TO THE EDITOR IN CHIEF:

February 8, 1989

I wish to reply briefly to the responses by Paul C. Szasz (82 AJIL 314 (1988)) and Henry J. Richardson III (82 AJIL 800 (1988)) to my contention that economic sanctions against South Africa are in violation of international law (82 AJIL 311 (1988)).

It would appear that the only common ground among the three of us is our abhorrence and utter rejection of apartheid. On that score I associate myself with the sentiments expressed by the above two writers.

This should not, however, cloud our objectivity as international law practitioners when expounding international law as a legal system. And it is precisely on that score that our interpretations of what international law is regarding sanctions, and more precisely economic sanctions, differ.

Both Mr. Szasz and Professor Richardson rely heavily, if not solely, on the "soft law" aspects of contemporary international law.[1] I am not convinced that the "soft law" they rely on so heavily is generally accepted as *international law* and generally seen as being obligations that must be put into practice by states members of the family of nations.

I sometimes get the impression that "soft law" originates in the camaraderie of the Sixth Committee of the General Assembly, the International Law Commission and similar quasi-legislative organs, which have conditioned themselves to treat this body of rules as if it were law—and in doing so, are selective about which states are to be the target of such "laws" and thus fall into the trap of double standards and hypocrisy. One of the memorable insights Edvard Hambro left to posterity was his phrase "Thank God for hypocrisy."[2] This phrase is directly relevant to the "soft law" syndrome of the United Nations era.

It often goes through as being *equity.* To quote Schwarzenberger, this equity

> has found ample expression in a growing number of resolutions, adopted by the political organs of the United Nations, and in standard-setting conventions. Irrespective of whether any of these efforts have resulted in law by the tests of Article 38 of the Statute of the International Court of Justice, some of the principles "enshrined" in these instruments have been invoked on the Court's Bench and even described as "the law recognized by the United Nations".
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> The flaws *de lege lata* in some of these propositions are not hard to detect.[3]

Schwarzenberger continues and declares that should a government be less than enamored by the prospect of the International Court of Justice dis-

[1] On the term "soft law," see Baxter, *International Law in "Her Infinite Variety,"* 29 INT'L & COMP. L.Q. 549, 550 (1980); Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413 (1983).

[2] *See* 4 G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 729 (1986) (quoting Hambro, in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES (H. Mosler & R. Bernhardt eds. 1974)).

[3] 4 G. SCHWARZENBERGER, *supra* note 2, at 730.

pensing such rules, principles and standards of United Nations instruments as a congenial fount of equity, it need not subject itself to the Court's jurisdiction. He states further that, by courtesy of the Court, governments are even able to control with considerable predictability the doses of United Nations "equity" that are likely to be administered to them in any *ad hoc* Chamber of the Court. He concludes: "It might also have a sense of humour of its own to watch whether any of the participants in the voting coalitions in favour of the various brands of United Nations equity would wish this 'soft' law to be applied, with themselves at the receiving end."[4]

To respond more specifically to Mr. Szasz's contention that the principle of domestic jurisdiction is no longer a bar to the international scrutiny of human rights violations (82 AJIL at 317), I wish to make the following comment: The mutual relationship between the *sovereignty of the state* and the *freedom of the individual* continually gains importance for the development of international law. The classical concept of unrestricted sovereignty necessarily results in a contradiction with individual rights if the latter are based on a legal justification finding its source beyond the power of the state. Unrestricted sovereignty consists in the lawful power of a state to arrange its internal and external affairs alone and without interference by other sovereign powers; hence, the sovereign seems to be free from any obligation in dealing with rights and duties of the individuals living under its jurisdiction.

This view, however, no longer corresponds to the requirements of the existing legal situation since the freedom of the individual, forming part of international human rights, is now considered not to be subject to every compulsory measure of state power, if the sovereign should limit the free development of personality in an intolerable manner. Although one cannot deny that theory and practice are far from being reconciled, the principle as such is no longer contested.

This principle confirms that *both* these rights—freedom of the sovereign state and freedom of the individual—are *equally* objects of legal protection under international law. On the other hand, it produces one of the profoundest problems we have before us, because in a concrete situation we have to decide on the *predominance* of one of these rights. The history of international law clearly demonstrates the permanent tension between these two goals, and today this tension is rapidly increasing on account of the daily invocation of human rights, as well as the invocation of state sovereignty, in international affairs.

Moreover, all demands in this respect emphatically invoke the requirements expressed in the Charter of the United Nations, which contains arguments for accusation as well as for defense. When, for instance, the Western powers reproach Communist countries for not protecting human rights sufficiently, the latter recall the prohibition against intervention in domestic affairs.

With regard to human rights as limiting state sovereignty, the United Nations Covenants on Human Rights cannot produce the same effect as the European Convention because the respective provisions remain open to different interpretations and no obligatory jurisdiction of an international court exists; thus, binding decisions are not to be expected.

[4] *Id.* at 731.

There is, however, one principle that we should never overlook; individual human rights and freedoms can be established and preserved *only* under the protection of effective authority of a sovereign state. Considering this, state sovereignty and human rights *must not be seen to contradict each other,* but rather to stand in a necessary relationship of reciprocity.[5]

Thus far, I have attempted to restrict myself solely to a strict legal response. With your permission, I wish to conclude on a more "political" note by commenting briefly on Professor Richardson's remarks about my being "too kind to both the snake and the house" (82 AJIL at 800).

May 17 of this year will only be the 35th anniversary of *Brown v. Board of Education,*[6] which declared unconstitutional apartheid American-style, imposed by law in the United States. This decision led to social, legislative and judicial events that shape race relations in the United States to this day, and will have consequences for years to come. The *Brown* decision was the legal expression of a long American historical process. In this country we are going through the same historical process, and I have good reason to believe that soon every South African will live under a system of racial equality and all that is understood under basic civil rights. South African audiences may look to the United States for guidance to supplement their own convictions about what may be achieved for race relations through the law.

By imposing economic sanctions, however, the United States is only turning the face of the man in the street in South Africa away from Washington.

GEORGE N. BARRIE*

TO THE EDITOR IN CHIEF:

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Professor Franck's article on legitimacy in the international system (82 AJIL 705 (1988)) concerns an important and intellectually challenging subject, and I would agree that solutions to problems of legitimacy may help "to find a key to a better, yet realistic, world order" (*id.* at 707). To consider legitimacy as an alternative to coercive compliance with rules of international law is a valuable idea.

The analysis of the *perception of legitimacy* as a factor of noncoercive compliance, however, is linked in the article with a definition of *legitimacy as perception.* Such a definition seems to deviate from the traditional usage of the term. Legitimacy, it would appear, is not generally understood as meaning "that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process" (*id.* at 706) (italics omitted). It is not *perception* of accordance, but *actual* accordance, with right process that is usually regarded as the essence of legitimacy: not the awareness of the worthiness of a rule to

[5] *See* Doehring, *The Relationship between State Sovereignty and Human Rights,* in 1979 ACTA JURIDICA 77.

[6] 347 U.S. 483 (1954).

* Professor of International Law, Rand Afrikaans University.