

1991

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Demetra K. Matsis

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Repository Citation

Demetra K. Matsis, *Guestworker Policies and Apartheid: Does One Resemble the Other?*, 74 Marq. L. Rev. 525 (1991).

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COMMENTS

GUESTWORKER POLICIES AND APARTHEID: DOES ONE RESEMBLE THE OTHER?

I. INTRODUCTION

From 1945 until the mid-seventies, the introduction of foreign labor into domestic markets was a marked feature of all advanced capitalist countries.¹ Employers sought flexible labor supplies to maintain productivity. Foreign employees met this need by providing labor for a few years, thereafter returning to their home countries. After World War II, an estimated thirty million people entered Western Europe as workers or workers' dependents.² This massive influx of workers led to the development of guestworker policies.³

The arrival of these workers and their families was spontaneous and unplanned, imposing social costs and tensions upon the social groups least able to absorb them—the migrant workers, the indigenous working class, and the unemployed.⁴ The citizens of these countries viewed immigration as a cause of their increasing problems. Their opinion was reinforced by politicians and the media. As a result, immigrants bore the brunt of citizens' developing racism and unrest.

1. STEPHEN CASTLES ET AL., *HERE FOR GOOD: WESTERN EUROPE'S NEW ETHNIC MINORITIES* 1 (1984).

2. *Id.*

3. The term "guestworker" refers "to [an alien who is subject to] governmental measures that permit aliens to be introduced into the labor market with the expectation that the aliens will not become citizens and will eventually return home." Philip L. Martin & Mark J. Miller, *Guestworkers: Lessons from Western Europe*, 33 *INDUS. & LAB. REL. REV.* 315, 315 n.2 (1980). The term "guestworker" has taken on a negative connotation, and also reflects the tension that exists between the "host country's need for foreign labor and their [sic] desire to limit the costs of the guestworkers' presence." Stacy Hickox, Note, *Labor Market Needs and Social Policy: Guestworkers in West Germany and the Arab Gulf States*, 8 *COMP. LAB. L.J.* 357, 357 n.1 (1987).

It is the very paradox of European migrations today that millions of people are living in foreign countries but are not designated as immigrants; neither do these countries see themselves as immigration countries. And vice versa, very few of the countries that send millions of their citizens to work abroad consider themselves as emigration countries in the narrow sense of the term. The concept of immigrant is paraphrased and terms such as "foreignworker," "guestworker," "foreign employee," or "migrant worker" are used.

RAY C. RIST, *GUESTWORKERS IN GERMANY* 4 (1978) (quoting W.D. BORRIE, *THE GROWTH AND CONTROL OF WORLD POPULATION* 93 (1973)).

4. CASTLES ET AL., *supra* note 1, at 2.

With the growth of world interest in human rights, the legal standing of guestworkers causes some concern.⁵ The status of guestworkers in countries such as West Germany and Switzerland is representative of a larger international problem — a problem concerning the violations of human rights. The international community has taken a stand against countries that oppress their minority populations by denying minorities' basic rights. A prime example of this is found in South Africa, against whom the international community leveled sanctions because of its apartheid policies. Yet the world has overlooked the discriminatory policies of the labor-importing countries of Western Europe.

This Comment begins by examining the guestworker policies of the Federal Republic of Germany (FRG) and Switzerland, two leading labor-importing countries.⁶ Part Three discusses the history of South Africa's apartheid policy. Part Four explores how apartheid and guestworker policies violate international law. Part Five assesses whether sanctions imposed upon South Africa because of its apartheid policies could be imposed upon the FRG and Switzerland because of their guestworker policies. Finally, this Comment concludes that economic sanctions could be successful in bringing about change in the policies of both the FRG and Switzerland.

II. THE GUESTWORKER SYSTEM

A. *The Federal Republic of Germany*

For most of the labor-importing countries of Western Europe, the entry of migrant laborers began in 1945.⁷ However, the FRG was a latecomer to the importation of labor, not beginning to recruit foreign workers until 1956.⁸ The reason for this late start was that the FRG had to absorb large numbers of "German refugees (from East Germany and the former eastern territories lost to Poland and the Soviet Union) in the early post-war years."⁹

5. Note, *The Legal Rights of Guestworkers: The Case of West Germany*, 24 COLUM. J. TRANSNAT'L L. 311, 311 (1986).

6. For a general discussion of the impact of foreign labor on the United States, see Philip L. Martins & Alan Richards, *International Migration of Labor: Boon or Bane?*, MONTHLY LAB. REV., Oct. 1980, at 4; David S. North & Philip L. Martin, *Immigration and Employment: A Need for Policy Coordination*, MONTHLY LAB. REV., Oct. 1980, at 47; John A. Scanlon, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819 (1982).

7. CASTLES ET AL., *supra* note 1, at 11. Other countries that import labor are Britain, Belgium, France, the Netherlands, and Sweden. See *id.* at 12.

8. *Id.* at 11.

9. *Id.*

The FRG did not consider itself an immigration country.¹⁰ Yet economic expansion pulled native blue-collar workers out of unskilled labor positions, thereby creating a need for unskilled foreign labor.¹¹ This need prompted the FRG to recruit foreign workers. The German government signed bilateral agreements with several countries in a position to export labor. The agreements provided that the German government would provide positions and the recruitment countries would locate suitable candidates.¹² German recruitment was successful—the foreign worker population rose from 95,000 in 1956 to 507,000 in 1961, and to 1.3 million by 1966.¹³

1. Residence Status and Labor Permits

The host countries control the immigration of foreign workers with labor and residency regulations.¹⁴ To enter the FRG, the foreigner must first receive a residency permit, subject to the discretion of an administrative board.¹⁵ The board first considers whether the foreigner's presence will "impair the interests" of the FRG; if so, the application is rejected.¹⁶ If the application is accepted, the foreigner is initially granted a one-year permit that may be extended for two years.¹⁷

From 1965 to 1978, foreigners residing in the FRG for five years were eligible for unrestricted permanent residence status, subject to the fulfill-

10. Martin & Miller, *supra* note 3, at 316.

11. Hickox, *supra* note 3, at 359.

12. The first agreement was with Italy in 1955. The German government followed this agreement by signing treaties with Greece and Spain in 1960, Turkey in 1961, Portugal in 1964, and Yugoslavia in 1968. RIST, *supra* note 3, at 61.

13. Stephen Castles, *The Guests Who Stayed — The Debate on 'Foreigners Policy' in the German Federal Republic*, 19 INT'L MIGRATION REV. 517, 519 (1985).

14. "[G]uestworker policies are neither temporary worker programs nor inspired by the immigration-and-settlement philosophy. . . . Foreigners are invited to stay in the hope that they will leave." W.R. Bohning, *Estimating the Propensity of Guestworkers to Leave*, MONTHLY LAB. REV., May 1981, at 37.

15. Hickox, *supra* note 3, at 366.

16. *Id.* Interests considered in deciding on the application are the worker's "'suitability for useful work,' political and economic factors, and the state of the labor market at the time." *Id.* (citing Franz, *Die Rechtsstellung der Ausländischen Arbeitnehmer in der Bundesrepublik Deutschland*, in GASTARBEITER: ANALYSEN UND BERICHT 44-45 (1972)). State interests were determined in the labor market. "Once foreign workers were no longer needed, or once their presence threatened the employment prospects of German citizens [or EEC citizens], foreign workers could be made to return home, because continued residence would presumably impair the interests of the German people and state." Note, *supra* note 5, at 316-17 (citing Dohse & Groth, *Ausländerverdrängung: Die Verschärfung des Ausländerrechts*, 16 KRITISCHE JUSTIZ 231, 233 (1983)).

17. Note, *supra* note 5, at 318. Since 1968, a worker from any EEC country may accept employment in any other member state without the necessity of obtaining a work permit or arranging employment in advance of entering the host country. RIST, *supra* note 3, at 24.

ment of three requirements: (1) possession of a special work permit; (2) knowledge of German; and (3) suitable housing.¹⁸ However, in 1978 the government changed the time limit from five years of uninterrupted residency to eight years.¹⁹ Still, an unrestricted residence permit does not guarantee security. An alien may be deported at any time if "his presence impairs significant interests of the Federal Republic of Germany."²⁰

The laws governing guestworker residence status are imprecisely defined procedural guidelines subject to broad discretion.²¹ Federal statutes defining grounds for expulsion are also extremely vague.²² One statute provides that even aliens who have obtained the right of residence are subject to automatic expulsion if they "threaten the democratic order, [or] have been convicted of a crime."²³ The broad discretion and vagueness of the statutes and policies result in the system being vulnerable to abuse and to inconsistent, unpredictable application.²⁴

German law requires the possession of both a residency and a labor permit, unless the worker possesses the unrestricted permanent resident permit. The guestworker must apply for the labor permit. For workers from non-EEC countries, the permit will tie the worker to one specific job

18. Note, *supra* note 5, at 318.

19. Hickox, *supra* note 3, at 367.

20. Note, *supra* note 5, at 318 (quoting AuslG § (1)(11), 1965 BGBl-I 355). Begging, violations of residency restrictions, and violations of the "free democratic foundations" of German society are sufficient reasons for revoking a guestworker's permit. RIST, *supra* note 3, at 136.

21. Note, *supra* note 5, at 318.

22. *Id.* Section 10(1) of the *Ausländergesetz* (the federal statute that governs the residence and legal status of aliens of the FRG) provides that an alien may be expelled if:

1. he endangers the free, democratic order or security of the Federal Republic of Germany,
2. he is convicted of a punishable offense,
3. he is placed in a work institution, psychiatric hospital, or sanitarium,
4. he violates tax law,
5. he violates a regulation with respect to restrictions on the practice of a particular profession or self-employment,
6. he violates residence law,
7. he refuses to supply information, or supplies false information, to an administrative authority with respect to himself, his family, nationality, profession, or economic situation,
8. he begs or is indigent,
9. he threatens public health or morality,
10. he cannot support himself and his family without claiming social welfare benefits, or
11. his presence impairs significant interests of the Federal Republic of Germany for other reasons.

Id. at 320 (quoting AuslG §§ 10(1) - 10(11), 1965 BGBl-I 355).

23. *Id.*

24. *Id.*

and must be renewed annually.²⁵ A change in jobs during the first year is considered a breach of contract, and the worker can be deported.²⁶ After five uninterrupted years the foreign worker will become eligible for a "special" labor permit. This permit allows the guestworker to work at any job, as long as no West German or EEC citizen is available.²⁷

2. Economic Conditions and Labor Policies

Guestworkers come to the FRG primarily to obtain better wages and greater social benefits.²⁸ Their hopes have not been completely fulfilled. Guestworkers' salaries are set at the minimum level required by national collective bargaining agreements.²⁹ While this may seem fair, German workers generally earn wages above the minimum level. Also, guestworkers' savings are reduced by "denial of the full rate of child benefits under the tax system, where children remain in the home country."³⁰ The guestworker is therefore taxed more than a similarly situated German, "despite his or her restricted access to the social welfare system's benefits."³¹ This measure, however, has backfired because many workers brought in their children who had previously been taken care of by relatives in their home countries.³²

Host countries tend to limit the scope of guestworkers' nonmonetary employment benefits so as to attract foreigners yet not lose control over the costs and supply of foreign labor.³³ Guestworkers are eligible for unemployment compensation for one year, which is the same for nationals, but only if unemployment is because of economic conditions and through no fault of their own.³⁴ Under any other circumstances, the guestworker is

25. Hickox, *supra* note 3, at 367.

26. Hickox, *supra* note 3, at 367 (citing Blanc-Jovan, *Discrimination Against Foreign Workers*, in *DISCRIMINATION IN EMPLOYMENT* 248, 287 (1978)).

27. Castles, *supra* note 13, at 526. The importance of the availability of West German or EEC citizens to fill the positions as a consideration affecting the granting of labor permits to guestworkers was strengthened by a decision from the government's Social Court in February 1977. The court ruled that a local labor office was within its rights to refuse a labor permit to a non-EEC national when there were German workers in the area unemployed. RIST, *supra* note 3, at 76.

28. Hickox, *supra* note 3, at 376.

29. *Id.* at 377.

30. *Id.*

31. *Id.* (citing Stephen Castles, *The Guests Who Stayed — The Debate on 'Foreigners Policy' in the German Federal Republic*, 19 INT'L MIGRATION REV. 517, 524 (1985)).

32. Castles, *supra* note 13, at 524.

33. Hickox, *supra* note 3, at 378.

34. *Id.* The EEC worker and his family are entitled to full social security benefits, with the contributions paid while working in the host country credited to him when he decides to return home. RIST, *supra* note 3, at 24.

entitled to benefits as a permanent resident, or as long as the market indicates that it is possible for the guestworker to find a job.³⁵ The FRG Commission recommended expelling migrants who do not have permanent status if they are unemployed for more than one year.³⁶

Non-EEC workers are entitled to receive social welfare benefits for up to one year and then may be expelled. Social assistance for foreigners, unlike unemployment compensation, is granted on a discretionary basis "if the circumstances of the individual case so warrant."³⁷ Only guestworkers with permanent status receive social benefits automatically. Guestworkers have little access to other benefits offered by the German social welfare system.³⁸

3. Housing

One of the major causes of tension between guestworkers and the indigenous population is housing. Guestworkers are forced to live in substandard and overcrowded housing.³⁹ An unexpected consequence is the competition with disadvantaged Germans (i.e., the unemployed, aged, and low income groups) for economical housing.⁴⁰ In 1975, a regulation was passed that prohibited migrants from residing in areas already "overstrained," such as the inner-city districts of Berlin and Frankfurt.⁴¹ By passing this regulation, the state was "identifying migrants as the cause of urban problems."⁴²

This tension is further exacerbated by the requirements of the residency permit system. The system requires that the board, in reviewing applications for entrance of additional family members, determines whether suita-

35. Hickox, *supra* note 3, at 378.

36. *Id.* (citing Note, *The Legal Rights of Guestworkers: The Case of West Germany*, 24 COLUM. J. TRANSNAT'L L. 311, 326 (1987)). The study conducted by the Kohl government was intended to determine the extent of the guestworker problem and possible solutions. The report has been criticized as a deliberate plan designed to pressure guestworkers into returning to their home countries. Note, *supra* note 5, at 326.

37. Hickox, *supra* note 3, at 378.

38. *Id.* The guestworker is not entitled to health insurance for family members outside the FRG, while Germans receive comprehensive coverage. Accident insurance is only available to foreigners with permanent residency.

39. *Id.* at 380 (citing Castles, *supra* note 31, at 521).

40. *Id.*

41. Castles, *supra* note 13, at 524. The federal government granted authority for cities with more than a 6% foreign worker population to apply for permission to restrict further immigration of foreign workers. When the population of foreign workers reaches 12%, the cities have the right to deny admission to additional workers. By 1976, it was estimated that approximately 45 German cities had placed this ban on immigrating guestworkers. RIST, *supra* note 3, at 153.

42. Castles, *supra* note 13, at 524. This regulation was dropped two years later, not because it violated guestworkers' human rights, but because employers protested that it made the "labor market too inflexible" and because it was impossible to effectively enforce. *Id.*

ble housing is available.⁴³ Furthermore, guestworkers must prove that housing is available before they can bring their families into the country.⁴⁴ These regulations were designed to prevent overcrowding; however, many workers resorted to bringing in their families illegally.

4. Family Reunification

Labor-importing countries initially theorized that guestworkers would stay for a couple of years and then leave.⁴⁵ By allowing family members to accompany the workers, the countries felt that the workers would stay longer. Therefore, labor importing countries placed limitations on family reunification. The maximum entry age for a guestworker's child into the FRG was first lowered from 20 years to 17, and then to 16 years.⁴⁶ Spouses and children who joined the guestworker who had lived in the FRG for one year were not allowed to receive work permits until they had lived in the country for four and two years, respectively.⁴⁷

5. Civil and Political Rights

The Alien Act of 1965 is one of the most important laws for guestworkers. The Act sets out the guidelines for immigrating to and working within Germany. The legislation also defines who is allowed to enter Germany: "Everyone is a foreigner who is not German in the sense of Article 116, Section 1 of the Constitution."⁴⁸ Article 116 provides that anyone of German descent, or a spouse or child who fled to Germany from territories of the Third Reich, is a citizen.⁴⁹

43. *Id.* Adequate housing is generally defined as at least 12 square meters of living space per adult and eight per child. *Id.*

44. RIST, *supra* note 3, at 151.

45. "The [West German] Federal Government continues to proceed from the assumption that the overwhelming number of foreign employees will not stay in the Federal Republic. . . . The limitation of the duration of stay will not be effected through (police) measures under the law relating to foreigners." Bohning, *supra* note 14, at 37 (quoting Federal Minister for Labor and Social Order, *The Policy of the Federal Government Towards Foreign Employees in the Federal Republic of Germany*, German Parliament, 6th Session, Print No. VI/3085, Jan. 31, 1972).

46. Hickox, *supra* note 3, at 381 (citing Rogers, *Transnational News of Migration*, in *THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL SOCIAL SCIENCE* 38, 47 (1986)). However, workers from EEC member states are allowed to bring their dependents with them. Family members allowed to enter with the guestworker include his or her spouse and children under the age of 21 years. RIST, *supra* note 3, at 24.

47. Hickox, *supra* note 3, at 382 (citing UNITED NATIONS, *INTERNATIONAL MIGRATION POLICIES AND PROGRAMMES: A WORLD SURVEY* 32 (1982)).

48. However, citizens of EEC countries have an unrestricted right to enter Germany. RIST, *supra* note 3, at 136 (quoting Alien Act, BGBl-I (1965), as amended April 28, 1975).

49. *Id.*

The FRG refuses to grant the right to vote to guestworkers of any duration. In fact, the *Ausländergesetz* (Foreigners Law) of 1965 specifically excluded not only their right to vote, but also other civil rights.⁵⁰ This law states “ ‘[f]oreigners enjoy all basic rights, except the basic rights of freedom of assembly, freedom of association, freedom of movement and free choice of occupation, place of work and place of education, and protection from extradition abroad.’ ”⁵¹ However, foreign workers have limited basic constitutional rights allowed to Germans, such as freedom of expression, access to the press, freedom of association, and the right of geographic mobility.⁵²

Foreigners are allowed the right to participate in union activities.⁵³ In 1978, approximately thirty percent of the foreign workers belonged to trade unions, compared to forty percent of German workers.⁵⁴ However, nonrenewal of a foreigner's contract lies within the German employer's discretion. Therefore, foreign workers might forego their rights to participate in union activities because of the control German employers have over the renewal of their contracts. German citizens' jobs, however, are protected by the Law Protecting Against Dismissals, which requires justification for non-renewal.⁵⁵

When the entry of foreign workers began, the German Trade Union Federation (DGB) was fearful about the effects on full employment and wage levels.⁵⁶ The DGB agreed to the entry of foreign workers but did little to combat discrimination and exploitation.⁵⁷ By 1972, the DGB called for a ban on further recruitment of foreign labor.⁵⁸ The union supported the government measures to stop foreigners from entering the FRG because

50. The FRG is not obligated to grant political rights to non-German citizens unless it has made explicit treaty agreements to do so. The FRG views the granting of these rights as an “internal and domestic activity as opposed to one found in principles of international law.” RIST, *supra* note 3, at 141.

51. Castles, *supra* note 13, at 522 (quoting Allgemeine Verwaltungsvorschrift zur Ausführung des Ausländergesetzes § 6).

52. Hickox, *supra* note 3, at 384 (citing Minet, *Spectators or Participants? Immigrants and Industrial Relations in Western Europe*, 117 INT'L LAB. REV. 22 (1978)).

53. *Id.*

54. *Id.*

55. *Id.* (citing Blanc-Jovan, *supra* note 26, at 330).

56. CASTLES ET AL., *supra* note 1, at 150.

57. *Id.* at 151 (citing STEPHEN CASTLES & GODULA KOSACK, IMMIGRANT WORKERS AND CLASS STRUCTURE IN WESTERN EUROPE 129-32 (1973)).

58. *Id.* After the ban came into effect, the entry of new workers, except for EEC citizens, virtually ended. To illustrate, the number of new workers coming into Germany decreased from 103,753 to 640. RIST, *supra* note 3, at 113.

it would not tolerate the unemployment of millions of West Germans while foreigners still had jobs.⁵⁹

While the DGB has not called for mass deportation, it has supported governmental discriminatory measures. These measures include: the option of a German worker to take over a position held by a foreign worker at the time the labor permit of the foreign worker expires;⁶⁰ restricting labor market access for foreign workers' children; and restricting the entry of children and spouses.⁶¹ The policies were effective. The first twenty-four months after their initiation saw the number of foreign workers legally employed in Germany drop by 439,000.⁶² One should note that these regulations are not applicable to workers from EEC countries.

In the early 1980s, the FRG concentrated on stopping further integration, reducing family reunification, and encouraging repatriation.⁶³ The Minister of the Interior set up a commission to develop new policies toward foreigners. The commission recommended tightening the conditions for granting residency permits: Foreigners would be allowed to stay only if they were able to support themselves, while conviction for a criminal offense would be reason enough for automatic deportation.⁶⁴ The commission also proposed that foreigners be required to carry a passport or identity card at all times.⁶⁵

The trend toward restrictive policies on migration continues to the present. Rising unemployment and urban problems cause widespread hostility between citizens and foreigners.⁶⁶ The FRG denies foreigners a range of civil rights; however, the deprivation of rights is not the same for all for-

59. CASTLES ET AL., *supra* note 1, at 151 (citing MANFRED BUDZINSKI, GEWERKSCHAFTLICHE UND BETRIEBLICHE ERFAHRUNGEN AUSLÄNDISCHER ARBEITER 65 (1979)).

60. RIST, *supra* note 3, at 113.

61. CASTLES ET AL., *supra* note 1, at 151.

62. RIST, *supra* note 3, at 113.

63. Castles, *supra* note 13, at 528. On June 5, 1989, the FRG government signed a treaty with Yugoslavia granting the country a loan of DM 2,500,000 for the reintegration of Yugoslavians temporarily employed in the FRG. The term of the repayment plan is 30 years (with a 10-year grace period) with an annual interest rate of two percent. Summary of World Broadcasts, June 22, 1989, at EE/WOO82/A/1.

64. Castles, *supra* note 13, at 529.

65. *Id.* The recommendations made by the Commission were seen as the beginning for a new *Ausländergesetz*. The Ministry of the Interior began working on the *Ausländergesetz*, thus removing the responsibility for guestworkers from the Ministry of Labor. By doing this, the government shifted the perception of guestworkers; they were no longer seen as useful labor but as a problem of public order. *Id.* at 528. However, by 1985 no new bill had been published. Several reasons may account for this. First, the foreign problem seems less problematic now that the number of foreigners has begun to decrease. Second, a movement has started favoring the recognition of a multicultural society in the FRG. *Id.* at 530-31.

66. Castles, *supra* note 13, at 525.

eigners.⁶⁷ Citizens of states that are members of the EEC have the same rights as Germans to employment and have reasonable security of residence, yet they do not have political rights and can be deported for offenses concerning public order and security.⁶⁸ Thus, foreigners from non-EEC countries face much broader discriminatory regulations concerning freedom of employment and the right to remain in the FRG.⁶⁹

6. German Unification

On September 12, 1990, the German Democratic Republic (GDR) and the FRG signed a treaty with the Soviet Union, Great Britain, France, and the United States. The treaty ended foreign occupation and enabled the GDR to unite with the FRG on October 3, 1990.

While reunification of the two Germanys has created one nation, it has also brought mass unemployment, rising inflation rates, and increasing government expenditures. The problems caused by reunification in the past year are affecting everyone involved—West Germans, East Germans, and foreign workers.

West Germans are facing higher taxes on income, tobacco, and gasoline to help pay for reunification.⁷⁰ East Germans are facing mass unemployment. "Unemployment in the East is nearing 40 percent and soaring monthly as the Bonn government and the Treuhand—the private agency in charge of selling off communist-era properties—quit subsidizing bloated and hopelessly unprofitable enterprises."⁷¹ In August 1991 the number of unemployed East Germans fell 5,400 to 1.06 million.⁷²

With large numbers of East and West Germans unemployed,⁷³ the guestworkers find themselves in a precarious position. No mention has been made by the government of the fate of these workers as East Germans flock to the West. As the German government tries to integrate the Eastern

67. Article 3 of the federal constitution of the FRG forbids discrimination because of "sex, race, language, country of origin, descent, beliefs, and religious or political suasion." RIST, *supra* note 3, at 134. However, no mention is made of forbidding discrimination based on nationality. The constitution provides for various rights given to "all German citizens." *Id.*

68. Castles, *supra* note 13, at 526.

69. *Id.*

70. Andrew Borowiec, *Germans Mark Troubled Year of Financial Union*, WASH. TIMES, July 2, 1991, at A9. The income tax rate will increase to 7.5%, and West German residents will pay 37% more in gasoline taxes. *Id.*

71. Paul Blustein et al., *Needy East Poses New Challenge; Summit Nations to Find Economies Out of Sync*, WASH. POST, July 14, 1991, at A1.

72. Christopher Parkes, *E. German Unemployment Falls for First Time Since Unification*, FIN. TIMES, Sept. 5, 1991, at 14.

73. The August unemployment figures for West Germany dropped 140,565, to end at 1.67 million. *Id.*

and Western economies, guestworkers may lose their jobs to provide employment for the German people. While foreign workers have been predominantly employed in the lower-paying jobs, unemployed Germans may find menial labor better than unemployment. Therefore, foreign workers will find themselves unemployed and virtually without recourse to the German government.

The most disturbing problem surrounding the relationship between the guestworkers and the Germans is the xenophobia felt by the East Germans. The intolerance is a result of their "lack of knowledge about foreigners."⁷⁴ Guestworkers are subjected to daily incidents of violence and racism usually initiated by right-wing and neo-Nazi groups.⁷⁵ Yet the government seems reluctant to deal with the problem.⁷⁶

7. Conclusion

West Germany is torn over its guestworker policies. The conservative forces want more restrictions and increased repatriation, which would mean increasing governmental control over the guestworkers' lives. Liberal and left groupings, along with migrant organizations, want improvements in the legal status of guestworkers. Neither group has prevailed, leaving the foreign workers in a state of confusion and insecurity.⁷⁷

Domestic resentment toward the guestworkers will be difficult to eliminate as unemployment rises and the economy worsens. "Foreign workers and their families must compete with German families for industrial jobs, scarce housing, and social resources."⁷⁸ As unemployment rises, citizens are becoming more concerned that the guestworkers are receiving a disproportionate amount of welfare benefits that the citizens are paying for with their taxes.⁷⁹

The important thing to recognize is that the guestworkers are no longer guests. Most of the workers residing in the FRG do not intend to return to

74. Adrian Bridge, *Bonn Urged to Stem Rising 'Intolerance' of Foreigners*, THE INDEPENDENT, July 13, 1991, at 15. A survey conducted by a German institution found that "49 per cent of young East Germans agreed that 'every foreigner is one too many.'" *Id.*

75. *Id.*

76. Liselotte Funcke, the government appointee responsible for foreigners living in Germany, resigned from her position because she felt that after ten years on the job, nothing had been accomplished. She also requested a meeting with Chancellor Kohl to discuss the immediate need for action. Chancellor Kohl did not meet with Ms. Funcke because of his "very busy schedule." *Id.*

77. Castles, *supra* note 13, at 533.

78. Note, *supra* note 5, at 337.

79. *Id.* (citing P. MARTEN & M. MILLER, ADMINISTERING FOREIGN WORKER PROGRAMS: LESSONS FROM EUROPE 80 (1982)).

their home countries. The German government should accept this fact and begin programs that are consistent with democracy and fundamental human rights.⁸⁰

B. Switzerland

From 1850 to 1917, immigration into Switzerland was loosely administered and was at the prerogative of each canton.⁸¹ During this time, all that foreigners needed to enter and remain in Switzerland was a passport, no criminal record, and an "indication that they would not become a charge on public welfare."⁸² However, in 1917 the government created the Federal Aliens' Police. With the creation of this agency, the federal government began to take immigration control out of the hands of the cantons and began to "subordinate the admission of foreigners to the country's capacity to absorb them."⁸³

In 1931, voters passed a new article to the federal constitution that granted the government the right to regulate immigration. This article provided that federal authorities, in deciding whether to allow foreigners to work and live in Switzerland, "should take into account the moral and economic interests of the country as well as the degree of foreign over population. As a general rule, when considering a request for employment (of a foreigner), the authorities should first solicit the advice of the appropriate public employment office."⁸⁴

1. Labor Permits

To remain in Switzerland guestworkers need a passport and one of the following four documents: "(1) a renewable residence permit, [or "annual permit,"] usually issued for one year; (2) a permanent residence permit; (3) a seasonal permit, which permits them to take seasonal employment for a maximum of nine months; or (4) a frontier permit, issued one year at a

80. *Id.* at 338. For a discussion of how the FRG's guestworker policies violate human rights, see *infra* text accompanying notes 163-177.

81. M. Gardner Clark, *The Swiss Experience with Foreign Workers: Lessons for the United States*, 36 INDUS. & LAB. REL. REV. 606, 607 (1983). Switzerland has 25 cantons which are similar to states. These cantons participate in federal organs and enjoy a Federal Constitution, while each also maintains a complete governmental structure. Max Frenkel, *Swiss Federalism in the Twentieth Century*, in MODERN SWITZERLAND 329, 329-30 (J. Murray Luck ed., 1978).

82. *Id.*

83. *Id.*

84. *Id.*

time, permitting them to cross the border and return home as daily commuters."⁸⁵

The Swiss government makes employers responsible for the recruitment of foreign workers. Employers must apply to the cantonal aliens' police, certifying that they cannot find either a qualified Swiss worker or a foreign worker with a permanent visa who is willing to work for the pay and under the conditions offered.⁸⁶ The aliens' police refer the application to the local public employment office, which verifies that the application conforms with prevailing wages and working conditions. Permission is usually granted by a local commission comprised of employers, trade representatives, and government specialists who examine collective bargaining contracts, occupational wage surveys, and the wages and working conditions in the industry. These procedures are performed to verify that the foreign workers are not taking jobs away from domestic workers by working for lower wages than Swiss labor standards require.⁸⁷

If the employer's application is approved, the employer is given written notice that a permit will be issued. The employer then informs the foreign worker of this fact. Thereafter, the worker applies to the cantonal police and receives an annual or seasonal permit, without which the guestworker cannot legally be employed or remain in Switzerland.⁸⁸

Switzerland prides itself in controlling the entry of illegal aliens. Foreigners intending to live or work in Switzerland must report to the aliens' police within eight days of their arrival, and any person housing these workers must report them to the police immediately. No employer can hire a foreigner who does not have a residence permit.⁸⁹ To enforce the policy, the cantonal aliens' police raid houses and businesses in which illegal aliens are thought to be residing or working.

85. *Id.* at 608. Seasonal workers cannot change jobs during the season, and they must return home and apply for a new permit each year. They are also not allowed to bring their families in, except as visitors. After four consecutive years, seasonal workers are entitled to annual permits and allowed to bring in their dependents. *Id.* at 608 n.7.

Annual workers must renew their permits every year; however, after five years their permits are automatically renewed, provided they have a job. Annual workers are entitled to bring their families in after fifteen months. After ten years, they may obtain permanent permits which free them from supervision by the aliens' police and allow them to work anywhere in Switzerland. Such permanent permits place the guestworkers on a level with Swiss citizens. *Id.*

86. *Id.* at 608.

87. *Id.*

88. *Id.*; see *supra* note 85 and accompanying text.

89. *Id.* at 609. Illegal aliens and anyone helping them enter or stay in Switzerland are subject to a fine of 10,000 Swiss francs, or sentenced up to six months in prison. By comparison, other violators of laws regulating immigration are subject to fines of up to 2000 Swiss francs. *Id.*

2. Post War Immigration

Switzerland actively recruited alien workers after World War II. Foreign labor allowed for the country's rapid economic expansion. These workers allowed for "flexible responses to new market demands, provided elasticity to the labor market, and slowed the growth of both money and real wages, allowing the Swiss to maintain more stable prices than their neighbors."⁹⁰ It did not take long for the alien laborers to become an integrated part of the economic structure, so much so that they became indispensable to the smooth running of the economy.⁹¹

However, by the 1970s problems began to arise when it became evident that the large number of foreign workers was changing "Switzerland's previously stable and sensitive religious, linguistic, and ethnic balance, threatening the Protestant majority that had been predominant in the country since the Reformation."⁹² The percentage of Roman Catholics had risen from 40.9% in 1890 to 49% in 1970, while the percentage of Protestants had dropped from 58% in 1941 to 48% in 1970.⁹³ Further, the majority of the foreign workers came from Mediterranean countries.⁹⁴ The numbers of foreign workers of Mediterranean origin increased until these workers made up almost 68% of all foreign workers in Switzerland during the 1960s.⁹⁵ Some citizens protested against the massive influx of foreigners, which only intensified the prejudice the Swiss already had against Mediterranean nationalities.⁹⁶

By the 1960s, the Swiss government, witnessing the tensions evolving within its economy and with its large number of alien workers, began tightening controls in admitting foreign workers. The government took mandatory measures to prevent employers from increasing their work force by hiring foreign labor.⁹⁷ The government passed decrees which put federal controls on the admission of foreign workers from nonadjacent countries, as well as those from Eastern Europe and the Far East. It also gave the Federal Aliens' Police the power to reject applications for foreign worker per-

90. *Id.* at 612.

91. *Id.* at 613.

92. *Id.*

93. *Id.*

94. *Id.* These countries include Italy, Spain, Turkey, Greece, and Yugoslavia. *Id.*

95. *Id.*

96. *Id.* at 613-14. Attempts have been made to try to stop immigration and to deport the foreign workers. For example, in 1970, a referendum was introduced that allowed Swiss citizens to vote on a proposal for the deportation of a large number of foreign workers. The referendum was only narrowly defeated. CASTLES ET AL., *supra* note 1, at 71.

97. Clark, *supra* note 81, at 614.

mits.⁹⁸ The federal government each year has set out to reduce the number of foreigners admitted into the country. Switzerland was partially successful in reducing the number of foreign workers in the country. In 1977, the number of foreign workers bottomed out at 650,000. However, the figures began to rise again and by 1981 the number of foreign workers had increased to 738,000.⁹⁹

3. Social and Political Rights

Guestworkers' rights are restricted compared to the rights of Swiss citizens. Foreign workers have a recognized right to strike, but this right is not formally guaranteed.¹⁰⁰ Foreign workers can participate in strikes as long as notice is given and the strikes are union sponsored. Switzerland attempts to provide the guestworkers with a legitimate public voice, but guestworkers' participation is limited.¹⁰¹ Foreign workers from democratic countries are allowed to vote in their own national elections; however, Switzerland does not allow these workers to vote at the consulates on its territory.¹⁰² Guestworkers have the right to join political parties; however, they may not endanger public order, and the government will not tolerate political violence by a foreigner.¹⁰³

Switzerland has made every effort to control the foreign worker population and the rights given to them. For example, it has implemented a very restrictive naturalization policy. The policy first has a twelve-year residence qualification. In addition, the foreigner must meet requirements pertaining to personal character and language knowledge, which few migrants can meet.¹⁰⁴ Furthermore, children born to foreign parents in Switzerland do not have an automatic right to Swiss citizenship and can be deported. Finally, the nationality law discriminates against foreign men in that children born to a Swiss mother with a foreign husband do not become Swiss citizens whereas children born to a Swiss father with a foreign wife become citizens.¹⁰⁵

98. *Id.*

99. CASTLES ET AL., *supra* note 1, at 68.

100. Martin & Miller, *supra* note 3, at 326.

101. *Id.*

102. *Id.*

103. *Id.* at 327.

104. CASTLES ET AL., *supra* note 1, at 70. Foreign workers who possess a seasonal or annual permit can be deported at the discretion of the government. Also, even workers with permanent residence permits can be deported for a variety of reasons. *Id.*

105. *Id.*

III. SOUTH AFRICA AND ITS POLICY OF APARTHEID

A. *The Settlement of South Africa by Foreigners*

The development of apartheid¹⁰⁶ dates to the early 1500s, when for the first time Europeans — the Portuguese — conquered a powerful tribe on the western coast of South Africa.¹⁰⁷ The Dutch were the next to arrive, looking for cattle to supply their ships with meat. The African tribes that possessed large herds of cattle resisted the Dutch invasion of their lands. Their resistance laid the foundation for future problems between blacks and whites over land.¹⁰⁸ In 1806, the British took over the administration of the Cape. In order to retain their control, the British imported 5,000 new immigrants.¹⁰⁹

With the discovery of gold and diamonds, new immigrants poured into South Africa in search of wealth. These new settlers became members of the "powerful new white labour force."¹¹⁰ During this time, the Europeans laid claim to vast amounts of land, leaving many Africans landless and unemployed since most of them were farmers.¹¹¹ "Many features of South African life today, such as passes and job reservation, originated in this period of upheaval."¹¹²

White parliamentary politics centered largely on country of origin and on two main parties — the Nationalist Party, supported primarily by Afrikaners,¹¹³ and the Unionist Party, supported by English speaking people. Both parties opposed racial equality.¹¹⁴

When the Nationalist Party came into power in 1948, most African countries were preparing for independence. Their declarations of independence affected Africans in South Africa; however, the groundwork for apartheid was laid during the European settlement of the country. The Nationalist Party based its platform on apartheid and the "continuation of

106. Apartheid is an Afrikaans word which means "apartness." The term is used to describe South African governmental policies legally separating the white, black, and Asian people of South Africa. Arthur J. Goldberg, *The Status of Apartheid under International Law*, 13 HASTINGS CONST. L.Q. 1, 1 (1985).

107. ANTI-APARTHEID MOVEMENT, RACISM AND APARTHEID IN SOUTHERN AFRICA 15 (1974).

108. *Id.* at 16.

109. *Id.* at 17.

110. *Id.* at 21.

111. *Id.*

112. *Id.*

113. An Afrikaner is a "descendant of the 18th century voortrekkers (Dutch settlers) who settled South Africa's interior. Afrikaners are of Dutch, German, and French ancestry." ROBERT W. PETERSON, *SOUTH AFRICA & APARTHEID* 5 (1971).

114. ANTI-APARTHEID MOVEMENT, *supra* note 107, at 27.

white dominance.”¹¹⁵ The Nationalist Party’s apartheid policy involved the following:

1. The consolidation and extension of legislation governing the separation of blacks, whites and Coloureds.
2. Bringing indirect rule via the chiefs and traditional special structures up to date in such a way as to inhibit the rise of an African nationalism.
3. Emphasis on Afrikaner economic and social control.
4. Racial separation through the medium of separate social institutions (language, culture, education) controlled directly by the government or through the selective use of State finance.¹¹⁶

The aims of apartheid were:

1. To ensure the continuation of white supremacy, while at the same time controlling the pace and direction of African nationalism.
2. To guarantee the expansion and competitiveness of South African business (Afrikaner in particular) by means of a lowly paid, docile and highly mobile reserve of African workers.¹¹⁷

B. Implementing the Apartheid Policy

The government began passing acts to “institutionalize clear-cut racial differentiation.”¹¹⁸ The acts began with the Mixed Marriages Act (1949)

115. *Id.* at 44.

116. *Id.*

117. *Id.* In 1948, the following main groups existed in South Africa:

Africans: The pool of cheap labour on which the economy is built. Mainly, although not completely, unskilled or semi-skilled, working in the mines and in industries in the main towns. A few had succeeded in entering law, liberal studies, and journalism. In the rural areas, employed on white farms or living on ‘reserves’.

Coloureds: Mainly semi-skilled or foremen, junior manager jobs in industry, particularly in the Cape area. Some still work in agriculture, but most have shifted to better paid urban jobs.

Asians: Mainly descendants of the indentured Indian labour recruited for the sugar plantations. Some free immigrants (mainly Moslem) had become traders and shopkeepers. Some Chinese and Malaysians as well.

Afrikaners: Many Afrikaners were still farmers, but many had become urbanized. Urbanization generally had been speeded up by the world economic depression in the 1930s. Afrikaners and English-speaking South Africans each controlled a sector in the economy.

English-speaking South Africans: A broad term used to distinguish Afrikaner groups from other whites who had British descent or connexions. They were mostly urbanized, usually more wealthy than the Afrikaners, and professional or managerial by occupation. Separated from the Afrikaners by history, area of settlement, language, religion and tradition.

Id. at 44-45.

118. *Id.* at 45.

and the Immorality Act (1950). These Acts were designed to prevent marriage and intercourse between whites and blacks.¹¹⁹ The Population Registration Act (1950) mandated that anyone over sixteen years of age possess identity cards and that such cards be produced at the request of an authorized person.¹²⁰ The Group Areas Act stipulated that each racial group must live in specifically demarcated areas.¹²¹ To minimize racial contact, the Reservation of Separate Amenities Act (1953) required all races to use separate public amenities at all times. This included eating and drinking, transportation, entertainment, and recreational facilities.¹²²

The government also dictated the education of African children. The Bantu Education Act (1953) removed control of African children's education from subsidized churches and mission societies and placed it under the control of the state.¹²³ In 1959, the Extension of University Education Act was passed. This Act closed "white" universities, except for individual exceptions, to all "Africans, coloureds, and Indians."¹²⁴

The government also restricted labor rights. Strikes by Africans are illegal, as are racially mixed trade unions.¹²⁵ While African unions are not illegal, they cannot participate in collective bargaining. On the other hand, white unions are registered and officially recognized as the workers' repre-

119. *Id.*

120. *Id.* This Act classifies people as white, black, Asian, or mixed race. Skin color and hair texture determine someone's race. A "pencil test" is often used. This test consists of putting a pencil in a person's hair. If the pencil does not fall out, the person is classified as black. Chris Erasmus, *Pillar of Apartheid Scrapped*, USA TODAY, June 18, 1991, at 1A.

Furthermore, identity cards are mandatory for all races in South Africa. Yet Africans must always carry their pass books; if they cannot produce these books immediately upon request, they may be arrested on the spot. Other races have a grace period of seven days to produce their books. ANTI-APARTHEID MOVEMENT, *supra* note 107, at 67.

An African pass book contains a photograph of the holder and indicates his or her race, sex, identity number, address, age, marital status, ethnic group or tribe, employer's name and address, length of employment, and tax receipts. "Every month an African employer [must] sign the . . . book and insert the date when employment is terminated. . . . When the books are issued, fingerprints are recorded for a central bureau." *Id.*

121. ANTI-APARTHEID MOVEMENT, *supra* note 107, at 67. This Act was passed in 1950 and is referred to as the "'cornerstone of positive apartheid.'" ANTHONY LEMON, APARTHEID IN TRANSITION 51 (1987) (quoting Dr. T.E. Dönges, in HANSARD, May 29, 1950, at col. 7434).

122. LEMON, *supra* note 121, at 51.

123. *Id.* Passage of this Act allowed the government to restrict the education of the Africans since "[t]here is no place for the Native in the European community above the level of certain forms of labour." *Id.* (quoting Dr. Verwood, in E. BROOKES, APARTHEID: A DOCUMENTARY STUDY OF MODERN SOUTH AFRICA 57 (1989)).

124. *Id.* at 52.

125. ANTI-APARTHEID MOVEMENT, *supra* note 107, at 46 (citing Bantu Labour (Settlement of Disputes Act (1953))).

sentatives.¹²⁶ The South African government allows itself the right to reserve "certain types of jobs to persons of a 'specified' race."¹²⁷ "Outside the 'homelands' Africans are by custom almost universally excluded from exercising administrative authority over whites."¹²⁸

Furthermore, non-whites have lost the right to vote. The Separate Representation Voters Bill (1951) provided for the removal of coloured voters to a separate roll through which they may elect four white members of the House of Assembly and two white or coloured members of the Cape Provincial Council.¹²⁹ However, by 1956 the government finally succeeded in completely removing colored voters from the separate roll.¹³⁰ The government eliminated this representation by 1968, and in 1970 abolished all political and social rights outside the homelands.¹³¹

Land has always been a point of conflict between whites and blacks. As early as 1913, with the Native Land Act, the South African government restricted the Africans' right to own land.¹³² Africans were not permitted to acquire land outside the scheduled "Native areas" except with the consent of the governor-general.¹³³ Apartheid was built on this unequal distribution of land — 86.3% of land was under permanent white control with 13.7% of the land to eventually pass over to the Africans.¹³⁴

World attention turned to South Africa and its apartheid policies in 1964 when India condemned the country for its treatment of the South African Indian population and its racial policies in general.¹³⁵ The United Nations (U.N.), responding to the demand for action against apartheid, imposed an arms embargo against South Africa.¹³⁶ Yet the U.N. had been discussing South Africa's racial policies since 1946, with no affirmative ac-

126. *Id.*

127. *Id.*

128. *Id.*

129. LEMON, *supra* note 121, at 50.

130. *Id.*

131. ANTI-APARTHEID MOVEMENT, *supra* note 107, at 46.

132. *Id.* at 69.

133. *Id.* at 69. "Such areas [of land] amounted to 7.3 per cent of South African land, at a time when Africans constituted 67 per cent of the population. The Act also made it illegal for any African to be on European land unless he was a hired servant." LEMON, *supra* note 121, at 39. The government eventually allotted an additional 6.1 million hectares for transference to the Native Reserves over a ten-year period with the Native Trust and Land Act. *Id.*

134. ANTI-APARTHEID MOVEMENT, *supra* note 107, at 46.

135. In 1943 and 1946, the whites, who were worried about the infiltration by Indians into predominately white neighborhoods, restricted Indian occupation and ownership of property. The whites viewed Indians as alien and unassimilable based on cultural differences. LEMON, *supra* note 121, at 246.

136. ANTI-APARTHEID MOVEMENT, *supra* note 107, at 104.

tion.¹³⁷ Eventually, in 1962, the U.N. asked its Member States to impose diplomatic sanctions against the country.¹³⁸ These measures were among the first sanctions imposed upon South Africa.¹³⁹

IV. INTERNATIONAL TREATIES THAT PROTECT HUMAN RIGHTS

A. International Treaties

The U.N. Charter presents a good starting point for examination of the minimum guarantees of human rights owed by each state to its citizens. The Charter states that one of its principal objectives is "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person."¹⁴⁰ The Charter goes on in Chapter I to state that "[t]he [p]urposes of the United Nations are . . . to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."¹⁴¹

In 1948, the U.N. further detailed its objectives for the promotion of human rights in the Universal Declaration of Human Rights. The Declaration was intended to be "a common standard of achievement for all peoples and all nations."¹⁴² This Declaration is a "statement of what the General Assembly believed the international law to be."¹⁴³ The International Covenant on Economic, Social and Cultural Rights,¹⁴⁴ and the International Covenant on Civil and Political Rights¹⁴⁵ both give legal effect to the Declaration.¹⁴⁶

The Covenant on Economic, Social and Cultural Rights sets out in its first article that "[a]ll people have the right for self-determination. By virtue of the right they freely determine their political status and freely pursue

137. *Id.*

138. *Id.*

139. See *infra* text accompanying notes 178-228.

140. Goldberg, *supra* note 106, at 2 (quoting U.N. CHARTER pmbl.).

141. *Id.* (quoting U.N. CHARTER art. 1, ¶ 2).

142. *Id.* (quoting G.A. Res. 217A, pmbl., U.N. Doc. A/810, at 72 (1948)). This Declaration "represents the most authoritative definition of human rights in existence: it has found its way into many national constitutions and parts have become recognized as international customary law." David Weissbrodt & Georgina Mahoney, *International Legal Action Against Apartheid*, 4 LAW & INEQ. J. 485, 487 (1986).

143. Goldberg, *supra* note 106, at 2.

144. G.A. Res. 2200A, 21 U.N. GAOR Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

145. G.A. Res. 2200A, U.N. GAOR Supp. No.16, at 49, U.N. Doc. A/6316 (1966).

146. Goldberg, *supra* note 106, at 2. "[T]hose Covenants recognized the same human rights as did the Declaration." *Id.*

their economic, social and cultural development.”¹⁴⁷ The Covenant further states that this right will be “exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁴⁸ The Covenant on Civil and Political Rights cites these passages verbatim. “They are the fundamental principles of international law which form the basis from which follow the other rights enumerated in both Covenants.”¹⁴⁹ These rights include, among others, the right of every person to:

1. have the opportunity to gain his living by work which he freely chooses or accepts;
2. the enjoyment of just and favourable conditions of work;
3. form trade unions and join the trade union of his choice;
4. an adequate standard of living and . . . to be free of hunger . . . ;
5. education . . . directed to the full development of the human personality and the sense of its dignity;
6. life and to liberty and security of person;
7. due process when accused of committing a crime;
8. freedom of thought, conscience and religion;
9. assemble peacefully and associate freely;
10. vote, to take part in the conduct of public affairs, to be elected to public office, and to have equal access to public service.¹⁵⁰

These are human rights that each nation must guarantee its citizens under international law.¹⁵¹

B. Apartheid and Guestworker Policies Under International Law

Apartheid and the guestworker policies must be measured against the above standards to determine whether they violate international law. Examining apartheid first, there are several documents which address the violation of human rights under the policies of apartheid. The first document is the Convention on the Prevention and Punishment of the Crime of Genocide.¹⁵² The Convention provides that it is a crime under international law, if “any of the following acts [are] committed with intent to destroy, in whole or part, a national, ethnical, racial or religious group, as such: Delib-

147. *Id.*

148. *Id.* at 2-3 (quoting G.A. Res. 220 A, Part II, art. 2 ¶ 2, 21 U.N. GAOR Supp. No. 16, at 49, U.N. Doc. A/6316 (1966)).

149. *Id.* at 3.

150. *Id.* (footnotes omitted) (quoting G.A. Res. 2200 A, Part III, 21 U.N. GAOR Supp. No. 16, at 49, U.N. Doc. A/6316 (1966)).

151. *Id.*

152. G.A. Res. 260 A, U.N. Doc. A/810, at 174 (1948).

erately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part."¹⁵³

A second document is the Declaration on the Granting of Independence to Colonial Countries and Peoples.¹⁵⁴ The Declaration states that "'subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation.'"¹⁵⁵

These two instruments were followed by two more documents that were aimed directly at apartheid. These documents are the Declaration on the Elimination of All Forms of Racial Discrimination and an International Convention bearing the same name.¹⁵⁶ The General Assembly of the U.N. was alarmed by the racial discrimination still evident in parts of the world. The first article of the Declaration condemns racial discrimination as:

an offence to human dignity . . . [which] shall be condemned as a denial of the principles of the Charter of the United Nations, as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, as an obstacle to friendly and peaceful relations among nations and as a fact capable of disturbing peace and security among peoples.¹⁵⁷

In 1973, the General Assembly adopted the International Convention of the Suppression and Punishment of the Crime of Apartheid. The U.N. based this Convention on the instruments examined above, as well as the U.N. Charter and Security Council Resolutions. The Convention "purported to outlaw apartheid as violating principles of international law expressed in all of those declarations."¹⁵⁸ The Convention against Apartheid was followed by numerous other declarations which expanded on the earlier documents mentioned above.¹⁵⁹

153. Goldberg, *supra* note 106, at 3-4 (citing G.A. Res. 260 A, U.N. Doc A/810, at 174, art II(c)).

154. G.A. Res. 1514, 15 U.N. GAOR Supp. No.16, at 66, U.N. Doc. A/4684 (1960).

155. Goldberg, *supra* note 106, at 4 (quoting G.A. Res. 1514, 15 U.N. GAOR Supp. No. 16, at 66 ¶ 1, U.N. Doc. A/4684 (1960)).

156. *Id.* Article III of this Convention declared that "State Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." *Id.* (quoting G.A. Res. 2106 A, 20 U.N. GAOR Supp. No. 16, at 47, U.N. Doc. A/6014 (1965)).

157. *Id.* (quoting G.A. Res. 1904, pmbl., 18 U.N. GAOR Supp. No. 15, at 35, U.N. Doc. A/5515 (1963)).

158. *Id.* at 5 (citing G.A. Res. 3068, 28 U.N. GAOR Supp. No. 30, at 75, art. 1, U.N. Doc. A/9030 (1973)).

159. *Id.* Other declarations include: The International Declaration Against Apartheid in Sports; the Declaration of the World Conference to Combat Racism and Racial Discrimination;

From the reasoning of this body of international law, five principles can be enumerated against which apartheid and the guestworker policies must be measured:

1. Discrimination based on race, color, national or social origin is illegitimate in almost all circumstances;
2. Such discrimination is illegitimate both [sic] because it denies the fundamental right of self-determination;
3. Because it denies the principle of equality in dignity and rights to which every human is entitled;
4. Recognition of these universally recognized fundamental principles imposes on States living in accordance with international law the obligation to eradicate such discrimination from their legal and economic systems; and
5. To take positive steps against such discrimination.¹⁶⁰

Apartheid violates these five principles. Apartheid is a public policy founded on the premise that discrimination against non-whites is acceptable because people of different colors or races are not equal.¹⁶¹ Blacks are not allowed the right of self-determination since they are denied the right to vote and hold office, are subject to the "pass" requirements, and are segregated. The denial of these rights also constitutes the denial of fundamental human rights. The government of South Africa has forbidden the teaching of doctrines that are contrary to separation based on racial inequality, and until recently the government had failed to take any measures to dismantle discrimination from its legal system.¹⁶²

Turning to the question of whether the guestworker policies violate human rights under international law, one must first examine how nations treat aliens under international law. Traditionally, "a state is under no obligation to admit nationals of another state into its territory and incurs no international responsibility if it deports them."¹⁶³ This meant that if aliens were allowed into a country, the host country could impose restrictions on the length of their stay, the areas where they may travel, and the activities in which they could participate. The host country could prohibit aliens

the Declaration of the Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War; the Declaration on Race and Racial Prejudice; and the Declaration on South Africa. *Id.*

160. *Id.* at 6.

161. *Id.*

162. *Id.*; see *infra* text accompanying notes 212-27.

163. Note, *supra* note 5, at 334 (quoting L. HENKIN ET AL., INTERNATIONAL LAW, CASES AND MATERIALS 685 (1980)).

“ ‘from such civil and political rights as the right to vote or to hold public office.’ ”¹⁶⁴

The only recognized general standard under international law is the standard that aliens must receive equal treatment to that of local citizens in respect to the application of the host country's laws:

If the alien receives the benefits of the same laws, protection, and means of redress for injuries which the state accords to its own nationals, there is no justifiable ground for complaint unless it can be shown that the system of law or its administration falls below the standard generally recognized as essential by the community of nations.¹⁶⁵

While a great number of declarations have been adopted by the international community regarding the violations of human rights, little has been mentioned about the rights of aliens. The U.N. Charter is silent on the issue of discrimination based on national origin. However, the Universal Declaration of Human Rights states that everyone is entitled to all the rights and freedoms set forth in this Declaration, without discrimination of any kind.¹⁶⁶ While no reference is made as to whether “everyone” refers to aliens or citizens, international interpretation has excluded the protection of citizens in foreign countries.¹⁶⁷

Yet the International Convention on the Elimination of All Forms of Racial Discrimination directly addresses the discrimination between citizens and aliens, stating that it shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to the Convention between citizens and noncitizens.¹⁶⁸ This provision significantly undercuts a separate provision in the Convention, which declares that a state “ ‘shall assure to *everyone within the jurisdiction* effective protection and remedies’ against violations of the Convention’s provisions.”¹⁶⁹

Likewise, the International Covenant on Civil and Political Rights protects the rights of all people to self-determination, and equal protection re-

164. *Id.* (quoting HENKIN ET AL., *supra* note 163, at 685).

165. *Id.* at 334-35 (quoting 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 47-72 (1943), reprinted in HENKIN ET AL., *supra* note 163, at 686-87).

166. *Id.* at 335 (citing *Universal Declaration of Human Rights*, G.A. Res. 217, 3 U.N. GOAR, U.N. Doc. 1,777 (1948)).

167. *Id.* (citing Russo, *Migrant Workers: Existing and Proposed International Action on Their Rights*, 15 REV. INT’L COMMISSION OF JURISTS 51, 53 (1976)).

168. *Id.* (citing the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195).

169. *Id.* (quoting the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195) (emphasis added).

ardless of national origin.¹⁷⁰ Yet Article 13 of the Covenant allows the expulsion of aliens "in pursuance of a decision reached in accordance with law," so long as they are given the chance to have their cases reviewed by the competent authority, except in cases where it is 'otherwise required' by 'compelling reasons of national security.'¹⁷¹ The Covenant also provides that the right to vote is a right only afforded to citizens, and the right to peaceful assembly is subject to restrictions imposed by the host country "to protect the interests of national security and the public order."¹⁷²

Guestworker policies are inconsistent with the five principles mentioned above. Guestworkers are being discriminated against on the basis of their national origin. Germany and Switzerland have imposed restrictions on foreign workers that do not affect the citizens of their home countries. Alien workers of any duration are denied the right to vote and the right to hold office. They are also segregated in respect to housing. Alien workers are therefore denied their right to self-determination, and, most tragic, they are denied basic human rights. The governments of these two countries are not taking active measures to eliminate these discriminatory measures. In fact, the governments seem to want to pass more restrictive provisions.¹⁷³

However, it is apparent that while guestworkers are not afforded fundamental human rights such as the right to vote; the right to choose an occupation; the right to an adequate standard of living; and the right to freedom of thought, conscience, and religion, international law does not view these "deprivations" as violations of human rights. One must assume this is true because aliens are not specifically protected under any of the agreements mentioned above. However, international law should not interpret the provisions literally. The purpose of international law "should not be to codify existing inequities, but to provide standards that encourage states to recognize and further the development of human rights for all individuals."¹⁷⁴

The International Labor Organization has made great strides in securing social rights for alien workers, yet these strides have not remedied all the omissions apparent in international law when dealing with alien workers. The U.N. and the international community must begin to make ac-

170. *Id.* at 336 (citing the International Covenant on Civil and Political Rights, G.A. Res. 2200 Annex, 21 U.N. GOAR Supp. No. 16, at 52, U.N. Doc. A/6316) (1966).

171. *Id.* (quoting the International Covenant on Civil and Political Rights, art. 1(3), G.A. Res. 2200 Annex, 21 U.N. GOAR Supp. No. 16, at 52, U.N. Doc. A/6316) (1966).

172. *Id.* (citing the International Covenant on Civil and Political Rights, art. 21).

173. *Id.* In 1982, Chancellor Helmut Kohl announced a new policy towards foreigners which emphasized stopping further immigration, reducing family reunification, keeping out refugees, and encouraging repatriation. Castles, *supra* note 13, at 528.

174. Note, *supra* note 5, at 336.

commodations for the growing number of alien workers throughout the world. At the end of 1981 and 1982, in Switzerland and West Germany, guestworkers and their families numbered 910,000¹⁷⁵ and 4.7 million¹⁷⁶ respectively. These numbers represent people without fundamental human rights — the same rights which the blacks of South Africa are denied — yet the U.N. has not spoken out against the guestworker policies as it has against apartheid.

V. SANCTIONS AGAINST SOUTH AFRICA — CAN THEY BE APPLIED TO WEST GERMANY AND SWITZERLAND

A. *The Birth of Economic Sanctions*

South Africa has been severely criticized for violating the international law of human rights with its policy of apartheid. International institutions, individual governments, and regional and private organizations have attempted a variety of methods aimed at ending apartheid.¹⁷⁷ Such methods include various forms of economic pressures and sanctioning schemes. The U.N. has imposed trade embargoes, and some companies have withdrawn their business or established codes of conduct for employees working in South Africa.¹⁷⁸

Until the creation of the League of Nations in 1919, the decision of whether to retaliate, including economic and military action, against countries that breached international law was left primarily to each state.¹⁷⁹ But, in 1919, the Covenant of the League of Nations included economic enforcement measures. Under Article 16 of the Covenant, "the economic weapon became the primary method of collective action against States that resorted to war."¹⁸⁰ The only problem with Article 16 was the large discre-

175. CASTLES ET AL., *supra* note 1, at 68.

176. *Id.* at 74.

177. Wendell C. Maddrey, Note, *Economic Sanctions Against South Africa: Problems and Prospects for Enforcement of Human Rights Norms*, 22 VA. J. INT'L L. 345, 346 (1982). Nongovernmental organizations include Amnesty International, the International League for Human Rights, and the International Commission of Jurists. *Id.* at 358 n.68. Regional Commissions include the European Commission of Human Rights and Inter-American Commission on Human Rights. *Id.* at 357 n.67.

178. *Id.* at 346.

179. *Id.* at 347-48.

180. *Id.* at 348. Paragraph 1 of Article 16 of the League of Nations Covenant provided: Should any Member of the League resort to war in disregard of its covenants under Article XII, XIII, or XV, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all finan-

tionary rights each country possessed, thereby weakening the centralized system of automatic sanctions. While the Council could recommend the imposition of economic sanctions, each country had the right to decide the timing and nature of the sanctions it would impose.¹⁸¹

After the demise of the League of the Nations and the birth of the United Nations, the drafters of the U.N. Charter felt that "a centralized international organization was crucial to the maintenance of world peace and order."¹⁸² Therefore, under Article 39, the U.N. Security Council was given the power to determine "the existence of a threat to the peace, breach of the peace or act of aggression."¹⁸³ Articles 41 and 42 then authorized the use of economic and military sanctions.¹⁸⁴ The States are bound to this decision regarding such enforcement action under Article 25.¹⁸⁵

Article 2 of the U.N. Charter prohibits the use of force by members to obtain their objectives: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent

cial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

Id. at 348 n.15 (quoting LEAGUE OF NATIONS COVENANT art. 16, ¶ 1).

181. *Id.* at 348-49.

182. *Id.* at 349.

183. *Id.* (quoting U.N. CHARTER art. 39). U.N. Charter Article 39 states: "The Security Council shall determine the existence of any threat to the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." *Id.* at 349 n.20 (quoting U.N. CHARTER art. 39).

184. Article 41 of the U.N. Charter reads:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Id. at 349 n.21 (quoting U.N. CHARTER art. 41).

Article 42 of the U.N. Charter provides:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Id. at 350 n.22 (quoting U.N. Charter art. 42).

185. *Id.* at 350. U.N. Charter Article 25 provides: "The Members of the United Nations agree to accept and carry out the decision of the Security Council in accordance with the present Charter." *Id.* at 350 n.23 (quoting U.N. Charter art. 25).

with the Purposes of the United Nations.”¹⁸⁶ The question then becomes whether economic sanctions constitute an illegal use of force. Based on numerous interpretations of Article 2, the answer appears to be no.¹⁸⁷

Applying economic sanctions seems like an attractive alternative means of enforcement. However, problems with economic sanctions, such as trade embargoes, do arise. The primary problem is obtaining full compliance. Trade embargoes have not always been honored by participating states, and even though Article 25 of the U.N. Charter makes compliance mandatory, enforcement is difficult.¹⁸⁸ Furthermore, even if full compliance is attained, the ultimate economic impact of trade embargoes may be minimal. Hence, some commentators note that trade boycotts are “weak responses to breaches of international law, with value only as symbolic gestures.”¹⁸⁹ But, when dealing with economic sanctions in response to human rights violations, these sanctions may be more effective since they publicize international concern and force the violating country into the center of this international concern.¹⁹⁰

Economic restrictions have become more popular when leveled against countries guilty of human rights violations. However, a difficult issue arises in the application of economic force because it involves a country's treatment of its own nationals, “an area once regarded under customary law as within the exclusive jurisdiction of each nation.”¹⁹¹ In other words, economic coercion is being used to promote human rights and is aimed at inducing changes in the internal order of another country.

B. Apartheid and the Use of Sanctions

1. The Organization for African Unity

The U.N. and various States have sought to influence South Africa, ignoring the issue of governing the internal workings of the country. Sanctions have also been brought by the Organization for African Unity (OAU). At its founding meeting in 1963, the OAU called for a “total eco-

186. *Id.* at 351 (quoting U.N. CHARTER art. 2, ¶ 4).

187. *Id.* at 352. The debate over whether economic force is prohibited under the U.N. Charter began in 1945 when Brazil introduced a proposal to ban the threat or use of economic coercion. Doc. 215, I/1/10, 6 U.N.C.I.O. Doc. 559 (1945). The proposal was soundly defeated. The issue arose again in 1965 within the Special Committee on Friendly Relations when it prohibited the use of military force only. *Id.* at 351-52.

188. Maddrey, *supra* note 178, at 354.

189. *Id.* at 355 (citing Tauberfeld & Tauberfeld, *The 'Economic Weapon': The League and the United Nations*, 58 PROC. AM. SOC'Y INT'L L. 183, 204 (1964)).

190. *Id.* at 356; see John Polakas, Note, *Economic Sanctions: An Effective Alternative to Military Coercion?*, 6 BROOK. J. INT'L L. 289, 309-17 (1980).

191. Maddrey, *supra* note 178, at 358.

nomic boycott" against South Africa.¹⁹² The OAU wanted a comprehensive boycott that would prohibit the importation of goods from South Africa, mandate the closing of ports to its ships, and deny overflight and landing rights to South African aircraft.¹⁹³

However, the OAU sanctions have proven to be relatively ineffective. In fact, in 1979 it was estimated that twenty-five African countries engaged in one billion dollars of trade per year with South Africa. With the bulk of this trade being food, it is unlikely that these African states will tighten the sanctions.¹⁹⁴

2. The United Nations

The U.N. has been attempting to deal with apartheid in South Africa since 1946. The idea of sanctioning South Africa was introduced to the U.N. in the 1950s. In 1962, the General Assembly considered sanctions and approved voluntary measures that "called for the breaking of diplomatic relations, the closing of ports to ships flying the South African flag, the boycotting of all goods sold by South Africa, and the refusal of landing privileges to South African aircraft."¹⁹⁵ However, the majority of these measures were ignored by most nations.

The General Assembly's recommendations were followed by the Security Council in 1963 when it passed Resolution 181.¹⁹⁶ This Resolution called for South Africa to abandon the policy of apartheid and requested all states to cease "the sale and shipment of arms, ammunition of all types, and military vehicles to South Africa."¹⁹⁷ However, the Security Council would not expand on these restrictions until 1977.

In 1977, the Security Council passed Resolution 418.¹⁹⁸ This resolution "condemns the South African use of violence against black dissidents and the 'defiant continuance' of the apartheid system."¹⁹⁹ The resolution also called for the strengthening of the 1963 arms embargo. One important fea-

192. *Id.* at 371 (citing Boutros-Ghali, *The Addis Ababa Charter*, 546 INT'L CONCILIATION 32, 32 (1964)).

193. *Id.* (citing Boutros-Ghali, *supra* note 192, at 32).

194. *Id.*

195. *Id.* at 371-72 (citing G.A. Res. 1716, U.N. GAOR, 17th Sess., Supp. No. 17, at 18519, U.N. Doc. A/5217 (1962)).

196. S.C. Res. 181, 18 U.N. SCOR, Resolutions and Decisions 7, U.N. Doc. S/Res/181 (1963).

197. Maddrey, *supra* note 178, at 372 (quoting U.N. SCOR, 18th Sess., at 7, U.N. Doc. S/Res./181 (1963)).

198. S.C. Res. 418, 32 U.N. SCOR, Resolutions and Decisions 5-6, U.N. Doc. S/Res/418.

199. Maddrey, *supra* note 178, at 372 (citing U.N. SCOR, 3rd Sess., at 5-6, U.N. Doc. S/Res./418 (1977)).

ture of the resolution was its position that South African policies and acts constitute a threat to international peace and security.²⁰⁰

The U.N. also urged members to adopt measures against South Africa. In 1985, the U.N. suggested the suspension of all new investment in South Africa; restrictions in sports and cultural relations; suspension of guaranteed export loans; and prohibition of all new contracts in the nuclear field.²⁰¹

3. The European Economic Community

In 1985 the European Economic Community (EEC) agreed on a series of restrictive measures to pressure South Africa to abolish its apartheid policy. These measures included a ban on arms trade, the recall of military attachés to South Africa, a freeze on official sports contacts, and an end to oil exports.²⁰² The EEC also passed measures to help establish programs to assist nonviolent anti-apartheid organizations and provide education to nonwhite South Africans.²⁰³

4. The United States

The United States took independent action towards sanctioning South Africa. In 1986, the Senate and the House of Representatives overrode President Reagan's veto on a bill imposing economic sanctions against South Africa.²⁰⁴ The Comprehensive Anti-Apartheid Act of 1986 (the Act)²⁰⁵ banned new corporate investments and loans; prohibited the importation of a number of South African goods; prohibited the export of numerous goods to South Africa; and refused landing rights in the United States for South African airways.²⁰⁶

The Act also contained five conditions that South Africa was required to meet before the sanctions could be lifted. The conditions are:

1. The release of all persons prosecuted for their political beliefs or unlawfully detained without trial, including African National Congress Leader Nelson Mandela.

200. *Id.*

201. *United Nations: Security Council Resolution Urging Sanctions Against South Africa*, in 24 INT'L LEGAL MATERIALS 1483, 1484 (1985) in U.N. SCOR 2602nd mtg., U.N. Doc. S/Res./569 (1985).

202. *E.C. Adopts Measures to Pressure South Africa*, in 24 INT'L LEGAL MATERIALS 1479, 1479 (1985).

203. *Id.*

204. Jeff Walker, Comment, *Economic Sanctions: United States Sanctions Against South Africa*, 28 HARV. INT'L L.J. 117, 118-19 (1987).

205. Pub. L. No. 99-440, 100 Stat. 1086 (1986).

206. Walker, *supra* note 204, at 119-20.

2. Repeal of the state of emergency and release of all detainees held thereunder.
3. Lifting of the ban on democratic political parties and permitting free exercise of political activities.
4. Repeal of the Group Areas Act and the Population Registration Act.
5. The government must enter into good faith negotiations without preconditions.²⁰⁷

C. *The Dismantling of Apartheid*

Whether South Africa has finally succumbed to world pressure or finally realized the time for white domination has come to an end, President F.W. de Klerk has begun dismantling apartheid. On February 2, 1991, President de Klerk announced that he was repealing the Land Acts of 1913 and 1936, the Group Areas Act of 1966, and the Black Communities Act of 1984.²⁰⁸ In June 1991, President de Klerk abolished the Population Registration Act.²⁰⁹ Yet the repeal of this act only affects newborn citizens. Those already classified will remain so until a new constitution is enacted.²¹⁰

In the last year, President de Klerk legalized anti-apartheid organizations and released Nelson Mandela, leader of the African National Congress.²¹¹ Furthermore, the national state of emergency, in effect for the last four years, was lifted in all but one of South Africa's four provinces.²¹² President de Klerk has also released some political prisoners, opened public hospitals to all races, and repealed legislation that allowed local governments to reserve public facilities for the use of whites only.²¹³

207. Mervyn M. Dymally, . . . *Let's Not Be So Quick to Decide; They Must Remain Until The Majority Rules, Which Will Guarantee That Anti-Apartheid Efforts Will Not Be Reversed*, L.A. TIMES, July 5, 1991, at B5.

208. Christopher S. Wren, *South Africa Moves to Scrap Apartheid*, N.Y. TIMES, Feb. 2, 1991, at A1.

209. Dymally, *supra* note 207, at B5.

210. Christopher S. Wren, *South Africa Scraps Law Defining People by Race*, N.Y. TIMES, June 18, 1991, at A1.

211. The African National Congress is a militant black political organization which has pushed the cause of black equality through various acts of violence. LEMON, *supra* note 121, at 89.

212. Christopher S. Wren, *South Africa Ends Emergency Decree in 3 of 4 Provinces*, N.Y. TIMES, June 8, 1990, at A1.

213. *Id.* at A9.

On July 9, 1991 the International Olympic Committee (IOC) announced its recognition of South Africa. This recognition ended thirty years of sports isolation for South Africa because of its apartheid policies.²¹⁴

One day after this announcement, the United States lifted the economic sanctions it imposed on South Africa in 1986. President Bush decided that South Africa had met the last condition, which was the release of all political prisoners.²¹⁵ Despite removal of the sanctions, the United States will continue to observe the U.N.-imposed arms embargo.

Following these recent events, the European Economic Community tried to lift its sanctions against South Africa. However, Denmark vetoed the plan, and the sanctions will remain in effect until EEC unanimity is achieved.²¹⁶

While President de Klerk has succeeded in eliminating or reforming many apartheid laws since he took office, problems remain. The Africans still have no right to vote,²¹⁷ are not subject to compulsory military service,²¹⁸ suffer disparities in pensions,²¹⁹ and experience institutional²²⁰ and municipal segregation.²²¹

D. Will Sanctions Work Against West Germany and Switzerland?

Before exploring whether sanctions would improve the positions of the guestworkers under consideration, one must consider the goal of applying sanctions. "Economic pressure can be viewed as an important—but not

214. Lionel Barber, *US Set to Lift South African Sanctions*, FIN. TIMES, July 10, 1991, at 16. This action clears the way for South Africa to take part in the 1992 summer games in Barcelona, Spain. South Africa last competed in the 1960 Olympic games in Rome, Italy. *Id.*

215. On the information provided by Secretary of State James Baker, President Bush stated that "everyone who had been imprisoned for peaceful political activity is free." Norman Kempster, *Bush Lifts Economic Sanctions on South Africa; Apartheid: He Sees 'Irreversible' Progress by Pretoria. Opponents in Congress Plan No Effort to Undo the Move*, L.A. TIMES, July 11, 1991, at A1, A9.

216. Other countries agree with Denmark's view that the removal of sanctions is premature. The countries of the Commonwealth, a 50 nation grouping of former British colonies, will continue to enforce sanctions.

217. President de Klerk says that he is willing to negotiate a new constitution which would allow Africans equal voting rights. Wren, *supra* note 208, at A1.

218. Only whites are subject to compulsory military service. *Id.*

219. White retirees receive larger pensions than their black counterparts. *Id.*

220. De facto segregation remains in many institutions thereby continuing the large economic differences between the races. *Id.*

221. Racially segregated municipal and township councils remain until a new constitution is written. *Id.*

necessarily decisive—tool for expressing disapproval to a particular policy or government.”²²²

If the goal of sanctions was to harm South Africa economically, the sanctions imposed were successful. In 1986, 250 American companies were doing business with or had investments in South Africa for a total of 2.5 billion dollars. Five years after the imposition of the sanctions, there are only 100 companies worth 1 billion dollars doing business with the country.²²³ However, American sanctions did not prohibit American companies from entering into licensing agreements with South African companies; therefore, U.S. goods were still available, but through South African businesses rather than through American ones.²²⁴

While sanctions had some effect on the dismantling of apartheid, this policy was destined to end. South Africa has built an enormous economy, but there are not enough whites to operate it.²²⁵ Businesses need skilled black laborers to help run and manage the companies; however, the government has restricted the education and movement of the Africans. Therefore, a need to improve the Africans’ positions has been created.²²⁶

The South African government was shocked at finding itself a collective moral outcast. International condemnation led the government of South Africa to implement reforms more quickly than otherwise would have happened. “‘It was the feeling that the country had become a global pariah rather than the economic pressures, however substantial, which seems to have given de Klerk the green light for reforms.’”²²⁷

The effects of sanctions on West Germany and Switzerland could run a similar course to South Africa. Economically, these two countries could be harmed if all countries imposed sanctions and complied with them. However, as is evident from South Africa, countries will trade with the sanctioned country if the imported or exported goods are vital to their economies.

222. Stephen P. Davis, *Economic Pressure on South Africa: Does It Work?*, in EFFECTIVE SANCTIONS ON SOUTH AFRICA: THE CUTTING EDGE OF ECONOMIC INTERVENTION 66 (George W. Shepherd, Jr. ed., 1991).

223. Thomas L. Friedman, *Bush Lifts a Ban on Economic Ties to South Africa*, N.Y. TIMES, July 11, 1991, at A1, A10. Yet critics contend that sanctions hurt the people they were intended to help—the Africans. Unemployment among blacks has reached an estimated 40-45% versus a 10% unemployment rate for whites. George J. Church, *South Africa; A Black and White Future*, TIME, July 22, 1991, at 40, 41; see also *The MacNeil/Lehrer NewsHour* (Educational Broadcasting, June 19, 1991).

224. Walker, *supra* note 204, at 121.

225. Church, *supra* note 223, at 41.

226. *Id.*

227. *Id.* (quoting unnamed British official).

Yet these two countries differ from South Africa in that their economies have been built with the guestworkers in mind, not by excluding them from work. West Germany's and Switzerland's businesses are run more efficiently than South African businesses. The European countries will hire a foreign worker to fill a job, thereby ensuring full employment. On the other hand, South Africa excludes Africans at the expense of an efficiently run economy.

The moral condemnation that would result because of sanctions would also force these countries to review their policies. Most likely, these countries, which have imposed sanctions against South Africa, do not view their guestworker policies as being similar to apartheid. Once the association is made, however, West Germany and Switzerland may be quick to reform their policies so as not to be the objects of world-wide disapproval.

VI. CONCLUSION

It took many years for the economic sanctions and widespread denunciation of South Africa to take effect. Nevertheless, the South African government has finally been forced to take measures to dismantle apartheid. But the use of sanctions can only be considered a limited success. While apartheid policies are crumbling, one must wonder to what extent the sanctions are responsible for the breakdown. Times have changed, and new leaders and increased violence must be considered when viewing the changes occurring in South Africa. Whether one believes that sanctions or other circumstances are responsible for recent changes, the result is still the same—apartheid is slowly coming to an end.

However, when looking at guestworkers in the FRG and Switzerland, it is important to determine whether sanctions and public denouncement are responsible for the new events in South Africa. If sanctions and public denouncement are responsible, then the guestworkers have hope that policies could change if sanctions were applied. If the sanctions are not responsible, then the guestworkers must hope that people striving for equality for foreign workers will come into power. The most important aspect of applying sanctions to these countries is the international concomitant condemnation, which would impair these countries' reputations in the eyes of the international community.

It is important to note that guestworkers can no longer be considered "guests." They have established themselves in these countries and do not plan on returning home. Measures must be taken to help these people. Guestworkers and their families are being denied many fundamental human rights; rights which under international law they are guaranteed.

The world must come to their aid as it came to the aid of the Africans in South Africa.

DEMETRA K. MATSIS