

The Crime against Humanity of Apartheid in a Post-Apartheid World

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Abstract

The crime against humanity of apartheid has been widely neglected: jurisprudence is non-existent and the academic discourse modest. The International Criminal Court (ICC) is the first international criminal tribunal to include the crime against humanity of apartheid in its statute, notwithstanding the controversy of this crime. According to critics the crime is a South African phenomenon that has not reached the status of customary law. The provision on apartheid in the Rome Statute of the ICC builds on the Apartheid Convention, which is highly contentious and not signed by any Western state. All the more, it is surprising that apartheid was included in the Statute.

Despite the fact that the crime of apartheid has never been prosecuted, this article argues that its inclusion into the Rome Statute raises some unique and interesting questions. It shows the international community's belief in the deterrent effect of this crime, as well as its continued importance. This article will scrutinise the elements of the crime and reveal definitional challenges. It will, in particular, discuss potential contemporary situations of apartheid. The ICC Prosecutor will have to release apartheid from its historical connection in order to bring to justice perpetrators of systematic racial oppression.

Keywords: apartheid; crime against humanity; Rome Statute; Apartheid Convention; North Korea; Palestine.

1. Introduction

More than twenty years ago, the South African apartheid regime ended with the country's first fully democratic elections. From its inception until the fall of the regime in 1994, the United Nations (UN) stood unified in its effort to bring down this institutionalised system of racial discrimination. Apartheid was criminalised as a crime against humanity in 1973 with the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention).¹ However, the Convention was highly contentious and has, until today, not been ratified by any state of the industrialised West. No trial or conviction for the crime of apartheid has ever occurred — and the Apartheid Convention is widely believed to be a dead letter.²

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¹ GA Res 3068 (XXVIII) (30 November 1973).

² An assessment which is very critical of the crime of apartheid as found in the Apartheid Convention is given by the South African Professor of Law Hercules Booysen in his article, 'Convention on the Crime of

Perhaps the crime of apartheid ended with the abolishment of the South African apartheid regime? It is all the more surprising that the crime against humanity of apartheid was included in a last minute compromise into the Rome Statute of the International Criminal Court (ICC)³ in 1998, four years after the end of the apartheid regime in South Africa. Despite its reoccurrence in international law, legal scholarship has largely turned a blind eye to this crime. This article attempts to fill this gap by (re)awakening the interest in this crime. Not only does the article reveal the potential and the pitfalls of the crime of apartheid, it also argues for the recognition of the crime of apartheid with respect to contemporary regimes.

This article undertakes a legal analysis of the crime of apartheid as found in Article 7(1)(j) Rome Statute. Most importantly, it answers the question whether the crime against humanity of apartheid is a relict of a bygone era or could potentially be used for prosecutions before the ICC. This article demonstrates that the crime of apartheid can be applied to cases other than South Africa, provided it can be disconnected from its historical link to the South African apartheid regime. Similar to the crime of genocide, which had — historically and analytically — to be released from the Holocaust, the crime of apartheid has to cut the ties to Southern Africa in order to gain independent significance.

Due to the contentiousness of the Apartheid Convention, some authors claim that the crime of apartheid should not be considered an international crime, and that it has not reached customary law status either.⁴ This article attempts to prove them wrong. Instead of treating the crime of apartheid as a relict, we should focus on the current importance of the crime and identify potential cases for prosecution before the ICC. As an international crime, apartheid has no geographic or historical limitations; rather, it is a crime against humanity, as are murder and torture.

The primary legal sources applied in this article are the relevant international treaty and customary law norms, foremost the Rome Statute and the Apartheid Convention. Domestic law is considered in as much as it is found to be of importance to the discussion. As secondary sources, scholarly writing and reports, notably by the International Law Commission and the UN Commissions of Inquiry, are used. Due to the complete absence of criminal proceedings for the crime of apartheid, case law plays a subordinate role.

This article first examines the history of the crime of apartheid, before reviewing the crime's inclusion into the Rome Statute as well as its status in customary law. The main body of this article is concerned with a legal analysis of the elements of crime and related definitional challenges. The article ends with looking into two apartheid-like

Apartheid' (1976) 2 *South African Yearbook of International Law* 56. Booysen calls the Convention, amongst other things, 'a masterpiece of hypocrisy' (60).

³ A/CONF.183/9 (17 July 1998) entered into force on 1 July 2002.

⁴ Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008) 13; Kriangsak Kittichaisaree, *International Criminal Law* (Oxford University Press 2001) 3.

situations, North Korea and Palestine, and draws the conclusion that the application of the crime of apartheid in the near future should not be ruled out.

2. A Brief History of the Crime of Apartheid

2.1. Origins of Apartheid

Apartheid literally signifies 'apartness' in Afrikaans and is not easily applied to cases other than that of South Africa: any similar situation seemingly demands a comparison with South Africa during the apartheid regime. This chapter will, in order to create an understanding for the crime of apartheid, briefly look into the origins of apartheid in Southern Africa and the criminalisation of apartheid by the Apartheid Convention, before turning to the colloquial use of the term.

The system of apartheid dates back to the 1930s when the South African Bureau of Race Relations (SABRA) created a plan on the separate development of races, building on the conceived historical legitimacy of apartheid as a logical outcome of the European settlement at the Cape in 1652.⁵ Opposed to assimilation or integration, apartheid was a political and a legal system that maintained the differences of the various racial⁶ groups by aiming at their separate development. The term apartheid has subsequently been associated with the racial segregation policy implemented by the South African National party's government during the years 1948-1994.⁷ Ultimately, the apartheid policy resulted in over 14,500 civilians being killed and many more affected, by restrictions of virtually every single aspect of life, ranging from free movement and public services, to choice of domicile or spouse.⁸

The term 'apartheid' was coined by the South African Prime Minister, Daniel Malan, in 1944, to denote the country's official policy of racial segregation between whites and various non-white groups; while Hendrik Verwoerd is seen as the architect of apartheid, claiming it to be a policy of good neighbourliness.⁹ With the appointment of Verwoerd as Minister of Native Affairs in 1950, the use of apartheid as a slogan and as a state program drastically increased.¹⁰ The segregation of Africans from the white society was

⁵ Paul Rich, 'South Africa' in Jay Sigler (ed), *International Handbook on Race and Race Relations* (Greenwood Press 1987) 252.

⁶ A more detailed analysis of the terms 'racial' and 'race' in the context of apartheid will be performed subsequently. At this point, the term 'racial' is used uncritically and as such undefined.

⁷ Alette Smeulders and Fred Grünfeld, *International Crimes and other Gross Human Rights Violations: A Multi- and Interdisciplinary Textbook* (Martinus Nijhoff Publishers 2011) 109; Johan Van der Vyer, 'Apartheid' in Dinah Shelton (ed), *Encyclopedia of Genocide and Crimes against Humanity* (Thomson Gale 2005) 47.

⁸ Jennifer Balint, *Genocide, State Crime and the Law: In the Name of the State* (Routledge 2012) 17.

⁹ Natan Lerner, *The UN Convention on the Elimination of all Forms of Racial Discrimination* (Sijthoff & Noordhoff International Publishers 1980) 42; Christine Byron, *War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court* (Manchester University Press 2009) 239; Smeulders and Grünfeld (n 7) 109-110; Rich (n 5) 250.

¹⁰ Rich (n 5) 250.

presented as being beneficial, both in order to protect the whites from an ever-present and allegedly increasing black menace (called the *swaart gevaar*), and also seemingly in the interests of the African societies themselves.¹¹ The South African system was unique with regard to the extent to which racial segregation and discrimination were formalised in the law.¹²

2.2. The Criminalisation of Apartheid

Apartheid was outlawed as an international crime against humanity with the adoption of the 1973 Apartheid Convention. Although, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity was the first to list apartheid as a crime against humanity, without prescribing individual criminal liability, however. The choice of the term 'apartheid' by the Apartheid Convention was by no means coincidental: it was a direct referral to apartheid South Africa.¹³ The applicability of the Convention is, however, contested: some scholars claim that the Convention was meant to apply exclusively to the South African context, while others emphasise that the wording of the Convention opens for application to other racialised regimes.¹⁴ The Convention, created in the Cold War era, was highly criticised and politicised.¹⁵ To date, it has still not been ratified by any states of the industrialised West. Not only was the treaty said to be the product of a Russian conspiracy against the West, several states also feared indictment for aiding and abetting the South African regime. Its application to any situation unrelated to that regime was therefore considered highly unlikely.¹⁶

2.3. The Use of the Apartheid Terminology

Miscellaneous situations have been described as 'apartheid', though often not in the legal sense of the word, usually as a moral description or by analogy to the South African case. Among the countless examples is the Indian caste system or sexual apartheid.¹⁷

¹¹ *ibid* 239.

¹² Smeulers and Grünfeld (n 7) 109.

¹³ At the time of the creation of the Apartheid Convention, the term was also used with regard to other territories in Southern Africa, such as South West Africa (Namibia), Rhodesia (Zimbabwe), the Portuguese Territories (Mozambique, Angola, Guinea-Bissau, Cape Verde and São Tomé and Príncipe) and Basutoland (Lesotho), Swaziland and Bechuanaland (Botswana). See Lerner (n 9) 41-42, 125-127; M Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn, Martinus Nijhoff Publishers 2013) 201; Max Du Plessis, 'International Criminal Law: The Crime of Apartheid Revisited' (2011) 24 *South African Journal of Criminal Justice* 423; Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press 2005) 59.

¹⁴ Bassiouni (n 13) 153; Du Plessis (n 13) 423; Ilias Bantekas, *International Criminal Law* (4th edn, Hart Publishing 2010) 236.

¹⁵ Alexander Zahar, 'Apartheid as an International Crime' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 245.

¹⁶ Ariel Bultz, 'Redefining Apartheid in International Criminal Law' (2013) *Criminal Law Forum* 205, 216-217; Roger Clark, 'Apartheid' in M Cherif Bassiouni (ed), *International Criminal Law* (3rd edn, Martinus Nijhoff Publishers 2008) 599-600.

¹⁷ Some examples from contemporary sources: 'India: "Hidden Apartheid" of Discrimination against Dalits' (*Human Rights Watch*, 13 February 2007) <<https://www.hrw.org/news/2007/02/13/india-hidden-apartheid-discrimination-against-dalits>>; Balakrishnan Rajagopal, 'The Caste System – India's Apartheid?'

The Norwegian press seems to be particularly sympathetic to the use of the apartheid terminology. Recent examples include a newspaper headline on 'Introduction of an apartheid system' regarding the alleged unequal treatment of clinical nutrition students and their fellow students in medicine at the University of Oslo;¹⁸ gender apartheid in Saudi-Arabia;¹⁹ apartheid in Norwegian schools with all-white classes,²⁰ the degrading treatment of Roma and beggars in public spaces²¹ and academic apartheid against Iranian students at Norwegian universities.²²

Although these examples are not necessarily legally relevant, they demonstrate how the apartheid discourse extends beyond both its historical and territorial aspects, and its contemporary legal definition. While we have seen that apartheid is recognised as a concept not limited to South Africa in its common use, can we say the same of the legal concept of the international crime of apartheid? The next chapter will analyse the crime against humanity of apartheid, as found in the Rome Statute of the International Criminal Court (ICC).

3. The Crime of Apartheid in the Rome Statute

3.1. The Inclusion of Apartheid into the Rome Statute

Prior to its inclusion in the Rome Statute, apartheid had been defined as a crime against humanity by Article 1(b) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and by Article I Apartheid Convention. However, none of the major precedents to the ICC contained the crime against humanity

The Hindi Newspaper (18 August 2007) <<http://www.thehindu.com/todays-paper/tp-opinion/the-caste-system-indias-apartheid/article1894191.ece>>; similarly, from a Norwegian source: 'Det Skjulte Apartheid?' [The Hidden Apartheid?] *Morgenbladet* (Norway, 11 February 2005) <http://morgenbladet.no/debatt/2005/det_skjulte_apartheid>; Peter Tatchell, 'Direct Action is Necessary because Homophobia is Sexual Apartheid' *The Pink Paper* (7 October 1994) <http://www.petertatchell.net/direct_action/sexual_apartheid.htm>; all URLs accessed 9 October 2015.

¹⁸ Original title: 'Medisinprofessor varsler: Har innført apartheidssystem' [Introduction of an apartheid system] *Universitas* (Oslo, 30 September 2015) (paper copy on file with the author) <<http://universitas.no/nyheter/60874/medisinstudent-utdannes-til-arroganse>> accessed 9 October 2015.

¹⁹ Sofie AE Høgestøl, 'Apartheid anno 2014', *Dagbladet* (Norway, 7 March 2014) <<http://www.dagbladet.no/2014/03/07/kultur/meninger/kronikk/saudi-arabia/kvinnedagen/32192939/>> accessed 9 October 2015.

²⁰ Mona Claussen, 'Norsk Apartheid Vekker Internasjonal Oppsikt' [Norwegian Apartheid Attracts International Attention] *Aftenposten* (Norway, 28 November 2011) <<http://www.aftenposten.no/nyheter/uriks/Norsk-apartheid-vekker-internasjonalt-opsikt-6708574.html>> accessed 9 October 2015.

²¹ Magnus Nygren Syversen, 'Sammenligner Norge med Sør-Afrika under Apartheid' [Comparing Norway with South Africa under Apartheid] *Fredrikstad Blad* (Norway, 3 December 2013) <<http://www.f-b.no/nyheter/nyheter/sammenligner-norge-med-sor-afrika-under-apartheid/s/2-2.952-1.8194189>> accessed 9 October 2015.

²² <<http://www.nettavisen.no/nyheter/-norge-driver-med-akademisk-apartheid/6644916.html>> accessed 9 October 2015.

of apartheid in their statutes.²³ Indeed, apartheid was not included in the draft statute for the ICC either. Interestingly, one of the first drafts of the Rome Statute was based upon the 1981 *Study on Ways and Means of Insuring the Implementation of International Instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, Including the Establishment of the International Jurisdiction Envisaged by the Convention*, thus at a very early stage linking the crime of apartheid with a prospective ICC.²⁴ The 1981 study was drafted as a result of the Apartheid Convention explicitly demanding the creation of an international penal tribunal with jurisdiction over the crimes listed in the Convention (Article V).

In 1992, the International Law Commission (ILC) presented a Draft Code of Crimes Against the Peace and Security of Mankind, into which apartheid was incorporated.²⁵ In this version of the Draft Code of Crimes and on the establishment of an international criminal court, the ILC suggested that the prospective court should have exclusive and compulsory jurisdiction over the crime of genocide, systematic or mass violations of human rights, apartheid, illicit international trafficking in drugs as well as seizure of aircraft and kidnapping of diplomats or internationally protected persons.²⁶ In other words: the crime of apartheid was considered to be on par with the crime of genocide, thus one of very few crimes of such seriousness that the international criminal court should assume exclusive jurisdiction. Indeed, the ILC even explains the court's exclusive jurisdiction was justified in that, '[c]ertain crimes because of their particular gravity, heinous nature, and the considerable detriment they cause to mankind, must come within the purview of an international criminal court'.²⁷ Furthermore, the gravity of the crime of apartheid is emphasised by the Commission's statement:

[I]t is possible to make a distinction between the most serious crimes, such as genocide and apartheid, which involve mass and systematic violations of universal values, and other crimes, and to limit the exclusive jurisdiction rule to crimes in the first category.²⁸

Although this ILC Draft coincides with the final years of the South African apartheid regime and as such certainly was influenced by the events of the time, it nevertheless demonstrates the uncontested seriousness of the crime of apartheid. Apartheid is repeatedly compared to genocide, which is nowadays considered 'the crime of crimes'.²⁹

²³ Precedents include the Nuremberg Tribunal, Tokyo Tribunal, Control Council Law No 10, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

²⁴ UN Doc E/CN.4/1426; Bassiouni (n 13) 584-585; M Cherif Bassiouni, *The Legislative History of the International Criminal Court* (Transnational Publishers 2005) 33, 61-62.

²⁵ International Law Commission, 'Tenth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur' (20 March 1992) UN Doc A/CN.4/442.

²⁶ *ibid* 55, para 36.

²⁷ *ibid* 55, para 38.

²⁸ *ibid* 55, para 40.

²⁹ See eg the title of a seminal work on the crime of genocide: William Schabas, *Genocide in International Law – The Crime of Crimes* (2nd edn, Cambridge University Press 2009).

However, this legal classification of the crime of apartheid has fallen into oblivion with the end of the South African regime. The inclusion of apartheid into the 1992 Draft has furthermore been criticised for overlooking the prevalent doubts about the crime's customary nature.³⁰ The Status of apartheid in customary international law will subsequently be examined in Chapter 4.

The ILC's Draft Code of Crimes of 1996 contained a generic version of apartheid, prohibiting 'institutionalised discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms', hence without reference to the South African situation.³¹ The ILC stated that institutionalised discrimination was 'in fact the crime of apartheid under a more general denomination',³² thereby implying that not only racial, but also ethnic and religious groups were protected.³³ Neither of the Draft Codes were acted upon.

It was only at the Rome Diplomatic Conference³⁴ that the inclusion of the crime of apartheid into the list of crimes against humanity was suggested by the countries of the Southern African Development Community (SADC).³⁵ There was some initial reluctance from other state delegations towards this proposition. Nonetheless, a majority of states urged for the recognition of this inhumane act, arguing that if apartheid was not explicitly listed as a crime against humanity, it would implicitly be subsumed under 'other inhumane acts' of Article 7(1)(k) Rome Statute. Put differently, since the crime was already implicitly contained in the Rome Statute, it might as well be singled out and given its own provision. An argument against its inclusion was that any widespread or systematic policy of apartheid would fall under the provision on persecution on racial grounds (Article 7(1)(h) Rome Statute); a separate provision on apartheid was therefore superfluous.³⁶ In the end, however, the delegations agreed that apartheid was of a

³⁰ Robert Cryer, *Prosecuting International Crimes – Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005) 259.

³¹ ILC, 'Draft Code of Crimes against the Peace and Security of Mankind with commentaries' (1996) <http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf> accessed 30 October 2015; see also Byron (n 9) 241.

³² *ibid.*

³³ Christopher Hall, 'The Crime of Apartheid' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Verlag CH Beck 2008) 228.

³⁴ Full title: 'The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998'; see, for more information, <<http://legal.un.org/icc/rome/proceedings/contents.htm>> accessed 30 October 2015.

³⁵ UN Doc A/CONF.183/C.1/L.12 (22 June 1998); see also Roger S Clark, 'History of Efforts to Codify Crimes against Humanity: From the Charter of Nuremberg to the Statute of Rome' in Leila Nadya Sadat (ed), *Forging a Convention on Crimes against Humanity* (Cambridge University Press 2011) 8, 25.

³⁶ Timothy McCormack, 'Crimes Against Humanity' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing 2004) 179, 198; Herman Von Hebel and Darryl Robinson, 'Crimes within the Jurisdiction of the Court' in Roy S Lee (ed), *The International Criminal Court – The Making of the Rome Statute; Issues, Negotiations, Results* (Kluwer Law International 1999) 79, 102.

character and gravity similar to other inhumane acts and merited its own criminal provision.³⁷

In retrospect, it has been argued that the inclusion of the crime of apartheid into the Rome Statute has led to an increased harmonisation of international criminal law. In prior instruments, the crime had already been afforded the status as a crime against humanity, this was confirmed by the Rome Statute, thereby leading to an expansion of the commonly accepted list of crimes against humanity.³⁸ The fact that the crime of apartheid was singled out as a crime against humanity and did not end up in the residual provision of 'other inhumane acts' is indeed strong reaffirmation of the universal condemnation of this inhumane practice.³⁹ Critical voices, however, assert that Article 7(2)(h) Rome Statute is incoherent, ambiguous and inoperable.⁴⁰ One scholar, Roger Clark, even claims that the crime of apartheid was an example 'of the use of the law as affirmation, exclamation or denunciation rather than a string in the prosecutorial bow'.⁴¹ At the same time, though, Clark also rightfully points out that the 'practice [of apartheid] is now so deeply condemned by the world's conscience that it is inconceivable that a modern code of crimes (...) would omit a specific reference to apartheid'.⁴² Nevertheless, he considers the addition of the crime into the list of crimes against humanity 'more symbolic than anything else and that the proscribed actions are already caught elsewhere'.⁴³

In this context, historic parallels to the crime of genocide should be drawn. As late as 1982, legal scholars claimed that the Genocide Convention was 'more symbolic than a legislative contract'⁴⁴ and that '[g]enocide has been charged with controversy from its very inception and it has never enforced specific punishment for cases of genocide'.⁴⁵ Indeed, this is wording that resembles the academic discourse on the crime of apartheid. Nowadays, nobody would even dare to discuss the continued importance of the crime of genocide or the Genocide Convention, particularly after the occurrences in Rwanda and the Former Yugoslavia. Similarly, the crime of apartheid can gain independent significance if applied to contemporary situations, as will be discussed later in the case of North Korea and the Occupied Palestinian Territories.

³⁷ Von Hebel and Robinson (n 36) 102.

³⁸ Caroline Fournet, *International Crimes: Theories, Practice and Evolution* (Cameron May 2006) 36.

³⁹ Ilias Bantekas and Susan Nash, *International Criminal Law* (3rd edn, Routledge-Cavendish 2007) 136.

⁴⁰ Bultz (n 16) 205.

⁴¹ Roger Clark, 'Crimes against Humanity and the Rome Statute of the International Criminal Court' in Mauro Politi and Giuseppe Nesi (eds), *The Rome Statute of the International Criminal Court – A Challenge to Impunity* (Ashgate 2001) 75, 88.

⁴² *ibid* 87.

⁴³ *ibid* 88.

⁴⁴ Jack Nusan Porter, 'What is Genocide? Notes Towards a Definition' in Jack Nusan Porter (ed), *Genocide and Human Rights: A Global Anthology* (University Press of America 1982) 2, 7.

⁴⁵ *ibid* 8.

3.2. The *Actus Reus* of the Crime against Humanity of Apartheid

Article 7(1)(j) in conjunction with Article 7(2)(h) Rome Statute defines the crime against humanity of apartheid as follows:

1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(j) The crime of apartheid;

(...)

2. For the purpose of paragraph 1:

(h) ‘The crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.⁴⁶

Article 21 Rome Statute contains a detailed provision on the applicable law for the ICC. It places in consecutive order, first, the Rome Statute, the Elements of Crimes and the Rules of Procedure and Evidence (Article 21(1)(a)). Secondly, where appropriate, applicable treaties and the principles and rules of international law (Article 21(1)(b)). Thirdly, it lists the general principles of law, should both the first and second order fail. The general principles have to be consistent with the Rome Statute and international law as well as internationally recognised norms and standards (Article 21(1)(c)). The ICC may — but does not have to — apply principles and rules of law as interpreted in its previous decisions (Article 21(2)). For this analysis, the interpretation of the provisions contained in the Rome Statute are of primary importance. Although the Elements of Crimes are not strictly binding, they help clarify the different elements of each crime and as such are a tool to assist the Court in their interpretation.⁴⁷

The following analysis of the elements of the *actus reus* of the crime against humanity of apartheid builds on a legal interpretation of Article 7(1)(j) and Article 7(2)(h) Rome Statute. The general, overarching requirements of crimes against humanity in the chapeau of Article 7 Rome Statute will hereafter not be analysed; instead, the focus will

⁴⁶ Rome Statute of the International Criminal Court, circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

⁴⁷ There were critical voices concerning the creation of the Elements of Crimes. One delegate at the Rome Diplomatic Conference in 1998 emphasised that the principle of legality — expressed by *nullum crimen sine lege, nulla poena sine lege* — results in that the elements of crimes must not be left to a later stage. State parties must be sure of the commitments that they were undertaking, see Bassiouni (n 24) 292, fn 40.

be on the specific requirements of the crime of apartheid.⁴⁸ Since the Rome Statute is a treaty by nature, the interpretative criteria in Articles 31 and 32 of the Vienna Convention on the Law of Treaties will be applied, in particular the literal, the contextual/systematic and the teleological criteria.⁴⁹ Article 31(1) Vienna Convention notes that terms are to be given their ordinary meaning in the context and in light of the respective treaty's object and purpose. While the ordinary meaning of treaty terms is always linked with its context, it may be treated separately for analytical purposes.⁵⁰

The following subchapters examine the different elements of the *actus reus* of the crime of apartheid. In so doing, the challenges — or pitfalls — of the criminal provision on apartheid will be revealed. Each respective subchapter deals with one of these elements, these being: inhumane acts, a character similar to those referred to in paragraph 1, an institutionalised regime, systematic oppression and domination and, lastly, the racial group.

3.2.1. *Inhumane acts*

The expression 'inhumane acts' is not defined and clearly any of the offences specified as crimes against humanity in Article 7(1) Rome Statute would amount to an inhumane act. Most likely there is an overlap between the concept of 'inhumane acts' (Article 7(2)(h) Rome Statute) and 'inhuman acts' (Article II Apartheid Convention), though generally the acts would have to reach a certain degree of severity, suffering or injury.⁵¹ Footnote 29 in the Elements of Crime on Article 7(1)(j) Rome Statute indicates that the term 'character' refers to the nature and gravity of the acts, meaning that an act similar in quality or seriousness to other crimes against humanity could also constitute an inhumane act for the purpose of this offence.⁵²

3.2.2. *Character similar to those referred to in paragraph 1*

The Rome Statutes' Elements of Crime to Article 7(1)(j) reads as follows:

Such act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts.⁵³

⁴⁸ Apartheid was referred to as an example of an 'act' in the meaning of an attack as a 'multiple commission of acts' (chapeau of Art 7 in conjunction with Art 7(2)(a) Rome Statute) by the ICTR in two judgments, an attack can also be non-violent in nature, such as the imposition of a system of apartheid on a people: *Prosecutor v Jean-Paul Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) para 581, and *Prosecutor v Georges Anderson Nderubumwe Rutaganda* (Trial Judgment) ICTR-96-3-T (26 May 2003) para 69.

⁴⁹ Arts 31-33 of the Vienna Convention articulate the general principles of interpretation in the international legal system and form a part of customary law (*Arbitral Award of 31 July 1989 [Guinea Bissau v Senegal]* ICJ Rep [1991] 70).

⁵⁰ Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2008) 162.

⁵¹ Hall (n 33) 264.

⁵² ICC, Elements of Crimes (2011 edn) <<http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>> accessed 30 October 2015; see also Byron (n 9) 242.

⁵³ ICC (n 52).

Article 7(2)(h) Rome Statute requires that the act is of an inhumane character similar to other crimes against humanity set forth in its Article 7(1). In practice, there may be a large degree of similarity between the inhumane acts of the crime of apartheid and the other crimes listed in paragraph 1.⁵⁴ The act required has to be of an inhumane character, which seems to refer to Article 7(1)(k) Rome Statute, describing 'other inhumane acts' as acts that intentionally cause great suffering or serious injury to body or to mental or physical health. However, such acts could also fall under the definition of the crime of persecution in Article 7(1)(h) Rome Statute, if they contain a discriminative intent based on the identity of a group, for example a racial group.⁵⁵ There is seemingly a real risk that the acts committed would be subsumed under any of the other paragraphs of Article 7(1) Rome Statute, thereby making the provision on the crime of apartheid obsolete. However, the principle of specificity, which emanates from the guiding principle of legality or *nullum crimen sine lege*, demands for criminal provisions to be as specific and clear as for judges to render consistent, coherent and foreseeable judgments and for perpetrators to foresee the consequences of their criminal behaviour. Punishment may only be imposed if the criminal provision that foresees punishment for a specific behaviour is sufficiently precise.⁵⁶ Thus, in criminal law the specificity of a provision is of paramount importance. The more specific and precise a criminal norm is, the more likely it is to be in coherence with the principle of legality. It could therefore be argued that a detailed provision, such as Article 7(2)(h) Rome Statute, is more likely to adhere to the principle of legality than a generic provision such as Article 7(1)(k) Rome Statute. The question of whether a comprehensive provision is more likely to lead to a conviction in a criminal trial before an international tribunal is yet another, completely different and primarily pragmatic, issue.

Understandably, the reference to 'acts of a character similar to paragraph 1' has caused some debate amongst legal academics. Sunga welcomed the Rome Statute's definition of the crime of apartheid with its rather short reference to acts in Article 7(1),⁵⁷ consequently omitting the long and vague list of acts found in Article II of the Apartheid Convention.⁵⁸ As a matter of fact, most of the acts listed in the Apartheid Convention are captured by the Rome Statute's definition; the list in the Apartheid Convention could

⁵⁴ Clark (n 41) 88.

⁵⁵ Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia 2002) 529.

⁵⁶ Shahabuddeen, Mohamed, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?' (2004) 2 *Journal of International Criminal Justice* 1008; with reference to ICTY, *Prosecutor v Vasiljević* (Trial Judgment) Case No IT-98-32T (29 November 2002) para 193.

⁵⁷ See Lyal S Sunga, 'The Crimes within the Jurisdiction of the International Criminal Court' (1998) 6 *European Journal of Crime, Criminal Law & Criminal Justice* 391.

⁵⁸ These acts include: 'denial (...) of the right to life and liberty of person' (lit a), which are '(...) murder (...) (i), (...) 'infliction (...) of serious bodily or mental harm, (...) infringement of (...) freedom or dignity, or (...) torture, (...) cruel, inhuman or degrading treatment or punishment' (ii), (...) arbitrary arrest and illegal imprisonment (...) (iii); 'deliberate imposition (...) of living conditions calculated to cause (...) physical destruction' (lit b); 'any legislative measures and other measures calculated to prevent (...) from participation in the political, social, economic and cultural life of the country (...) (lit c); 'any measures (...) designed to divide the population along racial lines (...) (lit d); 'exploitation of labour (...) (lit e); 'persecution of organizations and persons (...) (lit f).

therefore serve as illustration for the ICC when dealing with the crime of apartheid.⁵⁹ Werle suggests that 'inhumane acts of a similar character' could be interpreted using Article II Apartheid Convention.⁶⁰ Cryer clarifies that the term 'of a character similar to those referred to in paragraph 1' was included in order to prevent exceedance of the existing law; the Rome Statute thus simply provided an express recognition of the crime of apartheid.⁶¹

The above-cited suggestions by legal scholars reveal the ambiguity caused by the wording of Article 7(1) Rome Statute. The wording of 'acts similar to those referred to in paragraph 1 of Article 7' is indeed not helpful in clarifying the content of the crime of apartheid. Indeed, the reference is unclear, since it seems to point to Article 7(1)(k) Rome Statute without stating this explicitly. However, Article 7(1)(k) Rome Statute is also a rather open provision lacking a closer definition. There is therefore a substantial risk that a prosecutor would choose not to indict a perpetrator for the crime of apartheid because it creates an additional burden of proof. In addition to proving that there is an 'inhumane act of a character similar to those referred to in Article 7(1)', the prosecutor would also have to demonstrate the existence of a 'context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime'. Or, instead, the prosecutor could choose to indict an alleged offender of Article 7(1)(k) Rome Statute, thereby limiting his burden of proof to an inhumane act. Nevertheless, although apartheid could fall within the ambit of 'other inhumane acts', it was included into the Rome Statute as a separate offence in order to reaffirm the universal condemnation of its practice.⁶²

3.2.3. Institutionalised regime

The inclusion of the term 'institutionalized regime' represents the most significant difference between the definition of the crime of apartheid in the Apartheid Convention and the Rome Statute.⁶³ The 1996 Draft Code of Crimes by the ILC argued that the crime of persecution and the crime of institutionalised discrimination (or apartheid under a more general denomination) differed inasmuch as the latter demanded that a plan or a policy had been 'institutionalized'.⁶⁴ Whether this discrimination should be enforced by *de jure* authority (eg legal decrees) or simply by *de facto* actions is not apparent from the statutory provision in the Rome Statute; it should be ascertained that a *de facto* discrimination would be sufficient.⁶⁵

⁵⁹ Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2010) 264; Kittichaisaree (n 4) 125.

⁶⁰ Gerhard Werle, *Principles of International Criminal Law* (TMC Asser Press 2005) 262-263.

⁶¹ Cryer and others (n 59) 264.

⁶² Bantekas (n 14) 194.

⁶³ Cryer et al (n 59) 264-265.

⁶⁴ ILC (n 31) 49.

⁶⁵ Bultz (n 16) 223-224.

With regards to the term 'regime', a broad interpretation is demanded. Hall suggests that regime be understood in a broad sense of 'a method or a system of organising or doing something',⁶⁶ as opposed to its primary sense of a governmental method or system. He concludes that there are no indications in the Rome Statute that would prevent a broader interpretation of the term to include a system institutionalised by an armed group in control of a certain area, thereby allowing an armed group to qualify as a regime.⁶⁷ Byron confirms this view, emphasising that 'institutionalized regime can be understood as an established law or practice by a government or prevailing order',⁶⁸ thereby confirming the *de facto* institutionalisation. According to other scholars, the crime of apartheid effectively required a government policy of apartheid.⁶⁹ Bultz claims that a 'regime' should be limited to a recognisable state, the threshold of an institutionalised regime would be muddled if it included *de facto* control by loosely organised militias or rebel groups. He asserts that by construing the 'regime' notion too widely, it became too ambiguous and unidentifiable and therefore problematic in light of the principle of legality. According to Bultz, a non-state regime is not really institutionalised at all; instead he believes that any non-institutionalised discrimination would be covered by the crime of persecution and need not be embraced as a crime of apartheid.⁷⁰

An established law or practice by a government or prevailing order is most likely the closest to a definition of an institutionalised regime one gets.⁷¹ An institutionalised regime would indisputably exist when the oppression and the domination are anchored in domestic law, with the South African apartheid legislation as the prime example.⁷² One must, however, be cautious so as not to demand the same requirements for a contemporary apartheid situation. The threshold is created by the institutionalisation of a regime of systematic discrimination and oppression, not by a comparison to the governmental methods and legislation of the Union of South Africa.

3.2.4. *Systematic oppression and domination*

The criterion of systematic oppression by the regime suggests that there exists some controlling and harsh treatment of the racial group. Yet, precisely this requirement of systematicity of the treatment could present considerable challenges for the prosecution to prove.⁷³ The problem is created by the chapeau for all crimes against humanity in Article 7(1) Rome Statute that only disjunctively requires a systematic *or* widespread attack. Article 7(2)(h) Rome Statute thus seemingly introduces a mandatory requirement of systematicity, which contradicts the chapeau's intention. While case law

⁶⁶ Hall (n 33) 264-265.

⁶⁷ *ibid.*

⁶⁸ Byron (n 9) 242.

⁶⁹ McCormack (n 36) 200.

⁷⁰ See Bultz (n 16) 225, 229, stating that the concept was overly broad and inoperable.

⁷¹ Byron (n 9) 242.

⁷² Werle (n 59) 263.

⁷³ Byron (n 9) 242.

and scholarship have determined that crimes against humanity no longer demand a conjunctive requirement of a widespread *and* systematic attack,⁷⁴ Article 7(2)(h) Rome Statute seemingly re-introduces this out-dated requirement, thereby countermanding the development of international criminal law.

There is some uncertainty as to the distinction between ‘oppression’ and ‘domination’. Some scholars suggest that they cannot be distinguished and are essentially the same.⁷⁵ The Oxford English dictionary defines ‘oppression’ as ‘prolonged cruel or unjust treatment or exercise of authority’⁷⁶, whereas ‘domination’ is described as ‘the exercise of power or influence over someone or something, or the state of being so controlled’.⁷⁷ It has been pointed out that there would be a significant burden on the prosecution to demonstrate the existence of both ‘oppression’ and ‘domination’.⁷⁸ However, if these requirements were viewed as one — ‘oppression and domination’ — then the prosecutorial burden would to a certain extent be relieved.

3.2.5. *Domination of one racial group over any other racial group*

The crime of apartheid is defined as an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups. The construction of a ‘racial group’ is fundamental to the concept of apartheid.⁷⁹ If the prosecutor cannot prove the existence of a racial group, the crime of apartheid becomes untenable.

The crime of apartheid has certain elements in common with the crime of genocide. The latter protects a racial group as one of four exclusive victim groups in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and the corresponding Article 6 Rome Statute. The Apartheid Convention was, as a matter of fact, modelled after the Genocide Convention.⁸⁰ The relevant jurisprudence on genocide with regard to a racial group might indeed prove useful when defining the term ‘race’ within the context of the crime of apartheid.⁸¹ However, while the crime of genocide protects four distinct groups (racial, ethnical, national and religious), the crime of apartheid limits its protection to the racial group only. The legal definition of the racial group therefore becomes of paramount importance. The classification of the victims as

⁷⁴ See eg *Prosecutor v Tadić* (Trial Judgment) ICTY IT-94-1-T (7 May 1997) paras 646-648 (‘numerous other sources support the conclusion that widespreadness and systematicity are alternatives’, *ibid*, para 647); ‘Report of the Committee on the Establishment of a Permanent International Criminal Court’ (1995) UN Doc A/50/22, 17.

⁷⁵ Hall (n 33) 265 at n 123.

⁷⁶ *Oxford Dictionaries* (Oxford University Press 2015) <<http://www.oxforddictionaries.com/definition/english/oppression>>, accessed 23 November 2015.

⁷⁷ *Oxford Dictionaries* (Oxford University Press 2015) <<http://www.oxforddictionaries.com/definition/english/domination>>, accessed 23 November 2015.

⁷⁸ Hall (n 33) 265, fn 123.

⁷⁹ Du Plessis (n 13) 425.

⁸⁰ Reydamas (n 13) 59. The Rome Statute defines genocide in its Art 6: ‘For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (...)’.

⁸¹ Bantekas (n 14) 237.

members of a racial group constitutes a legal threshold, which must be proven in order for the crime of apartheid to occur.⁸²

The common meaning of the term 'race' has changed considerably since the end of World War II. At that time, the common understanding of race merged the notion of nation states with sub-groups of people.⁸³ The classification of sub-groups with different inherent, unchangeable characteristics was part of Hitler's Aryan master race policy. His creation of a homogenous German people (the so-called *Herrenvolk* or *Herrenrasse*) was an attempt to justify the extermination of 'others' as a sacred purpose of the biologically superior German people.⁸⁴ The Nazi party 'embarked on a lethal project of social engineering that was to eliminate "impure" groups that threatened the Aryan race'.⁸⁵ However the concept of race is also burdened by an out-dated pseudo-scientific explanation dating back to times of imperialism and colonialism asserting that people can be categorised by their features and innate characteristics. Natural sciences have long reached the conclusion that there are no genetic or biological differences amongst the different races.⁸⁶ Moreover, it has become accepted that race is the outcome of collective ascription and is typically used to refer to a group of people who are perceived as being different and possibly inferior to another group.⁸⁷ Thus, race is created by a specific society in order to indicate and justify differences in treatment or in position.⁸⁸ Already in 1950, the UNESCO Statement on Race emphasised that '[f]or all practical social purposes, "race" is not so much a biological phenomenon as a social myth'.⁸⁹ Since obviously 'the existence of races themselves no longer corresponds to usage of progressive social science',⁹⁰ race as a means to classify humans into major subspecies has become virtually obsolete.⁹¹

⁸² In agreement: Du Plessis (n 13) 425.

⁸³ The creator of the term 'genocide', Raphael Lemkin, discusses in a subchapter entitled 'Racial Differentiation' in his seminal work 'Axis Rule in Occupied Europe', the differences in wages paid to German construction workers compared to Eastern workers or Jews, implying that Germans, Poles, Ukrainians, White Russians and Jews were all members of different races (Raphael Lemkin, *Axis Rule in Occupied Europe* [Carnegie Endowment for International Peace, Washington 1944] 70-71).

⁸⁴ Henry Jr King, 'Genocide and Nuremberg' in Ralph Henham and Paul Behrens (eds), *The Criminal Law of Genocide* (Ashgate 2007) 29, 30.

⁸⁵ Alexander Laban Hinton, 'The Dark Side of Modernity: Toward an Anthropology of Genocide' in Alexander Laban Hinton (ed), *Annihilating Difference: An Anthropology of Genocide* (Blackwell Publishers 2002) 2, 14.

⁸⁶ Thomas Hylland Eriksen, *Ethnicity and Nationalism* (3rd edn, Pluto Press 2010) 5; Erica Howard, 'Race and Racism – Why does European Law have Difficulties with Definitions?' (2008) 24 *International Journal of Comparative Labour Law and Industrial Relations* 10.

⁸⁷ Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press 2009) 369.

⁸⁸ Hylland Eriksen (n 86) 5; Howard (n 86) 10; David Davis, 'Constructing Race: A Reflection' (1997) 54 *The William and Mary Quarterly* 7; Gudrun Holgersen, 'Etnisk diskriminering' [Ethnic Discrimination] in Anne Hellum and Kirsten Ketscher (eds), *Diskriminerings- og likestillingsrett* [Discrimination and equality law] (Universitetsforlaget 2008) 159.

⁸⁹ 1950 UNESCO Statement on Race, in UNESCO, *Four Statements on the Race Question* (1969) 33. The 1967 UNESCO Statement on Race and Racial Prejudice confirms that 'racist doctrines lack any scientific basis whatsoever' (ibid 50).

⁹⁰ Schabas (n 29) 142.

⁹¹ William Schabas, *Genocide in International Law* (1st edn, Cambridge University Press 2000) 129.

Modern genetics tend not to speak of race for three predominant reasons: first, there has been so much interbreeding between human populations that there are no pure racial groups. Secondly, hereditary physical traits are not evenly distributed within clear boundaries. Lastly, hereditary characteristics cannot explain cultural variations. People everywhere in the world have the same inborn abilities and variations exist only on an individual level, not at a group level.⁹²

When confronted with the definition of the term 'racial group' (mostly in connection to defining the protected racial group of the crime of genocide), international criminal tribunals were challenged with finding an objective definition of the protected group.⁹³ The reason for this approach is the fact that the racial group is an element of the *actus reus*, a threshold of the crime. Consequently, the international criminal tribunals tried to objectively define race, with rather mixed results. Gradually, however, there has been a shift towards a subjective approach, thereby avoiding scientifically verifiable (objective) parameters and instead relying on the persecutor's perception of the victim group.⁹⁴

While international criminal law seemingly tries to avoid any confrontation with race and racial groups, socio-anthropology has extensively dealt with the issue and commonly defines race as the perception of differentness.⁹⁵ Noticing this, legal scholars have suggested turning to anthropology in search of a legal definition of race:

[A]partheid constitutes a very specific crime against humanity, based solely on racial discrimination. It is relevant even after the collapse of the South African apartheid State, and much will depend on the anthropological definition of 'race'.⁹⁶

According to the contemporary socio-anthropological definition of race, the only matter of importance is whether social actors treat races as real and organise their lives and exclusionary practices accordingly. Race is therefore a social construct, defined and moulded by a group, usually in response to another group. Race is heavily influenced and ultimately created by stigmatisation and the perception of differentness. Race is thus not real, but imagined. As mentioned earlier, the perpetrator's perception becomes the main determining element: people discriminate because someone is perceived as being different.⁹⁷ In other words, if a group is perceived and treated as a distinct racial group, it would qualify as a racial group in the meaning of the crime of apartheid, despite

⁹² Hylland Eriksen (n 86) 6. Also noted by Kälin and Künzli (n 87) 368.

⁹³ In *Akayesu*, the ICTR Trial Chamber defined a racial group as 'based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors' (*Prosecutor v Akayesu* [Trial Judgment] ICTR 96-4-T [2 September 1998] para 514).

⁹⁴ William Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press 2011) 105.

⁹⁵ Lyal Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (Kluwer Law International, The Hague 1997) 112.

⁹⁶ Bantekas (n 14) 237.

⁹⁷ Howard (n 86) 10.

the lack of any 'objective' differences between the groups to which the victim and the perpetrator belong.

3.3. The *Mens Rea* of the Crime against Humanity of Apartheid

In addition to the specific intention of maintaining an institutionalised regime of systematic oppression and domination, Article 30 Rome Statute requires that the perpetrator commits the material elements with intent and knowledge. Thus, the *mens rea* of the crime of apartheid demands awareness by the perpetrator of the factual circumstances, such as the nature and gravity of his or her acts, and an intention of maintaining the institutionalised regime of systematic oppression and domination over a racial group. Of importance is that the systematic oppression and domination not only have the effect, but moreover the purpose of maintaining a regime by one racial group over another racial group. The crime of apartheid therefore demands a special intent to sustain an institutionalised system of racial discrimination, in addition to the general intent of committing the crime.⁹⁸

The wording of the *mens rea* is problematic because it seemingly excludes acts that establish a racial domination; according to the provision's wording, the criminal act is limited to maintaining such regimes.⁹⁹ However, it could be argued that any regime, once established, also has to be maintained. Furthermore, the wording suggests that replacing one regime with another is not included.¹⁰⁰ A possible solution to this apparent lacuna could be found in a wide definition of the maintenance term so as to include the establishment and the replacement of an apartheid regime, thereby approaching Article II Apartheid Convention that demands intent 'for the purpose of establishing and maintaining domination'.

3.4. Spatial Applicability of the Provisions on Apartheid

While there are controversies as to whether the Apartheid Convention was intended for, and could be applied to, contexts other than South Africa, this discussion is no longer valid for the Rome Statute. Since Article 7(1)(j) in conjunction with Article 7(2)(h) Rome Statute removed any reference to Southern Africa, the Southern African situation can no longer be used as a *conditio sine qua non* to determine the existence of the crime of apartheid in other cases. The crime of apartheid has been released from its former geographical shackles. The provisions on apartheid in the Rome Statute can therefore be applied to any situation occurring in the territory of any state party. They can furthermore be applied to any other state providing the ICC's jurisdiction is accepted and/or the UN Security Council authorises the initiation of an investigation.

⁹⁸ Du Plessis (n 13) 427; Bantekas (n 14) 48. This 'special intent' should, however, not be confused with the special intent of the crime of genocide, according to which the perpetrator not only has the intent to commit one of the enumerated acts, but furthermore has the special intent of destroying the group as such.

⁹⁹ Bultz (n 16) 225.

¹⁰⁰ Hall (n 33) 265-266.

Nonetheless, the contentiousness of the spatial (and temporal) applicability of the Rome Statute's provisions on apartheid has not yet fully dissipated. The shadow of the South African legacy still lingers over the crime of apartheid. Yet, with the inclusion of the crime of apartheid into the Rome Statute and the removal of any reference to the Southern African case, the time has now come to put Article 7(1)(j) Rome Statute to the test. As a matter of fact, there are a significant number of states with institutionalised regimes of systematic oppression and domination. If these cases reach the threshold of a crime against humanity and fulfil the elements of the crime of apartheid, a substantial number of cases could be added to the ICC's case-load.¹⁰¹ Two cases will be briefly analysed in chapter 5, demonstrating that the provisions on apartheid could be applied by the ICC in the near future.

4. The Status of Apartheid in Customary Law

4.1. The Prohibition of Racial Discrimination

There are three possible sources under international law, namely treaty, custom and general principles of law.¹⁰² Customary law demands evidence of a subjective recognition by states of what they consider to be a binding rule of international law (*opinio juris*) as well as an objective constant and uniform state practice.¹⁰³ International crimes are mostly created through conventions, but also through custom. The contentiousness of the Apartheid Convention and the not yet universal ratification of the Rome Statute as treaty sources containing the crime against humanity of apartheid, reveal the importance of the customary status of this crime. The Rome Statute attempted to codify pre-existing customary or conventional law, particularly crimes that were already prohibited in codified international law, such as the crime of apartheid.¹⁰⁴ The crimes listed in the Rome Statute thus coincide to a large extent with customary law.¹⁰⁵ Whether or not the crime against humanity of apartheid has reached customary law status remains an issue of dispute.¹⁰⁶ This chapter will attempt to demonstrate why the crime of apartheid is not only a treaty crime, but most probably also a customary crime.

¹⁰¹ Hall (n 33) 229.

¹⁰² 1945 Statute of the International Court of Justice, Art 38(1)(b) and (c).

¹⁰³ *Continental Shelf case (Libyan Arab Jamahiriya v Malta)* (Judgment) [3 June 1985] ICJ Rep, 29-30, para 27. *North Sea Continental Shelf* (Judgment) [20 February 1969] ICJ Rep, 43-44, paras 74-77.

¹⁰⁴ Kelly Askin, 'Crimes within the Jurisdiction of the International Criminal Court' (1999) 10 *Criminal Law Forum* 41. Von Hebel Robinson (n 36) 91, 122; Kittichaisaree (n 4) 56, 226. According to McCormack some states displayed a selective and at times promiscuous approach to a commitment to customary norms (n 36) 181, 200.

¹⁰⁵ Rodney Dixon and Christopher Hall, 'Crimes against Humanity' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Verlag CH Beck 2008) 159, 169.

¹⁰⁶ Cassese, for example, considers the inclusion of apartheid into the Rome Statute to be broader than customary international law: Antonio Cassese, 'Crimes against Humanity' in Antonio Cassese, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 353, 376.

The International Court of Justice (ICJ) in the *South West Africa* case made clear that ‘the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law’.¹⁰⁷ Not only norms proscribing racial discrimination, but also governmental practices of systematic racial discrimination are considered prohibited under customary human rights law.¹⁰⁸ Apartheid is a case of qualified racial discrimination that runs contrary to the most fundamental guiding principles of international law, notably human rights law: the UN Charter of 1945 provides in Article 1(3) that its members had to promote and encourage ‘respect for human rights and for fundamental freedoms for all *without distinction as to race, sex, language or religion*’ (emphasis added). Similarly, the Universal Declaration of Human Rights (UDHR) of 1948 confirms that ‘everyone is entitled to all the rights and freedoms set forth in this Declaration *without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*’ (Article 2, emphasis added). The customary law status of the prohibition of racial discrimination and apartheid as a case of qualified racial discrimination seems uncontested. Indeed, scholars confirm that ‘the customary status of the prohibition of (...) systematic apartheid-style racial discrimination is (...) beyond doubt’.¹⁰⁹ While the customary nature of racial non-discrimination is recognised, the question remains whether the crime against humanity of apartheid is a customary norm too.

4.2. *Opinio juris*

Evidence of *opinio juris* will often be drawn from debates in the General Assembly or from negotiation of international treaties, where the opinion of states on their legal obligations becomes apparent.¹¹⁰ The ICJ in the Advisory Opinion on *Nuclear Weapons* recognised that also General Assembly resolutions, even if they were not legally binding, could in certain circumstances provide evidence of an *opinio juris*.¹¹¹ This statement is of particular importance for the examination of the customary nature of the crime of apartheid.

No court has ever prosecuted the crime of apartheid (national or international); no person has ever been tried for the crime of apartheid.¹¹² Nevertheless, apartheid has been dealt with by virtually every organ of the UN since the very beginning of the organisation’s existence in 1946. It was apartheid that unified the international community in its struggle to bring to an end the South African regime in the midst of the

¹⁰⁷ *South West Africa Case (Ethiopia v South Africa; Liberia v South Africa)*, Second Phase (Judgment of 18 July 1966) ICJ Rep 1966, 293 (Dissenting Opinion by Judge Tanaka).

¹⁰⁸ The American Law Institute affirmed this in its *Restatement of the Foreign Relations Law of the United States (1986)*: ‘racial discrimination is a violation of customary law when it is practiced systematically as a matter of state policy’ (para 165). Confirmed by Thomas Buergenthal, Dinah Shelton, David Stewart, *International Human Rights – In a Nutshell* (3rd edn, West Group 2002) 42.

¹⁰⁹ Kälin and Künzli (n 87) 70.

¹¹⁰ William Schabas, ‘The Contribution of the Eichmann Trial to International Law’ (2013) 26 *Leiden Journal of International Law* 691.

¹¹¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep 1996, para 70, 254-55.

¹¹² Zahar (n 15) 245; Reydams (n 13) 60.

Cold War era. Numerous UN resolutions condemned apartheid, an indication of its seriousness. Indeed, in the period from 1946 to 1993, at least 14 General Assembly resolutions confirmed apartheid to be a crime against humanity. This is in addition to a multitude of other resolutions dealing with the consequences of the South African apartheid regime. Furthermore, on one occasion the Security Council affirmed that apartheid was a crime against humanity, as well as once stating that apartheid was a 'crime against the conscience and dignity of mankind'.¹¹³ Although purely related to the Southern African context, these UN resolutions shaped the understanding of the crime of apartheid and continue to be relevant with regards to its legal definition. From a historical perspective, these resolutions are of great importance because they illustrate the international community's commitment to eradicate and to criminalise apartheid. From a legal point of view, the resolutions show how apartheid grew to be recognised as a crime against humanity and demonstrate an *opinio juris* of the UN member states. If this *opinio juris* can be attributed with the corresponding state practice, the crime of apartheid could have actually gained customary law status.

The International Law Commission (ILC) seems to strengthen this argument further. In its 2013 Report on the Formation and Evidence of Customary Law, it noted that the prohibition against racial discrimination and apartheid were peremptory norms, which were formed as a result of a process of widespread acceptance and recognition by the international community as a whole.¹¹⁴ The condemnation of apartheid as a crime against humanity and as such an affront to human dignity by 'the majority of Member states' was already noted as early as 1972.¹¹⁵ There are therefore strong indications that an *opinio juris* as to the prohibition of apartheid as a crime against humanity exists, and has existed, for more than four decades.

4.3. State Practice

An increasing number of national legislations now contain the crime of apartheid, which demonstrates the general high acceptance of the crime and state practice as such.¹¹⁶ On the international level, there are a multitude of treaties with provisions on apartheid. As a matter of fact, all the international treaties that contain provisions on apartheid have reached a high number of ratifications, thereby indicating state practice: 176 states are members of the International Convention on the Elimination of Racial Discrimination (ICERD). According to the Preamble of the ICERD, its state parties were:

¹¹³ UNSC Res 556 (23 October 1984) and UNSC Res 392 (19 June 1976).

¹¹⁴ ILC, 'Formation and Evidence of Customary International Law' (14 March 2013) UN Doc A/CN.4/659 29-30.

¹¹⁵ Statement by Mr AA Farah before the Special Political Committee of the General Assembly on 9 October 1972, Unit on Apartheid, Doc No 20/72 (October 1972) 7.

¹¹⁶ See eg the legislation of Australia, Canada, Congo, Mali, New Zealand and United Kingdom or the draft legislation of Burundi and Trinidad and Tobago. In addition, numerous states have included apartheid as a war crime in their military manuals. See further International Committee of the Red Cross, Customary International Humanitarian Law database, <http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule88#Fn_19_15> accessed 28 October 2015.

alarmed [...] by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, *such as policies of apartheid, segregation or separation*' (emphasis added).¹¹⁷

Article 3 further stipulates the member states' obligation to oppose apartheid:

States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

It is to be noted that the discriminatory practice of apartheid was the only specific form of discrimination to be singled out and proscribed in its own treaty provision in the ICERD. Additional Protocol I to the Geneva Conventions with an article on the war crime of apartheid also achieved a high number of ratifications, with 173 state parties. The Rome Statute has to date been ratified by 122 states. The Rome negotiations for the ICC reaffirmed that apartheid is a crime against humanity — certain scholars perceive this as confirmation that the crime has achieved a customary law status.¹¹⁸ Last but not least, the Apartheid Convention with 109 ratifications confirms a generally high acknowledgement of apartheid as an international crime.¹¹⁹ Undoubtedly, the majority of ratifications occurred during the 1970s and 1980s. However, a not insignificant number of these took place in the early 1990s, thus in the final years of the South African apartheid regime.¹²⁰ Even more remarkable is that a total of 10 states either ratified or acceded the Apartheid Convention after the fall of the regime in 1994, the latest being in 2014 (State of Palestine).¹²¹ These recent ratifications demonstrate that the Apartheid Convention is perceived as a valid, functioning treaty and possibly not a dead letter after all.

There are furthermore no indications of hostility to the apartheid provisions by states that are not parties to the above-listed treaties. A clear signal is also the acceptance of subsequent instruments prohibiting apartheid by previous non-state parties to the Apartheid Convention (such as South Africa or the United Kingdom). The prohibition of racial discrimination itself is a clear rule of customary law. The prohibition of apartheid

¹¹⁷ International Convention on the Elimination of All Forms of Racial Discrimination, adopted by GA Res 2106 A (XX) (21 December 1965).

¹¹⁸ Bantekas and Nash (n 39) 135.

¹¹⁹ A frequently voiced criticism against the Apartheid Convention is the low number of State parties it has. However, the Vienna Convention on the Law of Treaties, a yardstick in international law, has only five more parties (113 ratifications).

¹²⁰ From 1990 until 1994, a total of nine States became party to the Apartheid Convention: Armenia, Bahrain, Bosnia, Croatia, Czech Republic, Estonia, Latvia, Oman and Zimbabwe. See <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-7&chapter=4&lang=en> accessed 10 November 2015.

¹²¹ The newest State parties can be grouped according to their region of origin: Azerbaijan (1996), Georgia (2005), Republic of Moldova (2005) as a group of countries from the Caucasus region; Guatemala (2005), Honduras (2005), Paraguay (2005), and Uruguay (2012) from Central and South America; Montenegro (2006) and Serbia (2001) representing parts of the Balkan. The State of Palestine (2014) was the latest state to accede to the Convention.

as a qualified example of racial discrimination, constituting an international crime, is recognised by an increasing number of states and can therefore be asserted to have reached the level of customary law.¹²²

4.4. *Erga omnes, jus cogens* and Universal Jurisdiction

In its famous *Barcelona Traction* case, the ICJ declared that not only was racial discrimination prohibited by international customary law, it was also a norm *erga omnes*:

Such obligations (obligations *erga omnes*) derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.¹²³

The judgment defines obligations *erga omnes* as follows:

In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.¹²⁴

The wording very much resembles that which the ILC later adopted in its Draft Code of Crimes, in which it is emphasised that apartheid was of particular gravity due to its heinous nature. Moreover, it involved mass and systematic violations of universal values.¹²⁵ Owing to the gravity of the crime and the damage caused to humanity as a whole, there is an obligation owed to the international community not to discriminate on a racial basis.

Not only has apartheid reached the status of customary law and is a crime with an *erga omnes* effect, it is also an international crime with *jus cogens* status.¹²⁶ *Jus cogens* permits states to assert universal jurisdiction over core international crimes. Crimes against humanity, amongst these, apartheid, have been recognised in international law for

¹²² Confirmed by Du Plessis (n 13) 421-422.

¹²³ *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment, 5 February 1970) ICJ Rep 1970, para 34.

¹²⁴ *ibid*, para 33.

¹²⁵ See Chapter 3.1 on the ILC Drafting history, as well as

http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_442.pdf&lang=EFS (55, paras 38-40) accessed 30 October 2015.

¹²⁶ ILC, 'Formation and Evidence of Customary International Law' (14 March 2013) UN Doc A/CN.4/659, 29-30. See also M Cherif Bassiouni, 'International Crimes: The Ratione Materiae of International Criminal Law' in M Cherif Bassiouni (ed), *International Criminal Law*, vol 1 (3rd edn, Martinus Nijhoff Publishers 2008) 129, 138.

several decades and could be a prime example for universal jurisdiction.¹²⁷ As a matter of fact, the South African apartheid regime prominently figured as a potential case of universal jurisdiction prior to the ratification of the Rome Statute: the government committed crimes against its own citizens, but had not ratified the Apartheid Convention and was therefore not directly bound by its provisions. The Convention aimed at halting the practice of a non-state party, which could only have been achieved by exercising universal jurisdiction.¹²⁸ Unfortunately, due to the lack of case law, it is currently rather unlikely that any state will assert universal jurisdiction for the crime of apartheid.

5. Application to Contexts other than South Africa

5.1. North Korea

While none of the current situations under investigation before the ICC deal with the crime of apartheid, there are indications that other situations might indeed fulfil the requirements of the crime.¹²⁹ In particular, the situation in Palestine, presently under preliminary examination by the ICC, may call for the application of the provisions on apartheid. The other recent situation, to which the apartheid terminology was applied in at least a partially legal sense, is North Korea. This sub-chapter and the subsequent one discuss both cases, without however going into depth regarding the underlying facts. The first case dealt with here is that of North Korea.

The Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea (DPRK) was established by the UN Commission on Human Rights as early as 2004 (based upon UN Human Rights Council Resolution 2004/13). The rapporteur's mandate has since been renewed on an annual basis by the Human Rights Council. While the office of the Special Rapporteur has existed for more than a decade, it

¹²⁷ Bassiouni (n 13) 237; Julia Selman-Ayetey, 'Universal Jurisdiction: Conflict and Controversy in Norway' in Kevin Jon Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press 2013) 267, 278-279.

¹²⁸ Daniel Derby and M Cherif Bassiouni, 'Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant Instruments' (1980-1981) 9 *Hofstra Law Review* 523, 530-531.

¹²⁹ In the situation in the Democratic Republic of the Congo, in the case of *Prosecutor v Thomas Lubanga Dyilo* (Case ICC-01/04-01/06) there were discussions regarding reparations that referred to the Truth and Reconciliation Commission (TRC) of South Africa following the abolishment of the apartheid regime (see eg Trial Chamber I, 'Submission on Reparations Issues', 10 May 2012, paras 26-28). However, these discussions did not refer to the crime against humanity of apartheid. The same goes for the situation in the Democratic Republic of the Congo, in the case of *Prosecutor v Germain Katanga* (Case ICC-01/04-01/07) that also discussed the reparations recommended by the TRC (Trial Chamber II, Redress Trust observations pursuant to Art 75 of the Statute, 15 May 2015, para 47). In the Situation in the Republic of Côte d'Ivoire, in the case of *Prosecutor v Laurent Gbagbo* (Case ICC-02/11-01/11), the Appeals Chamber referred in a footnote to the *Akayesu* case before the ICTR that mentioned apartheid as an example of a non-violent attack (Public document with confidential Annex 1 and public Annex 2, Prosecution's appeal against the 'Decision adjourning the hearing on the confirmation of charges pursuant to Art 61(7)(c)(i) of the Rome Statute', 12 August 2013, para 47, fn 97). The ICC did not perform a legal analysis of the crime of apartheid.

is only in recent years that its activity has become publicly more known. Subsequently, some of this recent development will be shown.

In April 2013, the Council established a Commission of Inquiry to investigate systematic, widespread and grave violations of human rights in the Democratic People's Republic of Korea (DPRK). The Commission was instructed to investigate, amongst other things, violations of the right to food, torture and inhuman treatment, discrimination, violations of freedom of expression and violations of the right to life. The Commission's mandate was based on the Human Rights Council Resolution 22/13.¹³⁰ In a public statement to the 25th session of the Human Rights Council in March 2014, the Chairman of the Commission of Inquiry, Michael Kirby, asserted that the government of North Korea had put into place a system of apartheid.¹³¹ The statement was released in connection with the publication of the corresponding report of the detailed findings of the Commission of Inquiry.¹³² The statement and the report contain multiple references to crimes against humanity that were — and allegedly still are — being committed by government officials of the DPRK against its own citizens.¹³³ While the Commission's report was not intended to be a legally binding document and makes no claims as such, it nevertheless had the objective of 'ensuring full accountability, in particular where these violations may amount to crimes against humanity'.¹³⁴ As such, the report integrates well with a number of recent reports by other Commissions of Inquiry. Indeed, it seemingly reveals a trend of non-legal commissions drawing legal conclusions without having performed a complete legal analysis of the crimes in question or having a corresponding mandate.¹³⁵

In his statement, Kirby makes direct reference to the apartheid regime in South Africa and the cruelties committed by Khmer Rouge in Cambodia.¹³⁶ In so doing, he compares the North Korean situation with other situations of serious human rights breaches, where international crimes were committed. Implicitly, he thereby performs a legal classification of the situation in North Korea. The statement notes that the social system in the DPRK, the *songbun*, was a discriminatory apartheid of a social class that should immediately and completely be abolished.¹³⁷ Most interestingly, however, with the

¹³⁰ UN Doc A/HRC/RES/22/13 (9 April 2013).

¹³¹ Statement by Michael Kirby, Chair of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (17 March 2014) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14385&LangID=E>> accessed 6 October 2015.

¹³² Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea (7 February 2014) UN Doc A/HRC/25/CRP.1.

¹³³ See n 131 and 132.

¹³⁴ See n 132, para 15(c).

¹³⁵ Other examples are the International Commission of Inquiry on Darfur that concluded that crimes against humanity had been committed, but not the crime of genocide ('Report of the International Commission of Inquiry on Darfur' (25 January 2005) UN Doc S/2005/60) as well as the Mapping Report on the Democratic Republic of Congo ('Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003' (August 2010)).

¹³⁶ See n 131.

¹³⁷ *ibid.*

exception of an appearance in one footnote, the comprehensive report never once mentions the term 'apartheid'.¹³⁸ On behalf of the Commission, Kirby urged:

... the members of the United Nations and the international community, to accept their responsibility to protect and to implement all the recommendations contained in our report addressed to them: especially those related to accountability, including the referral of the situation of the Democratic People's Republic of Korea to the International Criminal Court.¹³⁹

The Commission thereby calls upon the members of the UN to refer the situation to the Prosecutor of the ICC.¹⁴⁰ The statement ends with yet another comparison of the North Korean system with South Africa, as well as Nazism:

Contending with the scourges of Nazism, apartheid, the Khmer Rouge and other affronts required courage by great nations and ordinary human beings alike. It is now your duty to address the scourge of human rights violations and crimes against humanity in the Democratic People's Republic of Korea.¹⁴¹

The media were quick to pick up on one particular sentence issued by Kirby, that of the North Korean *songbun* being an apartheid system.¹⁴² Paradoxically, and as has also been noted above, apartheid does not figure in the report's analysis, except for once in a footnote. Yet, it was this specific comparison of the North Korean totalitarian system with Nazism, the Khmer Rouge regime and, not least, the South African apartheid regime that made headlines.

Clearly, there appears to be a discrepancy between the (legal) conclusions of the comprehensive report and the Chairman's statements. Two possible reasons for this present themselves: either Michael Kirby carried out a personal legal analysis of the situation in the DPRK and concluded that the crime against humanity of apartheid was, in his eyes, fulfilled (a rather unlikely scenario), or, more likely, Kirby used the not unknown rhetoric of labelling a discriminatory situation as 'apartheid', without having performed the corresponding legal analysis. It has to be recalled that the crime of apartheid requires the oppression and domination by one racial group over any other racial group. In order to fulfil the *actus reus* of the crime, two (or more) different racial groups would have to be involved. It is, however, highly unlikely that the different social

¹³⁸ See n 132, fn 1680.

¹³⁹ See n 131.

¹⁴⁰ See also n 132, paras 1218 and 1225.

¹⁴¹ See n 131.

¹⁴² See eg 'UN declares North Korea's crimes on par with Nazism, apartheid and Khmer Rouge', *The Journal.ie* (Ireland, 17 March 2014) <<http://www.thejournal.ie/un-declares-north-koreas-crimes-on-par-with-nazism-apartheid-and-khmer-rouge-1367424-Mar2014/>>; 'UN probe likens North Korea to Nazi regime', *Times of Israel* (17 March 2014) <<http://www.timesofisrael.com/un-probe-likens-north-korea-to-nazis/>> all URLs accessed 7 October 2015.

groups in North Korea would be considered 'races'. This interpretation of the term race would most likely stretch its legal meaning considerably and it is doubtful whether any international criminal court would accept such a legal classification.

Very recent developments reveal the likelihood of a referral of the North Korean situation to the ICC: at the end of October 2015, apparently a joint EU-Japanese draft General Assembly resolution encouraged the UN Security Council to refer the situation to the ICC.¹⁴³ According to the media, momentum was gathering as the referral became a real possibility and, in this context, the former UN Commissioner of Human Rights, Navi Pillay also emphasised that the North Korean caste system, the *songbun*, constituted a new example of apartheid.¹⁴⁴ In their oral statements, both former and current UN officials have been quick to draw the comparison between the *songbun* system in the DPRK and apartheid. Conversely, they are more cautious in their written reports, where apartheid terminology is consistently avoided.¹⁴⁵ In the case of an increasingly more likely referral of the North Korean situation to the ICC, a legal analysis of the *songbun* system as a crime against humanity of apartheid should be anticipated. However, the racial group is an essential element of the *actus reus* of the crime of apartheid and the social classes of the DPRK can hardly be classified as racial groups. Unless the racial group is very broadly interpreted to include any group perceived as being different from the perpetrator's group, an application of Article 7(1)(j) Rome Statute on the situation seems rather unlikely.

In summary, once again it has been shown that the symbolic power of the apartheid terminology cannot be underestimated. Simultaneously, this power also casts a shadow over the legal definition of the term.

5.2. The Occupied Palestinian Territories

Parallels between the South African apartheid regime and the situation in Palestine were drawn already at an early stage, as illustrated by the UN General Assembly Resolution 3382 (XXX) of 10 November 1975, which strongly condemned:

all governments which do not recognise the right to self-determination and independence of peoples under colonial and foreign domination and

¹⁴³ *The New York Times* (30 October 2015) <http://www.nytimes.com/aponline/2015/10/30/world/asia/ap-un-united-nations-north-korea-rights.html?_r=1> accessed 2 November 2015.

¹⁴⁴ Elizabeth Shim, 'Ex-UN official: North Korean caste system is the new apartheid', *United Press International* (USA 22 October 2015) <http://www.upi.com/Top_News/World-News/2015/10/22/Ex-UN-official-North-Korean-caste-system-is-the-new-apartheid/1571445526152/> accessed 2 November 2015.

¹⁴⁵ See eg A/HRC/28/71 (Report of the Special Rapporteur on DPRK, 18 March 2015); A/HRC/26/43 (Report of the Special Rapporteur on DPRK, 13. June 2014); A/HRC/28/L.18 (situation of human rights in DPRK that require the Council's attention, 23 March 2015); A/HRC/RES/28/22 (resolution adopted by Human Rights Council, 8 April 2015).

alien subjugation, notably the people of Africa and the Palestinian people.¹⁴⁶

The conflict in the Occupied Palestinian Territories (OPT) also prominently figures in the colloquial apartheid discourse. Numerous books make the connection between apartheid and Palestine already in their title: 'Seeking Mandela: Peacemaking between Israelis and Palestinians'¹⁴⁷ and 'Palestine/Israel: Peace or Apartheid'¹⁴⁸ are just two examples of a wide array of scholarly publications. The apartheid terminology is employed as a metaphor for the on-going struggle between two groups of people and is as such not applied in any legal sense. Although, other sources have specifically analysed the situation in the OPT from a legal perspective. One of these being the Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, which will be discussed subsequently.¹⁴⁹

Richard Falk, the Special Rapporteur, presented his final report to the UN Human Rights Council in January 2014, submitted in accordance with the Commission on Human Rights resolution 1993/2A and Human Rights Council decision 2/102.¹⁵⁰ In his report, Falk addressed Israeli settlements in the West Bank and the wall, in the context of the tenth anniversary of the Advisory Opinion by the International Court of Justice (ICJ),¹⁵¹ and considered the policies and practices of Israel in the Occupied Palestinian Territories (OPT) in light of the prohibition on segregation and apartheid. Thus, unlike the Commission of Inquiry to North Korea, Special Rapporteur Falk made it clear that he was looking into apartheid-like situations and would therefore perform a legal classification of the discriminatory systems put into place in the OPT.¹⁵² His report dedicates an entire chapter (chapter V) to the question of apartheid and segregation. Falk points out that he, as did his predecessors, had called for an advisory opinion by the ICJ on 'whether elements of the [Israeli] occupation constitute forms of colonialism and apartheid'.¹⁵³ However:

since no advisory opinion has been sought (...), in the present report the Special Rapporteur assumes part of the task of analysing whether

¹⁴⁶ UNGA Res 3382 (XXX) (10 November 1975) para 5.

¹⁴⁷ Heribert Adam and Kogila Moodley, *Seeking Mandela: Peacemaking between Israelis and Palestinians* (Temple University Press 2005).

¹⁴⁸ Marwan Bishara, *Palestine/Israel: Peace or Apartheid. Prospects for Resolving the Conflict* (Zed Books 2001).

¹⁴⁹ For a comprehensive legal analysis of the crime of apartheid in Israel/Palestine, see John Quigley, 'Apartheid Outside Africa: The Case of Israel' (1991-1992) 2 *Indiana International & Comparative Law Review* 221.

¹⁵⁰ Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk (13 January 2014) UN Doc. A/HRC/25/67.

¹⁵¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004 ICJ Rep (9 July 2004).

¹⁵² The report reads: 'An abiding theme of the reports of the Special Rapporteur during the past six years has been the consistent failure of Israel to comply with clear legal standards embodied in the Geneva Convention (...) and elsewhere in international humanitarian law and international human rights law' (n 149, para 3). It is to be noted that Falk is professor emeritus of law at Princeton University.

¹⁵³ Bishara (n 148) para 51.

allegations of apartheid in occupied Palestine are well founded. He discusses Israeli policies and practices through the lens of the international prohibition of ethnic discrimination, segregation and apartheid.¹⁵⁴

By referring specifically to the international prohibition of apartheid, the legal approach to the discriminatory practices in the OPT is further emphasised. The term 'prohibition' implies an analysis of the criminal law provisions. Indeed, the Special Rapporteur meticulously enumerates the relevant legal framework for his analysis, amongst others Article 85(4)(c) of Protocol I under the Geneva Conventions, the peremptory status of the prohibition of apartheid as declared by the International Law Commission,¹⁵⁵ Article 3 ICERD (thoroughly elaborating that, while this provision possibly only applied to South Africa, the overall prohibition of racial discrimination was found to be of universal character) as well as the Apartheid Convention.¹⁵⁶ Falk rightfully pinpoints the issue of the domination of one racial group over another racial group as one of the main elements — and challenges — to the application of the apartheid provisions. As such, he notes that racial discrimination had to be broadly defined as to include any distinction based on race, colour, descent, national or ethnic origin, as prescribed by Article 1 ICERD.¹⁵⁷ The report ends by concluding that it finds 'practices and policies which appear to constitute apartheid and segregation'¹⁵⁸ and refers to the possibility of a criminal investigation before the ICC.¹⁵⁹ The media response was dominated by headlines on the Israeli apartheid.¹⁶⁰ The accession of the State of Palestine to the Apartheid Convention only three months after Falk's presentation of his final report is hardly coincidental.¹⁶¹

One year after the submission of Falk's report, the Government of Palestine lodged a declaration under Article 12(3) Rome Statute accepting the ICC's jurisdiction and subsequently acceding to the Rome Statute.¹⁶² It is to be noted that the declaration only

¹⁵⁴ *ibid.*

¹⁵⁵ International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Arts 40–41 and commentaries.

¹⁵⁶ See n 150, para 52.

¹⁵⁷ *ibid.*, para 53.

¹⁵⁸ *ibid.*, para 78.

¹⁵⁹ *ibid.*, para 80.

¹⁶⁰ Stephanie Nebehay, 'UN Rights Envoy Points to Apartheid in Palestinian Areas', *Reuters* (24 February 2014) <<http://www.reuters.com/article/2014/02/24/us-palestinians-israel-un-falk-idUSBREA1N19I20140224>>; Umberto Bacchi, 'Israel Guilty of Ethnic Cleansing and Apartheid, Says UN Rapporteur', *International Business Times* (21 March 2014) <<http://www.ibtimes.co.uk/israel-guilty-ethnic-cleansing-apartheid-says-un-rapporteur-1441350>>; 'UN's Falk accuses Israel of ethnic cleansing', *Times of Israel* (21 March 2014) <<http://www.timesofisrael.com/uns-falk-accuses-israel-of-ethnic-cleansing-2/>>; all URLs accessed 9 October 2015.

¹⁶¹ This accession on 2 April 2014 makes the State of Palestine the newest party to the Apartheid Convention.

¹⁶² President Mahmoud Abbas (President of the State of Palestine), 'Declaration Accepting the Jurisdiction of the International Criminal Court', *International Criminal Court Press Release* (31 December 2014) <http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf> and ICC Press Release, 'Palestine declares acceptance of ICC jurisdiction since 13 June 2014' (5 January 2015) <<http://www.icc->

concerns alleged crimes committed since 13 June 2014. It therefore has a different temporal dimension than the report by Falk. The Office of the Prosecutor of the ICC had to, as a matter of policy and practice, open a preliminary examination into the situation in Palestine in order to establish whether the criteria for opening an investigation according to Article 53(1) Rome Statute were met.¹⁶³ If an investigation were to be opened it would be of particular interest to see whether the Office of the Prosecutor examines the committing of the crime of apartheid. In this context, it would prove to be of major importance whether or not the Palestinians and the Israeli are considered two distinct racial groups. If the ICC chooses to follow suit regarding the current development of the sociological and legal definition of race as being the perception of a group or a person's differentness, then the two groups in the OPT could indeed be characterised as two racial groups. With reference to the rather clear conclusion of Falk's report, which has a legal dimension, it would be surprising if the ICC Prosecutor were to disregard the application of the provision on the crime of apartheid. Further developments in this case are to be awaited.

6. Conclusion

The importance of the inclusion of the crime of apartheid into the Rome Statute should not be underestimated. Thirty years ago, the international community stood united in its efforts to abolish apartheid in South Africa. In the entire history of the United Nations, there has rarely been such widespread agreement on the wrongfulness of a situation. Nevertheless, perpetrators of apartheid were not held accountable, despite international condemnation and the creation of an international treaty criminalising apartheid. Although prohibited and criminalised by international law as early as 1976, when the Apartheid Convention came into force, the crime of apartheid has never been given sufficient attention by international lawyers. The open criticism towards the Convention, seemingly exclusively applicable to the South African situation, in effect led to impunity. With the end of the South African apartheid regime, many believed there would be no other cases of apartheid. The crime of apartheid fell into oblivion.

Yet, the inclusion of the crime in the Rome Statute is a confirmation of its legitimate space in international criminal law. And it should not be forgotten that of all types of discrimination, it was apartheid that developed a unique dynamic: in addition to being listed in several other instruments,¹⁶⁴ it is the subject of two international treaties,¹⁶⁵

[cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1080.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1080.aspx) both URLs accessed 9 October 2015.

¹⁶³ ICC Press Release, 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine' (16 January 2015) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx> accessed 9 October 2015.

¹⁶⁴ Art 85(4)(c) Additional Protocol I to the Geneva Conventions, Art 3 International Convention on the Elimination of Racial Discrimination and Art 1 Convention on the Non-Applicability of Statutory Limitations.

proscribed with individual criminality, accorded *jus cogens* status and universal jurisdiction — in addition to finding its way into the Rome Statute. Had the international community not believed in the continued relevance of the crime of apartheid, it could have chosen not to include it in the latter instrument. Instead, the delegates to the Rome Diplomatic Conference¹⁶⁶ spoke with a clear voice: no impunity shall be granted for crimes of racial discrimination. While the inclusion of the crime of apartheid most likely was seen, at least in part, as a tribute to the victims of the South African apartheid regime, it must also have been motivated by the strong belief of the delegates at the Rome Conference that such crimes could, and do, occur in other contexts.

The crime of apartheid is at the intersection of human rights law and international criminal law. As an aggravated case of racial discrimination, apartheid is a clear breach of the principle of racial discrimination of Article 1(3) UN Charter and Article 2 UDHR. Apartheid has been an important catalyst in the international community, by unifying the UN member states — in the midst of the Cold War era — against the apartheid regime of the South African government. The development of the crime of apartheid has contributed to the progression of international criminal law and the Rome Statute in ways that often are overlooked. The criminalisation of apartheid and its inclusion into the Rome Statute, ensuring individual criminal responsibility, is more than a legacy to victims of systematic oppression and racial discrimination; the inclusion deserves merit as to the farsightedness of the international community when it comes to dealing effectively with current and future cases of apartheid. It is now up to the ICC Prosecutor to release apartheid's terminological closeness to the South African context by applying Article 7(1)(j) Rome Statute to other situations. The recent reference to the crime against humanity of apartheid by Special Rapporteur Richard Falk reveals the continued relevance of this crime to current situations. Should the ICC Office of the Prosecutor decide to investigate the situation in Palestine, the application of the provision on the crime of apartheid is indeed obvious. There is accordingly a justified hope that the prosecution will use Article 7(1)(j) Rome Statute on the crime of apartheid as a string in the prosecutorial bow.

¹⁶⁵ The Apartheid Convention and the International Convention against Apartheid in Sports.

¹⁶⁶ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome (15 June-17 July 1998).