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David S. Abramowitz  
*University of Michigan Law School*

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# Safeguarding Due Process in a Hostile Environment: Foreign Lawyers in South Africa

David S. Abramowitz\*

A significant number of non-South African, nongovernmental<sup>1</sup> and inter-governmental<sup>2</sup> organizations are active in the promotion of human rights in South Africa. They provide financial assistance to human rights victims and their families,<sup>3</sup> monitor individual violations,<sup>4</sup> undertake fact-finding missions regard-

\* Class of 1986, University of Michigan Law School.

1. NGOs active in South Africa include Amnesty International, the Lawyers Committee for International Human Rights, the Lawyers' Committee for Civil Rights Under Law, the International Human Rights Law Group, the International Defence and Aid Fund, the American Committee on Africa, the Anti-Apartheid Movement, the British Council of Churches, the South African Institute of Race Relations, the World Council of Churches, and the International League for Human Rights. For background, see Weissbrodt, *International Trial Observers*, 18 STAN. J. INT'L L. 27 (1982) [hereinafter cited as *International Trial Observers*]; and Weissbrodt & McCarthy, *Fact-Finding by International Non-governmental Human Rights Organizations*, 22 VA. J. INT'L L. 1 (1981); G. SHEPHERD, *ANTI-APARTHEID* (1977); and Weissbrodt, *The Role of International Nongovernmental Organizations in the Implementation of Human Rights*, 12 TEX. INT'L L. J. 293 (1977) [hereinafter cited as *Nongovernmental Organizations*].

2. The United Nations (UN), the single largest intergovernmental organization involved in the protection of human rights, has both permanent and ad hoc bodies to investigate alleged systematic abuses. Regional organizations protecting human rights such as the European Commission on Human Rights and the Inter-American Commission on Human Rights also have significant investigatory powers. See R. LILlich & F. NEWMAN, *INTERNATIONAL HUMAN RIGHTS* 266-67 (1979).

3. The primary purpose of the International Defence and Aid Fund (IDAF) is to pay legal fees. G. SHEPHERD, *supra* note 1, at 38. The IDAF and Amnesty International (AI) also direct money to help families of detainees and prisoners survive during the absence of the main income provider. See AMNESTY INT'L, *AMNESTY INT'L REP.* 1980, at 25-26; G. SHEPHERD, *supra*, at 124-25.

4. For example, AI publishes lengthy descriptions of individual human rights violations by the South African Government. See, e.g., Amnesty International Newsletter, Oct. 1984, at 4, (discussing the detention and banning of Florence Mkhize, organizer of the African National Congress).

ing alleged systematic abuses,<sup>5</sup> and publicize their findings.<sup>6</sup> Although a variety of professionals, including doctors, diplomats, clergy, and teachers are involved in these activities, nongovernmental organizations (NGOs) sponsored by attorneys play a special role in the protection of human rights in South Africa.<sup>7</sup>

In spite of the apartheid system of white supremacy,<sup>8</sup> the availability of competent, well-funded counsel can ensure procedural due process which will protect the human rights of a person affected by state conduct.<sup>9</sup> The foreign lawyer, familiar with the complexities of the legal process and techniques of trial advocacy, may provide invaluable assistance to local counsel by directing funds where they are required, offering legal expertise when it is requested, and observing trials where public attention may be beneficial. Such support is particularly important to South African human rights lawyers because the local bar is vulnerable to suppression by security forces.<sup>10</sup>

5. The International Committee of the Red Cross (ICRC), for example, sends missions to make on-site inspections of prisons in South Africa, visiting both convicted prisoners and individuals detained by South African security forces. In 1983, delegates from the ICRC visited 374 prisoners convicted under security laws and one person held in preventive detention. INT'L COMM. OF THE RED CROSS, 1983 ANNUAL REP. 12 (1983). For examples of intergovernmental organization reports detailing systematic abuses of human rights in South Africa, see Ad Hoc Working Group of Experts, Violations of Human Rights in Southern Africa, U.N. Doc. E/CN.4/1984/8 (1984) and Ad Hoc Working Group of Experts, Additional Information on the Effects of the Policy of Apartheid on Black Women and Children in South Africa, U.N. Doc. E/CN.4/1983/38 (1983).

6. U.N. groups have sent missions to Europe and North America to discuss abuses in South Africa with policy makers. Recently the Special Committee met with Chester Crocker, U.S. Assistant Secretary of State for Africa, Claude Cheysson, French Minister of External Affairs, and Pope John Paul II. Report of the Special Committee Against Apartheid, 39 U.N. GAOR Supp. (No. 22) at 17, U.N. Doc. A/39/22 (1984).

7. Since a criminal sanction is often attached to the exercise of a human right, human rights lawyers in South Africa are generally criminal defense lawyers. For examples of activities that result in criminal liability in South Africa, see *infra* notes 16–18.

8. For a description of white supremacy in South Africa, see E. HARSCH, *SOUTH AFRICA: WHITE RULE, BLACK REVOLT* 27–62 (1980).

9. See *infra* notes 41–43 and accompanying text.

10. Marie Louise Hooper, director of the South Africa Programme of the American Committee on Africa stated:

It's getting more difficult now though; it used to be easy for us to get lawyers for [people arrested for political crimes]; there were many white lawyers and some Indian lawyers who would take all these freedom cases and fight them very successfully as far as they could. . . .

But quite a few of our best lawyers have left the country because they found they couldn't live there without spending all their time in gaol, and those who are left are getting quite frightened of the Government. . . . But we do it still; people are still being defended.

Report of the Ad Hoc Working Group of Experts, U.N. Doc. E/CN.4/950 at 62–63 (1967) [hereinafter cited as Hooper Testimony]; see also A. SACHS, *THE JAIL DIARY OF ALBIE SACHS* (1966) (describing torture and depression endured by the author while in detention after an active career defending accused in political trials); A. SACHS, *THE VIOLENCE OF APARTHEID* 21 (1967) (indicating that political lawyers have been forced to flee the country to escape government harassment); J. CARLSON, *NO NEUTRAL GROUND* 171, 367 (1973) (describing the effects of banning and harassment

Part I of this note briefly describes the effect of apartheid on human rights in South Africa. It then examines how liberal South African attorneys use procedural due process, as defined by the rule of law, to counter these effects. Part II discusses the methods used by foreign attorneys to support South African human rights lawyers. In particular, this section focuses on the activities of the International Commission of Jurists and the Lawyers' Committee for Civil Rights Under Law.<sup>11</sup> The note concludes that infusing fair process into the South African legal order is the most significant contribution foreign lawyers can make to the protection of human rights within South Africa.

### I. THE RULE OF LAW AND THE ROLE OF LAWYERS IN THE PROTECTION OF HUMAN RIGHTS IN SOUTH AFRICA

Since 1948, human rights advocates have increasingly focused their attention on the Republic of South Africa. Prior to that year, the racial laws of South Africa were not substantially more oppressive or discriminatory than the racial laws of other colonial systems in Africa<sup>12</sup> or certain states in the United States.<sup>13</sup> The 1948 election victory of the Afrikaaner-dominated National Party, however, heralded a new emphasis on a legal order based on white supremacy.<sup>14</sup> The new

on political lawyers); S. MORONEY & L. ENSOR, *THE SILENCED* (1979) (documenting the cases of lawyers, clerks, students, and others detained and/or banned by the State); Cooper, *Public Interest Law—South African Style*, 11 COLUM. HUM. RTS. L. REV. 105, 113 (1980) (arguing that the fear of the "knock on the door" prevents many lawyers from protecting human rights). This fear is not unfounded. The Minister of Justice may, at his discretion, place lawyers on a "consolidated list." Internal Security Act, No. 74 of 1982, § 16, reprinted in BUTTERWORTHS STATUTES OF THE REPUBLIC OF SOUTH AFRICA [BUTTERWORTHS S. AFR.], CRIM. LAW & PROC. 1291. Lawyers on this list may not give counsel to any banned client, *id.* at § 19(1), nor see a client detained by the Bureau of State Security. *Id.* at § 28(8). Finally, the Minister may disbar any advocate on the consolidated list. *Id.* at § 34(1)(b). See also *Arenstein v. Secretary for Justice*, [1970] 4 South African Law Reports [S.A.] 274 (the court affirmed that placement on the list alone justifies disbarment and refused to allow the affected person to show that he had not committed any act which made him unfit to be an attorney); cf. *Hassim v. Incorporated Law Society of Natal*, [1977] 2 S.A. 757 (the court concluded that the defendant may offer evidence contesting a conviction or mitigating the blameworthiness of conduct when a South African bar association is using the conviction or conduct to challenge the defendant's fitness to be a lawyer).

11. The International Commission of Jurists was founded in 1952. INT'L COMM'N OF JURISTS, BASIC FACTS 8 (1962) [hereinafter cited as BASIC FACTS]. It sent its first trial observer to South Africa in 1956. For a discussion of this trial, see Gardiner, *The South African Treason Trial*, 1 J. INT'L COMM'N JURISTS 43 (1957). The Lawyers' Committee for Civil Rights Under Law was founded in 1963 and became involved in South Africa beginning in 1967. LAWYERS' COMM. FOR CIVIL RTS. UNDER LAW, 10 YEAR REPORT 8, 96 (1973) [hereinafter cited as 10 YEAR REPORT].

12. Dugard, *Human Rights in South Africa—Retrospect and Prospect*, 1979 ACTA JURIDICA 263, 267. Kenya, for example, had a "pass" law similar to current laws in South Africa which forced all blacks to carry an identification card. See W. ROSS, *KENYA FROM WITHIN* 188 (1968).

13. Dugard, *supra* note 12, at 267.

14. See E. HARSCH, *supra* note 8, at 56–57.

government campaigned on a platform of apartheid<sup>15</sup> and, once elected, promoted racial segregation,<sup>16</sup> curtailed free speech,<sup>17</sup> and limited labor union activity.<sup>18</sup>

Applying the English doctrine of parliamentary supremacy, South African courts have consistently ruled that these restrictions are legally valid. According to the Appellate Division of the Supreme Court of South Africa,<sup>19</sup> parliamentary supremacy means that "Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and . . . it is the function of the courts of law to enforce its will."<sup>20</sup> South Africa's recently

15. *See id.* at 56. The National Party adopted apartheid as its campaign slogan for the 1948 election. *Id.* In 1950 apartheid was defined in the Afrikaans Dictionary as

a political tendency or trend in South Africa, based on the general principles (a) of a differentiation corresponding to differences of race and/or level of civilization, as opposed to assimilation; (b) of the maintenance and perpetuation of the individuality (identity) of the different colour groups of which the population is composed, and of the separate development of these groups in accordance with their individual nature, traditions and capabilities as opposed to integration.

AFRIKAANS DICTIONARY, *reprinted in* N. LERNER, *THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* 53 (1970).

16. *See, e.g.*, Population Registration Act, No. 30 of 1950, *reprinted in* BUTTERWORTHS S. AFR., CENSUS & STATS. 71 (forming classification of races); Blacks (Abolition of Passes and Co-ordination of Documents) Act, No. 67 of 1952, *reprinted in* BUTTERWORTHS S. AFR., BLACKS 811 (ordering all Africans over 16 to carry a "reference book"); Group Areas Act, No. 36 of 1966, *reprinted in* BUTTERWORTHS S. AFR., GROUP AREAS 121 (empowering the government to create separate "group areas", including residential areas, for blacks and whites); Extension of University Education Act, No. 45 of 1959, *reprinted in* BUTTERWORTHS S. AFR., EDUC. 693 (establishing separate universities for blacks and restricting admission of non-whites to white universities).

17. *See, e.g.*, Internal Security Act, No. 74 of 1982, *supra* note 10, at § 5, (limiting freedom of speech); *id.* at § 46 (limiting freedom of assembly); Publication Act, No. 42 of 1974, § 8, *reprinted in* BUTTERWORTHS S. AFR., CENSORSHIP 69 (limiting the distribution of political publication deemed "undesirable"). For a description of the provisions limiting speech and assembly prior to their consolidation into the Internal Security Act, see Dugard, *supra* note 12, at 270.

18. *See, e.g.*, Labour Relations Act, No. 28 of 1956, § 65, *reprinted in* BUTTERWORTHS S. AFR., LABOUR 399 (prohibiting strikes during labor disputes under various circumstances).

19. The Appellate Division is the highest appellate court in South Africa. S. AFR. DEPT. OF FOREIGN AFF. AND INFORMATION, SOUTH AFRICA 1984, at 291 (1984).

20. *Sachs v. Minister of Justice*, [1934] S.A. 11, 37; *see also Panel Discussion on Human Rights and the Administrative State and the Protection of Human Rights in Municipal Law*, 1979 ACTA JURIDICA 189 (discussing specific cases where South African courts showed themselves deferential to the legislature). This is not to suggest that the courts have always unquestioningly accepted parliamentary action. In two famous cases, *Republic v. Kahn*, [1955] 3 S.A. 177 (holding that prohibitions against a gathering of communists do not apply to purely social functions), and *Harris v. Minister of the Interior*, [1952] 2 S.A. 428 (finding that since the act depriving coloreds of the vote did not receive a two-thirds parliamentary majority, passage violated the "entrenched clauses" of the South Africa Act, which requires such a majority), the South African courts gained a reputation for independent thinking. Both of these holdings, however, were delimited by specific and fairly unique fact situations (in *Harris*, for example, the Parliament violated a voting procedure established by the South African constitution) and were subsequently circumvented by parliamentary acts which the courts upheld. *See*

enacted constitution also dictates the supremacy of the Parliament in the determination of substantive rights. Courts may inquire "as to whether the provisions of [the Constitution] were complied with," but otherwise have no review power.<sup>21</sup> Since no substantive rights are enumerated within the Constitution, South African courts have no independent judicial function.

According to English constitutional theory, parliamentary supremacy is tempered by the doctrine of the rule of law. As defined by A. V. Dicey, the rule of law is based on three separate tenets: supremacy of law, equality before the law, and the belief that constitutions are a consequence, rather than a source, of individual rights.<sup>22</sup> Supremacy of law prohibits arbitrariness and the use of wide discretionary powers on the part of the executive authority.<sup>23</sup> Equality before the law subjects all classes to the "ordinary law of the land administered by the ordinary law courts," thus precluding the exemption of government officials from liability for their acts.<sup>24</sup> The belief that constitutions are a consequence of individual rights implies that the courts may define and protect certain rights and hold them predominant over any particular constitution or law.<sup>25</sup> A recent redefinition of the rule of law by the International Commission of Jurists (the Commission) seeks to use Dicey's third concept to promote social, economic, and cultural conditions under which a person's "legitimate aspirations" may be realized.<sup>26</sup> Although the goal may be desirable, this transformation of the rule of law from a legal principle into a political agenda deprives the notion of much of its universality. Differing economic and social systems make it difficult for lawyers and judges to prescribe even general rules for the Commission's broad interpretation of the rule of law.<sup>27</sup>

J. DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 31-32, 162-63 (1979); *Collins v. Minister of the Interior*, [1957] 1 S.A. 552 (upholding the deprivation of the vote from coloreds after the Parliament reconstituted itself by adding 40 new senators and then passing the act in question by a two-thirds vote); *see also* *State v. Wood*, [1976] 1 S.A. 703 (dismissing an appeal from a conviction for attending a "gathering" which consisted of playing bridge).

21. Republic of South Africa Constitution Act, No. 110 of 1983, § 34, *reprinted in* BUTTERWORTHS S. AFR., CONST. LAW 1301.

22. A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202-03 (10th ed. 1959).

23. *Id.* at 202.

24. *Id.* at 202-03.

25. *See* A. MATTHEWS, LAW, ORDER AND LIBERTY IN SOUTH AFRICA 24 (1972).

26. The International Commission of Jurists has defined the rule of law as:

The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic background, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.

BASIC FACTS, *supra* note 11, at 4. These institutions include a written constitution guaranteeing civil and political rights protected by procedural safeguards, an independent judiciary, and a strong bar. *Id.*

27. *See* A. MATTHEWS, *supra* note 25, at 29.

In South Africa, supporters of the National Party reject both Dicey's and the Commission's definition of the rule of law. Many argue that while parliamentary supremacy is integral to South Africa's legal system,<sup>28</sup> the rule of law is part of an English legal heritage<sup>29</sup> which is not appropriate to the South African context.<sup>30</sup> Others equate the rule of law with the rule of law and order. One South African scholar describes this interpretation of the rule of law as requiring that laws be "enacted in accordance with the correct constitutional procedure, and . . . administered in accordance with the rules of procedure prescribed by parliament. . . . This approach equates the Rule of Law with rule by law and accurately describes the totalitarian system of Soviet Russia as well as the legal order of a Western democracy . . ."<sup>31</sup> Supporters of white supremacy have invoked this latter definition to justify suppression of dissent against apartheid.<sup>32</sup>

The South African Government operates according to a third, less oppressive interpretation of the rule of law. Focusing on the application rather than the creation of laws, the government requires that all people be accused in open court, have an opportunity to deny the charge and defend themselves, and have a right to choice of counsel.<sup>33</sup>

Most liberal South African defense lawyers also view the rule of law as a procedural restraint governing the application of laws in the courtroom.<sup>34</sup> Their definition resembles the government's in that it requires that no one should be deprived of liberty or property without recourse to an impartial court, and that citizens should have access to legal counsel to assert any substantive rights they possess.<sup>35</sup> It also requires equal treatment before the law.<sup>36</sup> It is in this latter requirement that the liberal practitioners' definition of the rule of law apparently differs from the government's. Although South African courts theoretically operate under the government's definition, they do not treat blacks and whites equally. According to one South African defense attorney, in proceedings involving infractions of apartheid laws, Commissioners' Courts tend to ignore established procedure and accept hearsay evidence, unreasonable presumptions, and almost any allegation which shows the black to be at fault.<sup>37</sup> In addition, courts accept

28. See J. DUGARD, *supra* note 20, at 37.

29. *Id.* at 41.

30. See Venter, *The Withering of the "Rule of Law,"* 8 *SPECULUM JURIS* 69, 86-88 (1973).

31. J. DUGARD, *supra* note 20, at 43-44.

32. See *id.* at 42.

33. S. AFR. DEPT. OF FOREIGN AFFAIRS, *SOUTH AFRICA AND THE RULE OF LAW* 47 (1968).

34. See J. DUGARD, *supra* note 20, at 40. For criticism of this view of the rule of law, see *id.* at 41-46.

35. See *id.* at 45.

36. See *id.*

37. See, e.g., J. JACKSON, *JUSTICE IN SOUTH AFRICA* 50-55 (1980) (Jackson's personal observations of the Commissioners' Courts). Commissioners' Courts and Magistrates' Courts have jurisdiction over offences committed by blacks. Black Administration Act, No. 38 of 1927, § 9(1), reprinted in *BUTTERWORTHS S. AFR.*, Blacks 131.

confessions from blacks in spite of strong evidence of coercion<sup>38</sup> and sentence blacks more harshly than whites.<sup>39</sup>

The procedural definition of the rule of law promoted by liberal defense attorneys may be one of the most effective interpretations for purposes of ameliorating human rights violations. Some South African scholars argue for a broader rule of law that would include legal protection of the substantive rights necessary to create a rational governing authority, including the liberties of person, speech, and association.<sup>40</sup> This prescription is unlikely, however, to have any immediate practical effect given the continued power of the National Party. In contrast, while the limited application of the rule of law supported by liberal South African practitioners is not likely to cause rapid changes in the government's arbitrary treatment of blacks, the provision of fair trial process for blacks and whites may mitigate the effect of human rights violations as they occur and promote their gradual elimination. Liberal South African lawyers who have obtained equal application of the law have won the acquittal of clients accused of violating pass laws,<sup>41</sup> the release of detainees and compensation for their injuries,<sup>42</sup> and preliminary injunctions against the forced removal of populations.<sup>43</sup> These efforts to obtain due process have two results: individual wrongs are redressed and the abusive practices of the South African Government are brought to the attention of the world press.

## II. THE INTERVENTION OF FOREIGN LAWYERS IN SOUTH AFRICA: REALIZATION OF PROCEDURAL PROTECTIONS IN THE TRIAL PROCESS

By assisting in the defense of human rights victims, foreign lawyers help mitigate the unfair trial process often practiced in South African courts. The financial support and legal expertise of foreign lawyers have helped South African advocates develop persuasive and creative legal arguments. The courtroom presence of foreign lawyers as trial observers limits political censure and encourages local counsel to use evidence which, while procedurally permissible, might otherwise be politically suppressed. Furthermore, whether or not local counsel are successful in redressing individual grievances, the foreign lawyer/trial observer can publicize the evidence brought out at trial, thereby attracting the financial support and human resources necessary to further the development of procedural due process for human rights victims of government policies.

38. See, e.g., *id.* at 156-63 (Jackson's observations of the Magistrates' Courts).

39. See A. SACHS, *JUSTICE IN SOUTH AFRICA* 154-57 (1980). Between 1961 and 1966, for example, whites were charged with interracial rape four times more often than blacks in relation to the population.

40. See, e.g., A. MATTHEWS, *supra* note 25, at 22.

41. J. JACKSON, *supra* note 37, at 19-20.

42. See, e.g., J. CARLSON, *supra* note 10, at 169-71.

43. Cooper, *supra* note 10, at 118-19.

### A. Providing Local Counsel for Indigent Clients

Attorney sponsored NGOs have been particularly active in funding the defense of political detainees. Such assistance is indispensable because the South African advocates who defend political prisoners and detainees are generally overworked<sup>44</sup> and often accept cases from indigent client knowing they will not receive remuneration.<sup>45</sup> Court-appointed defense attorneys are in short supply. Studies indicate that at least 80 percent of black or colored criminal defendants remain without representation.<sup>46</sup> Available court-appointed attorneys generally lack both the experience and the resources to defend major cases.<sup>47</sup> Without the assistance of NGOs, it is likely that most political trials would not take place.

Since 1967 the Lawyers' Committee for Civil Rights Under Law<sup>48</sup> has provided financial support to the counsel of individuals accused of political crimes.<sup>49</sup> Perhaps the most dramatic example of the effect of Committee assistance was the 1975–1976 trial of the South African Student Organization (SASO) and the Black People's Convention (BPC). In that case, the State prosecuted nine leaders of SASO and the BPC for organizing a peaceful rally in celebration of the independence of Mozambique.<sup>50</sup> The Lawyers' Committee provided the defendants with one of the most qualified and best equipped defense teams in the history of political trials in South Africa.<sup>51</sup> Under direct examination by the advocates retained by the Lawyers' Committee, Steve Biko, a leader of SASO who had been prevented from expressing his views for most of his political life, testified at length about the Black Consciousness Movement.<sup>52</sup> In addition to bringing out

44. Telephone interview with Penny Andrews, Centre for Applied Legal Studies (Nov. 21, 1984) (notes on file, Michigan Yearbook of International Legal Studies).

45. See A. SACHS, STEPHANIE ON TRIAL 13 (1968); Hooper Testimony, *supra* note 10, at 62–63.

46. McQuoid-Mason, *Discretion in the Provision of State-Financed Legal Aid and Services to Indigent Criminals Accused in South Africa*, in CRIMINAL JUSTICE IN SOUTH AFRICA 110 (M. Olmesdahl & N. Steytler eds. 1983)

47. See Deffenbaugh, *The Southern Africa Project for the Lawyers' Committee for Civil Rights Under Law*, in GLOBAL HUMAN RIGHTS 289, 300 (V. Nanda, J. Scarritt, & G. Shepherd eds. 1981).

48. See *supra* note 11.

49. The first act of the Southern Africa Project of the Lawyers' Committee was to provide money to Joel Carlson (a South African lawyer and sometimes trial observer for the International Commission of Jurists) to defend 37 clients facing capital punishment for guerilla activities. For a discussion of this case, see J. CARLSON, *supra* note 10, at 153–71. Since 1967, the Lawyers' Committee has funded the defense in at least seven major political trials. See Deffenbaugh, *supra* note 47, at 291–95. In the mid-1970s, the Southern Africa Project operated on a budget of between \$50,000 and \$150,000. *Id.* at 291.

50. *State v. Cooper*, [1976] 1 S.A. 932. For an explanation of the charges, see *South Africa*, 14 INT'L COMM'N JURISTS REV. 13, 13–16 (1975); see also E. HARSCH, *supra* note 8, at 272–74 (describing the activities of the South African Student Organization and the Black Peoples Convention in 1975 and 1976).

51. Deffenbaugh, *supra* note 47, at 294.

52. The Black Consciousness Movement maintains that "the black man must reject all value systems that seek to make him a foreigner in the country of his birth and reduce his basic human dignity." E. HARSCH, *supra* note 8, at 258.

views generally suppressed by the government, the privately financed defense team lengthened the trial considerably.<sup>53</sup> Furthermore, the effect of the testimony was not limited to the courtroom. The publicity given the trial contributed to the highly charged atmosphere in South Africa,<sup>54</sup> and violent civil disturbances erupted in South Africa in the spring of 1976.<sup>55</sup>

Foreign lawyers have also contributed to the development of legal clinics at South African law schools. Originally created by students,<sup>56</sup> these clinics have recently been integrated into the official curricula of several law schools.<sup>57</sup> In 1979 several of these law schools brought a Columbia University professor with extensive experience in the operation of student clinics to South Africa.<sup>58</sup> By helping law students represent indigents, he was able to extend available procedural protections to those who would not normally have access to legal counsel.

### *B. The Provision of Legal Expertise by Foreign Lawyers*

In addition to obtaining counsel for defendants, the foreign attorney may also help devise trial strategy and tactics. Although a person can practice law in South Africa only if he or she is a South African citizen or resident,<sup>59</sup> the foreign lawyer may share his or her expertise by preparing legal memoranda or furnishing South African counsel with expert witnesses.

The Lawyers' Committee for Civil Rights Under Law actively shares experts and expertise with South African counsel. In 1968, for example, at the request of local counsel, the Lawyers' Committee arranged for Professor Alan Moritz, a recognized authority in pathology,<sup>60</sup> to consult with local experts on the death of James Lenkoe.<sup>61</sup> Moritz eventually testified at Lenkoe's inquest and helped

53. Deffenbaugh, *supra* note 47, at 300.

54. *Id.* at 280. Blacks "pored over the newspaper reports of the trial." *Id.*

55. *See id.* at 280-84. By June 19, 1976, the official death count of the riots was 109, although one moderate black leader put the total somewhere around 700. *Id.* at 283-84.

56. *E.g.*, Cooper, *supra* note 10.

57. *See* Slabbert, *Socio-Political Factors Influencing Access to and Effect of Legal Representation*, in *CRIMINAL JUSTICE IN SOUTH AFRICA* 89, 98 (M. Olmesdahl & N. Steytler eds. 1983). For a detailed description of a program in Zimbabwe similar to those established in South Africa, see Donagher, *The University of Rhodesia Legal Clinic: An Example for South African Universities in the Field of Legal Training*, 3 *RESPONSA MERIDIANA* 325 (1978).

58. *See* Cooper, *supra* note 10.

59. *See* Attorney Act, No. 53 of 1979, § 15(c), *reprinted in* BUTTERWORTHS S. AFR., *LEGAL PRAC.* 453; Admissions of Advocates Act, No. 74 of 1964, § 3(c), *reprinted in* BUTTERWORTHS S. AFR., *LEGAL PRAC.* 401.

60. Dr. Moritz was chief consultant pathologist to the United States armed forces and participated in the autopsy of President Kennedy. J. CARLSON, *supra* note 10, at 228.

61. Dr. Moritz recommended several tests which provided substantial proof that Lenkoe had sustained electrothermal injuries in the twelve hour period proceeding his death in a South African prison. *Id.* He also discounted the possibility of suicide as described by the State's theory of Lenkoe's death. *Id.* at 231.

gather additional scientific proof of Lenkoe's torture. Although the court found that the death was a result of suicide,<sup>62</sup> Moritz's appearance helped bring the case to the attention of the world press.<sup>63</sup> The Lawyers' Committee has provided medical experts in other cases as well.<sup>64</sup>

The Lawyers' Committee has also furnished legal advice to South African counsel. In 1971, the Lawyers' Committee prepared a memorandum on U.S. law concerning the exclusion of evidence obtained through coercion.<sup>65</sup> In Namibia,<sup>66</sup> in 1973, the Lawyers' Committee helped instruct advocates seeking an injunction against floggings without prior legal process.<sup>67</sup> Finally, the Lawyers' Committee provided the South African advocates representing Steve Biko's family with legal experts whom they could consult.<sup>68</sup>

### *C. Trial Observation by Foreign Lawyers*

Once the case is prepared, foreign lawyers report on the process and outcome of the trial. Trial observation in South Africa effects two results. First, the observer publicizes the results of the trial,<sup>69</sup> thus generating pressure against any improper practices.<sup>70</sup> Second, the trial observer's presence may inhibit the state or the court from preventing procedurally permissible but politically unpopular expression, thus encouraging lawyers and defendants to express themselves in a more forward and dramatic manner.<sup>71</sup> This second phenomena is particularly important as it affects the trial process itself. By facilitating increased expression in the courtroom, foreign lawyers enable South African lawyers to preserve more information about government practices which foreign lawyers/trial observers report outside of South Africa. The resulting publicity generates greater support for human rights lawyers in South Africa.

62. *Id.* at 259.

63. *See, e.g.*, U.S. Pathologists Testifies, *N.Y. Times*, July 25, 1969, § 1, at 8.

64. In 1971, the Lawyers' Committee briefed an American psychiatrist to testify on the credibility of evidence obtained under coercive conditions. 10 YEAR REPORT, *supra* note 11, at 98. In 1978, prior to the inquest into Steve Biko's death, the Lawyers' Committee provided pathology experts to the Biko family's lawyers. Deffenbaugh, *supra* note 47, at 295.

65. 10 YEAR REPORT, *supra* note 11, at 98.

66. Namibia, or South-West Africa, was administered by South Africa under a League of Nations mandate later revoked by the United Nations. South Africa still controls the territory. E. HARSCH, *supra* note 8, at 123.

67. Deffenbaugh, *supra* note 47, at 292.

68. *Id.* at 295.

69. *See International Trial Observers*, *supra* note 1, at 58; Martin-Achard, *Political Trials and Observers*, 6 INT'L COMM'N JURISTS REV. 24, 34 (1971).

70. *See International Trial Observers*, *supra* note 1, at 58; Martin-Achard, *supra* note 69, at 37.

71. *See* Martin-Achard, *supra* note 69, at 35; *see also International Trial Observers*, *supra* note 1, at 113.

The trial of Dr. Beyers Naudé, director of the Christian Institute,<sup>72</sup> demonstrates how foreign lawyers can help ensure that the theoretical procedural safeguards of the South African system are not ignored. After the Christian Institute attempted for ten years to bring blacks into segregated churches, the Schlesbruch Commission, appointed to investigate several organizations suspected of subversive acts,<sup>73</sup> summoned Dr. Naudé to testify about the activities of the Institute. Dr. Naudé appeared, but refused to give evidence, desiring not to implicate any fellow workers unless they were provided with an opportunity to dispute his testimony. The state subsequently prosecuted him for refusing to take an oath and testify at a commission hearing.<sup>74</sup>

Anthony Allott, Professor of African Law at the Institute of Oriental and African Studies, University of London, observed the trial on behalf of the International Commission of Jurists.<sup>75</sup> Naudé's testimony concentrated on the contradiction between apartheid and Christian philosophy, and his reading of a sermon verbatim into the record probably constituted an unprecedented case of preaching in court.<sup>76</sup> It is likely that this anti-apartheid testimony, which a judge would normally try to exclude as irrelevant, was allowed because effectively silencing a

72. The Christian Institute was formed after the World Council of Churches passed a resolution that racial discrimination was inappropriate in both secular and religious worlds. INT'L COMM'N OF JURISTS, THE TRIAL OF BEYERS NAUDE 9 (1979) [hereinafter cited as TRIAL OF BEYERS NAUDE]. The Institute helped establish the African-dominated African Independent Churches Association, *id.* at 11, and sponsored the Study Project on Christianity in Apartheid Society (Spro-cas). *Id.* at 12. Spro-cas publications include LAW, JUSTICE AND SOCIETY (Spro-cas Publication No. 9, 1972), POWER, PRIVILEGE AND POVERTY (Spro-cas Publication No. 7, 1972), and SOME IMPLICATIONS OF INEQUALITY (Spro-cas Publication No. 4, 1971). Dr. Naudé was forced to resign from the Dutch Reformed Church when he took up the directorship of the Institute. TRIAL OF BEYERS NAUDE, *supra*, at 10.

73. This Commission was appointed to investigate the Christian Institute and three other organizations and individual persons connected with these groups. TRIAL OF BEYERS NAUDE, *supra* note 72, at 31.

74. See *State v. Naudé*, [1975] 1 S.A. 681. Section 6(1) of the Commissions Act, No. 8 of 1947, reprinted in BUTTERWORTHS S. AFR., CONST. LAW 171, states:

Any person summoned to attend and give evidence . . . who without sufficient cause (the onus of proof whereof shall rest upon him) . . . having attended, refuses to be sworn or make an affirmation . . . shall be guilty of an offense and liable on conviction to a fine not exceeding 50 pounds or to imprisonment for a period not exceeding six months, or both such fine and imprisonment.

*Id.* Dr. Naudé argued that he had "sufficient cause" not to testify because his Christian beliefs made it "humanly intolerable" to testify against colleagues without their presence. South African courts, however, have interpreted "humanly intolerable" and "sufficient cause" more narrowly. See *State v. Weinberg*, [1966] 4 S.A. 660, 665-66.

75. Allott, *State Law and the Christian Conscience in South Africa*, 11 INT'L COMM'N JURISTS REV. 55 (1973).

76. *Id.* at 57-58.

witness speaking against the racial policies of the South African Government could have created an unfavorable impression of South Africa's judicial system.

Trial observers have also had an impact on conditions in South African prisons. In 1977, the Lawyers' Committee for Civil Rights Under Law, in conjunction with the American Bar Association and the Lawyers' Committee for International Human Rights, sent Louis Pollack, then Dean of Pennsylvania Law School, to observe the inquest into the death of Steve Biko.<sup>77</sup> Together with Sir David Napley, former President of the Law Society of Great Britain, Dean Pollack concluded that the police investigation of Biko's death was "perfunctory in the extreme." He further concluded that "Mr. Biko died as a result of a brain injury inflicted by one or more unidentified members of the security police. . . ."<sup>78</sup> The wide publicity given these conclusions has had a moderating influence on South African security force practices. Deaths in detention fell from almost one a month before the inquest to zero since the inquest.<sup>79</sup> A non-lawyer, unfamiliar with inquest procedures and unable to portray himself or herself as a legal expert, would probably have been unable to challenge the validity of the proceeding and incapable of attracting the attention of the world press.

In all these cases, the observers drew great attention to the issues and individuals involved in the trials. Scrutiny from the world press and NGO literature, and the books which came out of these proceedings, helped publicize the state of affairs in South Africa. Recently, however, the South African Government has curtailed trial observation.<sup>80</sup> This may suggest that the South African Government is growing uncomfortable with the support which this activity generates against apartheid.

77. Steve Biko, "hailed as one of the most important black leaders in over a decade," died while being held by South African security police. Deffenbaugh, *supra* note 47, at 295. Biko was a founder of the Black Consciousness movement. *Id.*

78. *South Africa*, 20 INT'L COMM'N JURISTS REV. 15, 17 (1978); *see also* Deffenbaugh, *supra* note 47, at 295.

79. From mid-1978 to May 1980, no deaths in detention were reported. *U.S. Policy Toward South Africa: Hearings before the Subcomms. on International Economic Policy and Trade on Africa and on International Organizations of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 318 (1980) (statement of Millard W. Arnold, Director, Southern Africa Project, Lawyers' Comm. for Civil Rts. Under Law). Recently, however, sources have reported a string of deaths. Amnesty International Newsletter, April 1984, at 5; *see generally South Africa*, 30 INT'L COMM'N JURISTS REV. 20 (1983) (describing the death of I. T. Muofhe who was in perfect health at the time of his arrest, yet died in the custody of the security police two days later); Ad Hoc Working Group of Experts, *Violations of Human Rights in Southern Africa*, U.N. Doc. E/CN.4/1983/10 at 36-47 (1983) (detailing a series of deaths in 1982); SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, 1982 SURVEY OF RACE RELATIONS IN SOUTH AFRICA 254-59 (1983) (describing deaths in 1982).

80. Recently South African officials refused to give a visa to Gay MacDougal, present director of the Southern Africa Project. Interview with J. Greenberg, former General Counsel, National Association for the Advancement of Colored Peoples-Legal Defense Fund (Oct. 11, 1984) (notes on file, Michigan Yearbook of International Legal Studies).

### III. CONCLUSION

Intervention by foreign lawyers does not in any way offer a complete solution to human rights problems caused by South Africa's apartheid policy. However, the assistance of foreign lawyers can be extremely important to the liberal South African lawyer promoting the rule of law. The financial support, legal expertise, and publicity which the foreign lawyer can lend to the activities of South African lawyers preserves and ensures the full operation of existing procedural safeguards while promoting long-range change by prompting international pressure. Still, these efforts cannot alter the fundamental structure and substance of government policies. They can only contribute to a more tolerable interim situation while opponents of apartheid search for other means of eliminating human rights violations in South Africa.