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# Human Rights, Humanitarian Law and the South African Conflict

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John Dugard\*

## I. THE CASE FOR APPLICATION OF HUMANITARIAN LAW IN SOUTH AFRICA

In recent years, attempts have been made to invoke the principles of wartime humanitarian law in the South African conflict to prevent the execution of African National Congress ("ANC")<sup>1</sup> guerrillas found guilty of capital crimes by South African courts. Political opponents of the South African regime have demanded either full prisoner-of-war status<sup>2</sup> or some recognition of combatant status for ANC guerrillas in order to avoid the imposition of the death penalty. This Study examines whether modern humanitarian law contains principles that might be invoked to stop executions of this kind and what the prospects are for successful invocation before the courts of South Africa.

### A. *The Death Penalty in South Africa*

At a time when most legal systems are abandoning the death penalty as a relic of a barbarous age, South Africa has increased its use of capital punishment.<sup>3</sup> In South Africa, several crimes, including common law treason and statutory terrorism,<sup>4</sup> carry a nonmandatory death penalty. Conviction for murder brings with it a mandatory death sentence, unless the court finds extenuating circumstances in favor of the accused.<sup>5</sup> Most of those executed had been found guilty of murder in situations unconnected with political conflict. However, over the years, a number of ANC guerrillas have been tried for treason and

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1. The ANC is a widely supported liberation movement which has been outlawed by the South African government.

2. From 1983 to 1984, I conducted a survey of attitudes among South Africans towards international law which showed that most blacks believed that ANC insurgents should be treated as prisoners of war. Dugard, *The Conflict between International Law and South African Law: Another Divisive Factor in South African Society*, 2 S. AFR. J. HUM. RTS. 1, 17 (1986).

3. See Bruck, *On Death Row in Pretoria Central*, NEW REPUBLIC, July 13-20, 1987, at 18 (comparing capital punishment in South Africa and the United States).

4. Internal Security Act No. 74 of 1982, § 54(1), STAT. S.A.—*Criminal Law & Procedure*.

5. Criminal Procedure Act No. 51 of 1977, § 277, STAT. S.A.—*Criminal Law & Procedure*. The annual number of executions has fluctuated over the past years. In 1987, the execution of 164 persons in one year set a record in South Africa. AMNESTY INTERNATIONAL, REPORT 1988, at 71 (1988). 103 persons were executed between January and mid-October, 1988. Weekend Argus Reporter, Oct. 15, 1988.

murder arising out of actions taken with the aim of overthrowing the current regime. They have often been convicted and executed.<sup>6</sup>

In modern South Africa, a society committed to the death penalty for ordinary, nonpolitical killings, clemency for those found guilty of political killings cannot easily be expected. If an unknown murderer must hang for some crime which has not attracted any publicity, how can the courts empowered to pass sentence of death, and the executive entrusted with power of reprieve, spare an ANC guerrilla whose homicidal actions have received the full attention of the media? Two possibilities to institute more humane treatment of ANC combatants are imaginable. First is abolition of the death sentence in all cases.<sup>7</sup> Unfortunately, this solution remains a distant dream for South Africa as the abolitionist cause enjoys little public support. Second is the recognition of a special status for ANC combatants<sup>8</sup> under contemporary international humanitarian law which would exempt combatants from the death penalty.

This Study will consider the second option. Although it seems completely unacceptable to the South African regime at present, it is not too farfetched to contemplate a time when the incumbent regime may realize that the execution of its political opponents seriously obstructs the possibility of national reconciliation. To foster a climate of negotiation, the government may choose to invoke the norm of international humanitarian law governing the treatment of captured combatants.

### *B. Classification of the Conflict: Human Rights or Humanitarian Law?*

Before examining the applicability of norms of humanitarian law to the South African conflict, it is necessary to classify the conflict. Is it merely an internal conflict, involving a violation of human rights? Or has it reached the dimensions of an armed conflict, arising from internal conflict and external intervention, which warrants the application of some of the norms of humanitarian law?

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6. In June 1983, three ANC combatants—Simon Mogerane, Jerry Mosololi and Marcus Motaung—were executed, despite pleas for mercy from the UN Security Council and a wide range of other bodies. See Dugard, *supra* note 2, at 18.

7. This is the solution adopted by Israel for the occupied territories. Order Concerning Local Courts No. 268 (Death Penalty), 14 C.P. & O. 537 (Collection of Proclamations and Orders, issued by the Military Government in the Region of Judaea and Samaria, published in Arabic and Hebrew) (1968), cited in ISRAEL NATIONAL SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, *THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL* 25, n.26 (1985).

8. The Pan Africanist Congress ("PAC") is also recognized by the Organization of African Unity and the United Nations as a South African liberation movement. Obviously, the PAC should be entitled to the same benefits extended to the ANC. The ANC is singled out for special attention in this Study because its members have been the focus of the debate over prisoner-of-war status for combatants belonging to national liberation movements.

If the situation constitutes an internal conflict, international human rights norms provide the only extrinsic legal order to which to appeal. In practice, however, these standards offer little comfort to the ANC combatant put on trial for treason, murder or some other capital crime. Indeed, human rights standards do no more than ensure state compliance with due process requirements at the trial.

If, on the other hand, the situation is classified as an armed conflict to which the norms of international humanitarian law apply, ANC combatants may qualify for prisoner-of-war status or, alternatively, some lesser status which ensures that they are not executed for acts committed on behalf of a national liberation movement.

Critics of the ruling regime have alternately labeled South Africa as a society in the early stages of civil war or as a society at war with itself.<sup>9</sup> The suggestion that the South African situation qualifies as a type of war was, however, given new credibility in 1988 when a Lieutenant-General in the South African Defense Force stated in legal proceedings that "a war in which the Republic of South Africa . . . is engaged actually prevails within the territory of South West Africa and elsewhere in Southern Africa."<sup>10</sup> Although the court refused to accept that a state of war prevails in South Africa, the statement provides confirmation of the view that the level of conflict has escalated beyond that of ordinary internal turmoil. The government is not yet prepared to accept the legal implications for its armed opponents of a state of war categorization. If the government accepts that it is engaged in a war, the door is surely open to the authorities to confer some status other than that of "common criminal" on those engaged in the conflict.

## II. WARS OF NATIONAL LIBERATION AND HUMANITARIAN LAW

International humanitarian law, which seeks to introduce humane welfare considerations into the conduct of war, has evolved to keep pace with political developments relating to armed conflict. In particular, it has responded to the demands of decolonization and to the frequently made claim that national liberation movements are entitled in law to use force to assert their right to self-determination.<sup>11</sup>

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9. See Borrowdale, *The Law of War in Southern Africa: The Growing Debate*, 15 COMP. & INT'L L.J. S. AFR. 41 (1982).

10. Opposing Affidavit of J. van Loggerenberg at 17, End Conscriptioin Committee v. Minister of Defence, No. 88/2870 (Cape Prov. Div.) (unreported decision) (available through the Centre for Applied Legal Studies ("CALs"), Johannesburg, South Africa). This submission was rejected by the court in its judgment of October 14, 1988.

11. For a comprehensive study of this subject, see H. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS (1988).

The four Geneva Conventions of 1949<sup>12</sup> ("Conventions," "Geneva Conventions"), which expound most of the principles of contemporary humanitarian law, apply to international conflict categorized as "war" or "armed conflict."<sup>13</sup> Wars of national liberation, according to these Conventions, fall into the category of internal conflict. Thus the combatants of national liberation movements—"freedom fighters" or "terrorists," depending on one's perspective—are classified as violators of national law. These armed combatants are subject to punishment under national law, and are not categorized under the Third Geneva Convention<sup>14</sup> as prisoners of war who are immune from prosecution under municipal law.

### A. Protocol I

The failure of the Geneva Conventions to encompass wars of national liberation, which currently constitute a major area of conflict, resulted in the 1977 addition of two Protocols ("Protocol I," "Protocol II") to the Conventions.<sup>15</sup> Article 1(4) of Protocol I extended the protective principles of the Geneva Conventions to cover

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>16</sup>

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12. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [all four conventions jointly hereinafter Geneva Conventions].

13. Geneva Conventions, *supra* note 12, common art. 2; *see also* I. DETTER DE LUPIS, *THE LAW OF WAR* 16-19 (1987).

14. Such persons are however entitled to the minimum standard of treatment contained in the Geneva Conventions, *supra* note 12, common art. 3.

15. Protocol I Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 16 I.L.M. 1391, U.N. Doc. A/32/144 [hereinafter Protocol I]; Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 16 I.L.M. 1442, U.N. Doc. A/32/144.

16. Protocol I, *supra* note 15, art. 1(4).

In addition, Protocol I relaxes the definition that establishes combatants as prisoners of war.<sup>17</sup> In order to ensure that both parties to a conflict apply these new rules, Protocol I provides that a national liberation movement may become a party to the Conventions and Protocol I by means of a unilateral declaration deposited with the Swiss Federal Council.<sup>18</sup> By the beginning of 1988, seventy-three states had ratified or acceded to Protocol I.<sup>19</sup>

### B. *The ANC and Protocol I*

The drafters of Protocol I intended it to apply to the ANC as well as South Africa. Several resolutions of the United Nations testify to the expectation that ANC combatants will be treated as prisoners of war.<sup>20</sup> The ANC also sees itself as engaged in an international war and not an internal conflict. Representatives of the ANC attended three sessions of the 1974–1975 Diplomatic Conference on Humanitarian Law, which produced the 1977 Protocols. In addition, in 1980 ANC President Oliver Tambo delivered to the President of the International Committee of the Red Cross a declaration which states:

The ANC of South Africa hereby declares that it intends to respect and be guided by the general principles of international humanitarian law applicable in armed conflicts. Wherever practically possible, the ANC will endeavor to respect the rules of the four Geneva Conventions of 1949 for the victims of armed conflicts and the 1977 additional Protocol I relative to the protection of victims of armed conflicts.<sup>21</sup>

South Africa has not signed Protocol I. In light of discussions leading to the adoption of the treaty, several scholars have argued for recognition of a rule of customary international law which extends the principles of humanitarian law to conflicts involving national liberation

17. The requirements laid down in 1949 appear in article 4 of the Third Geneva Convention, *supra* note 12. Combatants qualify if they are under a responsible command and subject to an internal disciplinary system. Protocol I, *supra* note 15, art. 43. Furthermore combatants must "distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack." This last requirement is met when the combatant carries arms openly during or immediately prior to each military engagement. *Id.* art. 44.

18. Protocol I, *supra* note 12, art. 96.

19. *New Zealand Ratifies the Protocols*, 263 INTERNATIONAL REVIEW OF THE RED CROSS 185, 186 (Mar.-Apr. 1988).

20. *See, e.g.*, G.A. Res. 72A, 39 U.N. GAOR Supp. (No. 51) at 40, U.N. Doc. A/39/51 (1984); G.A. Res. 206, 35 U.N. GAOR Supp. (No. 48) at 29, U.N. Doc. A/35/48 (1980); G.A. Res. 2395, 33 U.N. GAOR Supp. (No. 18) at 19, U.N. Doc. A/72/8 (1968). These resolutions call upon South Africa to accord prisoner-of-war status under the Geneva Conventions to captured ANC combatants.

21. *Cited in Borrowdale, supra* note 9.

movements.<sup>22</sup> Despite these assertions, South Africa's persistent objections to Protocol I render it doubtful whether such a rule binds it, particularly with respect to the ANC.<sup>23</sup>

### III. PROTOCOL I BEFORE SOUTHERN AFRICAN COURTS<sup>24</sup>

Although South Africa has not signed Protocol I, lawyers have raised the argument in Southern African courts that the broad principles of Protocol I are binding on domestic courts.<sup>25</sup> In some cases, advocates have asserted that these principles exclude the competence of a municipal court to try ANC combatants. In other cases, defense counsel has more modestly proposed that the principles articulated in Protocol I should be taken into account in the mitigation of sentences.

#### A. *The Jurisdictional Issue*

Two cases illustrate the manner in which attorneys have used Protocol I to deny the jurisdiction of the court. In 1985, four ANC members arraigned on charges under the Internal Security Act<sup>26</sup> refused to plead, stating that they did not recognize the jurisdiction of the court. One of them, Norbert Buthelezi, read the following statement to the court:

The courts are a loyal and faithful arm of the very government the African National Congress is fighting to destroy. We therefore contend that this court cannot adjudicate in a dispute between ourselves and the government. It is absolutely impossible for the government to be an impartial judge in its own case. We received military training in the art of warfare in the people's army "Umkonto We Sizwe" [military

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22. Cassese, *The Geneva Protocols of 1977 on Humanitarian Law of Armed Conflict and Customary International Law*, 3 UCLA PAC. BASIN L.J. 55 (1984); Cassese, *Wars of National Liberation and Humanitarian Law*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 313 (C. Swiniarski ed. 1984); Penna, *Customary International Law and Protocol I: An Analysis of Some Provisions*, in *id.* at 201; Ginther, *Liberation Movements*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 245 (1981).

23. See Cassese, *Wars of National Liberation and Humanitarian Law*, *supra* note 22, at 322-23.

24. The term "Southern Africa" refers to the area including Namibia (called "South West Africa" by the South African government) and South Africa. Decisions from South West African courts have had precedential value in the Republic of South Africa. It is uncertain what effect such opinions will have in South African courts after Namibia's transition to independence.

25. For further articles on this subject, see Murray, *The Status of the ANC and SWAPO and International Humanitarian Law*, 100 S. AFR. L.J. 402 (1983); Murray, *The ANC in Court: Towards International Guidelines in Sentencing*, 14 J. S. AFR. STUD. 140 (1987) [hereinafter *ANC in Court*].

26. Internal Security Act No. 74 of 1982, § 54, STAT. S.A.—*Criminal Law & Procedure*. This statute creates a number of crimes of statutory treason, such as "terrorism," "subversion" and "sabotage."

wing of the ANC]. In that case we regard ourselves as truly fledged soldiers of our army. The African National Congress is a signatory to the Geneva Convention. We were captured in the process of executing our historical mission of liberating our people. Under the Geneva Convention we must be accorded the prisoner-of-war status. As prisoners-of-war no court of law has power over our case. The Geneva Convention recognises people who take up arms to fight against national oppression as prisoners-of-war in case of capture by the oppressor's security forces. We refuse to stand trial.<sup>27</sup>

The court dismissed this plea and proceeded with the trial. The four defendants were convicted and sentenced to periods of imprisonment ranging from eight to twelve years.

In the second case, *State v. Petane*,<sup>28</sup> counsel raised a similar plea. Defense counsel argued that state practice provided evidence of a customary rule of international law extending prisoner-of-war status to members of national liberation movements.<sup>29</sup> This rule forms part of South African law in accordance with the common law principle that customary international law is incorporated into the national law.<sup>30</sup> After a thorough examination of the attitudes of states towards Protocol I, Judge Conradie concluded that the provisions of Protocol I which extended prisoner-of-war status to members of national liberation movements are not part of customary international law and therefore were not incorporated into South African law.<sup>31</sup> He proceeded with the trial and, in due course, convicted Petane.<sup>32</sup>

These cases show that the courts are unlikely to accept the principles of Protocol I as a bar to the jurisdiction of a South African court. More frequently, and to some extent more successfully, counsel has

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27. *State v. Mapumulo*, No. CC 93/85 (Natal Prov. Div.) (unreported decision).

28. 1988(3) SA (C) 51. The case involved an ANC insurgent charged with terrorism and attempted murder arising out of his efforts to place a bomb at a shopping center and subsequent skirmishes with the police.

29. *Id.* at 53, 54. On the creation of customary rules see L. HENKIN, R.C. PUGH, O. SCHACTER & H. SMIT, *INTERNATIONAL LAW CASES AND MATERIALS* 37-69 (2d ed. 1987); G. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* (1983).

30. There is authority for this proposition in South African law. *See, e.g.*, *Nduli v. Minister of Justice*, 1978(1) SA (A) 893. Both the United States and England recognize incorporation of customary international law into municipal law. *See, e.g.*, *The Paquete Habana*, 175 U.S. 677 (1900); *Trendtex Trading Corporation v. Central Bank of Nigeria*, 1977 Q.B. 529 (C.A.).

31. *State v. Petane*, 1988(3) SA (C) 51, at 56. The unwillingness of the United States, the United Kingdom and other Western states to ratify Protocol I also makes it difficult to argue successfully the existence of such a customary rule.

32. Although terrorism is a capital crime, the judge declined to sentence the defendant to death and instead imposed a cumulative sentence on all counts of 17 years. The fact that the defendant had not caused any loss of life and, possibly, the argument that the defendant saw himself as a "soldier" and not a criminal, may have contributed to the judge's decision not to impose the death sentence.



raised Protocol I as a plea in mitigation of sentence, arguing that the defendant's combat status should be considered an extenuating circumstance.<sup>33</sup>

### *B. Mitigation of Sentences*

Using Protocol I, defense counsel has argued that the fact that an ANC combatant has reasonable grounds for believing that he is engaged in an international conflict reduces his moral culpability. Yet judicial willingness to consider Protocol I as an extenuating circumstance has varied. This argument met with some success in the High Court of South West Africa.<sup>34</sup> South African courts, on the other hand, have disregarded this argument. In *State v. Mncube & Nondula*,<sup>35</sup> despite the fact that one of the defendants, Mncube, fell within the scope of articles 43 and 44 of Protocol I,<sup>36</sup> the trial judge, Justice J.P.O. de Villiers, disregarded these facts in considering the plea in mitigation of sentence and sentenced both men to death.

In *State v. Mogoerane*<sup>37</sup> Judge Curlewis found three members of "Umkonto We Sizwe" guilty of murder arising out of attacks on police stations.<sup>38</sup> In response to my testimony on the subject of recent developments in humanitarian law, Judge Curlewis stated:

The interest, perhaps, of Professor Dugard's evidence is that, as he told us, the convention was passed with two organisations in mind: the PLO and the ANC. The PLO, in my view, is a bunch of thugs who kill Jews. The fact therefore that irresponsible people overseas and elsewhere praise it and give it a status and put a gloss of respectability upon it, does not seem to me to show much right thinking. Over forty years ago another bunch of thugs went about killing Jews

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33. Under South African law an extenuating circumstance is "a fact associated with the crime which serves in the minds of reasonable men to diminish morally, albeit not legally, the degree of the prisoner's guilt." *Rex v. Biyana*, 1938 (E. Dist. Local) 310, 311.

34. In *State v. Sagarius*, 1983(1) SA (SWA) 833, 836, Judge Bethune accepted the growing tendency in international law to treat members of national liberation movements as prisoners of war as an extenuating circumstance for the purpose of sentencing and imposed two sentences of 9 and one of 11 years upon three South West Africa People's Organization ("SWAPO") combatants convicted of the capital crime of terrorism.

35. No. 449/87 (Transvaal Prov. Div., May 5, 1988) (unreported decision). The defendants were charged with several counts of treason and murder arising out of the activities of ANC insurgents on the northern border of South Africa.

36. Uncontroverted evidence showed that he was subject to "an internal disciplinary system," carried arms openly and wore a uniform to distinguish himself from the civilian population. At the time of writing, an appeal is still pending in this case.

37. (Transvaal Prov. Div., Aug. 6, 1982) (unreported decision), published in 1 *LAWYERS FOR HUMAN RIGHTS BULLETIN* 118 (1983).

38. The three defendants were sentenced to death and later executed, despite strong pleas for clemency from the UN Security Council and several Western states.

and they also had a gloss of respectability put upon them for a long time. That was called appeasement.

I do not think that any comfort can be drawn for the ANC by being joined with the PLO. However, it may be said that Professor Dugard's view, although he did not express it specifically, I think it was mooted by Mr. *Unterhalter* [counsel for the accused], is that there may well be a move amongst academics to think that this *should* be regarded as custom, and thus influence this court. I have taken that into account.<sup>39</sup> [emphasis in original]

#### IV. PROBLEMS OF LEGITIMACY

In the short term the South African government and courts see no advantage in conferring any legal recognition upon the ANC or its members engaged in the armed struggle. Every effort is made to deny the organization any semblance of legitimacy. In the long term, however, Protocol I is not without advantage to the incumbent regime in South Africa.<sup>40</sup>

South Africa is engaged in a conflict with national liberation movements that have been recognized by the Organization of African Unity and the United Nations. The South African government refuses to accept an obvious international reality: the ANC, together with the PAC, is already regarded by the international community as the "authentic representative" of the "overwhelming majority of the South African people."<sup>41</sup> Recognition by South Africa of the ANC and PAC *for the purposes of humanitarian law* will not add to the legitimacy of these organizations.

As the conflict in Southern Africa grows, the likelihood increases that members of the South African Defense Force ("SADF") will be captured by the South West Africa People's Organization ("SWAPO")<sup>42</sup> or the ANC and abducted to a hostile neighboring state.

39. *State v. Mogoerane* (Transvaal Prov. Div., Aug. 6, 1982) (unreported decision), published in 1 LAWYERS FOR HUMAN RIGHTS BULLETIN 118, 124 (1983).

40. This argument was acknowledged by Judge Conradie in *Petane*: "Protocol I may be described as an enlightened humanitarian document. If the strife in South Africa should deteriorate into an armed conflict we may all one day find it a cause for regret that the ideologically provocative tone of [article] 1(14) [of Protocol I] has made it impossible for the Government to accept its terms." *State v. Petane*, 1988(3) SA (C) at 63.

41. *See, e.g.*, G.A. Res. 3141, 28 U.N. GAOR Supp. (No. 30) at 30, U.N. Doc. A/9030 (1973); G.A. Res. 3411, 30 U.N. GAOR Supp. (No. 34) at 36, U.N. Doc. A/10034 (1975); G.A. Res. 206, 35 U.N. GAOR Supp. (No. 48) at 29, U.N. Doc. A/34/48 (1980).

42. In 1979 a member of the SADF, Sapper van der Mescht, was indeed captured by SWAPO and held in Angola as a "prisoner of war." He was repatriated by SWAPO shortly before the hearing in *Sagarius*. *See* note 34 and accompanying text. The treatment of van der Mescht at the hands of SWAPO may have influenced the court to take a sympathetic approach to the punishment of SWAPO combatants in *Sagarius*.

One method of ensuring that captured South African soldiers will be treated as prisoners of war is reciprocity. If the South African government treats ANC combatants as ordinary criminals, then the possibility exists that the ANC will treat members of the SADF in the same manner. Similar considerations apply to the punishment of ANC combatants by the courts. If South African courts show leniency towards captured ANC combatants, the prospect exists that the courts of neighboring states which try members of the SADF captured during secret operations within their borders will also show leniency.<sup>43</sup>

The South African government's policy of refusing to recognize the applicability of Protocol I to the ANC is unwise. First, this determination fails to take account of the political fact that the ANC is internationally accepted as a national liberation movement. Second, the policy fails to show adequate concern for the future welfare of the government's own armed forces. If the military threat of the ANC grows, it may be difficult to implement Protocol I and gain the benefits of reciprocity. For this reason it is in South Africa's own interest to sign Protocol I immediately. If South Africa were to sign Protocol I, and to enact it into municipal law to be applied by the courts, the level of human suffering in the growing conflict might be reduced. Furthermore, such action might help the cause of national reconciliation. A history of martyrs-in-the-struggle is unlikely to advance the cause of reconciliation.

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43. This possibility is no longer merely an academic matter. At the time of writing, two members of the SADF are on trial for military acts committed in Borwarsana. See Dugard, *Soldiers or Terrorists?* 4 S. AFR. J. HUM. RTS. 221 (1988).