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ASSEMBLY

SECURITY COUNCIL
Thirty-sixth year

Letter dated 6 March 1981 from the Permanent Representative of South
Africa to the United Nations addressed to the Secretary-General

At the request of the South African Minister of Foreign Affairs and Information, the Honourable R. F. Botha, I am enclosing the text of a letter he has addressed to Your Excellency on 6 March 1981.

I should appreciate it if this letter could be circulated as an official document of the General Assembly, under agenda item 3, and of the Security Council.

(Signed) J. Adriaan EKSTEEN
Permanent Representative

ANNEX

Letter dated 6 March 1981 from the Minister of Foreign Affairs
and Information of South Africa to the Secretary-General

When future generations analyze the demise of the United Nations Organization, the reckless disregard by the General Assembly, one of the principal organs of the United Nations, of its own rules of procedure and of the Charter of the United Nations itself, will be singled out as one of the major contributing factors which precipitated that demise.

It is also a certainty that the unjust treatment which South Africa had continually suffered at the hand of the General Assembly and its institutional collaborators, will be cited as the best example of the disregard, which had become so characteristic of the General Assembly's actions, for the most fundamental rules of simple justice and for the legal instrument from which the United Nations derives its existence.

In this context reference will be unavoidable to the regrettable events which occurred on 2 March 1981 during the 102nd and 103rd plenary meetings of the General Assembly at its resumed thirty-fifth regular session.

In the interest of leaving a clear record and in acknowledgement of the position of the few nations which steadfastly observed the dictates of law as opposed to considerations of political expediency, I wish to refer to what happened on that occasion and to set out my Government's standpoint.

As Your Excellency knows, the debate concerned the South West African/Namibian issue, a matter in which South Africa is not only directly involved but in which it has a fundamental interest - a fact which is equally well recognized by the various organs of the United Nations, including the Secretariat. In view of this vital interest and of

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the important contribution that South Africa could make to the debate; and indeed was obliged, because of her responsibilities to make, so that the international community should have the benefit of a balanced viewpoint, South Africa decided to participate in the debate. South Africa's credentials, nominating her delegation to participate in the proceedings of the 35th General Assembly, were then submitted to you. This was not done with any ulterior motives as was subsequently alleged by the President of the General Assembly. The first reason is that South Africa's decision to participate was taken in the light of the most recent prevailing circumstances - the date of the debate and of the resumed General Assembly session itself had been fixed at short notice - and secondly South Africa is well aware, from bitter experience, of the hostile manoeuvring that inevitably follows any advance notice of a decision by her to participate.

In terms of the operating procedures of the General Assembly, a member of the South African delegation consequently requested the Secretariat official to place South Africa's name on the speakers' list. This he refused to do. This was the first violation of South Africa's rights as a Member State.

In the meantime the personnel of the President of the General Assembly were informed that the credentials naming the South African delegation to participate in the proceedings of the 35th General Assembly had been submitted to Your Excellency, that South Africa intended to place its name on the speaker's list and that South Africa would want to address the General Assembly, should the South African delegation's presence in the General Assembly Conference Hall be queried on a point of order. They were requested to inform the President accordingly.

Very shortly after the members of the South African delegation had taken their seats, the Ambassador of the United Republic of Cameroon raised a point of order, drawing attention to what he described as

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the "illegal presence" of the South African delegation. He then requested the President to advise the delegation to leave the hall and to instruct the Credentials Committee of the General Assembly to convene and report to the General Assembly as soon as possible.

Despite the South African delegation's clearly-expressed wish to address the point of order raised by Cameroon, not only already relayed as described above, but also by vigorously seeking to attract his attention visually and aurally, in the customary manner, the President steadfastly, in the words of The New York Times of 3 March 1981, 'ignored' them and proceeded to request the Credentials Committee to convene specifically to consider South Africa's credentials only, and then adjourned the General Assembly.

In the light of the illegal and unwarranted treatment meted out to South Africa, and not as subsequently alleged by the President of the General Assembly, in terms of some prior strategy, the South African Permanent Representative requested the Chairman of the Credentials Committee to meet with him or to allow him to address that committee (A/35/795); an eminently reasonable request, which he copied to the President of the General Assembly. Without responding to the Permanent Representative's letter the Chairman of the Credentials Committee proceeded to preside over a meeting of the Committee which found South Africa's credentials not to be in order by a vote of 6 to 1, with 2 abstentions, despite the fact that the credentials submitted complied with the requirements of the Rules of Procedure of the General Assembly and Your Excellency's report on them to the committee did not fault them. The Permanent Representative also addressed a letter to the President of the General Assembly requesting him to allow South Africa to make a statement in the General Assembly (A/35/796) when the report and recommendation of the Credentials Committee should come before it, i.e. immediately after the resumption of the General Assembly

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debate. He addressed a further letter to the President in which he protested at the latter's refusal to grant South Africa the opportunity of addressing the Assembly on Cameroon's point of order. All of these letters flowed from the President's high-handed and unconstitutional actions.

Prior to the resumption of the Assembly debate, the South African Deputy-Permanent Representative personally requested the President to allow South Africa to address the Assembly. The President undertook to inform him of his decision but subsequently refused to do so. It is common cause that after the resumption of the General Assembly debate, Cameroon proposed, on a point of order, that the South African Representative not be granted the opportunity to address the Assembly before the Assembly had dealt with the report of the Credentials Committee. This proposal was put to the vote and supported by all but a limited number of, albeit important, States, and South Africa was consequently once again refused the floor. The Credentials Committee's rejection of South Africa's credentials was thereafter endorsed by the General Assembly and the South African delegation had no choice but to leave the conference hall. In addition, the South African Permanent Representative addressed a further letter (A/35/798) to the President of the General Assembly in which he expressed his general objections concerning the manner in which the President had conducted the 102nd and 103rd Plenary meetings.

The course of events which I have related above involved very serious transgressions of the Rules of Procedure of the General Assembly and the provisions of the Charter. The Government of the Republic of South Africa certainly has no intention of simply ignoring these transgressions and of accepting them resignedly. On the contrary South Africa placed on record its firm condemnation and rejection of these blatant illegalities which make a mockery of

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any United Nations claims to be a responsible Organization commanding respect. These lamentable failures of the Organization will not be erased by the mere passage of time but will remain a blot on its reputation.

I now propose to deal with these transgression seriatim, not because I expect that this will persuade the United Nations to abandon its chosen course of illegality and irrelevance but because we do not want to afford those with ulterior motives the opportunity to interpret our silence as constituting consent or resignation.

1. The refusal of the responsible Secretariat official to put South-Africa's name on the speakers' list was, to say the least, irregular. This is a function entrusted to him in terms of the General Assembly's operating procedures. By refusing inscription, the official, apart from other considerations, became directly involved in a political issue before the Assembly. It should be noted that Article 100(1) of the Charter inter alia provides as follows:

'They (the Secretary-General and his staff) shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.'

In the light of the wrongs that have been perpetrated against my Country, I may refer you also to the provisions of Article 100(2):

'Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.'

South Africa has a legal right to have its name included in the speakers' list. In this connection I refer Your Excellency to

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the provisions of Rule 29 of the General Assembly's Rules of Procedure:

'Any representative to whose admission a Member has made objection shall be seated provisionally with the same rights as other representatives until the Credentials Committee has reported and the General Assembly has given its decision.'

If one bears in mind the provisions of the Charter relating to the powers and functions of the General Assembly (Articles 10 to 17) it must surely be quite clear that States have a right to address the General Assembly and therefore a corresponding and implied right to be included in the speakers' list. No member of the staff of the Secretary-General has the right to deny a Member State the basic right to which it is entitled in terms of the Charter and the Rules of Procedure.

In view of these considerations Your Excellency is now formally requested to determine whether the Secretariat official acted on his own authority or not, and if not, on whose authority he acted, and to inform me accordingly. Your Excellency is also requested to inform the South African Government of the steps that you intend taking to rectify the matter and to prevent a recurrence.

2. The refusal of the President of the General Assembly to allow South Africa to address the Assembly on a point of order, was a manifest violation of the express provisions of the Charter and the Rules of Procedure, to say nothing of the fundamental principles of justice recognized by civilized nations. Your Excellency is referred to the fact that South Africa was, as of right, entitled to request information and clarification regarding the point of order raised by the Permanent Representative of Cameroon. This right is explicitly recognized

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in paragraph 79 of the conclusions of the Special Committee on the Rationalization of the Procedures and Organization of the General Assembly. To allow South Africa the opportunity to request such clarification was not only the President's duty, it would also have been equitable and just.

Your Excellency is also informed that once the President had made a ruling on the point of order, South Africa wished, and had the right to appeal against that ruling in terms of Rule 71 of the Rules of Procedure. It reads as follows:

"During the discussion of any matter, a representative may rise to a point of order, and the point of order shall be immediately decided by the President in accordance with the Rule of Procedure. A representative may appeal against the ruling of the President. The appeal shall be immediately put to the vote, and the President's ruling shall stand unless overruled by a majority of the members present and voting ..."

You are again referred to the provisions of Rule 29 which make it quite clear that despite the fact that South Africa's presence in the General Assembly had been questioned, South Africa was nevertheless entitled to the same rights as other States.

Despite this, South Africa was not permitted to speak to the point of order questioning her own right to participate, nor to appeal against the President's ruling on the matter. South Africa had the same undiluted rights when the second point of order was raised when the General Assembly resumed.

In view of these considerations it is submitted that the President's actions were not only arbitrary and irregular, but that they were also unworthy of the high office he holds, unfair, discriminatory and renunciation of the sense of justice which is expected of him. His actions are therefore rejected by the South African Government as having been ultra vires and unpardonable.

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3. Previous experience leaves no doubt that convening the Credentials Committee and its predictable, but nonetheless deplorable recommendation, was simply a device to deprive South Africa of its right to participate in the proceedings of the General Assembly. The fact that it is not novel or original does not detract from the fact that it is patently unlawful. As Your Excellency knows, your own Legal Counsel pronounced on the illegality of this method as long ago as 11 November 1970. The decision of the Credentials Committee is as invalid today as it was in 1974.

The bona fide purpose of the Credentials Committee is to examine the credentials of delegations and to report to the General Assembly on whether or not they are, on the face thereof, formally in order. I submit that it is common cause that South Africa's credentials have never been anything else but formally in order, as Your Excellency's reports to the Credentials Committee have testified.

For these reasons I now reaffirm my Government's standpoint that the recommendation of the Credentials Committee and the subsequent acceptance thereof by the General Assembly were ultra vires those organs and are consequently rejected as being null and void.

4. In effect, the underhand method by which South Africa has been denied the right to participate in the discussions of the General Assembly and as a consequence thereof, its subsidiary organs, encompasses several other violations of the Charter as well as the spirit of that document.

The first provision of the Charter which has a direct bearing on the circumstances I am concerned with here, is contained

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in Article 2(2). It determines that all Members of the United Nations, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the Charter. (It is common cause and trite law that in law the word "shall" has a mandatory meaning, resulting in a legal obligation). The General Assembly resolution to deny South Africa participation in its deliberation is clearly a breach of this Article since South Africa is being denied what is perhaps the most fundamental right of membership, namely, the right to be heard.

Another provision which is being violated is postulated in Article 9(1), which determines that the General Assembly shall consist of all the Members of the United Nations. By virtue of the fact that South Africa became a member in accordance with the relevant provisions of Article 3, read with Article 110, and is consequently an original member of the United Nations, and by virtue of the use of the word "shall" in Article 9(1), South Africa clearly has a legal right to participate in the proceedings of the General Assembly.

Furthermore, Article 18(1) states that each Member of the General Assembly shall have one vote. It is therefore obvious that any actions - other than those provided for in the Charter - which are designed to deny a Member State the right to vote, would be in contravention of the unambiguous provisions of the Charter. The Charter does in fact provide for the suspension of the rights and privileges of membership. Article 5 lays down that a Member State against which preventive or enforcement action has been taken by the Security Council, may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council.

However, the procedure provided for in this article was not followed when the General Assembly de facto suspended South Africa's rights and privileges. It is submitted that, in accordance with the well-known canon of construction, inclusio unius, exclusio alterius, the fact that the Charter expressly provides for a specific procedure to be followed in order to suspend a Member's rights and privileges, leads to the conclusion that no other procedure - especially not a procedure which contravenes other provisions of the Charter - may be followed to achieve the same or a similar result. It would be fair comment to say that Article 5 was deliberately designed to make it difficult to suspend a Member's rights, for very sound reasons, inter alia, those postulated in the preamble and Article 1. Simply to disregard this article and to achieve the result it was designed for, by different means, is legally untenable.

As regards the requirements contained in Article 5, it is axiomatic, and publicists on international law are ad idem on this score, that a Security Council recommendation is a conditio sine qua non for a General Assembly resolution in terms of this article. This view is supported by the fact that the article also determines that the Security Council, by itself, can restore the suspended rights and privileges and consequently does not require the co-operation of the General Assembly. (Even extreme teleological methods of construction require a point of departure. To regard Article 5 as the point of departure for an argument which leads to the conclusion that the General Assembly resolution pertaining to South Africa falls within the ambit of Article 5, would be disregarding all fundamental rules of construction).

It is furthermore submitted that, not only were the procedures that were followed to reduce a Member State to something less

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than observer status contrary to the provisions of the Charter, but the reasons for doing precisely that, are also not catered for in the Charter.

It should be readily appreciated that the General Assembly resolution amounts not only to a contravention of the Charter, vis-a-vis South Africa, but also to a contravention as against the Security Council, since the latter's rights have been usurped, as well as against those Member States which, in accordance with consideration of law are opposed to considerations of political expediency, have opposed the measures against South Africa.

It is often not appreciated that the Charter is both the constitution of the United Nations, as well as a multi-lateral treaty. Contraventions of its provisions are, therefore, also breaches of the treaty obligations it imposes on the signatories thereof. Thus the Organization qua organization acted unconstitutionally when it suspended South Africa's rights, and the individual Members which initiated or supported the measures against South Africa committed a breach of their treaty obligations vis-a-vis South Africa and the States Members of the United Nations, which opposed those measures.

When a Member's right to participate in meetings of the General Assembly is impaired, the fact necessarily also deprives that Member, inter alia of the right to:

- (a) Participate in the election of the President of the General Assembly in accordance with the provisions of Article 21;
- (b) Participate in the election of the non-permanent members of the Security Council in accordance with the provisions of Article 23;

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- (c) Bring a dispute to the attention of the General Assembly in accordance with the provisions of Article 35(1);
- (d) Participate in the election of members of the Economic and Social Council in accordance with the provisions of Article 61;
- (e) Participate in proceedings to amend the Charter in accordance with the provisions of Article 108;
- (f) Participate in the election of members of the International Court of Justice in accordance with the provisions of the Statute of the Court;

It must also be appreciated that the very reason which gave rise to the suspension of South Africa's rights also give rise to the denial of other rights which should come into play when a particular set of circumstances prevail.

It should be apparent to the unbiased legal mind, as well as to that of the layman that, for more reasons than one, the General Assembly's resolution to deny South Africa the right to participate in its deliberations was, and still is, beyond a shadow of doubt, ultra vires that body and consequently null and void ab initio. Coupled with the fact that the action perpetrated against South Africa also violates one of the most fundamental rules of all civilized systems, viz audi alteram partem, it must surely amount to one of the most blatant incidents of disregard for what is not only unquestionably right, but what is indeed law, ever perpetrated by an institution with an already disastrous track record.

R.F. BOTHA
MINISTER OF FOREIGN AFFAIRS AND INFORMATION
