

1993

Human Rights at the United Nations: The South Africa Precedent

Richard Schifter

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [Law Commons](#)

Recommended Citation

Schifter, Richard. "Human Rights at the United Nations: The South Africa Precedent." *American University International Law Review* 8 no. 2/3 (1993): 361-372.

This Symposium or Conference is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University International Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

HUMAN RIGHTS AT THE UNITED NATIONS: THE SOUTH AFRICA PRECEDENT

By Richard Schifter*

From the dawn of diplomacy until the mid-twentieth century, it had been the established custom to limit international discourse to affairs dealing solely with relations between nations. In keeping with this custom, foreign leaders generally abstained from interfering with the way in which a government treated its people. This practice was based on the notion that to interfere in such affairs would be a gross invasion into the internal affairs of that country.

This was still the prevailing outlook among diplomats in 1945 when the San Francisco conference convened to write the United Nations Charter. However, in the wake of the horrors perpetrated by Nazi Germany against both foreigners and its own citizens, the writers of the Charter broke with precedent in elevating human rights to the international level. Article 1 of the Charter listed explicitly among the purposes of the United Nations the promotion of human rights and fundamental freedoms "without distinction as to race, sex, language, or religion."¹

Pursuant to its statement of purpose, the United Nations pledged itself to the promotion of universal human rights and fundamental freedoms.² To this end the Economic and Social Council, through its mandates in Articles 62 and 68,³ established the United Nations Human Rights Commission (UNHRC).⁴ To emphasize the United States' commitment to the UNHRC, President Truman appointed Eleanor Roosevelt as the United States Representative on the Commission. In turn, Mrs. Roosevelt, who was elected to chair the Commission, pressed for the early preparation of an international convention of civil liberties. Eighteen months later,

* Former Assistant Secretary for Human Rights and Humanitarian Affairs.

1. U.N. CHARTER art. 1, para. 3. *See also* U.N. CHARTER art. 13 (commissioning the General Assembly to work toward the realization of human rights for all).

2. U.N. CHARTER arts. 55-56.

3. *See* U.N. CHARTER art. 62 (authorizing the Council to make recommendations with regard to the promotion of human rights); art. 68 (requiring the Council to create commissions for the promotion of human rights).

4. ECOSOC Resolution 5(I) of February 16, 1946 and Resolution 9(II) of June 21, 1946.

this effort resulted in the creation of the *Universal Declaration of Human Rights*, which was adopted in the General Assembly by a vote of 48-0, with eight abstentions. Six of the abstainers were members professing the Leninist faith, namely the Soviet Union, Ukraine, Byelorussia, Czechoslovakia, Poland, and Yugoslavia. The other two abstentions were supplied by Saudi Arabia and South Africa.

By 1948 South Africa had become aware of the fact that its sanctioned practices of racial discrimination would soon attract the attention and disapproval of the United Nations. The world was still recovering from the painful memories of racism and hatred that epitomized Nazi Germany. The rhetoric and the reports of developments from South Africa were too reminiscent of the Nazi era to be treated with equanimity.

South African practices were clearly in the sharpest conflict with the Universal Declaration.⁵ Even among the eight abstaining nations, South Africa stood alone in according the rights contained in the Declaration to only a portion of its citizenry, namely whites. The other abstaining nations refused to grant such rights to any of their citizens. By making the distinction based on race, South Africa provoked the vivid comparisons between itself and Nazi Germany, which in turn hastened the condemnation by the international community.

That, of course, was not the only reason why South Africa was ultimately singled out for special scrutiny by the United Nations for its human rights violations. The other human rights violators, as it turned out, were members of voting blocs of substantial size and influence in the United Nations. Thus, while these members were in the position to protect each other, South Africa, by contrast, stood alone.

The unique treatment given South Africa at the very beginning of the United Nations human rights effort may correctly be seen as a demon-

5. In its preamble the Declaration speaks of "the dignity and worth of the human person" and "the equal rights of men and women." Article 1 stated that "[a]ll human beings are born free and equal in dignity and rights." Article 2 provided that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, . . . birth or other status." Article 7 pronounced "[a]ll . . . equal before the law and . . . entitled without discrimination to equal protection of the law." Under Article 13 everyone was given "the right to freedom of movement and residence within the borders of each State." And under Article 21 everyone was assured of "the right to take part in the government of his country, directly or through freely chosen representatives." UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS at 10-11, U.N. Doc. ST/HR/2/Rev.2, U.N. Sales No. E.83.XIV.2 (1983) [hereinafter UN ACTION].

stration of the Organization's double standard in the field of human rights. In fact, it very well may have required a friendless, racist human rights violator such as South Africa to break down the barriers that stood in the way of United Nations scrutiny of a member state's abusive treatment of its own citizens.

For once the drafters of the Charter had completed their tasks and had left the scene, responsibility for creating the new international organization and making it function was vested in a group of persons committed to the traditional notions of the proper scope of diplomacy. Notably, in Article 2(7), the Charter even incorporated one of the most important of these traditional notions, namely, the inviolability of domestic jurisdiction.⁶ Indeed, the representatives of South Africa would raise the issue posed by Article 2(7) every time their case would be raised in a United Nations forum.

The issue of racial discrimination in South Africa was indeed raised at the very first session of the UN General Assembly. But given the tradition of diplomacy, it was raised in a context which caused it to cross international borders. In this case, India claimed that South African legislation was in violation of certain human rights provisions of the Charter.⁷

Rejecting South Africa's domestic jurisdiction argument, the General Assembly adopted Resolution 44,⁸ holding that South Africa's actions should conform to the Charter's human rights provisions.⁹ The formulation used in Resolution 44 vividly demonstrates the caution with which the General Assembly approached the human rights issue in its early years. It dealt exclusively with the concern expressed by one member over the behavior of another member toward persons who originated in the first member's country. The Resolution also emphasized friendly relations between member countries, adding a vague reference to the Charter without specifying that the "relevant provisions" referred to in the Resolution were the human rights provisions. The two Governments were requested to report to the next session of the General Assembly on the measures which had been adopted to deal with the problem which

6. See U.N. CHARTER, art. 2, para. 7 (providing that no provision of the Charter should be interpreted to permit international intervention "in matters which are essentially within the domestic jurisdiction of any state").

7. U.N. ACTION, *supra* note 5, at 60. The Indian Government also charged violation of certain Indian-South African agreements. *Id.*

8. *Id.*

9. *Id.*

had been identified.¹⁰ It was hardly a bold step. Cautiously, and without fanfare, the United Nations General Assembly had slipped into the human rights field.

In 1947 members of the General Assembly debated the problem of the Indians of South Africa. India pointed out that South Africa had taken no steps to deal with the problem which had been the subject of Resolution 44. South Africa in turn accused India of having imposed unilateral sanctions.¹¹ The General Assembly found itself unable to get the required two-thirds to adopt a follow-up resolution, nor could it come to grips with the issue in 1948. In that year, however, India for the first time discussed South Africa's treatment of other Asiatics and other non-whites. South Africa once again raised the "domestic jurisdiction" issue posed by Article 2(7) and presented a draft resolution stating that the General Assembly lacked competence over the problems raised by India. The General Assembly failed to adopt the South African proposal, thus implying its rejection of the Article 2(7) argument.

Throughout these early years of the United Nations' existence, the bulk of the Organization's human rights activities focused on the preparation of documents setting forth general human rights standards. Diplomatic tradition continued to undermine the discussion of those member states which were responsible for committing the most severe human rights violations against their citizens. A blind eye was turned toward the brutal Stalinist dictatorship of the Soviet Union. As democratically elected governments in Eastern Europe were succeeded by totalitarian dictatorships, the United Nations remained silent. In keeping with tradition, none of the Western democracies was prepared to press the cases involving the most blatant abuses of individual human rights.

But India, perhaps inspired by diplomats not anchored to the tradition of silence, pressed on. The Dominion of India had after independence been divided into India and Pakistan. Although in disagreement on a great many issues, the two countries were united in pressing the South African discrimination issue at the United Nations. And with General Assembly Resolution 265 of May 14, 1949,¹² India and Pakistan succeeded in prodding their colleagues to take another small step forward in the human rights area. That resolution invited the three governments concerned — India, Pakistan, and South Africa — to meet at a conference to discuss their problems in consideration of the "purposes and

10. *Id.*

11. *Id.*

12. *Id.*

principles of the Charter” and the Universal Declaration.¹³ A cautious General Assembly did not specify which purposes and principles it had in mind. However, the mere reference to the Declaration of Human Rights in the context of a resolution dealing with a concrete human rights problem was another step forward.¹⁴

The real breakthrough came at the seventh session of the United Nations General Assembly. Thirteen member states made a request in September 1952 to place on the agenda of the General Assembly the conflict resulting from South Africa's *apartheid* policies.¹⁵ In several ways, this formulation significantly departed from those which preceded it. First, the memorandum squarely faced the issue of the treatment of blacks. It was no longer a matter involving only Indians and the impact of their treatment on the international relations between India and South Africa. Second, the traditional effort to inject diplomatic niceties was absent. Rather, the language was condemnatory of *apartheid* practices. Third, above and beyond invoking the standard jurisdictional statement that South Africa posed a “threat to international peace,” the General Assembly also stated in the memorandum that South Africa had violated the Charter's human rights provisions as well. Specifically, the memorandum called attention to: (1) a pattern of discrimination which disadvantaged 80% of South Africa's population; (2) the withholding of voting and other political rights from non-whites; and (3) the restrictions on the movement of blacks. All of these represent violations of the standards set forth in the Universal Declaration of Human Rights.

The filing of this request simply meant that these issues were to be raised in the context of the broader discussion concerning South Africa's discrimination against non-whites. Over the vehement objection of South Africa that the General Assembly was not competent to deal with this domestic South African problem, the item was inscribed on the agenda as requested.

13. *Id.*

14. It took another year and a half before the issue of racial discrimination in South Africa against all non-whites was finally confronted. In G.A. Res. 395, U.N. GAOR, 5th Sess. (1950), the General Assembly declared that “a policy of ‘racial segregation’ (*apartheid*) is necessarily based on doctrines of racial discrimination.” To deal with that issue, the General Assembly once again recommended a conference, an approach which South Africa had year after year rejected.

15. A memorandum to the General Assembly cast the conflict as a threat to international peace as well as a violation of internationally-recognized human rights. *Official Records of the General Assembly, Thirty-seventh Session, Supp. No. 22, agenda item 66, U.N. Doc. A/2183 (1952).*

The next precedent-setting step was taken on December 5, 1952, when the General Assembly passed Resolution 616A & B.¹⁶ Although failing to adopt the criticisms mentioned in the previously-mentioned memorandum, the Resolution announced the Assembly's realization that a meeting of the interested parties would be futile. Specifically, the Resolution created a commission to study the situation in South Africa and to report its conclusions to the next session of the General Assembly.¹⁷

By creating a commission to scrutinize the systemic racial discrimination in South Africa, the General Assembly laid a foundation for the subjection of South Africa to public criticism of its domestic practices. Despite mentioning the Charter's non-intervention provision (Article 2(7)), the Resolution recited the sections dealing with the Organization's commitment to human rights. The Resolution thus assigned the three-person committee to draft and submit a report to the General Assembly on how to resolve the conflict between these two mutually exclusive provisions with respect to South Africa.

The commission submitted three reports to the General Assembly — recognized as G.A. Resolutions 721, 820, and 917 — which were critical of the discriminatory practices of the Government of South Africa. In their reports, the commissions proposed a reconciliation between the two conflicting provisions of the U.N. Charter by determining that the human rights provision modified the non-intervention provision. In other words, the United Nations was not to treat human rights problems as “essentially domestic.”¹⁸ The General Assembly, however, still could not see its way clear to tackling a human rights issue without relating it to the traditional international agenda. Thus, Resolution 721 concluded that *apartheid* would “endanger friendly relations among nations.”¹⁹ Similarly, Resolution 820 held that *apartheid* was “a grave threat to the peaceful relations among ethnic groups in the world.”²⁰

16. G.A. Res. 616A & B, U.N. GAOR, 7th Sess. (1952).

17. U.N. ACTION, *supra* note 5, at 61. The commission was to take due notice of the provisions of Articles 1, 2, 13, 55, and 56 of the Charter (dealing with human rights), as well as of pertinent G.A. resolutions. *Id.*

18. *Id.* These reports were recognized by the General Assembly in G.A. Res. 721, U.N. GAOR, 8th Sess., Supp. 16, U.N. Doc. A/2505 (1953); G.A. Res. 820, U.N. GAOR, 9th Sess., Supp. 16, U.N. Doc. A/2719 (1954), and G.A. Res. 917, U.N. GAOR, 10th Sess., Supp. 14, U.N. Doc. A/2953 (1955). *Id.* (citing *Official Records of the General Assembly*, *supra* note 15).

19. *Id.*

20. *Id.*

In each instance the General Assembly sought to place the problem of South African race relations in a context which would suggest a threat to world peace, thus allowing UN intercession on the basis of its peace-keeping responsibilities. In large part, this was due to the reluctance of traditional diplomats to assume responsibility for intruding upon South Africa's domestic legislation. Furthermore, member nations which also engaged in human rights violations were eager to dispose of the South Africa case as being *sui generis*, so as to prevent the creation of an established process for the UN to use in future cases. Yet, although these governments were thus preserving for themselves the option to raise technical arguments to distinguish the case of South Africa from their own, the objective facts were that: (a) *apartheid* did not pose a real threat to peace beyond the borders of South Africa; and (b) the UN resolutions dealing with *apartheid* challenged South African domestic legislation on the ground that it was in conflict with the human rights provisions of the Charter.

By 1953 the United Nations had thus focused its attention on the problem of *apartheid* in South Africa. Whatever concerns there may have been that the United Nations General Assembly was involving itself in the domestic affairs of a member country had been swept aside. Although subterfuges were used in wording the resolutions, it was now clear that the United Nations had concluded that a violation of the human rights provisions of the Charter did not present an "essentially domestic" issue.

It is important to recognize that the United Nations began its work on *apartheid* prior to the massive decolonization of Africa and thus prior to the time when a large number of Black African countries joined the United Nations. After decolonization the intensity with which *apartheid* was dealt with at the United Nations increased significantly.

After years of discussion in the General Assembly concerning South Africa's policy of racial discrimination, the issue was taken to the Security Council in 1960 following the shooting of demonstrators by South African security forces. Security Council Resolution 134 of April 1, 1960,²¹ once again relying on the formula that conditions in South Africa could endanger international peace and security, called upon South Africa to abandon *apartheid*.²²

With its next resolution, Resolution 181 of August 7, 1963,²³ the

21. *Id.* at 69.

22. *Id.*

23. *Id.*

Security Council expressed itself more explicitly on the issue. It condemned "the policies of South Africa in its perpetuation of racial discrimination" and called upon South Africa "to liberate all persons imprisoned, interned, or subject to other restrictions for having opposed the policy of *apartheid*."²⁴ The Security Council also took one other significant step by calling upon all countries "to cease forthwith the sale and shipment of arms, ammunition of all types and military vehicles to South Africa."²⁵

Resolution 182 of December 4, 1963,²⁶ went one significant step further by creating a group of experts who were instructed to consider methods involving U.N. participation to resolve the dispute surrounding *apartheid*.²⁷ With this resolution the Council had clearly committed itself to the application of the Charter's human rights standards to a domestic (but evidently not an *essentially* domestic) situation.

From the middle Sixties onward the issue of racial discrimination in South Africa and all its consequences became one of the major preoccupations of the entire United Nations system. Security Council Resolutions 282 (1970),²⁸ and 392 (1976)²⁹ emphasized the need to strengthen the arms embargo. Resolution 418 (1977)³⁰ took a further step by invoking Chapter VII of the Charter and imposing a mandatory embargo on military and nuclear collaboration with South Africa. Resolution 591 (1986)³¹ urged the expansion of the embargo so as to include all items which the authorities of the exporting countries had reason to believe were destined for the military or police forces of South Africa.³²

The General Assembly, not restrained by the veto or threat of a veto, went much further in its various declarations. Under Resolution 31/6 J of November 9, 1976,³³ it adopted a comprehensive "Programme of Action against *Apartheid*." That program urged member nations: (1) to terminate diplomatic relations with South Africa; (2) to fully implement the arms embargo; (3) to terminate economic relations with South Africa; (4) to refuse to provide landing and passage facilities for South

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 70.

30. *Id.*

31. *Id.*

32. *Id.* at 69-70.

33. *Id.* at 63.

African aircraft; and (5) to suspend cultural, educational and sporting exchanges with South Africa.³⁴

The work of the General Assembly on the subject of South Africa was paralleled by the activities of the United Nations Commission on Human Rights and the Sub-Commission on Prevention of Discrimination. Resolutions were passed and studies were prepared on the subject of *apartheid*, which was denounced as a crime against humanity or a collective form of slavery. Other international organizations such as the International Labor Organization, the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Health Organization joined the effort.

Looking at these decades of effort by the United Nations in dealing with the issue of racial discrimination in South Africa, what conclusions can be reached regarding the efficacy of that effort? Did it ultimately make a difference?

Although it may prove difficult to demonstrate a direct relationship between a specific UN resolution and developments in South Africa, there is good reason to think that the UN's work has been effective. Those in South Africa who opposed all forms of racial discrimination had their morale boosted by the knowledge that they did not stand alone, that the international community shared their convictions and their aspirations. And ultimately, the continued chorus of condemnation appears to have affected the thinking of a younger generation of white South Africans.

It is quite possible that the opponents of discrimination would have pressed their case without UN support. And it is quite possible that a younger generation of white South Africans would have adhered to an outlook different from that of their elders. But it is reasonable to assume that the activities of the UN caused the South African authorities over the years to be less harsh than they otherwise might have been and hastened the day of the decision of these authorities to make the transition to a non-racist state.

Another set of questions might focus on the fact that it took so long for change to come about in South Africa. Once the United Nations had decided to concern itself with the issue of racial discrimination in a member state, would a different course of action have brought about change any earlier? If so, should the measures have been harsher or should the United Nations have been more restrained?

Military measures under Chapter VII of the Charter would probably

34. *Id.*

never have been seriously contemplated by the Security Council. But the question does arise whether earlier and more stringent economic sanctions could have persuaded South Africa's white population at an earlier time to change its stance. After all, the sanctions ultimately imposed by the United States did have a significant impact.

On the other hand, did the United Nations employ the right mixture of firmness and tact in approaching South Africa? Could the approach have been too soft in the beginning and too strident at a later date? Could an effort to obtain gradual improvements in South African human rights conditions have succeeded? Could it be that once the United Nations system was fully engaged on the issue of South Africa, the Soviet Union played too important a role in policy making? Although the problems faced by those interested in a peaceful transition are enormous, has the end of the Soviet Union improved the chances of a peaceful transition? Can the United States play a useful role in this context at this time?

An underlying problem — interfering with the effectiveness of the United Nations in dealing with the issue of racial discrimination in South Africa — was what has usually been referred to as the East-West conflict. Given the significant influence of the South African Communist Party within the African National Congress, the United States Government, even though concerned about and fundamentally opposed to racial discrimination, might not have considered it to be in its national interest to destabilize the South African Government.

Another problem which the West faced in bringing the weight of the United Nations system to bear on the situation in South Africa was the issue posed by the double standard. As noted earlier, whatever the excuse, in the case of South Africa, the UN was subjecting the laws and internal practices of a member country to review by the United Nations under the human rights provisions of the Charter. In how many other situations was it doing the same?

The answer to this question is that although the United Nations crossed the Article 2(7) Rubicon in the early 1950s by seeking to apply the Charter's human rights provisions in a specific country situation, it took more than twenty years before another country was subjected to similar treatment. That second country, Pinochet's Chile, like South Africa, also stood alone and friendless. Like South Africa it was most vehemently opposed by the Soviet Union. Even so, while resolutions directed against South Africa had by then become emphatic, if not strident, the initial United Nations action on Chile was quite mild. Under

General Assembly Resolution 3219 of November 6, 1974,³⁵ the United Nations Human Rights Commission was instructed to study human rights violations in Chile. In 1975, 1976, and 1977 the General Assembly expressed "distress" at the continuation of human rights violations in Chile. Years passed before stronger language was used.

In the meantime the United Nations system turned a blind eye toward the mass killings of Hutus in Burundi in the period 1972-1974 and to the political murders perpetrated in later years by President Idi Amin of Uganda. When Pol Pot killed millions of his fellow citizens, the United Nations Human Rights Commission's response, in Decision 9 of March 8, 1978,³⁶ was to request the Secretary General to transmit to the Cambodian Government the record of its proceedings at the 1978 session, in which there had been testimony about the gross human rights violations in Cambodia. Pol Pot's Government was simply asked to send its comments and observations.³⁷ By Resolution 4B of September 5, 1979,³⁸ the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, faced with evidence of the largest mass killing since World War II, did nothing more than to ask Cambodia to take urgent measures to restore full respect for human rights and fundamental freedoms and prevent violations from occurring in the future.³⁹

Clearer language was contained in a resolution passed in 1982, in which the United Nations Human Rights Commission for the first time criticized human rights conditions in a country belonging to the Soviet bloc. In the wake of the repression of the Solidarity Movement in Poland, the Commission, in Resolution 1982/26,⁴⁰ expressed concern over reports of human rights violations in that country and asked the Secretary General to conduct a thorough study of human rights conditions in that country.⁴¹

Thus, the fact that South Africa was the only country which the United Nations severely punished for its human rights violations, particularly in light of the number of other examples of oppression and cruelty prevalent in the global community, detracted from the *bona fide* nature of the United Nations effort. However, a solid legal foundation has now

35. *Id.*

36. *Id.* at 230.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 232.

41. *Id.*

been laid for action on country-specific human rights issues and the East-West conflict is history, there is reason for hope that the United Nations will be prepared to take on the task of dealing with human rights problems in a manner which seeks solutions rather than merely engaging in rhetoric in a setting in which the case of South Africa provides a solid precedent.