federal constitutions. With the exceptions of the Soviet Union and a few Eastern European Countries, federal constitutions, including that of the United States, have been silent on the question of secession. Moreover, US Constitutional jurisprudence suggests that the acceptance of a federal Constitution mandates the establishment of a permanent and indestructible union.

Furthermore, the US Supreme Court has rejected the argument that the nature of the federal union creates an implied right to secede. It would seem that the provision of the right of secession in the Ethiopian Charter is meant for cases of necessity as the separatist groups will be required to prove a denial, abridgement or abrogation of rights.

#### **6.6.6.5 Ethnic Self-determination in the South African context**

The policy of separate development in South Africa was based on the notion of ethnic self-determination which resulted in the establishment of the so-called TBVC and self-governing states.<sup>613</sup> This policy was rejected by the international Community as contrary to right of all the people of South Africa to self-determination and equal rights. The balkanisation of the country was also found to be in conflict with the rule of *uti possidetis* and therefore a violation of the territorial integrity of South Africa.<sup>614</sup> Thus the interim Constitution has reincorporated all the Bantustans, retained the 1910 boundaries and redemarcated the country into new provinces.<sup>615</sup>

However, in order to secure the participation of the white right wing in the first

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<sup>612</sup> See Selassie "Ethnic Identity and Constitutional Design for Africa" 47.

<sup>613</sup> See chapter 4 par. 4.2.1.1 *supra*..

<sup>614</sup> *Ibid*

<sup>615</sup> See schedule 1 of the interim Constitution.

elections the MPNP adopted Constitutional principle XXXIV which provides for community self-determination on a territorial basis.<sup>616</sup> Furthermore, the MPNP adopted an amendment which secures the recognition of a traditional monarch in the new constitution in fulfilment of the demand of the Zulu nationality for self-determination.<sup>617</sup> In addition, Constitutional Principles XI and XII guarantees the Afrikaner and Zulu Communities language and cultural rights as well as collective rights of self-determination in forming, joining and maintaining organs of civil society, including cultural and religious associations on the basis of non-discrimination.<sup>618</sup>

It follows from this therefore that the right of Community self-determination contained in Constitutional Principle XXXIV relates to the right of political self-determination, not just to minority rights contained in Article 27 of the ICCPR. This raises the question whether the interim Constitution recognises the right of ethnic[ or racial groups] to self-determination and secession. If so, it would mean that ethnic groups within South Africa reserve the right to opt for the Bantustan system. If not, one wonders whether the granting of the right of community self-determination is not superfluous as Constitutional principle XI and XII already guarantees minority rights.

If Constitutional Principle XXXIV grants the right of political self-determination as envisaged in the Common Articles 1 of the 1966 Covenants, rather than Article 27 of the ICCPR, to the Afrikaners the exercise of the rights can be attained in various ways as long as all the people of South Africa Consent through the constituent Assembly. The Declaration on Friendly Relations (1970) makes provision for ways in which political self-determination can be attained, that is, by merger, free association and independence. But, these options are only available to peoples who have a territory separate from that of the state from which they wish to secede. The problem facing the proponents of the

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<sup>616</sup> See Basson *South Africa's Interim Constitution* 345.

<sup>617</sup> See Act 3 of 1994 in GG 15681 of 26 April 1994.

<sup>618</sup> See Basson *South Africa's Interim Constitution* 345.

*Volkstaat* is that the Afrikaners do not have a separate territory and their individual members are part and parcel of the national territory of South Africa which is an internationally recognised self-determination unit. Any attempt to create a *Volkstaat* territory would result in massive relocations of whole communities and is likely to meet vehement opposition. Furthermore, it is difficult to imagine that the *Volkstaat* will be exempted from the operation of universally accepted human rights conventions within their territory if it wishes to be part of the international Community.

Although the *Volkstaat* is not territorially defined in that the Afrikaners do not constitute a local majority in any given province or region, the supporters thereof are determined to achieve it, if need be by the use of force. However, we have seen that international law does not recognise any secession achieved through aggression. It is interesting to note that the demand of the Afrikaners to self-determination was addressed and rejected by the South African Law Commission which also placed the principle of territorial integrity above the claim of the Afrikaners to self-determination. Furthermore, it was realised that the secessionist groups such as the right wing groups and their black counterparts (led by the IFP) demanded a federal or confederal state to lay the foundation for future secession from a unitary or federal South Africa.<sup>619</sup>

If the Volkstaaters would accept a territory which is not exclusively white it could be argued that there could be better prospects for the creation of a *Volkstaat*. For instance, a tenth province could be created where Afrikaners could form a majority. But if the Province is not independent, the *Volkstaat* would have to extend all universally recognised human rights to all citizens and finally it would really make no difference whether there is a *Volkstaat* or not. Or, alternatively, if all the people agree such a *Volkstaat* territory could be excised and be granted independence. The criticism against the recognition of Community self-determination is that separation of one region not only leads to

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<sup>619</sup> See Dugard "Human Rights and the Rule of Law in Post-Apartheid South Africa" in Licht & De Viliers (eds.) *South Africa's Crisis of Constitutional Democracy* (1994) 135-136.

the separation of other regions but also subjects the seceding unit to similar claims internally.<sup>620</sup>

If the reasons for secession are the denial, abridgement or abrogation of human rights of members of particular groups it could be argued that these fears are addressed by Article 27 of the ICCPR and that, therefore, instead of Constitutionalising the right to secede Article 27 of the ICCPR should be incorporated into a justiciable bill of rights. Furthermore, the right of self-determination outside the Colonial Context means the right to democratic governance, that is, the right for every citizen to participate in the determination of their own government - by exercising the right to vote, to elect or to be elected, in a system that can actually change the government. In summary, the rule of *uti possidetis* prevents the Afrikaners or Zulus from exercising an external right of self-determination entitling them to their own state. However, the people of South Africa as whole (through the Constitutional Assembly) are entitled to grant such a right to them. But if the demand for a Volkstaat rests on the fear of denial, abridgement or abrogation of their rights it is submitted that these fears have been adequately addressed by Constitutional principles XI and XII as well as their right to participate in the democratic process.

In other words Constitutional state based on the principle of Constitutional Supremacy addresses the fears of both individuals and groups and makes the recognition of individual and group rights unnecessary.

## **6.7 General Conclusions**

The Diceyan concept of the Rule of Law comprise a procedural and substantive aspects. Its substantive aspect incorporated only civil liberties. The weakness of this concept was that the individual was allowed the enjoyment of his or her

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<sup>620</sup> See Selassie *op cit* 45.

civil liberties at the pleasure of the sovereign Parliament. After World War II the Rule of Law came to be linked not only with democracy through civil liberties but also with the first and second generations of human rights contained in the Universal Declaration of Human Rights which not only derived from the UN Charter but also elaborated on its human rights provisions and incorporated them into the rule of law, in particular, by the International Commission of jurists which expanded the material (or substantive aspect of the rule law) filling it with the same values as the German *Rechtsstaat* principle. These legal values included the right to freedom and equality which comprise the notion of justice, the rights to democratic governance etc. Some of the legal values especially freedom, equality and justice became the higher law which all positive laws must comply with lest they become invalid.

Meanwhile the right of self-determination evolved and became a principle of customary international law recognised by all nations. The right of self-determination became an important weapon in the struggle for decolonisation as it gave colonial, oppressed and peoples under racist regimes the right to demand participation in the government of their countries either directly or through freely chosen representatives. The right of self-determination and the participatory rights inherent in it became a condition *since qua non* for the enjoyment of all three generations of human rights. It became applicable to both Colonial and non-colonial situations as a right to democratic governance. Thus the legal values of freedom, equality justice and the right to democratic governance came to comprise the dynamic concept of the rule of law which links human rights, democracy and the right of self-determination.

The Dynamic concept of the rule of law, unlike its Diceyan counterpart, was not derived from the culture or traditions of any particular country. It derived from the principle of humanity (*ubuntu*) which holds that the legal values of freedom and equality and their corollaries of justice and right to democratic governance are inherent in the worth and dignity to the human personality. As every individual human personality is a bearer of this worth and dignity the legal

values and human rights deriving from that worth and dignity became a common heritage of the human family. Thus the fact that the development and Constitutionalisation of these notions started in particular countries came to be of no consequence. In fact, as shown in the thesis both the first and third worlds contributed to the evolution of the Dynamic Concept of the Rule of law which gave birth to the modern constitutional state based on the principle of constitutional supremacy.

In practice the Dynamic Concept of the rule of law became universal through the UN system and the adoption of various international and regional human rights instruments. Today the essential elements of the Concept have become an integral part of the International Human Rights Law incorporated or adopted by the municipal laws of the majority of the UN Member States.

During Colonial days the rule of law and its inherent human rights were not extended to colonial peoples. For instance, in Nigeria South Africa, former Southern Rhodesia and South West Africa. Thus in these countries a host of racially discriminatory laws were enacted which violated the dynamic concept of the rule of law and prevented colonial peoples from participation in the government of their countries. Instead separate institutions of government were established for colonial peoples to keep them outside the Central political processes. These institutions failed to satisfy the requirements of the dynamic concept of the rule of law and resulted in popular resistances and wars of liberation which speeded up the decolonisation process.

During the sixties the UN played an active role in the decolonisation processes. But the former colonies of South Africa and Rhodesia relied on the domestic jurisdiction clause (article 2(7)) to prevent the UN from intervening against the colonialism and apartheid policies in Southern Africa. They argued that the domestic jurisdiction clause took precedence over the human rights provisions of the UN Charter and the Universal Declaration. Meanwhile the National liberation Movements in Southern Africa increasingly relied on international

human rights instruments in their struggles and in fashioning their policies. Thus during the sixties and seventies numerous resolutions were adopted on the former Southern Rhodesia South West Africa and South Africa which gave the UN jurisdiction over the questions of former Southern Rhodesia and South Africa regardless of the domestic jurisdiction clause. These resolutions also made the corpus of international Human Rights law applicable to the situation in Southern Africa. Consequently, the UN was able to nullify the entire South African Constitutional order and demand the establishment of a non-racial, united and democratic state. Finally, all the former colonial countries acknowledged the jurisdiction of the UN and allowed it to play a role in the creation of new states.

The constitutions of the new states of Zimbabwe and Namibia incorporated human rights and Namibia, in particular, adopted the modern concept of the a Constitutional State based on the principle of Constitutional supremacy.

Last but not least South Africa accepted the winds of change and agreed to enter into negotiations which resulted in the interim Constitution of 1993. Although South Africa was not a classical colonial state it was decolonised in the sense that the right of self-determination was extended to all the people in line with the Declaration on friendly Relations. Now South Africa has a government representative of all its people and a Constitutional State based on the principle of Constitutional Supremacy. Like Zimbabwe and Namibia the South African Constitution is based on certain constitutional principles which were designed to accommodate the fears of the white minorities. All in all, however the Constitution has realised the dynamic concept of the Rule of Law making it a *Grundnorm* of all future Constitutions.

The provision made for community self-determination in the interim Constitution does not seem to negate the right of self-determination of all the people as such a right, as we saw in the case of Ethiopia and Yugoslavia, is subject to the approval of all the people as part of their right to internal self-

determination. However, in a Constitutional State where freedom, equality and justice and the right of democratic governance are guaranteed and enforceable there does not seem to be any justification for the right of community self-determination outside the ambit of Article 27 of the ICCPR. It is suggested therefore that a Constitutional State based on the principle of Constitutional supremacy and which incorporates the corpus of international human rights law and a justiciable Bill of Rights offers adequate protection to both individuals and groups and therefore makes the right of community self-determination and the right to secession untenable. It is therefore further suggested that the right of self-determination should be redefined so as to apply to all the people of a given territory and that language, cultural and religious diversity should not be used as the basis for the right of self-determination which will dissolve many states in the name of freedom and democracy. Such a trend would negate the fundamental principles of non-racialism, non-discrimination and equality embodied in the corpus of International Human Rights law.

## LIST OF ACRONYMS AND ABBREVIATIONS

<b>ANC</b>	African National Congress
<b>APC/PCAM</b>	All-Party Congress/Pre-Constituent Assembly
<b>AWB</b>	Afrikaner Weerstand Beweging
<b>AZAPLA</b>	Azanian Peoples Liberation Army
<b>BYIL</b>	British Yearbook of International Law
<b>CASE</b>	Conference on Security and Co-operation in Europe
<b>CILSA</b>	Comparative and International Law Journal of South Africa
<b>Codesa</b>	Convention for a Democratic South Africa
<b>CSIR</b>	Council for Scientific and Industrial Research
<b>DP</b>	Democratic Party
<b>EPG</b>	Eminent Persons Group
<b>GA</b>	General Assembly (UN)
<b>HSRC</b>	Human Science Research Council
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICJ</b>	International Commission of Jurists
<b>IFP</b>	Inkhata Freedom Party
<b>IHRL</b>	International Human Rights Law
<b>MDM</b>	Mass Democratic Movement
<b>MK</b>	Umkhonto we Sizwe
<b>MPNP</b>	Multi-party Negotiating Process
<b>NEC</b>	National Executive Committee (ANC)
<b>NP</b>	National Party
<b>NPA</b>	National Peace Accord
<b>OAU</b>	Organisation of African Unity
<b>PAC</b>	Pan African Congress
<b>PF</b>	Patriotic Front
<b>SACP</b>	South African Communist Party
<b>SAJHR</b>	South African Journal of Human Rights
<b>SAYIL</b>	South African Yearbook of International Law
<b>TBVC</b>	Transkei/Bophuthatswana/Venda/Ciskei
<b>TEC</b>	Transitional Executive Council
<b>THRHR</b>	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
<b>TSAR</b>	Tydskrif vir Suid-Afrikaanse Reg
<b>UD</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNOMSA</b>	United Nations Observer Mission to South Africa
<b>WG</b>	Working Group

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