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HUMAN RIGHTS AND THE EMERGING INTERNATIONAL CONSTITUTION

Howard J. Taubenfeld*
Rita Falk Taubenfeld**

In all human organizations, there is a constitution, a charter, either implicit or explicit, written or unwritten, which defines the guidelines and parameters for choosing the working “rules of the game.” In any political entity, the constitution also sets limits beyond which the rulers may not go. An inquiry into the implicit, largely unwritten international constitution requires looking at, but also beyond, the public actions and claims of states at any moment. The content of such an unwritten constitution is perforce open to debate, especially at the international level where, in contrast with those of a state, all the political institutions remain relatively primitive. Nevertheless, by observation of state conduct one can deduce a basic set of decisionmaking rules of the game at the international level.

If the international constitution is to be a useful concept with operational value, rather than an empty deduction from a priori assumptions, it must be possible to identify some specific operational content. One evidence that such content exists is the fact that international law exists. Since by definition there is a complex of rules for the creation and existence of international law, and because these “constitutional” rules can be viewed as genuine constraints on the legitimate conduct of the nations, we need not be trapped into the infinite regression of choice to note that rules for rulemaking exist at the international level. As in all societies, the need for binding rules is based not on some prior legal rule, but on the shared need for survival, preferably with decency, dignity, and some hope for a share of the amenities which civilization offers, coupled with the desire for peace. We can also note that as with other constitutions, these rules for defining the rules have evolved and can be expected to continue to do so. Both the Nuremberg

* Professor of Law, Southern Methodist University School of Law. A.B., 1947; LL.B., 1948; Ph.D., 1958, Columbia University.

** Senior Research Associate, Southern Methodist University School of Law at the time of the preparation of this Article in its initial form. A.B., 1946, N.Y.U.; M.A., 1959; Ph.D., 1969, University of California at Berkeley.
trials and the growing recognition by the international legal community that basic human rights are entitled to protection, even against the will of the sovereign, are watersheds which attest to the fact of this ongoing evolution.

The notion of an unwritten constitution is not at all new. The unwritten British constitution not only defines how the rules are to be made and what the rules are at any given time, but also, in the repeated statements of jurists and statesmen, contains within it the concept of basic rights, the inalienable rights of an Englishman which no group in power—Crown, Parliament, courts, or all together—can legally transgress. That constitution sets limits on permissible group actions, somehow defined and implemented. Thus, even if undertaken via legitimate decisional processes, at least some government actions would be viewed by British courts as inconsistent with the British constitution, that is, as inconsistent with the basic rights of the British people.

Insofar as the notion of fundamental human rights is tenable at all, it offers similar evidence that the content of the underlying, partly unwritten international constitution is evolving. Thus, the acts constituting genocide could be viewed both as illegal in present international law and as a crime against humanity even before the phrase was coined and before a set of treaties or state practice so characterized them. Why? How? Genocidal acts turn out to have been barred by the unwritten international constitution, by an international consensus that there exists at some level a basic right: The right of different groups of mankind not to be wantonly exterminated.

As with all areas of international law, the present content of human rights law can be extracted from the regularities of positive international law. In this case, we seek certain regularities even now: those which deal with vested rights and the hierarchy and trade-offs between them, the rules of the game of decisionmaking in society, and the basic limits on the institutions of social choice. These forbidden incursions include the basic constitutional limits on permissible group actions and some limits on the wider level of government. Thus, freedom from interference in domestic jurisdictions is, absent exigent circumstances, an understood right of states.

In all systems, constitutional constraints on impermissible group action tend to conflict and compete. Different constitutional systems have different de facto social tie-breakers in such cases and different enforcement systems for protecting legitimate social
choice. The international legal system faces the same dilemmas but remains partial, limited, and primitive. For example, in the conflict between human rights and a sovereign's immunity from external interference, multiple standards and uncertain enforcement are common and to be expected. Different standards of performance are expected from states at different levels of economic and political development. Even so, some international constitutional limitations on state action can be defined even now. This Article therefore explores the notion of a largely unwritten international constitution and some of the features it now embodies. In part, this is accomplished by use of a case study of some human rights issues which have gone through a period of increasing scrutiny and articulation since World War II. Within the area of human rights we concentrate our attention on the class of crimes against humanity—those actions most clearly parallel to gross deprivatory actions of a kind proscribed by all national constitutions. Within that framework, we focus particularly, as one example, on that form of discrimination called apartheid.

Background

While the concept of the international protection of human rights was not unknown in 1945, the United Nations Charter,

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1. There are the familiar cases of prisoners, civilians wounded and sick in war, and of aliens under special circumstances. On the other hand, the more common approach was that of the British government which, when asked in 1938 to intervene on behalf of the German Jews, reportedly indicated that it considered such an intervention both improper and illegal under international law. For a discussion of the pre-1945 period, see the summary in R. Taubenfeld & H. Taubenfeld, Race, Peace, Law, and Southern Africa 37-39 (1968). For an overview with documents, see L. Sohn & T. Buerenthal, International Protection of Human Rights 1-5, 137-95, 213-369 (1973). For problem-oriented consideration of the issues with which this Article is concerned, see R. Lillich & F. Newman, International Human Rights: Problems of Law and Policy (1979).

An unusual and interesting early case of a process of forcing the development of a significant type of "human rights" which, at least initially, was unequally favored by, and unequally convenient for, the nations involved, is found in the experience surrounding the eradication of the slave trade in the nineteenth century. There a few major sea powers, primarily Great Britain, undertook to enforce their laws against the trade on the high seas, based on their own values, opportunities, and trade-offs, regardless of the national origin of the intercepted ship. E. Klingberg, The Anti-Slavery Movement in England 135 (1953). In time, the ban on slave-trading became internationally accepted. This occurred by the 1870's, after the American Civil War, H. Temperley, British Antislavery 1833-1870 257 (1972), although the United States Supreme Court had previously held that there was no such international rule. The Antelope, 23 U.S. (10 Wheat.) 30, 53 (1825). This, in turn suggests
without giving explicit content to a human bill of rights, expressly reaffirmed mankind’s “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.” This marks a turning point in the political and legal pursuit of humane treatment for humanity. Moreover, Charter articles call expressly for the United Nations (U.N.) to promote universal “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” Members are legally obliged to act to achieve these purposes. Thus, it is reasonable to argue that much of the U.N.’s subsequent work in the field of human rights, including the Universal Declaration of Human Rights of 1948, and the many subsequent human rights resolutions and even the conventions, has been primarily definitional: to give more specified content to the obligations

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2. U.N. CHARTER Preamble.

3. The peace treaties following the First World War did provide for some instances of human rights protection. For example, an individual could bring certain claims even against “his” government before an arbitral tribunal. See P. DE AZCAYATE, LEAGUE OF NATIONS AND NATIONAL MINORITIES 164-68 (1945); G. KAECKENBEECK, THE INTERNATIONAL EXPERIMENT OF UPPER SILESIA 45-54 (1942). The concept of an international interest in dependent peoples was formalized in the League of Nations’ mandates system. See J. GREEN, THE UNITED NATIONS AND HUMAN RIGHTS 648-53 (1956). The mandates system, established by Article 22 of the League of Nations Covenant, was a plan to supervise and administer the German and Ottoman colonies (the “mandated territories”) with special attention given to safeguarding the rights of the inhabitants. Provision was made for the receipt and examination by the Council of the League of Petitions from individuals and organizations regarding the territories. This right of an individual or of a group to petition an international organization was a “notable departure from the traditional idea that relations between national states are the sole concern of international law.” Id. at 651. The United Nations Charter generalized these rights to apply to all peoples. U.N. CHARTER art. II, para. 6.


5. Id. art. II, para. 5:

   The Organization and its Members, in pursuit of the Purposes stated in Article I, shall act in accordance with the following Principles.

   5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.


members assume vis-a-vis their own populations in accepting the Charter. 8

The inherent conflict between a state’s right to control its internal affairs and its obligations to the world community to assure at least a range of minimal human rights and freedoms to its people is obviously not entirely new, nor different in principle from other such conflicts between valued social principles or goals; nor, indeed, is it confined to the international level of government. 9

8. This principle was recognized in the early days of the United Nations. For instance, Judge Spiropoulas, a representative from Greece, commented: “[a]s the obligation to respect human rights was placed upon Member States by the Charter, it followed that any violation of human rights was a violation of the provisions of the Charter.” 3(1) U.N. GAOR, C. 6 (138th mtg.) 765 (1948); see P. Jessup, A MODERN LAW OF NATIONS 91 (1947); 20 U.N. GAOR, C. 3 (1347th mtg.) 336-37, 340-41, U.N. Doc. A/C.3/SR.1347 (1965) (comments of delegates from Trinidad and Tobago and New Zealand).

9. On this conflict of valid but competitive Charter obligations and of valued international goals and norms, Oscar Schachter has said:

[B]ecause principles are general and fundamental, they tend to clash with each other in specific cases—thus every principle in the Charter can be paired off with a contrary or opposing principle in the context of a particular situation . . . . Even the salient rule against force is “balanced by” the right of self-defence and collective enforcement measures and the most fervent supporters of the principle of self-determination have recognized the opposing claims of the obligation of peaceful settlement and the principle of “territorial integrity.” This characteristic opposition of principles is not, as some have suggested, the result of political confusion or defective drafting; on the contrary, it is a desirable and necessary way of expressing the diverse and competing aims and interests of mankind. An attempt to eliminate such inconsistencies can only result in an artificial emphasis on some abstractions and a suppression of valid and basic human values.

Schachter, The Relation of Law, Politics and Action in the United Nations, I RECUEIL DE COURS 191 (1963) (emphasis added) (footnote omitted), reprinted in part in THE STRATEGY OF WORLD ORDER 94, 114 (R. Falk & S. Mendlovitz eds. 1966). See also Schachter, Dag Hammarskjold and the Relation of Law to Politics, 56 AM. J. INT’L L. 1, 3-5 (1962) (Dag Hammarskjold recognized that principle of observance of human rights was always to be balanced by concept of nonintervention. Where principles of human rights and nonintervention both cannot be fully satisfied, some compromise, some trade-off between these valued goals, is clearly unavoidable). The definition of the optimal compromise for any social group as always depends on which or whose tastes and values are being used to define the group’s objectives; for example, the King’s, the Dictator’s, the President’s, the Congress’, or the majority’s, the minority’s, or those of some complex mixture thereof? For U.N. discussions of these issues, see R. TAUBENFELD & H. TAUBENFELD, supra note 1, at 31-79. There are interesting materials on many of these matters in International Protection of Human Rights: Hearings Before the House Subcommittee on International Organizations and Movements of the Committee on Foreign Affairs, 93d Cong., 1st Sess. (1973) [hereinafter cited as Hearings]. The Subcommittee, in its report, argued that protection for human rights of the type discussed in this Article already exists in in-
Not only are direct parallels relevant to any federal system, but even within an essentially unitary governmental structure practicing majority-rule decisionmaking, the potential conflict between the civil and other basic, constitutionally protected rights of the individual (and the various minorities) and the definitive decision-making rights of the sovereign majority parallels the potential conflict at the international level between the basic human rights of individuals and subgroups and the rights of a sovereign nation to be free of intervention in its domestic affairs. Indeed, the typical objective of "enshrining" a formal bill of rights, including specific constitutional protections for individuals in such a society, is an attempt to protect potentially threatened individuals and groups against the authoritative decisions of the legitimate government. At the very least the aim is to prevent that government from taking the specified types of actions labeled "unconstitutional" which would otherwise allow the majority, by entirely appropriate decisional rules and processes, to do great and even irreparable harm to the protected individuals and minorities.10

Analysts keep returning to the question of how to assure that the specified rights of individuals are in fact to be defended operationally, with maximum safety for all sections of society, against the potentially unacceptable depredatory acts of government acting within its normal spheres of authority. Which organ of "government" is to be allotted "final say" or "ultimate sovereignty" on constitutional issues? Who can correct that body if its decisions threaten human rights or social survival? If the international system is to develop institutions that can correct the "final" acts of governments, who will oversee these international institutions? The intrinsic nature of such ultimate political dilemmas—and the consequent inherent risks and imperfections of all group political-choice processes—cannot be escaped and therefore should be explored creatively. Then, given the intrinsically imperfect limited possibilities and the overall group's constitutional bargain on values, norms,
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and decision processes, the social constitutional design and those who interpret it under fire can be expected to minimize at least the major risks to all individuals, minority and majority.

It seems obvious that renewed attention to the logical and real dilemmas for individualistic traditions inherent in all coercive group-decision processes, that is, all government, will reinforce logically the traditional conceptual constitutional strategy of "individualism" which has regularly called for minimizing the sphere of government consistent with the achievement of other equally highly valued individual and social aims. This does not, obviously, eliminate debate in each case on the appropriate mix of risks and trade-offs. Unfortunately, no automatic system of clear-cut constitutional justice is at hand, or, indeed, even feasible in principle. Constitutional justice has to be defined in each case by human institutions, however imperfect. This ultimately is the bitter implication of all our famous human rights-constitutional dilemmas. There are no cookbooks. Humanity is left with the unavoidable responsibility to decide for itself, with dignity.

The short legislative history of these matters at the international level is revealing. The partial letdown of the post-Nuremberg Universal Declaration of Human Rights (1948)\(^1\) epoch ended in the 1960's with the General Assembly's adoption of the Declaration on the Elimination of All Forms of Racial Discrimination (1963),\(^12\) its promulgation of the International Convention on the Elimination of All Forms of Racial Discrimination (1965),\(^13\) and, after nearly two decades of frustrating negotiations, the General Assembly's adoption and opening for signature of an International Covenant on Civil and Political Rights,\(^14\) with an Optional Protocol

\(^{11}\) Eleanor Roosevelt, then the Representative of the United States, held the formal position that: "The draft declaration was not a treaty or international agreement and did not impose legal obligations; it was rather a statement of basic principles of inalienable human rights, setting up a common standard of achievement for all people and nations." 3(1) U.N. GAOR, C. 3 (89th mtg.) 32 (1948). While such statements are occasionally repeated today, see, e.g., the comment by State Department spokesman, Mr. Popper, in Hearings, supra note 9, at 503, the Declaration has taken on a life of its own; in 1968, the International Conference on Human Rights at Tehran stated unanimously that the Declaration "constitutes an obligation for the members of the international community." Proclamation of Tehran, Final Act of the International Conference on Human Rights 4, U.N. Doc. AJConf. 32/41 (1968).


permitting individual complaints in some cases to a Human Rights Committee,\textsuperscript{15} and an International Covenant on Economic, Social and Cultural Rights.\textsuperscript{16}

In addition, over the years, the U.N. has been moving in many other ways involving human rights, whether or not traditionally so labeled. First, several specific limited human rights agreements have been promulgated covering such areas as genocide,\textsuperscript{17} racial discrimination,\textsuperscript{18} women,\textsuperscript{19} and slavery.\textsuperscript{20} There have also been innumerable resolutions and declarations on these subjects.\textsuperscript{21} Many of these agreements are in force, but typically for the relatively few major powers. Second, a large number of specific human rights matters have been debated in the political organs of the U.N.\textsuperscript{22} More striking, the entire effort of the Organization in the field of decolonization and self-determination can also be viewed as at

\textsuperscript{15} Id. at 59.


Under these treaties, each country retains major power of interpretation and implementation of the agreed general norms. Furthermore the treaties are not self-enforcing, so that the ultimately effective final say in human rights matters would remain with the states.


\textsuperscript{21} See, e.g., authorities cited notes 25-29 infra.

\textsuperscript{22} For example, when the Soviet government prohibited Soviet women married to foreign subjects from leaving Russia in the 1940’s, this action was deplored by the Economic and Social Council in a Resolution in 1948. R. Taubenheim & H. Taubenheim, supra note 1, at 50. It has been argued that the increase of human rights activity in the U.N. is part of a "slow process of constitutional growth in the relationship between the individual and the organized international community. . . ." Id. at 51.
least one broad facet of the U.N.'s approach to human rights, an effort generally pursued with success politically and militarily and with at least psychological and moral support from the U.N., despite persistent claims of domestic jurisdiction on the part of the colonial suzerains involved. Thus, with moral support and other assistance from the U.N. and, in varying ways, from its most powerful members, millions of formerly dependent peoples have achieved the effective right to have indigenous nationals take over their own government. In practice of course, this has meant that indigenous groups of decisionmakers attained the power to run and to modify the inherited constitutions and the inherited ongoing political-distributive institutions of their own societies, whereas these had formerly been controlled by members of the colonial suzerain's decisionmaking groups and/or their clients and allies among the native populations, presumably in their own self-interests.

Typically, no specific enforceable human rights constraints have been imposed on these post-colonial indigenous governments vis-a-vis their own peoples as they have taken up this important constitutional and political restructuring, despite the obvious and inevitable intergroup conflicts in these emerging polities of often historically arbitrary geography and varied cultures. We know that some major human rights disasters have been a predictable result, and others may well be expected, as the dominating groups try to fashion and inculcate a national culture and attempt to both create and retain control over a national political-economic constitutional system. Typically, the new states themselves in their turn have routinely asserted "domestic jurisdiction" defenses when they have subsequently been challenged on human rights issues in the U.N. In sum, the jury is still out on the overall net benefit to human rights of a practice of decolonialization without an effective set of human rights obligations placed on the whole new set of sovereigns. Hopefully, in the long run, the net effect of the no doubt

23. See id. at 45-48.

24. Calls for nonintervention and noninterference in domestic matters are the norm but are often made by states which call for direct intervention in nonfavored states. Upper Volta, as one example, has said that its foreign policy is based on the concept of independence of states, while noting, in the same statement, that it supports "the freedom-fighters" in all of southern Africa. U.N. Press Release WS/261, Sept. 30, 1966, at 16. On the continuing problems of human rights in many countries of Africa, see BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, HUMAN RIGHTS IN AFRICA (Current Policy No. 119, Jan. 1980).
excessively pragmatic decolonization processes will be positive in terms of achieved human liberty.

Approaches to human rights at the U.N. have also included, for example, the adoption of resolutions on the elimination of racial discrimination, urging states to ratify the International Convention on the Elimination of All Forms of Racial Discrimination, and resolutions urging states to adopt the Covenants on Human Rights. States have also been urged to protect human rights in the administration of justice and in armed conflicts. At the same time, it has been primarily due to the widespread, highly traditional jealousy of their power on the part of the sovereigns, new and old, that the General Assembly has not been able to agree to create the post of High Commissioner for Human Rights.

We appear to be currently in a transition period regarding human rights. It is widely acknowledged that some protection in favor of individuals and groups against deliberate, extreme, damaging behavior on the part of states with power over them is necessary, and that some very general legal limitations on the freedom of states to encroach on an individual's human rights do already exist.

29. See G.A. Res. 3136, 28 U.N. GAOR, Supp. (No. 30) 80, U.N. Doc. A/9030 (1973); [1973] U.N.Y.B. 564-66. In the Human Rights Committee, the United States has favored resolutions which would create the post immediately. These resolutions have not carried. As U.S. Representative, William F. Buckley, Jr., once expressed the disappointment of the United States:

"The arguments of those opposed to the creation of High Commissioner appeared to center on the concern that said High Commissioner would interfere in the internal affairs of their countries. Our understanding was that suitable precautions against such interferences, in violation of the U.N. Charter, were built into the pending proposal."

"On the other hand, we cannot deny that there is a sense in which the mere espousal of human rights in an international organization is to interfere philosophically with the internal affairs of some countries. Human rights is an ideal to which we all pay lip service. Even the best-intentioned among us serve that ideal asymptotically; in some societies, with such studied unsuccess as to call into question whether we can really call human rights a shared ideal."

Bureaucratic Affairs, U.S. Dep't of State, U.S. Positions Stated at 28th U.N. General Assembly 15 (Mar. 1, 1974). There is still no High Commissioner despite further pressure by the United States and some other nations.
In fact, many of the general norms continue to be honored only in the breach by many states. Yet even though they remain uncongenial for sovereign states to absorb, such limitations now appear in many instances desirable even from the states' point of view for the maintenance of peace and security, or, in other words, for widely desired systemic stability in the current international system. Historically, intolerably offensive treatment of groups of resident individuals by states has tended to lead to international tension and even to outright conflict, particularly when other powerful states have population elements that are descendants or relatives or allies of a threatened group. Indeed, viewed from the vantage point of an emerging indirect governmental system, this element of political pluralism in the international system appears potentially healthy. In a functioning democracy, such complexity of interests of the actors is generally viewed as a major political source of widespread support for the control of extreme solutions.

Thus it is understandable that these general declaratory human rights norms, and calls for their specification, have been so widely joined in or acquiesced in despite the conceptual problems and realistic enforcement obstacles of the present international system. Nevertheless, widespread voluntary submission by states to the more explicitly defined but still very early and inchoate proposed regime of general human rights law, as exemplified in the Covenants on Civil, Political, Economic, Social and Cultural Rights,\textsuperscript{30} noted earlier, has so far not been extended by the great majority of states. The Covenants have not been widely and rapidly ratified.

The significance of this for the legal status and effective enforceability of human rights in this transition period in this essentially voluntaristic legal system does eventually have to be considered realistically. But if, as with the slow, evolutionary development of earlier norms, such as those barring slavery, we have to patiently expect long lags, we can also expect that these will often be followed by discrete jumps in explicitness of norms and in state conduct in conformity thereto.\textsuperscript{31}

\begin{footnotesize}
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\item For example, such a leap was taken at the Nuremberg Trials. Although in hindsight it can be shown that the delicts in question, the crimes against humanity, as well as the crimes against the person, had been slowly evolving, the "conscience" of mankind was also invoked. Surely at the international level, this is the counterpart to "public policy" arguments on the national, constitutional level. Further, the con-
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In sum, while the record is far from clear-cut, there has been a definite overall movement towards the position that the defense of at least some human rights, even against one's own legitimate government, at some times and places, is clearly a matter of general international concern and an appropriate sphere for international action. Quite predictably, once independent, the new states have joined the older guard, and all vociferously defend their own "domestic jurisdiction" when challenged on human rights issues. Nevertheless, on balance, the sphere of international interest in human rights issues has been slowly growing, and it appears that the effective scope of the claim of exclusive domestic jurisdiction has been shrinking slowly but markedly.

This evolution is perhaps less politically inexplicable even for a community of sovereigns than one might have supposed. It is by now a commonplace notion that all political systems must expect


33. Traditionally in the international system most states, large and small, have consistently pressed as primary, if not inviolable, the rights and perquisites of sovereignty. These have regularly tended to be viewed as superior to all other claims on a state. Generally, similar claims of other states have tended to be, likewise, given weight by their peer states. That by the end of World War II this had begun to be somewhat less consistently and overwhelmingly supported does, therefore, appear to mark a significant change in the tastes of the sovereigns for human rights, an increased willingness at least to acquiesce in some modestly reduced freedoms for other fellow sovereigns when serious international political conflicts are potentially involved, in a nuclear era. With it all, this appears to be part of a significant evolutionary process towards the development of a more effectively enforceable set of international human rights: if handled carefully, no doubt one of the potentially healthier nuclear fallouts.
frequently to have to force a choice between conflicting group objectives, and that typically these are espoused primarily by differing component population subgroups, presumably in reflection of their own visions of their varying self-interests at the time. Such is the case in practice with the conflict between national self-defense, as envisaged by the dominating internal coalition in a nation, and the human rights, at least the right of survival, of its minorities. Realistically, the tastes and interests of the dominating coalition within a society at any time can be expected to largely determine the eventual trade-offs effectuated. Threads of evidence suggest that the tastes of the various dominating coalitions in the states which have the potential power to form a dominating international coalition have been slowly changing in favor of the development of a more effective multinational protection of minimal human rights (perhaps regionalized when possible as in Europe with its Commission and Court of Human Rights), at least when potential threats to the peace are involved in this era when many countries have, or can readily develop, nuclear weapons.

It is also increasingly obvious that legal systems tend to grow discontinuously, in spurts and in lead sectors. Thus it is not unreasonable to expect that increasingly the U.N. will consider exploring, passing judgment on, and, perhaps in time, effectively acting in at least some classes of human rights depredations in addition to those (primarily negative anticolonial issues) it has considered in the past. This is obviously most likely in those cases for which the "political will" to intervene effectively exists or can be forged at that time in the international arena. What kinds of issues are these likely to be? For reasons to be explicated below, it seems likely that certain racial issues will be one such important subset. In particular apartheid of the South African variety is likely to be a significant "lead sector" in the evolving law of human rights.

AN EXAMPLE: SOUTH AFRICA'S APARTHEID AS AN OFFENSE AGAINST HUMAN RIGHTS

While consideration of the development of general human rights and of specific international human rights legislation has ebbed and flowed at the U.N., the situation in southern Africa has been an increasingly persistent issue in the General Assembly for 30 years.\textsuperscript{34} We do not here consider the particular "colonial" or

\textsuperscript{34} For discussions on apartheid in South Africa, see G. CARTER, SOUTHERN

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colony-offshoot-type questions of Rhodesia-Zimbabwe, the former Portuguese colonies, South West Africa-Namibia, with its special history and prospects, or the broader human rights issues in the Republic of South Africa itself. We focus briefly instead on the development and current status of that nearly universally condemned concept, apartheid, which, as the South Africans themselves suggest, is a nonintegration policy imposing "separate" development of peoples of different races within an imposed partition of the society. This policy complex, it is claimed, has emerged as a special case in the hierarchy of internationally opposed and highly offensive human rights delinquencies.

Apartheid Defined

If we are to consider the evidence as to whether apartheid is currently illegal in international law—a crime against humanity—it remains necessary to seek out the elements of a legally defensible case for such a judgment. Presumably, "workable" law can be expected to achieve the traditional objectives of providing clear-cut definition, reasonably predictable identification of, and warning against, perpetuating antisocial actions. With reliable punishment aided by a credible enforcement system, it can serve as a deterrent to predictably illegal activities, rendering such actions likely to be subjected to sanctions.

First, we should remember that two polar concepts of the nature of apartheid and its implications exist—that held, at least until very recently, by white South Africa, and that held by the African states and many of the black South Africans and shared more or less closely by most other nations. To most nations, apartheid is a policy of comprehensive repression and exploitation of a majority racial group by a dominating racial minority. In historic fact, the use of the concept has been primarily limited by all parties to cases of white minorities repressing and exploiting non-whites in Africa, though this certainly need not be the case in principle.

In the Republic of South Africa, the most prosperous and
technologically advanced sovereign state on the African continent, apartheid, in fact, succeeded *baaskaap* or was the later form *baaskaap* took, for various political reasons. This occurred when white South Africans of Dutch descent felt the need to organize their society for the long-run self-defense of their privileged status in a hostile continent and in a country in which they are a small but dominating minority. Thus, it was the continuation of an outright, forthright, and relatively unlimited assertion of a permanent domination by the white minority over the total population and the total resource base. The South African government defends apartheid as a humanitarian policy step allowing each to develop its special future.\(^{38}\) In that government’s view, this policy includes cultural and political “self-determination” and “self-government” of each major racial group within its separate enclave. In fact, however, the right of each group to self-determination is highly limited. It does not include the right to choose *not* to be separate, nor the right to choose the size and location of the separate enclave, nor the right to a fair partition among the groups. Native enclaves, Bantustans, geographically chosen by the central government, are scattered throughout South Africa. It is reported that they have consistently been apportioned the least desirable real estate in each locale.\(^{39}\) There is evidence that they cannot be the basis for a contiguous, economically self-sustaining state. They comprise about thirteen percent of the land to be divided among seventy percent of the peoples.\(^{40}\) They include no major port, major city, or major resources.\(^{41}\) When a valuable resource has turned up in one of the apportioned Bantustans, that area has reportedly been extracted from the Bantustan.\(^{42}\) They are clearly designed to be permanently

\(^{38}\) Racial classifications are set by the government: White (some 4 million), Bantu (Blacks, over 15 million), Coloureds (mulattoes, 2 million), and Asian (0.6 million). H. ADAM, MODERNIZING RACIAL DOMINATION 3 (1971); Mowle, The Infringement of Human Rights in Nations of Southern Africa, Hearings, *supra* note 9, at 946, 949. There is some evidence that classifications in the past have been varied for the convenience of the government; while Chinese were declared “non-white,” Japanese, whose trade partnership was valued, were reported at one time to be called “honorary whites.” See Lancaster, *South Africa’s Apartheid*, Wall St. J., July 13, 1966, at 14, col. 4-5.


\(^{41}\) See C. LEGUM & M. LEGUM, *supra* note 36, at 58.

As the political situation changes and the white South Africans feel more threatened by events outside their borders, and as the Bantustans develop stronger black leaders, it can be expected that some renegotiation of the unfair partition of South Africa between white and non-white regions will be effectuated, as appears to be taking place in the Transkei. Since in bargaining, the initial position is crucial and defines the overall "bargaining range," one cannot expect sufficient modifications to arrive at a "fair" partition to come from negotiations which start on the basis of the current Bantustans as a serious alternative capable of being made acceptable with essentially minor modifications.

The South African Government, of course, insists that the proposed partitions are fair. As noted, we have discussed one reasonable, not technically unspecifiable basis for a "fair shares" division of South Africa. R. Taubenheim & H. Taubenheim, supra note 1, at 117-25. While challenging evaluations would have to be made, they are in principle quite easy to determine. And in practice, a set of strategic, geographic, economic, political, and other scientific technicians could be found to help define and apply the best currently developed geographic-resource and property-evaluation techniques available to arrive at a politically, economically, and militarily defensible set of fair-partition packages, any one of which would assure some sort of fair division of assets and resources between the groups.

Note that there are likely to be many different specific alternative fair partitions that could fill the terms of our suggested criteria. It can be expected that the precise fair option selected will, to a considerable extent, determine and/or be determined by the subsequent feasible set of intra-group economic and political power relations in the deprived post-partition societies. Incidentally, it therefore also can be expected to affect relations between the post-partition societies. For some early modern explorations of what has subsequently turned out to be a major set of political-economic problems for both prediction or evaluation in all the social sciences, see J. Graaff, Theoretical Welfare Economics (1957); Scitovszky, A Note on Welfare Propositions in Economics, 9 Rev. Econ. Stud. 77 (1941-1942).

The social optimum cannot normally be determined by technicians on the basis of so general a distributive rule. Enormous interpersonal distributive indeterminates normally remain implicit in such general fair distributive social norms as "one person, one share." Even if this norm could be agreed upon in international negotiations, and it was agreed that it should be operationalized by technicians, enormous unresolved political-choice issues would remain for political resolution.

This all adds up to complex political negotiations and bargaining that are unavoidable both within the subdividing subgroups and between them in the processes of hammering out a choice of a unique, actual, internally and internationally fair partition. If the negotiations are well run, the outcome will come from the "optimal set," i.e., it will be one of the outcomes believed consistent with the norms: "One person, one share." This is, obviously, not the way the present unfair, imposed hodge-podge of partitions in South Africa has been adumbrated.

It should also be noted that we have, in passing, corrected wording of our initial counsel for one possible highly suitable norm for a fair partition, to the scientifically more accurate terminology of "one person, one vote" or "one person, one share."

Few individuals and far fewer societies appear to be in a firm historic or present position to cast the first stone on issues of the defense of human rights. Naturally this exempts no one from efforts to improve our own and everybody else's awareness,
labor throughout the Republic to be utilized for the benefit of white entrepreneurs in the neighboring richer white regions.\footnote{3}

The laws apportioning educational opportunities\footnote{4} assure that blacks do not generally become skilled or professionally qualified. Private capital of white entrepreneurs has not been permitted to be invested in Bantustans generally, purportedly to preserve their racial inviolability.\footnote{5} This would also serve to keep them underdeveloped and to reinforce the need of the bulk of the black population to rely on earning a living in the surrounding richer and more capital-endowed white areas.

As we have stressed elsewhere, some sort of mutually negotiated “fair shares” partition of South Africa, in order to achieve equitable, secure, mutually acceptable self-determination of the races would seem to be permissible under international law.\footnote{6} There have been several recent precedents of relatively stable partitions (given the apparent political alternatives) along cultural, religious, or racial lines. One example is India, where the typical results may at best be two unloving neighbors, each capable of defending its own survival within the political system, and therefore of defending itself from total exploitation by the other. But in South Africa under the current regime, “[t]here is no real Separate Development, only racial discrimination in an integrated economy,”\footnote{7} and there is also no fair-shares, mutually acceptable, potentially stable partition in the offing. Furthermore, since analytically the initial position (in this case the already-achieved unfair white-dominated division of territory and assets) dominates the ultimate bargain (by determining the bargaining ranges), no such partition could normally be expected from peaceful, “multinational” negotiations between

\begin{footnotes}
\footnote{3}{Mowle, supra note 38, at 949-51.}
\footnote{4}{Bantu Education Act, No. 47 of 1953, 6 STAT. REP. S. AFRICA 1031 (Butterworth 1959) (effective Jan. 1, 1954).}
\footnote{5}{C. LEGUM & M. LEGUM, supra note 36, at 213.}
\footnote{6}{R. TAUBENFELD & H. TAUBENFELD, supra note 1, at 117-25.}
\footnote{7}{C. LEGUM & M. LEGUM, supra note 36, at 213; see H. ADAM, supra note 38, at 37-52, 67-73.}
\end{footnotes}
poor, weak, divided bantustans and the present white-dominated South African government.

As for the legal treatment and civil rights of South African citizens, all South Africans live under an iron rule, including a legal system which authorizes government authorities to use numerous banning orders with no recourse,\(^4\) which permits imprisonment for a half-year for anyone who might possibly be a "witness" in a security case,\(^4\) which vests near unlimited power in the government to ban organizations, to ban political activities by suspected persons, to use six-month periods of solitary confinement to obtain information,\(^5\) and to resort to other extreme measures frequently labeled cruel in Anglo-American tradition and inconsistent with the maintenance of individual human dignity.\(^5\) In addition, however, the lives and opportunities as well as the civil rights of non-whites are specifically far more constrained and demeaning than those of whites. All details of the non-whites' lives are regulated: there are restrictions on where they can live, what jobs they can legally hold, how they can vote, if at all, who their political associates can be, what land they can own, who they can marry, what schooling they can have.\(^5\) Any "privilege" allowing an exception can be canceled at any time. Public facilities remain generally segregated, as does education. The presence of non-whites in white areas has to date been permanently "migratory." The African is in general

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\(^5\) Note, supra note 48, at 28-31.

\(^5\) H. Adam, supra note 38, at 53-54; Note, supra note 48, at 29.


forbidden to strike to improve his lot at work;\textsuperscript{53} while some daring Africans have bent this rule slightly,\textsuperscript{54} and while the rule has been modestly relaxed,\textsuperscript{55} there have been mass shootings by the police in the course of labor disputes, with rewards for the police commanders. A dispute at the Western Deep Levels gold mine at Carletonville in 1973 became a riot in which police shot and killed many miners.\textsuperscript{56} The police were totally exonerated by a magistrate and, it was further reported, the police officer who directed the attacks was promoted.\textsuperscript{57}

Even if the South African government’s statements and the facts of its legislation concerning apartheid as a system of separate development are taken at face value, they constitute a system of race relations constrained by a comprehensive set of coercively imposed barriers to the personal freedom, personal development, life chances, and well-being of the various non-white races. They prohibit the equal competition of the non-white majority with the white minority. They impose indefinite, irrevocable, economic, and political subordination of the non-whites which can only facilitate dependence, exploitation, deprivation, and the consequent brutalization of the lives of the vast majority of the population, based solely on skin color: it is a “pigmentocracy.”\textsuperscript{58} Even with all the projected Bantustans in full operation, the majority of non-whites

\begin{itemize}
  \item \textsuperscript{53} A. Sachs, \textit{supra} note 51, at 165.
  \item \textsuperscript{54} In March 1973, for example, there was a large-scale strike of unskilled Africans demanding improved wages and work conditions in Durban. Several other spontaneous strikes followed. There was another walkout of 10,000 workers in Durban in Jan. 1974. Some 250 were arrested by the police. U.N. Press Release, WS/643, Jan. 25, 1974, at 3.
  \item \textsuperscript{55} Strikes are now permitted legally in “nonessential” employment, under certain conditions, and only after a long series of negotiations.
  \item \textsuperscript{56} The South African government objected to any U.N. consideration on the ground that this shooting was a purely domestic affair. The Special Committee on Apartheid rejected this notion. Not only were alien miners involved, but it was noted that the U.N. had repeatedly affirmed that apartheid policies were a matter of international concern. Killing of African Mine Workers at the Lorraine Gold Mine in South Africa, Report of the Spec. Comm. on Apartheid, 29 U.N. Spec. Comm. on Apartheid (Agenda Item 28), U.N. Doc. A/9653, S/11328 (1974); U.N. \textit{Monthly Chronicle}, Nov. 1973, at 82; U.N. \textit{Monthly Chronicle}, Oct. 1973, at 29.
  \item \textsuperscript{58} C. Legum & M. Legum, \textit{supra} note 36, at 6; L. Thompson, \textit{Politics in the Republic of South Africa} 150-51 (1966). As noted earlier, it is not only “blacks” (Bantu) who are subjected to the special regimes but “coloured” (mulattoes), Indians, and Orientals as well. H. Adam, \textit{supra} note 47, at 39-43.
\end{itemize}
would be obligated to work in low-prestige, unskilled, relatively poorly paid jobs and to live much of their lives under a special regime, deprived of all potential opportunity, both to escape upward economically or politically and to develop fully—their life chances severely constrained "from the cradle to the grave" by the dominating minority. They are, in effect, low-paid prisoners, deprived of most of their legal rights, allocated to and required to return regularly to their sparse prisons.\(^59\) Their crime is being non-white. It is not the result of an act of choice. It is perpetual, indelible, and hereditary. Nonetheless, the major question remains: taken at its worst, is apartheid now, as practiced in South Africa, as part of its regular governance of domestic affairs, contrary to present international law?

One approach to such a question is to explore some closely related objections most frequently offered to any assertion that apartheid may already be illegal in general international and U.N. law.\(^60\) First, it is claimed that the treatment of a segment of a population, majority or minority, is still, in the view of all states, normally a domestic matter. Since Nuremberg, this is surely a difficult claim to make unqualifiedly, yet it can be expected that no controlling group in any state is normally willing to have its preferential biases, discriminatory practices, and the like aired and judged internationally. And whose standards would be applied if not those belonging to the majority or the "legitimate" decision-makers?

All societies are in fact run by a relatively small percentage of the population, which may variously be labeled as the "decision-makers," or the "elite," or the "power majority." Of course crucial differences exist in the "responsibility" these elites have to their constituents and in the effectiveness of the controls achieved by these constituents over the decisionmakers’ performances. The types of preferred treatment they extract for themselves, the scope

\(^{59}\) To pursue the metaphor, as in some Latin American countries, these "prisons" are "self-run," but life within them is kept within the real constraints ultimately dictated by the jailers.


Obviously, for any nations ratifying the treaty on apartheid, apartheid, as defined in the treaty, is illegal. U.N. CHARTER art. I, para. 3. The treaty is in force but it seems certain that many states in addition to South Africa will not ratify any such treaty. Hence, we must look to more generally accepted norms, if they exist.
of the subgroups with privileged access to preferred treatment and life chances within the society, and the scope and intensity of the special barriers erected to other regularly excluded, nonprivileged groups also seem likely to vary with this same set of political variables. But in all hierarchical political societies, there is a scarcity of preferred life roles relative to candidates and preferred subgroups, and disadvantaged subgroups tend to exist. How to separate and

61. See Taubenfeld & Taubenfeld, Achieving the Human Rights of Women: the Base Line, the Challenge, the Search for a Strategy, 4 HUMAN RIGHTS 125 (1975). In a study by Rita Taubenfeld, Overcoming Barriers to Equality: The Sexual Discrimination Case (forthcoming 1981), these issues are analyzed in greater depth. In that study it is stressed that the distributive struggles that determine a persons' or groups' achieved roles in a society are "typically characterized by (1) scarcity of the desired payout; (2) indeterminacy; and hence (3) great distributional conflict" even among the in-group members.

There is not much room at the top of a pyramid: by definition, there is much less room at the top than anywhere else. Thus, in a hierarchically organized society of multiple hierarchies more people will have to be privates than generals.

But when the distributive preferences of the actors run counter to this intrinsic structure of opportunities for payout, we face an extremely "niggardly nature." It is probably impossible to think of any cases in which in fact only one mortal could "fill the bill" well. Indeed human survival would be biologically endangered if this were the case. No one is uniquely qualified. Indeterminacy, more good candidates than openings, can be viewed as a necessary biological strategy. Under these circumstances, it pays the powerful or best-placed social subgroups to invent all kinds of diversionary or discriminatory exclusionary strategies for eliminating large groups of potential competitors for the scarce, desired social roles and life styles, and such strategies are in fact regularly resorted to in most or all complex societies.

Both the existence of arbitrary, irrelevant, discriminatory qualifying criteria (race, sex, religion, etc.) and, note also, the use of arbitrary devices to correct these biases coercively, if necessary (like quotas), on these assumptions need imply no long-run efficiency loss. Every population can be assumed to have qualifiable talent (too much). This is a continuous threat to the security of the tenure of all elites which can be expected to attempt to protect their privileges, at least normally by all legal devices they can devise for the purpose.

This designedly oversimplified set of statements is repeated here to suggest the analytical essence of some of the basic causes for the worldwide incidence of discrimination and some reasons for believing it will not be totally eliminated at the domestic or international levels soon.

The underlying convenience of arbitrary discrimination to the decisionmakers of most states and its institutionalization within the distributive machinery of most societies suggests that well-publicized, aggressively pursued corrective action backed ultimately by political coercion and constant vigilance are required. This only highlights the crucial importance for excluded groups to organize in order to garner and assert political power both at the national and international levels if they wish to greatly modify the traditional outcome of the distributive systems.

On quotas: Note also the by-now conventional acceptance of this arbitrary correction device in the international system. Obviously the use of quotas need not repress discriminatory conduct effectively. That depends on the "appropriateness" of the criteria used as a basis for quotas. U.N. personnel-policy experience exemplifies
to identify the internationally illegal discriminatory practices and policies from all these others seems therefore to be at the same time both difficult and conceptually crucial. An important related issue is the claim that in a world where there are demonstrably discriminatory policies and legal deprivations within member nations, based on ethnic origin, race, religion, sex, even ranging up to, in some cases, slaughters based on tribe, the particular “aberration” of apartheid cannot be held illegal. In principle this argument rests upon the premise that apartheid ought not and should not be condemned so long as so many other coercive, discriminatory activities are carried on by member states free from the scrutiny and comment of the U.N.

A third, frequently raised, closely interrelated objection to claims that apartheid is currently illegal is based on the formal concept of domestic jurisdiction in international law. The demand that a nation abandon a crucial national distributive policy and system of extensive and far-reaching effects on all citizens' ways of life within a sovereign nation, and that that nation dramatically revise its constitution to accord with what world opinion defines as minimal racial justice is surely a revolutionary concept. It would no doubt be resisted by all nations if it were applied to their own constitutions. Furthermore, any claim to the development, even incipiently, of binding powers of constitutional review by the international system, whether by the primitive international court system, or by the very primitive international legislature, is likely to be viewed as a major potential threat to the system of sovereign inde-

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62. The world has been confronted, for example, by shocking accounts of mass murders in Burundi where the dominant Tutsi, who number 15% of the population, held near-total control over the Hutus, the remaining 85% of the people. Estimates of the numbers massacred by the Tutsi to maintain their dominance range from 80,000 to 200,000. Hearings, supra note 9, at 53-54, 64-91, 974-81. African leaders of other nations reportedly did not want to interfere in Burundi's “internal affairs” at the time. Id. at 84; N.Y Times, June 4, 1972, § 4, at 2, col. 4. Cambodian killings are also reported to amount to perhaps a fourth of the population. To again proceed with our own analysis, we would have difficulty excluding such cases as especially severe crimes against international law. On their face, they appear to be identifiably extreme deprivations of human rights which are so severe that they should logically be crimes on human rights grounds, and should elicit both international reaction in defense of human rights, and the personal culpability of the responsible officials.
To summarize the issue more generally, we assert that the quest for international legal protection of human rights has evolved into a process of attempting to make ever more explicit—and hence more legally enforceable—an already broadly delineated set of constitutional-type international guarantees to individuals and groups against which their own government purportedly may not legally transgress. Most frequently, as in South Africa, these tend to involve valuable distributive issues of intense political interest to all members of the individual society itself, and to involve competition among them for access to privileged roles and lifestyles. Furthermore, the stakes are likely to be of special concern to those groups that form the effective, dominating coalition, the "power majority" within each nation. These are the groups which tend to run the country and can be expected to do so primarily to optimize their own overall satisfactions. It is quite possible of course that their satisfactions will include running what by their definition constitutes a good society.

It is just these groups, the major decisionmakers in each society, who will have very great incentives to defend the sovereign rights of their states to exclusive domestic jurisdiction over all important, valuable, distributive issues. These include the right to exclude and exploit or at least to deny fully equal treatment to all contenders for the best life chances, including all minorities and

63. U.N. Charter art. 2, para. 7.
64. For a discussion of this constitutional dilemma which the development of a binding human rights law poses to the present system, see R. Taubenfeld & H. Taubenfeld, supra note 1, at 8; text accompanying notes 9-11 supra.

The authors further suggest that:

[I]t is the contest for ultimate governmental control. Historically, sovereignty has been the chosen champion. A general international organization which could effectively and consistently impose a world consensus on human rights on a state would be far more like a federal government than any sovereign has thus far been willing to contemplate. In short, forceful UN intervention against apartheid in South Africa could represent a momentous and portentous, if small, break with international legal and organizational traditions.

R. Taubenfeld & H. Taubenfeld, supra, at 8.
all suppressed majorities, who have not been admitted to the dominating coalition.

Again we return to the question that, if this is not an atypical form of political-sociological behavior, how can we claim that the way chosen by South Africa, to wit, "apartheid," is, or is becoming, illegal in international law and is a "crime against humanity"? Can we do so in such a way that the other states, each of whose leaders can be expected to value their own privileged domestic jurisdiction, can be comfortable that the distinctions being made are clear-cut, analytically and politically necessary, and rather unlikely to boomerang on them? We think it can be done.

It can be seen that at least two relevant sets of constitutional-choice issues exist:_signature the normative-distributive dilemmas—briefly, how should access to the limited "best places in the sun" be shared out optimally among human members in the face of inherent acute scarcity; and (2) the operational dilemmas—how to develop people and/or design social-choice institutions which will implement the distributive decisions optimally and address such problems as keeping the elite effective yet honest and acquiescent to the group norms and rules.

Although constitutional diversity on these crucial choices on the basis of the sovereign's self-determination is the currently accepted strategy of the international community, we assert that (1) some subsets of solutions to these ultimately domestic political-constitutional questions, those that we label identifiably extreme, have become internationally unacceptable on human rights grounds; that (2) in such extreme cases at least the basic human rights of the endangered human groups are or should be superior to all other competitive internal or international rights, except, of course, similar survival rights of others; and therefore that (3) for reasons

65. A constitution need not, of course, be, and in the case of the international community is not, written, at least not in any single instrument. Here, we are directly concerned with another kind of constitutional choice, theoretical constitutional choice, a subject which already has a very long, distinguished intellectual history stretching in the modern era at least from Rousseau to Rawls, and one that is still unwinding. Consistent with contractarian traditions, we are thinking here of the constitutional choice by a "rational" community, composed of rational individuals, negotiating an optimal-compromise "social contract," a bargain on the basic rules by which society will be run, including, inter alia, therefore, the social choice of "fair" distributive strategy and institutions and, more generally, the planned society's overall approach to the resolution in practice of all the conflicts implied in the intrinsic dilemmas we have noted above, of coercive governments comprised of "sovereign" individuals.
to be explored below as applied to the case of apartheid, this subset of identifiably extreme constitutional choices should be regarded as not merely illegal but internationally unconstitutional because they are crimes against humanity. Special international enforcement efforts would seem to be called for, and the personal criminal responsibility of members of the domestic leadership found guilty of perpetuating these crimes should eventually be anticipated. In brief, clearly unconstitutional regimes can be identified. That of South Africa, at present, is unconstitutional on human rights grounds.

Apartheid and U.N. Norm Setting

The United Nations has had a special interest in South Africa from the first days of the organization’s life. Beginning with an Indian complaint in 1946 concerning discriminatory measures employed in South Africa against people of Indian origin, the General Assembly has adopted resolutions condemning South African policies at almost every session through the 17th, when the issue was merged into the question of apartheid. South Africa claimed that the matter could not even be discussed due to Article 2(7)’s prohibitions. Other states insisted that fundamental violations of the Charter could not be matters of domestic jurisdiction, and that “human rights were not essentially within the domestic jurisdiction of the state.” Thus, the basic conceptual conflict between these two very important accepted U.N. goals, or sets of constraints, emerged early and has remained a common theme of all U.N. activities on apartheid.

Apartheid has been formally before the U.N. since 1952 when the question of a race conflict in South Africa was considered by

68. For the discussion and Field Marshal Smuts’ statement, see U.N. General Assembly 1st Sess. (50th mtg.) 50, 2 Plenary Materials, Dec. 7, 1946, at 1007-10.
69. Id. at 1015-19.
70. Id., (51st mtg.), Dec. 8, 1946, at 1026 (Panama); id., (50th mtg.), at 1019-20 (China).
the General Assembly as a possible threat to international peace and a violation of basic principles of human rights and fundamental freedoms. South Africa rested its case primarily on the language of Article 2(7), contending that even discussion of the matter was impermissible intervention in a domestic matter. South Africa has uniformly insisted as well that its activities are no threat to the peace (a situation in which Chapter VII admittedly overrides Article 2(7)), but rather that, if anything threatens the peace, it is the bellicose demands on South Africa of other African states.

This conflict in interpretation and legal-norm setting has continued to this day. Most states have argued that action of the General Assembly with respect to human rights is not an “intervention” within the meaning of Article 2(7) and that South Africa’s policies violate the Charter and the Universal Declaration of Human Rights, which have been said to ban racial discrimination. The General Assembly has discussed and adopted resolutions on South Africa’s racial policies at every subsequent session. The Security Council has acted on occasion as well, although it never has utilized the full range of power given it by the Charter.

On April 1, 1960, after the Sharpeville massacre, the Security Council recognized that the situation in South Africa had led to international friction and, if continued, might endanger international peace and security, and called for measures to bring about equality and racial harmony. Over time, the General Assembly has recommended sanctions of varying degrees of severity: these include nonrecognition and nonacceptance of credentials at the U.N., economic sanctions, and arms embargoes. It has established Committees to keep watch on apartheid developments and to ad-


74. Note that Britain, the United States, and France are among South Africa’s principal trading partners and that South Africa is the largest single area of U.K. overseas investment. It enjoys significant U.S. investment as well. Much of the non-Soviet world’s supply of gold is produced in South Africa.

75. See N.Y. Times, Apr. 2, 1960, at 3, col. 3.

minister Namibia (South West Africa). In addition in August, 1963, the Security Council called on states to cease the sale of arms, munitions, and military vehicles to South Africa, but sales continued and South Africa built up a major domestic arms industry; it is now, in fact, an arms exporter.

Some states, like France, have over the years opposed generally the interventionary aims of the U.N. Others, while sup-


For the authors' general views on the lack of efficacy of economic measures alone against a determined, prepared state which considers that its vital interests are at stake, see Taubenfeld & Taubenfeld, The "Economic Weapon": The League and the United Nations, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 183 (1964) (58th annual mtg.).

porting the ends, have objected to the somewhat precipitous ways in which the General Assembly has acted. A few states have urged repeatedly that "in terms of Article 2(7) of the Charter, the United Nations is precluded from considering [the issue of apartheid];" others that "no immediate threat of hostilities exists." While many of the U.N. members have applied trading sanctions, the major western powers have not generally limited trade, except in arms, and some, in particular France, reportedly continue to sell arms as well.

Over the years, General Assembly language has become increasingly strong. In 1968, for example, the Assembly not only reiterated its views that apartheid was a crime against humanity, but also asked the Security Council urgently to consider the use of Chapter VII measures and condemned South Africa's trading partners for not enforcing economic measures, labeling apartheid as a mass violation of human rights, a flagrant violation of human rights, and a crime against humanity.

In addition, in 1970, with France, the United Kingdom, and the United States abstaining, the Council adopted a resolution again condemning apartheid, calling the situation a "potential threat to international peace and security," and calling upon all


states to support an arms embargo.\textsuperscript{86} The Council frequently condemned apartheid thereafter and, in 1977, on the basis that the South African situation was indeed a danger to international peace and security, the Security Council adopted a mandatory arms embargo.\textsuperscript{87}

The General Assembly, in numerous resolutions, has called apartheid a negation of the Charter of the United Nations and a crime against humanity, and has called removal of persons to Bantustans action akin to that condemned in the Nuremberg principles—as affirmed at the U.N. and elsewhere—as constituting "crimes against humanity" in that they involve "enslavement, deportation and other inhuman acts . . . enforced against [a] civilian population on political, racial or religious grounds."\textsuperscript{88}

The Assembly has thus also indicated its lack of satisfaction with the far broader Convention on the Elimination of all Forms of Racial Discrimination, promulgated by the General Assembly in 1965 and in force in 1969.\textsuperscript{89} Since it is in force, and relevant, we will briefly comment on the implications of this treaty for our problem.


\textsuperscript{89} 660 U.N.T.S. 195.
The Convention on Racial Discrimination is supportive of the U.N. work to protect human rights described earlier. It provides, *inter alia*, that States Parties shall "engage in no act or practice of racial discrimination against persons, groups of persons or institutions . . . ."90 More specific guarantees—the right to take part in government and public affairs at all levels, equal access to public service, equal treatment before tribunals, protection against violence and willfully inflicted bodily harm, freedom of movement within the state, the right of freedom of marriage and choice of spouse, and the right of freedom of peaceful assembly—are found in article 5. Many of these rights clearly do not exist for the majority of non-whites in South Africa. Article 3, for example, is directly on point vis-a-vis South Africa: the States Parties "particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate . . . all practice of this nature."91 For parties to the Convention, and to the extent that the Convention is accepted as indicative of existing international law, by international standards as well, state-endorsed, or even state-tolerated racial discrimination in general, and apartheid in particular, are currently deemed illegal. While special mechanisms are provided, the primary sanctions of the Convention remain publicity and world opinion.92

Although Nuremberg seems to indicate that under international law illegality of a gross nature can lead to the criminal prosecution of officials who order and carry out the illegal acts, even in the absence of specifically applicable treaties, the General Assembly has not been willing to allow this precedent to suffice in the case of apartheid. Nor did it feel that mere illegality as under the Convention on Discrimination sufficed. It has continued the pursuit of explicit specificity in building its political-legal case against apartheid and its perpetrators as a particular example of an extreme case of internationally illegal deprivation, and, indeed, as a human rights "crime."

Thus, in 1973, as noted above, specific General Assembly at-

90. *Id.* at 218.
91. *Id.* (emphasis omitted).
92. Reservations are permitted to the Convention and a substantial number have been made. Moreover, while a Committee on the Elimination of Racial Discrimination is established to review state-reported compliance with the Convention, and can receive complaints by individuals, it can receive such complaints only if their State has recognized the competence of the Committee to do so, and few States seem willing to do so.
tacks on apartheid, as distinct from ordinary racial discrimination, culminated in the promulgation of a Convention on the Suppression and Punishment of the Crime of Apartheid. It was stated that "apartheid constitutes a total negation of the purposes and principles of the Charter of the United Nations."

In the Apartheid Convention, the General Assembly called anew for the implementation of effective measures to suppress the crime of apartheid. The Convention defines the crime of apartheid as constituting "inhuman acts committed for the purposes of establishing and maintaining domination by one racial group... over any other racial group of persons and systematically oppressing them." Included as such "inhuman acts" are the infliction of serious bodily or mental harm, arbitrary arrest, the deliberate imposition of living conditions calculated to cause the destruction of a racial group, and measures designed to prevent a racial group from participating in the political, social, economic, or cultural life of a country. A ban on mixed marriages is specifically mentioned as well; so too are expropriation of landed property belonging to members of a racial group, exploitation of labor, and persecution because of opposition to apartheid. International criminal responsibility applies to those committing or directly inciting such acts, and parties to the Convention undertake to suppress the crime of apartheid and punish those guilty of it.

The Convention does not itself bind a nonsignatory South Africa, of course, and, since it remains unratified by many nations, and by major powers, it cannot by itself soon be expected to form the basis for either a treaty or a customary norm. Yet the expression of intent of the signatories is clear. And, as noted, the law of human rights may well be expected to grow in response to discrete policy jumps taken by a few (or, at times, even one) especially con-

94. Id., reprinted in 13 Int'l Legal Materials, supra note 93, at 50. Showing its further displeasure, the General Assembly, in 1974, refused to seat the South African delegation and moved to expel South Africa from the U.N. The Security Council did not concur in expulsion, the United States, France, and the U.K. all casting negative votes.
95. See id. at 75-77, reprinted in 13 Int'l Legal Materials, supra note 93, at 50-57.
96. Id. at 75-76, reprinted in 13 Int'l Legal Materials, supra note 93, at 52.
97. Id. at 76, reprinted in 13 Int'l Legal Materials, supra note 93, at 53-55.
98. Id.
cerned states. If the new norm being espoused appears ethically compelling because its time has finally come, or for other reasons, and is also backed by persistent, convincing political efforts by the lead state(s), the laggards may indeed be expected to eventually acquiesce officially, particularly if they feel it politically useful or necessary for group safety. In a growing legal system where there are lag and lead sectors and actors, the fact that there may well be uneven performance in practice for some time, or multiple standards for states with different real capacities and incentives to conform, cannot be viewed as particularly unusual or special to human rights issues. It is indeed, a healthy sign of growth of legal and organizational capacity in this nonintegrated international system.100

Nevertheless, it remains a problem for the signatories and for the effective development of human rights that many or perhaps most of those states appear to be currently in violation of one or more of the Apartheid Convention’s prohibitions. Indeed, this highlights a basic difficulty with the overall approach to the control of apartheid via legal innovation, as well as by continuous political pressure in and outside the United Nations. Innovation in response to genuine, complex, intransigent problems is not to be denigrated, but the fact is that many of the moves against South Africa, including the Convention against Apartheid, appear to have been designed to be applied only to this one widely disliked, highly offensive state (which has some powerful business connections). Therefore there does not appear to have been a major effort to define an international set of generally applicable standards concerning which highly unacceptable illegal practices or conduct must inevitably be labeled as crimes against humanity. Nor does this approach appear to have been in the nature of a quest for minimum human rights norms to which all signatories would be willing to conform now or agree to be bound either immediately or even eventually when they develop the mature capacity to conform to agreed group standards. As such, the long campaign and the Convention do risk violating such other important basic concepts of justice as equality, in principle, before the law. They may reasonably look capricious, unfair, and politically as well as legally unworkable, and therefore a discrediting bad precedent. In sum, although we have recognized specifically the frequent necessity for “leading” sectors even in the law, it would be reasonable also to

look for some evidence of a genuine intention of some of the laggards to attempt to catch up eventually with the proposed standards, if only to preserve the long-run credibility and viability of the legal system.

The upshot is that this highly specific condemnatory Convention appears an unnecessary negative path to take towards innovation intended to effectively increase the real content of human rights protection of all peoples against governments. For understandable but dubious reasons, it deliberately passes over the hard, fundamental conceptual and constitutional dilemmas inherent in doing so and the resultant increased necessity for strong, legal protections for both minorities and majorities, at all levels of government, including the international level. There have been many warnings over the years from the United States and other governments that the U.N., to be viable, also should avoid a “tyranny of the majority.” Therefore, a basic document interpreting the scope of “crimes against humanity,” which has to be a very important international constitutional concept, should be drawn only subsequent to a full-scale, sophisticated, constitutional exploration of these dilemmas, the conceptual and international compromises they necessitate, and the risks we are all taking however we choose to design our contemporary social contract. Presumably it should not primarily evolve as the embodiment of a not very careful effort to single out one or two especially unpopular criminal states.

It is also fair to add an additional challenge before returning to the case. If it appears generally agreed by the states that the present felt need in a world where nuclear weapons are available to many states is an international system allowing both the continuation of largely sovereign, self-defending governments and the growth of specified, credibly defensible minimal human rights, it would surely behoove the governments of the major Western powers, which were the principle critics of the Apartheid Convention on grounds of workable “justice,” to come forth with their own more positive proposals taking some small steps, especially in cases of extreme depredations, in the direction of safe progress towards a more workable international constitutional regime for the effective defense of human rights now. In principle it is not impossible to combine this with the maintenance of credible security for the reasonable needs for independence of the nations from dangerously encroaching external legal-enforcement processes. The will to take this step has clearly been lacking.

In any case, the major thrust of a new convention against the
whole class of grave delinquencies, crimes against humanity—of which apartheid remains a prime example—should be aimed at clearly establishing the existence of limits of destructive treatment of peoples, including discriminatory conduct, beyond which all sovereigns, in principle, could not legally go. The norm itself, then, would be generally applicable. It should no doubt be designed to operate ultimately on some rule of reason, interpreting and applying the general guidelines included. The resultant regime might be expected to recognize, *inter alia*, that, although all societies run by humans can be expected to practice some arbitrary, de facto discriminations, and the control of these undesirable phenomena is traditionally within domestic jurisdiction and will remain there, there is nonetheless a limit beyond which states cannot legally go in imposing draconically discriminatory treatment on internal populations on the basis of arbitrary criteria, without generating international concern and, eventually, enforcement activities. Furthermore, it would be important that it be generally understood that this is in the nature of a constitutional rule, and that states are obligated to assure that their effective, legitimate power majorities do not cross this constitutional bar to undertake measures of massive exploitation or policies that irreversibly degrade by coercion their power minorities. It must be understood that there is, after all, an international “Bill of Minimum Rights” of individuals and subgroups, no less defensible because it is partly unwritten. It would appear that it would then be easy to demonstrate that a program like apartheid in South Africa—a planned, comprehensive, coercively imposed, exploitative campaign by a government entrapping a population subgroup permanently in degrading conditions from which it has no genuine exit—which would not be illegal under the laws of that society is identifiably beyond the line drawn by the international community; that is, that a regime which amounts to an appropriation of the subgroup’s birthrights, depriving it of not just one or two important rights but of all of the civil, economic, political, psychological, and personal human rights and aspirations enjoyed by other subgroups in the population is both repugnant and criminally illegal.

Such a new convention might also include a list of carefully drawn per se offenses reminiscent of those in the present Convention. For example, one could argue that, in explicitly imposing, on the arbitrary basis of race, a militarily policed, second-class lifetime plan which offers no exit except by death or by secession on grossly confiscatory terms tantamount to expulsion with expropriation,
apartheid is clearly and identifiably equatable with genocide, so inhuman, entrapping, and dehumanizing, and therefore so inevitably dangerous to the peace as to be illegal per se. It could then reasonably be listed as a rather more specified member of the illegal set of crimes against humanity. No one claims that such a convention would be simple to obtain or to apply at the international level, and there appear to be no simple routes to the fair, effective growth of protection for human rights. Yet, the interests at stake call out for a full-fledged attempt at protecting human rights within the world legal order.

It is true that even the present Convention might, if widely accepted, achieve the status of those anti-war and related treaties which were taken at Nuremberg as showing knowledge of intolerable wrongdoing and of international lawbreaking by Nazi leaders, who were indeed held individually responsible for their acts. It might prepare the ground for a more general, fairer, safer, more conceptually sound approach to the development of the legal category of crimes against humanity which no government of humans can expect to transgress indefinitely with impunity.

THE CURRENT STATUS: SUMMARY AND CONCLUSIONS

As we have seen, apartheid has been termed odious, intolerable, a pathological aberration and, in recent years, in a formal manner, a crime against humanity. It has been urged in the U.N. that it be treated as a cruel, inhuman disease which must not be permitted to affect other areas. It has been described, in language appropriate to Chapter VII of the U.N. Charter, as “a threat to international peace.”

We return then to our earlier questions: Can emotional and essentially political overtones be separated out so that a reasonably intelligent, objective judge could determine that there is today a set of acts or government programs which constitutes an identifi-

102. “The United Nations has recognized that the perpetration of [colonialism, racial discrimination, and apartheid], particularly in their gravest manifestations in Southern Africa, constitutes a great danger to international peace.” U.N. Press Release, SG/SM/1209 PL/84 Feb. 17, 1970, at 2 (statement by U.N. Secretary General U Thant). Prof. Van Dyke has argued that: “If the principles and the reasoning applied to Southern Rhodesia justify a finding that it constitutes a threat to the peace, it is a very short step to the conclusion that South Africa does too.” V. VAN DYKE, HUMAN RIGHTS, THE UNITED STATES, AND WORLD COMMUNITY 214 (1970).
able, internationally illegal set of comprehensive, coercive, discriminatory activities into which category the South African system of apartheid fits? If so, how can it be judicially identified as being different from other commonly or universally used methods of affording different population subgroups unequal opportunity, which remain presumably either legal or arguably illegal but not amounting to crimes against humanity. And, finally, in which instances is it likely to be elevated to the level of an overriding norm, presumptively superior even to the conflicting Charter-approved norm that no state and no international organization may intrude on the historically sanctified right of the sovereign state to pursue its own domestic policies, including its distributive policies, free of all outside interferences?

We have already suggested our answer to these crucial questions and our approach to establishing workable, legal criteria for significant crimes against humanity. Concern for human rights, as indicated in the Charter, has been slowly spreading since World War II. It is still a tender flower, but there are by now enough treaties, enough practice, enough concern voiced by national spokesmen, enough expansion of Charter terms by definition, enough creation of a constitutional limit on states, to permit argument that at least some of a population subgroup's minimal human rights to survival are presently and legally enforceable even against sovereigns under some specifiable, reasonably clear-cut circumstances. These delicts, which are labeled crimes against humanity, are indeed readily identifiable, ex post at least, in part because they tend to be extreme measures of such an obvious, comprehensive, flagrant, and irreversible nature as to engage the conscience of humanity. They therefore also promise to threaten the peace sooner or later. In the interim, they tend to promote international tensions and crises which accompany the efforts of especially affected nations—those with special affinity to the endangered population groups—to create the political will in international forums to achieve enforcement of basic justice against such crimes against humanity. Apartheid in South Africa, as practiced to date, appears to be such a case.

It is true and to be expected that such a complex of extreme deprivatory practices may already be illegal, even when perpetrated by a sovereign despite the fact less pervasive but commonly practiced discriminatory domestic practices are not yet internationally illegal and, indeed, may never be expected to be so. Workable standards for defining this extreme class of offensive policies do ex-
ist and are evolving. Scholars and nations should explicitly explore the appropriate legal approach to such crimes against humanity but even without such scrutiny it is already possible to assert that states and judges could apply existent and emergent international normative standards reasonably, objectively, fairly, and equitably so that predictable, generally applicable, norms and outcomes would result, even if some would escape the net. Clear-cut crimes against humanity are not impossible to identify even on the basis of past international practice.

Finally, even if it is likely that the international system cannot soon be expected to cope fairly and well with the most widespread types of domestic discriminatory conduct of the numerous states (for example, with generally practiced discrimination against women), it is nonetheless neither illogical nor legally improper that the states, or the U.N., persist in efforts to obtain at least minimum justice, the survival of subgroups, and to assure peace and security where offenses are most clear-cut and comprehensive—most exploitative, long-standing, irreversible, inhuman, and dehumanizing—and where international political consensus in favor of effective enforcement has been actively pursued and widely attained. Indeed, for the states or the U.N. to ignore such a course could in the long run be dangerous to the peace. In addition, failure to cope with deficiencies of this type is likely to compromise respect for, and hence the future viability of, current international institutions themselves. Similarly, the fact that, even in the case of clearly defined international legal norms and decisions, enforcement and compliance are often imperfect in the international system would not normally alter the illegality of the conduct involved. These are, indeed, all too common failings of international law; they do not affect the juridical determination of present illegality. Lapses in compliance do, of course, highlight the longstanding need for systemic reform and for improved performance by the nations. Nevertheless, imperfect performance and de facto multiple standards of achieved justice exist within all legal systems; this has never been taken as an excuse for instituting anarchy or jungle law. One last important consideration needs iteration here: a legal system cannot indefinitely continue to respond negatively to demands for minimal justice, even if these entail new risks.

When it is even riskier for members of a court or the overwhelming majority of states not to permit the organs of the international system to exercise new or newly effective powers than it is for them to do so, survival logic calls for such an exercise of powers to be viewed as legally and politically permissible. Presumably the organized, developing international system also has some right of self-defense in extremis, even if that requires growth which some may quite reasonably regret or dread. At the very least, if the court or organization does allow itself to choose to fail, possibly, in its view, for the good of all, it would seem that the constitutional and other normative dilemmas on which its stewards have chosen to allow it to founder should be thoroughly explored by them for the education of their ultimate replacements. A legal system and an administrative system have to be able to change and, if necessary, grow to their tasks; at least they ought to be allowed to fail creatively, and without, hopefully, bringing the peace down with the failure.

Some Possible Elements of an Operational Criterion: Offenses Against Humanity in Human Rights Law

Without attempting to cope with the inevitably difficult range of questions involving borderline cases in which discriminatory distributive social systems or institutions are just barely intolerable and dehumanizing enough to be verging on the criminally illegal, we have drawn together a not necessarily complete list of the few readily identifiable extreme classes of comprehensively exploitative and coercively dehumanizing domestic distributive policy complexes which are now or soon promise to be illegal under international law. Among the extreme offenses readily classed as crimes against humanity and treated as currently illegal there are two clear-cut cases—slavery and genocide. In addition, the exercise of colonial domination over a country whose people are normally of different ethnic stock, while not presumably a crime against humanity, is equally clearly not now politically acceptable. It has been a repeated source of danger to peace and security. It can be

counted on to lead to civil and international disturbances. Indeed it is now likely that new attempts to establish such a formal colonial sovereignty would be treated by many as illegal internationally. Historically, in the typical colonial case, an indigenous population was explicitly dominated by a foreign government, often via a small resident foreign minority which organized the local distributive system of the colony so as to exploit the potentials of the territory's resource base as far as possible, principally for the suzerain's de facto benefit. There are surely strong parallels between the effects of this now unacceptable regime and the current South African regime. Apartheid, which has been described and defined in some, if not all, of its complexity above, shares important motivational and other features with each of these other currently legally or politically unacceptable institutions and, indeed, by extension, could be and has been viewed as illegal as well as politically unacceptable on those grounds alone.

Once again, although slavery is formally illegal so that in principle a person cannot legally be the property of another, conditions which are almost indistinguishable from, or close substitutes for, illegal slavery are normally not criminal in international law. Note, for example, the impaired status and the genuinely limited legal rights and opportunities of married women in many nations. Similarly in the case of apartheid, there are various less pervasive, less irreversible, less comprehensive, less draconic, less insurmountable, less offensive economic-deprivation and legal-exclusionary strategies which probably do significantly and systematically compromise the life chances of nonfavored groups of citizens automatically, often on the basis of arbitrary, irrelevant criteria, over which the parties have no choice, such as race, sex, religion, tribe, color. These are regularly used by all nations precisely because they tend to yield outcomes favorable to the privileged group similar to those achieved by the organized, legal type of racial enslavement which is labeled apartheid in South Africa. Yet, there is a clear-cut difference between an intent to advantage one's own group and disadvantage or discriminate against all others, and a conscious, deliberate, comprehensive, irreversible, lifelong, coercively enforced legal, political, economic, and social program designed to achieve lifelong racial exclusion and subjugation and economic exploitation or racial expulsion. That difference is even now identifiable with some discipline and some legal predictability. Indeed there is a very important difference between

105. Taubenfeld & Taubenfeld, supra note 61, at 153-55.
any subgroup’s being systematically disadvantaged and being officially barred permanently from the social competitions for the desirable life roles as in apartheid.

In conclusion, the package of extreme exclusionary practices known as apartheid in South Africa is so offensive to internationally shared common norms of decency, and so deliberately, incompensably damaging to the victims thereof, and to their sense of their own human dignity, that it both should be, and probably is, not merely illegal in international law, but by now constitutes a crime against humanity. Unfortunately, as in other cases, enforcement may not be possible except post bellum.106

Of course, the tenor of this argument includes the possibility that, in years to come, the line of unreasonable, illegal conduct for sovereigns will shift so that some of the present commonly practiced offenses perpetrated by sovereigns against their various population subgroups will also become enforceably illegal in international law. In time, the effective protection of human rights will grow, and the category of crimes against humanity will be cautiously but more liberally construed as well. For the present, we have to start slowly and carefully and to expect to rely primarily on achieving no more compliance than can be induced from the domestic institutions of the law-breaking state itself, augmented by international pressure. In terms of constitutional choices, major interferences with sanctified domestic jurisdiction will be restricted to the already really clear-cut cases of currently abhorrent crimes against humanity: slavery, genocide, and apartheid.

106. For South Africa proper, we note again that there have been, in 1980, official statements appearing to portend a change in at least the most drastic parts of the apartheid program. See note 55 supra. On the current U.S. attitude with respect to South Africa and change, see BUREAU OF PUBLIC AFFAIRS, U.S. DEP’T OF STATE, SOUTH AFRICA: U.S. POLICY, APRIL 30, 1980 (Current Policy No. 175, May 1980).