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SOCIAL JUSTICE MOVEMENTS AND LATCRIT COMMUNITY: Lessons from the World Conference Against Racism: South Africa as a Case Study

PEGGY MAISEL*

BIO:

* Associate Professor and Director of Clinical Programs, Florida International University College of Law; Fulbright Professor and Associate Professor, University of Natal School of Law, Durban, South Africa (1996-2001); B.A., 1971, Pomona College; M.A., 1972, Occidental College; J.D., 1975, Boston University; M.A.T., 1978, Antioch School of Law. The author thanks Ira Horowitz, who organized a delegation to the World Conference Against Racism and is an attorney and social justice education consultant, for his contributions and comments.

SUMMARY: ... It is difficult to get people to remember, let alone focus on the accomplishments and ongoing challenges that emerged during the United Nations sponsored World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance (the WCAR) held just over a year ago in Durban, South Africa. ... Then, in one of the more startling speeches I heard, the delegate from Australia rose to defend colonialism as being responsible for helping to create modern Australia. ... Work nationally and in cooperation with other States and relevant regional and international organizations and programmes to strengthen national mechanisms to promote and protect the human rights of victims of racism, racial discrimination, xenophobia and related intolerance who are infected, or presumably infected, with pandemic diseases such as HIV/AIDS and to take concrete measures, including preventive action, appropriate access to medication and treatment, programmes of education, training and mass media dissemination, to eliminate violence, stigmatization, discrimination, unemployment and other negative consequences arising from these pandemics. ... Recognizing that the legacy of racism and economic injustice caused by colonialism and slavery cannot be overcome by the previously disadvantaged countries alone, the Durban Declaration from the WCAR also sets forth actions that must be taken by the international community. ... As described earlier, the obligations placed on the industrialized world by the Durban Declaration derive from its recognition that economic underdevelopment and poverty are the legacies of colonialism, apartheid, and racism. ...

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It is difficult to get people to remember, let alone focus on the accomplishments and ongoing challenges that emerged during the United Nations sponsored World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance (the WCAR) held just over a year ago in Durban, South Africa. The reason is simple: that conference ended on September 8, 2001, and what we remember about that period is now permanently obscured by what happened just three short days later. But the events of September 11 make it more imperative than ever that we address the evils of racism, racial discrimination, and xenophobia. It is important that we remember what the Durban Conference achieved and, more importantly, continue our work to reach the vision for the world announced there. This Article seeks to help refocus attention on that important need.

By way of establishing some historical context, the conference in Durban was the third conference sponsored by the United Nations to formulate and move ahead on a worldwide anti-racist agenda. The first two conferences, held in 1978 and 1983, were considered successful primarily because they effectively mobilized world support behind the struggle to end apartheid in South Africa.ⁿ¹ It was thus symbolic that the United Nations held the third conference in South Africa in celebration of the peaceful [*740] demise of that hated regime. Like the first two conferences, the conference in Durban demonstrated how many countries of the world could unite to issue a moral pronouncement that opposed all forms of racism, racial discrimination, and xenophobia. Thus, all countries that attended the entire session agreed by consensus to a final document titled the Declaration and Programme of Action of the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance (WCAR)ⁿ² (often referred to as the Durban Declaration).

Perhaps the most significant advancement made during this third World Conference, and one that was among the most contested, was the assertion that slavery, in both its current and past manifestations, is a crime against humanity.ⁿ³ While there was [*741] unanimous denunciation of any ongoing slave trade, the Western countries (even in the absence of the United States) fought hard to eliminate inclusion of earlier acts of slavery from this pronouncement on a theory of historical relativism, i.e., that such a common practice of the past should not in retrospect be declared a crime against humanity. Ultimately, the Western countries either simply chose to adopt the latter interpretation for themselves,ⁿ⁴ or they retreated to the argument that the Durban Declaration agreed to is not a legal document and therefore cannot impose liability for past acts. ⁿ⁵

What was much more problematic at this conference, as in [*742] others of recent vintage (for example, the World Summit on Sustainable Development held again in South Africa approximately one year after the WCAR), was getting commitments from countries to back the moral pronouncements in terms of meaningful economic reforms. The WCAR made abundantly clear the fact that racism and economic disparity are thoroughly intertwined, with people of color suffering from the highest rates of poverty, malnutrition, lack of education, housing, and poor health throughout the world.ⁿ⁶ Indeed, as one who personally attended the conference, perhaps my most vivid long-term memory will be of the various indigenous groups who emerged forcefully on the world stage at the WCAR to make known their current suffering both in racial and economic terms. I include here, for example, the Dalit (the so-called "untouchables" in India), the Romany (more commonly known as "Gypsies," a term many despise), indigenous peoples, and landless people, all of whom held passionate demonstrations at the conference. These groups forced the official delegates to at least listen to their concerns, although that did not always translate into definitive action. ⁿ⁷

A full review of what the Durban Conference did and did not [*743] achieve is beyond the scope of this Article. Indeed, only the passage of time will reveal that answer. Instead, this Article will focus on the current struggle of the host country, South Africa, to overcome its notorious past as a means of assessing what is involved in the present day struggle to eliminate the scourge of racism and poverty. South Africa seems especially appropriate as the subject of such a case study because of that country's history and the fact that the government led by the African National Congress (ANC) was born with the express purpose of ending the years of racial hatred and discrimination that were central to the prior regime.ⁿ⁸ Further, during its eight years of existence, the current government has consistently struggled to create a truly democratic society. Therefore, looking at events in South Africa should teach us about the obstacles that must be overcome to reach that goal even where there is a strong will to do so.

Before assessing South Africa's efforts to create the type of society envisioned in the Durban Declaration, Part I describes what happened prior to and during the WCAR that led to the adoption of that declaration. This review is helpful because, among other things, it reveals both the areas of agreement and division between nations regarding responsibility for remedying the past effects of racism, slavery, and colonialism. That knowledge, in turn, allows for a more accurate assessment of both the ability of South Africa to effect

change as well as the international support South Africa can expect from other countries. To further prepare for an assessment of how well South Africa is meeting its obligations under the Durban Declaration, Part II describes the current situation in the country and how its history of colonialism and apartheid has brought it to this point. Part III then contains an analysis of the efforts of the new South African government to eradicate the racial disparities that are the legacy of the past. As recognized in its new constitution, those efforts are assessed in relation to the achievement of both social justice - i.e., the elimination of prejudice and discrimination - and also economic justice - i.e., the reduction of poverty and deprivation. Finally, as the delegates to the WCAR recognized, the achievement of economic justice in this globalized world is dependent [*744] on the support of the wealthier Western and developed nations. Thus, Part IV concludes the analysis by considering how South Africa's efforts have been aided or hampered by those countries. In the end, it is hoped that this Article will provide some insight into what must be done to create the type of world so elegantly and passionately described in the Durban Declaration.

I

The WCAR

The World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance included delegations from 169 countries⁹ that convened on August 31, 2001 in Durban after a series of preparatory conferences held throughout the world.¹⁰ [*745] These preparatory conferences met in order to define issues and agree on a platform of action to present for further refinement at the final conference.¹¹ The hope expressed at these preliminary meetings was that the member states of the United Nations would make a serious commitment to end racism and its attendant evils throughout the world.

Just prior to the WCAR, organizations from civil society met at an international, non-government organizations forum that was held from August 28 to September 1. The formal work of that session was to agree on a declaration to present to delegates at the U.N. Conference and to develop strategies and positions for lobbying efforts. It was during this period that the majority of the activism took place, including demonstrations on behalf of the Palestinians, landless peoples, and the South African Congress of Trade Unions which opposed the privatization of various quasi-public companies in the country. There was incredible camaraderie, energy, and commitment displayed throughout this conference as activists from around the world struggled to unite behind specific principles and actions that could be urged upon the formal delegations. Much was agreed upon regarding key issues such as: reparations, both for African countries and African Americans; caste and discrimination based on work and descent; persons with disabilities; education; environmentalism; gender; hate crimes; health; and HIV/AIDS.¹² It could be expected that the networking and cooperation that occurred during this conference will lead to a more effective voice for civil society in the future work arising out of the WCAR.

Unfortunately, however, the potential influence of this gathering was undermined by the extreme split that developed over the crisis in the Middle East. Thus, as one commentator noted, "civil society at the Durban WCAR became so entangled in the ... ideological warfare over the state of Israel, that the NGO Forum Declaration and Programme of Action is now being rejected as [*746] antisemitic [sic] and racist by many Northern NGOs."¹³ Indeed, as reported on the web site of the South African Broadcasting Corporation, five of the biggest international non-governmental organizations (NGO) distanced themselves from the forum's final declaration, as did the U.N. High Commissioner for Human Rights, Mary Robinson. The reason for the dissent was the declaration's language regarding Israel, which was characterized as harsh and inflammatory.¹⁴ Nevertheless, many of the delegates from the NGO gathering remained during the U.N. Conference and, through lobbying and other efforts, were able to influence its final declaration.

The WCAR itself consisted of nine days of intense meetings, discussions, and speeches that culminated, as mentioned above, in the adoption by consensus of the Durban Declaration. The fact that such a document

was produced at all was attributed in part by many participants to the fact that failure was unacceptable for a conference in South Africa, and also to the commitment and negotiating skills of the chairperson of the conference, Her Excellency Dr. Nkosazana Dlamini Zuma, the Foreign Minister of South Africa.ⁿ¹⁵ The WCAR was originally scheduled to run for eight days and end on September 7, but, as the time for the closing session approached, the delegates were still deadlocked on the two most contentious issues: (1) whether to characterize past acts of slavery as crimes against humanity, and (2) what the official conference position would be on the Israeli/Palestine conflict.ⁿ¹⁶ Minister Zuma was able to keep the delegates [*747] together for an additional day, however, and the conference ended late, but with the ultimate adoption of the Durban Declaration.

The speeches given by delegates immediately after the declaration's final approval exemplify what a difficult task it must have been to get agreement among the nations. It seemed that almost every country wanted to be heard criticizing those parts of the Durban Declaration with which it disagreed. The delegate from Canada, who spoke first, eloquently praised much of the document. Nevertheless, his main purpose seemed to be to advance the position of his country's absent neighbor and other Western nations on two key issues. First, his statement criticized the Conference for having considered the Israeli/Palestinian conflict at all and for the final position the declaration took on Israel.ⁿ¹⁷ Second, it pressed the interpretation mentioned earlier, that any language regarding slavery should condemn only its current forms, and not retrospectively condemn the practices of the past, [*748] such as the Transatlantic Slave Trade.ⁿ¹⁸ Then, in one of the more startling speeches I heard, the delegate from Australia rose to defend colonialism as being responsible for helping to create modern Australia.ⁿ¹⁹ Later, the Syrian delegate criticized the failure to condemn Israel more strongly and the decision to incorporate language about the Holocaust into the Durban Declaration.ⁿ²⁰ Ironically, the fact that parts of the final document angered so many nations indicates that it did push them well beyond positions previously taken. Indeed, the declaration should be seen as remarkable because it contained so strong a condemnation of past and present racism and slavery, and then set forth a Programme of Action to overcome their effects.

[*749] Significantly, the United States and Israel delegations left the WCAR before its conclusion, refusing to participate further in the work of the conference or to agree to any declaration emanating from it.ⁿ²¹ The United States left nominally in defense of Israel.ⁿ²² However, according to many, equally important was the United States' discomfort with agreeing to a document containing a condemnation of the Transatlantic Slave Trade as a crime against humanity. Such an admission most certainly would have increased the country's vulnerability to possible reparations lawsuits in this country.ⁿ²³

Despite disagreement among the delegates and the walk-out by the United States and Israel, the WCAR did produce a document that commits the United Nations and participating countries to a Programme of Action both nationally and internationally that could have a significant impact in ending racism, racial discrimination, xenophobia, and related intolerance. For example, despite the protestations of countries like Canada and Australia, the declaration clearly condemns both colonialism [*750] and slavery, and acknowledges the harm they have caused.ⁿ²⁴ Even more significantly, the Durban Declaration affirms that it is the responsibility of the former colonizing countries to help repair the damage resulting from colonialism.ⁿ²⁵ The remainder of this Article discusses the national and international commitments in the Durban Declaration as a framework for assessing how realistic it is for a country such as South Africa to overcome the severe deprivations caused by its history of racism.

II

The Effects of Colonialism and Apartheid in South Africa

The first step in this analysis is to briefly describe the current situation in South Africa, and then to trace its roots to the country's history of colonialism and apartheid. What is perhaps most telling is that the gap

between the rich and the poor is greater in South Africa than in almost any other country in the world.ⁿ²⁶ More than fifty percent of the population lives in poverty,ⁿ²⁷ and the unemployment rate is increasing.ⁿ²⁸ Fuelling this crisis is the lack of resources available to provide the poor with decent education, health care, and social services. The situation has now reached crisis status as a result of the spread of HIV/AIDS that is believed to have infected twenty percent of the adult population.ⁿ²⁹ [*751] As in other countries with similar demographics, a resulting problem is a high rate of crime and violence.ⁿ³⁰

It is not difficult to connect this contrast of extreme wealth side by side with poverty and deprivation to South Africa's unique history of racial injustice. As a member of the South Africa Human Rights Commission has written: "At the very core of apartheid was an unequivocal commitment to white supremacy, segregation and inequality."ⁿ³¹ The apartheid state created a hierarchy of races with whites who made up thirteen percent of the population at the top of the pyramid, Indians and coloreds in the middle, and Africans, who were about seventy-five percent of the population, at the base.ⁿ³² Housing, health care, and social and community services were all provided on a segregated basis,ⁿ³³ with the bulk of the resources and money spent on whites. There was also job segregation with many whites guaranteed work through the civil service system while Africans either were unemployed, [*752] worked in the informal sector as street vendors and the like, or, if employed, were confined to specific types of menial or arduous labor, such as minework or domestic work.ⁿ³⁴

The formal apartheid system was instituted in South Africa in 1948, following the election in which the Afrikaner-dominatedⁿ³⁵ National Party came to power. Though the system did not end until 1994, apartheid-like policies were not confined to the period of National Party rule. Racial and economic segregation began early in the country's colonial period, and laws were enacted throughout its history to keep blacks in a subordinate position.

From the 17th through the 19th Century, both the Dutch and the English colonized parts of South Africa. As elsewhere, the settlers seized land and gained control of the country's wealth and resources through war. Later, the settlers maintained control through suppression of first the indigenous Khoi-San, and then the other black traditional groups such as the Xhosa, Sotho, and Zulu people. As was inevitable, the two colonial powers eventually clashed, resulting in a British victory in the Anglo-Boernⁿ³⁶ War waged from 1899 to 1902. Thereafter the four colonies of Natal, the Cape, the Orange Free State, and Transvaal fell under British rule and were officially united on May 31, 1910, when General Louis Botha became the first Prime Minister of a united (white) South Africa. The South Africa Act of 1909, approved by the British Parliament, served as the Union of South Africa's Constitution until 1961 and provided that only whites would be able to vote, except in the Cape colony where for a few more years there would be a limited, non-racial, property-based franchise.

[*753] The legal framework for formal racial and economic segregation began with the Glen Gray Act in 1894, which forced black Africans into wage-labor by limiting their access to land and fining those who were not employed.ⁿ³⁷ After the creation of the Union of South Africa, Parliament in 1913 passed the Natives Land Act 27 of 1913, which established scheduled "native" areas for black people only. As a result, Africans could not own eighty-seven percent of the country's land by 1936, except with permission of the government. Millions of black South Africans were ultimately moved to these areas, thus reserving the bulk of the valuable land for white agriculture, mining, and other economic interests. During the apartheid era, other laws were enacted controlling free movement of black people and black labor and regulating the process of race classification, education, and language.ⁿ³⁸

In 1983, a new constitution was enacted, the Republic of South Africa Constitution Act 110 of 1983, which set up a tricameral parliament with separate houses for representatives elected by white, colored, and Indian voters.ⁿ³⁹ Africans were totally excluded from the political process. What followed was a period of increased mass protests and armed resistance that was met by attempts at greater repression in the form of

repeated states of emergency. n40 Liberation efforts were supported by strict international sanctions and isolation of South Africa and its economy. [*754] Ultimately, the government realized it was no longer tenable to maintain its despotic regime, and it began in 1989 a drawn-out process of negotiations n41 that culminated in the fully democratic elections in 1994. n42

III

National Obligations Under the WCAR Plan of Action: The South African Response

As described in the previous section, colonialism and apartheid in South Africa entrenched both racial segregation and economic injustice over three centuries before the first democratic elections in 1994. It is this type of legacy, replicated to some degree in most countries in Africa and many throughout the world, that the Durban Declaration is designed to address.

The Durban Declaration initially calls upon all states to take a wide variety of measures internally to combat racism, xenophobia, and related injustices. Among the recommended measures are those related to preventing and treating HIV/AIDS, n43 additional investment in social and public services, n44 supporting education, n45 creating jobs, n46 and eradicating poverty. n47 There also is a call to create a national legislative framework that expressly and specifically prohibits racial discrimination and provides judicial and other remedies of redress. n48

Before examining South Africa's record on these matters and the obstacles it now faces, the point must be made that, as with [*755] other developing countries, South Africa's ability to implement all but the obligation concerning a legislative framework is dependent in part upon the actions of the Western, industrialized world. Thus, it is obvious that poorer countries can amass the capital needed to successfully develop programs to eradicate poverty, support education, and create jobs only if the wealthier states meet the commitments they agreed to elsewhere in the Durban Declaration. n49

Given the limitations just mentioned, South Africa has already demonstrated, for the most part, a strong commitment to meet the obligations it agreed to in the Programme of Action. To begin with, it has one of the strongest national legislative frameworks in the world with regard to promoting substantive equality, socio-economic rights, and laws that prohibit racial and other forms of discrimination. For example, there is a long and inclusive list of protected groups under the equality clause of the Bill of Rights that prohibits discrimination on the basis of race, ethnic or social origin, color, culture, language, and sexual orientation, among other groups. n50 Further, its Constitutional Court has extended this prohibition to certain persons without South African citizenship n51 and to those who suffer from HIV/AIDS n52 on the grounds that they are analogous to the listed prohibitions, and discrimination on these grounds would harm a person's dignity. Perhaps even more significantly, the constitution expressly sanctions affirmative action programs in order to achieve substantive equality and remedy the effects of past discrimination. The Constitutional Court said, in certifying the constitution, that it contemplates "laws, programmes or activities that have as their objective the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, color or creed." n53

Next, as required by the constitution, the South African Parliament has passed important implementing legislation to require affirmative action in employment by requiring employers to implement [*756] plans that include preferential treatment and numerical goals for members of disadvantaged groups. n54 Likewise, legislation has been enacted that extends the prohibition against discrimination to private individuals and businesses and that allows the government, for instance, to charge richer white communities more than poorer black ones for services such as electricity. n55

Beyond mandating the end to discrimination and redress for past injustices, the constitution and legislation also aspire to bring about socio-economic equality. Thus, the constitution establishes various socio-

economic rights, including entitlements to educationⁿ⁵⁶ and emergency medical treatment,ⁿ⁵⁷ and the somewhat lesser rights of access to housing,ⁿ⁵⁸ health care services, food, water, and social security,ⁿ⁵⁹ depending on the availability of resources. The Constitutional Court has shown both the reach and the limitation of these rights in two leading cases. In one, the court required the government to provide temporary housing for people who became homeless and were waiting for permanent housing.ⁿ⁶⁰ In the other, the court upheld the government's denial of treatment to a man needing kidney dialysis because the state argued that the cost of keeping him alive would limit its ability to provide housing, food, and water to many other people.ⁿ⁶¹

The South African Constitution and its implementing legislation therefore meet almost all of the requirements of the WCAR Programme of Action, and in many ways can serve as a model to the rest of the world of what constitutes a proper constitutional, [*757] legislative, and judicial framework to overcome the legacies of colonialism, apartheid, and racism. But despite this excellent beginning, the South African experience also demonstrates that, even focusing solely on matters within its own government's control, the creation of such a framework can only go so far in eradicating these past evils. Equally, if not more important, are the decisions the government makes with regard to numerous other matters.

This is no less true for South Africa, as various policy decisions have hampered the country's efforts to reach its potential. The first involves the nation's one-time decision to enter into a multi-billion dollar arms deal in 2000 that over the next five years obligates South Africa to purchase, mostly from European arms manufacturers, substantial military hardware. The purchase includes three new submarines, four corvette warships, thirty helicopters, and forty-two jet fighters and trainers. This purchase amounts to the greatest expenditure in the national budget, and is among the ANC government's most controversial decisions because it obviously takes funds away from under-resourced areas such as education and health care.ⁿ⁶² Perhaps even more ominous for the long run is the way the ANC responded to the strong dissent that appeared within its own ranks. For example, Member of Parliament Pregs Govender, the ANC chairperson of the Joint Monitoring Committee on the Improvement of the Quality of Life and the Status of Women, criticized the arms deal at the first National Gender Conference held in August 2001. Immediately afterward, Minister Essop Pahad from the President's office attacked Ms. Govender's position from the same podium. Ms. Govender later resigned from Parliament.ⁿ⁶³

A second example of difficulties the South African government has experienced in implementing a program to remedy the [*758] effects of colonialism and apartheid concerns its much-admired Truth and Reconciliation process. To fulfill an obligation that came from the negotiated settlement allowing for democratic elections, the new government passed a statute establishing a Truth and Reconciliation Commission (TRC) that was charged with investigating and remedying gross human rights violations that occurred during the apartheid era, and granting amnesty to perpetrators who admitted their responsibility in accord with certain strict prescriptions.ⁿ⁶⁴ Pursuant to this mandate, the TRC investigated thousands of complaints of gross human rights violations between 1996 and 2000, including the airing of many stories in public hearings. In addition, amnesty was granted in twelve percent of the 7,112 applications filed.ⁿ⁶⁵

A third and less well-known mandate under the TRC statute provided for government payment of reparations to survivors of gross human rights violations or surviving family members of persons who died as a result of such actions. In effect this provision was the quid pro quo for the granting of amnesty to perpetrators because the statute creating the TRC took away the right of survivors to sue persons who were granted amnesty for civil damages. The reparations were intended as compensation for having been traumatized physically, emotionally, and/or left destitute and without earning capability. The problem, however, is that despite the government's best intentions to adequately compensate people who suffered gross human rights violations, payments have in fact been minimal at best. As a result, there is a strong sense of betrayal and resentment amongst many of the people who came forward. From the government's standpoint, the reason is a lack of resources.ⁿ⁶⁶

From the standpoint of assessing the ability of South Africa to [*759] fulfill its obligations under the Durban Declaration, this experience provides an example of how difficult it is to provide economic relief for the past effects of racism, colonialism, and apartheid. Thus, as part of its efforts to pay reparations, the government approached wealthy white-owned businesses that had profited under apartheid and asked them to contribute to a special fund. Likewise, the government asked other perpetrators, members of civil society, and foreign donors to contribute. Nevertheless, very little money was raised from these sources,ⁿ⁶⁷ which indicates how difficult, if not impossible, it will be to raise money for international reparations to compensate African nations for the effects of slavery and colonialism.

A much broader and potentially more devastating example of where the South African government has failed to successfully implement the Durban Declaration relates to the HIV/AIDS pandemic. The Durban Declaration urges member States to:

Work nationally and in cooperation with other States and relevant regional and international organizations and programmes to strengthen national mechanisms to promote and protect the human rights of victims of racism, racial discrimination, xenophobia and related intolerance who are infected, or presumably infected, with pandemic diseases such as HIV/AIDS and to take concrete measures, including preventive action, appropriate access to medication and treatment, programmes of education, training and mass media dissemination, to eliminate violence, stigmatization, discrimination, unemployment and other negative consequences arising from these pandemics.ⁿ⁶⁸

Despite such pronouncements from the international community that began long before the WCAR, the ANC government has resisted recognizing that HIV develops into AIDS, which has confused the South African public and set back prevention efforts.ⁿ⁶⁹ Just how many lives could have been saved if there had [*760] been an aggressive prevention campaign from the time people became aware of the full dimensions of this epidemic will never be known. What is clear is the incredibly devastating effect the high death rate from AIDS is having in all sectors of South African society.

Besides lagging behind in prevention efforts, the government also fought efforts to provide appropriate access to medication and treatment to AIDS sufferers. The most notorious of these was its vigorous opposition to a lawsuit by the citizen-based Treatment Action Committee and others to require that it dispense Nevirapine, an inexpensive medication that has demonstrated its ability to significantly lower mother-to-child transmission of HIV. Fortunately, the Constitutional Court found that the right to health care required the government to provide a comprehensive program to distribute this drug to pregnant women.ⁿ⁷⁰ Nevertheless, the fact that the government's actions [*761] delayed the distribution of this drug has again undoubtedly cost lives.

On a more positive note, the ANC recently has seemed to bend to both internal and international criticism and is making antiretroviral drugs available not only to pregnant women but also to rape victims, which is a reversal of its previous policy.ⁿ⁷¹ In addition, the government announced that it is studying the possibility of enacting compulsory licensing to override patents and allow the importation of generic HIV/AIDS drugs, which is allowed by the TRIPS (Trade-Related Aspects on International Property Rights) agreement when countries have a national emergency.ⁿ⁷² Hopefully, this change of position has not come too late to reverse the spread of this deadly virus.

The final area to be discussed concerning the performance of South Africa in fulfilling its national obligations under the Durban Declaration is probably the most difficult to assess. It concerns the economic policies of the ANC-led government which have been criticized as not being effective in combating poverty, and blamed for increasing unemployment. While the government is clearly committed to overcoming the legacies of apartheid, they have chosen to do this through an economic policy that seeks to

prevent the pullout of international capital and promote more foreign investment, policies that are seen by some as too friendly to the West.

The government is in a difficult position because of the realities of the global economy, as discussed in the next section on international obligations. Not being an economist, I do not feel comfortable expressing an opinion as to the correctness of the government's chosen path. It should be noted, however, that there are substantial criticisms that these policies are not working,ⁿ⁷³ and they do represent a departure from earlier policy that puts greater emphasis on social development designed to directly [*762] improve living conditions for the disadvantaged.ⁿ⁷⁴

The peaceful transition from the prior regime to the democratically elected ANC-led government came with extreme limitations on the economy. White South African businesses had complete control under the apartheid system, including control of mining, agricultural, and all other sectors. As a result, government resources to address past inequities were extremely scarce in 1994. The government did make some progress, nevertheless, immediately after the first national elections, through the implementation of the Reconstruction and Development Programme (RDP).ⁿ⁷⁵ The most significant gains were made in the areas of improving access to housing, water, and electricity. Universal health care up to the age of six also was introduced. Such spending put a strain on government resources, and it was feared that continued government spending would fuel inflation.

The ANC then changed its economic policies after the currency fell by twenty-five percent in 1996. It curbed spending on social programs and adopted a new conservative economic policy known as GEAR (Growth, Employment, and Redistribution) that is intended to attract foreign investment by controlling inflation. It also is designed to create a favorable climate for investment and trade by holding down wage demands and instituting deficit reduction.ⁿ⁷⁶ The policy so far has been successful in controlling inflation but private investment has decreased and unemployment increased. ⁿ⁷⁷

[*763] Like the arms purchase and the earlier policies on AIDS, there has been opposition to the governments' actions on the economy within the ANC alliance. One area of considerable contention concerns the decision to begin to privatize all or a portion of state-owned utilities such as the telephone and electric companies. These privatization decisions are opposed by the Congress of South African Trade Union (COSATU), the largest federation of labor unions in the country and a key partner in the alliance, and by organizations advocating for the poor that believe that privatization will result in both the loss of jobs and also higher rates for basic services.ⁿ⁷⁸ Demonstrations against privatization began during the WCAR and continue up to the present. ⁿ⁷⁹

The bottom line so far is that these domestic economic policies have been unsuccessful in bringing poverty relief or in creating new jobs. Moreover, as indicated by COSATU's strenuous opposition to the privatization policy, the government-led tripartite coalition with COSATU and the Communist Party is showing some signs of unraveling. Determining who is correct in these economic judgments is beyond the scope of this article. Furthermore, it is possible that the real blame for GEAR's poor showing so far may be more a result of global economic forces than the government's policy. In that case, any blame would at a minimum have to be shared with the industrialized nations, and as indicated in the next section of this article, those nations have done little to help the economies of developing countries.

In conclusion, with regard to its internal policies and actions, South Africa is an example of a country that recognizes the evils of racism and racial discrimination and has made significant gains in combating them. Thus, it has created an exemplary constitutional, legislative, and judicial framework to promote equality, [*764] and it has made significant gains in providing basic services. It is also an excellent example of how national programs are limited by internal and global economic realities. South Africa's experience demonstrates that without a commitment from the international community to overcome colonialism, apartheid, and racism, even the most committed national governments will be unable to make adequate progress in achieving substantive equality.

IV

International Obligations Under the WCAR Program for Action: The Response of the Industrialized Nations

Recognizing that the legacy of racism and economic injustice caused by colonialism and slavery cannot be overcome by the previously disadvantaged countries alone, the Durban Declaration from the WCAR also sets forth actions that must be taken by the international community. South Africa is unusual in the developing world in that it has elements of a developed economy and significant wealth within its borders, but its government nevertheless remains dependent on the global economy. Thus, the success of its internal economic policies designed to create favorable conditions for trade and investment are restricted by the actions of the more developed nations.

As described earlier, the obligations placed on the industrialized world by the Durban Declaration derive from its recognition that economic underdevelopment and poverty are the legacies of colonialism, apartheid, and racism.ⁿ⁸⁰ The WCAR documents therefore call upon the international community, particularly the former colonial powers and the developed nations of the West, to take actions to alleviate these conditions. Stated broadly in Section 158 of the Durban Declaration, the conference recognizes the "need to develop programmes for the social and economic development of developing countries, especially those on the African continent and the Diaspora, within the framework of a new partnership" in nineteen areas.ⁿ⁸¹ These areas range from the [*765] broad pronouncement of "poverty eradication" to more specific proposals such as debt relief, market access, and transfer of technology.ⁿ⁸²

Given the fact that it is just over a year since the conference and that the events of September 11 and its aftermath have intervened, it is too early to judge just how seriously the industrialized world will honor the pledges made there. Nevertheless, it should be instructive to briefly review the performance of the West in two key areas.ⁿ⁸³ The first is the implementation of fair trade rules and improved market access, which are seen by many as having the most potential to alleviate poverty and create jobs.ⁿ⁸⁴ [*766] A representative from Oxfamⁿ⁸⁵ earlier this year summed up why this reform is needed by explaining that: "For every dollar we give in aid, two are stolen through unfair trade."ⁿ⁸⁶ In a report issued around that time by Oxfam entitled "Rigged Rules and Double Standards," the international aid organization revealed that: "More than 128 million people could be lifted out of poverty if Africa, Latin America, East Asia and South Asia each increased their share of exports by just one per cent."ⁿ⁸⁷

Looking at the West's performance on fair trade and market access, there have been some positive developments, such as the recent announcement by Prime Minister John Howard of Australia that his country will eliminate all trade tariffs and quotas currently levied against the world's fifty poorest nations. Also, at the opening of the recent World Summit on Sustainable Development, a key official of the European Union promised reform of the system of agricultural subsidies in Europe, which he acknowledged severely undercut the livelihood of farmers in the developing world. In effect, he acknowledged that tariff reduction was not enough if these subsidies remained in place.ⁿ⁸⁸

On the whole, however, other than the action taken by Australia, nations have done little more than make promises. The announcement of a recent agreement reached by France and Germany during negotiations on admission of former Eastern block countries to the European Union demonstrated this. As United Press International reported, the two countries agreed to [*767] freeze European Union farm subsidy spending at 2006 levels for the years from 2007 to 2013.ⁿ⁸⁹ For the developing world, this delays any meaningful change on European farm subsidies for another decade.ⁿ⁹⁰

The situation in the United States regarding this issue parallels the one in Europe. Indeed, one South African publication has noted that these two world powers seem to justify their farm subsidies by arguing, in relation to each other, that "mine is smaller than yours."ⁿ⁹¹ While it may not be clear who subsidizes

their farmers more, the recent extension of U.S. farm subsidies for another ten years has not been lost on South African leaders. Thus, its finance minister, Mr. Trevor Manuel, has pointed out that "the U.S. \$ 300 [billion] of agricultural subsidies granted in the year 2000 is six times the total sum of [overseas development aid] granted. So we face a huge contradiction." n92 And President Mbeki pledged in May of this year, during a question period in the South African Parliament, to raise the issue of the extension of U.S. farm subsidies at the upcoming World Trade Organization meetings. It seems clear, therefore, that with regard to the issue of market access and fair trade, the major Western powers remain more responsive to the pressures of sections of their own electorate than they do to promises of reform that they make at various world gatherings such as the WCAR. And they do this despite their knowledge of how critical reform of their trade practices is to the worldwide reduction of poverty.

Unfortunately, the pattern among the wealthy nations of making promises but fulfilling them slowly at best, repeats itself with regard to the second issue to be analyzed, debt relief. The extent of the burden their foreign debt places on developing countries is revealed in the following "key point" from a journal article last year that argues strongly for immediate, meaningful relief: [*768] "World Bank figures for 1999 show that \$ 128 million is transferred everyday from the sixty-two most impoverished countries to wealthy countries, and that for every dollar these countries receive in grant aid, they repay \$ 13 on old debts."n93

Admittedly, as with market access, some progress has been made. Thus Prime Minister Tony Blair of Great Britain brokered a deal with the U.S. and Japan at the G8 summit in June 2002 to provide an extra \$ 1 billion in debt relief for the most impoverished African countries.n94 While aid agencies hailed the deal as a breakthrough, they nevertheless said much more was needed: "It's progress, but we want to see enough debt relief to achieve the 2015 millennium development goal of halving poverty. Low-income countries in Africa need 100 per cent debt cancellation in order to move towards halving poverty,' said Henry Northover of Cafod, the Catholic development aid agency." n95 In sum, looking at both these key issues, it is hard to be optimistic about the West's resolve to support the economic development needed to overcome the legacies of colonialism, apartheid, and racism that they acknowledged at the WCAR.

Conclusion

This Article attempts to refocus attention on the accomplishments and challenges that came out of the United Nations-sponsored World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance held in September 2001. Although few people realize it as a result of intervening events, the Durban Declaration was a remarkable document. This is primarily true because, among other matters, it contained an open acknowledgement by former colonial powers and slave-holding countries that they have a responsibility to help remedy the evils of racism and economic disparity that are the direct result of their earlier actions. More specifically, the document, which was agreed to by 169 nations including all of the world's great powers except for the United States, contained a clear statement condemning slavery as a crime against humanity. Finally, it set out a series of steps that both individual countries and the international [*769] community as a whole agreed to take to undo the vast disparities that exist between the wealthy and poorer countries.

To assess just how much progress was made in Durban, this article next focused on the host nation, South Africa, to see what had been accomplished there and what remained to be done. There is hope for the situation in South Africa: in the eight years since its first democratic elections, that country has worked hard to overcome its horrific past by enacting a constitutional, legislative, and judicial framework that calls for an end to racism and racial discrimination both socially and economically. Some progress has also been made to provide basic services to previously disadvantaged populations. South Africa has been less successful, however, in implementing the constitutional framework of socio-economic rights because of some internal strategic and policy mistakes, but even more so because of a lack of government resources.

Finally, we have seen that the actions of the Western, industrialized world are crucial if countries like South Africa are to be able to overcome the legacies of colonialism and apartheid that the developed nations helped to create. Unfortunately, the WCAR provided another instance for the United States government to demonstrate its unwillingness to cooperate with other nations in reaching compromises that serve the interests of all, rather than what it perceives as its own narrow self-interest. But beyond that, the European Union and others have joined the United States in failing to take meaningful steps to lift trade barriers, end agricultural subsidies, provide debt relief, and allow for the importation of affordable medicines to treat HIV/AIDS and other diseases.

The question remains as to what must be done to move toward the world described in the Durban Declaration. Lawyers concerned with critical race theory must continue to demonstrate the obvious links between race and economic apartheid and keep these issues on the front burner. Lawyers must work through international organizations and make the case for the United States and other Western nations to adopt the Durban Declaration agreed to at the WCAR.

FOOTNOTE-1:

n1. Background paper for the third world conference prepared by Mr. Theodor van Boven, member of the Committee on the Elimination of Racial Discrimination, in accordance with paragraph 51 of Comm'n Res. 1998/26, E/CN.4/1999/WG.1/BP.7 (1999).

n2. The Declaration and Programme of Action has a series of declarations on general issues including the following:

General Issues, ...

3. We recognize and affirm that, at the outset of the third millennium, a global fight against racism, racial discrimination, xenophobia and related intolerance and all their abhorrent and evolving forms and manifestations is a matter of priority for the international community, and that this Conference offers a unique and historic opportunity for assessing and identifying all dimensions of those devastating evils of humanity with a view to their total elimination through, inter alia, the initiation of innovative and holistic approaches and the strengthening and enhancement of practical and effective measures at the national, regional and international levels;

4. We express our solidarity with the people of Africa in their continuing struggle against racism, racial discrimination, xenophobia and related intolerance and recognize the sacrifices made by them, as well as their efforts in raising international public awareness of these inhuman tragedies.

Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, at 10, U.N. Doc. A/CONF.189/12 (2002) [hereinafter Durban Declaration] available at http://www.un.org/WCAR/aconf189_12.pdf.

n3. General Issues, paragraph 13 states:

We acknowledge that slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organized nature and especially their negation of the essence

of the victims and further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, Asians and people of Asian descent and indigenous people were victims of these acts and continue to be victims of their consequences.

Id. at 10-12 (emphasis added). The position of the majority of those attending was clearly that past practices should be included within the condemnation. See, e.g., the concluding statement from the delegate from Kenya:

It is therefore fitting that it was in South Africa that the international community declared and recognized slavery and the slave trade, especially the transatlantic slave trade, to be a crime against humanity; not today, not tomorrow, but always and for all time.

N⁴ made it clear that crimes against humanity are not time bound. It is also significant that now an apology and appropriate remedial, as per paragraph 119, are expected and in order.

Id. at 141.

n4. See the concluding statement of the delegate from Canada:

On the issue of past injustices, let there be no doubt - Canada believes that the transatlantic slave trade was morally repugnant and is a stain on the fabric of history.

With regard to the text related to this issue, Canada would like to register clearly its understanding that paragraph 10 [paragraph 13 in the final document] of the Declaration means that widespread and systematic enslavement directed against a civilian population today constitutes a crime against humanity, and if the transatlantic slave trade occurred today it would constitute a crime against humanity.

Furthermore, it is Canada's understanding with regard to paragraphs 117, 118 and 119 of the Declaration, that under international law there is no right to a remedy for historical acts that were not illegal at the time at which they occurred.

Id. at 120-21.

n5. See the concluding statement of the delegate from Belgium, who was selected to speak on behalf of the European Union and who asked to add the following comments:

The Declaration and the Programme of Action are political, not legal documents. These documents cannot impose obligations, or liability, or a right to compensation, on anyone.

Nor are they intended to do so. In particular, nothing in the Declaration or the Programme of Action can affect the general legal principle which precludes the retrospective application of international law in matters of State responsibility.

Furthermore, the European Union has joined consensus in a reference to measures to halt and reverse the lasting consequences of certain practices of the past. This should not be understood as the acceptance of any liability for these practices

Id. at 143-44; see also *infra* note 14 and accompanying text.

n6. See, for example, General Issues, paragraph 19, which provides:

We recognize the negative economic, social and cultural consequences of racism, racial discrimination, xenophobia and related intolerance, which have contributed significantly to the underdevelopment of developing countries and, in particular, of Africa and resolve to free every man, woman and child from the abject and dehumanizing conditions of extreme poverty to which more than one billion of them are currently subjected, to make the right to development a reality for everyone and to free the entire human race from want.

Durban Declaration, *supra* note 2, at 12.

n7. See, for example, the comments of Alberto Saldamando, General Counsel, International Indian Treaty Council, of Indigenous Chicano/Zapotecan origin, who praised the participation of representatives of many Indigenous Peoples, but who nevertheless was disappointed in the final outcome as it related to indigenous peoples:

Many Indigenous Peoples and their representatives participated not only at the WCAR in Durban but in all of the WCAR preparatory processes, as well as the NGO Forum held in conjunction with the WCAR, in the hope that there would be a serious commitment by the member States of the United Nations and civil society to end racism throughout the world. No such commitment was forthcoming.

He then points out that the WCAR misstated international standards recognizing indigenous peoples as the owners of their traditional lands, territories, and natural resources, and instead did not require compliance with international standards. Alberto Saldamando, *The World Conference Against Racism: Continuing Racism Against Indigenous Peoples*, *Indigenous Affairs*, Jan. 2002, at 43.

n8. An additional reason for the choice of South Africa is my familiarity with that country's recent history stemming from my living and teaching there from January 1996 to December 2001, with nine months in the United States during that time.

n9. Chapter II, Attendance and Organization of Work, paragraph 3, states:

The following States were represented at the Conference: Afghanistan, Albania, Algeria, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guatemala,

Guinea, Guinea-Bissau, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Tunisia, Turkey, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Viet Nam, Yemen, Yugoslavia, Zambia, Zimbabwe.

Durban Declaration, *supra* note 2, at 79-83.

n10. The opening section of the final declaration took note of the work of the preparatory conferences and meetings. These included the reports of the regional conferences organized at Strasbourg, Santiago, Dakar and Tehran and other input from States, as well as the reports of expert seminars, non-governmental organization regional meetings and other meetings organized in preparation for the World Conference. *Id.* at 6.

n11. See Report of the Asian Preparatory Meeting, U.N. GAOR, 2d Sc1/2.A/CONF.189/PC.2/9, available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.189.PC.2.9.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.189.PC.2.9.En?Opendocument) (last visited Aug. 27, 2003).

n12. NGO Forum Declaration, World Conference Against Racism (Sep. 3, 2001), at <http://www.racism.org.za/declaration.htm> (last visited Mar. 10, 2003).

n13. See Saldamando, *supra* note 7, at 46. The language considered most objectionable appeared in paragraph 162 of the NGO Forum Declaration and Programme of Action ("We declare Israel as a racist, apartheid state in which Israel's brand of apartheid is a crime against humanity...") and paragraph 164 ("We recognize that targeted victims of Israel's brand of apartheid and ethnic cleansing methods have in particular been children, women and refugees and condemn the disproportionate numbers of children and women killed and injured in military shooting and bombing attacks.") NGO Forum Declaration, *supra* note 12.

n14. U.N. Integrated Regional Information Networks, U.S. and Israeli Delegates Walk Out, at <http://www.allafrica.com/stories/200109050027.html> (Sept. 5, 2001). The five NGOs were Physicians for Human Rights, Amnesty International, Human Rights Watch, Lawyers Committee for Human Rights, and the International Service for Human Rights. See *id.*; see also *supra* note 13 and accompanying text.

n15. Resolution 3, paragraph 3, states: "[The] representatives of States participating in the [WCAR] ... express our gratitude and our admiration for the masterly control, competence and devotion shown by Mrs. Zuma, Chairperson of our Conference, which contributed decisively to the success of our deliberations." Durban Declaration, *supra* note 2, at 68.

n16. Another indelible memory for me was waiting with hundreds of other delegates from the NGO Conference and other interested persons from 3:00 in the afternoon until 10:30 that night

for the final session to begin. There was little to do other than chat with friends and wait anxiously to see when it would start. It was also a tense time because right up to the time the Declaration was presented, no one knew what the final language would be. The next day it was great to talk to Adjoa Aiyetoro, chair of the National Coalition for Black Reparations in America (N'COBRA). She had taken part in the NGO caucus on reparations for African Americans, and declared a "victory" as a result of the final language adopted concerning the Transatlantic Slave Trade.

n17. See the concluding statement of the delegate from Canada:

We are not satisfied with this Conference. Not enough time has been dedicated to advancing its objectives, that is, developing forward-looking, action-oriented strategies to eradicate the many forms of discrimination that exist today. Instead, too much time has been spent on an issue that does not belong here.

Canada is still here today only because we wanted to have our voice decry the attempts at this Conference to de-legitimize the State of Israel and to dishonour the history and suffering of the Jewish people. We believe, and we have said in the clearest possible terms, that it was inappropriate - wrong - to address the Palestinian-Israel conflict in this forum. We have said, and will continue to say, that anything - any process, any declaration, any language - presented in any forum that does not serve to advance a negotiated peace that will bring security, dignity and respect to the people of the region is - and will be - unacceptable to Canada.

That is why the Canadian delegation registers its strongest objections and disassociates itself integrally from all text in this document directly or indirectly relating to the situation in the Middle East. We state emphatically that this text is ultra vires; it is outside the jurisdiction and mandate of this Conference.

Durban Declaration, supra note 2, at 119-20.

n18. See supra note 4.

n19. See the concluding statement of the delegate from Australia:

Australia is a country whose good governance and strong democratic traditions and institutions derive directly from its colonial history. In relation to the text on the past, we therefore express serious concerns at the use of the same language in paragraphs 11 and 116 to condemn colonialism as is used in paragraph 12 to condemn apartheid and genocide.

Durban Declaration, supra note 2, at 118.

n20. See the concluding statement of the Syrian delegate:

Although Syria wished for clearer wording, especially on the MiddleEast... and although the Conference is not part of a peace process for the Arab-Israeli conflict, we should not forget that racist practices are being carried out in the occupied Palestinian and Arab territories. It goes without saying that we have documented evidence of the demolition of houses, the use of F-16s, the uprooting of people and trees, especially olive trees, the transfer of people, the besieging of people, of making people starve, and of the killing of children: all these are racist practices and it is obvious that Israel is carrying them out. Of course, I know that some of our

friends and colleagues in the western hemisphere do not like such language, but if they do not like it, why do they attend such a Conference in the first place?

I have only one observation on this paper which you have presented. That observation addresses the understanding and the substance of the meaning of the Holocaust. Of course, I would like to say from the beginning that the Holocaust was a horrible thing, regardless of where it happened. But we must remind our European friends who are very sensitive about the Holocaust that the Holocaust happened in Europe, and was committed mostly by Europeans. To generalize it, as though the Europeans want to distribute their sense of guilt throughout the whole world, is a mistake.

Let us be morally courageous enough to tell the truth: what do they mean by, 'We recall that the Holocaust must never be forgotten'? It should not be forgotten by the people who made it, who created it, who did it. We were not party to it, we have never been a party to it and we will never be a party to it, and that is why we do not accept this general term here. We would like it to be very concise and very specific and not to be applied to every nation on earth.

Id. at 127.

n21. Chapter II, Attendance and Organization of Work, paragraph 4 states: "On Monday, 3 September 2001, the delegations of Israel and the United States of America withdrew from the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance." Id. at 83.

n22. See FoxNews.com (Sept. 4, 2001) available at <http://www.foxnews.com/story/0,2933,33345,00.html> (last visited Mar. 11, 2003). "In a statement released in Durban on Monday evening, U.S. Secretary of State Colin Powell, who had remained in Washington, denounced the draft declaration's 'hateful language' and said he had told the U.S. delegation to return home from the conference." Id.

n23. The following excerpt from a description of the content of the radio program "Democracy NOW!" aired on Pacifica Radio the day after the United States withdrew from the WCAR:

Senior diplomats at the U.N. Conference Against Racism are charging that the U.S. withdrawal from the conference was prompted by its fear of facing massive reparations claims over the enslavement of African Americans, and not, as it implied, by friction over the Middle East.

As Israeli and the U.S. delegations packed their bags for early flights home today, a South African Government spokesman said: "The general perception among all delegates is that the U.S. does not want to confront the real issues of slavery and all its manifestations."

The headline of an article yesterday in the Durban-based Daily News read "Slavery pay-out key to US walk-out."

Civil Rights activist Jesse Jackson also slammed the U.S. delegation for pulling out of the conference, saying it was a political smokescreen to evade the slavery issue. He says he will make reparations a priority when he returns to the U.S.

Delegates at UN Conferences Say Slavery and Reparations, Not Israel Reason for US Walkout, WebActive (Sept. 4, 2001) at <http://www.webactive.com/pacifica/demnow/dn20010905.html> (last visited Mar. 11, 2003).

n24. General Issues, paragraph 14 states, "We acknowledge the suffering caused by colonialism and affirm that, wherever and whenever it occurred, it must be condemned and its reoccurrence prevented. We further regret that the effects and persistence of these structures and practices have been among the factors contributing to lasting social and economic inequalities in many parts of the world today." Durban Declaration, *supra* note 2, at 12.

n25. See *supra* note 6 and accompanying text.

n26. As a result of apartheid policies, the wealthiest 10% of the population in South Africa account for 60% of the country's wealth. Kathryn Strachan, HST's Equity Project, Equity Update, Feb. 2000, at <http://www.hst.org.za/update/49/policy.htm> (last visited Aug. 27, 2003).

n27. Between September 1999 and the year 2015, using two dollars a day as the poverty standard, poverty will increase in Sub-Saharan Africa from 484 million to 597 million. This is in spite of the Millennium Development Goals set by the United Nations to halve global poverty by the year 2015. Charles Cobb Jr., *Still Stuck at the Bottom of the Pile: What Must Africa Do to Develop?* (Apr. 23, 2002), at <http://allafrica.com/stories/200204230361.html> (Apr. 23, 2002) (last visited Mar. 11, 2003).

n28. In 1996, the official unemployment rate was 20%. Today it is 29.4%. South African Reserve Bank, *Economic and Financial Data for South Africa* (Oct. 23, 2002), at <http://www.resbank.co.za/Economics/zaflink1.html> (last visited Aug. 27, 2003).

n29. The adult rate of HIV infection in 2001 is estimated at 20.1% of the population. During 2001, 360,000 adults and children died of AIDS, and there are currently 660,000 AIDS orphans in South Africa. Antenatal HIV prevalence in South Africa increased rapidly from 0.7% in 1990 to 10.5% in 1995 and 24.5% among ANC attendees in 2000. Joint U.N. Programme on HIV/AIDS/World Health Org., *Epidemiological Fact Sheet on HIV/AIDS and Sexually Transmitted Infections* (2002), available at <http://www.who.int/cmc-hiv/fact-sheets/pdfs/Southafrica EN. pdf>.

n30. "'Violent crime is the reason why 60% of emigrants leave SA. During the 1990s, approximately 250,000 South Africans were murdered,' says the author of one study, Johann van Rooyen." S. Wagstyl, *Financial Times* (South Africa), July 25, 2002; see also Johann van Rooyen, *The New Great Trek: The Story of South Africa's White Exodus* (Unisa Press 2000).

n31. Peggy Maisel & Lesley Greenbaum, *Foundations of South African Law: Critical Issues for Law Students* 84 (2002).

n32. In South Africa, the apartheid government classified people into many different groups and then subdivided these into four larger race groups: white, colored, Indian and African. For instance, people were classified in their Passbooks as Xhosa, Zulu, Malay, Cape Colored, Colored, and even Other Colored. The purpose seemed to be to maintain the fiction that there are no majority groups or races in South Africa, only minority groups, and to further divide one group from another. While colored, Indian and African people were all considered black; the African group was made up of indigenous people and members of African ethnic groups such as the Zulus. The four main apartheid classifications will be used for purpose of clarity in this Article.

n33. I got a sense of just how complete the segregation under apartheid was while talking to a white woman from the United States who had married a black South African in the late 1980s. I knew that there was no place her family could legally live together since she was barred from the black areas, as he was from the white ones; also, their children were mixed race, and therefore, were classified as "colored." I was still dumbfounded when she told me that one of

her greatest fears was that if they happened to be in an auto accident, she, her husband, and her children would all be taken to different hospitals.

n34. While also the victims of institutionalized discrimination and deprivation, the two groups in the middle were allowed limited privileges in order to enlist their support in maintaining the suppression of the African majority. Thus, Indians and coloreds were provided with better schools and could go further in their education; they had greater job opportunities and could actually own small businesses in certain sectors. For a thorough and entertaining history of South Africa, including detailed descriptions of the development of each of the different cultural groups, see Allister Hadden Sparks, *The Mind of South Africa* (1990).

n35. The term "Afrikaner" was the one adopted by the former Dutch settlers in South Africa, who were unique amongst colonists in that they fully settled in their new country and eventually cut most ties to their native land. As their name implies, they eventually saw themselves as Africans, not Europeans. As taught to them by the local Dutch Reformed Church, they believed South Africa was ordained by God to be their home. For a more complete explanation of Afrikaner history and culture, see *id.*

n36. "Boers" is another term used for the Dutch Settlers.

n37. See Maisel & Greenbaum, *supra* note 31, at 102.

n38. See Group Areas Act 18 of 1936 and Act 41 of 1950 (controlling land ownership); Mines and Works Act 12 of 1911 (controlling labor); Native Laws Amendment Act - Black Laws Amendment Act 54 of 1952 (controlling free movement); Population Registration Act 30 of 1950 (controlling race classification); Separate Representation of Voters Act 46 of 1951 (controlling the franchise); Suppression of Communism Amendment Act 50 of 1951 (controlling organization and expression); Reservation of Separate Amenities Act 49 of 1953 (controlling public amenities); Prohibition of Mixed Marriages Act 55 of 1949 (controlling marriage and sexuality); Bantu Education Act 47 of 1953 (controlling education policy).

n39. The new tricameral Parliament was established with a (white) House of Assembly, a (colored) House of Representatives, and an (Indian) House of Delegates. Republic of South African Constitution Act (Act No. 110 of 1983), Part 6, No. 52, at 25. Whites were guaranteed control of the government because the president was selected by an eighty-eight member electoral college consisting of fifty Whites, twenty-five coloreds, and thirteen Indians, chosen by their respective houses of Parliament. *Id.* Part 3, No. 7(b)(3), at 4.

n40. "The 1985 and 1986 declarations of states of emergency suggest a return to rule by the military gun and casspir, rather than through the law and the legal process." N.C. Steytler, *Criminal Justice and the Apartheid State*, in *Race and the Law in South Africa* 68 (A.J. Rycroft et al. eds., 1987).

n41. The fact that apartheid ended through a negotiated process rather than through the triumph of a revolutionary struggle is crucial to understanding some of the key obstacles to change in South Africa today. For example, civil service workers hired by both the former white regime and its collaborators in the allegedly independent Bantustan governments, established to rule the black "Homelands," retained their positions after the transition. Thus they either are still employed, although many are useless and/or corrupt, or they have received expensive severance packages and generous pensions. The same is true for the military, judiciary, and police, all of which suffer from widespread division and distrust, and which have experienced episodes of racial conflict.

n42. For a description of the transition period, see Allister Haddon Sparks, *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution* (1994).

n43. See Durban Declaration, *supra* note 2, at 45.

n44. *Id.* at 27.

n45. *Id.* at 18.

n46. *Id.* at 44.

n47. *Id.* at 46.

n48. *Id.* at 55.

n49. See *infra* text accompanying notes 74-75.

n50. Section 9(3) of Constitution of the Republic of South Africa Act 108 of 1996.

n51. *Larbi-Odam v. Member of the Executive for Educ. (North-West Province)* 1998 (1) SA 745 (CC), available at <http://www.concourt.gov.za/cases.php>.

n52. *Hoffman v. S. Afr. Airways*, 2001 (1) SA 1 (CC), available at <http://www.concourt.gov.za/cases.php>.

n53. *In re Certification of the Constitution of the Republic of S. Afr.*, 1996 (10) BCLR 1253 (CC).

n54. Sections 13, 15 of Employment Equity Act 55 of 1998, available at <http://labour.gov.za/docs/legislation/eea/act98-055.html>.

n55. Section 7(d) of Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Among other matters, this Act prohibits "the provision or continued provision of inferior services to any racial group compared to those of another racial group." *Id.* However, in spite of enacting the Promotion of Equality Act in 1999, the government has not yet actually implemented this Act. The Act mandates the establishment of equality courts. *Id.* 16. While people who will work at these courts have started to be trained, three years later the equality courts are still not up and running. The implementation of legislation has often been slow, creating problems in the transformation of institutions, and in this case the promotion of equality.

n56. Section 29(1) of Constitution of the Republic of South Africa Act 108 of 1996.

n57. *Id.* 27(3).

n58. *Id.* 26(1).

n59. *Id.* 27(1).

n60. *Gov't of the Republic of S. Afr. and Others v. Grootboom and Others*, 2000 (11) BCLR 1169 (CC).

n61. *Soooramoney v. Minister of Health (KwaZulu-Natal)*, 1998 (1) SA 765 (CC).

n62. See Norm Dixon, *Cancel Arms Spending!*, *Green Left Weekly*, Oct. 25, 2000, at 1, available at <http://www.greenleft.org.au/back/2000/425/425p26b.htm>. The cost of the program was budgeted at 30 billion Rand (U.S. \$ 4.2 billion) in February 2000, but the National Assembly's Standing Committee on Public Accounts learned that during that year the program's cost had already ballooned to 43.8 billion Rand and may end up at 60 billion Rand (U.S. \$ 8.5

billion). The 60 billion Rand figure compares to 4 billion Rand budgeted for housing and less than 1 billion Rand for land reform or water and sanitation.

n63. Farewell speech by Pregs Govender, chairperson of the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women (May 30, 2002), available at <http://www.anc.org.za/andocs/speeches/2002/Sp0530.html> (last visited Mar. 11, 2003).

n64. See 17 of Promotion of National Unity and Reconciliation Act 34 of 1995, amended by 1 of the Promotion of National Unity and Reconciliation Amendments Act 18 of 1997, available at <http://www.gov.za/acts/1997/promot.pdf>.

n65. See Summary of Amnesty Decisions, at <http://www.doj.gov.za/trc/amntrans/index/htm> (Jan. 11, 2000).

n66. See Human Rights Watch/World Report 2001, South Africa Human Rights Developments, at <http://www.hrw.org/wr2kl/africa/southafrica.html> (last visited May 13, 2003); see also A. Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (2001) (commenting on the lack of progress towards providing reparations). Victims' groups expressed concern at the delay in making payments of reparations, in accordance with the recommendations of the TRC's 1998 report. Although 30 million Rand (U.S. \$ 4.2 million) had been paid out to 10,000 victims by June 2000, the total required to fulfill the recommendations was approximately 3 billion Rand (U.S. \$ 420 million).

n67. See A Summary of Reparation and Rehabilitation Policy, Including Proposals to be Considered by the President, at <http://www.doj.gov.za/trc/reparations/summary.htm#interim> (last visited May 3, 2003). A President's Fund, funded by Parliament and private contributions, has been established to pay urgent interim reparation to victims in terms of the regulations prescribed by the President. *Id.*

n68. Durban Declaration, *supra* note 2, at 26.

n69. Several statements from President Thabo Mbeki publicly questioning the link between HIV and AIDS illustrate and indicate some of the reasoning behind the government's position. See, e.g., Mbeki Says CIA Had Role in HIV/AIDS Conspiracy, United Press International (Johannesburg), Oct. 6, 2000, available at <http://www.aegis.com/news/upi/2000/up001001.html>.

South Africa's President Thabo Mbeki has accused the Central Intelligence Agency of being part of a "conspiracy to promote the view that HIV causes AIDS," the *Mail & Guardian* reported Friday. Mbeki also thinks that the CIA is working covertly alongside the big U.S. pharmaceutical manufacturers to undermine him because, by questioning the link between HIV and AIDS, he is thought to pose a risk to the profits of drug companies making anti-retroviral treatments, the paper reported.

Id.; see also Letter from Thabo Mbeki, South African President to World Leaders (Apr. 3, 2000), available at <http://www.sumeria.net/aids/mbekilte.html>. Another example is a letter dated April 3, 2000, from President Mbeki to World Leaders. He wrote:

Toward the end of last year, speaking in our national parliament, I said that I had asked our Minister of Health to look into various controversies taking place among scientists on HIV-AIDS and the toxicity of a particular anti-retroviral drug. In response to this, among other things, the Minister is working to put together an international panel of scientists to discuss all

these issues in as transparent a setting as possible... . It is obvious that whatever lessons we have to and may draw from the West about the grave issue of HIV-AIDS, a simple superimposition of Western experience on African reality would be absurd and illogical... . Scientists, in the name of science, are demanding that we should cooperate with them to freeze scientific discourse on HIV-AIDS at the specific point this discourse had reached in the West in 1984. People who otherwise would fight very hard to defend the critically important rights of freedom of thought and speech occupy, with regard to the HIV-AIDS issue, the frontline in the campaign of intellectual intimidation and terrorism which argues that the only freedom we have is to agree with what they decree to be established scientific truths.

Id.

n70. Minister of Health and Others v. Treatment Action Campaign and Others, 2002 (5) SA 703 (CC).

n71. See Preventing HIV After Rape, available at <http://www.doh.gov.za/search/index.html> (last modified Feb. 12, 2003).

n72. The South African government is considering issuing a declaration of (public health) emergency due to AIDS. See Bobby Jordan, Mbeki Investigates Declaring a National Emergency on HIV/AIDS to Secure Cheap Drugs, Sunday Times, Mar. 11, 2001, available at <http://www.suntimes.co.za/2001/03/11/news/news01.htm>.

n73. See, e.g., Adrian Hadland, Unions Take ANC to Task Over Policy, Alliance, Cape Argus, Aug. 24, 2000, available at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=ct20000824121013580L300750.

n74. See Andile Mngxitama, The Policy Environment, Social Watch, 2001, available at <http://www.socialwatch.org/en/informesNacionales/171.html>.

Although the government still claims to be guided by the RDP [Reconstruction and Development Program], it is widely accepted both within and outside of government that this policy was abandoned in 1996, following the adoption of the neoliberal Gear strategy, which replaced the emphasis on state-led development with a focus on market liberalisation (including the gradual removal of agricultural subsidies), the privatisation of state assets, debt reduction and stringent fiscal deficit reduction targets, and flexible labour market policies aimed at attracting foreign investment.

Id.

n75. See Peter Hawthorne, The Selling of Mbeki's New Deal, Time (Europe), June 10, 2002, available at <http://www.time.com/time/europe/magazine/2002/0610/mbeki/>. The percent of people in South Africa who are the poorest of the poor has dropped from 20% in 1994 to roughly 5% in 2001, indicating the commitment and success of some government policies. Id.

n76. See Growth, Employment and Redistribution: A Macroeconomic Strategy, at <http://www.polity.org.za/html/govdocs/policy/growth.html> (June 14, 1996).

n77. See Nancy Singham & Dennis Brutus, South Africa at the Mercy of the Global Economy, People's Tribune, Nov. 11, 1999, available at <http://www.lrna.org/league/PT/PT.1999.11/PT1999.11.9.html>. Private investment in South Africa fell from

6.1% in 1996 to 3.1% in 1997 and 0.7% in 1998. *Id.* Eighty percent of foreign investment has been in the form of short-term portfolio investment, which is speculative capital. *Id.*

n78. See COSATU-Memorandum: Anti-Privatisation, at <http://www.cosatu.org.za/docs/2002/memora.htm> (Oct. 1, 2002).

n79. There was a three-day general strike against privatization during the World Conference Against Racism in August 2001 timed to pressure the government to stop privatization. A two-day general strike in October 2002 to protest the government's policy of privatization of electricity, transport, telecommunications, and other state-owned industries was a failure. No more than 300,000 unionists were on strike at any time. Fred Bridgland, *South African General Strike a Dismal Failure*, *The Scotsman*, Oct. 3, 2002, available at <http://www.news.scotsman.com/international.cfm?id=1095382002>.

n80. See *infra* note 6 and accompanying text.

n81. The complete list is as follows:

Debt relief; Poverty eradication; Building or strengthening democratic institutions; Promotion of foreign direct investment; Market access Intensifying efforts to meet the internally agreed targets for official development assistance transfer to developing countries; New information and communication technologies bridging the digital divide; Agriculture and food security; Transfer of technology; Transparent and accountable governance; Investment in health infrastructure talking HIV/AIDS, tuberculosis and malaria, including through the Global AIDS and Health Fund; Infrastructure development; Human resource development, including capacity building; Education, training and cultural development; Mutual legal assistance in the repatriation of illegally obtained and illegally transferred (stashed) funds, in accordance with national and international instruments; Illicit traffic in small arms and light weapons; Restitution of art objects, historical artifacts and documents to their countries of origin, in accordance with bilateral agreements or international instruments; Trafficking in person particularly women and children; Facilitation of the welcomed return and resettlement of the descendants of enslaved Africans.

Durban Declaration, *supra* note 2.

n82. *Id.*

n83. Even though the United States walked out of the WCAR and therefore did not agree to the Durban Declaration, its actions will be included in this review for several reasons. First, the United States has made promises at other international gatherings and in official government statements that it supports reforms of the type to be analyzed here. Second, it makes no sense to leave out a review of the performance of the richest and most developed nation in the world, and one that continues to have a strong influence in creating the policies of the World Bank and the IMF. And finally, there is a strong moral argument for the United States to support meaningful economic development, especially in Africa since the United States' wealth at least in part came about as a result of the enslavement of Africans.

n84. The importance of this issue can be seen, for example, in the priorities established by the new organization to improve African economic development created primarily under the leadership of President Mbeki of South Africa. Thus, as recently reported in the South African press: "What: the New Partnership for Africa's Development (Nepad) wants above all from industrial countries is improved market access, in addition to more aid. But given a choice

between more aid and trade, it is trade that stands the best chance of improving African incomes." Jonathan Katzenellebogen, For Nepad, Trade Would Eclipse Aid, *Business day* (South Africa), Oct. 18, 2002, available at <http://www.bday.co.za/bday/content/direct/1,3523,120976-0079-0,00.html>. It should be noted, however, that there is not unanimous agreement in Africa on how to best pressure the West for assistance. Thus dating back to at least 1992, some African leaders have argued for direct reparations to African countries to compensate them for the harm caused by colonialism and the slave trade. See, e.g., Ali Mazrui, *Global Africa: From Abolitionists to Reparationists*, 37 *Africa Studies Review* (1994); Lord Anthony Gifford, *The Legal Basis of the Claim for Reparations* (Apr. 27-29, 1993) (a paper delivered at the First Pan-African Congress on Reparations, Abuja, Federal Republic of Nigeria), available at <http://www.arm.arc.co.uk/legalBasis.html>.

n85. Oxfam International consists of twelve non-profit development organizations around the world that together try to tackle the root causes of poverty, social injustice, and inequality. The countries that have Oxfam organizations include the United States, Canada, Great Britain, Spain, Hong Kong, and Australia. See <http://www.oxfam.org/eng>.

n86. UN Integrated Regional Information Networks, Rich Rob Poor of US \$ 100 Billion a Year (Apr. 11, 2002), at <http://www.allAfrica.com/stories/200204110619.htm>. David Gallagher gave a speech at the launch in Johannesburg of "Make Trade Fair," a global campaign to remove trade barriers to exports from the developing world. See also <http://www.maketradeFair.com> (last visited June 30, 2003).

n87. *Id.*

n88. Richard Ingham, EU Pledges to Reform Policy on Agricultural Subsidies, *Business Day* (South Africa), Sept. 6, 2002, available at <http://www.bday.co.za/bday/content/direct/1,3523,1168293-6078-0,00.html>.

n89. See Gareth Harding, EU Reaches Historic Enlargement Deal (Oct. 25, 2002), at <http://upi.com/view.cfm?StoryID=20021025-020357-8005r>.

n90. Thus the same UPI report states: "This cleverly crafted compromise allows opponents of the European Union's \$ 40 billion-a-year Common Agricultural Policy - such as Germany, Britain and the Netherlands - to claim farm spending has been capped and supporters of the current regime to claim agricultural subsidies have been guaranteed for another decade." *Id.*

n91. See Ferial Haffajee & Greta Hopkins, EU, U.S. Farm Subsidies Hurt Poor Nations, *WOZA*, June 14, 2002, available at <http://www.woza.co.za/june02/subsidy14.htm>.

n92. Charles Cobb Jr., Still Stuck at the Bottom of the Pile: What Must Africa Do to Develop? (Apr. 23, 2002), at <http://allafrica.com/stories/200204230361.html>.

n93. Soren Ambrose, *Multilateral Debt: The Unbearable Burden*, *Foreign Policy in Focus*, vol. 6, no. 37, Nov. 2001, at 1.

n94. Christopher Adams, UK Leads Way in Winning G8 \$ 1bn Debt Relief Promise, *BBC* (June 26, 2002), at <http://www.globalpolicy.org/soecn/ffd/2002/0627uk.htm>.

n95. *Id.*