Roswell B. Perkins of New York, delegate of the American Law Institute, urged opposition to the amendment on the grounds that it was unsupported and diversionary.

Peter Langrock, Vermont State Delegate, also opposed the amendment.

Calvin H. Udall of Arizona, a former member of the Board of Governors, proposed that the House adopt the resolution proposed by the Section of Individual Rights and Responsibilities and the Standing Committee on World Order Under Law with an amendment to add the following: "Be It Further Resolved, That the American Bar Association opposes the policies of any government that discriminate against its inhabitants on the basis of their race."

By voice vote, the House approved the Udall amendment. The House then, by voice vote, approved the motion to substitute, and by voice vote and without further debate, the House approved the resolution as follows:

*Be It Resolved,* That the American Bar Association opposes the South African policy of apartheid and its various manifestations and urges the United States Government to take appropriate action to oppose apartheid and its various manifestations.

*Be It Further Resolved,* That the American Bar Association opposes those policies of any government that discriminate against its inhabitants on the basis of their race.

**Section of Individual Rights and Responsibilities.** Section Delegate Martha W. Barnett presented the Section's recommendation concerning the free flow of information and ideas across American borders. Mrs. Barnett moved approval of a revised resolution which was limited in scope to the importation of information from abroad.

Secretary Neukom reported that the Board of Governors had transmitted the revised resolution without recommendation.

Philip A. Lacovara of the District of Columbia Bar, urged adoption of the resolution.

By voice vote and without debate, the resolution was approved as follows:

*Be It Resolved,* That the American Bar Association recommends that U.S. policy concerning the importation of ideas and information be guided by the following principle:

There should be no prohibition on the import into the United States of ideas and information if the circulation of the ideas and information in the United States is protected by the First Amendment to the Constitution. However, this principle would not preclude (a) labeling requirements as to the source of information; (b) restrictions on quantities of material that a foreign power may import into the United States; or (c) procedures to screen incoming materials to determine if their circulation is restricted by law within the United States.

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The full report of the Section appears at page 508.
JOINT REPORT OF THE SECTION OF
INDIVIDUAL RIGHTS AND RESPONSIBILITIES
AND THE STANDING COMMITTEE ON
WORLD ORDER UNDER LAW

RECOMMENDATION*

Be It Resolved, That the American Bar Association opposes the South African policy of apartheid and its various manifestations as inconsistent with current ABA policy, and with the international treaty obligations of the United States and with the international Rule of Law, and supports actions by the United States Government, international organizations and all other nations, opposing apartheid and its various manifestations, including: the pass laws; the denial to the Black majority of the right of political participation in the governance of South Africa; the homelands policy and the resultant denationalizations and deprivations of citizenship, relocations and removals of the African majority; the security legislation and practices contravening the Rule of Law, particularly the bannings, disappearances, detention without even rudimentary legal processes such as specific charges or trial, without recourse to lawyers or to habeas corpus; the practices of the security police resulting in torture and deaths in detention; the use of the judicial process to implement and enforce apartheid; the occupation of, and application of apartheid to, Namibia; and the harassment and intimidation of attorneys in South Africa and Namibia because of their opposition to apartheid or representation of those who are so opposed.

REPORT

"From our beginning, regard for human rights and the steady expansion of human freedom have defined the American experience. And they remain today, the real, moral core of our foreign policy. The United States has said, on many occasions, that we view racism with repugnance. We feel a moral responsibility to speak out on this matter, to emphasize our concerns and our grief over the human and spiritual cost of apartheid in South Africa.

To call upon the government of South Africa, to reach out to its black majority by ending the forced removal of blacks from their communities and the detention, without trial and lengthy imprisonment, of black leaders.”

President Reagan
December 10, 1984

“The political system in South Africa is morally wrong. We stand against injustice, and, therefore, we must reject the legal and political premises and consequences of

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1Remarks of the President in ceremony commemorating International Human Rights Day (December 10, 1984). The President noted that “there are occasions when quiet diplomacy is not enough—when we must remind the leaders of nations who are friendly to the United States, that such friendship also carries responsibilities for them, and for us.”
apartheid... We reject unequivocally attempts to denationalize the Black South African majority and relegate them to citizenship in the separate tribal homelands. We do not and will not recognize these areas. All Americans are repelled by the sight of long-settled, stable black communities being uprooted and their inhabitants forcibly removed to barren sites far away "homelands" they have never seen before. Neither can we countenance repression of organizations and individuals by means of administrative measures like banning and detention without due process of law."
Under Secretary of State Eagleburger
June 23, 1983

Background
It is of paramount importance that the American Bar Association, with its long tradition of support for the Rule of Law internationally, adopt this recommendation to make clear its concern regarding South Africa's utter disregard of the Rule of Law and gross abuse of fundamental human rights and freedoms.2A

As the above-cited statements of President Reagan and the then Undersecretary of State Lawrence Eagleburger demonstrate, this recommendation for an ABA resolution declaring its opposition to apartheid and its various manifestations is in fact consistent with the long-standing position of the United States government.3

2AThis resolution is consistent with at least five (5) previous policies adopted by the ABA House of Delegates: (1) The Rule of Law resolution (2/75); (2) favoring economic sanctions against Rhodesia (8/72); (3) support for the International Covenant on Civil and Political Rights (2/79); (4) support for the International Convention on the elimination of All Forms of Racial Discrimination (8/78); and (5) support for the International Covenant on Economic, Social and Cultural Rights (2/79).
3In August 1963 the U.S., because of its concern over the dangers of apartheid to international peace and security, supported the Security Council's non-mandatory arms embargo against South Africa. The U.S. Ambassador to the United Nations commented: "It is only calling things by their right name to say that we are confronted for the moment with a deadlock between the overwhelming majority of mankind and the Republic of South Africa. There has been no forward motion; indeed, there has been retrogression—calculated retrogression. Press Release No. 4332, July 31, 1963.

Again, in the December 1963 Security Council action strengthening the non-mandatory arms embargo, Ambassador Stevenson remarked, "We all have an obligation under the Charter... to act individually, to use our own influence to bring about a change in South Africa. Press Release No. 4328, December 4, 1963.

On February 1970 President Nixon set forth the U.S. position on southern Africa: "Clearly there is no question of the U.S. condoning, or acquiescing in, the racial policies of the white-ruled regimes. For moral as well as historical reasons, the U.S. stands firmly for the principles of racial equality and self-determination. See, Hearings, Subc. on Africa, Comm on For. Aff., House of Rep., 93rd Cong., lst Sess., 1973, p. 159. The Assistant Secretary of State, David Newsome, affirmed that "we have reiterated our abhorrence of apartheid and have reaffirmed our intention to maintain our arms embargo to South Africa. Id.

In March of 1978 Patricia M. Derian, Assistant Secretary of State for Human Rights and Humanitarian Affairs, in a speech before the Lawyers' Committee for Civil Rights Under Law and Division V of the D.C. Bar Association, stated that as regards South Africa "it is the position of the United States that the provisions of Articles 1, 55, and 56 of the United Nations Charter embody mutual recognition by all parties that every person without distinction is entitled under the charter to respect for his or her human rights and fundamental freedoms."

Indeed, American lawyers have been actively involved against apartheid. In 1968 the Association of the Bar of the City of New York, in connection with the trial of the thirty-seven Namibians in South Africa—a trial which was the first application of the Terrorism Act—"resolved to record its deep concern and its protest over the actions
is the only country in the world with racial discrimination enshrined into its Constitution. Its entire governmental, political, economic, social and legal structure is predicated on distinctions based on race and color.

of the Republic of South Africa, in applying its own law and judicial process extra-territorially, to South West Africans and by prosecuting thirty-seven of them under the Terrorism Act of 1967... This Act offends basic concepts of justice, due process and the rule of law accepted by civilized nations and violates the Declaration of Human Rights." (Cited in Joel Carlson, No Neutral Ground 208, 1973).

Note should also be made of the work of the Lawyers' Committee for Civil Rights Under Law. The Committee has enjoyed the support of eminent members of the legal profession, including past presidents of the American Bar Association, former Attorneys General and law school deans. In 1967 the Lawyers’ Committee established the Southern Africa Project which seeks (1) to ensure that defendants in political trials in South Africa and Namibia receive the necessary resources for their defense and a competent attorney of their choice; (2) to initiate or intervene in legal proceedings in this country to deter actions that are supportive of South Africa’s policy of apartheid, when such actions may be found to violate U.S. law; and (3) to serve as a resource for those concerned with the erosion of the rule of law in South Africa and that government’s denial of basis human rights.

The International Commission of Jurists compiled a report “South Africa and the Rule of Law,” Geneva, 1960 (hereinafter cited as ICJ Report) “in the hope that world legal opinion will thereby be informed of the profoundly distressing conditions of life in the Union of South Africa and the perilous state of the rule of law in terms of both classic freedoms and social justice.”


See, comments in the “Report of Special Study Missions to Africa, The Faces of Africa: Diversity and Progress; Repression and Struggle” (1971), p. 141. The Special Study Mission noted that “with the advent of the United Nations and the dedication of the Charter of the United Nations to the principle of equal rights and self-determination of peoples, a new era of international law dawned. This has been marked by progress in many countries toward the eradication of legal distinctions based on race and color. South Africa is an ignominious exception. While the rest of the world embarked on a course of recognizing the equality and dignity of each man, South Africa has enshrined apartheid into its system of law.”

The Human Rights Report comments that the “83.3 percent of South Africa’s population which is not part of the white minority suffers from pervasive discrimination which severely limits political, economic, and social life.” Human Right Report, supra note 5 at 324.


Supra note 1. at 2.
Law to speak out.9 Reference should also be made to the December 4, 1984 letter of thirty-five conservative Republican congressmen to the Ambassador of South Africa to the United States. The letter read in pertinent part:

"We are, for the most part, politically conservative and as conservatives recognize all too well the importance and strategic value of South Africa. We understand the need for stability both within the internal affairs of your country and your external relationship with the United States. But precisely because we do feel strongly about our mutual interests, we cannot condone policies of apartheid which we believe weaken your long-term interests and certainly our ability to deal with you in a constructive manner . . . .

We are looking for an immediate end to the violence in South Africa accompanied by a demonstrated sense of urgency about ending apartheid."10

One of those thirty-five congressmen, Congressman Vin Weber, in a column in the December 11 edition of the Washington Post reflected:

"If conservatives look to freedom as the dominant guiding principle in domestic policies, should we not look for the same in the international area? Therein lies the great challenge inherent in the question of South Africa . . . . the moral implications of supporting an avowedly racist government were rationalized away, if not blatantly ignored. But if conservatives are to lead the free world into the 21st century, we must do so on the basis of a policy that has a firm and consistent moral foundation. We must stand firmly for freedom and democracy, and that does not permit us to blind our eyes to a government that denies both to the vast majority of its citizens simply because of the color of their skin."11

II. Discussion

Consonant with its undertaking in the 1975 rule of Law Resolution12 affirming its support of the Rule of Law in the international community, the American Bar Association should adopt the proposed recommendation. This recommendation is made pursuant to the reaffirmation in 1983 of the commitment of the Association in Goal VIII13 to advance the rule of law in the world and to promote peace and human rights through law.

The recommendation is consistent with the positions of the American Bar Association in support of the ratification by the United States of the significant human rights conventions: the International Covenant on Civil and Political Rights,14 the International Covenant on Economic, Social and Cultural Rights,15 and the International Convention on the Elimination of All Forms of Racial Discrimination.16

The recommendation is also in line with the 1972 ABA resolution urging the Congress to repeal the Byrd Amendment which permitted the United States to import Rho-

13See American Bar Association, International Law Relations ("Advancing the Rule of Law Among Nations: The Association's 8th Goal?").
designer chrome notwithstanding the Chapter VII Security Council decision to impose mandatory economic sanctions against Rhodesia. The preambulatory paragraphs of this resolution noted the treaty obligation to enforce decisions of the Security Council and commented, inter alia, that the United States considers the rule of law to be the only alternative to the rule of force and that the good faith fulfillment of treaty obligations is central to the rule of law.

This report is consonant with the "Reports on the Trips to South Africa and Zimbabwe" from the International Legal Exchange Program of the Section of International Law and Practice (1982).19

17In August 1972 the AGA (Importation from Rhodesia, Standing Committee on World Order Under Law) adopted a recommendation favoring economic sanctions against Rhodesia. This followed the adoption by Congress in 1971 of the Byrd Amendment to the Strategic and Critical Materials Stockpiling Act. 50 U.S.C. Sec. 98-98h which provided that the President could not prohibit the importation of any material that was militarily strategic and critical and that originated in a non-Communist country so long as its importation was not banned from communist countries. This Act conflicted with the Chapter VII measure passed by the Security Council of the United Nations that prohibited all trade with Rhodesia.

18It reads in pertinent part: "WHEREAS, Article 25 of the Charter of the United Nations provides that the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Importation from Rhodesia, supra note 17.

19See, especially Sec. VI, findings of the Trip Participants (hereinafter, AGA Study Group), cited as, Reports on the Trip to South Africa and Zimbabwe, from the International Legal Exchange Program of the Section of International Law and Practice, October 29 to November 6, 1982, [hereinafter cited as ABA Trip Report], at 51-55. Note also the observation that "South Africa is a terribly divided, racially segregated country in which the legal system has been employed to further the political objectives of apartheid or racial discrimination." The penultimate paragraph of the findings concludes that "to the extent that the laws of South Africa operate to deprive the great majority of its citizens of their fundamental human rights, it becomes a matter not merely of domestic concern within South Africa; it justifiably be-

A. Apartheid

Apartheid is the policy which the 16.2 percent white minority imposes on the black majority to maintain white supremacy.20 Apartheid has been found by the International Court of Justice to be a governmentally established and enforced system of preferences, distinctions, exclusions, limitations and restrictions based exclusively on race, color, national and ethnic origin.21 It is a fundamental premise that the Rule of Law requires a governmental system that treats all persons as equal before the law.22 Apart-

20Human Rights Report, supra note 5 at 322.


heid is diametrically opposed to this peremptory norm of non-discrimination. 22A This recommendation is proposed mindful of the commitment of the American Bar Association to encourage respect for and observance and promotion of human rights and dignity of all men without distinction on the basis of race, color or ethnic origin.

international law .... The principle of equality before the law ... is stipulated in the list of human rights recognized by the municipal system of virtually every State no matter whether the form of government be republican or monarchical and in spite of any differences in the degree of precision of the relevant provisions. This principle has become an integral part of the constitutions of most of the civilized countries in the world."

22A The philosophy of apartheid was explained in the 1953 Report on the U.N. Commission “The Racial Situation in South Africa,” ECOSOC Document E/CN.4,949, November 22, 1967, which stated that, “It is the mission of the white race living in South Africa to protect that civilization, ‘against attacks from outside and subversion from within.’ In other words, though representing a numerical minority, it must at any cost safeguard its position of domination over the coloured races ... The best service, therefore, that the whites can render to the nonwhites is to separate them from the white population, to consider them as distinct social and economic groups, and to see that as far as possible, they live in territories, zones, or ‘locations’ assigned to them as their own.” In surveying the official texts of the South African government to ascertain what the policy of apartheid is, Judge Ammoun in his separate opinion of the ICI Advisory Opinion, supra note 20, at 82, cited statements of various South African prime ministers. Note especially his reference to Dr. Verwoerd’s statement to Parliament in 1958 in which he recalled the positions of two other prime ministers: “Dr. Malan said it, and Mr. Strijdom said it, and I have said it repeatedly and I want to say it again: The policy of apartheid moves consistently in the direction of more and more separate development with the ideal of total separation in all spheres.”

As its various manifestations demonstrate, the apartheid system represents a deliberate, comprehensive systematic deprivation of the fundamental freedoms inherent in the norm against racial discrimination by its distinctions, exclusions, restrictions, and preferences. The International Convention on the Elimination of All Forms of Racial Discrimination, supra note 16, at Art. 1 (1), defines racial discrimination as “... any distinction, exclusion, restriction or preference bases on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

22Universal Declaration of Human Rights, supra note 21.


The Special Rapporteur for the Human Rights Commission in his report, “Study of Apartheid and Racial Discrimination in Southern Africa” (E/CN.4/949, Nov. 22, 1967) found the laws of South Africa violative of the following fundamental freedoms and human rights: The rule of non-discrimination; the right to take part in Government, freedom of peaceable assembly and association, freedom of opinion and expression, the right to a nationality, the right to seek and enjoy another country’s asylum from persecution, freedom of religion, the right to marry and to protection of family life, the right to property, freedom of movement and residence, the right to leave one’s country and return, the right to privacy, the right to personal freedom and security, freedom from slavery and servitude, from inhumane and degrading treatment and punishment, the right to a fair trial, the right to an adequate standard of living, the right to rest and leisure, the right to social security, the right to education, the right to participate in cultural life, access to public facilities and accommodations, and the right to a just social order.
American Bar Association would add its prestigious voice to those of other respected institutions, such as the International Commission of Jurists, in declaring the repugnancy of apartheid to the Rule of Law, the U.S. Department of State acknowledges in its Report on Human Rights Practices that:

“(r)egardless of whether or not the new Constitution represents reform of apartheid or only its rationalization and modernization, the practice of apartheid remains the basis for the organization of South African society. Apartheid institutionalizes political and economic control by the white minority. Discriminatory laws and practices are woven through out the fabric of South African society.”

The fundamental thesis of apartheid, racial discrimination, is not only antithetical to basic notions of law and justice but is perilous to international peace and security. The United Nations Charter predicates international peace and security and conditions of stability inter alia on “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, color, sex or religion.”

The right against racial discrimination has been characterized by the International Court of Justice as one of the “basic rights of the human person,” and therefore of such importance that “all states can be held to have an interest in their protection; they are obligations erga omnes.”

The gravity of the situation in South Africa to international peace and security is indicated by the imposition by the Security Council, with the support of the United States, of mandatory sanctions in 1977. In that resolution 42, the Security Council inter alia called upon the Government of South Africa to abandon the policies of apartheid and discrimination, and to liberate all persons imprisoned, interned or subjected to other restrictions for having opposed the policy of apartheid.

1. The Pass Laws

The South African constitution codifies apartheid and under this policy Africans are perceived solely as units of labor and their presence in the urban areas is permitted only to the levels to which labor is needed and is regulated by the influx control and pass laws as well as by the Group Areas Act. It should be further noted that ap-  

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29ICJ Report, supra note 4.
30Human Rights Report, supra note 5, at 323.
31Charter of the United Nations, supra note 21, at Art. 1 (3).
proximately 200,000 persons are arrested each year for pass law offenses.\textsuperscript{33}

amended the Urban Consolidation Act with the effect of tying the influx of families of resident workers to the availability of housing. In practice, this limits the impact of the decision." Human Rights Report, supra note 5, at 329.

The Ad Hoc Committee on Forced Labour of the International Labour Organization has made the following finding with respect to the question of forced labor in South Africa: That there exists in South Africa "a legislative system applied only to the indigenous population and designed to maintain an insuperable barrier between these people and the inhabitants of European origin," that "the indirect effect of this legislation is to channel the bulk of the indigenous inhabitants into agricultural and manual work and thus to create a permanent, abundant and cheap labour force," and that in this sense "a system of forced labour of significance to the national economy appears to exist in the Union of South Africa." (Declaration Concerning the Policy of 'Apartheid' of the Republic of South Africa," July 8, 1964, Geneva ILO).

"Conditions in South Africa reflect a considerable degree a special circumstance: a conscious, systematic effort over the years to control black labor, to channel it where it will benefit whites and to raise barriers against where it is not needed or where it is not needed or where it seems to complete with whites." South Africa: Time Running Out, The Report of the Study Commission on U.S. Policy Toward Southern Africa [University of California Press and Foreign Policy Study Foundation, Inc., 1981], p.81 [hereinafter cited as South Africa: Time Running Out].

\textsuperscript{33}Ramarumo Monama, \textit{Is This Justice?—A Study of the Johannesburg Commissioners' (Pass) Courts} (University of Witswatersrand, 1983).

"Since the beginning of this century, more than 17 million people have been arrested or prosecuted under South Africa’s “battery” of pass laws and influx control regulations, according to figures submitted to the Carnegie Inquiry. Professor Michael Savage of the University of Cape Town’s sociology department said that at least 17,252,146 Africans were arrested for these offences between 1916 and 1982. However, if prosecutions under related poll tax and trespass laws are included, he estimates that more than 26 million Africans have been prosecuted in terms of various influx control laws in this period. (Star 18-4-84). In 1982, the number of arrests was more than 202,000. In 1983, 275,934 blacks were prosecuted in the Commissioners’ Court; under 1 percent had legal representation; and there were 142,000 convictions. Some cases were observed to last as little as 90 seconds." \textit{Violations of Human Rights in South Africa 1983-84}, Working Group Kairos, The Netherlands, July 1984, at p.12 [hereinafter cited as Kairos Report].

"The act [The Blacks (Abolition of Passes and Coordination of Documents) Act 67 of 1952] requires that every African over the age of sixteen be fingerprinted and furnished with a reference book containing the individual’s identity card and employment information.

\textsuperscript{34}Human Rights Report, supra note 5, at 322.

\textsuperscript{35}Id.

The report of the members of the ABA jointly sponsored trip to South Africa commented:

As presently structured, the proposals, with their preponderant emphasis on white control, merely complete the sophisticated symmetry of racial discrimination or apartheid. Coloureds and Asians are given token representation in a white dominated parliament while Africans are totally excluded altogether. For Africans the new constitution is based on an unasserted but nonetheless devastating reality that no African is to be considered a citizen of the state for which the constitution has been drafted. Indeed, the exclusion of Africans has been based on ‘cultural differences’ and ‘divergent political objectives.’ All Africans will belong to one of ten homelands which, when given independence by South Africa, will mean the loss of their South African citizenship. When questioned by members of the delegation, the Council explained that the homelands or ‘states’ were established to allow each of South Africa’s numerous
3. The Homelands Policy

The apartheid policy comprehends both the denial under the South African constitution to 73 percent of its population, its African citizenry, of the right of political participation in the Government of South Africa, and the policy of “separate development,” namely the allocation of each African to a tribal “homeland” and the relegation of these citizens to specified “homelands,” whose total area comprises 13 percent of the land area of South Africa, all for a racially discriminatory purpose of achieving a “white South Africa.”

With the exception of South Africa, no state has recognized the “independent” homelands as independent states. The policy of the United States Government in harmony with that of the other states of the international community is opposed to the recognition of these areas.

a. Denationalization and Deprivations of Citizenship. The homelands policy contemplates planned denationalization of the disenfranchised majority by the “independence” of each homeland in order to effectuate the denationalization of all Africans both those who reside in the homeland areas and those who reside in the urban areas. Such denationalization is contrary both to two peremptory norms, ius cogens, of international law, the norms against racial discrimination and involuntary denationalization, and to the principle of self-determination.

The ABA Study group noted, “The most disturbing thing that the participants learned was that the South African government is embarked on a massive effort to denationalize 70 percent of its population in the name or furthering and achieving the concept of racial discrimination embodied in the doctrine of apartheid. what South Africa has done, and continues to do, is to deprive African South Africans of their citizenship by the process of denationalization. Despite the fact that no nation has recognized any of the homelands, nearly 10 million people have thus far lost their nationality with millions more to be denationalized in the immediately foreseeable future. The unilateral, massive, wholesale exchange of a valid, recognized South African nationality for that of a nationality of a non-recognized homeland creates a stateless person for whom the international community is ultimately responsible. The implications of this policy and the effects that it has had, and is having on black South Africans was of grave concern to the participants and warrants the most urgent study.” ABA Trip Report, supra note 19, at 50-51.

All homelands would become independent states; the entire African population of the Republic would be granted political rights and citizenship in these states; consequently, there would ultimately be no African citizen of the Republic would be granted political rights and citizenship in these states; consequently, there would ultimately be no African citizen of the Republic of South Africa requiring accommodation in the political order of South Africa itself.” South Africa: Time Running Out, supra note 32, at p. 50.

Human Rights Report, supra note 5, at 332 section 2(d).

Eagleburger Statement, supra note 2.

39The ABA Study group noted, “The most disturbing thing that the participants learned was that the South African government is embarked on a massive effort to denationalize 70 percent of its population in the name or furthering and achieving the concept of racial discrimination embodied in the doctrine of apartheid. what South Africa has done, and continues to do, is to deprive African South Africans of their citizenship by the process of denationalization. Despite the fact that no nation has recognized any of the homelands, nearly 10 million people have thus far lost their nationality with millions more to be denationalized in the immediately foreseeable future. The unilateral, massive, wholesale exchange of a valid, recognized South African nationality for that of a nationality of a non-recognized homeland creates a stateless person for whom the international community is ultimately responsible. The implications of this policy and the effects that it has had, and is having on black South Africans was of grave concern to the participants and warrants the most urgent study.” ABA Trip Report, supra note 19, at 52.

40—Denationalization on racial, ethnic, religious, or other related grounds is particularly notorious because of its close association with Nazi and fascist atrocities . . . the emerging peremptory norm (ius cogens) of nondiscrimination will, as previously noted, make unlawful many types of denationalization. In sum, the whole complex of more fundamental policies for the protection of human rights, as embodied, for instance, in the United Nations Charter, the Universal Declaration of Human Rights, the International Covenants on Human Rights, and other related instruments and programs, global as well as regional, may eventually be interpreted to forbid use of denationalization as a form of “cruel, inhuman and degrading treatment or punishment.” M.S. McDougal, H.D. Lasswell and Lung-chu Chen, Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity [Yale University Press, New Haven and London, 1980], pp. 906, 909.

The eminent South African professor,
b. Relocations and Removals. In pursuance of the bantustan (homelands) policy, the South African Government has carried out the internecinaty decreed policy of relocations and removals of Black people from “black spots” in white-designated areas and 3.5 million people have been removed in furtherance of the homelands policy. At least 1.4 million people have been forced off white-owned farms since 1960. Some 1.3 million have been “endorsed out” of city areas and into the bantustanas since 1956. Over 400,000 have been forced out of long established homes in so-called Black spots to permit those areas to be consolidated with adjoining white areas. Over half a million have been forced to leave their homes in urban areas.

B. The Security Legislation

The security laws of the South African Government and the practices pursuant to them, i.e., bannings, disappearances, deten-...

John Dugard, in commenting on the Transkei and Bophuthatswana, has said that “both the Status of Transkei Act and the Status of Bophuthatswana Act provide that on independence a wide range of persons, ethnically, linguistically or culturally connected with those states, ceased to be South African nationals. Both statutes are careful to avoid any express suggestion of denationalization on the ground of race, but there can be little doubt that they are intended to apply to Africans only, and this is borne out by their implementation in practice.

These statutes offend the norm of contemporary international law prohibiting denationalization measures based on racial or ethnic grounds; a norm which derives its validity from the universal condemnation of the 1941 Nazi decree denationalizing Jews and from modern human rights instruments. Denationalization is widely deplored in the international community as is shown by the statement of Hannah Arendt that:


Since the pattern of group residence sought by the developed apartheid system does not correspond to the actual location of various groups that existed when apartheid was set up, the Government has forcibly removed many people from their homes. These forced resettlements of black and colored “squatters” in urban areas and removal of black settled communities, “black spots,” from designated white areas to black tribal homelands is a major feature of government policy. Such removals often result in violence, as in the October 1983 attempt by officials to move squatters from Katlehong.

Human Rights Report, supra note 5, at 328.

See, Kairos Report, supra note 33, at 4 et seq.
tions without charge and procedural rules in derogation of due process, are contrary to the rule of law and violate the human rights of all citizens of South Africa, whatever

for the state or the maintenance of law and order. Chapter Three is entitled 'Measures in respect of certain Persons,' and includes provisions for restrictions on membership in organizations and public bodies, 'banning,' or the restriction of an individual to a certain place, restrictions on attending gatherings and dissemination of speeches, publications and utterances. In addition, the chapter provides for interment or preventive detention for purposes of interrogation or for holding as witnesses. Chapter four is the first legislative attempt to provide for a board of review and the inspection of detainees in police custody. Chapter Five establishes certain restrictions in connection with various gatherings and abrogates the right to public assembly without government authority. Chapter Six enumerates various offenses and penalties while Chapter Seven provides for the rules of procedure, jurisdiction of courts and admission of evidence in matters involving the Act. "The ABA Trip Report," supra note 19, at 33-34.

These new security laws were introduced following the February 1982 report of the Rabie Commission; the new Act replaces the Terrorism Act No. 83 of 1967 and other security legislation but retains many of the infamous provisions of the earlier laws. For example, Section 29 of the Internal Security Act contains an enlarged version of the Terrorism Act. In regards to the Terrorism Act, Judge Ammoun commented that the Act "... intended to enforce apartheid through severe repression, which violates the most sacred principles of criminal law, namely the nullum crimen sine lege, the rules relating to the definition of principal and accessory, the non-retroactivity of penal laws and of penalties, the presumption of innocence, and the rule of res judicata." ICJ Advisory Opinion on Namibia, supra note 20, Separate Opinion at 83. 48

The Terrorism Act "... obliged the detainee to prove his innocence beyond reasonable doubt. It further provided that once charged, the attorney general could issue a certificate prohibiting any court from granting bail. The attorney general could also determine what court could hear the matter and where and when that court would sit. Should any defendant succeed in being acquitted, the act provided that the defendant could be redetained and charged again for the offenses arising out of the actions he had their race, color, national or ethnic origin. 49

The Report on the Trip to South Africa and Namibia from the International Legal Exchange Program of the Section of International Law and Practice (hereinafter the ABA Report on the Trip to South Africa) makes the following comment on the basic security legislation, the Internal Security Act:

By and large, the entire Act has been structured so as to be outside of the scope and framework of the judicial system. Chapter Four provides for a right of appeal from some of the provisions of the Act, however, it is an appeal to a review board which is a government appointed tribunal as opposed to a court of law. While the review board gives the impression of objectivity, it does not address the essential issue of the unfettered discretion given the Minister of Law and Order and the Commissioner of Police. By the time one has legal recourse to the review board so as to determine whether the actions of the government are arbitrary or capricious, more than six months of detention will have passed. 51

already been charged with. Furthermore, the act provided a guilt-by-association clause, joining all defendants together and holding all of them responsible for any criminal action of any defendant or of any named member of the organization to which the defendant belonged." No Neutral Ground, supra note 4, at 154.


48 The basic inconsistency between the Rule of Law and the South African Security Laws was condemned in 1967 by the reference of the U.S. Ambassador to the U.N. to "the atrocious Terrorism Act under which 37 South West Africans were charged and brought to trial, under conditions repugnant to all who believe in justice under the law." No Neutral Ground, supra note 4, at 207.

50 ABA Trip Report, supra note 19, at 34-35.

51 Prior to the Internal Security Act the authority for banning was the Suppression of Communism Act of 1950. In a 1972 study commission on "Law, Justice and Society," Report of the Legal Commission of the Study Project on Christianity in Apartheid Society (SPRO-CAS Publication No. 9 1972) (hereinafter cited as SPRO-CAS), the chairman, Jack Unterhalter writes: "Not only is the treasure of the law and of our values thus wasted. There has developed with
1. BANNINGS

The South African government has virtually unfettered powers to silence opposition by executive fiat through the power conferred upon with the Minister of Law and Order to issue banning orders, which are not subject to court review, against individuals, organizations and publications. Banning includes restrictions to, or exclusion from, certain areas (extending even to home arrest), prevention of attendance at any gathering (with gatherings being defined to include meetings of two or more persons), prohibited from being quoted or published. Although a banning order is not subject to review by the courts, the violation of a banning order is a criminal offense and so punishable.52

Those detained and banned represent a cross-section of society: students, trade unionists, journalists, church and community leaders.53

2. DISAPPEARANCE

As noted in the State Department Human Rights Report, “South African law does not require notification of a detainee’s family, lawyer, or other person when an individual is detained or released, and people have simply disappeared into policy custody for long periods.”54

3. DETENTIONS WITHOUT CHARGES OR TRIAL

The Internal Security Act authorizes detentions without charge or trial for certain offenses for varying conditions and periods, in some cases unlimited periods.55

4. DETENTION WITHOUT ACCESS TO COUNSEL OR HABEAS CORPUS

Interrogation of persons held under the security laws may be done without access to counsel.56 The security legislation in prac-

54Human Rights Report, supra note 5, at 326.
55Id. at 327. The Internal Security Act renews the powers of the authorities “to hold people indefinitely in preventive detention and to detain incommunicado potential witnesses in future political trials. However, provision was made for fortnightly visits to Section 29 detainees by a magistrate, a doctor and an Inspector of detainees appointed by the Minister of Justice. Procedures were also established for reviewing the cases of Section 29 detainees after six months’ detention. A board of Review was set up to which Section 28 detainees, those in preventive detention, and banned people might apply, but the Minister was not required to implement the board’s recommendations. Amnesty Int’l Report (1983) (hereinafter cited as Amnesty) at 77-78.
56Because security detainees may be interrogated without access to counsel, they may admit to actions or charges the implications of which they may not fully understand. However, such statements often are not admissible in court. Many trials are held “in camera” or in distant parts of the country making it difficult or impossible for family or others to attend. If deemed necessary, by the court, witnesses may testify without being publicly identified. Security and criminal trials are held before regular courts which are generally regarded as independent of executive or military control, although all judges and practically all magistrates are white and thus the black population has virtually no representation in the judicial system.” Human Rights Report, supra note 5, at 327.
tice nullifies the principle of habeas corpus.\textsuperscript{57}

5. TORTURE AND DEATHS IN DETENTION

The policy of incommunicado detentions pursuant to these security laws authorizes a system of detentions removed from judicial or public scrutiny and leads to torture and deaths in detention.\textsuperscript{58} The common practice of torture to secure admission of guilt is well attested from court records and evidence of lawyers—one recorded that seventy percent of his clients displayed evidence of assault.\textsuperscript{59}

THE USE OF THE JUDICIAL PROCESS TO ENFORCE APARTHEID

By its very nature apartheid has a "debasing effect" upon all aspects of the legal system and legal profession in South Africa.\textsuperscript{60}

\textsuperscript{57}Id.

\textsuperscript{58}Between 1963 and 1978, 50 persons died in detention, and their deaths especially where autopsies occurred in the presence of representatives of the deceased were widely attributed to police torture. Following the extraordinary exhibition of police methods and attitudes in the inquest in 1977 into the death of Steve Biko, deaths in detention appeared to have dropped away. But in December 1981, Thshihwa Isaac Mufhe, a former member of the Black People's convention, died two days after he and nine others had been detained by security police in the bantustan of Venda. Mufhe was a member of the Lutheran church. Four of the nine others, who are still detained, are members of the Lutheran clergy. They are reliably reported to have been brutally assaulted and taken to the hospital." Testimony, supra note 43, at 163-164.

In 1982 Neil Aggett became the first white person to die in detention. Aggett, "a doctor working as a trade union official, was found hanged in his cell at the Johannesburg security police headquarters on 5 February. He had been detained in November 1981 when a number of students, officials of black trade unions and other critics of the government were arrested by security police. He was held incommunicado under section 6 of the Terrorism Act and was not charged. Following Neil Aggett's death, detainees who had been in custody with him alleged that he had been assaulted and subjected to electric shock torture by security police and, shortly before his death, interrogated continuously for more than sixty hours. At an inquest eyewitnesses testified to his ill treatment and alleged that they, too, had been tortured by security police. Lawyers representing Neil Aggett's family acknowledged that he had died by suicide but argued that it had been induced by ill-treatment. An Amnesty International observer attended part of the inquest in October. In late December the magistrate dismissed the evidence of former detainees, accepted the account given by the security police, and absolved them from any responsibility. In early August Ernest Dipale, aged 21, was also found hanged in a cell at the Johannesburg headquarters of the security police. No inquest had been held by the end of 1982." Amnesty, supra note 54, at 78.

The Department of State, in its Human Rights Report, notes "cases of deaths in detention or at the hands of police, prison, or security police elements included six known instances with nine deaths in 1983." Human rights Report, supra note 5 at 324. For a detailed investigation into inquests, court transcripts, and parliamentary inquiries into deaths in detention, see the Report of the Lawyers Committee for Civil Rights Under Law, "Deaths In Detention and South Africa's Security Laws" (September 1983).

\textsuperscript{59}Testimony, supra note 43 at 165.

\textsuperscript{60}See, SPRO-CAS, supra note 51 at 1. Professor John Dugard, writing as Secretary of the 1972 Legal Commission of the Study Project on Christianity in Apartheid Society, and Peter Randall, Director of SPRO-CAS, state, inter alia, in their introduction of the Report of the Commission that the common theme of the essays in the Report is the debasing effect apartheid has upon the law, the courts, the legal profession and the officers of the law."

Note also the observations of the Study Commission on U.S. Policy Toward Southern Africa: "The formal constraints on the South African courts as defenders of civil liberties are not limited to the curbs placed on them by the laws affecting rights. The constraints also include the courts' lack of constitutional standing as protectors of rights in South Africa. The principle of parliamentary sovereignty and the absence of a bill of rights enforceable by the courts put the South African judiciary at a marked disadvantage compared with American courts . . . . One explanation of why the courts have not taken a stronger libertarian stand is that some judges regard the infringements of civil rights as necessary for state security. Allen Drury, in his book, A Very Strange Society, records an interview with judges who evidenced unconcern about the application
The ABA Report on the Trip to South Africa and Zimbabwe is pertinent here:

“The laws of apartheid can broadly be divided into two categories: those laws which prescribe the personal, social, economic, cultural and educational status of the individual in society; and those laws which construct the institutions of separate development and determine the political status of the individual. Because both sets of laws are enacted by Parliament which makes no pretenses at representing all of the country’s people; and because the judiciary is required to uphold such legislation without reviewing or commenting on its legality or adherence to universally recognized standards of justice and decency, South Africa’s legal system has become a proper subject for international scrutiny.”

61 of the Internal Security Act. On the other hand, even judges critical of security legislation frequently do no better than colleagues who favor the laws because they regard judicial intervention as undesirable meddling in politics.” South Africa: Time Running Out, supra note 32 at 77.

62See, ABA Trip Report, supra note 19 at 15. Further the reluctance of the courts to push the outer limits of the restrictive security laws is indicated in the following remarks of Professor Dugard: “South African judges have less power than their American counterparts. They have no competence to declare invalid acts of Parliament which offend the basis freedoms of the individual despite the fact that these may be regarded as common law rights or constitutional conventions. Section 59 (2) of Republic of South Africa Constitution Act places this beyond all doubt in providing that: ‘no court of law shall be competent to inquire into or to pronounce upon the validity of any act passed by Parliament’ . . . . although it is clear that the judiciary has acted with integrity and impartiality, their performance sometimes has been disappointing to natural lawyers in the interpretation of those laws which most seriously offend the foundation of our legal order, the detention-without-trial laws . . . . There are other cases in which statutes have been interpreted in favour of the executive and in which inadequate consideration has been given to those basic rights which, according to Centlivres C.J., are to be regarded as ‘constitutional conventions’ . . . . The judges have failed to use their interpretative powers to the full in respect of discriminatory legislation and harsh security laws.” SPRO-CAS, supra note 51 at 24, 26, and 27.

Professor Dugard further notes, “The judiciary’s passive attitude toward legislation contrary to the South African legal tradition is largely shared by the practising legal profession. This is apparent from its lack of organized opposition to racial legislation which offends the principle of equality before the law or to the detention-without-trial laws. Universal and unequivocal condemnation of such abhorrent measures as section 6 of the Terrorism act was surely to be expected from a profession proud of its legal heritage. Yet, with certain exceptions, this has not been forthcoming. The most notable exception is the Johannesburg Bar which condemned both the 90-day and the 180-day detention law when they were first introduced. Although it failed to respond to the Terrorism Act when it was passed in 1967, it did later condemn it in the most vigorous terms when its full horrors became apparent . . . . (T)he incorporated law society of Natal, too, has made its attitude clear and in 1970 it reaffirmed its abhorrence of any statute denying the due process of law, interfering with the presumption of innocence of an accused person or permitting interference with personal liberty without access to a court of law . . . . Other branches of the organized profession have ‘spoken out’ on several occasions . . . . Id. at 29 - 30.

62Undersecretary of State Eagleburger noted in his June 1983 statement, “In recent years the power of the court has been circumscribed by new acts of parliament and police practices which remove from the courts the ability to review executive action.” Eagleburger statement, supra note 2 at 4.
process to suppress political opposition.  The Human Rights Report of 1983 of the U.S. Department of State points out further fundamental deficiencies in the South African government system with respect to the denial of a fair public trial, arbitrary interference with privacy, family, home or correspondence 31, as well as regarding freedom of speech and press, freedom of peaceful assembly and association33, and freedom of movement within the country, foreign travel, and emigration.  

The security laws curtail and infringe the civil liberties of all persons in South Africa, black or white.

C. Namibia

The International Court of Justice has declared that the application of apartheid to Namibia is a “flagrant violation of the purposes and principles of the Charter” and that the continued occupation by the South African Government of Namibia is in violation of international law.

The position of the United States Government in affirmation of the action of the United Nations General Assembly of terminating the mandate—a resolution which the United States supported—and in support of the illegality of the introduction of apartheid into Namibia is cogently set forth in the Written Statement of the United States to the International Court of Justice, submitted in November 1970 in the nature of an amicus brief for the Court in its consideration of the 1971 Advisory Opinion.


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63See, Testimony, supranote 43 at 164-165.
64Human Rights Report, supra note 5, at 327.
65Id. at 327-28.
66Id. at 332.
67In response to the South African request to provide the Court with information as to the objectives and purposes of its policy of apartheid or separate development, the Court responded in the concluding paragraphs of its 1971 Advisory Opinion on Namibia, supra note 20 in paragraphs 129, 130 and 131: The Government of South Africa having made this request, the Court finds that no factual evidence is needed for the purpose of determining of whether the policy of apartheid as applied by South Africa in Namibia is in conformity with the international obligations assumed by South Africa under the Charter of the United Nations. In order to determine whether the laws and decrees applied by South Africa in Namibia, which are a matter of public record, constitute a violation of the purposes and principles of the Charter of the United Nations, the question of intent or governmental discretion is not relevant; nor is it necessary to investigate or determine the effects of those measures upon the welfare of the inhabitants.

It is undisputed, and is amply supported by documents annexed to South Africa’s statement in these proceedings, that the official governmental policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups in separate areas within the Territory. The application of this policy has required, as has been conceded by South Africa, restrictive measures of control adopted and enforced in the Territory by the coercive power of the former Mandatory. These measures establish limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory.

Under the Charter of the United Nations the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, color, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purpose and principles of the Charter. 

68The Court held, inter alia, that “the continued presence of South Africa in Namibia, being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory. Id. at 46, para. 133.
69General Assembly Resolution 2145 (1966).

70In its Written Statement, the United States argued:
Namibia under the Mandate; there is no other legal basis for its continued presence in the territory. South Africa is therefore, in illegal occupation of Namibia. The United States supported the Security Council Resolution\(^1\) accepting the Opinion of the Court.

**D. The Harassment and Intimidation of Attorneys**

On the brighter side of this gloomy picture is the fact that there are lawyers in South Africa and Namibia who are striving to uphold human rights and fundamental freedoms under tremendous difficulties. Many are subjected to varying degrees of isolation and intimidation, harassment and consequential loss of public and private clients.\(^2\) Special mention should be made of the obstacles faced by Black attorneys.\(^3\)

**Conclusion**

The recommendation to the House would reaffirm and implement the commitment of the American Bar Association to the Rule of Law internationally, to the advancement of the Rule of Law in the world and to the promotion of peace and human rights through law.

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A. The United Nations validly terminated the rights and authority granted to South Africa under the Mandate of 17 December 1920. The Mandate was a treaty in force and South Africa was legally obligated to carry out its provisions in good faith. Although there was no case brought before the Council of the League alleging that a mandatory had breached its obligations, had such a breach been established during the league period, the Council would have had the authority to terminate the rights of the Mandatory. The United Nations succeeded to this power. In a number of respects, namely, by refusing to submit reports and to transmit petitions of the inhabitants of the Territory, by systematic rejection of recommendations of the General Assembly and the Security Council with respect to the Administration of the territory and by the application of apartheid in Namibia, South Africa materially breached its Mandate obligations. In the light of the failure of other measures taken over nearly two decades to induce South Africa to cease its material breaches, the General Assembly reasonably exercised its power to revoke South Africa’s rights and authority as Mandatory by resolution 2145 (XXI). The Assembly was also competent to assume the functions of administration under the Mandate of 17 December 1920.

\(^1\)Security Resolution 301 (1971).

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J. DAVID ELLWANGER  
*Chairperson*  
*Section of Individual Rights and Responsibilities*

ROBERT F. DRINAN  
*Chairperson*  
*Standing Committee on World Order Under Law*

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\(^2\)See, ABA Trip Report, *supra* note 19 at 27.

\(^3\)The Black South African attorneys are handicapped by all the usual accoutrements of apartheid pass laws, curfews and group area laws which have a crippling affect on their ability to have an office in an urban area and to provide legal representation to the Black majority.

It is submitted that communications from the American Bar Association in firm support of the Rule of Law and of fundamental human rights would greatly hearten the Bar Associations in South Africa and Namibia. This would be consonant with the belief of the Association in the independence of lawyers and in the need for an independent judiciary. Moreover, it would be encouraging to the South African and Namibian lawyers often working at great personal sacrifice in the defense of individual clients charged under the apartheid and/or security laws.