# THE GENEVA CONVENTIONS OF 1949

# AND

# THE STATUS OF POLITICAL PRISONERS IN SOUTH AFRICA

Statement before the
United Nations Special
Committee Against Apartheid
March 26, 1980

By

Gay Johnson McDougall
Attorney at Law
622 East 20th Street
New York, New York 10009

In his highly commendable study titled Political Trials in South Africa: 1976-1979 , Glenn Moss has identified four , major types of political trials on the basis of the activities which initiated the arrest of the defendant.

1) Direct and public or semi-public politicizing and consciousness raising activity where no specific acts of violence are alleged;
2) Largely spontaneous attacks on property which was perceived as some sort of symbol of oppression (e.g., Bantu Education Schools, Bantu Administration Board Institutions, small shopkeepers with a reputation for gross exploitation of township dwellers, etc.);
3) The recruitment of people for military training, and their transportation out of South Africa; and
4) A type of action which is rapidly becoming more frequent, the trained guerrilla fighter returning to South Africa often carrying a large quantity of arms, explosives and ammunition.

While it goes without saying that not all trials fall neatly into one of these categories, my intention is to concentrate primarily on those trials which fall within the last group and the status of those who stand accused under those charges.

In relation to the other three types of trials, these trials evidence a qualitative leap forward in the intensity and the organized, pre-meditated nature of the resistence. They mark a

clear departure from activities which may with any accuracy be regarded as disturbances or riots. They are clear indicies of a steadily mounting armed conflict; the initial stages of a civil war in the classical sense.

A conflict such as this one, while still embryonic in its nature and intensity is shielded from outside inspection and regulation by the notions of state sovereignty and non-interference in the internal affairs of a state. However, once an otherwise internal armed conflict begins to take on a certain proportion and character, it becomes increasingly a subject of international law.

The situation in South Africa has crossed this threshold. We must now begin to consider to what extent the Republic of South Africa in its treatment of political prisoners, is in breach of international law, primarily the Geneva Conventions of 1949 and the Protocols thereto.

In a traditional war situation, when a member of the regular troops of one of the belligerents is captured by the enemy, the provisions of the Geneva Convention of 1949 Relative to the Treatment of Prisoners of War dictate a certain level of humane treatment during the period of captivity. Specifically, such captured militant cannot be tortured, can be forced to do labor only in extremely limited situations, and until the hostilities end, must be housed and fed according to detailed prescriptions that are considered to reflect generally accepted rules of civilized conduct. The Convention therefore specifies in great detail the requisite treatment of prisoners of war with regards to such matters as inter-

rogation, evacuation, quarters, food, hygiene, forced labor, and correspondence. Most importantly, prisoners of war are immune from criminal prosecution and, hence, execution for those acts of combat which do not violate the laws of war, but which might otherwise be common crimes under municipal law.

In June, 1977 these provisions, formerly considered operative only between sovereign states parties to the 1949 Convention were expressly extended to cover captured militants in national liberation struggles against colonial and racist regimes. The legal instrument which contains this amendment is the first Protocol to the Geneva Conventions of 1949. Adopted by representatives of 97 countries to the Diplomatic Conference on the Humanitarian Laws of War, this Protocol can be interpreted as a piece of international legislation specifically devised to facilitate the demise of colonialist and racist regimes. The tactic used to achieve these ends is to legitimize and insure the protection of those nationals of colonial and racist states who challenge those regimes.

More specifically, by its terms Protocol I applies to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination..." This extension of scope does not run solely to the provisions of the Protocol,but also applies to the main text of the 1949 Convention. Therefore,as to those parties to the Convention who are also parties to the Protocol, these clear terms end any controversy over the interpretation of the text of the Convention with regard to the inclusion of liberation movements regardless of their lack of status as sovereign states.

Further, the Protocol sets a procedure by which liberation movements may formally accede to the Protocol and the Convention. This is a significant recognition of the international legal personality of the liberation movements; they are granted by the Protocol nothing less than a right to enter, as full parties with full rights and obligations, into a multilateral treaty with sovereign states.

The Protocol also represents a significant recognition of the nature and necessities of guerrilla warefare by modifying the stringent requirements as to combat tactics found in the 1949 Convention.

On December 7, 1978, Protocol I entered into force. On this date, eleven states have registered with the United Nations instruments of accession to the Protocol, although some 63 states are signatories. However, because of the Protocol's obvious application to the struggle against apartheid, the Republic of South Africa has not, and I am confident that it will not become a party.

South Africa's obligation to accord prisoner of war status to its political prisoners, then, must be derived from the original Geneva Conventions of 1949, to which South Africa acceded in 1952, thereby becoming bound to honor its provisions in all those situations in which the Convention is by its terms applicable.

The Geneva Conventions were generally written to be applicable in situations where three main characteristics exist:

1) The parties to the conflict must be parties to whom the Convention applies.
2) The conflict must be one which can be characterized as international rather than internal in nature.
3) The parties must conduct the hostilities in a certain manner. Most importantly, the fighting forces must be part of an organized group under a responsible command which conducts its operations in accordance with the laws and customs of war.

An examination of these elements with regard to the current situation in South Africa and the prisoners with whom we are concerned today, reveals that these basic requisites have been met.

First, as to the requirement that the parties to the conflict must be parties to whom the Convention applies. In 1952 the Republic of South Africa acceded to the Convention and thereby became bound to

honor its provisions. The traditional view is that a party to a convention must only respect its provisions in its relations with other parties to the convention, all parties presumably being sovereign states. In the case before us, however, the liberation movements lack full state identity in the traditional sense and therefore lacked the capacity to become signatories to the Convention in 1949. This fact, however, stands as no absolute bar to the participation of liberation movements in the rights and obligations of the Convention because the Convention is open to any belligerent entity with international status. This status can emanate either from a formal recognition of belligerency, or, as in the case of the liberation movements, from international law itself. Further Article 2, paragraph 3 of the Convention provides that although one of the Powers in conflict may not be a party to the Convention, the Powers who are parties shall be bound by the Convention in relation to the non-Party, if the latter also accepts and applies the provisions of the Convention. This rule is not affected by the fact that the parties to the conflict do not formally recognize each other.

The central legal question becomes, then, whether the conflict possesses an international or non-international character. For, if the conflict is non-international, then it is outside the scope of the detailed protections of the Geneva Convention and South Africa is not in violation of international law when it treats captured militants as mere terrorists rather than as prisoners of war. Conversely, if the conflict is international in character, then such

captured militants should be immune from prosectuion under the laws of South Africa for their acts of combat.

This crucial requisite, i.e. the international character of the conflict, is normally a consequence of the fact that both the parties to the conflict are states. In the case under consideration, however, I submit that while the liberation movements lack full state identity, the international character of the conflict in South Africa is derived from a long series of developments which have taken place both in international society and consequently in international law, which have led progressively and cumulatively to the establishment of the international character of conflicts waged on the basis of the principle of self-determination and, most pertinent to South Africa, non-discrimination based on race. This has been achieved through numerous United Nations resolutions and declarations among the most important of which have been the Charter of the United Nations, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights and the numerous resolutions of the General Assembly and the Security Council condemning apartheid and calling for collective measures against South Africa.

From these developments, the liberation movements of South Africa have been vested with a locus standi in international law

and relations, a right of armed resistence to the forcible denial of the equality of all South Africans, and a right to seek and receive support and assistance from third states. An international character is thereby conferred on these armed struggles in South Africa.

In the context of the United Nations Charter, such conflicts are no longer within the domestic jurisdiction of any member state and therefore are subject to the control or settlement procedures of the United Nations in their entirety. In the context of the Geneva Conventions of 1949, such conflicts are fully covered by the main body of the Convention.

Inasmuch as this point is crucial to my conclusions I will happily make a background paper on this point available to the members of the Special Committee upon request.

With regard to the third test of application of the Convention, i.e. the manner in which the hostilities are conducted, the question is one of fact rather than law. The Convention requires that in order to be accorded prisoner of war status when captured, combatants fighting in international conflicts must belong to an organized armed force under responsible command which conducts its operations in accordance with the laws and customs of war.

To return to the collection of trial transcripts in the Moss study, the prosecution in the trials of prisoners accused of guerrilla activities uniformly conceded and even elaborated on the following points: that the accused had received military and political train-

ing outside the country under the auspices of the African National Congress or the Panafricanist Congress, that elaborate transport systems had been established for the movement of "trained terrorists", that bases had been established for the storing of munitions and that arsenals were in the process of being established at these bases. These points, conceded by the prosecution, are powerful evidence that the accused do in fact belong to an organized armed force with a responsible chain of command.

The question of the degree to which there is respect for the laws and customs of war is one of detailed fact which must be addressed within the context of each individual case. However, as evidence of this point please hear the words of Naledi Tsiki, who in April, 1978 was found guilty on a charge of Terrorism as a party to conspiracy, and sentenced to 14 years imprisonment. In his statement to the court Tsiki said of his training:

> "One thing was paramount in what I was taught; that the lives of innocent civilians, of whatever colour, should not be placed in jeopardy...Despite what has been done to my people at Sharpville, Soweto, and several other places, my reaction has not been that of emotionalism. It would be unacceptable to me to go out and shoot children and their unsuspecting parents simply because they are white. That would be sheer terrorism, to which both I and the organizations to which I belong are opposed."

In summary, Mr. Chairman, I submit that world opinion, seeking to express itself in increasingly formal legal terms, now unanimously supports the struggle of the African people of South Africa for equality and freedom. The international recognition of the legitimacy of the struggles of the South African people has been highlighted by the unanimous vote for the arms embargo and the numerous General Assembly resolutions calling for the recognition of South African political prisoners as prisoners of war.

I submit that both in terms of 'collective legitimization' and international law, sufficient grounds now exist to consider the struggle in South Africa as one within the full panoply of protections established under the Geneva Prisoner of War Convention of 1949.