

REPORT NO. 4 OF THE
SECTION OF INDIVIDUAL RIGHTS
AND RESPONSIBILITIES
PRESENTED JOINTLY WITH THE
SECTION OF INTERNATIONAL LAW AND PRACTICE
AND THE
STANDING COMMITTEE ON
WORLD ORDER UNDER LAW

RECOMMENDATION*

BE IT RESOLVED, That the American Bar Association urges the United States Government to launch major diplomatic initiatives to secure the cooperation and support of U.S. allies for multilateral action against the apartheid policies of the Government of South Africa through the use of appropriate national and international mechanisms. Such diplomatic initiatives should be pursued in all appropriate fora, including future economic summits and other meetings where the United States, its allies and other governments have occasion to meet.

REPORT

In recent years the American Bar Association has expressed strong opposition to South Africa's system of apartheid. Despite this opposition, there has been no significant improvement in the human rights situation in South Africa. Indeed, most observers, including the U.S. Government, see a deterioration in various aspects of South Africa's human rights performance. As the State Department

noted in its 1988 Country Reports on Human Rights Practices:

The human rights situation in South Africa continued to deteriorate in 1988 as the Government took additional harsh measures to repress opposition to apartheid, including nonviolent political activity. In February, the [South African] Government effectively banned 17 anti-apartheid organizations, including the United Democratic

*The recommendation was approved. See page 38.

Front, a loosely organized national movement of more than 600 anti-apartheid groups, and prohibited the largest union, the black-controlled Congress of South African Trade Unions, from engaging in political activities; in 1988 a total of 32 organizations were banned. The State of Emergency was extended in June for the third consecutive year, with even tougher restrictions on anti-apartheid groups and the media. These tight...restrictions further reduced available information about the current situation, including the number of detentions and the extent of political violence. Best estimates at the end of 1988 indicated that the [South African] Government had used the emergency powers to detain hundreds of key nonwhite opposition leaders and organizers. At the end of the year, an estimated 1,500 people were being held without charge, down slightly from estimates at the end of 1987; hundreds of these have been held continuously since the imposition of the June 1986 State of Emergency.¹

Apartheid is of special concern to the lawyers of America. While South Africa is by no means the only country in the world guilty of repressing the human rights of its citizens, it is unique in its enshrinement of this system of discrimination in its constitution and its use of the instruments of law—statutes and courts—to implement an official policy of racial discrimination. The country's black majority (73.4% of the population)

continues to suffer from pervasive, legally sanctioned discrimination based on race in political, economic and social aspects of life. They continue to have no right to vote in national elections or to be represented in Parliament. The so-called parliamentary democracy instituted in 1984 under a new constitution, is controlled by whites (14.7%), with the "colored" (mixed race) and Asian minorities (9.1% and 2.8% respectively) represented in the other two chambers of the tricameral Parliament. White control is backed by a powerful defense and police establishment which includes the South African Defense Force comprising over 95,000 active duty personnel and nearly 400,000 reservists, and the South African Police, with 56,000 members.

The American Bar Association has stated its opposition to apartheid on several occasions: the House of Delegates adopted Recommendation 112 in February 1985 supporting "actions by the United States Government, international organizations and all other nations, opposing apartheid and its various manifestations"; Recommendation 116B in August 1986 "calling on the Government of South Africa immediately to release all persons in South Africa who are in prison, detained or banned solely because of their opposition to apartheid"; and Recommendation 107 in August 1987 urging that "corporations which disinvest facilities in South Africa or Namibia attempt to include all South African or Namibian racial groups among the purchasers." In 1985, the ABA also expressed its support for legislation which would include the "imposition of carefully tailored economic sanctions designed to induce the

¹State Department Report to the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations, 101st Congress, 1st Session, *Country Reports on Human Rights Practices for 1988*, at 320 (Joint Committee Print 1989).

Government of South Africa to dismantle its official policy of apartheid."²

Since the beginning of the State of Emergency in 1986, more than 30,000 people have been detained. South African monitoring groups estimate that only about 4% of those detained have been convicted of any criminal charge. South African law and State of Emergency regulations do not require notification of a person's family, lawyer or any other person in the event of his or her detention, and they prohibit the unauthorized publication of the name of any detainee if "the prevention of or combating of terrorist activities" is the stated reason for the detention. In addition, detainees have no right to be charged or tried in a court of law and no right to have their detention orders reviewed by judicial authorities.

While the number of detained children decreased in 1988, the numbers are still staggering. Some human rights groups estimate that as many as 40% of those detained since the imposition of the State of

Emergency have been under the age of 18.³ Reports of physical abuse of detainees and prisoners, including children, have continued.

One of the most remarkable of the detention powers is the power to detain witnesses. Any "person likely to give material evidence for the State in any criminal proceedings" for a security offence may be detained for up to six months before the relevant trial takes place and thereafter for as long as the trial takes. Again, no information is required to be made public about the identity of such detainees.

Even when released from detention, individuals may be subject to State of Emergency "restrictions" which can include prohibitions on travel outside a city, strict curfews, prohibitions on attending meetings or talking to journalists, and requirements to report daily to the local police. New regulations issued in 1988 allow the government to restrict people simply by publishing their names, with no need to serve the orders personally. An estimated 500 to 1,000 persons had been restricted by the end of 1988 and by April 1989, an additional 500 released detainees had restriction orders placed on them. Contravention of the restrictions may result in fines or imprisonment of up to 20 years.

The abhorrence with which these detention and restriction practices are held by the American Bar Association was forcefully stated in a March 23, 1989 letter from President Robert D. Raven to South African President P.W. Botha. In his letter, President Raven noted

²Statement of Philip A. Lacovara before the Subcommittee on International Finance and Monetary Policy, Senate Committee on Banking, Housing and Urban Affairs, June 13, 1985. In his testimony, Mr. Lacovara suggested four principles to guide the selection of appropriate sanctions legislation: 1) sanctions should be directed primarily at the Government of South Africa itself; 2) sanctions should be conditional and prospective; 3) sanctions should recognize that, as a practical matter, a system that has evolved over generations cannot be purged peacefully overnight; and 4) the legislation should give the President primary responsibility for implementing the sanctions and determining their effectiveness. The legislation ultimately adopted, the Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086, codified at 22 U.S.C. §§ 5001-5116 (Supp. IV 1986), included a variety of economic sanctions.

³See, e.g., Bindman. "Preliminary Report on South Africa." *The Review* (No.38), at 43 (International Commission of Jurists, June 1987) [hereinafter Bindman].

the Association's grave concern that the Government's "policy of detaining men, women and children—often for long periods—without filing any charges against those people and without bringing them to trial" was an extra-legal practice to circumvent South African courts and judicial process, "thereby seriously undermining the rule of law and the most elemental of internationally-recognized legal protections." He referred to the fact that similar concerns had been expressed by South African lawyers, notably the Association of [South African] Law Societies, the Society of Advocates of Natal, the National Association of Democratic Lawyers, the Black Lawyers Association, and the Lawyers for Human Rights.⁴ President Raven went on to express a particular and immediate concern about several hundred detainees who had gone on hunger strike to protest their detentions, some of whom were being held without knowing why they were in custody. The letter concluded by urging the South African Government "to discontinue the practice of detention without trial, to immediately charge or release all remaining detainees, to release the names of all persons currently held under detention without charge, and to lift all restriction orders on former detainees."

⁴Accompanying President Raven's letter was a copy of a statement dated March 6, 1989 issued by K.R. McCall, Chairman of the Society of Advocates of Natal which stated, *inter alia*, that "[t]he proper administration of justice is seriously impeded whilst recourse to our courts is denied to persons detained without trial and such persons should either be released or, if they have committed an offence, charged, without any further delay."

A fundamental component of the Rule of Law requires that citizens have access to legal representation and that those who do not have the means to pay for such representation in matters where their liberty is at stake must be provided with it at the expense of the State. The provision of legal aid in South Africa is wholly inadequate and the funds provided by the government for this purpose fall far short of the sums provided in comparable legal systems.⁵ The need is particularly great in South Africa given the large number of death sentences imposed. Amnesty International reports that between 1985 and mid-1988, 537 executions were carried out in South Africa (not including the "homelands"). The figure in the United States for the comparable period was 66.⁶ Of the 172 persons executed in 1987 in South Africa, nine were white and 21 of which were executed in groups of seven. As a consequence of poverty, most black defendants in capital cases are represented by lawyers under the antiquated *pro Deo* system in which a very junior advocate is appointed by the Bar to take the case for a nominal fee which is paid by the Bar. Other impoverished defendants must rely on the help of those who are able to represent them without charge or who can be paid from charitable sources, often from outside South Africa.

Because most lawyers live in the cities of South Africa, the problem of adequate legal representation is especially acute in the rural areas. Many who are in such areas are dependent on the white property own-

⁵Bindman, *supra* note 3, at 48.

⁶Amnesty International, *When the State Kills*, at 204, 227 (1989).

ers for their income and are therefore unable and unwilling to represent black people in their districts. Those who do provide representation particularly in political cases are often subject to harassment and even detention as a result of their professional work.⁷

State of Emergency regulations also severely impair freedom of expression and press by making even the reporting of "subversive statements" a criminal offense. Television coverage, still photography, sketching and radio recording from areas covered by the State of Emergency are banned and the media may not report on police operations in "unrest situations," except as information is released by the Government. The Minister of Home Affairs has the personal power to close a publication for up to three months without explanation. Three South African newspapers were temporarily shut down during 1988. The ability to receive information is further limited by the Publications Act which prohibits the importation, possession and publication of politically or morally "undesirable" works. Materials subject to the Act are those found to be "prejudicial to the safety of the state." The regulations are so harsh that the editing of many papers must be done by lawyers; if a paper cannot afford a lawyer for this purpose, the risk of banning increases substantially. Decisions of the Publications Appeal Board are not subject to judicial review except in rare instances.

Restrictions on freedom of association have likewise been reaf-

firmed or increased. The ban on all outdoor meetings (except sports events or specially authorized gatherings), in effect since 1976, was renewed in 1988. During the year, 17 major anti-apartheid groups were effectively banned when they were prohibited from performing almost all activities. A total of 32 organizations were banned during the year.

While the United States Government has expressed its opposition to apartheid in a variety of ways, its efforts to date have been insufficient in moving the South African Government towards ending apartheid. Many observers ascribe this failure to a lack of a clear and comprehensive policy which has the support of both the Executive Branch and Congress. U.S. efforts have been further limited by the fact that its ability to unilaterally effect change in South Africa is severely limited. Multilateral cooperation among the U.S. and its allies is therefore an essential ingredient to future actions.

South Africa has a large, developed economy which, at least in the short term, is able to withstand outside economic pressure. It has successfully diversified trading ties⁸ and been able to meet most of its capital requirements through domestic sources.⁹ The South African economy, however, is not completely invulnerable to outside economic pressures. Most economists agree that comprehensive sanctions, combined with the prolonged absence of foreign capital investment in the

⁷See "South Africa—The Administration of Justice and the Judicial System," *CIJL Bulletin* (No. 21), at 44-45 (Centre for the Independence of Judges & Lawyers, April 1988).

⁸General Accounting Office (GAO), *South Africa: Summary Reports on Trade, Lending, Investment, and Strategic Minerals*, at 14-17 (Sept. 1988) [hereinafter GAO Report].

⁹Report of the Secretary of State's Advisory Committee on South Africa, *A U.S. Policy Toward South Africa*, at 29 (1987).

country, will have a significant impact on South Africa's ability to sustain real economic growth.¹⁰

The ability of the United States to exert economic influence over South Africa, in turn, is relatively weak. Since the passage of the Comprehensive Anti-Apartheid Act of 1986 (CAAA),¹¹ the U.S. has greatly reduced its market share with respect to South African trade. During 1987, the U.S. accounted for only 12.7% of South Africa's imports and 12.7% of its exports, a decline from 1984 when the U.S. was South Africa's primary trading partner with 19.7% of its imports and 24.2% of its exports.¹² Currently, the United States is South Africa's sixth largest trading partner, after Japan, West Germany, the United Kingdom and Italy.¹³ Similarly, loans and investments by the U.S. in South Africa have decreased dramatically.¹⁴ Finally, the U.S. currently relies, at least to some degree, on imports of certain strategic minerals exported by South Africa.¹⁵

These assessments lead to certain inescapable conclusions. First,

given the apparent short-term resilience of the South African economy, sanctions should be part of a long-term strategy designed to raise the financial costs of maintaining apartheid. Second, even if sanctions are employed in this manner, United States' sanctions alone would be incapable of applying effective economic pressures on the South African government.

To date, the United Kingdom, West Germany, France, Italy, Japan and Israel have all enacted measures against South Africa. These measures have not been as stringent as those enacted by the United States and generally fall within the framework of the sanctions package enacted by the European Community in 1986 (which consists of a voluntary ban on new investment in South Africa and prohibitions on imports of krugerrands, iron and steel).¹⁶

¹⁰Report to the Congress Pursuant to Section 501 of the Comprehensive Anti-Apartheid Act of 1986, at 5 (Sept. 30, 1987).

¹¹See note 2 *supra*.

¹²GAO Report, *supra* note 8, at 14-17.

¹³*Id.*

¹⁴*Id.* at 31-32.

¹⁵Currently ten minerals have been certified by the President as necessary for the economy or defense of the United States and unavailable from other reliable suppliers. 52 Fed. Reg. 4454 (1987). The presence of some of the minerals on the list is subject to some disagreement. See, e.g., General Accounting Office, *Strategic Minerals: Extent of U.S. Reliance on South Africa*, at 4 (June 1988); Southern Africa Project of the Lawyers' Committee for Civil Rights Under Law, *Implementation of the Comprehensive Anti-Apartheid Act of 1986*, at 27-37 (1988).

¹⁶U.S. Department of State, *Report to the Congress on Industrialized Democracies' Relations with and Measures Against South Africa in Implementation of Sections 401(b)(2)(B) and 506(1) of the CAAA*, at 1 (May 12, 1987). In addition, the U.K., West Germany, and France prohibit most nuclear trade with South Africa, and the U.K. prohibits loans to South Africa, exports of petroleum and exports of computers for use by the South African military and police. *Id.* at 18, 20, 30 & 51. Japan prohibits investment in and loans to South Africa, krugerrand imports, computer exports and nuclear trade with South Africa. *Id.* at 32-33. Israel prohibits new investment in and loans to South Africa, iron and steel imports, krugerrand imports and oil exports. Friedman, "Israel Approves Curbs on Pretoria," *N.Y. Times*, Sept. 17, 1987, at 13; Frankel, "Israel Imposes Sanctions on South Africa," *Washington Post*, Sept. 17, 1987, at A46. In addition, Israel has announced that it will not renew existing defense contracts with South Africa and that it will ban the use of Israeli ports as transit points for the shipment of goods to or from South Africa. *Id.*

These realities underscore the fundamental need for multilateral cooperation in efforts to end apartheid. This need was explicitly recognized in the CAAA, Section 401 of which states:

It is the policy of the United States to seek international cooperative agreements with the other industrialized democracies to bring about the complete dismantling of apartheid.¹⁷

Only by obtaining the support of key South African trading partners like the United Kingdom, West Germany, France, Italy, Japan and Israel can the United States thwart the ability of South Africa to circumvent sanctions by transforming goods (particularly gold) in third countries to hide their South African origins or using third countries as a substitute market for goods displaced by U.S. sanctions. Numerous opportunities, both bilateral and multilateral, exist for the United States to pursue such multilateral cooperation and support, including the economic summit of the Group of Seven and ongoing contacts in multinational institutions such as the United Nations.

Conclusion

In view of the foregoing, strong multilateral action represents an essential, and perhaps the only effective, means to impose significant diplomatic and economic costs on South Africa in the hopes of pressuring it to abandon apartheid. Consistent with Section 401 of the Comprehensive Anti-Apartheid Act of 1986, the United States Government should forcefully pursue multilateral and bilateral initiatives

with U.S. allies in all available fora to secure their support for coordinated and comprehensive actions against the apartheid policies of South Africa.

Respectfully submitted,

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¹⁷22 U.S.C. § 5081(a).