RACE, PEACE, LAW,
AND
SOUTHERN AFRICA

Race, Peace, Law, and Southern Africa

BACKGROUND PAPER AND PROCEEDINGS
of
THE TENTH HAMMARSKJÖLD FORUM

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and

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on

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in the

Settlement of International Disputes

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THE WORKING PAPER

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EDITOR'S FOREWORD

Of the crises that have afflicted the United Nations in 1967, not the least trying has been that of South West Africa. There, despite the 1966 decision of the International Court of Justice, the Organization's legal interest was the most clear-cut in all of racially tense southern Africa, because of the U.N.'s role as successor to the League of Nations. There the U.N. took perhaps its most far-reaching action—on paper at least—by undertaking to administer a territory whose *de facto* rulers have, so far as appears, the will and means to repel any U.N.-mounted invasion now in sight. There, consequently, the most successful attempt at world order to date may be running its greatest risk of frustration.

Since the Tenth Hammarskjold Forum in December 1966, events respecting the South West Africa part of southern Africa moved rapidly at the U.N. until overshadowed by the Middle East explosion. At the end of March the *Ad Hoc* Committee set up "to recommend practical means by which South West Africa should be administered" gave up trying to agree on one plan. In late April began a Special Session of the General Assembly, which the following month voted to establish a U.N. Council and Commissioner to administer the territory prior to independence in 1968. In June the Special Session elected to the Council: Chile, Colombia, Guyana, India, Indonesia, Nigeria, Pakistan, Turkey, United Arab Republic, Yugoslavia, and Zambia. U.N. Legal Counsel Constantin A. Stavropoulos was appointed Acting U.N. Commissioner for South West Africa.

The legal unfoldment of southern Africa's racial problems is thus a continuing process. The Tenth Hammarskjold Forum could do no more than examine the situation at a given moment. The examination had the benefit of sharply con-

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flicting viewpoints: the White South African plan to protect white hegemony by a species of partition, the Black African insistence on unified states with majority rule, and the outside observer's proposal for compromise through a "fair" partition. Through these contrasting presentations, the Forum employed the adversary method for developing the legal issues. In similar fashion, the issues of "Law and Policy-Making for Trade Among 'Have' and 'Have-Not' Nations" were developed at the eleventh Hammarskjold Forum in April 1967 and the issues in the Middle East crisis are to be developed at the twelfth Forum in December.

The Committee which arranges the Forums is pleased that Mr. James N. Rosenberg, a founder of the Series, has accepted appointment as Honorary Chairman. The Committee's gratitude goes as always to the Staff of The Association of the Bar of the City of New York for its cooperative assistance and especially to Mr. Anthony P. Grech, Reference Librarian, who compiled the bibliography appended to outstanding working paper by Professor and Mrs. Howard J. Taubenfeld.

New York, August 1967

> John Carey, Chairman
> Special Committee on the Lawyer's Role in the Search for Peace, The Association of the Bar of the City of New York

PART ONE

THE WORKING PAPER

Race, Peace, Law and Southern Africa

RITA F. TAUBENFELD and HOWARD J. TAUBENFELD

> The prevention of war, like the prevention of revolution
> within the state, does not depend on legal procedures,
> but on the art of adjustment. Gerhart Niemeyer, *World
> Order and the Great Powers*, p. 48.

As the title of this paper suggests, we have undertaken the intellectually hazardous and academically unfashionable assignment of discussing a highly emotive and sweeping set of issues, race and southern Africa,[1] in the context of a highly generalized, abstract conceptual framework, the evolving international legal and peace-keeping system. In this fall of 1966, the problems of southern Africa have matured into a dominating political issue at the United Nations and events can be expected to outrun any attempt merely to survey the historical facts and current events. There are nevertheless even better reasons for analysis of these issues in a broader perspective.

The detailed facts of life in southern Africa have been carefully surveyed elsewhere. Apartheid has been discussed in principle and examined in practice. It has been found "odious," "intolerable" and labeled a "pathological" aberration by heads of governments, including President Johnson, and by scholars outside South Africa.[2] It has been labeled by most of the UN's members as an offense to humanity, a disease which, in principle, they have agreed must not be permitted to spread to South West Africa and Rhodesia.[3] It has been described as a direct threat to world peace.[4] This case does not have to be made now. In surveying and summarizing the available material, the hazards are few; it is easy to side with the angels. The hazards commence when the policy questions are submitted to analysis; what can be done about these issues within the present international system and with what prognosis? As the decision-makers put it: "What are the real options?" and "Which appear optimal, given the overall aims and preferences of the decision-makers?" At this juncture in history, it seems irresponsible to discuss southern Africa and not to face at least the first of these hazardous sets of questions.

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One caveat must be offered. It is sometimes said that area specialists fail to "find the forest" because they "lack ignorance." Here, with all modesty, we can claim some advantages. We are not specialists in African problems and we rely heavily on information provided by such specialists. Our long-run interests are in the development of international organization and law, and, of course, in a civilized and peaceful world.

For these reasons, our major focus here is on the interrelations between the bitter, intransigent problems of southern Africa and the orderly development of an international system capable of providing at least the necessary minimum of world order and security with justice required to permit us to retain a hope for human survival. In attempting this, we cannot hope to uncover in this paper the optimum overall policy response for next week's international crisis. We seek rather to identify and address ourselves, however briefly, to the underlying issues which the problems of southern Africa raise, and promise to raise, for the international system and the United States as well as the general, long-run, overall policy alternatives these imply.

At this level of abstraction, the important conflicts, dangers and possibilities will not, we believe, change by next week or next year.

First, then, we briefly describe the regions in question, the reported "intolerable" conditions under which their majorities live, and the UN's long-standing concern with each. Then we will attempt to identify the most important legal, conceptual, political, moral and systemic conflict issues which have emerged. Last, we will explore some possible approaches to a solution or solutions for the area and their implications for the international system.

Before turning to the countries separately, it may be well to point out their links. South Africa, Southern Rhodesia and Portugal have demonstrated that they are aware of their common cause as white-dominated societies on the periphery of a raging black Africa. They have provided each other with mutual assistance; both South Africa and the Portuguese colonies have helped sustain Rhodesia against world economic sanctions. South Africa

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and Portugal vote together, sometimes against the world, at the UN. The loss of any one of them is likely to be a psychological and a strategic blow to the others. Indeed, some Western governments have urged a "one-at-a-time" policy for southern Africa on the analogy to a self-supporting line of dominoes or a house of cards.[5]

It is nevertheless also essential to distinguish between these natural allies. The most important conceptual distinction separates the problems of the Republic of South Africa from the others. The central issues in the Portuguese territories and even in South West Africa and Rhodesia can be construed as colonial, with, of course, important racial overtones. The international interest in them can readily be subsumed under the rubric of colonial self-determination. As such, they are the "hard core" cases, the tag end of a process of decolonization which, as one diplomat has noted,[6] has culminated since World War II in the political independence of states with "two-thirds" the population of the world, under the prodding and the approving eye of the present UN.[7] South Africa presents a different, far more troublesome and important set of issues; the Republic is a sovereign member of an international society of sovereigns.

For the existing international system, then, southern Africa is the present point of confrontation between two basic and fundamentally inconsistent international positions. One is the accumulating insistence on international action to assure certain group and individual human rights, even against the will of a legitimate sovereign. These rights include *inter alia* both the "self-determination of peoples" and internal non-discrimination on racial and ethnic lines. The other conflicting tenet is the traditional sanctity of the sovereign national state to pursue its own domestic policy and to design its own way of life and domestic political system free not only of interference from other states but from the international community as well. Both the concepts of sovereign independence and immunity from interference, on the one hand, and of human rights, on the other, are enshrined in the Charter, and South Africa, in pursuing its domestic policy in contravention of some of the most fundamental standards of currently

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agreed international morality rests its case at base on the "illegality" of other states either individually or through the United Nations in concerning themselves in her affairs.

Such conflicts among basic norms and cherished values, which usually embody and reflect other conflicts of interest of groups or individuals, are common in all constitutions, including those of relatively stable, well-organized societies with well articulated government institutions where they are normally resolved peacefully by binding legal or political decision machinery.[8] Conflicts of important and valued norms are common in the Charter system.[9] Such conflict implies the necessity of choosing between or preferably, if possible, reaching a compromise between the incompatible norms and aims. However, the conflict between the traditional concept of inviolable sovereignty and international intervention in the name of human rights strikes at the heart of the present international system of sovereigns.

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

Even if we agree that this path should be trod, and that South Africa is the ideal case with which to begin the long climb to, hopefully, a more "just" world, one safer for the individual, safer from genocide, it seems obvious that so crucial a departure from the past should be designed as carefully as possible to assure that the achievement of these important purported ends will, indeed, be likely. Anything else promises at a minimum to compromise the future possibilities for growth of the organized international community's capacity in the area of human rights and might in fact threaten the survival of the present Organization in general. So far, no solution for South Africa offered at the UN promises to fulfill what we consider to be these minimum requirements. On the other hand, at this point in history, the UN cannot, and would

not, ignore apartheid as a "domestic" issue in traditional fashion. Quite aside from the moral issues, in a world hyper-sensitive to race, in which the present Great Powers have been forced to become rivals in their affirmation of racial equality by the proximate debut of a non-white superpower, the existence of a "pigmentocracy" [10] is an ultimate threat to the peace, with, if possible, even more terrifying long-run potentials than all the others.[11] A world of mutual nuclear deterrence, which relies ultimately on the rational mutual cowardice of the giant states for stability must somehow contain the mass hysteria and the fundamental threat to rationality which racial conflict represents.

We turn first to contemporary conditions in southern Africa and to the record of the UN's interest there.

I. *SOUTHERN AFRICA IN BRIEF*

To speak of southern Africa as one unit for legal and political analysis is of course misleading, despite the basic interdependence of the areas and issues involved and the common cause their governments have made.[12] We here sketch briefly the components; first, the Portuguese colonies, Rhodesia, and South West Africa, in all of which the issue of the right of self-determination is at the fore with race a dominant overtone; last, South Africa, in which an asserted international interest in internal discrimination on a racial basis confronts most directly the claim of all sovereigns to be left alone to deal with internal matters.

The Portuguese Areas

Angola and Mozambique are, in Portugal's view, integral parts of Portugal, just as Algeria was considered by France to be an integral part of France.[13] This view has been expressly rejected by the General Assembly.[14] The territories have a combined area of some 679 thousand square miles and a population of some 12 million, making tiny Portugal today's largest colonial power. Of the 12 million, in the 1950 census, only some 130,000 were European, 55,000 were "mixed," 100,000 were "civilized" or "assimilated" Africans and the other 11½ million, were "indigenous." [15]

While official Portuguese policy is largely free of explicit rac-

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ism, little progress in economic or political development has occurred for the bulk of the population in these areas. Explicit United Nations political interest in the territories is quite recent; in 1961, uprisings in the various Portuguese areas in Africa led to vigorous Portuguese military action in each of them. In March and June, 1961, the Security Council "deplored" the severely repressive measures employed and called the situation an actual and potential cause of international friction and one likely to endanger the maintenance of international peace and security. Portugal was asked to cease repressive activities and to find a peaceful solution to the discontent of the native majorities.[16] The General Assembly also called on Portugal to introduce measures for the respect of human rights there.[17]

As a result in part of these pressures, Portugal has instituted economic and social reforms to a limited degree. The "Native Statute" and forced labor laws were repealed; Africans were given Portuguese citizenship; compulsory primary education is offered by all schools (since 1964); and an attempt at economic integration within the "escudo zone" is in progress.[18] Guerrilla warfare has nevertheless remained endemic in the Portuguese territories with an estimated hundred thousand Portuguese troops now in Portuguese Africa. Despite the alleged receipt by the rebels of Chinese and Russian weapons, of alleged training in Communist guerrilla schools, and of alleged sanctuary in other African states, especially the Congo,[19] the Portuguese have been perhaps surprisingly successful thus far in controlling the rebellions, though at substantial economic cost.[20] At the moment, only in Portuguese Guinea are the rebel forces reported to be of any immediate consequence.

Pressures from other states directed toward independence for these areas continue unremitting. In 1963, Portugal was expelled from the UN's Economic Commission for Africa by ECOSOC; in November, 1965, she was expelled from the Inter-African Coffee Organization "because it is not an African country;" in May, 1966, she was suspended from all WHO regional activities.[21] The UN also provides assistance to refugees from Portuguese territory and awards scholarships for refuge education.[22]

Of greater political significance, in November, 1965, the Secur-

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