

NEGOTIATIONS, THE TRANSITION AND THE ROLE OF THE INTERNATIONAL COMMUNITY

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1. BACKGROUND

- 1.1 The unique set of circumstances constituting the issue of apartheid has resulted in the international community at the regional and the international level adopting the most profound political and legal responses to deal with this threat to international order and morality. Such a response has involved over 300 resolutions since 1946 condemning apartheid as a breach of the right to self-determination and as a crime against humanity, has provided a legal validation for the armed struggle and a protected status for the combatants of the liberation movement.
- 1.2 In addition, the United Nations, the Organisation of African Unity, other regional bodies and countries have used this legal and moral consensus for the imposition of various forms of sanctions, including the first ever decision by the Security Council in 1977 to impose a binding arms embargo against a member State as such sales constituted a threat to international peace and security.
- 1.3 Throughout this period and especially with the intensification of repression, the international organisations have demanded the dismantling of the apartheid system, rejected the claim that apartheid was a matter of domestic jurisdiction, expelled apartheid South Africa from membership of international organisations and, in 1974, withdrew the credentials of the apartheid regime at the General Assembly of the U.N. This resulted in the culminating finding that the apartheid regime was illegitimate and had no authority to speak for the people of South Africa.
- 1.4 It was on this basis that the Security Council of the UN - more muted than the General Assembly because of the threat of the veto by apartheid's traditional allies - made its historic finding that the so-called new constitution of South Africa of 1983 runs counter to the UN Charter and was therefore null and void. Such a finding of nullity is without parallel in international law and relations and provided an even stronger basis for international intervention in South Africa and support for the struggle.
- 1.5 In order to assist in the historic task which the international community has undertaken to assist in the removal of apartheid, the Organisation of African Unity and the General Assembly of the United Nations adopted the now well known Declarations supporting the ending of

apartheid by negotiations. These Declarations reflected the close relationship between a regional organisation and the international community, increasingly displayed also in other theatres. The Declarations identified the principles to govern a new constitutional order in South Africa, the creation of a climate of opinion for free political discussion and the further route towards the adoption of a constitution, including an interim government (OAU).

- 1.6 Both Declarations anticipated a continued role for the international community in 'ensuring a successful transition to a democratic order' (but the parties must agree on such a role).

2. THE ATTITUDE OF THE PARTIES

- 2.1 The transition is the crucial period, in all countries. Crucial for the National Party perspective on the transitional process is that the process should be embarked upon according to the present constitutional order. This means that the current regime remains fully in power and continues to have the monopoly of power, especially concerning the maintenance of law and order.
- 2.2 Responding to the calls for an interim government, the regime proposes some form of interim participation of the 'extra-parliamentary' groups in the decision-making process, such as the holding of an informal summit of leaders, the forming of specialised working groups or the use of the envisaged 'multi-party conference' as a channel to convey to the government advice, requests or criticism concerning interim government action. Another suggestion is the appointment of representatives of extra-parliamentary groups to cabinet positions. Complaints about violence would be investigated by a Standing Committee on Violence which would advise the government.
- 2.3 For drawing up a new constitution, the National Party proposes the holding of a multi-party conference where parties with 'proven' support would be entitled to participate. The conference would have an open agenda but should first of all discuss the composition, functioning and decision-making process of the actual constitutional negotiation conference and work out principles to be embedded in a constitution. A new constitution would have to be adopted in legal continuity with the present constitutional order i.e. by a referendum among the white electorate followed by a general referendum, provided that the first result is positive.
- 2.4 The position of the ANC is well known. We want an interim government of national unity, with powers transferred from

the present constitutional arrangements, to govern the country in the short interim period. The mechanism to draw up a new constitution should follow the example of Namibia i.e. an elected Constituent Assembly. In addition, there is now reference to the role of the international community in relation to the transition period. In his opening address to the National Conference in July, the President of the ANC said:

'... It would be important that we discuss the question of the possible role of the international community during the transitional period, the role it would play to expedite this process so that we move forward with minimum delay towards the accomplishment of our goals.'

- 2.5 The role that the international community could play, though the Organisation of African Unity and, especially, the United Nations is concerned largely with such matters as monitoring the security forces, peace-making through mediation acting as a verification institution or even taking on the powers of an interim administration.
- 2.6 But what is of importance is to realise that the UN role is no longer limited to peace-keeping forces as in the Middle East, to keep warring factions apart or even to supervise a cease-fire, as in Iraq. Over the past four years, a sophisticated multi-dimensional role has been developed to deal with a variety of situations of transition which will be described now.

3. UN TRANSITION ROLES

- 3.1 The nature of the international role has undergone a great deal of change in recent years. The best way of looking at the varied way the international community has been requested to assist is to look at some situations.

3.2 NAMIBIA

Following the adoption of resolution 435 in 1978, the UN undertook to supervise the process of elections towards a Constituent Assembly. The Group of 5 states negotiated supplementary agreements with the front line States, South Africa and SWAPO. These were incorporated into the overall agreement. The lesson of this stage of the negotiations is that there must be a single comprehensive document for the sake of clarity and interpretation.

The UN Transition Assistance Group (UNTAG) consisted of a scaled down military contingent which monitored the cease fire and movement of troops. A civilian police unit, together with local police, was responsible for law and order. Civilian observers supervised the election powers carried out by South Africa - from the election

campaign (including equal access to the media, not done satisfactorily) to the final counting of votes, to guarantee a free and fair election. The Special Representative of the Security Council had wide powers on such matters as ensuring the abolition of discriminatory legislation and the release of prisoners. Part of UNTAG's responsibility was the repatriation of Namibian refugees under the auspices of the UNHCR and the Namibian Council of Churches. Finally the Special Representative had to certify to the Security Council that the elections were fair and free.

3.3 WESTERN SAHARA

Contrary to its role in Namibia, the UN for the first time will not only observe but organise the whole election process in Western Sahara, under the agreement reached with Morocco and POLISARIO in 1991. The UN will establish the electoral procedure, identifying and register persons entitled to vote, monitor the election campaign and ballot, announce the outcome of the referendum - on condition that it was fair and free - and finally guarantee the implementation of the result.

- 3.4 The above examples are 'colonial' ones; in addition, the UN has been recently involved in conflicts of a certain international dimension where the core of the issue is the internationally supervised change of the internal political and legal order. These arrangements are for:

3.5 CAMBODIA

The Permanent Members have agreed to set up a UN Transitional Authority in Cambodia (UNTAC) in 1992 which will have authority which fall short of a government: UN officials will take over key positions in the national administration for monitoring and controlling all administering bodies. They will investigate complaints against civil servants and human rights violators. Military observers will monitor and verify the implementation of the cease fire. The soldiers of the parties to the conflict will be reduced in number and confined to specified areas and their weapons stored under the supervision of the UN. Over 300,000 refugees will be repatriated under UN auspices and the UN Development Programme will assess and meet short-term infrastructural needs. The main job of UNTAC, as in Western Sahara, is the organisation and implementation of free and fair elections for a Constituent Assembly.

- 3.6 In Central America, the presidents of countries there adopted a peace plan for democracy, national reconciliation and the holding of fair and free elections. These presidents invited the UN and the Organisation of

American States to send observers to monitor compliance with the agreements and the holding of elections. As a result, the Security Council set up in 1989 the UN Observer Group for Central America to verify compliance with the agreements. The democratisation of individual states has been at the request of these states.

3.7 NICARAGUA

The independent State of Nicaragua requested the Security General of the UN to verify the election process in Nicaragua. The task of ONUVEN was to: verify that political parties were fairly represented in the Nicaraguan Supreme Electoral Council; verify that political parties enjoyed complete freedom of organisation and mobilisation; that political parties had equal access to radio and television; verify that the electoral registers were properly drawn up and to report any complaint or irregularity to the Electoral Council. ONUCA also had responsibility over the cease-fire between the Nicaraguan arms and the Contras and the demobilisation of the Contras. ONUCA's work was carried out to the satisfaction of all.

3.8 EL SALVADOR

A comprehensive peace plan is about to be announced after a decade of civil war when over 50,000 have died. The peace plan will include a cease-fire, agreements on constitutional and electoral reform, reform of the judiciary and the armed forces, based on full respect for human rights and economic justice. An agreement on respect for human rights has now been reached. In 1991, the Security Council established the UN Observer Mission in El Salvador (ONUSAL). Its initial mandate is to verify compliance of the parties with the human rights agreement, promote human rights and investigate the violations of human rights and to make recommendations for the elimination of these violations. It will also remodel Salvadorean society by making recommendations on the reform of the army, the judiciary, the security system. It is therefore the first peace-keeping operation with a mandate in the field of human rights.

- 3.9 A similar process as in El Salvador is occurring in Guatemala. The Government and the resistance movement have signed an agreement to deal with similar topics as in Salvador. The verification of the agreement will be to the National Reconciliation Commission, the UN and, possibly another international organisation such as the OAS.

- 3.10 Haiti's crisis after the fall of Duvalier arose from the fact that successive governments came into power by coups

d'etat or by fraudulent elections. As a result, the elections held in June 1990 were supervised by the UN through the UN Observation Group for the Verification of Elections in Haiti (ONUVEH). Its mandate was to advise the electoral board in establishing a credible electoral process in order to guarantee democratic elections, support the local security forces to draw up an election security plan and to uphold law and order on election day.

The UN mission was in the form of a technical assistance programme rather than peace-keeping. But it ensured that the elections were fair. International surveillance was crucial.

3.11 ANGOLA

In May 1991, the Government of Angola and UNITA signed the "Peace Accord for Angola" consisting of 4 documents, providing for a comprehensive political settlement. In one of these documents, UNITA and the government agree that fair and free elections under the supervision of international observers who will certify that the elections are fair and free, will be held. The Government will amend the Constitution and draft laws repealing the electoral powers. There will be a single army and its neutrality will be guaranteed by the Angolan parties with the support of the international monitoring group.

The monitoring system is complex, consisting of both national and international elements. The primary responsibility lies with the parties directly involved, with a Joint Political-Military Commission of the two parties, together with the US, Portugal and the USSR as observers. The PMC does not replace the Angolan Government but has the powers (decision-making by consensus) to guarantee the conditions of peace for the holding of free, fair, multi-party and internationally verifiable elections.

The Security Council on May 30, 1991 enlarged the mandate of the Cuban withdrawal supervision group. UNAVEM will not monitor compliance with the agreements. Its function is more modest: it will verify that the national monitoring groups are assuming their responsibilities.

Upholding law and order remains the responsibility of the Government of Angola during the transition period. However, the neutrality of the police will be supervised by teams of monitors, made up of two members designated by the Government and by UNITA. They will visit police facilities, examine police violations of political rights. UN police observers have the task of verifying and assisting the monitoring teams. UNITA will be allowed to participate in the police force. To achieve this, vacancies in the police shall be filled by personnel designated by UNITA.

Finally, the peace process will lead to the holding of free and fair elections under international supervision during 1992. The role and tasks of the UN will be determined by the parties concerned.

4. ROLE FOR THE INTERNATIONAL COMMUNITY

- 4.1 The experience of Zimbabwe and Namibia, during their transition, shows that the roles of the OAU and the UN have been of considerable importance. In the case of Zimbabwe, the Commonwealth and the OAU ensured that the legal authority, Britain, effectively supervised the de facto power, the Muzorewa-Smith regime. In the case of Namibia, there can be little doubt that the UN, under pressure from various parts of the international community, ensured that the electoral law, the maintenance of order and the proper organisation of the ballot were changed in order to ensure a fair and free election.
- 4.2 The experience of other countries in recent years has shown the variety of ways in which the international community has provided assistance.
- 4.3 What follows on South Africa is the concluding and summary part of a paper prepared by a diplomat-scholar which provides insights into a possible role for the UN. The paper itself is nearly 40 pages long.
- 4.4 "UN practice clearly establishes the competence of the United Nations concerning the situation in South Africa and its overcoming. Insistence on the principle of non-intervention is therefore legally totally unfounded.
- 4.5 To exercise pressure on the South Africans to comply with the demands formulated in the resolutions, the Security Council adopted a mandatory arms embargo against South Africa and subsequently urged UN member states to adopt additional sanctions. These measures were aiming at the eradication of apartheid and at the attainment of peaceful change. With important changes in the policy of the NP-government and its embarking on reform policy it has to be decided, when the moment of lifting of sanctions has been reached. Whereas the arms embargo can only be lifted by a new resolution of the Security Council to that end, the question of lifting other sanctions principally lies within the competence of the individual countries.
- 4.6 In the Declaration on South Africa 1989, the international community unanimously decided, that sanctions shall not be lifted, until there is clear evidence of profound and irreversible changes in South Africa. This is short of the Harare Declaration of 1989, according to which

sanctions shall not be lifted until the adoption of a new constitution.

- 4.7 In recent months, however, one could notice a crumbling of sanctions against South Africa, taking away from the democratic forces what they describe as an important weapon in the struggle for a democratic constitution. The ANC is therefore adopting a more flexible position, trying to bind the lifting of specific sanctions to the achievement of specific objectives in the transition process. Nevertheless, sanctions seem to be an outgoing model which during the proper negotiating process will not be effectively in place any longer to be instrumentalized as a leverage. But in general, it seems that sanctions are an instrument too superficial and crude to be employed as a means of pressure on the government with regard to specific and subtle questions during the transition process.
- 4.8 Therefore, the next step is to explore if alternative modes of participation of the international community in the transition process of countries are available. The most prominent instruments for such international involvement are so-called United Nations Peace Keeping Operations. An analysis of examples like Cambodia, Namibia, Western Sahara, Central America (Nicaragua, El Salvador, Guatemala), Haiti, and Angola shows, that UN peace keeping operations are employed not only in the aftermath of classical international conflicts but also in the overcoming of situations of i.a. civil war, foreign intervention, or unstable governance. This is especially true in cases or countries, where a government, being de facto in power, but, with its legitimacy being fundamentally questioned, shows its readiness to transform the political system of the country into a participatory democratic way of governance.
- 4.9 In order to get this process recognised both nationally and internationally, such a transition process must take place under conditions of full transparency and equal participation of all sectors of the society. In a growing number of cases there is an agreement between the conflicting parties to deploy international mechanisms of monitoring and assistance to that end.
- 4.10 International presence in countries of civil war and long political repression offer the population of a country the trust in their right to free political expression. International bodies of mediation boost the process of confidence building and consensus finding among the parties concerned. International observers are, finally, important "watch dogs" over the compliance of the parties with the agreements reached. Breaking provisions of the agreement on the mechanism of transition is thus not only

an act against one's partner in the agreement, who, perhaps, does not have the means and possibilities to react adequately, but against the international community and its institutions itself. Thereby a higher degree of observance and implementation of the transitional agreements can be reached.

- 4.11 It can well be stated, that the situation in SA constitutes a case of fundamental change: The white minority government is de facto effectively in power but governs on the basis of a constitution which the Security Council declared null and void. Therefore, in principle, the case of South Africa does not differ from cases, where so-called multi-dimensional peacekeeping operations were deployed.
- 4.12 Moreover, from the point of view of the international community the transition process in a country of such importance as South Africa should not be left to the power game of South Africans alone - having in mind the actual unequal distribution of power in the country. The international community has to secure an internationally acceptable solution, i.e. in line with international standards of democratic governance and basic human rights. In South Africa, there seems to exist a lack of neutral, non-partisan institutions within the country, which have both the moral authority among the parties and the political power to act as an effective mediator, to find binding decisions on concrete debated issues according to agreements between the parties, and to enforce them.
- 4.13 Moreover, with regard to transitional security mechanisms, for the same reasons there is no force inside South Africa in sight which seems to be suited for upholding law and order during transition in a non-partisan and unchallenged way. A possible role for the United Nations would therefore probably not be one of actually conducting the implementation of the agreement(s) on the transition process but to act as an additional accompanying mediation and verification institution
- 4.14 The paper tries to give some recommendations on possible features of UN participation in the transition process: As in many other cases, the UN Secretary-General could appoint a Special Representative on South Africa who participates in the capacity of an observer in the talks about talks and in the negotiations. He may convene negotiations, and could submit mediating proposals to overcome deadlocks. In the agreements on the transition mechanism the United Nations could be given a guaranteeing role, securing the proper implementation of the arrangements. A rather limited United Nations presence could monitor and verify the compliance of the mandated authorities with the tasks and obligations assigned to

them under the agreements and use its good offices in the case of disagreement on the interpretation and application of the agreements. The United Nations could be used to secure the impartiality of the transitional government, be it by monitoring the de facto government, be it by being included in an interim government.

- 4.15 The paper also states, that the deployment of a large-scale UN peace keeping force to put an end to township violence is unrealistic and probably even not recommendable. The United Nations could, however, supervise and secure the impartiality of the transitional security mechanism. The form of UN participation could be to expand national commissions of inquiries to include UN experts, or to deploy a UN mission of experts. International investigation of this issue would result in the internationalisation of the question of violence and would give this burning issue a more prominent place with regard to the evaluation of the overall international community's policy towards South Africa.
- 4.16 The strongest arguments for UN involvement can be found concerning the holding of general, free and fair election or to the holding of a referendum. Since in the elections the partners at the negotiating table are becoming competitors for power in the new political system all means will be used to influence the elections in one's favour and to dominate the electoral process. Of course, the party de facto in power has many advantages in that respect. One measure to meet this problem is to entrust a national body consisting of representatives of all political organisations with the implementation of elections. Additionally, in most cases international observers are invited to give a judgement on the character of the elections and increasingly, the United Nations are requested to assist in the election process. As it is described in Chapter III, UN participation in the electoral process can take different forms.
- 4.17 In the case of South Africa, probably a national electoral body will be formed. In addition, the United Nations could be invited to monitor and surveille the proper implementation of the elections. Such a UN operation could be mandated to monitor all aspects of importance for the holding of free and fair elections, but also to secure a climate free of intimidation and fraud by a limited presence on the ground.
- 4.18 UN participation in the transitional process will only take place, however, on the basis of an agreement among all parties and a formal request by the current government. Therefore the UN Declaration on South Africa of 14 December 1989 requests the parties concerned to conclude an "agreement on the role to be played by the

international community in ensuring a successful transition to a democratic order".

- 4.19 As far as the ANC is concerned, there seems to exist a growing sympathy with a possible UN involvement in the transition process can be implemented by South Africans alone was to some extent based on the belief that the NP-government is a good faith negotiating partner. This belief was fundamentally shaken in recent months i.a. due to the NP-government's dealing of obstacles of negotiations and the "Inkathagate". Increasingly, the ANC regards an international presence in South Africa as a useful leverage of international pressure to achieve the aim of a united, democratic, and non-racial society based on the principle of one person one vote. United Nations participation in the transition process would prevent the removal of the question of South Africa from the international agenda in its most crucial phase.
- 4.20 So far the NP-government as the stronger actor in the national power game was against a possible internationalisation of the transition process.
- 4.21 As it was shown in chapter III, in an increasing number of countries, where de facto governments with a questionable legitimacy try to be admitted to the international community as a fully accepted member by embarking on a policy of fundamental reform, the United Nations are invited to assist in the transition process. From this follows, that the good faith of a de facto government which is strictly opposed to transparency and opening up for the international community, has to be seriously doubted. Considering the "Inkathagate" and other dubious developments a clear cut-dismissal by the NP-government of demands of the ANC to involve the United Nations in the transition process will be understood in that direction both by South Africans and by the international community.
- 4.22 In the past, the NP-government was openly hostile towards the United Nations. Since 1990, however, the NP-government is making efforts to prove its commitment to fundamental change and is co-operating with the United Nations: In June 1990, a UN mission visited South Africa to investigate the question of existence of irreversible and fundamental changes called for in the UN Declaration of 1989. They fully co-operated with the mission and thus accepted the principle of international evaluation of the political situation in South Africa. A second UN mission will take place in the near future. Furthermore, the NP-government is currently negotiating an agreement with the UNHCR on the latter's participation in the repatriation of refugees. Maybe this is the point of departure for a more extensive United Nations presence in South Africa in the post-sanctions era".