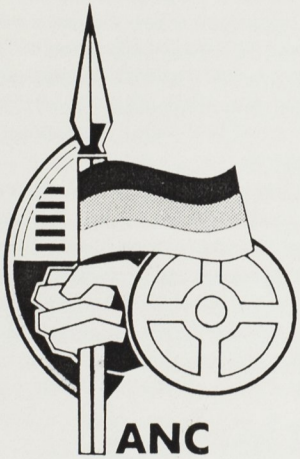

UNITED ACTION
FOR PEOPLE'S POWER!

THE ILLEGITIMACY OF THE APARTHEID REGIME, THE RIGHT TO STRUGGLE AGAINST IT AND THE STATUS OF THE AFRICAN NATIONAL CONGRESS

consent or 'rule of law' developed by the people. Its government has never received the consent of the people, and when it was 'given' independence by its metropolitan master, that independence was given to the colonial minority and not to the people as a whole.

When the union of the Boer and British states came about in 1910, there was no pretence of consultation with the vast majority of the population. The political settlement retained a veneer of rights for blacks in limited areas but the constitution itself forbade any real participation by them.

However, this veneer of democracy does not affect the reality of racism and expropriation. Only three years after the union were traditional patterns of segregation and discrimination strengthened. The 1913 Land Act, which effectively divided up the territory of South Africa in the same proportion as we find today, is the foundation on which the whole edifice of apartheid has been erected.

The principal concern of the government, and of all governments since, has been the preservation of the powers and privileges of the whites. Where traditional colour bars had been eroded, legislation was passed to restore it; where the strength of the black vote threatened to impinge on actual election results, as in the Cape, it was at first nullified by giving the vote to white women but not to black women, and later abolished altogether.

Right from the beginning, prominent politicians were enunciating policies that are the clear forerunners of the bantustan policies worked out in the Thirties by the Broederbond and put into practice in the later years of National Party rule.

The Recolonisation of South Africa: Removals and the Bantustans

Africans today can still only exercise property rights in the 13 per cent of the land allocated to them by the white parliament. Outside these scattered, largely overcrowded, often arid and inadequate fragments of land, Africans must live on sufferance, under the constant threat of forced removal, eviction and harassment.

Over the past three decades state power has been used by the whites to forcibly uproot a minimum of four million adults through a process euphemistically dubbed relocation or resettlement. These neutral terms disguise the traumatic uprooting of long-established communities and their forcible transfer to the poverty-stricken bantustans. There is no appeal, no recourse to any court of law against the sudden descent of the bulldozers which are sent to destroy the homes of the people.

The grand design of apartheid was to keep the Africans herded into the rural areas, in a number of spurious 'homelands' which were allocated to them against their wishes and without their being so much as consulted. These 'homelands' or bantustans provide pools of cheap labour for the white industries which can be utilised when and as required.

Notwithstanding the abolition in 1986 of the notorious Pass Laws, under which millions of Africans had been arrested and thrown into jail over the years, influx control is still strictly exercised in other guises, principally through the provision — or rather lack of provision — of housing in the townships. Those who have no accommodation are forbidden to travel to the cities, and so the white areas are still effectively closed to blacks and black workers are still unable to bring their wives and families to live with them. Freedom of movement, a basic human right, is carefully controlled under the guise of 'orderly settlement'.

The first bantustan to be given 'independence' was the Transkei, in 1976, but no state in the world has yet recognised its status, or the status of any of the other three because

the establishment of these entities violates the right of self-determination of the people of South Africa. Their economies are totally dependent on the regime and on the remittances of their migrant workers. Their pitiful black administrators derive their puppet status from the apartheid regime and not from any democratic vote by the citizens of the bantustans.

An important feature of the law conferring indeptendence on these bantustans was that their inhabitants ceased to be South African citizens from the date of that independence.

A small minority of Africans have been allowed to retain South African citizenship through the exercise of Section 10 rights in the white urban areas. For the rest, even if they were not born in a 'homeland' and have never lived in a 'homeland', they are lumbered with an unwanted citizenship which automatically deprives them of the few rights that remained to them in the urban areas of South Africa.

Thousands of blacks continue to be deported to the 'homelands' on the grounds that they are undocumented 'aliens'. White aliens from outside South Africa's borders have the protection of international law and cannot be unceremoniously removed from one area to another; these internal 'aliens' have no rights whatsoever. It was thought that over 40 per cent of the population of the Cape would be illegal 'aliens' in terms of the Aliens and Immigration Laws Amendment Act passed in 1984. All these practices of deportation and discrimination contravene the principle — that race cannot form the basis for denationalisation — accepted by the international community since the 1941 decree in Nazi Germany which denationalised Jews.

The international outcry which this arbitrary deprivation of one of the most fundamental human rights caused, led to the 1986 Restoration of South African Citizenship Act. Its effects, however, are not as impressive as its title, and those communities which are still today being incorporated compulsorily into the bantustans find themselves again in an uncertain position.

The precise details of entitlement to citizenship are not so important as the fact that rights to citizenship can be so carelessly disposed of by the apartheid regime, removed, restored and again restricted, without those concerned having any say in the matter whatsoever. This is the essence of colonial rule: rights can be removed or adjusted without the consent of the individuals directly concerned.

The compulsory and mass denationalistation of millions of Africans is contrary to general international law and to the basic precepts of human rights.

A regime which has placed restrictions on marriage and sexual relations in the past, which has divided South Africa on a racial basis under the Group Areas Act, which allows the permeation of racial theories into schools, church, jobs and social security legislation, bears the hallmarks of international outlawry.

The Right to Self-Determination

The people of South Africa have a right to determine their own future. This right originates in various sources, firstly the Charter of the United Nations itself and then in a series of resolutions of international bodies, opinions and judgments of the World Court of Justice and the practice of states. This right is best illustrted by the categorical statement of Article 1, which is common to the two human rights Covenants of 1966, both of which are now in force, which reads:

> All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

This, in fact, reiterates the working of the famous 1960 UN Declaration on the Granting of Independence to Colonial Countries and Peoples.

The practice of the international community has given direct effect to the right to self-determination within certain contexts and in relation to identifiable struggles. These practices give formal expression to a principle which has been growing over the century and which is now so strong as to form a 'peremptory norm' that 'cannot be set aside by treaty or acquiescence but only by the formation of a subsequent norm of contrary effect'. In other words the principle is now established and is an obligation on the part of the international community which has to be observed. In legal language, it forms part of the *jus cogens*, the customary international law which limits the rights of states in certain areas and which has important implications for the entire community.

The Illegitimacy of the Regime

South Africa is unique in that it completely denies African people the right to participate in the government and administration of the state. In the past decade, the regime has introduced new constitutional arrangements whose purpose has been to co-opt elements of the Indian and Coloured population. There are now Indian and Coloured chambers in the South African parliament, but they meet separately from each other and from the white parliament. Their limited powers cover only so-called 'own affairs', and in the case of 'general affairs' on which joint decisions have to be taken, their joint strength is less than that of the white parliament alone.

Africans are completely excluded from this arrangement. They have been given only some illusory and meaningless rights to local government, which have been rejected by the majority of the people. They are now being promised a minor role in an advisory National Council by the Botha regime.

This violates one of the most fundamental tenets of the Universal Declaration of Human Rights which, in Paragraph 3 of Article 21, reads:

> The will of the people shall be the basis of the authority of the government; this will shall be expressed in periodic and general elections.

In South Africa the people have no legal means of expressing their will and the government therefore has no authority to govern.

Further, apartheid has again and again been stigmatised as a crime against humanity by the international community. As the International Court of Justice laid down in 1971:

> To establish ... and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter (of the United Nations).

Undoubtedly the whole purpose of the South African constitution and of the multitude of racist laws which have grown up over the years is precisely to establish and enforce the anti-human distinctions condemned in the UN Charter. The Population Registration Act may be nonsense scientifically, but it has inflicted untold harm and suffering on the people of South Africa and forms the corner-stone for the territorial and racial arrangements of the apartheid state.

Clearly, South Africa is a special case in the world today. No other country has enshrined racism in its law and made it the basis for the whole structure and development of its society. No other country has two systems of law, based on distinctions of race, for what

it considers to be two different sections of its people.

It is arguable that the policy of apartheid and its implementation is very close to genocide in its effects on the black people of South Africa. The millions of people who have been uprooted from their homes in pursuit of the segregation of the races have suffered appalling deprivation as a result, a deprivation totally unknown to their white rulers. The poverty of the bantustans, the effects of natural disasters such as flood and famine, have been hugely exacerbated by apartheid. Thousands of children have died before they had a chance to experience life, while white children enjoy one of the lowest infant mortality rates in the world.

And this is quite apart from the deaths and injuries caused by the terror tactics of the regime in its desperate attempts to retain power.

Such a state of affairs may have been acceptable to the imperial world of Rhodes and Beit, and in Britain to Queen Victoria. Today, however, the colonial relationship has almost disappeared and under the new international legal order is no longer a matter of national pride but of shame and illegality.

In South Africa, the colonial relationship of the white minority to the black majority is hidden under a smokescreen of laws and regulations such as those according 'independence' to the bantustans.

As the former colonies of Africa and elsewhere in the world assert their independence and their right to respect, so the world has increasingly come to recognise that, in the words of the General Assembly of the United Nations, 'the racist regime of South Africa is illegitimate and has no right to represent the people of South Africa'.

This view is reinforced by the fact of growing recognition of apartheid as itself a crime against humanity. The apartheid regime has deprived millions in South Africa and Namibia of their liberty and property. It has perpetuated a system of gross racial discrimination and inequality. It has systematically incarcerated and tortured thousands of people, contrary to the rules of international law. It has, in particular, waged a war against the children of South Africa.

As early as 1966 the UN General Assembly characterised the acts of the apartheid regime as 'war crimes', and even the Security Council has applied the Nuremberg Principles to the South African situation (under resolutions 392 of 1976 and 473 of 1980).

The International Court of Justice has found that there are certain obligations which 'derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'. These obligations will be discussed below.

Another facet of the illegality of the apartheid regime is it maintains itself through force. The present state of emergency, with its draconian powers of detention which have been used to silence thousands of dissenting voices, is only the latest in a vast range of laws which have been passed by the ruling minority in order to suppress the majority. The people's organisations have been banned, their leaders imprisoned, newspapers shut down, meetings and demonstrations stopped. South African history is littered with examples of the murder of opponents of apartheid, whether after a hollow legal trial, as the result of police violence in jail or outside it, or from police bullets fired at unarmed demonstrators.

Colonial systems rely on force to maintain themselves. The use of force to deprive a people of the right to self-determination violates the Charter of the United Nations an other rules of law and constitutes a crime against peace.

But South African violence is not confined within its borders, nor even to Namibia which it occupies by force and in defiance of the United Nations — the occupation of Namibia is in itself a crime under international law.

It has embarked on military adventures in a number of independent states of Southern Africa, notably in Angola where its forces occupy part of the country more or less permanently, but also in Mozambique and other Southern African states. Commandos have made raids across borders to kill civilians and refugees; individuals have been assassinated or kidnapped. The regime's efforts at the political and economic destabilisation of the Frontline States are well known; so is its active support of surrogate forces such as Unita in Angola and MNR in Mozambique.

The international community, without exception, has consistently condemned these acts. They constitute unprovoked aggression, which is contrary to international law and a crime against international peace. The UN Security Council has consistently condemned many of these acts of aggression, but has so far been prevented from characterising them directly as threats to world peace (which would automatically trigger off the sanctions procedures of Chapter VII of the United Nations Charter), by the vetoes exercised by the United States, United Kingdom and France.

The Nuremberg Principles and Apartheid South Africa as a Crime Against Peace

The Nuremberg Principles adopted by the UN General Assembly in 1946 are a set of rules which grew out of the conclusions of the International Military Tribunal held in Nuremberg after the war to try the major Nazi war criminals. That Tribunal held that there was both international and individual responsibility for the crimes that were committed during the war, which can be summed up under three heads:

1. **Crimes Against Peace:** Namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy of any of the foregoing.
2. **War Crimes:** Namely, violations of the laws or customs of war.
3. **Crimes Against Humanity:** Namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Traditionally, breaches of international law were held to occur only when one state broke an international duty owed to another state. But the law now considers that international duties are owed also to the international community as a whole, with the result that a state may breach international law without necessarily having infringed the rights or integrity of another state.

Every state, therefore, has a right to suppress breaches of duty owed to the international community. It could be argued that where breaches of fundamental obligations occur, other states may be under a **duty** to suppress the breach. In any event, no state may aid or abet, encourage or assist in these breaches. There is individual responsibility for the commission of these offences and a responsibility adheres also to those who assist in the maintenance of such conditions of illegality.

In applying the Nuremberg Principles to South Africa, and deciding whether or not the apartheid regime has committed a crime against peace, the first necessity is to determine

whether or not **aggression** is involved. If the United Nations Security Council were to resolve that it were, there would be no problem. Unfortunately, the use of the veto by the three Western States at the Security Council has prevented this.

However, since 1975 the UN General Assembly has passed numerous resolutions condemning acts of aggression by the regime against Mozambique, Lesotho, Zambia, Botswana and Angola. So has the Security Council, without invoking Chapter VII of the Charter. The UN has also condemned the ruthless use of power internally to suppress both peaceful civilian opposition to apartheid, and the legitimate use of armed resistance being waged by the liberation movement. South Africa's illegal occupation of Namibia is considered to be another form of aggression.

There is authoritative support, both from international legal opinion and in many conventions, declarations and resolutions of the United Nations, for the view that in spite of the failure of the UN Security Council to make a positive determination under Chapter VII of the Charter on the issue, the whole nature of the apartheid regime and its actions must be held to be aggressive and illegal.

Undoubtedly too, the apartheid regime is guilty of crimes against humanity, as described above. Indeed, this is endorsed by the International Convention on the Suppression and Punishment of the Crime of Apartheid, which came into force in July 1976 and by September 1984 had been ratified or acceded to by 79 states.

The Convention itself states that 'in the Convention on the Prevention and Punishment of the Crime of Genocide, certain acts which may also be qualified as acts of apartheid, constitute a crime under international law'. The principles behind the Apartheid Convention are now considered to be part of general customary law.

The association between the crimes of apartheid and of genocide has been further confirmed by the 1985 report of the Ad Hoc Working Group of Experts appointed by the UN Commission on Human Rights, which points out that genocide is not merely the act of murder applied on a mass scale to a national or ethnic group, but also covers acts 'calculated to destroy the individual or prevent him from participating fully in national life'.

Apartheid, the report concludes, is:

> 'not simply a crime against humanity but a series of acts of genocide, as far as some aspects of its practices and policies are concerned, but also with implications for international peace and security'.

Various consequences flow from such a conclusion. Notably, those who are responsible for the planning and implementation of apartheid can be held liable for their crimes, as the Nazis were and still are, without any limitation on the time for putting them on trial. Also, the victims of apartheid are entitled to reparation.

These consequences are spelled out in the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968. Its provisions, it states, apply to:

> 'representatives of state authority and private individuals who, as principals or accomplices, participate in and who directly incite others to the commission of any of those crimes (against humanity) or who conspire to commit them, irrespective of the degree of completion, and to representatives of the state authority who tolerate their commission'.

The convention also lays down in Article 1 that no statutory limitation shall apply to certain crimes, and specifically assimilates 'inhuman acts resulting from the policy of apart-

heid' to 'crimes against humanity'. Now that the Convention is in force, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights has been entrusted with the task of compiling a list of persons, from the highest echelons of the state machinery in South Africa to the murderers and torturers of the police force, who have been responsible for committing the crimes defined in the Convention.

The Right of the ANC to Combat Apartheid

If apartheid is held to be a crime, and the apartheid regime to be illegitimate, then certain consequences also flow from this for the resistance movement against apartheid.

Since 1965 the UN General Assembly has recognised 'the legitimacy of the struggles by peoples under colonial rule to exercise their right to self-determination and independence'. Slowly, the UN also came to the conclusion that movements fighting colonialism have certain rights to recognition and representation. This was first applied to the movements fighting Portuguese colonialism in Africa. Now, SWAPO of Namibia is recognised as 'the sole and authentic representative of the Namibian people'. The ANC does not, to date, enjoy this unique status, but since 1973 it has been recognised by the UN as representing the people of South Africa, and as a result it (together with the PAC) enjoys a special status at the UN and on various of its organs.

The Right to Armed Struggle

The ANC has a right to conduct armed struggle in pursuit of the right to self-determination of the South African people. This was confirmed by the unanimous adoption by the UN General Assembly of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations (General Assembly Resolution 2615 (XXV) 1970), which laid down that:

> In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.

Similarly, the United Nations General Assembly resolution on the Definition of Aggression of 1974 provides that nothing in the definition of aggression can prejudice the right of self-determination, freedom and independence of peoples under 'colonial and racist regimes or other forms of alien domination', nor the right of these peoples to struggle to that end and to receive support.

The UN Security Council has also been evolving in its response. Resolution 392 of 1976, adopted three days after the shootings at Soweto, explicitly recognised 'the legitimacy of the struggle of the South African people for the elimination of apartheid and racial discrimination'. In 1977 it unanimously affirmed the right of the people of South Africa to the exercise of self-determination, which was extremely significant.

Since 1981 further Security Council developments have been inhibited by the influence of the Reagan administration, but the initial important recognition of the legitimacy of the struggle remains.

The resolutions of the Security Council were authoritative statements of international law. The fact that neither the United States nor the United Kingdom voted against these is significant. The General Assembly of the UN has been even more forthright and has,

by overwhelming majorities, rejected the 'criminal' policies of the apartheid regime and reaffirmed, virtually annually since 1979, the 'legitimacy of the struggle by all available and appropriate means, including armed struggle, for the seizure of power'.

Peoples denied a right to self-determination have not only a right to be represented but to ensure that other states respect their authority. It is international law which creates such a status, not the recognition by other states. As a corollary, there is now a duty not to recognise the entity which exercises illicit governmental power. Such a duty of non-recognition flows from the fact that the apartheid regime denies fundamental rights which form the heart of the international legal order. To deny the African National Congress its authority or to equate its legitimate and lawful acts to those of 'terrorism' is to violate an important legal right.

Flowing from this position, it is clear that there is a duty for all states to support the ANC's legitimate struggle and to withdraw all aid and support from the illegitimate apartheid regime. This is a powerful legal argument for the imposition of comprehensive and mandatory sanctions against the regime, and the denial of all assistance to it.

The Geneva Conventions

Under international law, combatants of the ANC should be able to avail themselves of the protection of the Geneva Convention Protocol 1 of 1977. The original Geneva Conventions of 1949 applied only to conflicts between states and, with limited and tightly-drawn provisions, to guerrillas. But the world community soon recognised the need to apply the humanitarian rules of warfare to other situations. In 1973 the United Nations General Assembly, in Resolution 3102 (XXVIII), stated:

> The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Convention and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments are to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes.

The International Committee of the Red Cross has already started to consider how to expand the 1949 Conventions and this UN resolution gave further impetus to the debate, which finally gave birth to the new Protocols in 1977. The important factor was that these conflicts are of an international nature.

Armed conflicts of an international character are now covered by Protocol I of 1977, which uses the UN formula quoted above, and thus brings the conflict in South Africa within the purview of the Conventions. In addition, the ANC acquired the vital right to become itself a party to the Conventions, which it did by making a formal declaration in Geneva in 1980.

The Declaration of the African National Congress, deposited in Geneva with the International Committee of the Red Cross, states that:

> It is the conviction of the African National Congress of South Africa that international rules protecting the dignity of human beings must be upheld at all times. Therefore, and for humanitarian reasons, the ANC hereby declares that, in the conduct of the struggle against apartheid and racism and for self-determination in South Africa, it intends to respect and be guided by the general principles of international humanitarian law applicable in armed conflicts.

The ANC has been scrupulous in observing its international obligations under the Conventions, but so far the apartheid regime has obstinately refused to accede to the Protocol and has persistently denied the existence of any obligations under the Protocol. It continues to torture detainees and to execute captured combatants, which the Protocol would restrain it from doing. These acts constitute grave breaches of the laws of war.

In a number of trials in South Africa in recent years, defence lawyers have invoked the internationally protected status of combatants of the ANC, and the demands of the UN General Assembly for either commutation of death sentences imposed by South African courts or for prisoner-of-war status for captured combatants.

In a remarkable vote on 1 October 1982, 136 states called for this status when Simon Mogoerane, Jerry Mosololi and Marcus Motaung were sentenced to death following the Booysens Police Station and Sasolburg attacks. There were no votes against and only the USA abstained. More recently, in October 1987, combatants of Umkhonto we Sizwe, facing trial in Cape Town, have relied on the provisions of international law.

Under UN General Assembly Resolution 34/93H (XXXIV) of 1979, governments are obliged to take 'appropriate measures to save the lives of all persons threatened with execution in trials staged by the illegitimate racist regime on charges of high treason and under the obnoxious Terrorism Act'.

This is yet another argument in favour of the imposition of comprehensive sanctions against the apartheid regime and for the provision of maximum, all-round assistance to the African National Congress.

Conclusion

Customary international law has now developed to a point where it clearly recognises the illegitimacy of the apartheid regime, and the crime against humanity which the regime is daily committing in its frantic efforts to remain in power.

The crime of apartheid is closely associated with the crime of genocide, and its authors and perpetrators will undoubtedly one day be called upon to account for their actions, and held liable to compensate their victims. The world has a duty to act, and a duty to uphold and assist those who are conducting a rightful and legal struggle to overthrow apartheid and thus allow all the people of South Africa to participate in the process of self-determination.

Not only does international law establish the illegitimacy of the apartheid regime, but it also provides the legal basis for its abolition. States must take this factor into account in dealings with the regime. It is apartheid and colonialism that is at the heart of the problem. Those states which continue to have 'normal' relations with the regime are guilty of aiding and abetting the commission of one of the most heinous crimes known to international law.

Individuals such as heads of government, ministers, civil servants, business and sports persons and corporations can therefore be held liable for such collaboration. Inside South Africa, the responsibility for individual acts of collaboration, first adumbrated at the Nuremberg Trials, must also be borne in mind.

The right of the international community to take action against collaboration with apartheid and in solidarity with the freedom struggle is clearly established in law. This Conference must provide the political impetus and moral conviction to ensure that this law has practical application.