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NYLS Journal of Human Rights

Volume 4
Issue 1 *Volume IV, Part One, Fall 1986 - Homelessness*

Article 8

1986

# Conscientious Objection to Service in the South African Defence Force as a Ground for Political Asylum in the United States

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# CONSCIENTIOUS OBJECTION TO SERVICE IN THE SOUTH AFRICAN DEFENCE FORCE AS A GROUND FOR POLITICAL ASYLUM IN THE UNITED STATES

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## INTRODUCTION

The United Nations recognizes "the right of all persons to refuse service in the military or police forces which are used to enforce *apartheid*" and "[c]alls upon Member States to grant asylum" to conscientious objectors.[1] The United States voted in favor of the General Assembly resolution recognizing this right.[2] Nevertheless, the State Department, which advises the Immigration and Naturalization Service (INS) on all asylum applications,[3] currently opines that refusal to serve in the South African Defence Force (SADF) does not satisfy the statutory criteria for political asylum in the United States.[4] This Article will argue that the State Department opinion runs counter to United States law and international law.

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* J.D. Columbia University 1987, B.S. University of Witwatersrand.

1. United Nations, General Assembly, "Status of Persons Refusing Service in Military or Police Forces Used to Enforce Apartheid," Resolution 165 (XXXIII), 20 Dec. 1978, in General Assembly, *Official Records*, Thirty-third Session, Supplement No. 45 (A/33/45), 154. G.A. Res. 33/165 also calls upon member states to grant conscientious objectors "all the rights and benefits accorded to refugees under existing legal instruments . . . " *Id.*

2. Third Committee of the General Assembly, Press Release GA/SHC/2249 of Dec. 12, 1978, at 27(presenting the Committee discussions on G.A. Res. 33/165)(copy on file at N.Y.L.S. HUM. RTS. ANN.).

3. 8 C.F.R. § 208.7(1987).

4. *In re* W., (A27140064), Advisory Opinion Letter from Leon M. Johnson, Department of State, to David N. Ilchert, District Director of INS, San Francisco, at 5 (Mar. 25, 1985)(copy on file at N.Y.L.S. HUM. RTS. ANN.); *In re* C.,(A26177723), Advisory Opinion Letter from Leon M. Johnson, Department of State, to S.I.E., Nonimmigrant Unit, Travel Control Branch, INS New York, at 5 (Feb. 22, 1985)(On the strength of this letter, INS New York denied asylum and withdrew permission to work. The applicant, facing the prospect of administrative and judicial appeals without a source of income, left the United States.)(author's personal files).

## I. Asylum Standards

In joining the consensus on U.N. Resolution 33/165, the U.S. delegate stated his understanding that any decision as to the granting of asylum would be made in accordance with the standards of each nation.[5] To qualify for political asylum in the United States an applicant must show "persecution or a well-founded fear of persecution on account of . . . political opinion" in the country of origin.[6] The refusal to obey laws making military service compulsory in foreign countries is "generally not considered sufficient grounds for asylee status."[7] The State Department has confirmed this general policy in the context of South African draft resisters. Many countries, including the United States, have laws governing military registration and induction and "[t]he fact that someone breaks the law in his country and would be imprisoned for that illegal act does not constitute a well-founded fear of persecution within the meaning of the Refugee Act and the United Nations Convention and Protocol relating to the status of refugees."[8] For "prosecution to be tantamount to persecution . . . the punishment must be disproportionate to the crime,"[9] and the penalty for draft evasion in South Africa is not "disproportionately severe"[10] when compared with penalties for draft evasion in the U.S. prior to the existence of the "volunteer army."

### *A. The Refugee Act of 1980*

The 1980 amendment[11] to the Immigration and Nationality Act of 1952[12] changed the definition of a refugee[13] to remove ide-

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5. Third Committee of the General Assembly, Dec. 12, 1978, discussions on Resolution 33/165, *supra* note 2, at 27.

6. *See* 8 U.S.C. § 1101(a)(42)(A)(1982), quoted in note 13, *infra.*

7. A. Helton, Manual on Representing Asylum Applicants 8 (1984)(footnote omitted).

8. *U.S. Gives Political Asylum to White Foe of Apartheid,* N.Y. Times, Feb. 26, 1983, at A3, col. 1 (quoting State Department spokesperson, Paula Kuzmich).

9. *In re* W., supra note 4, at 4-5.

10 *Id.* at 2.

11. Pub. L. No. 96-212, 94 Stat. 102 (1980).

12. 8 U.S.C. § 1101 *et seq.* (1982).

13. *See* 8 U.S.C.§ 1101(a)(42)(A)(1982) ("The term 'refugee' means . . . any person . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of [his or her country of nationality or, if stateless, country of

ological bias from immigration law[14] and to conform with the language of the United Nations Protocol Relating to the Status of Refugees.[15] The courts have not yet settled the question of whether the 1980 amendment wrought substantive changes in the asylum standard,[16] and it is claimed that "foreign and domestic policy considerations . . . continue to dominate asylum decision making"[17] in spite of the 1980 amendment.

Ideological neutrality would be a mixed blessing for South African draft resisters. If it is improper for denial of asylum to be based solely on South Africa's pro-Western anti-communist foreign policy, it is equally improper for a grant of asylum to be based solely on South Africa's abhorrent ideology of apartheid. United States foreign policy should not dictate broad presumptions of eligibility for asylum.[18]

### *B. The Effect of the Protocol*

Although the substantive effect of the 1980 Act may be uncertain, it is settled that Congress intended to conform the Immigration and Nationality Act with the language of the United Nations Protocol.[19] The Protocol contains the general definition of refugee status arrived at by the Convention relating to the Status of Refugees.[20] The U.S. acceded to the Protocol in 1968.[21]

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habitual residence] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion . . . .").

14. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 251 (1984)(citing testimony in Congressional hearings).

15. Rejaie v. INS, 691 F.2d 139, 144 (3d Cir. 1982). The United Nations Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 (entered into force with respect to the United States Nov. 1, 1968), is binding on the United States under international law.

16. *See, e.g.*, INS v. Cardoza-Fonseca, 55 U.S.L.W. 4313(Mar. 9, 1987); INS v. Stevic, 467 U.S. 407 (1984); *Rejaie*, 691 F.2d at 139; Zavala-Bonilla v. INS, 730 F.2d 562 (9th Cir. 1984).

17. Helton, *supra* note 14, at 243.

18. Justice Department draft procedure establishing a presumption that aliens fleeing "totalitarian" countries have a well-founded fear of persecution, also appears to violate at least the spirit of the 1980 Act. *See* N.Y. Times, Apr. 17, 1986, at A1, col. 1.

19. *Rejaie*, 691 F.2d at 144.

20. OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1967 CONVENTION AND THE PROTOCOL RELATING TO THE STATUS OF REFUGEES, ¶34 (1979) [hereinafter HANDBOOK] ("any person who . . . owing to well-founded fear of being persecuted for reasons of race,

It is generally acknowledged that the United Nations High Commission *Handbook*, which is based on the Protocol, is a "significant source of guidance"[22] in U.S. immigration law. The State Department, in assessing the merits of South African draft resistance cases, purports to use the standard of a "well-founded fear of persecution within the meaning of the Refugee Act and the United Nations Protocol relating to the status of refugees."[23]

In opinion letters from the State Department to INS regarding specific asylum applications by South African draft resisters, the State Department uses the *Handbook* to assess claims of potential persecution. The *Handbook* states that "a refugee is a victim — or potential victim — of injustice, not a fugitive from justice"[24] but that "excessive punishment [for a common law offense] . . . may in itself amount to persecution."[25] The State Department renders this as "the basic principle that, for prosecution to be tantamount to persecution . . . the punishment must be disproportionate to the crime."[26] After comparing the effective SADF service commitment of four years with the sentence of six years for refusal to serve, the State Department concludes that the ratio of 4:6 years is in fact less severe than the equivalent ratio of 2:5 years in the U.S. prior to the existence of the "volunteer army" and is therefore not disproportionately severe.[27] The *Handbook* sanctions this mode of

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religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."). *Cf.* 8 U.S.C. § 1101(a)(42)(A)(1982) quoted *supra* note 13.

21. 19 U.S.T. 6223, T.I.A.S. No. 6577.

22. Zavala-Bonilla v. INS, 730 F.2d 562, 567 n. 7 (9th Cir. 1984).

23. N.Y. Times, Feb. 26, 1983 at A3, col. 1.

24. HANDBOOK, *supra* note 20, at ¶56.

25. *Id.* at ¶57.

26. *In re W.*, *supra* note 4, at 4.

27. *Id.*, *supra* note 4, at 2. Section 16 of the South African Defence Amendment Act No. 34 of 1983, 10 Stat. S. Afr. 539 (1984), which amended section 126A of Act 44 of 1957, sets the maximum sentence for failure to serve in the SADF at one-and-a-half times the total period of service to be rendered. Under 50 U.S.C. App. § 462(a), U.S. draft resisters may be imprisoned for up to five years. When the compulsory period of military service in the U.S. was two years, prior to the advent of the volunteer army, this amounted to a harsher penalty of two-and-a-half times the total period of service to be rendered.

analysis by providing that the inherent difficulty of evaluating the laws of another country may be overcome by each country using its own legislation as a yardstick.[28] However, the *Handbook* immediately adds a second criterion: "Moreover, recourse may usefully be had to the principles set out in the various international instruments relating to human rights, in particular the International Covenants on Human Rights."[29] The State Department policy makes no apparent attempt to assess South African conscription law in terms of international human rights.

## II. JUDICIAL INTERVENTION

If the State Department policy culminates in the issuance of final deportation orders to South African draft resisters, the federal courts may be petitioned to intercede.[30] Administrative discretion is broad in the determination of asylum eligibility,[31] but the factual basis of the denial is not really the issue here. The real issue is a question of law and procedural fairness and the federal courts may review these matters directly.[32]

The stated grounds for an administrative order must be grounds "upon which [agency] action can be sustained."[33] INS is subject to the Administrative Procedure Act[34] and must consider all relevant factors when making administrative determinations.[35] The *Handbook* provides a unique source of relevant factors in asylum determinations.[36]

Selective application of these factors may even rise to the level of a constitutional violation if factors supporting the order are cited while factors undermining the order are simply ignored. Aliens in asylum proceedings are covered by fifth amend-

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28. HANDBOOK, *supra* note 20, at ¶60.

29. *Id.*

30. 8 U.S.C. § 1105a(a)(1982).

31. *See* Wong Wing Hang v. INS, 360 F. 2d 715, 719 (2d Cir. 1966).

32. Chlomos v. Department of Justice, 516 F.2d 310 (3d Cir. 1975); Hirsch v. INS, 308 F.2d 562 (9th Cir. 1962).

33. SEC v. Chenery Corp. 318 U.S. 80, 95 (1943).

34. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950)(Deportation cases must conform to the requirements of the Administrative Procedure Act.), *cert. denied*, 434 U.S. 829.

35. Motor Vehicles Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29, 43 (1983); Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir. 1977).

36. Zavala-Bonilla v. INS, 730 F.2d 562, 567 n.7 (9th Cir. 1984).

ment due process protection[37] and self-serving selective application of relevant factors does not conform with the "traditional standards of fairness"[38] required by the due process clause.[39]

The appropriate remedy would be a remand with instructions to the State Department and INS to apply the *Handbook* criteria in an objective and non-selective fashion. Three responses are possible: both factors may be applied and the initial determination confirmed; both factors may be applied and the initial determination reversed; or the agencies may decide not to apply the *Handbook* factors at all. This remedy is appropriate because it goes to process and not necessarily to substantive outcome. This enables the courts to correct procedural deficiencies without undue interference with agency discretion.

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37. The Japanese Immigrant Case, 189 U.S. 86 (1903)(deportation context). The circuits differ on whether the 1980 Refugee Act created a liberty interest within the protection of the due process clause of the fifth amendment. The fifth circuit recognizes "a constitutionally protected right to petition our government for political asylum." Haitian Refugee Center v. Smith, 676 F.2d 1023, 1038 (5th Cir. Unit B 1982). The second circuit recognizes a similar right. Augustin v. Sava, 735 F.2d 32, 37(2d Cir. 1984); Yiu Sing Chun v. Sava, 708 F.2d 869,877(2d Cir. 1983). However, the eleventh circuit holds that the 1980 Refugee Act creates a right protected by express statutory provisions and not by constitutional guarantees. Jean v. Nelson, 727 F.2d 957, 981-82(11th Cir. 1984), *aff'd.* without deciding the constitutional issue, at 472 U.S. 846 (1985).

38. Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953). The extent of process afforded applicants who are already technically within the U.S. and thus subject to deportation, as opposed to exclusion, is greater than that afforded applicants who seek asylum at a port of entry and are thus subject to exclusion. *Id.* at 210-12. However, the 1980 Act does not distinguish between asylum applicants present in the U.S. and those seeking entry: "The Attorney General shall establish *a* procedure for an alien physically present in the United States or at a land border or port of entry, *irrespective of such alien's status,* to apply for asylum . . . ." 8 U.S.C.§ 1158(a)(1982)(emphasis added). It could thus be argued that due process protection must be afforded asylum applicants regardless of whether they are already present in the U.S. or are merely seeking entry. *See, eg.,* S. REP. No. 256, 96TH CONG., 1ST SESS. 4(1979).

39. The extent of procedural protections afforded statutory benefits such as political asylum is determined by a tripartite test which considers the private interest affected by the official action, the risk of error and the value of additional safeguards, and the government interest involved. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). In political asylum cases the private interest in remaining in the United States and the risks of erroneous denial are often substantial. The government has no legitimate interest in manipulating the HANDBOOK factor analysis and a good faith application of the factors imposes no additional fiscal or administrative burden. *See generally,* Note, *The Right to Appointed Counsel in Asylum Proceedings,* 85 COLUM. L. REV. 1157, 1179-84(1985) (written by Elizabeth Glazer)(discussing the *Mathews* test in the context of due process and the right to appointed counsel). Under the *Mathews* criteria the asylum applicant should be protected from selective application of the HANDBOOK factors.

## III. AGENCY RESPONSE ON REMAND

One response by the agencies to the court-ordered remand may be a refusal to apply the *Handbook* factors at all. This refusal may in turn be challenged in federal court as a refusal to consider "a significant source of guidance,"[40] and a failure to consider an "important aspect"[41] of an asylum claim. If the agencies respond to remand by considering both factors, the outcome may be the same or different as administrative discretion is preserved. However, once both factors are taken into consideration, the applicant's prospects are arguably far brighter.

### *A. The Human Rights Factor*

Even if the human rights factor as described in the *Handbook* is included in the State Department analysis, it is not clear that the basic finding will be different. The right of a country to defend itself is fundamental and in no way inconsistent with international human rights. At least on the face of it, the South African Defence Act does no more than "defen[d] the Republic" from internal and external threats.[42] Apartheid, the key tenet of that Republic, has been condemned as a "crime against the conscience and dignity of mankind,"[43] but the U.S. has consistently failed to join the majority of U.N. members in supporting such sweeping resolutions. It may also be contended that defense of the Republic and propagation of apartheid are entirely separate and that the former offends no principle of human rights. In fact, apartheid and the SADF are inextricably bound.

The SADF is statutorily authorized to engage in "defence of the Republic,"[44] "prevention or suppression of terrorism"[45] and,

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40. Zavala-Bonilla, 730 F.2d 562, 567 n.7 (9th Cir. 1984); *see supra* notes 33-36 and accompanying text.

41. Motor Vehicles Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29, 43(1982)(failure to consider an "important aspect" of an administrative determination is arbitrary and capricious).

42. South African Defence Act No. 1 of 1976, 10 Stat. S. Afr. 621 (1984) (amending Defence Act No. 44 of 1957, § 3(2)(a), 10 Stat. S. Afr. 455-610 (1984)) [hereinafter Defence Act].

43. *Report of the World Conference for Action against*Apartheid, *Lagos, Nigeria* 22-26, Aug. 1977(United Nations publication, Sales No. E.77.XIV.2 and Corr.), § X [hereinafter *Lagos Declaration*].

44. Defence Act, *supra* note 42, § 3(2)(a).

45. *Id.* at § 3(2)(aA).

among other things, in "the prevention or suppression of internal disorder."[46] The authorization to suppress "terrorism" allows the SADF to enforce the draconian Internal Security Act with its sweeping definition of "terrorism."[47] The intent element of "terrorism" is defined to include "bring[ing] about or promot[ing] *any* constitutional, political, industrial, social or economic aim or change in the Republic."[48] Any violent act with such intent amounts to treason, while almost any non-violent act with such intent may constitute subversion. Thus a broad spectrum of political activity, "in the Republic or elsewhere,"[49] may result in detention and prosecution, or "suppression" by the SADF. The broad powers of the SADF are roughly separable into internal and external components.

### *1. Internal Role of the SADF*

In 1977, the Minister of Defence outlined "military strategy" with respect to "*national political policy.*"[50] The cornerstone of this policy was the "independent development of all population groups."[51] Thus, the maintenance of apartheid was explicitly made part of the SADF mandate. In 1983, the South African Constitution made provision for Coloured and Indian representation in Parliament.[52] The South African government has used such reform measures to proclaim the demise of apartheid. Although apartheid may no longer be the favored term for South Africa's elaborate system of racial segregation, it is clear that the basic principles remain entrenched. The majority black population is conspicuously excluded from the new multiracial Parliament. Even within the new Parliament, the Houses are racially segregated and the white House of Assembly has more voting power than the Coloured and Indian Houses combined.[53] In all fundamental respects, the system of apartheid

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46. *Id.* at § 3(2)(b).

47. South African Internal Security Act, No. 74 of 1982, § 54, 8 Stat. S. Afr. 1291, 1359 (1984).

48. *Id.* (emphasis added by author).

49. *Id.* at § 54(2)(i), 8 Stat. S. Afr. 1361 (1984).

50. White Paper on Defence 1977, ¶22 at 8 (emphasis in the original)(copy on file at N.Y.L.S. HUM. RTS. ANN.).

51. *Id.*

52. Republic of South Africa Constitution Act 110 of 1983, 7 Stat. S. Afr. xx (198x).

53. *Id.* at §§ 37,52; *see generally* Rudolph, *Constitutional Law*, ANNUAL SURVEY OF

is still very much in force and the SADF is becoming an increasingly important factor in its maintenance.

SADF troops occupying black areas in an attempt to quell widespread dissent in 1985 were responsible for numerous injuries and many deaths. According to figures released in the House of Assembly by the Minister of Defence, the SADF was resposible for deaths in Kathlehong, Langa, Despatch and Dudunza.[54] Under the State of Emergency declared on July 21, 1985, the broad powers of the SADF were further augmented. Non-commissioned officers of the SADF are given broad discretionary powers for the "maintenance of public order"[55] and any member of the SADF is given authority to arrest or detain any person[56] or search any vehicle or place,[57] if in his opinion this is necessary for the maintenance of public order. Under the regulations governing the State of Emergency, "any act in good faith" for the maintenance of public order is fully indemnified[58] and no civil or criminal proceedings may be brought against the authorities. This may be interpreted as a license to the security forces to restore order at any cost. A 1986 report by Lawyers Committee for Human Rights alleges widespread beatings, shootings, whippings and arrests and torture of children by the security forces. Although South African officials reject the charges, specific detailed allegations have been made of SADF involvement in these activities.[59]

Although the South African Police retain primary responsibility for the suppression of internal dissent, the role of the SADF has become increasingly important in recent years.

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SOUTH AFRICAN LAW 1-9 (1983).

54. The [Johannesburg] Star, June 24, 1985 at 7, col. 1 (international edition). *See also, Army Playing Major Role in Riot Townships,* The [Johannesburg] Star, April 15, 1985 at 1, col. 1(international edition)(briefly describing SADF activities in New Brighton, Zwide, kwaZakhele, and kwaNobuhle townships); *Mob at Uitenhage Sets Young Mechanic on Fire,* April 22, 1985 at 1, col. 1(international edition)(mentioning that a "Defence Force unit fired on a crowd of rioters" in the Eastern Cape, as well as the death of a 22-year-old man in an incident involving the SADF in Langa).

55. Proclamation No. 9877, July 21, 1985, Schedule II, §§ 1(ii), 2.

56. *Id.* at § 3.

57. *Id.* at § 5.

58. *Id.* at § 11.

59. *U.S. Group Charges Wide Beating of Children by South African Police,* N.Y. Times, April 18, 1986, at A4, col. 4.

### 2. *The external Role of the SADF*

The most enduring manifestation of the external role of the SADF has become its 66-year presence in Namibia. Originally legitimate under a League of Nations Mandate, this presence was meant to prepare the territory for eventual self-determination.[60] In violation of the Mandate, South Africa repeatedly sought to annex and incorporate Namibia and refused to facilitate full independence through a Trusteeship agreement after the establishment of the United Nations.[61]

In 1969, the United Nations Security Council first declared this presence to be an illegal occupation.[62] Two years later, the International Court of Justice confirmed this determination,[63] and in 1976 a Security Council Resolution was passed, with United States support, demanding that South Africa end its illegal occupation.[64] A declaration on Namibia, expressing "grave[] concern[] at the threat to international peace and security posed by the continued illegal occupation of Namibia by South Africa," was adopted by the General Assembly on May 3, 1978.[65]

South Africa's illegal presence in Namibia has led to further violations of international law. Atrocities by SADF personnel directed at the civilian population in northern Ovamboland were allegedly intended to stamp out support for the SWAPO guerilla insurgency.[66] Although such accounts are practically impossible to verify, details match in many independent accounts. Namibia is frequently used as a staging point for massive invasions of Angola. Ostensibly "hot pursuit" or preemptive operations have in-

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60. J.H.P. SERFONTEIN, NAMIBIA 21 (1976).

61. LONDON INTERNATIONAL DEFENCE & AID FUND, NAMIBIA: THE FACTS 11 (1980).

62. S.C. Res. 264, 24 U.N. SCOR, Resolutions and Decisions of the Security Council 1-2, U.N. Doc. S/INF/24/Rev. 1 (1969).

63. Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding S.C. Res. 276 (1970), 1971 I.C.J. 16.

64. S.C. Res. 385, 31 U.N. SCOR, Resolutions and Decisions of the Security Council 8-9, U.N. Doc. S/INF/32 (1976).

65. "Declaration on Namibia and Programme of Action in Support of Self-Determination and National Independence for Namibia", adopted by the General Assembly, May 3, 1978 at the Ninth Special Session on the Question of Namibia (copy on file at N.Y.L.S. HUM. RTS. ANN.).

66. "Letter dated July 24, 1979 from the President of the U.N. Council for Namibia to the Secretary-General," U.N. Doc. A/34/382, S/13469 (1979); U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1982, 297-98 (1983).

volved such diverse targets as the Kassinga refugee camp in 1978 and the Gulf Oil depot at Cabinda in 1985.[67] Over 200 people were killed in a 1982 raid alone.[68]Angola has not been singled out for SADF invasion. Since 1980, Swaziland, Mozambique, Zimbabwe, Botswana and Lesotho have also been subjected to SADF raids. In these instances, preempting the ANC guerilla insurgency is generally cited as justification. International law undoubtedly affords nations the right to defend themselves against external aggression.[69]

In the era of guerilla warfare, self-defense is frequently invoked to justify preemptive strikes on foreign soil. The United States used this rationale to justify the 1986 air-strike on Libya although Libya posed no direct threat to United States territory and only an indirect threat to U.S. citizens travelling abroad.[70] Thus it might be argued that raids by the SADF on neighboring territories do not violate international law. However, the clear disapproval of the international community is shown by the litany of condemnatory United Nations resolutions. The U.S. has likewise condemned these actions, although frequently abstaining from U.N. resolutions. After the 1985 Cabinda raid into Angola and a raid on Botswana which took twelve lives, the U.S. recalled Ambassador Herman Nickel "for consultations."[71] This was widely interpreted as a strong gesture of condemnation in the context of the Reagan Administration policy of "constructive engagement" with the South African government. Although some of the SADF's external operations are arguably justified under international law, the overall role of the SADF has provoked the argument that South Africa, per se, constitutes a threat to international peace.[72]

After high-school student protests were forcefully suppressed in Soweto and other black areas in 1976, the World Conference for Action Against *Apartheid* described apartheid as a

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67. *Commando Says Target Was Angola Oil Depot*, N.Y. Times, May 29, 1985, at A2, col. 3; *Captured Commando Speaks Out*, The [Johannesburg] Star, June 3, 1985, at 1, col. 1(international edition).

68. *South Africans Kill 201 in Angola Raid*, N.Y. Times, March 17, 1982, at A3, col. 4.

69. The extent of this right is controversial and beyond the scope of this article.

70. N.Y. Times, April 15, 1986 at A1, col. 2.

71. N.Y. Times, June 15, 1985, at A1, col. 1.

72. Johnson, *Sanctions and South Africa*, 19 HARV. INT'L L. J. 887 (1978).

"flagrant violation of the Charter of the United Nations and the Universal Declaration of Human Rights" and "a crime against the conscience and dignity of mankind."[73] In recognition of the role of the SADF in propagating the system of apartheid, the Conference urged the immediate granting of "political asylum to *bona fide* war resisters and deserters from the *apartheid* armed forces."[74] This recommendation led in 1978, to the passage of U.N. General Assembly Resolution 33/165 which "[r]ecognizes the *right* of all persons to refuse service in the military or police forces which are used to enforce apartheid" and "[c]alls upon Member States to grant asylum" to such resisters.[75] The United States voted in favor of this resolution.[76]

Official U.S. policy statements spanning seven administrations have conceded the link between the SADF and human rights abuses of the apartheid system. Since 1963, the U.S. has voluntarily refused to sell materials to South Africa which might enhance its military capabilities.[77] Even under the Reagan Administration's constructive engagement policy, this longstanding policy remains in effect.[78] In 1985, President Reagan "declared a national emergency to deal with the threat posed by the policies and actions of the Government of South Africa to the foreign policy and economy of the United States"[79] and applied additional military and economic sanctions by Executive Order.[80] This consistent pattern linking the SADF to the human rights abuses of apartheid would make it difficult for the State Department to separate SADF activities from propagation of apartheid

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73. *Lagos Declaration, supra* note 43.

74. *Id.*

75. G.A.Res. 33/165, *supra* note 1 (emphasis added).

76. Third Committee of the General Assembly, Dec. 12, 1978, *supra* note 2, at 27.

77. In a statement to the Security Council on August 2, 1963, United States Representative Adlai E. Stevenson announced that the United States "expect[ed] to bring to an end the sale of all military equipment to the Government of South Africa by the end of th[e] calendar year." Statement by Mr. Stevenson, 49 Dep't St. Bull. 333, 335(1963). Five days later the United States voted for a Security Council resolution calling upon "all States to cease forthwith the sale and shipment of arms, ammunition of all types and military vehicles to South Africa." S.C. Res. 181, 18 U.N. SCOR, U.N. Doc. S/5386 (1963).

78. N.Y. Times, Mar. 20, 1981; N.Y. Times, Mar. 25, 1981.

79. President's Message to Congress Concerning Economic Sanctions Against South Africa, 22 WEEKLY COMP. PRES. DOC. 1262 (Sept. 25, 1986).

80. Exec. Ord. No. 12,532, 50 Fed. Reg. 36,861 (1985).

in the context of the human rights factor.

### B. *The Excessive Punishment Factor*

The State Department application of the *Handbook*'s excessive punishment factor is also subject to challenge. The *Handbook* uses the term "common law offence"[81] in connection with the "excessive punishment" rule.[82] The State Department equates "common law offense" with "crime"[83] but the terms are not necessarily interchangeable. "Crime" in a narrow sense may mean only the contravention of a statute describing undesireable behavior. The term "common law offense" incorporates traditional notions of wrongfulness.[84]

Refusal to serve in the SADF violates the clear language of the South African Defence Act. Under a narrow view this is a crime regardless of the reason for refusal. Treason is a "common law offense" with a long pedigree[85] and refusal to defend one's country may be construed as treasonous. However, if the specific culpability of refusal to serve in the SADF is taken into consideration, an argument can be made for finding no common law offense at all.

Questions of culpability are essentially questions of morality.[86] The theory of natural law purported to operate in this sphere of absolute morality.[87] No theory of absolute moral law is necessary to apply normative considerations in this case. International law certainly comes closer to the moral ideal than the positive law of South Africa, and international law has been very clear on the role of the SADF. In fact, international law views

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81. HANDBOOK, *supra* note 20, at ¶57.

82. *Id.*

83. *In re* W., supra note 4, at 4.

84. *See generally* G. FLETCHER, RETHINKING CRIMINAL LAW, xix-xxiii (1978).

85. When a Man doth compass, or imagine the Death of our Lord the King . . . or if a Man do Levy War against our Lord the King in his Realm, or be adherent to the King's Enemies in his Realm, giving to them Aid and Comfort, in the Realm, or elsewhere . . . . [t]hat ought to be adjudged Treason.

Statute of 25 Edw. 3 (1350); *see also* Arthur Crohagan's Case, 79 Eng. Rep. 891 (K.B. 1634) (applying 25 Edw. 3).

86. H.L.A. HART, THE CONCEPT OF LAW 78 (1961)(identifying the "primary norms" of a system of laws).

87. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152 (1928/29)(*"certain principles of right and justice. . .are entitled to prevail of their own extrinsic excellence."* (emphasis in the original)).

not refusal to serve in the SADF but apartheid itself as the crime.[88] *"Bona fide"*[89] draft resisters, who have sincere political or moral objections to service in the SADF, thus lack the element of culpability essential to a common law offense. Prosecution on account of such conscientious objection would amount to persecution "on account of . . . religion . . . or political opinion,"[90] establishing eligibility for political asylum.

It must be conceded that this argument is not likely to receive serious consideration in agency determinations. Even courts are reluctant to allow testimony on moral justifications for otherwise illegal acts. In the recent trial of eleven church workers accused of providing sanctuary to undocumented aliens from Central America, District Judge Earl Carroll consistently ruled out defense attempts to testify on religious or humanitarian issues or conditions in Central America.[91] Courts have occasionally shown a willingness to consider wrongfulness of conduct as distinct from its criminality,[92] but these instances are admittedly rare.

Moreover, asking the State Department to pass judgment on the morality of foreign draft laws would run counter to general legal and diplomatic precedents. *Chao-Ling Wang v. Pilliod*,[93] for example, held that prosecution by a military tribunal in Formosa of a naval officer for refusal to return to Formosa in accordance with his orders, does not constitute persecution. A serving officer may be distinguished from an inductee but the general rule would probably cover both. As interpreted by INS, this rule is very broad. INS recently issued an order for the deportation of a Nicaraguan conscientious objector despite the fact that President Reagan has denounced the Sandinista army as a "brutal Communist aggressor."[94]

Even if the State Department and INS are not convinced by

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88. *Lagos Declaration, supra* note 43.

89. G. A. Res. 33/165, *supra* note 1.

90. 8 U.S.C. § 1101(a)(42)(A)(1982).

91. *Testimony Ended in Trial on Aliens*, N.Y. Times, Apr. 2, 1986 at B8, col. 1.

92. U.S. v. Meadows, 598 F.2d 984, 993 (5th Cir. 1979)(Rubin, J., dissenting in part).

93. 285 F.2d 517 (7th Cir. 1960).

94. *Nicaraguan Fights Ouster by U.S., Citing Military Draft in Homeland*, N.Y. Times, Mar. 31, 1986 at A15, col. 5; *but cf.* N.Y. Times, Apr. 17, 1986 at A1, col. 1, at A28, col 1(discussing Justice Department draft procedures establishing a presumption that aliens fleeing "totalitarian" countries have a well-founded fear of persecution).

the common-law offense rationale, a good-faith application of both the *Handbook* factors should result in reversal of current State Department policy. The powerful human rights considerations must surely outweigh the U.S. domestic law proportionality comparison. If application of both factors does not result in reversal of State Department policy, we have come full circle — a federal court is unlikely to set aside this determination. In one important respect, however, it is a victory. The State Department is forced to make explicit findings on the role of the SADF and its effect on human rights. These findings may then be tested in the forum of public opinion and in the congressional arena. The mere prospect of attempting to justify a finding that the role of the SADF is compatible with international human rights, may lead to a voluntary reversal of the present policy.

Although exposure to public scrutiny may not appear to be a very powerful remedy, the unique pariah status of South Africa has considerable force in the realm of political embarrassment. For example, Jeane Kirkpatrick met with the chief of South African military intelligence while she was U.S. delegate to the U.N., in spite of the U.S. policy against granting visas to high-ranking South African military officers. Initially the State Department denied that the meeting had taken place, but later claimed that Mrs. Kirkpatrick had been unaware of the affiliation of the South African official. The State Department was quick to confirm that the policy against granting visas remained in full force.[95] The force of public opposition to apartheid was demonstrated by the recent sanctions measures enacted against South Africa. President Reagan vetoed the measure,[96] but for the first time in his presidency, the veto was overridden by Congress.[97] A quasi-political remedy of this sort may not be a per-

95. *State Dept. Cites 'Omission' in South Africans' Entry,* N.Y. Times, Mar. 20, 1981, at A5, col. 1; *White House Says Mrs. Kirkpatrick Didn't Know South African's Role,* N.Y. Times, Mar. 25, 1981, A4, col. 3.

96. President's Message to the House of Representatives Returning H.R. 4868 Without Approval, 22 WEEKLY COMP. PRES. DOC. 1281 (Sept. 26, 1986).

97. Comprehensive Anti-Apartheid Act, Pub. L. No. 99-440, 100 Stat. 1086 (1986). The Act states that Congress finds "the policy of apartheid [to be] abhorrent and morally repugnant," § 110(a)(1), 100 Stat. 1093, and commits the United States to a policy of assisting the "victims of apartheid," § 103(b)(3), 100 Stat. 1090, and "aiding individuals or groups in South Africa whose goals are to . . . foster nonviolent legal or political challenges to the apartheid laws," § 103(b)(3), 100 Stat. 1090. Although South African draft resisters do not fall within either of these categories (unless "victims of apartheid" is

fect remedy, but it is perhaps an appropriate one, given the political essence of asylum requests.

## CONCLUSION

United States immigration law and international law strongly support the claim of South African draft resisters to political asylum in the United States. Current State Department policy does not recognize SADF draft resistance as sufficient grounds for political asylum. Judicial intervention to force reconsideration of this administrative determination would show that the State Department policy is neither legally nor politically defensible.

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construed very broadly), granting political asylum to such resisters is clearly compatible with the spirit of the Act.