his attention. SWAPO or any other party that is affected will have to go through the challenge process, and only if the challenge process is contested at the end will he get involved.

The pressure is all to stand back, not control in any way, merely to supervise. I think that the first indication of how this would work out was on the first day of April. I assume that a Special Representative who had heard that there was fighting in the north would have chartered a plane, and 15 minutes later, would have been on his way to the place where the fighting took place to investigate on the ground himself, to see witnesses, and to find out what had happened. But because of the nature of the document and the pressures that existed this was not done. I think that this raises very unfortunate precedents for any action in the future.

REMARKS BY WINSTON P. NAGAN*

My comments owe much to Henry Richardson. First, they build upon an earlier presentation organized under his direction which focused on a more realistic appraisal of the trends in the South African power process and the possible choices for the future, of course conditioned by those stubborn and irreducible facts of the situation. Richardson subsequently published a piece showing that under international law there was an obligation to withdraw recognition from the Pretoria authorities. One of the key subpoints of that paper was the recognition that the Pretoria authorities had in some degree lost control over the governance process in many local black communities inside South Africa. These communities had either run out the government stooges, simply ignored them, or set up alternative structures of government at the local level.

My comments focus on what the New Haven School calls the “constitutive process” as applied to the situation in South Africa, with particular reference to constitutive expectations of black South Africa. There are some theoretical assumptions that obviously draw on less traditional views I take of international law. Two of those assumptions I need to make explicit. One is simply the problem of the relationship of constitutive process to power relationships and how one makes this relationship relevant to international law. Since the general problem of law and power is always problematic and controversial, any particular application will similarly be problematic and controversial. The second assumption is the problem of the role of the international lawyer in shaping future outcomes by both intervention and prediction. What role can international lawyers play in the promotion of a constitutional design for South Africa that is more consistent with international standards and international values, keeping in mind that one has to keep one’s feet on the ground and account for those stubborn and irreducible facts that I have mentioned?

To set the stage for some background for this, I want to look at the external dimension of international power emanating from the role of the United Nations and the role of the two superpowers. Then I will trace at least the emergence of a black perspective and how that black perspective in some degree coalesces around some of those dominant power themes connected to the larger international environment.

A brief review of these external factors would start with the role of the United Nations with regard to South Africa. In my opinion U.N. concern itself has carried a cost. In the United States in particular, the idea that the United Nations was supporting black terrorist groups by laundering taxpayer money through the United Nations has been a favorite theme of right wing think tanks such as the Heritage Foundation,

*Professor of Law, University of Florida College of Law.
and others. These groups equate support for liberation movements with support for world Communist domination.

The U.N. budget has become suspect, or rather, U.S. contributions to it have become a significant political issue on the domestic scene. At the back of this, in my opinion, is the race factor. Race is the muted motivating factor behind the conduct of many right wing think tanks. Indeed, race appears to be a key ingredient in winning elections at home.

The internationalizing of apartheid by the United Nations also internationalized the problem of racism and the collective concern for its eradication. The U.N. role here in my opinion has been a towering one—germane, of course, to the comments I am trying to make. In seeking to eradicate the scourge of racism the United Nations has also made South Africa a major international issue, and in doing so it has generated an alternative set of expectations, expectations of the general community reflected in the major purposes of the charter system itself. Specifically, the United Nations effectively set in motion a process for the delegitimization, and ultimately, I suspect, for the derecognition of the Pretoria authorities in the international field. At the same time the process that it set in motion has, I think, been working quite steadily towards the legitimation of the struggle against apartheid.

Here is a quick summary of the basic context. The United Nations has developed an intelligence base about South Africa and apartheid. It has distributed the information and data about apartheid on a global scale. It has combatted efforts by South Africa and its allies to redeem South Africa from its polecat status internationally. It has promoted a policy of comprehensive sanctions against South Africa. I do not think we can look at the Comprehensive Anti-Apartheid Act of 1986 as quite apart and immune from the expectations generated about sanctions by the United Nations. The United Nations has improved the status of movements of national liberation (I include here the African National Congress (ANC), the Pan Africanist Congress, and of course SWAPO). And it has, of course, provided support for the movements of national liberation that in effect suggest an alternative to the apartheid scheme.

Along with the impact of the United Nations externally, that organization has clearly had an impact on constitutive expectations within South Africa and, of course, on the conditions of power there. It has brought home to South Africans in general the critical importance of international standards, which should be incorporated into any kind of future dispensation of power, and which will become, in effect, the framework of a negotiating stance should that ever be a political possibility.

In other words, the United Nations has made international standards relevant to the constitutional alternatives that we can envision for South Africa. The United Nations has brought to South Africa constitutive expectations of the larger world community, a fact that has not been lost on either black or white South Africans. In fact, if you look at the 1983 constitution of South Africa, it mirrors much of the lingo and platitudes of the international scene.

Coming to the superpowers—this is always a question of great controversy and concern, at least since McDougall and Laswell published that well-known article, *The Identification and Appraisal of Diverse Systems of World Public Order.* There has been a diversion of the application of its ideas and some of us think they ought to be applied in a more sophisticated way. But the bottom line of the piece seemed to be that you cannot divorce international law entirely from the framework of global

power generated by diverse systems of public order. Behind that framework are the United States and the U.S.S.R.

One ought to be cautious about that as an organizing formula; it is not always the case that a superpower can directly secure the exact outcome that it desires. There are many examples of superpower frustration and impotence: the Soviets in Afghanistan, the United States in Nicaragua and to some extent even in Namibia.

There have been some developments with regard to the superpower equation. First, the Soviets evidently have been deeply involved in formulating the Namibian accords. Commentators believe that without the brokering of the United States with the Soviets and South Africans to get the Cubans to act in compliance with the accords, getting the Angolans to go along with them would not have been possible.

But there seems to be more than that to the equation. For example, it has now become apparent that the Soviets have had talks and relationships with the South Africans under the auspices of the British. Indeed these have been going on since 1985. Now all things seem to suggest an alternative Soviet policy for South Africa and for the Soviet Union in its relationships with the ANC, of which it has been historically quite supportive. Uri Ukalov, who heads the Soviet Foreign Ministry’s Department of African Countries, issued a statement that, in effect, suggested that political dialogue rather than military strategies would appear to be the more realistic scenario for the U.S.S.R. with regard to Southern Africa policy. Ukalov said: “We would prefer political settlement and want apartheid to be dealt with by political means. Any solution through military means will be shortsighted. We do not want to emphasize the need to enlarge the armed struggle. South Africa should not be destroyed, it should only be spoken to, not only through threats and poundings of fists on the table, there should be dialogue.”

It is quite clear, as the newspapers have indicated that there is a significant change in the Soviet posture with regard to its support for the ANC. This raises the question of how critical the U.S.S.R. has been to the ANC and how important this may be to the ANC’s capacity to generate a kind of power presence in the Southern African context. The kinds of questions that one must look at here are, of course, what kind of military threat does the ANC pose to the South African status quo? Does a reduction in military aid from the U.S.S.R. mean a reduced power presence for the ANC or can other strategies of power, nonmilitary ones, compensate for this? Or, can military assistance from other sources be available to compensate for the ostensibly reduced aid from the U.S.S.R.? How, if at all, would this affect the South African or the Pretoria authorities in their view of the ANC either as a threat or as a credible force to be negotiated with in the long term. And how, if at all, would all of this impact on both internal and external constituencies with which the ANC either has influence or has historically generated support?

One of the points that has been made about this posture of reduced military support for the ANC by the U.S.S.R., is the assumption that the ANC itself has always been uniformly and unilaterally committed to the strategies of violence. The noises made by our own State Department are somewhat confusing on this. Some of you might recall recently the Pentagon document that labeled the ANC as a terrorist organization. The document was subsequently refuted by the Department of State which stated that this was not a national policy, although the document had actually been approved by them. It is quite clearly not the ANC’s policy to target civilians and to use unrestrained violence to secure its objectives.

In any event, it is not altogether clear that the assumptions the Reagan Administration has made—that the ANC is the only cause of violence in the region—are correct.
The bottom line, of course, is that when the ANC was outlawed, it was made subject to the full violence of the South African state which made an effort to crush it. In some ways the ANC’s violence posture is essentially an exercise of self-defense which may theoretically be tied to the principle of self-determination as well.

When we come to the United States, we see what I think history will recount as one of the great ironies of U.S. foreign policy—the policy of constructive engagement. First of all, I doubt that we would have gotten the Comprehensive Anti-Apartheid Act without the policy of constructive engagement, so that it certainly was in this sense a negative force producing a positive result. And second, I doubt that the status and stature of the ANC within the United States could ever have been achieved but for the policies of constructive engagement. Again, another supreme irony of history is that it has been the policy of almost all Democratic and Republican administrations to pretty much ignore the ANC, so I think the Reagan Administration was first to have high level contacts with that organization. Secretary of State George Shultz actually met with Oliver Tambo, president of the ANC. Again, those kinds of irreducible and stubborn facts of life will sometimes polarize the most sophisticated theories coming out of university think tanks.

The present status of U.S. policy with the repudiation, in effect, of constructive engagement by the Comprehensive Anti-Apartheid Act comes close to what the Soviets are saying about the demand for a negotiated solution. But in fact U.S. policy now, I think, is actually a more radical policy than that of the U.S.S.R. in the sense that the framework of the Comprehensive Anti-Apartheid Act sets out preconditions and imposes sanctions if these conditions are not met. These preconditions include protection for the ANC, rule of law protections, and a whole range of other issues. Second, and in my opinion most important for constitutive expectations for black South Africans, the Comprehensive Anti-Apartheid Act indicates what kind of future South Africa we should be envisioning: a nonracial South Africa, a South Africa committed to the rule of law, civil rights, and social justice.

Those three international elements enable me to set the backdrop for the central theme of this comment, which is to look at the constitutive expectations of black South Africans themselves. These expectations are to a large extent also shaped by the international environment. We can, of course, take black South African expectations of governance in the century down to the Gandhian period and the commitment to nonviolence. And implicit in the principle of nonviolence is the pervading theme that ethics should be a fundamental component of governance. I do not want to leave that message out.

What I would like to do is go into the World War II period because for black South Africans that period fixed their position in society. The Atlantic Charter was one of the most important documents for the establishment of black expectations about constitutional governance. The ANC annual conference of December 16, 1943, contains a document titled, “African Claims in South Africa: The Atlantic Charter from the Standpoint of Africans Within the Union of South Africa.” That document, in my opinion, precisely sets out an impressive framework of black demands which have been refined but not undermined or rejected in any way from then to now, including both civil and political rights, both cultural and economic rights.

The further development of this is reflected in the Freedom Charter itself. The Freedom Charter, although not as sophisticated, in my opinion, as the document based on the Atlantic Charter, was extremely important in connecting black constitutional expectations to the international scene in questions of human rights, democ-
racy, and legitimacy. The Freedom Charter rooted authority, so to speak, in the people themselves.

More recently there have been a plethora of other documents. The Declaration of the United Democratic Front (UDF), for example, came rather close to the adoption of the new so-called South African Constitution and that document, among other things, pointed out that the fundamental expectation of blacks in South Africa is of democracy. And the UDF Declaration says, “no to the Republic of South Africa Constitution vote, a vote which will create yet another undemocratic constitution in the country of our birth.”

Late last year, the ANC published its own constitutional guidelines for a democratic South Africa. This was in some ways an updating of the Freedom Charter of 1955, but it is a more sophisticated document and the influence of international law, especially of international human rights law, is apparent in the document. The preamble of the Charter says the Freedom Charter remains unique as the only South African document of its kind that adheres firmly to democratic principles accepted throughout the world. The new guidelines then affirm a free and democratic commitment to a nonracial South Africa.

The guidelines include elements of the rule of law and are somewhat ambiguous and need clarification on the question of individual rights versus group rights. Some interpreters have said the guidelines do not recognize the notion of group rights, and I might add parenthetically that the Freedom Charter of 1955 clearly recognized group rights, clearly recognized equal rights for national groups within the framework of South Africa. The 1988 document recognizes group rights in the form of linguistic and cultural diversity and provides facilities for free linguistic and cultural development. But it stresses the principle of individualization more than any major instrument shaping expectations about governance in South Africa.

There are of course some weaknesses in the document. For instance, in the human rights, or bill of rights, section it does not categorically and in specific terms outlaw for South African purposes torture and capital punishment, which I think have been two of the principal pillars of repression in South Africa.

It does have some rather sophisticated elements of economic justice and equity. It includes an effort to outlaw sexism and racism, and, finally, it incorporates the principles of affirmative action to reform the structural inequity that has characterized the South African system. So it does represent, in my opinion, a significant effort to shape the contours of constitutional debate about South Africa and it is quite clear to me that international sources have been central in the definition of what that dialogue should encompass.

PROSPECTS FOR PEACE IN SOUTHERN AFRICA: A VIEW FROM WITHIN

by John Dugard*

My purpose today is to consider the prospects for peace within the Southern African region from the perspective of a South African international lawyer. Inevitably I shall concentrate on two issues: Namibian independence and apartheid in South Africa.

*Director of the Center for Applied Legal Studies, University of the Witwatersrand, Johannesburg, South Africa; Visiting Professor of Law, University of Pennsylvania, 1989.